REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 365 OF 2017

REGINLAD NJAGI NYAGA.....PETITIONER

VERSUS

FRENCH EMBASSY-NAIROBI.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

TRANSPARENCY INTERNATIONAL.....INTERESTED PARTY

RULING

BACKGROUND

1. Through the petition filed on 24th July 2017, the petitioner herein who describes himself as an adult Kenyan citizen sued the respondents herein seeking the following orders;-

I. That an award of the learned Honourable Lady Justice Linnet Ndolo, delivered on 31st May, 2016, dismissing the claimant suit, being cause No. 160 of 2011. Employment and Labour Relations Court, be considered unconstitutional invalid and /or set aside,

II. An award to the petitioner amounting to OPTION A unlawful termination

a) 1 month pay in lieu of notice……kshs 25,516

b) Gross salary arrears until the final termination of this court for period between April 2005 and April 2017, 12 years at the rate of Kshs 45,516 per month 45,516 x 12 x 12 ……6,554,304.

c) Payment in lieu of unpaid annual leave for 18 years worked at the rate of equivalent to one month basic salary per year worked Kshs 25,516 + leave allowance at the rate of Kshs 5000 per year worked= 30,516 x 18=549288.

d) Denied house, transport and medical allowances for 18 years worked at the rate of kshs 20,000 per month -20,000 x 18……..4,320,000.

e) Service pay for the 18 years worked at the rate of kshs 25,516 per year service ……459,288.

f) Compensation for exploitation and oppression of the Factotum position at the rate of equivalent of one month basic salary pay per month worked for 18 years that's 25,516 x 12 x 18……kshs 5,511,456.

Total …….17,419852.

g) Damages for wrongful dismissal.

h) Maximum 12 months gross salary in compensation.

i) Cost of this suit with interest therein (a, b, c, d, e, f, g, h)

or

<u>OPTION B- TERMINATION ON ACCOUNT OF REDUNDANCY</u>

I. As a particularized in option A above (a) (b) (c) (d) (e) (f)…17,419,852.

II. 2 months basic salary per year if service as severance pay

III. Sum amount ……25,516 x 2 x 18 =918,576

IV. A golden handshake of gratuity of ……2,000,000.

V. An ex gratia payment of ……..2,000,000.

VI. TOTAL ……..22,000,000.

VII. Interest for (i) (ii) (iii) (iv)

VIII. Cost of this suit with interest thereof.

IX. The cost if this petition be met by the respondent.

X. Any further order of relief that the Honourable court deems fit, just and expedient to uphold the Rule of Law and protect the Rights of freedoms of the petitioner under the Constitution.

2. The respondents filed their respective responses to the petition in which they stated that the matter is resjudicata a judicial determination having been made, against the petitioner, by the Employment and Labour Relations Court in Cause No. 160 of 2011. The respondents further stated that this court lacks jurisdiction to hear and determine the matter and that the petitioner has not identified, with exact precision, the rights, if any, that have been violated or infringed by the respondents.

3. Before the petition could be listed for hearing, the petitioner filed the application dated 4th June 2018 that is the subject of this ruling. In this application, the applicant seeks orders that the matter be certified as raising substantial questions of law to be heard by an uneven number of judges.

4. The applicant also seeks orders that summons do issue to the 1st and 2nd respondents to appear in court , in person, for purposes of being cross examined at the hearing of the petition and further orders that representation of the respondents by their advocates be considered unprocedural, irregular, illegal unconstitutional and invalid.

5. The application is brought on the grounds that there has been massive, successive, abuse and violation of the petitioner's rights and fundamental freedoms in the Bill of Rights and the legal and constitutional processes in the matter for over 7 years in an effort to deny the petitioner his terminal dues in unlawful termination of employment.

6. The applicant accuses the respondents advocates and the Honourable judges who have previously handled the case of impunity and failure to observe, respect protect, promote, and fulfill his rights and fundamental freedoms.

7. The applicant's case is that it is only a bench of an uneven number of judges that can issue him with appropriate reliefs of all the prayers sought in the petition and adds that the respondents will not suffer any prejudice if the orders sought are granted.

8. The 2nd respondent opposed the application through grounds of opposition dated 26th July 2018 in which it listed the following grounds;-

1. That this matter is resjudicata, a judicial determination having been pronounced by the Employment and Labour Relations Court in Cause No. 160 of 2011 against the petitioner.

2. That this Honourable court lacks jurisdiction to hear and determine the matter. The petitioner is seeking to correct the decision of the Employment and Labour Relations Court, a court of equal and competent jurisdiction.

3. That this matter offends the provisions of Article 165(4) of the Constitution which provides for reference to a bench of uneven number of judges in terms as follows;

> **" 165 (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be head by an even number of judges, being not less than three, assigned by the Chief Justice."**

4. That this application is bad in law, ill-conceived, without merit and an abuse of the court process and ought to be

dismissed forthwith.

9. At the hearing of the application the applicant, who appeared in person, submitted that the respondents had not replied to the application in person, are therefore in contempt of court and need to be cross examined by the applicant.

10. On her part Miss Mutindi learned counsel for the 2nd respondent submitted that the petitioner filed his petition after the his claim was dismissed before the Labour Court and that the petition was therefore res-judicata and did not require a determination by a panel of judges.

11. Counsel submitted that the petitioner ought to have appealed against the said decision of the Employment and Labour Relation Court and argued that there was no point in this court entertaining this matter in view of the decision by the Employment and Labour Relation Court.

12. I have considered the application dated 4th June 2018, the grounds of opposition filed by the 2nd respondent and the parties rival submissions. The main issue for determination is whether this matter should be certified as raising substantial questions of law and therefore deserves certification as such and be placed before the Honourable the Chief Justice for the empanelment of a bench. The other issues are whether or not the instant petition is res judicata and whether the respondents should be summoned to appear in person for purposes of being cross examined and whether the representation of the respondents by their advocates on record should be declared unconstitutional.

13. Starting with the last issue, I find that the applicant's claim that the respondents' advocates appearance and representation of the respondents in this matter is illegal is misguided as it is the constitutional right of every party to a suit to be represented by an advocate of his choice.

14. On the second issue of issuing summons to the respondents to appear in person, at the hearing, for purposes of cross examination, I find that no basis was laid for such a prayer considering that the applicant's petition simply challenges the validity and/or constitutionality of the award made by the Employment and Labour Relations Court.

15. Turning to the first and the main issue for determination in this application I find that the answer to the question on whether or not this matter ought to be certified as raising substantial questions of law so as to warrant reference to the Chief Justice for the empanelment of a bench requires a close examination Article **165 (3)** of the Constitution which 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.*

16. It is evident from the above provisions of the Constitution 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."***

17. *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 an like any discretion, however, that power to certify matters must be exercised judiciously on sound and reasonable judicial principles and not capriciously or whimsically.

18. The constitution is however clear at Article 165 (3)(b) on the jurisdiction of the court to hear and determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened while 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.

19. The most notable decision on the issue of certification for the empanelment of an expanded bench is the celebrated 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. 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.

20. 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".***

21. 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 of Article 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."***

22. 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. The mere fact that parties are of the view that the matter falls under Article **165(4)** does not bind the Court in issuing the said certification unless the issue also arises as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution.

23. Applying the principles espoused in the above cited cases to the instant petition, I note that the petitioner herein basically challenges the decision made by the learned Honourable Lady Justice Linnet Ndolo, on 31st May, 2016, dismissing his suit, being cause No. 160 of 2011. Employment and Labour Relations Court, on the basis that the said decision is unconstitutional and/or invalid. The petitioner also seeks an award for unlawful termination of employment.

24. Bearing in mind that t*he main issue for determination in this application 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,* I am not satisfied that this case meets the threshold set for matters that deserve the empanelment of a bench. I find that there is nothing peculiar, or novel about this case that is basically concerned with an award of unlawful termination of employment. I therefore decline to grant the orders sought in the application dated 4th June, 2018 which I hereby dismiss for want of merit with costs to the respondents.

25. Before signing off this ruling, I note that the respondents raised the issue of the petition being res-judicata and court lacking jurisdiction to hear and determine the petition herein. Considering the history of this case and the long line of judges who have handled it, I find that these are substantive issues which parties need to canvass within the petition.

26. For the above reasons I direct that parties file and exchange written submissions to the petition and direct that the said submissions be highlighted on 15th May 2019.

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

W. A. OKWANY

JUDGE

In the presence of :

The petitioner

Mr Mutindi for the 2nd respondent

Court Assistant – Kombo