REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTION PETITION 451 OF 2018

THIRDWAY ALLIANCE KENYA.....1ST PETITIONER

DR. EKURU AUKOT .....2ND PETITIONER

VERSUS

HEAD OF THE PUBLIC SERVICE - JOSEPH KINYUA.....1ST RESPONDENT

BUILDING BRIDGES TO UNITY ADVISORY TASK FORCE....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

AMB. MARTIN KIMANI.....1ST INTERESTED PARTY

PAUL MWANGI.....2ND INTERESTED PARTY

ADAMS OLOO.....3RD INTERESTED PARTY

AGNES KAVINDU.....4TH INTERESTED PARTY

SEN. AMOS WAKO.....5TH INTERESTED PARTY

FORENCE OMOSE.....6TH INTERESTED PARTY

SAEED MWANGUNI (PROF.).....7TH INTERESTED PARTY

JAMES MATUNDURA.....8TH INTERESTED PARTY

MAJOR (RTD) JOHN SEII.....9TH INTERESTED PARTY

BISHOP LAWI IMATHIU.....10TH INTERESTED PARTY

MAISON LESHOOMO.....11TH INTERESTED PARTY

SEN. MOHAMMED YUSUF HAJI.....12TH INTERESTED PARTY

MOROMPI OLE RONKAI.....13TH INTERESTED PARTY

BISHOP PETER NJENGA.....14TH INTERESTED PARTY

ROSE MOSEU.....15TH INTERESTED PARTY

ARCHBISHOP ZECHEUS OKOTH.....16TH INTERESTED PARTY

RULING

1. The 2nd Respondent, Building Bridges to Unity Advisory Task Force, through the Notice of Motion Application dated 31st May, 2019 seeks a certification of the Petition herein as raising substantial questions of law and a reference of the same to the Chief Justice for appointment of an uneven number of judges, not being less than three, to hear and determine the petition as required by Article 165(4) of the Constitution.

2. The 1st Respondent, the Head of Public Service – Joseph Kinyua, the 3rd Respondent, the Attorney General, and all the 16 interested parties support the application.

3. The application is supported by grounds on its face and an affidavit sworn on the date of application by Paul Mwangi, one of the joint secretaries of the 2nd Respondent.

4. The 1st Petitioner, Thirdway Alliance Kenya, and the 2nd Petitioner, Dr Ekuru Aukot, opposed the application through grounds of opposition dated 12th June, 2019.

5. The 2nd Respondent's case is that the President of the Republic of Kenya vide Gazette Notice No. 5154 of 31st May, 2018 in fulfillment of his obligation to always report to the Nation of Kenya on measures taken to realize the national values spelt out in Article 10 of the Constitution, constituted the 2nd Respondent with the objective of ensuring the attainment of the national values and principles of governance through a specific nine-point agenda being: ethnic antagonism and competition, lack of national ethos, inclusivity, devolution, divisive elections, safety and security, corruption and shared prosperity.

6. The petitioners have through these proceedings challenged the President's decision to constitute the 2nd Respondent. According to the 2nd Respondent, the petition raises substantial questions of law under Article 165(3)(d)(ii) of the Constitution touching on the following points:-

> **"(a) Whether or not the President has an independent constitutional obligation separate from the Chapter Fifteen institutions, to promote compliance with and ensure realization of the national values and principles of governance such as good governance, inclusivity, non-discrimination and national unity, ethnic antagonism and competition, lack of national ethos, devolution, divisive elections, safety and security, corruption and shared prosperity;**
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> **b. Whether or not the President in exercise of his prerogative powers has authority to designate persons to an advisory task force to advise the President in attainment of the national values and principles of governance.**
>
> **c. Whether or not the obligation of ensuring the promotion of national values and principles is a reserve of limited institutions.**
>
> **d. Whether the President's decision to appoint an advisory task force has any legal basis?**
>
> **e. Whether the court lacks jurisdiction over the dispute on the basis of the political question doctrine, and related to that whether the dispute is justiciable in the first instance; and**
>
> **f. Whether constitution of a task force by designation of members already holding specified offices is amenable to the rules of merit and fair competition which applies to ordinary appointments."**

7. It is the 2nd Respondent's case that the identified questions raise matters of general public importance, which are open and have never been finally settled by the Supreme Court. Further, that the questions are not free from difficulty and call for debate of alternative views by an expanded bench.

8. According to the 2nd Respondent, 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. Further, that the questions have a material bearing on the decision of the case and the rights of the parties before the Court.

9. Additionally, it is averred for the 2nd Respondent that the questions posed originate from pleadings on the record and the Court must decide the same for a just and proper determination of the case. The 2nd Respondent urged this Court to exercise its discretion in favour of certifying the petition as raising a substantial question of law stating that no prejudice shall be occasioned to any party by grant of the orders sought.

10. The petitioners oppose the 2nd Respondent's application on the following grounds:-

> **"1. 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;**

2. Further, and notwithstanding the provisions of article 165(4), the decisions of a three judge bench or more is of equal force to that of a single judge exercising the same jurisdiction;

3. That the need to dispense justice without delay particularly given the urgency and specific factual situation of this instance will be defeated by a prolonged process of certification, reference and constitution of a bench by the Chief Justice since the 2nd Respondent's acts being challenged could have been completed thus rendering the petition herein nugatory and a mere academic exercise;

4. That the Application herein is an afterthought and filed in bad faith with the sole aim of further delaying the expeditious hearing of the main petition so as to buy time for the 2nd Respondent to complete their impugned activities;

5. That the "sudden need and realization" by the 2nd Respondent, that this petition raises substantial questions of law is a clear afterthought coming a whooping six (6) months after the Petition was filed, served and responded to by all the parties;

6. That the application for certification and reference to the Chief Justice was not made promptly, timeously and without delay hence the same has been overtaken by events since directions have already been issued in respect of the hearing and disposal of the main Petition;

7. This is an application that is brought too late in the day in order to delay the expeditious hearing and conclusion of the petition and the application for interim orders;

8. The conduct of the Respondents have, in the course of this petition, not treated or taken it with the seriousness it deserves. They have always come to Court citing flimsy excuses like holidays; and responding too late in the day;

9. Further, the Respondents have never and intentionally so, refused to comply with court orders and or directions;

10. It is 6 months since the petition was filed and Respondents have participated at each and every appearance before court and at no time did they raise the issue of empaneling. A 6 months wait is mischievous and malicious and a move intended to delay the petition;

11. The ends of justice will not be met with any further delay in not hearing the petition to conclusion and or hearing the notice of motion on interim orders;

12. The Respondents are buying time to continue violating the Constitution and to waste public money against provisions of Article 201. Each Judge so far seized of this matter has confirmed that it raises serious constitution issues. It [is] therefore urgent that this petition is heard."

11. The 2nd Respondent filed submissions dated 18th June, 2019 in support of its position. The petitioners' submissions are dated 19th June, 2019.

12. The question is whether the instant petition raises substantial questions of law warranting a certification of the same as requiring the empanelment of a panel of an uneven number of judges to hear it.

13. Both sides agree that the decision whether or not to certify a matter as raising substantial questions rests purely on the discretion of the judge handling the matter. Counsel for the 2nd Respondent cited the ruling of John M Mativo, J delivered on 10th July, 2017 in **National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission [2017] eKLR** whereas counsel for the petitioners cited the decision made on 23rd November, 2016 by Odunga, J in **Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another [2016] eKLR** as affirming the said principle.

14. There is now sufficient case law as to what constitutes a substantial point of law. In the **National Super Alliance** case, it was observed that:-

"A point of law which admits more than two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law it 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, in so far 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 the question of law for a just and proper decision of the case. An entirely view 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.*"

[citations omitted]

15. In **Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR; Civil Appeal No 4 of 2015**, the Court of Appeal stressed that the circumstances of each case determines the outcome of an application for certification under Article 165(4) of the Constitution and went ahead to distil the principles applicable to such certification as follows:-

"42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of "general public importance", The word, "substantial" in its ordinary meaning, means "of considerable importance"[2]. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following 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;

(vi) 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."

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."

16. Those are the principles I will apply in deciding whether to allow or disallow the 2nd Respondent's application. The petitioners are indeed correct that whether a case is heard by one judge or more than one judge of this Court, the weight and value of the decisions made remain the same. A judge sitting alone is not compelled to follow a decision made in a case heard by more than one judge. The persuasive nature of any given decision made by a court of coordinate jurisdiction is what carries the day. I therefore agree with the statement of Odunga, J in **Wycliffe Ambetsa Oparanya (supra)** that:-

"28. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or *stare decisis* principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges and I have attempted to outline some of the issues for consideration hereinabove."

17. Certification should also not be used by judges as an avenue for avoiding responsibility. The fact that a case is difficult or complex is not a good ground for certification of the same under Article 165(4) of the Constitution. I therefore agree with John M Mativo in **National Super Alliance Kenya** (supra) when he states that:-

"The Court must adopt a holistic approach to the matter at hand. The mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article 165(4) of the Constitution. In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment. In my view the mere fact that a matter is novel or jurisprudentially challenging does not *ipso facto* elevate it to a substantial question of law for the purposes of Article 165(4) of the Constitution.

With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes."

18. This point was earlier stressed by Odunga, J in **Wycliffe Ambetsa Oparanya** (supra) when he stated 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".

19. In my view therefore, in order for this Court to decide whether or not this petition does indeed raise substantial points of law, it must interrogate the pleadings filed by the parties. I agree with the petitioners that an application of this nature should be made at the initial stages of the petition. I do not see why such an application should not be made at the time of filing the petition or at the time of filing a response depending on which party is making the application. When an application is made six months after the service of the petition, like in this case, it is likely to be perceived that the application is being used to delay the hearing and the determination of the petition.

20. The perception becomes prominent when the petition seeks to stop an ongoing activity like that being undertaken by the 2nd Respondent in this petition. This, however, does not mean that an application cannot be made at any stage during the lifetime of the petition. I will therefore not dismiss the application because of the delay in the filing of the same by the 2nd Respondent.

21. The petition dated 13th December, 2018 seeks the following reliefs:-

" i. A declaration that the body being referred to as the Building Bridges to Unity Advisory Task Force established vide gazette notice No. 5154 dated 24th May 2018 is unconstitutional, illegal, null and void.

ii. An order of judicial review to remove into this Honourable Court and quash the decision of the Head of Public Service made on 24th May 2018 or thereabouts to Gazette the establishment of a body being referred to as the Building Bridges to Unity Task Force Gazetted on 24th May 2018 vide Gazette Notice No. 5154 hence setting aside the Gazettement.

iii. An order compelling the 1st, 2nd Respondents and the 1st and 2nd interested parties to publish and supply to the petitioners a detailed budget and financial statements of all the public funds allocated and expended for use by the 2nd Respondent.

iv. An order requiring the Respondents and interested parties to jointly and severally refund to the national treasury the public monies expended on the operations of the said task force.

v. An order declaring any report produced by the said task force illegal and unconstitutional.

vi. An order compelling the Directorate of Criminal Investigations to commence investigations into irregularities and illegalities committed during the 2017 general election more specifically as a result of the nullification of the presidential results of August 2017.

vii. An order compelling the Office of Director of Public Prosecutions to commence investigations and prosecutions of individuals who may have ignited political violence in the country as a result of the 2017 general elections more specifically as a result of the nullification of the presidential results of August 2017.

viii. Any other order that the Court may deem fit and just to grant.

ix. The costs of and occasioned by this application."

22. On the face of the petition it is indicated that the petition is brought in respect of alleged contravention of articles 1, 2, 3, 4(2), 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 35, 47, 73, 77, 79, 129, 201, 232, 258, 259 and 260 of the Constitution. In the body of the petition, the grievances of the petitioners are reduced to alleged violation of articles 2, 3, 10, 132, 201 and Chapter 15 of the Constitution.

23. Whereas the political circumstances which gave birth to the 2nd Respondent may have seismic effects on the politics of the country and careers of politicians, the issues raised by the petitioners fall within the category of matters that require routine interpretation of the Constitution. There is nothing new or novel about the issues raised by the petitioners. The core issue in this petition is whether the 2nd Respondent fits into the constitutional and legal architecture governing the affairs of Kenya. This is an issue about the constitutionality of the 2nd Respondent which is an issue arising on a daily basis in almost all the matters before this Court. Elevating the politics surrounding the creation of the 2nd Respondent into a substantial question of law will render certification under Article 165(4) of the Constitution unpredictable and not governed by the judicious exercise of discretion by the judge but by the political heat generated at that particular moment. This is not a road we should travel.

24. In conclusion therefore, I find that the 2nd Respondent has failed to convince me that this is a matter meriting certification under Article 165(4) of the Constitution. I therefore find the application dated 31st May, 2019 unmerited and dismiss the same. The costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 4th day of July, 2019

W. Korir,

Judge of the High Court