REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 295 OF 2018

HONOURABLE PHILOMENA MBETE MWILU.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION.....2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT

(ANTI-CORRUPTION) NAIROBI.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

STANLEY MULUVI KIIMA.....INTERESTED PARTY

RULING

1. On 6th September 2018, the 1st respondent took out a Motion on Notice dated and filed in court on the same day seeking orders of the court certifying the petition dated and filed in court 29th August 2018 as one raising a substantial question of law and of great public importance to warrant it being heard by a bench. The 1st respondent asked that the petition be sent to the Hon. The Chief Justice for empaneling an expanded bench of un equal judges to hear it.

2. The Motion is supported by the affidavit of ***Lilian Ogwora*** sworn on the same day. The grounds upon which the application is premised are stated on the face of the motion. They include issues such as whether the 1st respondent will have abdicated his mandate if he fails to prosecute a sitting judge; whether the 1st respondent can institute criminal proceedings against a sitting judge among others.

3. Ms. Ogwora deposes that the petition raises a substantial question of law which necessitates empanelling a bench of an uneven number of judges to hear it; that the respondent's mandate is constitutional and statutory; the petition seeks several reliefs which have a severe implication on the respondent's powers; and that determination of the petition will have an implication on the performance of respective constitutional mandate of the 1st respondent, the National Police Service and Director of Criminal Investigation.

Responses

4. The petitioner's counsel filed a response dated 1st October 2018 and filed in court on 2nd October 2018 opposing the application. It is contended that the issues raised in the petition are for declarations that investigations against the petitioner and the decision to institute criminal charges against her violate the petitioner's constitutional rights; quashing of the Criminal proceedings and orders prohibiting the respondents from continuing with the petitioner's prosecution.

5. The petitioner's contention is that the criminal charges and intended prosecution relate to a commercial transaction which cannot found a criminal prosecution; that although the court can certify a matter under Article 165(4)of the constitution for purposes of empaneling a bench,

courts have already dealt with and determined that the meaning of substantial question of law and what courts must take into account include the provisions of the constitution as a whole and the need to dispense justice without delay particularly given specific facts of the case.

6. The petitioner further contends that each High Court Judge has jurisdiction and authority under Article 165 of the constitution to determine any matter that falls within the jurisdiction of the High Court; that despite the provisions of Article 165(4),, the decision of an expanded bench of the High Court is of equal jurisprudential value and that the issues raised by the applicant for determination do not arise from the pleading and that they tend to erroneously imply that the JSC has received a petition for removal of the petition or ought to have taken up the matter upon institution of the criminal charges.

7. It is also contended that the reason for instituting criminal proceedings should be for ensuring that justice is served without regard to other extraneous considerations which is not the case in this petition. The petitioner therefore contends that the application has not been filed in good faith and should be disallowed.

Submissions

8. Mr. Muteti appearing together with ***Ms. Oduor*** for the 1st respondent applicant have argued in favour of allowing the application and certification of the matter for empaneling a bench on grounds that it raises a substantial question of law. According to learned counsel, the petition challenges the powers of the DPP (1st respondent) to prosecute a sitting Judge arguing that the DPP has powers to do so which is different from the powers and mandate of the Judicial Service commission hence a bench will draw the line between the two institutions.

9. Secondly, ***Mr. Muteti*** contends that since the petition raises a substantial question of law it would be proper that the petition is heard by un even bench. Counsel relies on a number of decisions including ***Okiya Omtatah & another v Anne Wanguru & 3 Others*** [2017] eKLR para 37, 40, 42 and 43 arguing that each case should be considered on its own merit; ***Luo Council of Elders v Cabinet Secretary for Water*** [2017] eKLR paragraph 22, 24, 34, 35 and 37 contending that thus petition will affect a wide interest of Society and ***Eric Gitari v Attorney General*** [2015] eKLR para 21 and 34. He also relies on ***Republic v Law Society of Kenya & 2 Others Ex parte Nelson Havi*** [2017] eKLR (paragraph 39, 40).

10. According to learned counsel, although the jurisprudential value of the expanded bench and that of a single judge is the same, the present petition merits an expanded bench. ***Ms. Oduor*** supports ***Mr. Muteti*** and expounded on the reasons for seeking certification of the petition. she adds that the court should consider whether the substantial question of law raised in the petition affects rights of parties and placed reliance on the Indian case of ***Chunilal V Mehta& sons Ltd v Century Sinning & Manufacturing Co. Ltd*** **AIR 1962 SC 1314.**

11. Mr. Ogeto, learned ***Solicitor General,*** appearing for the 2nd, 3rd and 4th respondents agrees with ***Mr. Muteti*** and ***Ms. Oduor's*** submissions that the matter raises a substantial question of law. He also contends that the nature of the 1st respondent's obligations in terms of various Articles of the constitution as read with chapter 6 of the constitution is critical. According to learned ***Solicitor General,*** whether criminal proceedings can be instituted against a sitting judge of a superior court or whether it is necessary to remove a judge before criminal prosecution are critical and so is whether other constitutional commissions and institutions can take appropriate action against a sitting judge. He points out to the fact that many parties have shown interest in joining the petition as proof that the petition is of great public importance.

12. Mr. Omogeni, learned Senior Counsel, opposes the application contending that although where a matter raises cardinal issues it can be considered for purposes of empaneling a bench, certification of such a matter involves exercise of discretion. According to Senior Counsel, the issue raised in the petition is whether a commercial transaction can effectively found criminal prosecution. He contends that the issues being raised by the respondents for purposes of certification are extraneous. In learned Senior Counsel's view, whether or not the court should certify a matter for purposes of an expanded bench should be clear from the pleadings which is not the case in the present petition given that some of the issues being raised do not arise from the pleadings.

13. Learned Senior Counsel also relies on the case of ***Republic v Law Society of Kenya*** (Misc Appl No 499 and 555 of 2016 for the submission that the question of law must be founded on the pleadings but contends that the issues the 1stCrespondent raises are not founded on the pleadings. Learned Senior Counsel further argues that the issues raised in the petition are not new since they have been determined on a regular basis. He relied on the case of **County Council of Meru v Ethics and anti-corruption Commission** [2014] eKLR.

14. On the issue of public importance, learned Senior Counsel argues that the fact that more parties are seeking to be enjoined in the petition does not make the petition of great public importance. He contends that there is no substantial question of law placed before the court as required by Article 165(4) of the constitution to warrant certification. He asks that the application be disallowed.

15. Mr. Kimuli, learned counsel for the interested party, supports ***Mr. Omogene's*** submissions arguing that Article 165(4) should not be used for purposes of forum shopping. According to learned counsel, certification should only be allowed in exceptional circumstances and, in his view, those circumstances do not obtain in the present petition.

Determination

16. I have considered this application; responses, submissions by counsel as well as the authorities relied on. The application seeks certification of the petition as one raising a substantial question of law under Article 165(4) and should thus be referred to the Chief Justice for empaneling an uneven bench to hear it. The application brought by the 1st respondent is supported by the 2nd, 3rd and 4th respondents.

17. The petitioner and interested party oppose the application arguing that there is no substantial question of law raised in the petition because all that the petitioner questions is the 1st respondent's decision to turn a commercial transaction into a criminal case. They hold the view that a single judge of this court can effortlessly hear and determine the petition.

18. Article 165(4) of the constitution provides that a matter certified by the court as raising a substantial question of law under clauses 3(b) and (d) should be heard by an un even number of judges being not less than three, assigned by the Chief Justice. The constitution does not define what constitutes a "substantial question of law" thus leaves it 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 to warrant reference to the Chief Justice for assignment of uneven bench to hear it.

19. What is however clear from the constitutional text, is that the issue must be one that falls either under clause 3(b) or (d) of Article 165 of the constitution. Clause 3(b) confers jurisdiction on 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 clause 3 (d) gives the court jurisdiction to hear any question respecting interpretation of the constitution. In that context, the issue must either be one of violation or infringement of fundamental rights or interpretation of the constitution or even both.

20. Courts have since interpreted the meaning of a substantial question of law and this was best done by the Supreme Court of India in the celebrated case of ***Chunilal V Mehta& sons Ltd v Century Spinning & Manufacturing Co. Ltd*** (supra) where it was stated 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.

21. 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."**

22. This interpretation has been applied in our jurisdiction in several cases. In ***Community Advocacy Awareness Trust & Others v. The Attorney General & Others*** *(*High Court Petition No. 243 of 2011**)** the court observed that the Constitution of Kenya does not define, 'substantial question of law thus 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.

23. 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".***

24. What emerges from these decisions is that a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however, 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. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference.

25. In this petition, there is no denying that the issue raised therein relates to allegations of violation of rights and fundamental freedoms of the petitioner. Second, it is also true that the issue also relates to the interpretation of the constitution with regard to execution of the mandate of the 1st respondent, an even more critical issue given the fact that the petitioner is not only a sitting judge but is also the Deputy Chief Justice and Vice President of the Supreme Court. The fact of arrest and intention to prosecute a sitting judge is not a mere question of law. It is in my view, a substantial question of law and a matter of great public importance given that this is the first time in the history of our judicial system since the promulgation of the 2010 Constitution, that a sitting Judge not least the Deputy Chief Justice and Vice President of the Supreme Court, has been arrested within the precincts of the court, in the course of her duties and arraigned before court for possible criminal prosecution on allegations of matters that took place several years back. Whether the respondents can do what they set to do against the petitioner and how they can do it is, in my considered view, not only a substantial question of law, but is also of great public importance in our judicial history.

26. I appreciate that the constitution confers discretion on the court considering the application for certification to decide whether or not to certify a particular matter for purposes of empaneling a bench. At the same time we have to bear in mind that the constitution itself recognizes that there may be cases that would sometimes require more than one Judge thus the reason why Article 165(4) found space in our constitution although the jurisprudential value of the decision of a bench would not override that of a single judge of the same court.

27. The court did also appreciate this in the case of ***Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi*** [2017] eKLR stating 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.

28. In ***Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division***) Misc. High Court Civil Suit No. 559 of 2011 the Court again observed that a High Court whether constituted by one judge or more than one judge exercises the same jurisdiction and neither decision can be said to be superior to the other. 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.

29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary.

30. Having come to the decision to certify the petition for an expanded bench, I must then briefly address the question of the conservatory orders already in force. On 29th August 2018 this court having heard an application ex parte, granted conservatory orders and gave directions for compliance by parties in order to facilitate expeditious hearing of the petition. Shortly thereafter, on 6th September 2018 to be precise, the 1st respondent filed the present application seeking certification of the petition for an expanded bench. The application was fixed for hearing on 9th October 2018.

31. While parties were still complying with directions regarding the petition, the 1st respondent yet again filed another application this time dated 18th September 2018 seeking to have the petition transferred to the Ethics and Anti-corruption Division of this Court and directions on the hearing of the application for conservatory orders. The application, as I understand it, was to be heard with a view to setting aside the ex parte conservatory orders granted on 29th August 2018. That application was also set for hearing on the 9th October 2018.together with the application for certification.

32. On that day, the applicant elected to argue the application for certification. The court then directed that the application for certification be heard sine its determination would give the direction the petition would be moving. If allowed, there really would be no need for the transfer of the petition to the EACC Division. What I gather from the application is that the applicant does not seem to want the conservatory orders to remain in force any more than they have been. This is because at the ends of their arguments on 9th October 2018 the applicant opposed further extension of these conservatory orders.

33. The applicant has himself come to this court arguing that the petition raises a substantial question of law and should, for that reason, be heard by an expanded bench. The 2nd, 3rd and 4th respondents agree with him. They have even formulated questions they would want the expanded bench to consider including the law regarding independence and mandate of constitutional commissions and the independent office of the 1st respondent National Police Service and the Director od Criminal Investigations.

34. Having agreed to certify the petition for empanelling a bench, it is only reasonable that conservatory orders remain in force for purposes of preserving the status of the petition pending pronouncement of the law by the expanded bench. The applicant must appreciate that rule 3(4) of the Constitution of Kenya (Protection of Rights and fundamental freedoms) Practice and Procedure Rule, 2013 ***("The Mutunga Rules")*** provides that in exercising its jurisdiction under the rules, the court should facilitate the just, expeditious, proportionate and affordable resolution of cases.

35. The court is required to ensure just determination of cases, efficient uses available and administrative resources and quick disposal of proceedings. In doing so, rule 4 allows a party who claims that his/her rights and fundamental freedom are violated or threatened to move the court and under rule 13, a petition filed under urgency may be placed before a judge for appropriate orders or directions. Rule 23 provides that despite any provision to the country, a judge before whom a petition under rule 4 is presented, shall hear and determine an application for conservatory or interim orders.

36. The conservatory orders herein were granted pursuant to an application under urgency and the court fast tracked the petition for quick disposal and parties have fully complied with the court's directions. Having applied for an expanded bench, it is my view that it will serve greater purpose, justice and good order to maintain the conservatory orders in force pending the hearing and determination of the petition. That, in my view, is in line with the objectives of the rules of this court to hear and determine petitions without delay while at the same time protecting rights and fundamental freedoms of those who have come before it for redress.

37. This is not however a final pronouncement on the application dated 18th September 2018. The applicant may wish to pursue that application before the expanded bench because this court's duty was limited to determining whether or not to certify the matter for an expanded bench. having done so it cannot ignore the necessity of preserving the subject matter for the expanded bench because without conservatory orders, there would be nothing for the bench to determine since the matter would be reduced to an academic exercise.

38. Consequently and for the above reasons, I hereby certify that this petition raises a substantial question of law to warrant its reference to the Chief Justice under Article 165(4) of the Constitution.

39. This petition is hereby referred to the Hon. The Chief Justice for him to consider empanelling an uneven bench of Judges to hear it. The

conservatory orders granted on 29th August 2018 are hereby extended until the hearing and determination of the petition unless otherwise set aside by the expanded bench.

Dated, Signed and Delivered at Nairobi this 17th day of October 2018

E C MWITA

JUDGE