



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 19 OF 2017
KATIBA INSTITUTE.....PETITIONER
VERSUS
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....RESPONDENT
RULING

In a Petition filed on 25th January 2017 by Katiba Institute, a Constitutional research, policy and litigation institute, against Independent Electoral and Boundaries Commission, a Constitutional Commission vested with among other responsibilities, the mandate to manage elections in this Country, the petitioner sought the following reliefs.

- a. A declaration that political parties are bound by the provisions of Articles 10, 19, 20, 27, 28, 56, 81(b) and 91(1) of the constitution and hence any action taken by them, including nomination processes for candidates for members of Parliament, must comply with the requirements of those provisions.*
- b. A declaration that the power conferred to the respondent in Article 88(4)(a) of the Constitution of regulation of the process by which parties nominate candidates for elections” obligates the respondent to ensure that nominations carried out by political parties meet the requirements of the constitution, especially Articles 10, 19, 20, 27, 28, 56 and 91(1).*
- c. A declaration that Articles 10, 19, 20, 27, 28, 56 and 91(1) of the Constitution obligates the respondent to reject any nomination list of a political party for its candidates for the 290 constituency based elective positions for the members of National Assembly and 47 county based elective positions for the member of the senate that do not comply with the pro-third gender rule.*
- d. A declaration that the respondent has violated Articles 249(1), 35(1) and (3) and the access to Information Act, 2016 by failing to provide the petitioner with the information sought.*
- e. An order requiring the respondent to accept and process the nominations for inclusion as candidates for the 290-Constituency based elective positions for members of National Assembly and 47 County based elective positions for members of the Senate for the 2017 General Elections from any of the nomination lists of political parties that meet the two-third gender requirements.*

Simultaneous with the petition, the petitioner took out a motion on notice through which the court was asked to certify that the petition raises a substantial question of law and therefore it should be referred to the Hon. Chief Justice pursuant to Article 165(4) for purposes of empanelling a bench of an uneven number of Judges of this court, not being less than three, to hear and determine the petition.

Upon being served, the respondent filed grounds of opposition to the motion dated 20th February 2017 and filed to court on the same day opposing the application on the grounds that it does not meet the threshold required under Article 165(4) to allow empanelling of a bench, that the issue raised in the petition is not a novel one or complex, that the application is an abuse of the court process and is bad in law.

At the hearing of the motion, Mr. Waigwa Wanyoike appeared for the petitioner/ applicant while Miss Olando was for the respondent. Learned counsel for the petitioner moved the motion and urged the court to grant it and refer the file to the Hon. Chief Justice to empanel a bench of not less than three judges to hear the petition because, Learned Counsel argued, it raises weighty legal issues including whether **Article 27(8)** applies to political parties when nominating candidates for elective posts both at National Assembly and Senate levels with regard to the 290 and 47 elective posts in both the National Assembly and the Senate.

Learned Counsel further submitted that in considering the petition, the court will have to decide whether the respondent (IEBC) is enjoined by the Constitution to reject a political party's nomination list if it does not comply with the two-third gender rule. Counsel submitted that the petition is informed by the fact that the petitioner sought information from the respondent on whether the respondent will enforce the constitution by ensuring that political parties comply with the two-third gender requirement during nominations but no response was received.

According to learned counsel, the issue raised in the petition is one that falls under **Article 165(3) (b) and (d)** since it also requires interpretation of the constitution thus it raises a substantial question of law under **Article 165(4)** to warrant the file being referred to the Chief Justice to empanel a bench to hear the petition. Mr. Wanyoike continued to submit that **Article 88(4)** as read with **Article 91** requires the respondent to enforce the two-third gender requirement and therefore this is a question of constitutional interpretation.

On whether the petition raises a substantial question of law, learned counsel submitted that the issue raised in the petition is complex, is a novel point of law, it requires substantial amount of time to dispose of, and has a significant impact should the petition be granted. The petition, counsel submitted, will generate huge public interest in that it will affect those who will be looking forward to be elected as members of the National Assembly and Senate. Counsel referred to decisions in the case of **Law Society of Kenya v Attorney General and 10 others**[2016] eKLR, **J. Harrison Kinyanjui v Attorney General & Another** [2012] eKLR, **Kaplana H. Rawal v Judicial Service Commission & others** [2015] eKLR, and **Sir Chunilal Mehta and Sons, Ltd v The Century Spinning & Manufacturing Co. Ltd** 1962 AIR 1314 to support his submissions on the considerations to be taken into account when deciding whether or not to certify a matter to be one that raises a substantial question of law for purposes of empanelling a bench. Counsel submitted that the issue raised in the petition is a novel, one since courts have not determined whether **Article 27** binds political parties to comply with the two third gender rule when nominating candidates for various elective political positions, and whether the respondent (IEBC) should enforce this requirement during nomination of those candidates. Counsel prayed for grant of the order sought in the motion.

Miss Olanda, learned counsel for the respondent opposed the motion submitting that the petition does not raise a substantial question of law hence there is no need to refer it to the Chief Justice for empanelling a bench. According to learned counsel, **Article 165(4)** does not define what a substantial question of law is but it is up to the court to determine it. Learned Counsel submitted that for a matter to raise a substantial question of law, the question must be a novel one, complex and must raise a contested question of law.

Learned Counsel was of the view that the petition does not raise a novel question since the issue of gender

rule has been dealt with before by the Supreme Court hence it is not a new issue. Counsel further submitted that the issues raised in the petition is not complex because **Article 88** is clear on the mandate of the respondent (**IEBC**) hence a single judge of this court can determine the petition. Learned counsel argued that there is no disputed question of law nor are there conflicting decisions on the same issue to warrant empanelling a bench. According to Counsel, Public interest is not a ground for consideration under **Article 165(4)**. In any case, counsel submitted, all constitutional petitions raise public interest issues hence this is not a peculiar petition. Counsel referred to the case of **county government of Meru v Ethics and Anticorruption Commission [2014] eKLR**, and **Republic v President & 5 Others Exparte Willfrida Itolondo & 4 others [2013] eKLR** in support of their submission and urged that the motion be dismissed.

I have considered the application, the opposition thereto and submissions by Counsel. I have also considered the authorities relied on. The question that arises for determination is whether the petitioner has demonstrated that the petition raises a substantial question of law for this court to allow a referral. The petitioner has submitted that the petition herein raises a substantial question of law and therefore it should be placed before the Honourable Chief Justice for purposes of empanelling a bench of uneven number of judges of this court, not being less than three, to her it. According to the applicant, the petition raises question of law of such importance that it would be better if it was heard by a bench.

Article 165(4) of the Constitution provides:-

“ Any matter certified by the court as raising a substantial question of law under clause 3(b) or (d) shall be heard by an un even number of judges, being not less than three, assigned by the Chief Justice.”

For a matter to be heard by a bench, the court must certify it as one raising a substantial question of law that falls under **Article 165 (3) (b) or (d)**, which provides as follows-

“ subject to clause 5, the High Court shall have:

a.

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.

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 of whether anything said to be done under the authority of this constitution or 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 governments and...” (emphasis)

The constitution, (**Article 165(4)**) does not define what a substantial question of law is, but from the reading of **Article 165(3)(b)** and **(d)**, the question must on breach of the constitution, violation, denial or infringement of fundamental freedoms under the Bill of rights, or one on the interpretation of the constitution. where the question raised in the petition touches on an issue under **Article 165 (3)(b) or (d)**, the court will then have to decide whether it is a substantial question of law before certifying it for purposes of empanelling a bench.

The petition herein raises questions touching on **Article 27(8)** of the constitution. **Article 27** is on equality before the law and **sub article 3** thereof states that women have the right to equal treatment including equal opportunity in political, economic, cultural and social spheres. **Article 27(8)** relates to the two third gender rule which requires that the state puts in place measures to implement the principle of two third gender rule in both elective and appointive bodies. The applicant has argued that that issue of ensuring that that rule is achieved and the fact that **IEBC** is being asked to implement that rule during political parties' nomination of candidates for elective positions for members of the National Assembly and Senate is a substantial question.

In deciding whether or not to certify a matter as raising a substantial question of law, the court exercises discretion. In the case of **Law Society of Kenya v the Attorney General & 10 Others** [2016] eKLR, **Lenaola J**, (as he then was) dealt with an application for referral and stated that in deciding whether or not to refer a matter, the court exercises a discretion and in doing so the court should consider whether the matter is complex, raises a novel point, whether the matter requires substantial amount of time to be disposed of and the level of public interest generated by the petition.

In the case of **Martin Nyage Wambora v Speaker County of Embu & Others** [2014] eKLR, it was also stated that in deciding whether or not to allow a referral, the court exercises its discretion and that each cases should be considered on its own circumstances.

What constitutes a substantial question of law is a question that has been the subject of consideration by courts. In the case of **Sir Chunilal v Mehta and Sons, Ltd v The Century Spinning & Manufacturing Co. Ltd 1962 AIR1314** substantial question of law was defined thus;

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the privy council or the federal court which or which is not free from difficulty or which calls for discussion or alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”

In the case of **J. Harrison Kinyanjui v Attorney General & Another** [2012]eKLR, the court stated-

“Giving meaning to “substantial question” must take into account the provisions of the constitution as a whole and need to dispense justice without delay particularly given specific fact situation. Each case must be considered on its merit by the Judge certifying the matter... 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... 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... there must be something more to the ‘substantial question’ than merely novelty or complexity of the issue before the court.”

The same issue was again considered by the court in this case of **Robert N. Gakuru & Another v The County Government of Kiambu and Another** [2013] eKLR where it was stated:-

“The test for construing a matter as raising a substantial issue of law is no easy task and should be taken seriously by parties and the court as well. To my mind, therefore, a substantial question of law would depend on the facts and circumstances of each case, if any guidance is needed, I would say that it is a matter that has not been previously settled by a court such that it does not have a binding or persuasive precedent. It also would be a matter that is intertwined involving diverse areas of the law therefore making the matter relatively complex as compared to other matters normally conversed before the same court, and calling for an alternative view...”

It can therefore be said that, a substantial question of law is one that raises a question of that has not been

fully settled, that has a significant impact to the public and is likely to persist if not fully and finally settled. I am aware and it has been submitted by the respondent's counsel, that there has been litigation on the issue of the two third gender rule and the supreme court's opinion given on this issue in the case of **in the matter of the principle gender representation in the National Assembly and the Senate [2012] eKLR (The Advisory Opinion No. 2 of 2012)**.

This is not the first time that this issue is coming up for consideration. In that context it is not a new issue, it is not, in my view, a complex one either that cannot be handled by a single judge of this court. The court must also take into account the fact of human resource in terms of personnel given that it will require more than one judge to hear this matter. That means there will be delay in concluding this matter.

Although the petition would appear to raise an issue of general public importance touching on nomination of candidates for elective posts, that alone does not make it a substantial question of law that must, of necessity, be decided by a bench. There must be something new in the case that has not been determined to make it a substantial question of law which is not the case here. As **Onguto J** stated in the case of **Del Monte Kenya Limited v County Government of Muranga & 2 others [2016] eKLR**;

“the question as to whether there exists a substantial question of the law, even if one adopted the definition in the Chunilal Mehta case, is left to the individual judge to determine depending on the circumstances and unique facts of each case.”

Having given due consideration to this matter, and considering the circumstances thereof I have come to the conclusion that this is not a proper case for referral. Consequently the notice of motion dated 25th January, 2017 is declined and is hereby dismissed with no order as to costs.

Dated and Delivered at Nairobi this 3rd Day of March 2017

E C MWITA

JUDGE