



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC APPLICATION NO. 499 AND 565 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAW SOCIETY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**ADVOCATES DISCIPLINAR TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**SECRETARY LAW SOCIETY OF KENYA, DISCIPLINARY TRIBUNAL & COMMITTEE....3<sup>RD</sup> RESPONDENT**

**AND**

**AHMEDNASIR MAALIM  
ABDULLAHI.....INTERESTED PARTY**

**EX PARTE: NELSON HAVI**

**RULING**

1. These proceedings were instituted by the *ex parte* applicant herein, **Nelson Havi**, who contends that there is pending before the High Court and Court of Appeal, H.C.C.C. No. 46 of 2015, **Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others**, Civil Appln. No. 21 of 2016 **Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others** and Civil Appeal No. 259 of 2015 **Tatu City Limited & 2 others –vs- Stephen Jennings & 6 others**, in which the directors of **Tatu City Limited** and **Kofinaf Limited** are feuding over the sale of the companies’ properties.

2. In the said proceedings, the Applicant acts for all the Plaintiffs, Applicants and the Appellants respectively, whilst the Interested Party acts for the Respondents directly or indirectly through law firms associated with him.

3. It was contended that in February, 2015, the Interested Party was consulted, interfering (sic), briefed and instructed by the Applicant and a director of **Tatu City Limited** and **Kofinaf Company Limited**, to act for the Plaintiffs in H.C.C.C. No. 46 of 2015 but jumped ship, sought the Defendants and was thereafter instructed by them to infiltrate the legal representation for Plaintiffs and terminate the suit with

a view to countermand orders made against the Defendants on the 6<sup>th</sup> day of March, 2015, the 28<sup>th</sup> day of April, 2015 and the 12<sup>th</sup> day of June, 2015, directing that an in-depth forensic audit in respect to the loans of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs be conducted to resolve the disputed sales of properties and reconciliation of the financial accounts.

4. It was averred that the Interested Party has, in an effort of scuttling, interfering, compromising and terminating the three matters pending in the High Court and the Court of Appeal infiltrated the legal representation for the Plaintiffs, the Applicants and the Appellants in H.C.C.C. No. 46 of 2015, Civil Appln. 21 of 2016 and Civil Appeal No. 259 of 2015 respectively, with a view to terminating them. On the 16<sup>th</sup> day of March, 2016, the Applicant acting on instructions of Tatu City Limited, notified one Superior Homes (Kenya) Limited not to contract the purchase of a property of Tatu City Limited on the offer by the Defendants in H.C.C.C. No. 46 of 2015, in view of the orders aforesaid and the pendency of the three matters aforesaid.

5. It was further averred that on the 25<sup>th</sup> day of August, 2016 and the 6<sup>th</sup> day of September, 2016, the Interested Party lodged complaints with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, falsely and maliciously alleging that the Applicant was not authorized to act in the said pending suits and to write **Superior Homes (Kenya) Limited** as he did, when the issue of the Interested Party's claimed representation for **Tatu City Limited** and **Kofinaf Company Limited** in place of the Applicant in the three pending cases is yet to be determined.

6. It was the applicant's case that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have acted on the instructions and directions of the Interested Party and without due regard to the law and the facts, concluded that there is a *prima facie* case against the Applicant and summoned the Applicant to take plea in respect to Disciplinary Tribunal Cause Number 95 of 2016. Further, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' actions have been taken at the behest, directions and control of the Interested Party, with a view to suppress complaints of misconduct made against the Interested Party on 3<sup>rd</sup> May, 2012, 12<sup>th</sup> October, 2015 and 21<sup>st</sup> May, 2016 whose progression the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have actively hindered and suppressed.

7. In the applicant's view, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision in respect to Disciplinary Tribunal Cause Number 95 of 2016 is biased, is taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant and his clients in the three cases, is taken without due regard to relevant considerations, is taken on the directions of the Interested Party who is not empowered to give such directions and the decision is made in bad faith and abuse of power.

8. The subject of this ruling however is an application made pursuant to Article 165(4) of the Constitution which was argued on behalf of the ex parte applicant by **Dr John Khaminwa**. According to learned counsel, the matters before this Court are of paramount considerable importance. It was learned counsel's view that though the matters are judicial review proceedings in nature, they go beyond judicial review proceedings under the common law since they touch on the administration of justice in the country, the Bill of Rights, the role of institutions relating to administration of justice, the advocates disciplinary committee, the Bar, the Director of Public Prosecution, the Police, the Judiciary.

9. Learned counsel contended that the affidavit of the applicant discloses a shocking state of affairs in the country. It was disclosed that the interested party herein is a former member of the Judicial Service Commission who enjoyed considerable powers under the statute and that he is a past chairman of the Law Society of Kenya. As such it was contended that the interested party was in control of the Judicial Service Commission.

10. Learned counsel also raised issues relating to the process of vetting of judges and magistrates which in his view was unfair and that its process was predetermined.

11. It was therefore the ex parte applicant's case that these matters should be placed before the Chief Justice so that when deciding on the composition of the bench he should set up a panel of experienced

judges and whom no one in the country can intimidate.

12. It was contended that the Law Society does not seem to have given the applicant a fair hearing under the law, the Constitution and the International Covenants. It was urged that the Law Society ought to enjoy the status of an independent bar that is not interfered with which is what is happening according to the applicant.

13. It was therefore contended that this is a matter of public importance and gravity which ought to be hard heard in the manner sought herein. It was argued that the empanelled bench may arrive at a conclusion that the judges who were declared unfit to continue serving deserve apologies.

14. The application was however not opposed by **Mr Kiongera** for the Respondents.

15. On the part of the interested party, the application was opposed by **Miss Hanan**. According to learned counsel, this is simply a judicial review application seeking judicial review orders of certiorari, prohibition and mandamus in respect of a complaint before the Disciplinary Tribunal by a client and by the interested party.

16. According to learned counsel there is no allegation of violation of the Bill of Rights and the issues do not concern other judges or the mandate of the Judicial Service Commission. It was therefore contended that the allegation of the interested party having influenced the Judicial Service Commission is not part of this application while the competency of the interested party has been determined by the Court.

17. It was therefore the interested party's position that the matter should proceed.

### **Determinations**

18. I have considered the issues raised by or on behalf of the parties herein. Article 165(3) and (4) 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.***

19. Therefore the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law in the following instances:

**1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**

**2. That it involves a question respecting the interpretation of the Constitution and under this is included (i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the 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.**

20. One of the rights enshrined in the Constitution is the right to fair administrative action under Article 47 of the Constitution. Accordingly, it is my view that as long as the issue revolves around an allegation of denial, violation, infringement or threat of such denial violation or infringement the Court may perfectly be entitled to invoke its jurisdiction under Article 165(4) of the Constitution notwithstanding the fact that the proceedings are judicial review in nature.

21. The general rule in these sorts of matters was laid down by the Court of Appeal in **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** in which the Court held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. Therefore 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. However like all discretion, that power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes.

22. In my view, the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. Despite appreciably great strides made in the expansion of the Judiciary in the recent past, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this Country still does not enjoy the luxury of granting such orders at the whims of the parties. 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. I with respect associate myself with the position adopted by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** where he held that:

**“the 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.”**

23. I also defer to the decision in Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011 where this Court held:

**“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.”**

24. Since the determination of such issue is a judicial one, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law. Therefore the mere fact that parties are of the view that the matter falls under Article 165(4) does not necessarily bind the Court in issuing the said certification.

25. According to the above provision, it does not suffice that the matter raises the issue 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. The Court must go further and satisfy itself that the issue also raises a substantial question of law. Similarly the mere fact that a substantial question of law is disclosed does not suffice 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.

26. As to whether this is the case is a matter for judicial determination based on the facts of the particular case and the law involved. This was appreciated in 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.”**

27. In that case the Court proceeded to note that the promulgation of the Constitution of Kenya, 2010 brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. This Constitution has been recognised by the Supreme Court as being transformative in nature. It has expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than one judge, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the *Civil Procedure Act* would never be realised.

28. In Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314, it was held that:

**“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 or which is not free from difficulty or which calls for discussion of 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 a substantial.”**

29. 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*."**

30. The Indian tests for determining whether a matter raises substantial question of law are therefore: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

31. To my mind the above considerations offer proper guidelines and an insight in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution.

32. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition.

33. These however are mere examples since the Article employs the word "includes". Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand. Even before the promulgation of the current Constitution, it was appreciated in Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2 KLR 6 that:

**"in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any."**

34. In my view, the Court must adopt a holistic approach to the matter at hand. In other words, 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 this case, it is contended that the issues the subject of these proceedings raise matters of great public importance. Mere great public importance per se however cannot be an automatic passport for dispatching a Court file on a trip to the Chief Justice since great public importance alone, with due respect does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. In my view the issue is not merely to do with weight, 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 weighty questions whether complex or not whether of great public importance or not since the Court cannot abdicate its duty of determining disputes to another organ.

35. I have however considered the issues the subject of these two applications and with due respect I am unable to agree that the issues which were submitted before me will, based on the current state of

pleadings fall for determination in these proceedings. Strictly speaking the issues in these proceedings revolve around the propriety or otherwise of the proceedings before the Respondents and those are matters which this Court deals with almost on a daily basis.

36. With due respect to the ex parte applicant the insinuation of intimidation does not arise as far as this Court is concerned. As was held in Masalu and Others vs. Attorney General [2005] 2 EA 165 it was held that:

**“While it is not disputed that it is the duty of every citizen to play certain roles in a society under Article 17, the judicial officer’s role and duties are unique and different. Judicial officers are charged with safeguarding the fundamental rights and freedoms of the citizenry and in the performance of their duties, they are entrusted with checking the excesses of the Executive and the Legislature. These duties require insulation from any influence direct or indirect that may warp their judgement or cause them to play into the hands of corrupt elements, especially when there is a climate of political excitement. It is noteworthy that the administration of justice is the firmest pillar of Government...When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim.”**

37. In the same case the Court held that:

**“A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the least importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man’s side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary.”**

38. It must be appreciated that the Constitution of this Country recognises that there is the High Court and Courts of equal status presided over by High Court judges. The Constitution does not create a distinction between more experienced judges and less experienced ones. With due respect to insinuate that newly appointed judges are more amenable to intimidation is to demean the institution of the judiciary.

39. This was the view of that eminent Judge, **Madan, J** (as he then was) nearly 4 decades ago in M M BUTT vs. Rent Restriction Tribunal & Others Civil Application No. Nai. 6 of 1979 [1982] KLR 417 when in his usual poetic and eloquent style expressed himself as hereunder:

**“A Judge is a Judge whether recently qualified or foggy. The former has the benefit of his latter learning, the later the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of justice spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both are free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torchbearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisers are the best judge of their affairs.”**

40. 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.

41. In this case however the only issue that can be identified going by the pleadings before me is whether the proceedings before the Respondents are proper and whether the Respondents will accord the ex parte applicant a fair hearing. I don't see how such issues cannot be determined by a single Judge of this Court. In other words the constitutional edict under Article 165(4) of the Constitution has not been satisfied.

42. As was held in **Uhuru Highway Development Limited vs. Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996**, litigation is not a luxury as justice is for all and all must have equal access to courts as well as equal priorities in being heard. Sections 1A and 1B of the *Civil Procedure Act* require the Court to take into account "***the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing***" See **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008**.

43. It is, in my view, only in cases contemplated under Article 165(4) of the Constitution that the Court will certify that a matter raises a substantial issue of law.

44. In the circumstances, I decline to certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution and the application for the same fails and is hereby dismissed. The costs will be in the cause.

**Dated at Nairobi this 2<sup>nd</sup> day of June, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Ms Shamalla for the Applicant**

**Mr Mugambi for Dr Khaminwa for the Applicant**

**Mr Kiongera for the Respondents**

**Mr Issa for the Interested Party**

**CA Mwangi**