

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 328 OF 2017

**IN THE MATTER OF SECTIONS 44A AND 109 OF THE ELECTIONS ACT NO. 24 OF 2011
AND**

**IN THE MATTER OF ARTICLE 10, 19, 21, 22, 23, 162 (20 (B)), 258 & 259 OF THE
CONSTITUTION OF KENYA AND IN THE MATTER OF ENFORCEMENT OF
FUNDAMENTAL RIGHTS AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
PROTECTION OF RIGHTS ENSHRINED UNDER ARTICLES 2 (1), 2 (40), 2 (50), 2 (6), 10, 36,
38, 81, 82 (2), 86, 88 AND 232 OF THE CONSTITUTION OF KENYA**

BETWEEN

NATIONAL SUPER ALLIANCE

(NASA)KENYA.....PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....
RESPONDENT**

RULING

The Respondents counsel has applied orally for this court to certify this case as raising substantial questions of law under clause **3 (b)** or **(d)** of article 165 of the Constitution and refer the file to the honourable the chief justice to constitute a bench of three **(3)** Judges of the High Court to hear and determine the matter.

The grounds in support of the applications are that the petition raises serious points of law in that it invites the court to determine two issues of great importance relating to the general elections scheduled for 8th August 2017, namely, how the voters will be identified and how the results will be transmitted.

Prof. Ben Sihanya, for the petitioner stated that he did not oppose the application in principle, but expressed the view that a single judge can hear and determine the matter. In his view, the petition only requires the Respondent to obey the law.

The law as to what constitutes a substantial point of law Counsel was eloquently enunciated by the Supreme Court of India in *Chunilal Mehta vs Century Spinning and Manufacturing Co.*^[1] a decision which sets out the considerations to be followed in applications of this nature. The said decision has been followed in several cases of this court differently constituted, namely, *Justice Philip Tunoi & Another vs The Judicial Service Commission & Another*^[2] and *Hon. Justice Kaplan H. Rawal vs Judicial Service Commission & Others*.^[3]

The key issue for determination is whether or not the Respondent has demonstrated good grounds to warrant this court to refer this petition to the Hon. the Chief Justice to empanel a bench of an uneven number of judges to hear and determine this matter. Does this petition raise a substantial questions of law

under clause article **165 (3) (b)** or **(d)** of the constitution? This warrants a close examination of the said provisions and the issues raised in this petition.

The general rule in applications of this nature was laid down by the Court of Appeal in *Peter Nganga Muiruri vs. Credit Bank Limited & Another*^[4] 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 judiciously and not on caprice, whim, likes or dislikes.

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.^[5] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case*^[6] stated as follows:-

“Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with.”

Writing on judicial power, Chief Justice [John Marshall](#) wrote the following on the subject:-

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”^[7]

I am clear in my mind that 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, statutory provisions and relevant precedents. I with respect associate myself with the position adopted by **Majanja, J** in *Harrison Kinyanjui vs. A. G. & Another*^[8] 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.”

Also relevant is the case of *Vadag Establishment vs. Y A Shretta & Another*^[9] where the High Court held that:-

“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.”

Article **165 (3)** 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.

The only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article **165(4)** which requires that for the matter to be referred to the Chief Justice under the said provision, the High Court must certify that the matter raises a substantial question of law in the following instances:-

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

b. 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.

In my view, the determination of such issues 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.

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.

The issue 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*^[10] 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.”

In *Chunilal Mehta v. Century Spinning and Manufacturing Co*^[11], the Supreme Court of India, after considering a number of decisions on the point, laid down the following test for determining whether a question of law raised in the case is substantial question of law or not :-

“...The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or 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 question 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 question of law.”

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, 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.^[12] 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.^[13] 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*.^[14]

The question of what constitutes a "substantial question of law" was further substantiated by the Supreme Court of India in the case of *Hero Vinoth vs Seshammal*^[15] in which it laid down the position that a question of law having a material bearing on the decision of the case (that is a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

The test rendered by the Supreme Court of India 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 highest court of the land, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.**

In my view, 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. 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. 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.

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. [16] 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. [17] 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. [18]

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.

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.

Though the expression "substantial question of law" has not been defined in the constitution, the true meaning and connotation of this expression is now well settled by various judicial pronouncements among them the earlier cited decisions. There is a difference between question of law and substantial question of law. It is not a mere question of law but a substantial question of law that is required. A question of law will be a substantial point of law if it directly and substantially affects the rights of the parties. 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. If the law is well-settled by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law. This position was well stated by the Supreme Court of India which authoritatively held that once the Supreme Court has settled a question of principle, its application to the facts of a case is not a substantial question of law. [19]

In my view, without delving into the merits or otherwise of the petition, I find that there are specific provisions of the law and constitutional provisions upon which this petition is grounded, and even though to my knowledge, the issues raised in this petition has not been litigated before, the matter does not *prima facie* raise substantial questions of Law.

However, what may be persuasive to this court to exercise its discretion in allowing the application is the importance of the general elections to this country and the need to ensure that the electoral process is free, fair, transparent and accountable, hence a matter of great public interest. On this ground alone, namely, the public interest in the litigation, I am inclined to exercise my discretion and allow the application.

Consequently, I certify this matter under article 165 (4) and direct that the same be referred to the Honourable the Chief Justice to constitute a bench of three judges to hear and determine this matter.

Signed, Dated and Delivered at Nairobi this 10th day of July 2017

John M. Mativo

Judge

[1] AIR 1962 SC 1314

[2] HC Pet No. 244 of 2014

[3] HC Pet No. 386 of 2015

[4] Civil Appeal No. 203 of 2006

[5] See Sir Dinshah F. Mulla, *Supra*, at page 1381.

[6] [77 ER 209; (1597) 5 Co.Rep.99]

[7][Osborn V. Bank of the United States](#), 22 U. S. 738 {1824}.

[8] {2012} eKLR

[9] Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011

[10] High Court Petition No. 243 of 2011

[11]*Supra*

[12] See Santosh Hazari vs. Purushottam Tiwari {2001} 3 SCC 179

[13] *Ibid*

[14] *Ibid*

[15] {AIR} 2006 SC 2234

[16] *Wycliffe Ambetsa Oparanya & Others vs Director of Public Prosecutions & Others*, H.C. CON. PET. NO. 561 of 2015.

[17] *Ibid*

[18] *Ibid*

[19] see *State of Kerala v R.E.D'Souza* (1971) 3 SCR 71