



Law Society of Kenya v The National Assembly & another; Centre for Enhancing Democracy and Good Governance & 5 others (Interested Parties); International Commission of Jurists & 3 others (Amicus Curiae) (Petition 3 of 2016) [2016] KEHC 7268 (KLR) (Constitutional and Human Rights) (12 February 2016) (Ruling)

Law Society of Kenya v Attorney General & 10 others [2016] eKLR

Neutral citation: [2016] KEHC 7268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 3 OF 2016

I LENAOLA, J

FEBRUARY 12, 2016

BETWEEN

THE LAW SOCIETY OF KENYA PETITIONER

AND

THE NATIONAL ASSEMBLY 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

CENTRE FOR ENHANCING DEMOCRACY AND GOOD GOVERNANCE INTERESTED PARTY

CONSTITUTION AND REFORM EDUCATION CONSORTIUM INTERESTED PARTY

KATIBA INSTITUTE INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

NATIONAL CIVIL SOCIETY CONGRESS INTERESTED PARTY

THE JUDICIAL SERVICE COMMISSION INTERESTED PARTY

AND

THE INTERNATIONAL COMMISSION OF JURISTS AMICUS CURIAE

THE INTERNATIONAL COMMISSION OF JURISTS AMICUS CURIAE

KITUO CHA SHERIA (LEGAL ADVICE CENTER) AMICUS CURIAE



RULING

Background

1. On 1st December 2015, the 2nd Respondent debated and passed the Statute Law (Miscellaneous Amendment) Bill, 2015. One of the amendments contained therein was to Section 30(3) of the Judicial Service Act, 2011 and inserting therein a provision that the Judicial Service Commission, in recommending any person of appointment as Chief Justice and Deputy Chief Justice to the President, shall submit three names for each office and the President shall then appoint one of the three.
2. It is the Petitioner's case that such a procedure is in blatant violation of Article 166(1)(a) of the Constitution and seeks inter alia a declaration that the said amendment is unconstitutional.
3. On 22nd January 2016, I heard Submissions by all Counsel present on whether the Petition raises a substantial question of law and ought therefore to be heard by an uneven number of Judges appointed by the Hon. Chief Justice under Article 165(4) of the Constitution. This Ruling is limited to that question only.

Submissions by the Petitioner, 2nd Respondent, 1st – 6th Interested Parties and Amici Curiae

4. In his submissions on behalf of the Petitioner, Mr. Kitonga SC stated that on four grounds, the issues raised in the Petition would raise substantial questions of law. The grounds are;
 - i. Novelty
 - ii. Public Interest
 - iii. Complexity
 - iv. Time for disposal
5. On novelty, he submitted that none of the issues raised in the Petition have previously been determined by any superior Court. That the questions include whether the powers of recommendation by the Judicial Service Commission can be limited, defined or broadened by a statutory amendment; whether Article 166(1)(a) of the Constitution empowers or requires the Commission to submit more than one name to the President for appointment of the Chief Justice and Deputy Chief Justice and whether, in passing the amendment, the National Assembly was obligated to subject such a fundamental amendment to public participation.
6. On public interest, he submitted that judicial independence and the independence of the Judicial Service Commission are of such paramount importance that this Court in determining the Petition would have to do so in that context.
7. Regarding the complexity of the matter, learned Senior Counsel submitted that where a matter raises such seriously contested issues and where the said issues are complex and require a multi-faceted approach to the interpretation of both the Constitution and Statute, an expanded bench would mostly likely deliver an unimpeachable finding.
8. Lastly, that because of the need to settle the contested issues in the Petition within the shortest time possible and since the two positions of Chief Justice and Deputy Chief Justice may need to be filled up



in the near future, only a bench of more than one Judge can expeditiously dispose of the matter also noting the workload of any single Judge.

9. Mr. Omogeni SC on behalf of the Judicial Service Commission, the 6th Interested Party, associated himself with Mr. Kitonga's submission and added that the issues in contest are of great public importance and that a fundamental question also arises whether an existing statutory provision and which has in past appointments of the Chief Justice and Deputy Chief Justice been faithfully implemented by both the JSC, the President, and the National Assembly, can be watered down by the latter.
10. Mr. Lempaa representing the 1st – 5th Interested Parties similarly supported Mr. Kitonga's submissions and raised another issue which he considered was a substantial question of law i.e. whether the National Assembly by omnibus miscellaneous amendments to a number of Statutes can, by so doing, ostensibly also amend the Constitution.
11. Mr. Mulekyo for the 2nd Amicus Curiae, Kituo cha Sheria, also supported a referral under Article 165(4) as did Miss Otieno for the National Assembly, the 2nd Respondent. Mr. Mwongela representing the 1st Amicus Curiae, the International Commission of Jurists (Kenya Chapter) took the same view. In addition to the above, Mr. Kitonga, Mr. Mulekyo and Mr. Lempaa submitted useful authorities which I shall shortly revert to.

Submissions for the 1st Respondent

12. The Attorney General represented by Mr. Deya took the lone view that a referral under Article 165(4) is a matter of discretion and that in the present circumstances, there is no reason to refer the matter for the constituting of a bench because there is no debate that the President is the appointing authority of both the Chief Justice and Deputy Chief Justice.
13. Regarding public participation, he submitted that members of Parliament represent their constituents in law making and so the public's concerns are properly catered for in such circumstances.
14. Lastly, he submitted that a three Judge decision does not carry any more weight than a single Judge decision and therefore none is more superior than the other. That therefore the present Petition is one fit for determination by a single Judge.

Determination

15. I propose to determine the question whether the Petition herein raises a substantial question of law as is the expectation of Article 165(4) of the Constitution, for me to refer it to the Hon. Chief Justice, by first setting out the law on the subject and thereafter applying it to the present matter.
16. It is my view that reading the authorities submitted by Counsel, there is not yet a definite criteria established by our Courts on what constitutes a substantial question of law. However, the seminal Supreme Court of India decision in *Chunilal Mehta vs Century Spinning and Manufacturing Co.* AIR 1962 SC has been quoted as the leading authority on the subject. The Court stated 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 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 substantial.”

17. Similarly in *Santosh Hazari vs Purushottam Tiwan* (2001) 3SCC the Court expressed itself as follows;

“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.”
18. At home and flowing from the language used in Article 165(4), in *Martin Nyaga Wambora & Others vs Speaker, County Assembly of Embu & Others* [2014] eKLR, it was stated that a referral under that Article is a matter of discretion on the part of the High Court and that each case must be looked at in its own circumstances (See also *Community Advocacy Awareness Trust & Others vs The A.G* Petition No.243 of 2011 and *Philip K. Tunoi & Anor vs Judicial Service Commission & Anor* [2015] eKLR.)
19. In addition, it is my understanding that in exercise of discretion to make a referral as above, and in agreement with Mr. Kitonga the High Court must be guided by the following criterion;
 - (a) Whether the matter is complex.
 - (b) Whether the matter raises a novel point.
 - (c) Whether the matter by itself requires a substantial amount of time to be disposed of.
 - (d) The effect of the prayers sought in the Petition.
 - (e) The level of public interest generated by the Petition.
20. In applying all the above principles to the present case, I should note from the outset that in Petition No.313 of 2014, *The Attorney General vs Law Society of Kenya and Anor, the Chief Justice* appointed a bench of five Judges to determine the question whether, upon a recommendation to the President for appointment of Judges of the High Court, the President can decide to ignore the names forwarded to him or appoint some nominees after a long delay and refuse to appoint others. That matter therefore at face value raises near similar questions as the present Petition including the question of separation of powers.
21. Further, I agree with Mr. Kitonga and other counsel in support of a referral that the issues raised in this Petition are of general public importance and have not been settled by any superior Court in the past (See *Chunilal* (supra)).
22. It is therefore also true that the novelty of the questions posed for determination would require more than one Judge to make a firm decision.
23. It cannot however be true, as posited by the Attorney General, that the issue is straight forward merely because it may be true that the President is undoubtedly the only appointing authority of the Chief Justice and Deputy Chief Justice. That submission is flawed for the reason that it is indeed the constitutionality of the amendment as opposed to the mere act of effecting an appointment that is the substance of the Petition. That issue is weighty and no straightforward answer to it exists.
24. I further agree with Mr. Omogeni and Mr. Lempaa that a fundamental question arises as to whether, by a miscellaneous amendment to a Statute, allegedly without public participation and without any debate by the National Assembly, the Constitution may be ostensibly amended. The answer to that



question is debatable and the fact that Parties have taken divergent views makes it a weighty and greatly important matter to be determined by more than one Judge.

25. The amendment has also attracted huge public interest and debate and it is best that a collective, firm and expeditious answer to the issues in contest should be given and whether or not a single Judge can or cannot do the same is moot in the circumstances of the present Petition.

Disposition

26. From the foregoing, it is my view that the issues raised in the Petition raise substantial questions of law in the context of Article 165(4) of the *Constitution* and I hereby exercise discretion and refer the matter to the Chief Justice to constitute a bench of Judges to hear and determine the same.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Kitonga and Mr. Wanyama for Petitioner

Mr. Wena for 1st Respondent

Mr. Mwendwa for 2nd Respondent

Miss Maina holding brief for Mr. Mulekyo for 2nd Amicus Curiae

Mr. Omogeni for Interested Party

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 15/2/2016 at 11.00 a.m.

Interim orders extended.

ISAAC LENAOLA

JUDGE

12/2/2016

