



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.531 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

NYAKINA WYCLIFFE GISEBE.....2nd PETITIONER

AND

PRESIDENT UHURU MUIGAI KENYATTA.....1st RESPONDENT

DEPUTY PRESIDENT WILLIAM SAMOEI RUTO.....2nd RESPONDENT

TREASURY CABINET SECRETARY HENRY ROTICH.....3rd RESPONDENT

TREASURY PRINCIPAL SECRETARY KAMAU THUGGE.....4th RESPONDENT

THE HON. ATTORNEY GENERAL.....5th RESPONDENT

AND

CONTROLLER OF BUDGET AGNES ODHIAMBO.....1st INTERESTED PARTY

CBK GOVERNOR PATRICK NGUGI NJOROGE.....2nd INTERESTED PARTY

AUDITOR GENERAL EDWARD OUKO.....3rd INTERESTED PARTY

RULING

Factual background

[1] On the 1st of December 2015, the Petitioners filed a Petition against the Respondents in which they complained of the Respondents' failure to comply with various provisions of the Constitution, the **Public Finance Act of 2012**, the **Fair Administrative Action Act of 2015**, the **Leadership and Integrity Act of 2012** and the **Public Officer Ethics Act of 2003** in their handling of what has become popularly known as the Eurobond proceeds. The complaint stems from media reports of 28th October 2015 in which it was reported that a substantial amount of the proceeds from the Eurobond had been misappropriated. In this regard, the Petitioners maintain that in 2014, the Government borrowed US\$2.75

billion from the International Community through the sovereign bond or the Eurobond. It is their case that the above mentioned money was raised for the 2014/15 fiscal year and that US\$ 2 billion of that amount was borrowed for infrastructure development and to repay a syndicated loan owed by the Government in December 2014. They further allege that the remaining US\$ 750 million was borrowed in December 2014 from the International Market through the Eurobond by means of “**Tap Sales**” to finance infrastructure projects. They aver further that the funds were illegally and unlawfully deposited in an offshore account instead of being deposited into the Consolidated Fund as required by the Constitution and the **Public Finance Act of 2012** and further, that the offshore account was never surrendered to the Controller of Budget to approve it. They maintain that they wrote a letter to the Respondents pertaining to the media reports in which they sought among other things the following:

- “(a) a comprehensive brief on the Eurobond process;*
- b. Bank statements of the Central Bank of Kenya reflecting all the transactions relating to the Eurobond funds;*
- c. a breakdown of the projects that benefited from the Eurobond funds; evidence that the Eurobond funds were budgeted for by Parliament;*
- d. evidence that the Eurobond funds were spent with the approval of the Controller of the Budget; and*
- e. development budgets of all the departments and agencies that received the funds.”*

[2] The Petitioners also aver that the Respondents never bothered to respond to the letter, and deliberately refused to give them the information requested in order to conceal the misappropriation of the funds. Their argument is that the law requires of the Respondents to demonstrate to them and the general public, that no part of the Eurobond funds was misused or stolen as reported by the media. That all the Respondents have therefore failed to discharge their constitutional obligations and should be held personally liable to recover the funds. They also argue that placing the Eurobond funds in an off-shore account was not in accordance with the dictates of **Article 206(1)(a)** of the **Constitution** and that the account in which the funds were deposited is not synonymous to the one envisaged in **Article 206(1) (a)** and that in any event the said Article envisages a public fund created by an Act of Parliament for a specific purpose and not merely an account. The Petitioners also submit that the **Public Finance Management (Amendment) Act 2014** is unconstitutional because it introduced amendments which extinguished the role of constitutional oversight institutions over Kenyan sovereign bonds issued in International Markets. This, they argue, created a loophole through which Eurobond funds were misused because they were kept out of the reach of constitutional oversight organs. They further argue that the 5th Respondent failed in its constitutional duty to advise the 1st to 4th Respondents not to place the Eurobond funds in an offshore account which is out of the reach of constitutional oversight organs.

[3] From the above averments, the Petitioners urge this Court to make a determination on several questions some of which are the following:

- a. Whether the Respondents’ actions violated **Articles 206, 228** and **Articles 35, 46 (1)(a)** read with **Article 46(3)** of the **Constitution** to the extent that the 3rd and 4th Respondents published information in a manner deliberately misleading the public;
- b. Whether **section 83** of the **Public Finance Management Act 2012** has been violated to the extent that the quarterly report by the Treasury does not conform with the standards prescribed and published by the Accounting Standards Board;
- c. Whether **Article 47** read with **Articles 1 ,2, 3, 4(2)** and **10** and **Chapter 12** of the **Constitution** have been violated;
- d. Whether **Articles 10, 47** and **Chapter 12** of the Constitution obligated the Respondents to seek

- approval of Parliament before depositing money in public funds other than the Consolidated Fund;
- e. Whether the Respondents should be held personally liable for the actions complained of;
 - f. Whether the offshore account into which the funds were deposited by the Respondents is synonymous with the Public Fund in the meaning of **Article 206(1)** of the **Constitution**;
 - g. Whether the Respondents should be criminally investigated with a view to prosecuting them; and
 - h. Whether the amendments brought to **Sections 50(7)** and **53** of the **Public Finance Management Act 2012** by the **Public Finance Management (Amendment) Act of 2014** are constitutional.

[4] On the same date that they filed their Petition, the Petitioners filed an application in terms of **Article 165(4)** of the **Constitution** in which they submitted that the Petition raised a substantial question of law necessitating a referral of the matter to the Chief Justice for the constitution of a bench. The Respondents opposed the application and the question therefore is whether on the facts placed by both parties before this Court, a substantial question of law arises necessitating a referral as contemplated by **Article 165(4)**.

Applicants' case

[5] The Petitioners submit that the questions for determination arise in a novel way and have never been determined before and as such need to be decided by a bench as mandated by **Article 165(4)** of the **Constitution**. They also submit that the Eurobond issue is also a matter of huge public interest and those allegedly involved in it wield immense political power. They urge this Court to seek guidance from the Indian cases of **Sir Chunilal vs Mehta and Sons Ltd vs Century Spinning and Manufacturing Co Ltd 1962 SC 1314** and **Hero Vinoth (Minor) vs Seshammal Appeal (civil) 4715 of 2000** on what constitutes a substantial question of law. It is their submission that the framers of the Constitution's intention accords with the ancient saying that two heads are better than one and that empanelling a bench is necessary for spreading the responsibility among the judges and eliminating the risk of misinterpretation. That it is incumbent upon a bench to come up with an objective yardstick to guide the Courts on how to interpret **Article 165(4)** in the future and they lament the fact that presently, there is no objective standard on the basis of which **Article 165(4)** cases are dealt with. They submit in that regard that **Article 165(4)** cases are referred to the Chief Justice subjectively without a clear objective standard.

[6] They further argue that where a question turns largely on the application of provisions of the Constitution, a substantial question of law does not arise. However, if the question turns purely on interpretation and the meaning thereof has not been settled by a bench of the High Court or a higher court in earlier decisions, a substantial question arises. In that regard, that the instant case turns on the interpretation of various Articles of the Constitution and that there are no settled general principles whose mere application would be applied for the disposal of the matter. Lastly, they submit that the instant case meets the test laid down in the **Sir Chunilal** case (supra) and that this Court should not follow the decision in the case of **J. Harrison Kinyanjui vs Attorney General and Another [2012] eKLR** which they argue was decided on wrong principles of law.

Respondents' case

[7] The Respondents opposed the application and they filed their grounds of opposition dated 15th January 2016. They submit that the Petition does not raise any weighty or novel matters necessitating the constitution of a bench as provided for in **Article 165(4)** of the **Constitution** and that the application is also frivolous. That no cause of action in any event has been demonstrated to exist against all the Respondents individually or collectively. That a judgment of a single judge has the same weight and binding effect as that of a bench of judges and that in any event, an appeal mechanism is available in both occasions to the Court of Appeal if any party is dissatisfied with the decision of the High Court. They submit further that judicial time and the paucity of judges militate against empanelling a bench in terms of **Article 165(4)** of the **Constitution**.

Determination

[8] Although the Petitioners have formulated many questions for determination, it seems to me that the fundamental issue for determination turns on the constitutionality and lawfulness of the Respondents' conduct in handling the Eurobond funds. That is, whether such conduct was in accordance with the strictures of the relevant provisions of **Chapter 12 of Constitution** and the **Public Finance Management Act of 2012**. It seems to me that all the other questions raised are therefore peripheral to that question. The next question is therefore whether on the assessment of the facts of this case and of counsel's arguments, a substantial question law arises to warrant the constitution of a bench of judges under **Article 165(4)** of the **Constitution**.

[9] In that context, the Petitioners rightly pointed out that since **Article 165(4)** does not define what a substantial question of law entails, this Court should turn to the interpretations adopted by our courts and the case law in other jurisdictions for guidance. In that regard, **Turkana County Government and 27 Others vs Hon. Attorney General and Others**, this Court in dealing with the same question of what constitutes a substantial question of law made reference to the Supreme Court of India's seminal decision in **Chunilal vs Mehta vs Century Spinning and Manufacturing Co**, AIR 1962 SC 1314 where it was 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 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.”

[10] Further, in **County Government of Meru vs Ethics And Anti-Corruption Commission [2014] eKLR** the Court expressed the view that the principles applicable to **Article 165(4)** are as follows:

“(a) The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.

(b) The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

(c) Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.”

Similarly, in **Martin Nyaga and Others vs Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR** the Court summarised the principles applicable on **Article 165(4)** thus:

- 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.

[11] The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under **165(4)** is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises. With this in mind, I do not see the need to make any determination on the correctness or otherwise of the case of **J. Harrison Kinyanjui vs Attorney General & Another [2012] eKLR** as urged by the Petitioners. The question is whether, on the facts of this particular case, a substantial question of law arises and the factors to be taken into account in determining this are established and should not be applied in a checklist approach.

[12] In that context, it is undisputable that the issue of Eurobond has attracted enormous public attention and has been all over the media recently. Furthermore, it cannot be gainsaid that the matters involved are of great public importance and matters involving alleged misappropriation of public funds cannot be downsized. A question whether the Respondents violated **Article 206** of the **Constitution** read with **section 17(1)** and **(2)(a)** of the **Public Finance Act 2012** which vests the administration powers of the Consolidated Fund on the National Treasury, by depositing the Eurobond proceeds in an offshore account, is not only a question of a novel nature but one of general public importance.

[13] Further, **section 50(7)** of the **Public Finance Act of 2012** requires the Cabinet Secretary in charge of finance to ensure that the proceeds of any raised loan should be paid into the Consolidated Fund or any other public fund established by Government. One may ask, did the Cabinet Secretary fail in his duty to ensure that the proceeds of the Eurobond are paid into the Consolidated Fund as alleged in this case? There is no clear-cut answer to this question. Furthermore, does the off-shore account into which the proceeds of the Eurobond were allegedly deposited qualify as **“any other public fund established by Government”**? This too is debatable. These are all questions of utmost public interest and of an interpretational nature that arise in a novel fashion. Their determination touches on the social, political and economic well-being of the Nation as a whole.

[14] There is another question the determination of which would not be without difficulties. That is whether the Respondents can be held personally liable for the alleged contravention of the Constitution and whether the Respondents’ conduct falls under the ambit of **Section 15(2)** of the **Public Officer Ethics Act, 2003** for them to be held personally liable is debatable. The same applies on whether the funds allegedly misappropriated qualify as property as required by the section for it to find application. It is also debatable whether **Section 3** of the **Public Officer Ethics Act, 2003** which vests investigative powers of public officers like the Respondents in the Commission established under the Section would, in these circumstances find application and thereby preventing the Petitioners from directly approaching this Court. These are both complex and novel issues which may require considerable judicial effort and time to be resolved. There are no readily available answers for all these important and complex questions and with all of the above in mind, I am convinced that the matter raises issues worth empanelling a bench in terms of **Article 165(4)** of the **Constitution**.

Conclusion

[15] The issues involved are of general public importance and the involvement of several legislations and constitutional provisions complicates the issues. The matter will require a substantial amount of time to be finalised and the level of interest generated by the Petition is very high. I am therefore satisfied that the matter is worthy of reference to the Chief Justice in terms of **Article 164(5)** for the **Constitution** of an uneven number of judges to hear and determine the above issues.

Disposition

[16] I therefore certify that the matter be referred to the Chief Justice in terms of **Article 165(4)** of the **Constitution** for the constitution of a bench as prayed by the Petitioners.

[17] Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioners present

Miss Barasa holding brief for Mr. Mukele for 1st Respondent

Mr. Kuria for 2nd – 4th Respondents

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

5/2/2016