REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.465 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI…….....……PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC)……...…….…….1ST RESPONDENT

DIRECTORATE OF IMMIGRATION AND REGISTRATION OF

PERSONS MINISTRY OF INFORMATION……...2ND RESPONDENT

COMMUNICATION AND TECHNOLOGY……..…….3RD RESPONDENT

THE HON. ATTORNEY GENERAL……..…4TH RESPONDENT

RULING

Factual background

[1] On 27th October 2015, the Petitioner filed in this Court a Petition together with a Notice of Motion Application under a Certificate of Urgency seeking the following orders:

> **"(1) That the application be certified as urgent and be heard ex parte and service thereof be dispensed with in the first place.**
>
> **(2) That this Honourable Court be pleased to join other parties relevant to this Application/Petition as and when it deems fit.**
>
> **(3) That this Honourable Court be pleased to certify that the Petition herein raises a**

substantial question of law and forthwith refer the case to His Lordship the Chief Justice for appointment of a bench of three or five judges pursuant to Article 165(4) of the Constitution of Kenya, 2010.

(4) That the Honourable Court be pleased to forthwith place this application for inter-partes hearing before His Lordship the Chief Justice for priority hearing.

(5) That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and /or favour the cause of justice.

(6) That costs be in the cause."

[2] The instant application is predicated on prayer 3. In the Petition, the Petitioner submitted that the electoral system presently in place does not comply with the dictates of **Articles 86** and **140** of the **Constitution**. He submits that the 1st Respondent has neglected or refused to comply with these provisions. In that context **Article 86** provides:

"At every election, the Independent Electoral Commission and Boundaries Commission shall ensure that?

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safekeeping of election materials."

Article 140 provides:

"(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential elections.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination."

Petitioner's case

[3] The Petitioner's case is that the above provisions contemplate an electronic or digital electoral system because it is the only system that can ensure that the constitutionally required threshold in **Article 86** of the **Constitution** of integrity, accuracy, transparency, verifiability and impartiality is satisfied. His further submission is that the Respondents have failed to comply with the above provisions because the paper based and manual system currently in place does not meet the threshold in **Article 86** of the **Constitution**. He further contends that **Section 44** of the **Elections Act (No. 24 of 2011)**, which gives the Respondent the discretion to choose the appropriate method of conducting elections is unconstitutional. His further submission is that while **Article 140** of the **Constitution** requires questions surrounding the validity of presidential elections to be decided within 21 days after the date of declaration of the results of

the elections, that provision can only be complied with if there is an electoral or digital voting technology in place.

[4] The Petitioner in addition submits that the implication in **Article 86** is that a tamperproof election system is required and the Respondents have failed or refused to implement the same because it is only achievable through an electronic or digital electoral system which they don't have in place and submits that in fact technological resources are readily available to set up such a system. He also submits that the digital electoral system eliminates the possibility of human tampering with elections because there are bulwarks built within it to ensure that any evidence of tampering is easily detected and he attributes the absence of a digital or electronic electoral system to the 1st Respondent's conduct of squandering funds worth Kshs.16 billion meant for the operationalisation of the system.

[5] The Petitioner further submits that the determination of the above issues require the empanelment of a bench in terms of **Article 165(4)** of the **Constitution** and that the issues involved are weighty and raise substantial questions of law in terms of the said **Article 165(4)**. Furthermore, he submits that the absence of previous decisions by the superior courts or settled principles on the issue points to the fact that the case raises a substantial question of law and he laments the fact that there is no objective standard or yardstick on the basis of which cases of this nature are certified in terms of **Article 165(4)**. He submits therefore that because the expression "substantial question of law" is not defined in the Constitution, this Court should seek guidance from case law in other jurisdictions that have dealt with the question of the substantial question of law. In that context, he referred this Court to the Indian case of **Sir Chunilal vs Mehta and Sons Ltd vs Century Spinning and Manufacturing Co Ltd 1962 SC 1314** in which the Supreme Court of India said the following:

> **"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."**

[6] He further relies on **Hero Vinoth (Minor) vs Seshammal Appeal (civil) 4715 of 2000** in which the Court pointed out that a question that materially affects the rights of the parties will be a substantial one if it is not covered by specific provisions of law or is not a settled principle and is debatable. That a plain reading of the wording of **Article 165(4)(b)** or **(d)** is ambiguous and it would be difficult to know what "substantial" means and that it may well mean a case involving the interpretation of the Constitution generally, a case of general public importance to the country, a new or novel question of interpretation.

[7] He is of the further view that constituting a bench is necessary for spreading the risk of errors and misinterpretation around, and for sharing the responsibilities among judges. That the empaneling of a bench is only limited to issues under **Article 165 (3)(b)** or **(d)** of the **Constitution** because these are the only issues that can be disposed of by means of a pure interpretation of the Constitution and the proposition is based on his view that where a question turns on the application of the Constitution, as opposed to its interpretation, no substantial question of law arises. That it is important for this Court to lay down an objective standard on how to interpret **Article 165(4)** going forward as there is no yardstick presently on the basis of which cases may be referred to the Chief Justice. It is his submission therefore that this matter raises novel questions surrounding the interpretation of **Articles 81**, **86** and **140** of the **Constitution** which have never been determined hence the need for a bench of judges.

[8] The Petitioner also urges this Court not to consider itself bound by the decision in **J. Harrison Kinyanjui v Attorney General & Another [2012] eKLR** in which the Court took the view that lack of judicial resources should militate against constituting a bench in terms of **Article 165(4)** and submits that the decision followed a managerial and progressive realisation approach to the interpretation of **Article 165(4)** of the **Constitution**. He submits that judicial resources could not have been intended to be a factor in the interpretation of **Article 165(4)** and that if the framers had intended it to be so, they would have

specifically said so. He also submits that the concept of "justice should not be delayed" should not be understood in the sense that having to empanel a bench would delay the finalisation of a case or that a substantive determination of a case should be compromised. On this basis, he submits that the Court in **J Harrison** erred in rendering the test in **Chunilal** inapplicable in the interpretation of **Article 165(4)**.

Respondents' case

[9] The 1st Respondent submits that the Petitioner has not satisfied the constitutional threshold under **Article 165(4)** of the **Constitution** and that the issues raised are not complex to the extent that they raise a substantial question of law. It argued further that a mere public interest in the outcome of the case does not trigger the application of **Article 165(4)** and that even if the Petition raises weighty matters of public interest, such issues are not substantial so as to trigger the application of **Article 165(4)** of the **Constitution**. Further, that the principle of justice without delay should be taken into account when seeking to apply **Article 165(4)** and a decision of three or more judges has equal force to that of a single judge and that the issues raised in the Petition have been considered and decided by other Courts in the past and are therefore not novel. It submits that in the interests of securing the jurisprudence, ascertaining certainty, predictability, the Court should therefore dismiss the application with costs.

[10] In an affidavit dated 15th day of January 2016, the 4th Respondent stated that the Petition raises no weighty matters necessitating the constitution of a bench in terms of **Article 165(4)** and that the matter can easily be determined by a single judge. He also submitted that no causes of action has been demonstrated to exist against the Respondents either collectively or individually and that the paucity of judges should be considered as a factor militating against constituting a bench and the need to attend other matters. That judicial time should therefore jealously guarded. In any event that there is an appeal mechanism in both a multi-bench and single bench and that the issues raised are not new and that even if they were, the Court has the discretion to address them as they framed.

Determination

[11] The question before me is whether the Petitioner has made out a case for this Court to make a referral to the Chief Justice in terms of **Article 165(4)** of the **Constitution**. In other words, whether he has demonstrated that a substantial question of law arises from the Petition. **Article 165(4)** of the **Constitution** does not define what constitutes a substantial question of law and our courts have repeatedly relied on the most celebrated Indian Supreme Court case of **Sir Chunilal vs Mehta and Sons Ltd vs Century Spinning and Manufacturing Co Ltd 1962 SC 1314** where it was stated 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 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."**

[12] Kenyan Courts have adopted this definition but have been careful to ensure that it is befitting to Kenyan circumstances and that is why in **J. Harrison Kinyanjui vs Attorney General & Another [2012] eKLR** the Court remarked that if the dicta were to be followed ***"then it would follow, that every question concerning our Constitution would be a substantial question of law"***. The dicta was endorsed later in **Okiya Omtatah Okoiti & Another vs Ann Waiguru Cabinet Secretary, Devolution & Head of Public Service [2014] eKLR** and although factors such as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question of law, the Courts have also indicated that none of these factors is singly decisive and that the list is not exhaustive. However, what is important is that all these cases emphasised that each case should be dealt with on its own merits and in my view, this is a strong built-in mechanism to ensure flexibility in the determination of these kind of cases. On this basis, I do not see the need for this Court to interfere with the decision and reasoning in the **J. Harrison Kinyanjui** case.

[13] In that context, has the Petitioner therefore made out a case on his submission that the matter raises a substantial question of law necessitating a referral to the Chief Justice in terms of **Article 165(4)** of the **Constitution**? As said above, this question should be dealt with based on the facts as they have been presented before me and in my view, the issues raised in this Petition are weighty and of general public importance. I say so because elections occupy a special place in Kenyan history and the subject carries with it sadness amongst some Kenyans including some still in IDP Camps as a result of electoral violence. On that basis, it is my view that questions surrounding the interpretation of **Articles 86** and **140** of the **Constitution** should be dealt circumspectly as any outcome that may be reached on the interpretation of the implicated constitutional provisions will undoubtedly impact the country as a whole.

[14] Apart from the importance of the issues raised, there are no readily available answers to the questions raised by the Petitioner. These are questions of interpretation and divergent views may be held on what should be the apt outcome. In this case, the use of "whatever" in **Article 86(a)** implies that the 1st Respondent has a discretion on the method contemplated in that Article. However, it is unclear where a line should be drawn between exercising this discretion and ensuring compliance with the stipulations of **Article 86**. The extent of this discretion is even wider in the enabling **Section 44** of the **Election Act 24** of **2011**. The submissions raised by the Petitioner are therefore clearly weighty and it may be necessary to determine the limits of the 1st Respondent's discretion in relation to ensuring that whatever method it chooses, satisfies the aspirations of **Article 86(a)** of the **Constitution**.

[15] The Petitioner's other submission that the timeframe stipulated in **Article 140(2)** is inadequate is also deserving of judicial attention as is the adequacy of judicial time for the effective determination of election disputes. There may be a need for amending the provision as urged by the Petitioner and a constitutional amendment is a weighty matter, which in my view would require the empanelment of a bench in terms of **Article 165(4)** of the **Constitution**. The Petitioner's further submission that a constituted bench may be better placed to deal with these matters than a single judge is in the circumstances not without merit. In fact, in other jurisdictions an appeal against a single judge's judgment is first determined by a full bench of the same division before it is heard by an appeal court. This is the case for example in South Africa.

[16] In approaching these matters, there is the question whether the Courts may need to exercise judicial restraint and respect the independence of the 1st Respondent in exercising its functions especially in matters that fall within its discretion and therefore, for the judiciary to compel an independent institution such as the 1st Respondent to adopt and implement a certain methodology without information on the cost implications of such proposals may arguably constitute an intrusion by the judiciary into the independence afforded to the 1st Respondent by **Article 86(a).** At the same, and converse to that fact the Courts as the custodians of the Constitution have a duty to interpret the Constitution in a manner that is progressive. This, in my view adds to the complexity and sensitiveness of the issues involved.

Conclusion

[15] From the above, I am satisfied that the issues involved are of utmost public importance, weighty, debatable and deserve the constitution of a bench in terms of **Article 165(4)** of the **Constitution** for determination.

Disposition

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

[17] Order accordingly.

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

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioner present

Mr. Ombwayo for 2nd Interested Party

Mr. Kuria for 1st – 5th Respondents

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

5/2/2016