



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.206 OF 2016**

**BETWEEN:**

**MAINA KIAI .....1<sup>ST</sup> APPLICANT**

**KHELEF KHALIFA.....2<sup>ND</sup> APPLICANT**

**TIROP KITUR .....3<sup>RD</sup> APPLICANT**

**AND**

**THE INDEPENDENT ELECTORAL AND.**

**BOUNDARIES COMMISSION .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. This is an Application brought to this Court by way of a Notice of Motion dated 20<sup>th</sup> May 2016 seeking that the Petition of even date be certified as urgent and that it be heard by a bench of odd number judges in terms of **Article 165(4)** of the **Constitution**. It is accompanied by the supporting affidavit of Maina Kiai of even date and for the avoidance of doubt I recite the reliefs sought as they appear in the said Notice of Motion below:

***“a) That the Application be certified urgent and be heard ex parte in the first instance.***

***b) This Honourable Court be pleased to direct that the Petition herein be heard by a bench of odd number of judges.***

***c) This matter be referred to the Honourable Chief Justice to constitute an odd number bench and issue directions on the hearing of the Petition.”***

2. The nub of the Applicants’ case in the Petition is that to the extent that the **Elections Act No. 24 of 2011** and the **Electoral (General) Regulation 2012** provide that the results of the of a presidential election in a Constituency as shown in Form 34 is subject to confirmation by the 1<sup>st</sup> Respondent after a

tally of all the votes cast in the election are offending and contrary to provisions of **Articles 86 and 138** of the **Constitution** hence they seek the following reliefs in their Petition:

*“a) A declaratory order that Sections 39(2) and (3) of the Elections Act 2011 are contrary to the provisions of Article 86 of the Constitution and are therefore null and void;*

*b) A declaratory order that Regulations 83(2), 84(1) and 87(2) (c) of the Elections (General) Regulations 2012 are unconstitutional and contrary to Article 86(b) and (c) as well as Article 138 of the Constitution. And therefore null and void;*

*c) A declaration that respective Constituency Returning Officers are the persons responsible for the conduct and declaration of constituency presidential election results.*

*d) A declaration that Constituency presidential election results once declared and announced by respective Constituency Returning Officers are final for the purposes of that election;*

*e) A declaration that Constituency Returning Officers possess a fundamental and inalienable mandate to announce and declare the final results of a presidential election at Constituency level and that such declaration is final and is not subject to alteration, confirmation or adulteration by any person or authority, other than an election court, pursuant to Article 86 and 138 (2) of the Constitution of Kenya.*

*f) Costs of this Petition.*

*g) Any further relief or orders that this Honourable Court may deem just and fit to grant.”*

#### **Applicants’ case**

3. In support of the appointment of an uneven number judge bench, they argue that the Petition raises a substantial question of law in accordance with **Article 165(4)** of the **Constitution**.

4. They also submit that the issues raised in the Petition are novel and have not been previously determined by any Superior Court. Further, that this Petition is a matter of public interest because it seeks to secure due process of the law as well as the integrity of the electoral process and the sanctity of the votes to be cast in the 2017 general elections.

5. Moreover, they aver that the issues raised therein are complex and will require consideration by more than one judge so as to give a firm decision that will assist in clarifying these issues. Furthermore, the constitution of a bench with more than one judge will assist with the expeditious determination of the Petition bearing in mind that the next general elections are in August 2017.

6. They argue in addition that the Petition requires an interpretation of specific provisions in the **Constitution** as well as the **Electoral Act 24 of 2011** and the **Elections (General) Regulations 2012** and that it would be interest of justice for it to be heard by a number of judges. Further, that the relief sought in their Petition will have an impact on the preparations for the general elections scheduled for 8<sup>th</sup> August 2017.

7. Furthermore, they submit that an expeditious hearing of the Petition will be in the interest of justice so as to afford enough time to the preparation of the said elections guided by the directions and orders of this Court that will be given in the Petition.

8. Lastly, they argue that the aim of the Petition is to **“secure the integrity of the electoral process and to protect the sanctity of votes to be cast at the next general elections”**.

#### **Respondent’s case**

9. From the record none of the Respondents filed any answer to the application before me.

### **Issues**

10. The sole issue arising from this Application is whether the Petition herein should be certified as raising a substantial question of law so as to justify a referral to the Chief Justice for the constitution of an uneven number of judges.

### **Determination**

11. In determining such matters **Article 165(4) of the Constitution** is always the logical starting point. It provides:

**“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.”** (Emphasis added)

12. The key words in the above provision are: “*substantial question of law*”. I note that they have not been defined in the Constitution and so I turn to examine how our Courts have interpreted them to mean. In **Community Advocacy Awareness Trust & Others v The Attorney General & Others (2012) eKLR (Petition No. 243 of 2011)** this Court noted:

***“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.”***

13. While I agree with the above statement, this discretion must however be exercised by taking into account a multiplicity of factors which have been, through many judicial decisions, been set out. This is why this Court in **Peter Solomon Gichira v The Attorney General and Another Petition No. 313 of 2015**, laying down the test/guidelines to assess whether a matter raises substantial questions of law, followed the much celebrated dictum in **Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314** which reads 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 a substantial.”***

14. Thus gleaned from the above exposition of the law some of the relevant factors in deciding what constitutes a substantial question of law are:

1. Whether, directly or indirectly, it affects the 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 pronouncements of the Supreme Court or any other superior court; or
4. The issue is not free from difficulty; or
5. It calls for a discussion of an alternative view.

15. In the same decision, the Court went further, at paragraph 20 to set out other additional factors that

may be relevant in determining this question, and held:

***“Other factors which a court may consider in my view include: 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 public interest generated by the Petition.”***

The Court then added thus:

***“Whereas this Court appreciates that the decision of an enlarged bench may well be of the same value as a decision arrived at by a single High Court judge, the Constitution itself does recognize that in certain circumstances, it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed by a bench of numerically superior judges and I have attempted to outline some of the issues for consideration hereinabove.”***

16. Further, in ***Federation of Women Lawyers (Fida-Kenya) & 3 Others v Attorney General & 2 Others [2016] eKLR (Petition 226 of 2015)*** at paragraph 9, this Court held that **“while the above principles are a general guide on what a judge should consider in any application under Article 165(4) of the Constitution and each case ought to be looked at in its own unique circumstances and whether in those circumstances an appraisal of the factual and legal matrix would establish the existence of a substantial question of law”**.

17. In the above context, the Petition raises important public interest issues relating to the interpretation of sections in legislation that was promulgated to give effect to provisions in the Constitution governing elections. More precisely, it requires this Court to clarify the function of the Constituency Returning Officers in presidential election processes as well as the status of their announcement/declaration of final results in a presidential election at constituency level i.e. is such an announcement/declaration provisional in that it is subject to alteration/confirmation by the IEBC or any other person/body or is it final.

18. In answering this question, this question this Court will invariably have to interpret the impugned statutory provisions through the prism of the **Constitution** including **Articles 86** and **138** to determine whether they pass constitutional muster.

19. It is also important to make a firm determination on this issue before the next general elections to avoid any uncertainty on the important issues raised.

20. The public interest nature of this issue is indisputable and I will say no more.

### **Disposition**

21. I find that the Petition herein does indeed raise substantial questions of law and I hereby exercise discretion and refer the matter to the Chief Justice to constitute a bench of Judges in terms of **Article 165(4)** of the **Constitution**.

22. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

No appearance for Parties at 9.15 a.m.

**Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**