



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL RIGHTS & HUMAN RIGHTS AND JUDICIAL REVIEW DIVISIONS**

**MILIMANI LAW COURTS**

**PETITION NO 246 of 2016 AS CONSOLIDATED WITH JR APPLICATION NO. 258 OF 2016**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 23, 25, 27, 47, 165(6), 258 AND 260 OF THE  
CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 2 (1), 3 (1) 10 (1) (2), 19 (2), 20 (2), 27 (1), 35 (1), 38(1) (2) & (3),  
47 (1) (2), 48, 50 (1) (2), OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTIONS 4 AND 5 FAIR**

**ADMINISTRATIVE ACTION ACT**

**NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: STANDING ORDER NO.111 OF THE**

**NATIONAL ASSEMBLY STANDING ORDERS**

**BETWEEN**

**JAMES OPIYO WANDAYI & OTHERS.....APPLICANTS**

**AND**

**KENYA NATIONAL ASSEMBLY.....1<sup>ST</sup>  
RESPONDENT**

**THE SPEAKER OF THE NATIONAL ASSEMBLY...2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an application dated 29<sup>th</sup> July, 2016, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, **Kenya National Assembly and The Speaker of the National Assembly** (hereinafter referred to as “the Applicants”) seek the following orders:

**1. This honourable court be pleased to certify that the application herein raises substantial questions of law and refer the Petition to his Lordship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three (3) pursuant to Article 165(4) of the constitution.**

**2. That cost of the application be in the cause.**

2.. The application was based on the following grounds:

**1. The application raises weight and complex questions of law concerning the extent or limit to which the court can interfere with the conduct of business and the regulation of members in parliament.**

**2. The issue of the constitutionality of Standing Order 111 of the National Assembly Standing Orders, which are made pursuant to Article 124 of the Constitution, is a substantial question of law that has not yet been considered by the courts.**

**3. The application raises issues as to whether the Speaker of the National Assembly can act or make a decision outside the rules (the provisions of Standing Orders and the National Assembly (Powers and Privilege) Act that govern the conduct of proceedings of the house if so, such decision will still be binding upon members of parliament.**

**4. The issues raised in the application are also of general public importance as they concern the conduct of business in parliament which is vested with the sovereign power of the people under Article 1(2) of the Constitution.**

**5. The issues raised in the application are novel and have not been decided upon before by a court of law.**

**6. The issues raised in the application are complex and raise substantial questions of law that require empanelment of a bench to hear the application and render a judgment thereon.**

3. According to the applicants, the application herein raises novel and substantial questions of law under the constitution for the following reasons;

**a. The application raises weighty and complex questions of law concerning the extent or limit to which the court can interfere with the conduct of business and the regulation of members in parliament.**

**b. The issue of the constitutionality of Standing Order 111 of National Assembly Standing Orders, which are made pursuant to Article 124 of the Constitution is a substantial question of law that has not yet been considered by the courts.**

**c. The application raises issues as to whether the Speaker of the National Assembly can act or make a decision outside the rules (the provisions of Standing Orders and the National Assembly (Powers and Privilege) Act that govern the conduct of proceedings of the house if**

**so, such decision will still be binding upon Members of Parliament.**

**d. The issues raised in the application are also of general public importance as they concern the conduct of business in parliament which is vested with the sovereign power of the people under Article 1(2) of the Constitution.**

**e. The issues raised in the application are novel and have not been decided upon before by a court of law.**

**f. The issues raised in the application are complex and raise substantial questions of law that require empanelment of a bench to hear the application and render a judgment thereon.**

**g. The application raises weighty and complex questions of law concerning the extent or limit to which the court can interfere with the conduct of business and the regulation of members in parliament.**

4. The applicants were of the view that the orders sought herein will prejudice the respondents to the application in any manner hence this is a proper matter to be sent to the Honourable Chief Justice for the empanelment of a bench of an uneven number of judges being not.

5. On behalf of the applicants, it was submitted by **Miss Thanji** while reiterating the foregoing that the issues raised in this petition seek to determine *inter alia* the sovereignty of the people and that this being the first Parliament under the current Constitution the issues raised herein are novel and substantive as the same have never been considered before. It was further submitted that the effect of granting the orders sought herein would be to affect the manner in which the National Assembly and by extension Parliament conducts its business and how the Speaker regulates the business in the House.

6. The application was supported by the 3<sup>rd</sup> respondent. According to **Mr. Njoroge**, learned counsel for the 3<sup>rd</sup> Respondent, the matter has a wide range of consequences amongst which are the decision whether the constituents should be considered as not being represented in Parliament during the period of the suspension and secondly, the need to maintain order and discipline in the House if the Standing Order in question is declared null and void.

7. On behalf of the Petitioners, the application was opposed by **Mr Anthony Oluoch**, their learned counsel. According to **Mr Oluoch**, the issues surrounding the decisions when the Court will direct that a matter raises substantial questions of law are now crystallised. To learned counsel, the issue is whether the matter is complex, the issue of time and public interest. It was submitted that the allegation of handicapping the powers of the Speaker do not arise since there exist other Standing Orders such as 107 and 108 which may be invoked in cases of discipline. Therefore a declaration of inconsistency of one of the said Standing Orders would not cripple the House considering the fact that the House Business Committee itself is on record as having noted the draconian nature of the said Standing Order.

8. It was submitted that the effect of striking out the said Standing Order would be to allow Parliament to amend the same in order to comply with the Constitution. On the issue of time, it was contended that since the matter has now been narrowed down to the constitutionality of the Standing Order, the determination would not require a lot of time. The Court was urged to take into account the fact that judicial resources are scarce and the need to expedite the matter.

### **Determinations**

9. I have considered the issues raised in this petition. As has been held by this Court before, 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 and statutory provisions. Despite appreciably great strides made in the expansion of the Judiciary in the recent, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this Country still does not enjoy the luxury of granting such orders at the whims of the

parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country. This position was appreciated by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** 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.”**

10. I also defer to the decision in **Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011** where this Court held:

**“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.”**

11. Article 165 of the Constitution provides as follows:

***(1) There is established the High Court, which—***

***(a) shall consist of the number of judges prescribed by an Act of Parliament; and***

***(b) shall be organised and administered in the manner prescribed by an Act of Parliament.***

***(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.***

***(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.*

*(5) The High Court shall not have jurisdiction in respect of matters—*

*(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*

*(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).*

*(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

12. Therefore the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law in the following instances:

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

**2. That 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.**

13. Since the determination of such issue 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.

14. According to the above provision, it does not suffice that the matter raises the issue 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 Court must go further and satisfy itself that the issue also raises a substantial question of law. As to whether this is the case 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 High Court Petition No. 243 of 2011** 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.”**

15. In that case the Court proceeded to note that the promulgation of the Constitution of Kenya, 2010 brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. This Constitution has been recognised by the Supreme Court as being transformative in nature. It has expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than two judges, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the *Civil Procedure Act* would never be realised.

16. In **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, it was held 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 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.”**

17. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

**"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. 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. 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. 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*."**

18. The Indian tests 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 Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

19. To my mind 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.

20. 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.

21. 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. Even before the promulgation of the current Constitution, it was appreciated in **Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2 KLR 6** that:

**“in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any.”**

22. In my ruling in this matter on 4<sup>th</sup> July, 2016, I appreciated that:

**“The case before this Court is unprecedented both in terms of its ramifications and effects. The suspension of the applicant from the National Assembly and its functions though expressed to be for the “remaining session” runs to almost a whole year. The decision in question does not just affect the *ex parte* applicant but also affects the people of Ugunja Constituency who elected the *ex parte* applicant to represent them in the National Assembly. These interests are by no means trivial or inconsequential. To the contrary they revolve around the sovereign rights of the people of Ugunja Constituency as decreed in Article 1. It is my view that our Constitution is partly crafted based on the *Lockean* social contract theory. This is so when it is appreciated that Article 1(1) of the Constitution, the very first Article, provides that “all sovereign power belongs to the people of Kenya”. It is further important to appreciate that according to the same document at Article 1(2), that sovereign power may be exercised directly or through the people’s democratically elected representatives. When it comes to the exercise of such power through the said representatives, it is important to note that under Article 1(3) the peoples’ representatives only exercise a “delegated” function. In other words, the Members of Parliament only exercise delegated authority. Whereas the people can exercise their sovereign power directly, when it comes to the exercise of legislative power their participation therein directly is limited and highly restricted hence the role of a Member of Parliament cannot be underestimated. The people cannot for example participate in and influence debates in the National Assembly and they cannot vote on matters affecting them...Clearly therefore the role of a Member of the National Assembly are onerous. His or her role transcends his own personal interests. In this case the consequences of the decision of the Speaker are that the people of Ugunja stand to be locked out from being represented and their interests articulated in the National Assembly for almost a year. They cannot for example determine the manner in which their taxes are to be expended.”**

23. In the said decision I identified various issues to be determined in this petition. I was of the view that the Court will be called upon to determine the procedure for invoking standing order no. 111 vis-à-vis the provisions of Article 47 of the Constitution as read with the provisions of the ***Fair Administrative Action Act, No. 4 of 2015***. I also identified the issue whether in exercising the said power the Speaker ought to take into account the principle of proportionality in light of the ramifications of such a decision to third parties particularly in light of the provisions of section 5 of the ***Fair Administrative Action Act*** aforesaid.

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

25. In my view the issues in this petition are not issues which arise before this Court on a daily basis. The issues to be decided by this Court raise fundamental and monumental issues of the interpretation of the

Constitution and in particular the power of the people to exercise their sovereignty in instances where representative exercise of that power is not possible and whether the restrictions imposed on that representative exercise of sovereignty may justify the right of the people to exercise and enjoy their sovereignty and constitutional rights and freedoms.

26. Therefore the inescapable conclusion that I come to is that taking into account the factors which this Court ought to consider in deciding whether or not to exercise the powers conferred upon it under Article 165(4) of the Constitution and considering the issues for determination, I am satisfied that the issues raised herein raise substantial questions of law as contemplated under Article 165(4) as read with clause (3)(b) or (d) of Article 165 of the Constitution as to justify the empanelling of a bench of uneven number of Judges of this Court of not less than three, assigned by the Chief Justice. I so certify.

27. Accordingly, I direct that this Petition be transmitted to the Hon. the Chief Justice forthwith for the purposes of the empanelling of that bench.

28. Further directions will be given by the said bench as empanelled. For avoidance of doubt the orders granted herein on 4<sup>th</sup> July, 2016 will remain in force.

**Dated at Nairobi this 15<sup>th</sup> day of September, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Oluoch for the Petitioners/Applicant**

**Miss Otieno for Mr Mwendwa for the Respondents**

**Cc Mwangi**