



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 401 OF 2016

BETWEEN

WILBERT KIPSANG CHOGE.....PETITIONER

AND

THE HON. ATTORNEY GENERAL..... 1ST RESPONDENT

THE SENATE.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

RULING

1. The Petition herein relates to Parliament's alleged failure to enact legislation giving effect to the two-thirds gender principle according to Article 81 (b) of the Constitution. This follows the Supreme Court's Advisory Opinion in **The Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] e KLR** requiring legislative measures to be taken by the National Assembly and the Senate by 27 August 2015.

2. Subsequent to the Supreme Court's Advisory Opinion, the court in **Centre for Rights Education & Awareness (CREAW) vs. Attorney General & Another [2015] e KLR** directed the Attorney General and the now defunct Commission on the Implementation of the Constitution (CIC) to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of *inter alia* Article 81(b) of the Constitution and the aforementioned Advisory Opinion within 40 days of the court's decision, that is, 26 June 2015.

3. The Petitioner contends that, to date, Parliament has failed to enact such legislation, the consequence of which the President on the advice of the Chief Justice ought to dissolve Parliament.

The application under Article 165 (4) of the Constitution

4. Together with the Petition was filed a Notice of Motion dated 22 September 2016 seeking for orders that the Petition be certified as raising substantial questions of law thus requiring the constitution of a bench by the Chief Justice under Article 165 (4) of the Constitution. The grounds in support thereof were that, the issues raised were of public importance and novel, since the courts have not dealt with the issue of dissolution of Parliament.

5. The application was not opposed.

Arguments in court

6. In urging the application, Ms. Ngania on behalf of the Petitioner submitted that the Petition raises an issue of public importance as to whether or not to dissolve Parliament, a substantial question of law thus requiring empanelment of a bench in accordance with Article 165 (4). This, she contends, was never dealt with by the Supreme Court. Consequently, she urged the court to allow the application.

7. In support of the application, Mr. Mwangi Njoroge, on behalf of the 2nd Respondent stated that there is a weighty issue with regards to the dissolution of Parliament.

8. Mr. Anthony Njoroge on behalf of the 3rd Respondent also submitted in support of the application. It was his submission that the substantive issue is whether the President has power to dissolve Parliament despite Articles 101 and 102 of the Constitution. It was further submitted that the Constitution donates to Parliament various roles, for example under Articles 211, 221, 224 and 229 which it would not otherwise be able to perform if it was dissolved. Counsel also urged that in any event, Article 261 and 102 (1) are contradictory and need to be addressed.

Discussion and Determination

9. The sole issue for determination is whether the Petition herein should be certified as raising substantial questions of law necessitating the empanelment of an uneven number of judges assigned by the Chief Justice as provided under Article 165 (4) of the Constitution.

10. There is no controversy as to what constitutes a substantial question of law as set out in various decisions of the High Court. In the case of **Kevin Turunga Ithagi vs. Hon. Justice Hedwig Ongudi and 7 Others, Petition No. 442 of 2015** (Unreported), this court set out the principles to be reflected upon, as follows:

- a. There is no agreed definition as to what constitutes as a substantial question of law;**
- b. The question and determination is always left to the discretion of each court faced with an application made pursuant to Article 165(4) of the Constitution;**
- c. That the decision of one judge of this court is the same and has the same force as that of three or more judges; and**
- d. The reference for empanelment is not a jurisdiction to be exercised lightly.**

11. See also **Delmonte Kenya Ltd vs. County Government of Muranga & Another [2016] e KLR, Republic vs. President of the Republic of Kenya & 5 Others Ex P Wilfrida Itolodo & 4 Others [2013] e KLR, Martin Nyaga Wambora vs. Speaker of County Assembly of Embu [2014] and Philip K. Tunoi & Another vs. Judicial Service Commission & Another [2015] e KLR.**

12. The parties themselves are in agreement that the question of dissolution of Parliament and the ramifications therein raises substantial a question of law. Further, it was urged that the Petition raises issues of public importance. However, and as stated in **Kevin Turunga Ithagi vs. Hon. Justice Hedwig Ongudi and 7 Others (supra)**, public interest may be considered but it is not necessarily the sole decisive factor as it is in the nature of constitutional petitions filed to enforce provisions of the Constitution to be matters of public interest. This does not then necessarily mean that the same ought to be heard by an uneven number of judges as constituted by the Chief Justice. However, there is also need to holistically look at the Petition and the issues raised.

13. I have reviewed and considered the questions raised in the Petition in their totality.

14. The issues arising are with regard to enactment of legislation giving effect to the Supreme Court's Advisory Opinion No. 2 of 2012 in **The Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] e KLR**. Subsequently, the matter was further dealt with by my this court (Mumbi J.) in **Centre for Rights Education & Awareness (CREAW) vs. Attorney General & Another [2015] e KLR**. Having been dealt with by the courts as stated above, the issue is hardly a novel one. The Point then taken by the Petitioner as well as the Respondent is that the ramifications of any decision to dissolve Parliament are very heavy. The ramifications cannot be deemed as a substantial question of law in this case. The petitioner has not brought that forth as a question for determination and besides, the Constitution is already relatively clear on what happens when there is such a finding that parliament is delict in the legislative duty as far as specific statutes are concerned.

15. In applying the principles set out above and in view of the fact that the courts have previously dealt with the issues raised in the Petition, I am of the considered view that the Petition herein does not merit certification and ultimately, empanelment of an uneven number of judges by the Chief Justice.

16. In the circumstances, the application for certification under Article 165 (4) of the Constitution fails. It is dismissed.

17. The costs of the application will follow the order as to cost made by the trial court.

Dated, signed and delivered at Nairobi this 7th day of December, 2016

J.L. ONGUTO

JUDGE