



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

**PETITION NO. 235 OF 2014**

**SAMUEL SABUNI.....1<sup>ST</sup> PETITIONER**  
**JACKSON MUNGAL.....2<sup>ND</sup> PETITIONER**  
**SAMUEL M MURIUKI.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**COURT MARTIAL.....1<sup>ST</sup> RESPONDENT**  
**CABINET SECRETARY FOR DEFENCE.....2<sup>ND</sup> RESPONDENT**  
**PRINCIPAL SECRETARY FOR DEFENCE.....3<sup>RD</sup> RESPONDENT**  
**CHIEF OF DEFENCE FORCES.....4<sup>TH</sup> RESPONDENT**  
**BRIGADIER K. O. DINDI.....5<sup>TH</sup> RESPONDENT**  
**LT. COL. NJUGUNA.....6<sup>TH</sup> RESPONDENT**  
**CAPTAIN S C YATOR.....7<sup>TH</sup> RESPONDENT**  
**ATTORNEY GENERAL.....8<sup>TH</sup> RESPONDENT**  
**LT. COL. YVONNE KERUBO KIRUL.....9<sup>TH</sup> RESPONDENT**

**RULING NO. 2**

On 6<sup>th</sup> June, 2014 the advocate for the petitioners Mr. Were Odera asked this Court to place this matter before the Chief Justice for purposes of constitution of a panel of an uneven number of judges to hear this petition. He argued that the petition raises weighty issues and it is only just that the same be heard by a panel of judges. He submitted that the seriousness of the issues raised is supported by the fact that at the moment there are various cases across the High Court relating to proceedings before the courts martial and some judges have issued orders staying the proceedings while other judges have not stayed proceedings. I suspect counsel is saying that the issuance of contradictory decisions by the High can only mean that substantive issues have been raised.

Mr. Njoroge for the state opposed the application on the grounds that no weighty matters had been raised and the constitution of a panel of not less than three judges will only end up delaying this matter.

The law governing the empanelment of an odd number of judges to hear a matter is found in Article 165 (4) of the Constitution of Kenya which states:

**“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.”**

Article 165 clause 3(b) and (d) provides that:

**“(3) Subject to clause (5), the High Court shall have—**

**(a).....**

**(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).....**

**(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).....”**

It is not disputed that the matter before this Court raises constitutional issues. The question is whether the issues raised deserve a hearing by a panel of an uneven number of judges.

In the **COUNTY GOVERNMENT OF MERU v THE ETHICS & ANTI-CORRUPTION COMMISSION [2014] eKLR** Majanja, J crystallized the principles behind the grant of an order for empanelment of a bench of judges as follows:

**“9. The principles which govern the exercise of discretion in an application such as the one before the court can be distilled 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.**

**10. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter up to the Supreme Court. In this regard the fact that the matter was filed under certificate of urgency and was put on the fast track for determination and as it involves an on-going investigation conducted by the respondent is a relevant consideration.”**

I agree with Majanja, J that an order for the empanelment of an odd number of judges to hear a matter is not granted as a matter of course. A judge must be satisfied that the issues raised actually merit a hearing by more than one judge.

Counsel for the petitioners argued that the fact that conflicting decisions have been issued by the High Court shows that the issues are weighty. I am not persuaded by the argument. The fact that conflicting decisions have been made in regard to issuance of conservatory orders does not elevate the matter to the status of one raising weighty issues. The best way of resolving conflicting decisions of the High Court is to file an appeal as in any case, the decision of a panel of judges of the High Court is only persuasive to a single judge of the same Court.

On the other hand, the claim by Mr. Njoroge for the respondents that the appointment of an uneven number of judges will delay the hearing of the petition could be one of the reasons for not asking the Chief Justice to constitute a panel of judges to hear a matter. However, in my view, this alone is not sufficient reason for failing to ask the Chief Justice to constitute a panel of judges to hear a matter if it does indeed raise a substantial issue of law.

I have considered the issues in this matter and I am of the view that the same can be tackled by a single judge. I therefore find the petitioners’ application unmerited and dismiss the same. Costs shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of June, 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**