

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E212 OF 2024

BETWEEN

KIMATHI M'IKIAO.....
.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST
RESPONDENT

CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND
PRESIDENT OF THE SUPREME COURT OF KENYA.....
.....2ND RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY OF
KENYA.....3RD RESPONDENT

RULING

Introduction

1. The Petition dated 23rd April 2024 revolves around the challenge to the tripartite legal requirement that once a person initiates divorce proceedings is simultaneously required to file a children case in view of custody and maintenance and matrimonial cause with regard to division of matrimonial property. In view of this, the Petitioner seeks that this Court invalidate the Sections of the law that mandate this practice.

2. Consequently, the Petitioner in the accompanying Notice of Motion Application, seeks empanelment of a bench under **Prayer '3'** to resolve the substantial questions of law raised in the Petition. This prayer is the subject of ruling and provides as follows:

This Court be pleased to adjudge and find that the Petition filed by the Petitioner herein raises weighty and fundamental constitutional issues warranting a referral to the Chief Justice to constitute a three-judge bench to hear and determine the Petition herein.

Petitioner's Case

3. The Application is sustained by the Petitioner's supporting affidavit and the grounds on the face of the Application.
4. By way of background, the Petitioner avers that he converted his marriage contracted under Meru customary law to a Christian marriage at Ridgeways Baptist Church on 26th October 2013. Later on, the marriage broke down leading to filing of **Divorce Cause No. E1255 of 2023 - JKM V KM** which is still pending.
5. He states that during the process he was informed by his Counsel that he was also required to file a children case for custody and maintenance as well as a matrimonial cause on division of matrimonial property. The Petitioner grieved by this tripartite requirement, filed the instant suit contesting the constitutionality of the same.

6. In his view, the three mutually exclusive legal proceedings arise from the breakdown of a family and so should be heard in a single legal proceeding. The Petitioner claims that the impugned requirement amounts to:

- a) *Subjection to living in a society that disregards equity, non-discrimination, and protection of the marginalized.*
- b) *Deprivation of the enjoyment of rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.*
- c) *Subjection to direct and indirect discrimination in accessing and enjoying the services offered by the Respondents after the breakdown of a marriage.*
- d) *Subjection to living in a society that disregards the salient role of the family as the natural and fundamental unit of society.*
- e) *Delayed justice through subjugation to multiple court processes contrary to constitutional dictates.*
- f) *Derogation of the rights of consumers to the protection of their economic interests as well as provision of necessary information to gain full benefit from services offered by the Respondents.*
- g) *Impediment of the realization and/ or apt enjoyment of the right to access justice owing to the additional and yet avoidable costs in terms of time as well as finances.*
- h) *Impediment of the realization and/ or apt enjoyment of salient rights of children and consequently subjection to living in a society that fails to properly uphold the best interest of the*

child principle in Kenya's divorce and incidental proceedings.

7. The Petitioner asserts that this requirement offends the Preamble of the Constitution alongside Articles 10,27,45,48 and 53 of the Constitution and thus ought to be declared unconstitutional, null and void. It is noted that this suit is brought in public interest, is aimed at contributing to the jurisprudence around the practice of divorce and related proceedings.

Respondents' Case

8. The Respondents response and submissions to the prayer of empanelment of a bench, is neither in the Court file nor in the Court Online Platform (CTS) save for the 3rd Respondent who filed submission on the said application.

Petitioner's Submissions

9. The Petitioner in support of his Application through Mwirigi, Nzomo and Company Advocates filed submissions dated 20th January 2025 where the single issue for determination was highlighted as: *whether the Petition raises weighty and fundamental constitutional issues warranting a referral to the Chief Justice to constitute a three-judge bench to hear and determine the said Petition.*
10. Counsel submitted that the Petition herein raises weighty and fundamental issues that transcend the individual

interests of the Petitioner and serve public interest. Particularly, the substantial questions are set out as:

- a) *The interpretation and application of the Preamble as well as Articles 10, 27, 45, 46, 48 and 53 of the Constitution.*
- b) *The question of the definitive place of the Preamble in Kenya's constitutional interpretation.*
- c) *The constitutionality of the impugned practice and/or requirement which affects majority, if not all the members of the public dealing with a breakdown of their marriages.*
- d) *The question of whether the Court envisioned under the Matrimonial Property Act, Cap 152 and its attendant Regulations is the very same Court envisioned under Section 2 of the Marriage Act, Cap 150.*

11. Counsel noted that this Court in addition to its jurisdiction under Article 165(3)(b) and (d) of the Constitution is empowered under Article 165(4) of the Constitution to certify a matter as raising a substantial question of law under these provisions. Reliance was placed in **Sir Chunilal V. Mehta and Sons Ltd -v- Century Spinning and Manufacturing Co Ltd 1962 SC 1314** where 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 or the Federal Court or which is not free from difficulty.”

12. Comparable dependence was placed in **Eric Gitari -v- Attorney General & another [2016] eKLR, Okiya Omtatah Okiiti & another -v- Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR, Del Monte Kenya Limited -v- County Government of Muranga & 2 others, Nairobi High Court Petition No.398 of 2015 [2016] eKLR** and **Okiya Omtatah Okiiti & another -v- Attorney General & 3 others [2016] eKLR**.
13. In this matter, Counsel submitted that the Petition raises substantial questions of law on the interpretation and application of the Preamble as well as Articles 10, 27, 45, 46, 48 and 53 of the Constitution in fairly novel manner, that has not yet benefitted from a determination by the superior courts. Moreover, Counsel stressed that these issues transcend the Petitioner's individual interests as will affect all persons dealing with a breakdown of their marriages.
14. Counsel submitted that the novel issues in this matter are:
- a) *The question of the definitive place of the Preamble in Kenya's constitutional interpretation.*
 - b) *The constitutionality of the impugned practice and/or requirement which affects majority, if not all the members of the public dealing with a breakdown of their marriages. In this sense, any decision by this Honourable Court will not only affect the Petitioner but also all other families undergoing or that may in the future undergo a*

breakdown of marriage. The family is constitutionally recognized by Article 45 of the Constitution as the 'natural and fundamental unit of society and the necessary basis of social order.' As such, all decisions affecting the family inevitably affect the larger society.

- c) *The question whether the legal construct of marital breakdown (as envisioned under Article 45(3) of the Constitution) irredeemably infers a breakdown of the social construct of a family (constitutionally protected under Article 45(1) of the Constitution) or merely implies a transition towards a different family configuration.*
- d) *The position of judicial juxtaposition between the implementation of individual rights and collective (family and communal) rights provided by the Constitution in the administration of justice.*

15. Counsel noting that the jurisprudential value of single judge decisions and decisions by expanded benches is similar, he argued that the Constitution envisions the need for determination of some cases by a bench of uneven number of judges. Reliance was placed in **Republic -v- Law Society of Kenya & 3 others Ex-Parte Nelson Havi [2017] eKLR** where it was held that:

“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.”

16. Like dependence was placed in **Luo Council of Elders & 7 others -v- Cabinet Secretary Water & Irrigation & 13 others, Nakuru ELC Petition No.9 of 2017 [2017] eKLR.**

3rd Respondent’s Submissions

17. Counsel for the 3rd Respondent, Andrew Emacar filed submissions dated 25th November 2024 where the single issue for determination was: *whether the petition raises weighty and fundamental constitutional issues warranting a referral to the Chief Justice to constitute a three-judge bench to hear and determine the Petition.*
18. Counsel relying in **Stanley Livondo v Attorney General 2020] KEHC 843 (KLR)** submitted that the Court guided as follows:

*“The guidelines for certification under Article 165(4) of the Constitution were provided by Court of Appeal in **Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** as follows:*

“There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its

ordinary meaning, means “of considerable importance”. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;*
- (ii) The applicant must show that there is a state of uncertainty in the law;*
- (iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;*
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”*

19. Counsel in view of this submitted that the issue of tripartite proceedings following the breakdown of a marriage does not meet the governing principles of certification under Article 165(4) of the Constitution. Counsel contended that the Petition concerns ordinary interpretation and application of the Constitution and other legislations, which are questions

and issues that single judges of Superior Courts deal with within their daily discharge of the constitutional mandate. That said, Counsel stressed that a decision from a single judge has equal force in law as that from a bench.

20. Counsel as well submitted that the Petitioner had failed to demonstrate how his rights had been infringed by the practice of instituting the three exclusive legal proceedings. Equally, Counsel argued that there is no uncertainty in law on the issues raised in the Petition since the practice of instituting the tripartite proceedings with respect to dissolution of marriage, division of matrimonial property and custody and maintenance of children after the breakdown of a marriage in Kenya, is to:

- a) *Offer great benefit to the child, through ensuring the best interest of the child is the primary consideration and not lost in the divorce proceedings.*
- b) *Provide a machinery for ascertaining property rights of the parties to a marriage.*
- c) *Render justice to the innocent parties to that union.*

21. In fact, Counsel informed that the triple proceedings were pursuant to law reforms driven by the new Constitution and Kenya's commitment to international conventions, aiming to modernize and harmonize family law while ensuring equality and fairness.

Analysis and Determination

22. In light of the foregoing, it is my humble take that the issue for determination is:

Whether the Petition dated 23rd April 2024 raises substantial questions of law meriting certification before the Chief Justice for the empanelment of an uneven Judge bench.

23. The law on empanelment of a bench is provided under Article 165 (4) of the Constitution which provides as follows:

(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.

24. The Court in **Kinyanjui v Attorney General & another [2016] KEHC 5104 (KLR)** discussed this issue as follows:

“8. Therefore, giving meaning to “substantial question” must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a 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.”

25. The Court went on to note that:

“10. A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the “substantial question” than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case.”

26. Furthermore, the Court in **Magare Gikenye J Benjamin v Salaries and Remuneration Commission & 146 others; Senate & 9 others (Interested Parties) [2021] KEHC 13290 (KLR)** citing the set jurisprudence in this area as outlined in a number of authorities, rehashed as follows:

“9. The application under consideration relates to certification in the High Court; that is under Article 165 (3) and (4) of the Constitution. The manner in which a single Judge of the High Court certifies that a

matter raises a substantial question(s) of law so as to warrant the empanelment of an expanded bench has, on several instances, been dealt with by the Superior Courts.

10. The Supreme Court of Kenya in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione* [2013] eKLR established the principles for certification under Article 163(4)(b) of the Constitution. However, those principles were adopted, with modification, by the Court of Appeal in *Okiya Omtatah Okioti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR when the Court of Appeal dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of the Constitution.

11. The Supreme Court summed up the principles as follows: -

In summary, we would state the governing principles as follows:

- i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;**
- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of**

- which will have a significant bearing on the public interest;*
- iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;*
 - iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;*
 - v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;*
 - vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;*
 - vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.*

12. As said, the Court of Appeal applied the above principles in *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR* and expressed itself thus: -

42. In *Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone* [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- a) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;**
- b) The applicant must show that there is a state of uncertainty in the law;**
- c) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;**
- d) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.**

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.

13. The High Court has as well severally dealt with the matter. In Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi [2017] eKLR the Court stated that: -

42. 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...

46. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution.

14. In Philomena Mbeti Mwilu v Director of Public Prosecution & 4 others [2018] eKLR the High Court had the following to say: -

29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our

constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary.

27. It is appreciated from the cited guiding authorities that Courts have consistently cautioned that empanelment is not to be granted lightly merely because a party alleges constitutional issues. Empanelment as settled is reserved for exceptional matters involving weighty or novel constitutional issues of public importance. As such, not every constitutional petition justifies empanelment unless the issues are complex, unsettled, unprecedented or of great public significance.
28. The Petitioner in his submissions underscores the issues that he perceives to raise a substantial question of law. Additionally, the Petitioner in the Petition seeks the following reliefs:
- i. A declaration be issued that the Preamble of the Constitution does not serve a ceremonial role but may be a salient source of rights in Kenya's constitutional adjudication. In the alternative, a declaration be issued that the Preamble of the Constitution does not serve a ceremonial role but is a salient interpretative tool in Kenya's constitutional adjudication.*
 - ii. A declaration be issued that the impugned practice and/ or requirement is unconstitutional,*

null and void for contravening the Preambular Paragraph 5 and the provisions of Articles 10, 27, 45, 46, 48, and 53 of the Constitution.

- iii. A declaration be issued that the Court envisioned under the Matrimonial Property Act, Cap 152 and its attendant Regulations is the very same Court envisioned under Section 2 of the Marriage Act, Cap 150.*
- iv. An order be issued directing the 3rd Respondent to spearhead the process of amending the existing legislative and regulatory framework that collectively gives rise to the impugned practice and/or requirement within a timeline that this Court deems fit.*
- v. An order be issued directing the 1st Respondent to provide guidance and legal advice throughout the process of amendment of the existing legislative and regulatory framework that collectively gives rise to the impugned practice and/or requirement within a timeline that this Court deems fit.*
- vi. An order be issued directing the 1st Respondent to update this Court and the Petitioner on the progress of effecting the order of this Court in (e) above within a timeline that this Court deems fit.*
- vii. An order be issued directing the 2nd Respondent to immediately but pending the amendment of the existing legislative and regulatory framework, issue Practice Directions on the amalgamation of the three mutually exclusive legal proceedings into a single case.*
- viii. This Court be pleased to grant any other or further relief as it may deem fit in the circumstances of the instant Petition.*

ix. This being a public interest case, there be no orders as to costs.

29. In my view, the running theme herein is the Petitioner's challenge to the tripartite legal requirement which compels persons undergoing marriage dissolution to file separate proceedings for their divorce, their children and their matrimonial property. According to the Petitioner this is unconstitutional as all these matters ought to be consolidated as a single proceeding. Palpably, these issues require an interpretation and application of constitutional and legal principles.
30. The issue raised by the Petitioner is not new. Courts have been resolving disputes relating to the subject matter over the years and the statutory and legal distinction has been elaborately discussed in these decisions. Accordingly, this issue cannot be said to be novel.
31. This Petition questions the constitutionality of the impugned practice. That is not a complex question as this Court routinely deals with such matters in the course of its work hence it does not require a referral to a bench to resolve.
32. Thirdly, the Petitioner alleges that the matter is of public importance yet the impugned laws have been in force for a couple of years with Court applying them all the way from the subordinate courts to the all the Superior Courts. In my

considered opinion, the issue does not present an extraordinary public significance to justify empanelment of a bench.

33. It is the view of this Court that the matter has not satisfied the threshold for certification of empanelment of a bench.

34. The application is dismissed.

Dated, signed and delivered virtually at Nairobi this 20th day of November, 2025.

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L N MUGAMBI
JUDGE