

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO.E757 OF 2025

OKIYA OMTATAH OKOITI.....PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT

THE CHAIRPERSON, INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....4TH RESPONDENT

THE SENATE.....5TH RESPONDENT

AND

KATIBA INSTITUTE.....INTERESTED PARTY

RULING ON CERTIFICATION

**(On the Petitioner/Applicant’s Notice of Motion Application dated 07/11/2025
seeking certification under Article 165(4) of the Constitution)**

1. The Petitioner/Applicant’s Notice of Motion Application dated 07/11/2025 primarily seeks that this Court, sitting as a single judge, should certify the Petition herein in terms of Article 165(4) of the Constitution, with the consequence that the Hon. Chief Justice would thereafter empanel a bench

comprising an uneven number of Judges, not being less than three, to hear and determine both interlocutory matters as well the Petition.

2. The Petitioner/Applicant concedes in the Petition dated 07/11/2025 that the present Petition shares some thematic concerns with prior legal proceedings, particularly the **Maina Kiai & Others v IEBC & Others [2017] eKLR** case decided by the Court of Appeal. However, the Petitioner/Applicant contends that the present Petition raises novel and significant questions of law regarding the National Tallying Center as established by the Elections Act, 2011, and its Regulations, particularly as the same applies to the Presidential Election.

3. In support of his contention that the Petition raises significant questions of law under Articles 165(3)(b) and (d) of the Constitution that are fit for certification as such under Article 165(4), the Petitioner/Applicant places reliance on the test laid down by the Supreme Court of India in the case of **Sir Chunilal V Mehta and Sons Limited -v- Century Spinning and Manufacturing Company Limited**. That five-prong test for determining whether a substantial question of law arises within a matter as set out in that case is as follows:
 - a. Whether directly or indirectly the questions affects the substantial rights of parties;
 - b. Whether the question is of great public importance;
 - c. Whether the question is novel and has not been settled in a decision of the apex court;
 - d. Whether the issue is not free from difficulty; and

- e. Whether there are alternative views and interpretations adopted by the Parties.
4. Having considered the Application and the written submissions, I note that all the parties who are participating thus far in these proceedings are either in support of the Application or have elected to leave the matter to the Court.
5. I must also make clear from the outset that in determining a question of certification the Court must ensure that it does not delve into the relative merits or demerits of the contested legal and factual positions at issue in the Petition before it. The role of the Judge is to weigh those contested legal and factual positions against the applicable legal tests to determine if on the face of it significant questions of law that warrant certification have been raised. In the case of **Community Advocacy Awareness Trust & Others -v- The Attorney General and Others [HC Pet 243 of 2011]** the Court observed that the Constitution does not define what is '*a substantial question of law*' and the same is left to the individual judge.
6. The High Court has also consistently taken the position that in determining whether there is a substantial question of law, the Judge must take into account the Constitution as a whole and apply the same to the individual case and circumstances before it. Additionally, to my mind it is not sufficient that a matter is of great interest to the public or it raises substantial questions of the public interest; the Petition must ultimately raise significant questions of constitutional or statutory law for the same to be fit for certification.

7. It is clear to this Court that the five-prong test for a substantial question of law has not been met. Specifically, I am not satisfied that:
 - a. The question is fully novel and has not been settled, at the very least in part by the dicta of the Supreme Court in the two Presidential Election Petition Judgments of the year 2017 and the Presidential Election Petition Judgment of the year 2022; and
 - b. The question is not free from difficulty.
8. On the limb of applicable prior precedents, the task that the High Court has been called to embark on with respect to the Petition will largely be to situate the Petition within the jurisprudence of decisions of the Supreme Court and the Court of Appeal and thereafter apply the same to the Petition for the same to either succeed or fail on its relative merits or demerits.
9. Any novelty in this Petition would not be fully so, as the questions before the Court are a build-up from the legal basis found and held in previous cases, including the seminal case of *Maina Kiai*. This is a task that a single-judge is well suited for, it would appear that the Petition herein is one which comfortably fits within the bread-and-butter jurisdiction of the High Court sitting as a single-judge.
10. Related to this, I am equally not satisfied that the issues raised in the Petition are not free from difficulty. The issues, even with a preliminary examination and without having formed a conclusive opinion, do not appear to this Judge to be profoundly difficult, or involving multiple and starkly different views and

interpretations. Additionally, as stated earlier much of the ground that shall be tread in this Petition, and the principles that will guide this Court in its decision making, have been well established.

11. Elisha Zebedee Ongoya's "***Protecting the Integrity of the Electoral Process, or, Obfuscating the Electoral Process? - A Response to Walter Khobe Ochieng's "The Promise of the Maina Kiai Judgement" in Light of the Subsequent Supreme Court Jurisprudence in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & Others***" [Kabarak University School of Law Journal of Law and Ethics, Volume 3, 2018] is an example of the rich scholastic ground upon which an adjudication of the instant Petition could perhaps reference. The existence of a fairly large number of scholastic authorities in addition to those from the Bench very much eases the task at hand, to the extent that the present Petition cannot be properly characterized as one whose difficulty would require three or such other uneven number of High Court judges to share the load.

12. In a system of superior courts of record, jurisprudence is built to a very large extent by placing the new bricks of judicial decisions on top of former ones. This is the essence of the hierarchy of courts and the precedent-based system that underpins our judicial order; and it upholds and fosters expeditious, coherent, and uniform judicial decision making that fits within an established framework of principles and positions that have been tried and tested over time.

13. Article 165(4) was not intended to result in eternal certifications of complex matters. As was stated in the case of *Okiya Omtatah Okiiti and Anor -v- Anne Waiguru and 3 Others*, the jurisprudential weight of a multi-judge decision of the High Court is well settled. The purpose of Article 165(4) was for the High Court, when tasked with charting the course into new constitutional and legal territory, to map the same with three or more High Court judges acting as cartographers. It is to be expected that once the constitutional and legal terrain has been mapped sufficiently in a particular area of litigation, there will no longer be need for certification in subsequent cases, and those subsequent cases would rely on those previously established constitutional and legal principles.

14. As I conclude, I wish to add that it was and still remains the expectation of the Constitution and the People of Kenya who promulgated it that Judges of the High Court will adjudicate over difficult, complex, significant, and profoundly impactful matters on a day-to-day basis as single-judges. This is clear from not only our commonwealth tradition but also from the architecture of the High Court of Kenya as being a default single-judge bench court. Certification under Article 165(4) should not be permitted to become 'par for the course' to the extent that it waters down the essence and special nature of Article 165(4).

15. A matter not receiving certification under Article 165(4) of the Constitution does not in any way water down its importance or potential seminal nature. Many of the most celebrated and impactful decisions of the High Court post-2010 were delivered by single-judge benches. By declining to certify a matter under Article 165(4), a judge is not saying that the matter is easy, insignificant,

or unimportant, rather that declining to certify is only a statement that the matter does not fall into the strict and narrow criteria that guides certification.

16. Accordingly, and for the foregoing reasons, I decline to certify this matter in terms of Article 165(4), and this Petition and any other interlocutory matters that may arise in these proceedings shall proceed in the regular manner before a single-judge.

17. In that regard, the Petitioner/Applicant's Notice of Motion Application dated 07/11/2025 be and is hereby dismissed with each party to bear its own costs of the Application, if any.

**DATED, SIGNED, AND DELIVERED VIRTUALLY ON THIS 18TH DAY OF
DECEMBER 2025.**

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BAHATI MWAMUYE MBS

JUDGE

In the presence of:

Petitioner in person – Mr. Okiya Omattah

Counsels for the 1st Respondent - Mr. Wambua Kilonzo, Mr. Moses Kipkogei, Mr. Nicholas Malonza

Counsel for the 3rd Respondent – Ms. Amollo h/b Ms. Atieno

Counsel for the 4th Respondent - Mr. Nura, Mr. Ali Ahmed