

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
[CORAM: KIMONDO, ABURILI & MUGAMBI JJ]
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E557 OF 2025

BETWEEN

ESTATE SONRISA LIMITED.....
.....PETITIONER

AND

JUSTICE NAIKUNI LUCAS LEPERES.....1ST
RESPONDENT
ATTORNEY GENERAL.....2ND
RESPONDENT
SAMUEL KAMAU MACHARIA.....3RD
RESPONDENT

RULING

1. The 1st Respondent's notice of motion dated 17th September 2025, impugns the *ex parte* ruling of the single judge (*Mwamuye J*) delivered on 29th August 2025. The principal ground is that the single judge erred by failing to set down the matter for *inter parties* hearing thereby denying the 1st respondent an opportunity to object to the matter being so certified and forwarded to the Chief Justice for empanelment. He thus seeks that:

This Court be pleased to review, vary, and/or set aside the ruling and orders delivered on 29th August 2025 in so far as they certified the matter as raising substantial questions of law and directed its transmission to the Chief Justice for empanelment of a bench.

2. The 1st Respondent is a Judge of the Environment and Land Court and Presiding Judge at Kwale. He deposes that he only became aware of the impugned ruling through media reports. He contends that the petitioner's omission to serve him constituted a grave breach of the *audi alteram partem* principle enshrined in Articles 25(c) and 50 of the **Constitution**.
3. He deposes that when he learnt of the ruling, he wrote to the Hon. Chief Justice requesting that the empanelment be stayed pending determination of this review.
4. He asserts that had he been heard, he would have demonstrated that the petition is misconceived because the law on the matter has already been settled. He emphasizes that the certification proceeded on an erroneous premise of novelty yet the question on whether a judge can be held personally liable for acts performed in the exercise of judicial functions is settled in national and

international jurisprudence as illustrated by the cases of **Bradley v Fisher** (80 U.S. 335 (1871)), **Sirros v Moore and Others** [1975] QB 118, **John Sangwa v Nkonde SC** (Supreme Court of Zambia Appeal 2 of 2021) [2021] ZMSC 34, **Bellevue Development Company Ltd v Gikonyo & 3 others** [2020] KESC 43 (KLR), **Karani v JSC** [2022] eKLR, **Maalim v Nyagah** [2022] eKLR, **Okonya v Attorney General** [2024]eKLR among others.

5. He stated that where settled questions of law are concerned, fairness requires that no certification be made without affording a party a chance to be heard. He thus contended that this application satisfies the threshold of review since there were material circumstances and submissions that were not before the Court when the certification was done.
6. Further, that there is an error apparent on the face of the record in that the Court treated as novel what the law has already conclusively settled. He adds that this matter also raises “*other sufficient grounds*” relating to fairness, institutional comity and the constitutional scheme.

7. Lastly, he contended that the issue before this Court is a live matter before the Judicial Service Commission where the subject matter is his removal from office. Consequently, the pursuit of identical grievances in parallel proceedings amounts to forum shopping, exposes him to double jeopardy and is clearly an abuse of the process.
8. The application is fervently opposed by the petitioner through a replying affidavit sworn on 11th November 2025. Its learned counsel, *Nelson Havi*, submitted that the motion is defective and incompetent as it was predicated on the **Civil Procedure Act** and *Civil Procedure Rules*.
9. He contends that the question whether a petition raises substantial questions of law is a judicial function that can be exercised by the High Court *suo moto*. As such, the certification is not open to review or setting aside.
10. Nonetheless, he points out that the question whether or not a judge can be personally liable in a constitutional petition for violations of the Bill of Rights has already been submitted to this enlarged bench for hearing and determination.

11. Finally, he argued that the matters raised in this petition and those before the Judicial Service Commission are separate and distinct and cannot therefore be a ground for review. He implored us to dismiss the motion.

12. The 2nd and 3rd respondents neither filed a reply nor lodged any submissions. However, when learned counsel for the 3rd respondent, *Ms. Achieng*, appeared before the Deputy Registrar on 16th December 2025, she informed the Court that the 3rd respondent supported the 1st respondent's motion.

13. We directed that the application be heard entirely on the basis of brief written submissions to be exchanged within set timeframes. For the avoidance of doubt, we restated that there would be no oral hearing. We shall now summarize the written submissions by the 1st respondent and the petitioner.

Applicant's written submissions.

14. The 1st respondent's counsel, *Danstan Omari and Associates*, filed submissions dated 21st November 2025. In his view, the two issues for determination are: *whether the **Civil Procedure Act** and its*

Rules are applicable in constitutional litigation; and, whether review is merited in the circumstances of this case.

15. On the question of applicable procedure, counsel relied on the decision of the Court of Appeal in **Karl Wehner Claasen v Commissioner of Lands & 4 others** [2019] KECA 766 (KLR) which affirmed that where the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* (hereafter the *Mutunga Rules*) are silent on a matter, the Court may have recourse to the *Civil Procedure Rules*.

16. Counsel submitted that the High Court has consistently applied this principle in situations similar to the one at hand. He cited **Kooba Kenya Limited v County Government of Mombasa** [2020] KEHC 6380 (KLR), **John Nyapola Okuku & 3 others (Interested Parties)** [2021] KEHC 8871 (KLR) and **Abdisalam Hassan Ismail & 2 others v Kenya Railways Corporation & 3 others** [2015] KEHC 3924 (KLR) among others.

17. He argued that the *Mutunga Rules* are silent on the issue of review and hence the recourse to the *Civil Procedure Rules*. Reliance was made on **James Omariba Nyaoga & 8 others v**

County Education Board-Kisii County & 2 others; Principal, Kenyoro Secondary School (Interested Parties) & 3 others [2021] KEHC 5078 (KLR).

18. Regarding the issue whether the review is merited in the circumstances of this case, he contended that the 1st Respondent was denied his right to be heard before the impugned ruling was delivered. He relied on the Court of Appeal decision in **David Oloo Onyango v Attorney-General** [1987] KECA 56 (KLR) which held that breach of natural justice renders a decision null and void *ab initio*, regardless of whether the outcome would have been the same. Reliance was also placed on **Syokimau Residents Association & 5 others v Regina Mueni Kaloki & another** [2021] KEHC 13570 (KLR) and **Kidero & 4 others v Waititu & 4 others** [2014] KESC 11 (KLR).

19. Citing the case of **National Bank of Kenya Limited v Njau** [1997] KECA 71 (KLR), Counsel argued that failure to hear the 1st respondent is an error apparent on the face of the record; and, one that is so self-evident that it does not require an elaborate argument to be established.

20. Moreover, he submitted that the circumstances of this case, constitute sufficient cause within the meaning of review. Reliance was placed on ***Pancras T. Swai v Kenya Breweries Limited*** [2014] KECA 883 (KLR) where the Court of Appeal observed that sufficient reason is deliberately broad and need not be analogous to discovery of new matter or error; and, permits review where justice demands correction of a defective or unfair process.

21. According to the applicant's counsel, the exercise of discretion in relation to the certification was in itself a misdirection in law. He submitted that certification under Article 165(4) of the **Constitution** is an exceptional order made only when absolutely necessary. In his view, by declaring the matter ripe for summary certification and denying the parties the right to be heard, the learned judge misapplied the certification threshold and ignored the prevailing jurisprudence.

22. Reliance was also made on ***Peter Solomon Gichira v Attorney General & another*** [2015] KEHC 3019 (KLR), where the court held that empanelment is exceptional and must be reserved for matters presenting novel, complex or weighty constitutional questions. He

further cited ***Kinyanjui v Attorney General & another; Omollo & 18 others (Interested Parties)*** [2012] KEHC 5411 (KLR).

23. Lastly, he submitted that judicial resources are scarce and that empanelment of a bench results in delay and increases the backlog of cases as acknowledged in ***Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another*** [2015] KEHC 6984 (KLR).

The Petitioner's written submissions

24. The Petitioner's submissions are dated 11th November 2025. Learned counsel maintained that the application is incompetent as it is founded on the **Civil Procedure Act** and *Civil Procedure Rules* which are inapplicable to a constitutional petition. He relied on ***Offshore Trading Company Limited v Attorney General*** [2021] eKLR where it was held that:

The matter pending before this Court is a constitutional petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under "The Protection of Rights and Fundamental Freedoms, Practice and Procedure

Rules, 2013, otherwise known as Chief Justice Mutunga Rules.

25. Reliance was placed on ***Said Juma Chitembwe v The Tribunal*** [2023] eKLR where it was held that:

The import of Article 160 (5) of the Constitution is that a member of the Judiciary is accorded judicial immunity for anything done or omitted to be done in good faith and in the lawful performance of a judicial function. The Constitution uses two key phrases: anything done or omitted to be done in good faith and in the lawful performance of a judicial function. The use of the two phrases was not idle but deliberate. Only things done by a judge in good faith and in the lawful discharge of the function of judicial office will merit protection. The antithesis to acting in good faith would be to act in bad faith, where a person acts dishonestly in the discharge of the functions of a judicial officer. In other words, bad faith will be implied when the office-bearer has acted with clear intent to deceive. This privilege will also be extended only when the action was done lawfully and in the performance of judicial functions. It is not available for acts done by a judge, or judicial officer who are out on frolics of their own, going beyond the confines of what would normally be regarded as their judicial

function. From a plain and textual reading of Article 160(5) of the Constitution, and Section 6 of the Judicature Act, judicial immunity is not absolute nor does it cover improper conduct aimed at furthering personal interests.

26. Regarding the objection that the issues here are the subject of parallel proceedings before the Judicial Service Commission, learned counsel relied on ***Mwilu v Judicial Service Commission*** [2025] eKLR where it was held that:

Interpretation of the Constitution and the general enforcement of the Bill of rights are not roles given to the Judicial Service Commission. They belong to the High Court at first instance, with ability for onward upward appeal from the High Court's decision.

27. On 5th November 2025, we issued extensive preliminary directions on disposal of the motion. One of the directions was that the application would be heard entirely on the basis of brief skeleton submissions to be exchanged within the set timeframes. For the avoidance of doubt, we directed that there would be no oral hearing.

28. As stated earlier, only the petitioner and the 3rd respondent complied fully with those directions. But when the learned counsel for the 3rd respondent appeared before the Deputy Registrar on 16th December 2025, she informed the Court she supported the 1st respondent's motion.

29. On 16th December 2025, all the parties appeared before the Deputy Registrar who confirmed compliance by *some* of the parties with our preliminary directions. We then set today's date for the virtual delivery of our decision.

30. We take the following view of the matter. The main petition as well as another interlocutory motion are still pending. We thus decline to make comments on the merits of the petition or to delve too deep into the primary dispute between the parties. We shall confine ourselves to the question whether the single judge was entitled to certify the matter *ex parte* as one raising substantial questions of law and to transmit the file to the Chief Justice for empanelment.

31. In order to do so, we shall briefly advert to the general principles of constitutional interpretation. **Article 259** of the

Constitution, the court is enjoined to interpret the constitution in a manner that:

- (a) Promotes its purposes, values and principles;**
- (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- (c) Permits the development of the law; and**
- (d) Contributes to good governance.**

32. **Article 165 (4) of the Constitution** upon which this particular issue rests states as follows:

Any matter certified as raising a substantial question of law under Clause 3(b) or (d) shall be heard by uneven number of Judges, not being less than three, assigned by the Chief Justice...

33. This article has two critical components or conditions that the court must satisfy itself with before certifying the matter for empanelment. They are:

- i) The matter must be one that falls under Clause 3(b) or (d) of Article 165 of the Constitution, and
- ii) The court must be satisfied that it raises a substantial question of law.

34. If the Court is satisfied that the two conditions have been met, it will refer the matter to the Chief Justice for empanelment.

35. The first limb, is for the Court to ascertain if the issue under consideration raises:

b) the question whether a right or fundamental freedom in the Bill of rights has been denied, violated or threatened.

d) any question respecting to interpretation of this Constitution including 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;

36. Once it has satisfied itself that the matter before it falls in any of the above categories, it must then proceed and determine

the limb, whether the issue raises a *substantial question of law*. Courts have pronounced themselves on this issue in various judicial precedents. In the celebrated Indian Case of ***Sir Chunilal Mehta and Sons, Ltd v The Century Spinning & Manufacturing*** (1962) SC 1314 the court explained:

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 has 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 general principles to be applied in determining the questions are well settled and that there is a mere question of applying those principles or that the plea raised is probably absurd, the question would not be substantial....

37. The Supreme Court gave guidance in ***Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione*** [2013] eKLR which was relied on by ***Okiya Omtatah Okiiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3***

others, Nairobi Civil Appeal 4 of 2015 [2017] eKLR by the Court of Appeal in arriving at the following four 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;

(iv) 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 t

he matter for which the certification is sought.

38. Having expounded the principles, the Court of Appeal finally held:

[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.

39. From the foregoing analysis, it is apparent that a *substantial question of law* does not have an absolute definition or fixed definition. The phrase has been used to refer to a matter that indicates great public importance transcending the interest of the parties in the dispute and which has significant impact in the administration of justice.

40. At the outset, we need to point out that there is no express requirement either in the **Constitution** itself or in the *Mutunga Rules*, that makes it mandatory for the judge to hear the parties prior to certifying the matter for empanelment. In ***Wycliffe Oparanya & 2 Others v DPP & Another*** [2016] eKLR, the Court observed:

... the Court is obliged either on its own motion or on an application of the parties to 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.” [underlining added].

41. There are instances when the question of empanelment has been heard after *inter parties* hearing, for instance, in ***Murang’a County Government v KTDA*** [2020] eKLR or ***Republic v Titus Yoma & 12 others*** [2024] eKLR but this in itself does not deprive a single judge the discretion to *suo motu* determine whether the matter meets the threshold for certification and empanelment. The judge may, prior to making the decision, seek the involvement of the parties to enrich the court’s decision but that does not translate into a mandatory requirement or that such failure will lead to invalidation of the judge’s independent *ex parte* assessment.
42. We have taken note that in this matter, the single judge in a lengthy and considered ruling set out clearly the reasons why he considered the matter as one raising substantial questions of law and transmitted it to the Chief Justice for empanelment. The learned judge weighed the issues that were at his disposal and was satisfied that they raised substantial questions of law to merit the certification and empanelment of a bench.

43. The Honourable the Chief Justice proceeded to discharge her constitutional mandate and empaneled the bench. In our considered view, the judge's decision coupled with the decision of the Hon Chief Justice marked the conclusion of the empanelment process; and, which this Court, by dint of **Article 164 (5)** of the **Constitution** cannot overturn.

44. Paraphrased, the impugned decision can only be challenged on appeal. This position resonates with the Court of Appeal decision in **Rigathi Gachagua & 5 Others v Thomas Kimotho Maingi & 80 others** [2025] eKLR, where it was held:

The role of the Chief Justice in setting up a bench under Article 165(4) is triggered by a matter being certified by the High Court or court of equal status as raising a substantial question of law under clauses (3) (b) or (d) of the said Article. Once the Court certifies that a matter qualifies to be heard by an expanded bench, the Chief Justice cannot question that decision. Anyone aggrieved by the certification has a right of appeal to the Court of Appeal. [underlining added].

45. Further, in ***Koome & 6 Others v JSC, Havi & 23 Others (Interested Parties)*** Petition 083 of 2025 [2025] KEHC 17206 (KLR), the Court, after reviewing several decisions stated:

[38] Guided by the foregoing authorities, it is manifest that the High Court, having certified the matter under Article 165(4) and consequently caused the empanelment to be effected, the court has fully discharged its jurisdiction in that respect. The High Court cannot now recall, revisit, or re-remit the matter to the Hon. Chief Justice for re-certification or re-assignment. To do so would not only offend the doctrine of functus officio but also undermine the principle of finality that undergirds judicial proceedings.”

46. In the end, we find that the learned single judge was entitled to certify the petition *ex parte* as raising substantial questions of law to be heard by an uneven number of judges under **Article 165 (4)** of the **Constitution**; and, to transmit the matter to the Chief Justice for empanelment of this bench.

47. The upshot is that the 1st respondent’s notice of motion dated 17th September 2025 is devoid of merit and is hereby *dismissed*. We make no order on costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 27th day of February, 2026.

K. KIMONDO
JUDGE

R. E. ABURILI
JUDGE

L. N. MUGAMBI
JUDGE

Ruling read virtually in the presence of:

Mr Havi & Mr. Ashioya for the Petitioner.

Ms. Wanjiku & Ms. Nekesa holding brief for Mr. Omari for the 1st Respondent.

Absent for the 2nd respondent.

Absent for the 3rd Respondent.

Mr. Ombuna, Brian & Robert Court Assistants.