



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 4 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPELLANT

NYAKINA WYCLIFE GISEBE.....2ND APPELLANT

VERSUS

ANNE WAIGURU, THE CABINATE SECRETARY,

DEVOLUTION AND PLANNING.....1ST RESPONDENT

JOSEPH KINYUA, THE STATE HOUSE CHIEF OF STAFF AND

HEAD OF PUBLIC SERVICE.....2ND RESPONDENT

PETER O. MANGITI, THE PRINCIPAL SECRETARY,

DEVOLUTION AND PLANNING.....3RD RESPONDENT

MARGARET KOBIA, CHAIRPERSON,

THE PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

(An appeal from the Judgment, Directions, and Order of the Employment and Labour Relations Court of Kenya at Nairobi, (M. N. Nduma, J.) dated 15th day of October, 2014

in

CONSTITUTIONAL PETITION NO. 42 OF 2014)

JUDGMENT OF THE COURT

1. In this appeal, the appellants urge that the matters arising for determination before the Employment and Labour Relations Court (the ELRC) in Petition No. 42 of 2014 raise *a substantial question of law* within

the meaning of Article 165(4) of the Constitution. The appellants contend that the ELRC erred in refusing to accede to their request to have the matter placed before the Chief Justice to constitute a bench of three judges to hear and determine the Petition. We are invited to overturn the ruling of the ELRC in that regard made on 15th October 2014 and to pronounce the principles that should guide the lower courts when faced with an application under Article 165(4) of the Constitution.

Background

2. In a petition dated 19th June 2014, the appellants complained that the 1st respondent, a cabinet secretary at the time, acted beyond her powers by unconstitutionally and illegally removing and appointing persons from and into offices in the public service; meddling in the affairs of the Public Service Commission; misleading the President of the Republic of Kenya into making irregular and unlawful dismissals and appointments into the public service; and devising policies that undermine the rule of law and constitutionalism.

3. The appellants' complaints as against the 2nd respondent, the State House Chief of Staff and head of public service, are that he acted beyond his powers to sign letters to remove and appoint officers in the public service and for meddling in the affairs that are the preserve of the Public Service Commission.

4. As against the 3rd respondent, a then Principal Secretary holding office under Article 155 of the Constitution, the appellants complain that as the person responsible for the management of human resources in the department, he abdicated his duty by purporting to take instructions from "an anonymous entity to effect removals, appointments, and transfers of personnel under his administration."

5. The appellants joined the 4th respondent in the petition as the chairperson of the Public Service Commission, a body established under Article 233 of the Constitution, with the mandate to establish and abolish offices in the public service and to appoint persons to hold or act in those offices. They assert that the 4th respondent is guilty of gross incompetence for failing to protect the affected employees of the Public Service Commission and for endorsing a policy on decentralization of human resource management in the civil service, which, according to the appellants, seeks to unconstitutionally and illegally wrest control of human resources in state departments from the Principal Secretaries and vest the same in Cabinet Secretaries contrary to Articles 155(2), 232, 233, 234, 249 and 259(1) of the Constitution.

6. Amongst other reliefs, the appellants sought declarations, that the 1st respondent had violated the Constitution and statutes; that the 2nd respondent has no power to superintend Principal Secretaries or control or direct the functions of the Public Service Commission; that the irregular removals from and appointments into office in the public service by the 1st and 2nd respondents are unconstitutional and invalid and that the policy on decentralization of human resource management endorsed by the 4th respondent is in violation of Articles 234 and 249 of the Constitution.

7. The full particulars of the claims by the appellants are set out in great detail in the lengthy petition, which we need not go into for purposes of this appeal.

8. Together with that petition, the appellants filed a notice of motion, also dated 19th June 2014, in which they sought numerous interlocutory prayers, including: a prayer that the court "be pleased to certify that the Petition herein raises a substantial question of law and forthwith refer the case to his Lordship the Chief Justice for appointment of a bench of three or five judges pursuant to Article 165(4) of the Constitution of Kenya, 2010"; stay orders temporarily suspending the 2nd respondent's letter titled, Central Human Resource Management Postings, and dated 18th February 2014; and temporary stay of implementation of Policy on Decentralization of the Human Resource in the Civil Service.

9. That application was heard, ex parte in the first instance, by the Hon. Lady Justice Onyango, J. who on 23rd June 2014 certified the same as urgent; restrained implementation of the Policy on decentralization of the Human Resource Management in the civil service pending inter partes hearing of the application

and gave directions on the inter partes hearing of the application.

10. The application was eventually heard inter partes before Nduma, J. on 29th September 2014 who delivered the impugned ruling on 15th October 2014 dismissing the application with costs.

11. Aggrieved, the appellants lodged this appeal.

The appeal and submissions

12. Mr. Okiya Omtatah Okoiti, the 1st appellant, who appeared in person, referred to the memorandum of appeal and to the appellants' written submissions and urged that the applicants were not given a fair hearing; that the application should have been heard before Onyango, J. who initially granted interlocutory orders; that it was irregular for Nduma, J. the Principal Judge of the ELC to have heard the application; that the 1st appellant had notified the court and the other parties in writing that he would be out of the country for medical reasons yet the application was heard in his absence; that Article 50 of the Constitution on the right to a fair hearing was violated and the ELC should have adjourned the hearing to allow the 1st appellant to be present; that in the result, the ELC erred by dismissing the application without hearing it on merits as envisaged under Articles 22, 48, 50(1), 159, 165(3)(d)(i) and (ii) and 258 of the Constitution.

13. Mr. Okoiti submitted further that this is a proper case for the ELC to have referred the matter to the Chief Justice to constitute a bench made up of uneven number of judges because a substantial question of law is involved within the meaning of Article 165(4) of the Constitution. He faulted the Judge for rendering what he termed as a "managerial" as opposed to a judicial decision on this question, arguing that the availability of judicial resources is not a relevant factor for consideration when interpreting Article 165(4) of the Constitution.

14. According to Mr. Okoiti, Article 165(4) of the Constitution "is absolute and is not dependent on the human resource or on the nature of the establishment within the Judiciary" but rather, "is dependent on whether or not there is an objective standard by which the discretion of a court can be exercised judicially to certify a matter as raising a substantial question of law."

15. Mr. Okoiti faulted the Judge for following the decision in **J. Harrison Kinyanjui v Attorney General & Another [2012] eKLR** in which the High Court (Majanja, J.) declined to adopt the interpretation accorded by the Supreme Court of India to the expression "substantial question of law" in the case of **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314**.

16. Mr. Okoiti further argued that the practice by the High Court and courts of equal status in interpreting Article 165(4) where they subjectively refer matters to the Chief Justice for empanelment of a bench is unsatisfactory and an objective standard should be established. In that regard, he drew our attention to numerous decisions of the High Court to which we will later make reference in this judgment.

17. He suggested that a distinction should be drawn between matters calling for interpretation of the Constitution and matters relating to the application in addressing this question. He urged that, "Article 165(4) requires that, for the first time, any question of constitutional interpretation should be heard by an uneven bench of at least three judges of the High Court, unless the case could be decided on other grounds which do not require the interpretation of the Constitution, in which case a single judge can hear the matter and decide it on those non-constitutional grounds. In other words, "substantial" simply means "necessary for the disposal", or that the case turns on constitutional interpretation of an Article of the Constitution which has never been determined in an earlier matter.

18. With that, Mr. Okoiti submitted that the matters for determination in Petition No. 42 of 2014 pending before the ELC raise a substantial question of law and urged us to allow the appeal so that the matter may be placed before the Chief Justice to constitute a bench of three judges to hear and determine the petition.

19. Mr. Nyakina Wycliffe Gisebe, the 2nd appellant, who also appeared in person, adopted the submissions by Mr. Okoiti. He however stressed that the intended policy to transfer powers relating to human resources in the public service to Cabinet Secretaries negates professionalism and runs counter to Article 232(1)(a) of the Constitution.

20. Opposing the appeal, Mr. F. Ngatia, learned counsel for the 1st respondent, took us through the background to the appeal. He submitted that none of the officers affected by the transfers complained or challenged their transfers; that no evidence was presented that those officers authorized the appellants to litigate on their behalf; and that the appellants are outsiders seeking to advance private claims.

21. According to counsel, the 1st appellant's complaint that his right to a fair hearing was breached has no merit; that there is no basis for the appellants to cast aspersion on the integrity of the Principal Judge of the ELRC by claiming that the hearing of the matter before him was irregular; that although the 1st appellant gave written notice dated 14th August 2014 that he would be travelling to Germany for medical attention, the indication was that it was for a period of 30 days; that when the application was scheduled for hearing before the Judge on 29th August 2014, the 2nd appellant did state that the 1st appellant was out of the country but also informed the court that "we are ready to proceed."

22. Submitting that the appellants' petition does not raise any substantial point of law under Article 165(4) of the Constitution to warrant a bench of three judges, counsel referred us to the High Court decisions in **J. Harrison Kinyanjui v Attorney General & Another** (above); **Republic v President and 5 others, Ex parte Wilfrida Itolondo and 4 others [2013] eKLR** among other decisions and urged that the appellants had not discharged their burden to demonstrate that a substantial question of law is involved. Counsel urged that the court must bear in mind that certification would result in delay in the disposal of the matter. Furthermore, counsel argued, any party aggrieved by a decision of a single judge would have the right of appeal to this Court.

23. Mr. K. Onyiso, learned counsel for the 2nd to 4th respondents, submitted that the appeal is devoid of merit; that the issues raised in the appellants' petition before the ELRC are not novel but routine employment matters relating to transfer of personnel; and that the Judge was right to decline to certify the matter as raising any substantial point of law. He referred us to the High Court decision in **Martin Nyaga and others v Speaker County Assembly of Embu and 4 others and Amicus Curiae [2014] eKLR** and urged that the decision to empanel a bench of more than one judge should be made where it is absolutely necessary in exceptional circumstances; and that in the present case, the issues raised are not of general public importance and neither have the appellants demonstrated how they are affected by the actions complained of.

Analysis

24. We have considered the appeal and the submissions. There are essentially two issues. The first is whether the appellants' right to a fair hearing was violated. The second is whether the Judge erred in declining to certify that the appellants' petition raised a substantial point of law.

25. There are two aspects of the appellants' complain that their right to a fair hearing was violated. The first is that the matter was irregularly heard before Nduma, J. The record shows that Justice Onyango first handled the matter on 23rd June 2014 when the appellants' application first came up for hearing. That Judge granted interlocutory relief, *ex parte*, and fixed the application for interpartes hearing on 1st July 2014. On 1st July 2014, the matter was placed before Nzioki wa Makau, J. None of the parties appear to have been present on that occasion. That Judge directed that the matter be mentioned before Onyango, J. on 3rd July 2014. On 3rd July 2014, Onyango J. scheduled the application for hearing on 24th July 2014; granted the respondents time to file a response to the application and extended the interim orders. A further adjournment was on 24th July 2014 granted by Onyango, J. at the instance of the respondents and a mention date fixed for 31st July 2014 with a direction that no further adjournment applications would be entertained at the instance of the respondents. Interim orders were extended.

26. During the mention on 31st July 2014, Onyango, J. granted the respondents “leave to apply for consolidation of the petition with Petition No. 27 of 2014 and for constitution of 3 judge bench under the vacation rules” and again extended the interim orders.

27. On 15th August 2014, the matter was before Nzioki wa Makau, J. who certified the application as urgent and directed the application to be heard on 20th August 2014. On 20th August 2014, the matter was placed before Rika, J. who, without objection from any party, ordered the consolidation of Petition No. 27 of 2014 with Petition No. 42 of 2014; extended the interim orders and scheduled the hearing for 29th September 2014.

28. On 29th September 2014, the matter was fixed for hearing before Nderi Nduma, J. who then heard the matter, in the absence of the 1st appellant, and reserved his ruling for 15th October 2014.

29. It is evident from that brief procedural history of the application that from the time the matter was first in court on 23rd June 2014 to the time it was eventually heard on 29th September 2014, four judges handled the matter. It is common practice in our country for one judge to certify a matter as urgent and to grant interim relief, *ex parte*, and for the matter to be heard *inter partes* before another judge. There is therefore no merit in the claim that Onyango, J. should have heard the application *inter partes* or that Nduma, J. irregularly entertained the application.

30. As regards the complaint that the application was heard in the absence of the 1st appellant, it is common ground that the 1st appellant did, by a notice dated 14th August 2014, inform the parties that he would be travelling to Germany for medical reasons, for a period of about 30 days beginning 22nd August 2014. It is also not contested that the 2nd appellant informed the court on the day of the hearing on 29th September 2014 that the 1st appellant was away in Germany for medication and would be back in two weeks. He did not however seek an adjournment. He informed the court that, “we are ready to proceed.” In those circumstances we ask ourselves; can the Judge be faulted for proceeding with the hearing in the absence of the 1st appellant? In our view he cannot. Although the 1st appellant argued before us that the 2nd appellant was not his representative, there was nothing before the Judge to suggest that the 2nd appellant was not speaking for the 1st appellant when he said, “we are ready to proceed.”

31. In our judgment therefore, there is no merit in the complaint that the appellants’ were not given a fair hearing.

32. We turn now to the question whether the Judge erred in declining to certify that the appellants’ petition raised a substantial point of law for purposes of Article 165(4) of the Constitution. Article 165(4) provides:

“(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.”

33. Clause 3(b) is in reference to the jurisdiction of the High Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened while clause 3(d) is in reference to the jurisdiction of the High Court to hear any question respecting the interpretation of the Constitution.

34. The High Court has had occasion to consider what constitutes “a substantial point of law” for purposes of Article 165(4) of the Constitution. We sample a few of those decisions. In **J. Harrison Kinyanjui v Attorney General & Another** (above) Majanja, J. in his judgment delivered on 27th September 2012 stated, correctly in our view, that “*it is left to each High Court judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges.*”

35. The learned Judge was however not persuaded that our courts should emulate a standard used by the Supreme Court of India in the case of **Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314 1962 SCR Supl. (3) 549** to determine whether a question of law is a substantial one or not. Although the test in that case was applied in the context of an appeal from a decision of the High Court declining a certificate of fitness for appeal to the Supreme Court, it is nonetheless instructive. The Supreme Court of India held that:

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it ... directly and substantially affects the rights of the parties and if so settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably whether it is either an open question in the sense that it is not finally absurd the question would not be a substantial of law.”

36. In Judge Majanja’s view, to adopt that approach would lead to an untenable situation where “every question concerning our Constitution would be a substantial question of law” with the undesirable result that it “would burden judicial resources to the extent that the value of obtaining justice without delay under Article 159(2)(b) would be imperiled.” We do not subscribe to this later view. We do not think that the application of that standard would result in every case concerning the Constitution becoming a substantial question of law. On the contrary, that test provides a sieve, to sift those cases that raise a substantial question or questions of law from those that do not.

37. Subsequently, in a ruling delivered on 20th May 2014 in the case of **County Government of Meru vs. Ethics and Anti-Corruption Commission [2014] eKLR**, Majanja, J, when dealing with an application to certify a matter as raising a substantial point of law for purposes of Article 165(4), stressed, correctly in our view, that the circumstances of each case must be considered. He stated:

“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 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 upto the Supreme Court.” [Emphasis]

38. Korir, J. endorsed that approach in his ruling delivered on 11th June 2014 in **Samuel Sabuni and 2 others vs. Court Martial and 8 others Petition No. 235 of 2014**

39. On his part, Odunga, J. in a ruling delivered on 6th June 2013 in **Republic vs. President & 5 others Ex parte Wilfrida Itolondo & 4 others [2013] eKLR**, embraced the test used by the Supreme Court of India in **Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd.**

Later in a ruling delivered on 16th June 2014 in **Martin Nyaga and others v Speaker County Assembly of Embu and 4 others and Amicus Curiae**, Odunga, J. cautioned that:

“...The decision whether or nor to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are very scarce. Empanelling such a bench usually has the consequence of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country. I therefore associate myself with the position taken by Majanja, J. in Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR that the meaning of "substantial question" must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation.”

40. In **Okiya Omtatah Okoiti and another vs. President Uhuru Muigai Kenyatta and 4 others, Petition No. 531 of 2015**, Lenaola, J. (as he then was) in his ruling delivered on 5th February 2016^[1] after reviewing earlier decisions had this to say:

“The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises.”

41. We are fully in agreement with that approach. The position we take whilst embracing the test by the Supreme Court of India in **Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd** is that each case must be decided on its own facts and circumstances. No factor alone is decisive. A party seeking certification must lay a basis for the certification. Further, certification under Article 165(4) of the Constitution is a matter in the judicial discretion of the court. Such discretion must however, be exercised on sound basis.

42. 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”^[2]. 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.”

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.

44. Applying those principles to the present case, we think this is a proper case for the constitution of a three-judge bench. It might, on the face of it, appear as though the appellants are seeking to enforce or advance perceived contractual employment rights on behalf of the affected employees. But we consider that there is a fundamental constitutional interpretation question regarding the constitutionality or otherwise of the proposed policy that transcends the circumstances of this particular case and which could affect the workings of public service.

45. We accordingly allow the appeal to the extent only that we order that the file in Petition No. 42 of 2014 as consolidated with Petition No. 27 of 2014 be placed before the Chief Justice for appointment of three Judges to hear and determine the Petitions.

Each party shall bear its own costs of the application in the High Court and of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

.....

DEPUTY REGISTRAR

[1] See also the ruling by Lenaola, J (as he then was) in *Okiya Omtatah Okoiti v IEBC and 3 others*, Petition No. 465 of 2015

[2] See Oxford English Dictionary