



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETITION NO. 213 OF 2019**

**IN THE MATTER OF: PUBLIC INTEREST LITIGATION UNDER ARTICLES 3(1), 22, 23, 48, 50 (1), 258 AND 259 (1) AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED THREATS UNDER ARTICLES 1(1), 2(1-4), 3(1), 4(2), 10(1) & (2), 19, 20, 21, 24, 129, 131(2)(a), 153(4)(a), 201(a) & (d), 232(1)(b), (d), (e) & (f), AND 259 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED THREAT TO COUNTY GOVERNMENT WORKERS' RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: SECURING SOME KSHS.120 BILLION OF COUNTY GOVERNMENT WORKERS' PENSION FUNDS AND THE IMPLEMENTATION OF THE COUNTY GOVERNMENTS RETIREMENT SCHEME (CGRS) ACT, 2019**

**AND**

**IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION**

*BETWEEN*

**OKIYA OMTATAH OKOITI PETITIONER**

*VERSUS*

**COUNTY GOVERNMENTS RETIREMENT SCHEME.....1<sup>ST</sup> RESPONDENT**

**152 OTHERS.....2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**PETITION NO. 222 OF 2019**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 6, 10, 19, 20(1,2, 3, 4), 21,22,23, 27(1, 2), 28, 36, 40, 41, 43(1)(E), 118(1)(B), 232 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2, 3, 6, 10, 19, 20(1, 2, 3, 4), 21,22,23, 27(1, 2), 28, 36, 40, 41, 43(1)(E), 118(1)(B), 232 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: SECTIONS 2, 22(1), 22(A & B), 24(1),  
25B, 26, 33 AND 58 OF THE RETIREMENT BENEFITS ACT

AND

IN THE MATTER OF: SECTION 138(1) OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATIONS, REASONABLENESS AND DOCTRINE OF  
PROPORTIONALITY

*BETWEEN*

KENYA COUNTY GOVERNMENT WORKERS UNION .....1<sup>ST</sup> PETITIONER  
MATILDA JEBET KEMETTO .....2<sup>ND</sup> PETITIONER  
BENSON OLIANGA ORIARO..... 3<sup>RD</sup> PETITIONER  
BERNARD ATSIULA INYANGALA .....4<sup>TH</sup> PETITIONER  
BONIFACE WAWERU GITUKE .....5<sup>TH</sup> PETITIONER  
EMILY W. MWANGI .....6<sup>TH</sup> PETITIONER  
FRED BULUKU .....7<sup>TH</sup> PETITIONER  
CHARLES MAKINI .....8<sup>TH</sup> PETITIONER

*VERSUS*

THE BOARD OF TRUSTEES OF  
LOCAL AUTHORITIES PROVIDENT FUND .....1<sup>ST</sup> RESPONDENT  
DAVID KOROS, THE CHIEF EXECUTIVE OFFICER  
LOCAL AUTHORITIES PROVIDENT FUND .....2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT  
THE CABINET SECRETARY,  
NATIONAL TREASURY AND PLANNING .....4<sup>TH</sup> RESPONDENT  
THE CABINET SECRETARY,  
MINISTRY OF DEVOLUTION..... 5<sup>TH</sup> RESPONDENT  
THE CABINET SECRETARY,  
MINISTRY OF STATE FOR PUBLIC SERVICE.....6<sup>TH</sup> RESPONDENT

AND

CORNEL W. MABATSI AND  
SEBASTIAN AMOL PROPOSED INTERESTED PARTIES/APPLICANTS

AND

PETITION NO. 230 OF 2019

IN THE MATTER OF: ARTICLES 2(4), 6(2), 10(2)(A), 27, 36, 40, 41, 43(1)(E), 118(1)(B), 174 (C), (H), 186(1), 189 AND 235 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 14 OF THE FOURTH SCHEDULE TO THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 132 AND 138 OF GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: SECTION 49 OF THE URBAN AREAS AND CITIES ACT, 2011

AND

IN THE MATTER OF: SECTION 24 OF THE RETIREMENT BENEFITS ACT

AND

IN THE MATTER OF: REGULATIONS 20 AND 40 (B) OF THE  
RETIREMENT BENEFITS (OCCUPATIONAL RETIREMENT BENEFITS SCHEME) REGULATIONS, 2000

AND

IN THE MATTER OF: SECTIONS 2, 3 (C), 6, 18, 23, 24, 52, 53, 55 AND 56 OF THE COUNTY GOVERNMENTS RETIREMENT SCHEME ACT, 2019

AND

IN THE MATTER OF: THE VIOLATION AND/OR THREATENED VIOLATION OF ARTICLES 2(4), 6 (2), 10(2)(A), 27, 36, 40, 41, 43(1)(E), 118(1)(B), 174(C), (H), 186(1), 189 AND 235(1) OF THE CONSTITUTION OF KENYA, 2010 AS READ WITH CLAUSE 14 OF THE FOURTH SCHEDULE AND CLAUSES 6 AND 15 OF THE SIXTH SCHEDULE THERETO

*BETWEEN*

THE LOCAL AUTHORITIES PENSIONS

TRUST BOARD OF TRUSTEES..... 1<sup>ST</sup> PETITIONER

THE COUNTY PENSION FUND

BOARD OF TRUSTEES .....2<sup>ND</sup> PETITIONER

*VERSUS*

THE ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT

THE CABINET SECRETARY,

NATIONAL TREASURY .....2<sup>ND</sup> RESPONDENT

RETIREMENT BENEFITS AUTHORITY .....3<sup>RD</sup> RESPONDENT

THE LOCAL AUTHORITIES PROVIDENT FUND

BOARD OF TRUSTEES .....4<sup>TH</sup> RESPONDENT

AND

KENYA COUNTY GOVERNMENT

WORKERS UNION .....1<sup>ST</sup> INTERESTED PARTY

COUNTY PENSIONERS ASSOCIATION .....2<sup>ND</sup> INTERESTED PARTY

RULING

The Ruling before this Court is in respect of two applications.

**Background**

On 8<sup>th</sup> November, 2019, Okiya Omtatah Okoiti filed a Petition dated 6<sup>th</sup> November, 2019, **Petition No. 213 of 2019: Okiya Omtatah Okoiti v The County Government's Retirement Scheme & 152 Others.**

On 15<sup>th</sup> November, 2019, the Kenya County Government Workers Union together with 7 other persons filed a Petition dated 15<sup>th</sup> November, 2019, **Petition No. 222 of 2019: Kenya County Government Workers Union & 7 Others v The Board of Trustees of Local Authorities Provident Fund & 54 Others.**

On 5<sup>th</sup> December, 2019, the Local Authorities Pensions Trust Board of Trustees and the County Pension Fund Board of Trustees filed a Petition dated 3<sup>rd</sup> December, 2019, **Petition No. 230 of 2019: Local Authorities Pensions Trust Board of Trustees & Another vs The Attorney General & 3 Others.**

On 9<sup>th</sup> December, 2019 by consent of the parties in Petition No. 213 of 2019 and Petition No. 222 of 2019 this Court consolidated the two petitions with the following directions on the management of the same:-

- i. The lead file would be Petition No. 213 of 2019
- ii. Okiya Omtatah Okoiti, the Petitioner in Petition 213 of 2019 would be the 1<sup>st</sup> Petitioner and Kenya County Government Workers Union & the 7 other Petitioners in Petition 222 of 2019 would be the 2<sup>nd</sup> to 9<sup>th</sup> Petitioners respectively.
- iii. The Respondents would be as listed on Petition No. 213 of 2019 as the County Government's Retirement Scheme and 152 Others respectively

On 27<sup>th</sup> February, 2020 following consolidation of Petition No. 213 of 2019 and 222 of 2019, the 2<sup>nd</sup> Respondent therein, the Local Authorities Provident Fund filed the Notice of Motion application dated 26<sup>th</sup> February, 2020 (hereinafter "the **First Application**").

On 27<sup>th</sup> May, 2020, the Petitioners in Petition No. 230 of 2019 – the Local Authorities Pensions Trust Board of Trustees and the County Pension Fund Board of Trustees filed the Notice of Motion application dated 26<sup>th</sup> May, 2020 (hereinafter "the **Second Application**").

**The First Application**

In the First Application filed by Gikera Vadgama on record for the 2<sup>nd</sup> Respondent in Petition No. 213 of 2019 (as Consolidated with Petition 222 of 2019) the Applicant sought inter alia the following orders:

1. Spent.
2. That this Honourable Court be pleased to consolidate Petition 230 of 2019 with Petition 213 and 222 of 2019.
3. That this matter be placed before Onyango J. and be heard together with Petition 213 and 222 of 2019 when the matters will be mentioned in Court on 13<sup>th</sup> April, 2020.
4. That the cost of this Application be in the cause.

The First Application is supported by the grounds on the face of the application that:

1. The Applicant herein is a Respondent in both Petition 213 (as consolidated with Petition 222 of 2019) and Petition 230 of 2019.
2. The issues for determination in Petition 230 of 2019 are similar to those raised in Petitions 213 and 222 of 2019.
3. The two Petitions (Petition 213 and 222 of 2019) have been consolidated and by an order issued on 9<sup>th</sup> December 2019, Petition 213 of 2019 was picked to be the lead file.

4. The two Petitions came up in Court on 5<sup>th</sup> February 2020 when this Court set down the matter for hearing on 18<sup>th</sup> May 2020. The Court also issued directions on filing of documents and gave a mention date on 13<sup>th</sup> April 2020 before the Deputy Registrar to confirm filing of documents.

5. It would only be prudent that all the three Petitions are heard and determined simultaneously.

6. It is in the interest of justice that the orders sought herein be granted.

The First Application is again supported by the 4<sup>th</sup> Respondent in Petition No. 230 of 2019 who is also the Applicant in First Application but represented by the firm of Ngatia & Associates Advocates. In support of the Application, Ngatia & Associates filed the Replying Affidavit of **DAVID KOROSS**, the Chief Executive Officer and Secretary of the Applicant, sworn on 26<sup>th</sup> February 2020. He depones that the issues in the three petitions relate to the constitutionality and implementation of the County Governments' Retirement Scheme Act, 2019.

For purposes of this Ruling, the Local Authorities Pension Fund shall be referred to as the "**Applicant to the First Application**" notwithstanding its titles in the three Petitions or the Counsels representing it.

The First Application is opposed by the Petitioners in Petition No. 230 of 2019, the Local Authorities Pensions Trust Board of Trustees and the County Pension Fund Board of Trustees.

### **The Second Application**

On 27<sup>th</sup> May, 2020, the Local Authorities Pensions Trust Board of Trustees and the County Pension Fund Board of Trustees filed a Notice of Motion dated 26<sup>th</sup> May, 2020 (the **Second Application**) seeking inter alia the following orders:

1. The Petition herein and ELRC Petitions No. 213 and 222 of 2019 (hereinafter referred to as the "Petitions") are hereby certified as raising substantial questions of law.
2. The respective files shall be placed before the Honourable Chief Justice for purposes of appointing an uneven number of Judges, being not less than three, to hear and determine the Petitions.

The grounds in support of the Second Application as set out on the face of the application is that the Petitions raise the following substantial questions of law:

1. Whether the National Government can establish, through an Act of Parliament, a pension scheme for members, officers and staff of County Governments.
2. Whether the National Government can compel County Governments through an Act of Parliament to abandon or wind up their preferred pension scheme(s) and instead join a different pension scheme.
3. Whether the constitutional mandate of the National Government on matters relating to retirement benefits schemes goes beyond "Policy formulation and setting standards" and extends to the establishment or prescription of a specific occupation pension scheme for members, officers and staff of County Governments.
4. Related to (1), (2) and (3) above whether the County Governments' Retirement Scheme Act, 2019 (the impugned Act) is unconstitutional for violating the functional and institutional integrity of County Governments as guaranteed under *inter alia* Articles 6(2), 10(2)(a), 185(2), 186(1), 187(2), 189(1)(a) and 235(1) of the Constitution and the Fourth Schedule thereto.
5. Whether the National Government can enact a law whose object or effect is to enable it to shrink or evade its constitutional responsibility under Clause 6 of the Sixth Schedule to the Constitution for the actual deficits and other liabilities of the Local Authorities Pensions Trust.
6. Whether the personal pension savings of the members, offices and staff of county governments, deducted from their respective monthly payslips are public funds to justify the establishment through the impugned act, of a pension scheme that is modelled on the superstructure of a state corporation and the National Government's control of the pension scheme established by impugned Act.
7. Whether Parliament can establish a pension scheme for the members, officers and staff of County Governments by ignoring or disregarding expert opinions on structural soundness and se up of pension schemes, legitimate concerns of members and sponsors of existing pension schemes made during public participation and existing contractual obligations and statutory rights applicable to staff of the defunct local authorities seconded to County Governments.
8. Whether it is permissible from regulatory, policy and structural points of view to merge a defined benefits pension scheme with a defined contribution pension scheme, to merge an indebted pension scheme before full settlement of their respective liabilities and to merge a pension scheme with a provident fund.

For the purposes of this Ruling, the Local Authorities Pensions Trust Board of Trustees and the County Pension Fund Board of Trustees shall jointly be referred to as "**Applicants to the Second Application**".

On 15<sup>th</sup> June, 2020, the Kenya County Government Workers Union, the 1<sup>st</sup> Interested Party in Petition 230 of 2019 filed an affidavit sworn by Roba S. Duba its National General Secretary on 8<sup>th</sup> June 2020 in support of the Second Application. He depones that the Impugned Act is prejudicial to the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties in Petition 222 of 2019 and other members of the 1<sup>st</sup> Interested Party to the extent that it seeks to subjectively transfer the 1<sup>st</sup> Interested Party's members from a superior pension scheme to an inferior scheme without their consent.

He further depones that the petitions raise substantial questions of law to warrant the empanelment of a bench of an uneven number of judges not less than three under Article 165 (4) of the Constitution as the Petitions raise weighty and complex questions of law. The questions concern the interpretation of the Constitution under Article 259(1) in respect of the County Governments' Retirement Scheme Act No. 21 of 2019 which irregularly seeks to repeal the Local Authorities Pension Trust (Laptrust DB Scheme) established under Local Authorities Pension Trust Rules, 2007, Local Authorities Provident Fund (LAPFUND) established under Local Authorities Provident Fund Act Cap 272 and the Laptrust (Umbrella) Retirement Fund (Laptrust DC Scheme) which were established under an irrevocable Trust Deed registered under the Retirement Benefits Act.

He depones that the consolidated petitions raise novel points in respect of the complexity of the matter since by their nature the consolidated petitions require a substantial amount of time to be disposed of considering the number of parties involved, the voluminous nature of pleadings, the time taken by parties to comply with filing respective responses and the number of documents to be perused and referred to. In addition, the petitions are sensitive and of great public interest/importance.

He further depones that the instant Petition touches on the same subject matter as the consolidated Petitions which were before Ongaya J. hence the danger of there being conflicting decisions.

The Applicant to the First Application filed a Replying Affidavit sworn by David Korros its Chief Executive Officer on 8<sup>th</sup> June 2020. Therein, he deposes that the issues raised in the three Petitions relate to the respective functions and powers of national and county governments provided in Chapter 11 of the Fourth Schedule of the Constitution and that these issues are neither novel nor complex to amount to substantial points of law. He avers that the issues can be competently dealt with by a single Judge.

He avers that the Application is an afterthought calculated to obstruct and delay the cause of justice and contradicts the Applicants to the Second Application's Counsel's position that the Petition be heard expeditiously.

He avers that the three Petitions raise common questions of law and ought to be consolidated. He contends that by the Petitioner seeking that the three Petitions be certified as raising substantial questions of law they admit that the Petitions raise common questions of law and fact thus they ought to be consolidated.

### **Submissions**

The parties in all three Petitions agreed that the Applications proceed by way of written submissions and on 17<sup>th</sup> June 2020 Counsel for the parties highlighted their respective submissions.

### **Submissions by the Applicant to the First Application**

The Applicant to the First Application is represented by Gikera Vadgama in Petition No. 213 of 2019 (as consolidated with Petition 222 of 2019) while it is represented by Ngatia & Associates Advocates in Petition No. 230 of 2019. For purposes of the two applications, the respective Advocates filed written submissions in support of the First Application and in Opposition to the Second Application.

### **Submissions by Gikera Vadgama**

The Applicant to the First Application submitted that the issue of consolidation is an issue that has been litigated upon and determined over the years and that the Court in **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 Others [2014] eKLR** cited the decisions in **Stumberg and Another v Potgeiter (1970) E.A. 323** and **Kerugoya ELC Case No. 809 of 2013** where the Courts set out the principles to be considered while consolidating matters.

It submitted that the Petitions raise the same questions of law and facts which are whether the County Governments' Retirement Scheme Act 2019 is unconstitutional for violating the functional and institutional integrity of the County Governments as guaranteed under at Articles 6(2), 10(2)(a), 185(2), 186(1), 187(2)(a) and 235(1) of the Constitution and the Fourth Schedule thereto. Further, whether the Act is in conflict with the Retirement Benefits Act and whether it should be declared unconstitutional for lack of public participation during its enactment process.

It further submitted that reliefs sought in the three Petitions are similar in that they seek to have the County Government Retirement Scheme Act declared inconsistent with the Constitution. It argued that if the Petitions are heard and determined separately each judge will render their respective decisions which might be in conflict with each other thus this will give rise to inconsistencies and anomalies.

It further argued that should consolidation be granted, no party will be aggrieved. It urged the Court to consider the Supreme Court decision in **Law society of Kenya v The Centre for Human Rights and Democracy [2014] eKLR** and allow the First Application.

With respect to the Second Application, it submitted that the application should not be allowed for reasons that the Court has jurisdiction to hear and determine the three Petitions. It submitted that the decision to certify a matter as raising a substantial question of law is purely an exercise of judicial discretion as stated in the case of **Okiya Omtatah Okoiti and another v President Uhuru Muigia Kenyatta and 7 Others [2016] eKLR**.

It submitted that the issues raised in the three Petitions do not raise substantial issues of law that warrant certification for the matter to be placed before the Chief Justice for appointment of an uneven number of Judges as the issues herein are constitutional issues that can be handled by a competent, well-seasoned Judge. It was submitted that the main issue for determination is whether the County Governments' Retirement Scheme Act No. 21 of 2019 or the sections thereof are unconstitutional.

The Applicant to the First Application relied on the case of **Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone [2013] eKLR**, where the Court laid down the governing principles for certification under Article 165(4) of the Constitution. It further relied on the case of **Martin Nyaga and Others v Speaker County Assembly of Embu and 4 others and Amicus Curiae [2014] eKLR** where the Court held that the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and that empanelling such a bench may delay the cases that are already in queue worsening the backlog of cases.

In conclusion, the Applicant to the First Application urged the court to consider that Petitions No. 213 and 222 of 2019 have already been consolidated and were scheduled for hearing on 18<sup>th</sup> May 2020. It submitted that there is a risk that if the matter is certified as raising substantial questions of law to be heard before a three Judge bench it will not be disposed of without undue delay. It was therefore the Applicant to the First Application's submission that the Second Application be dismissed with costs.

#### **Submissions by Ngatia & Associates**

The Applicant to the First Application submitted that the consolidation of the Petitions shall facilitate the efficient and expeditious disposal of the dispute in accordance with Article 159(2) (b) of the Constitution. It relied on the case of **David Ojwang Okebe & 11 Others v South Nyanza Sugar Company Limited & 2 Others [2009] eKLR** where the Court of Appeal held that the main object of consolidation is to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. It further relied on the cases of **Nyati Security Guards and Services Ltd v Municipal Council of Mombasa** and **Joseph Okoyo v Edwin Dickson Wasuma [2014] eKLR**.

It submitted that the main issue for determination in the Petitions is whether the County Governments Retirement Scheme Act 21 of 2019 or the sections thereof are unconstitutional and ought to be declared as such. It avers that Article 165(4) of the Constitution stipulates that any matter certified by the Court as raising a substantial question of law shall be heard by an uneven number of judges. However the Constitution does not define what constitutes a substantial question of law.

It submitted that the holding in **Okiyah Omtatah Okoiti & another v Anne Waiguru Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** was that the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion which must be exercised on sound basis. That the Court in **Harrison Kinyanjui v Attorney General & Another [2012] eKLR** held that a court must not lose sight of the fact that the High Court does not have the last word on the interpretation of the constitution and that there is a right of appeal to the Court of Appeal and the Supreme Court on constitutional matters. It further relied on the cases of **Royal Media Services Ltd & 2 Others v Attorney General & 6 Others & 2 Others [2013] eKLR** and **Muranga County Government v Kenya Tea Development Agency Limited [2020] eKLR**.

It submitted that there is sufficient judicial authority and jurisprudence available to guide the Court whilst making a determination on whether the impugned Act is unconstitutional or in conflict with other statutes. It relied on the case of Council of **County Governors v Lake Basin Development Authority & 6 Others [2019] eKLR** where the Court held that the issues raised before it were not novel as Courts have on numerous occasions dealt with cases involving the interpretation of the Constitution and constitutionality of statutes.

It submitted that the parties herein should not lose sight of the fact that due to the need to have the dispute resolved expeditiously, Petition 213 of 2019 and Petition 222 were consolidated by an order issued on 9<sup>th</sup> December 2019. It submitted that there is need to dispense justice without having regard to the value of the subject matter as was held by the High Court in the **Royal Media Services Ltd Case [supra]** to be one of the factors that a Court in determining an application seeking certification ought to consider.

It is its submission that once interim orders are issued, it would be most unjust to allow certification since no expeditious hearing will ensue thereafter. In conclusion, it urges the Court to dismiss the application with costs.

#### **Submissions by the Applicants to the Second Application**

With regard to the First Application, the Applicants to the Second Application submitted that there can be no serious dispute among the parties on the substance or purpose of the law on consolidation of suits. They submitted that the law on consolidation of suits seeks to avoid the spectre of conflict in decisions and to promote the efficient use of scarce judicial resources.

It was their submission that the consolidation of the Petitions would have the unintended consequence of unwittingly creating inconvenience and/or delay in the hearing and determination of the dispute. They submitted that the consolidation is attractive on paper but would lead to a spectre of about 170 litigants who are legally entitled to make oral and written submissions and delay in determination of the Petitions due to the likelihood of adjournments and confusion and obfuscation of issues. They argued that the Court should decline the First Application.

With respect to their application, they submitted that pursuant to

Article 165(4) of the Constitution, the appointment of panels of uneven numbers of Judges is confined to matters that raise substantial questions of law.

They submitted that the prevailing case law on the certification of matters as raising substantial questions of law is to be found in **Eric Gitari v Attorney General & another Constitutional Petition No. 150 of 2016**, **National Gender and Equality Commission v Cabinet Secretary, Minister of Interior and Coordination of National Government & 2 Others Constitutional Petition No. 12 of 2016** and **Wycliffe Ambetsa Oparanya & 2 Others v Director of Public Prosecutions & another Constitutional Petition No. 561 of**

2015.

They submitted that the above cases set out the factors to be considered in exercising the discretion to certify a matter as raising a substantial question of law include *inter alia* whether the matter affects substantial interests of parties, whether the matter is of general public importance and raises a novel point and whether the matter requires a substantial amount of time to be disposed of.

They argued that the consideration of all relevant factors as set out in these cases shows that the Petitions meet the threshold of Article 165(4) of the Constitution. They urged the Court to allow the application.

### **Determination**

Upon consideration of the applications, responses and submissions by the parties, there are only two main issues arising from the two applications. The first is consolidation of Petition No. 230 of 2019 with Petition No. 213 of 2019 as consolidated with Petition No. 222 of 2019.

The second is reference to the Chief Justice for empanelling of a bench under Article 165(4) to hear the three petitions on grounds that they raise substantial questions of law.

### **Consolidation**

Petition No. 213 of 2019 and Petition No. 222 of 2019 were consolidated on 9<sup>th</sup> December 2019 as both relate to the same subject matter. The Applicants to the Second Application contend that sections of the County Governments Retirement Scheme Act, 2019 (the Impugned Act) are inconsistent with Articles 2(4), 6 (2), 10(2)(a), 27, 36, 40, 41, 43(1)(e), 118(1)(b), 174(c)(h), 186(1), 189 and 235 of the Constitution as read with Clause 14 of the Fourth Schedule and Clauses 6 and 15 of the Sixth Schedule. The reliefs sought in Petition No. 230 of 2019 include *inter alia* a declaration that sections of the impugned Act are inconsistent with the Constitution and that the Act is incompatible with the devolved system of government set in the Constitution.

By contrast, Petitions No. 213 of 2019 and 222 of 2019 seek to protect members of the existing schemes, (LAPTRUST and LAPFUND). The prayers sought in the three Petitions substantially seek to have the Court declare that Sections of the County Governments' Retirement Scheme Act, Impugned Act, are in contravention of the Constitution and contrary to some Acts of Parliament including the County Government Act and the Retirement Benefits Act.

The circumstances when Courts can consolidate suits are well set out both in the law and in jurisprudence from the Courts.

Rule 23 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

**The Court may consolidate suits if it appears that in any number of suits—**

**(a) some common question of fact or law arises; or**

**(b) it is practical and appropriate to proceed with the issues raised in the suits simultaneously.**

The Applicant to the First Application in support of the consolidation has cited numerous decisions by the Courts which stipulated the factors and gains in consolidation of suits. The Supreme Court in **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR** held:

*“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed... It is obvious to us that, in the interests of all parties, the central issue in the appeals ought to be determined expeditiously and conclusively by this Court. Consolidation of the appeals, in our perception, would significantly advance that goal.”*

It is not in contention that Petition No. 230 of 2019 raises similar issues as Petition No. 213 of 2019 as consolidated with petition 222 of 2019. All three petitions relate to the same subject matter being the unconstitutionality of certain sections of the County Governments Retirement Scheme Act. The specific issues raised in each Petition may vary broadly.

There is also the issue of the impugned Act overarching policy and regulatory frameworks which cuts across all three Petitioners. This means that these are issues that can be consolidated and heard together.

Concerns have been raised over complications, delay or confusion that may arise because of the number of parties involved. It is the opinion of this Court that with proper administration and co-operation of parties, these issues can be addressed and ironed out.

I do not find the consolidation of the matters herein would result to any prejudice upon the parties or would be undesirable. In the **Nyati Security Guards** case (supra) the Court held that:

*“There are however situations where consolidation is undesirable like where in two actions a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer and the purpose of saving time will be defeated.”*

Even though the Petitioners in Petition 230 of 2019 are Respondents in the other two causes, the issues they have raised are similar to those where they have been sued. It is my finding that the question on whether Petition 230 of 2019 should be consolidated with the Petition No. 213 of 2019 and Petition No. 222 of 2019 can only be answered in the affirmative to allow for the expeditious determination of the matter in the spirit of Article 159(2)(b) of the Constitution.

In so finding, I take into consideration that the consolidated Petitions No. 213 of 2019 and Petition No. 222 of 2019 had been scheduled for hearing on 18<sup>th</sup> May 2020 before a single Judge.

I do not agree with the argument that the number of parties or filed documents should be a determining factor.

**I thus grant the orders sought in the application dated 26<sup>th</sup> February 2020 and hereby consolidate Petition No. 230 of 2019 with Petition 213 of 2019 as consolidated with Petition No. 222 of 2019.**

With respect to the Second Application, the Applicants in support have prayed that this Court certify that the Petitions raise substantial questions of law and should be placed before the Hon. Chief Justice for purposes of appointing an uneven number of Judges to hear and determine the matters. Learned Counsel Mr Muthomi argued that the substantial questions of law revolve around the functional and institutional integrities of County Governments. The parties in support of this position argued that the petitions raise novel questions of law and that the Court should also consider the bulkiness of the documents.

Senior counsel Mr Ngatia and Counsel Mr Gikera, in opposition to the application, submitted that the Petitions raise questions that can be determined by a single Judge. It is further submitted that the value of the subject matter and number of persons involved alone do not warrant certification of a matter as raising issues of great public importance. That parties had already conceded to Petition 213 of 2019 as consolidated with Petition No. 222 of 2019 being heard by a single Judge and a hearing date had already been set for 18<sup>th</sup> May 2020. That empanelling will unnecessarily delay the matter and that there are no weighty issues of public interest.

Article 165(4) of the Constitution provides:

**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.**

As rightfully submitted by the parties, the Constitution does not define what a substantial question of law is. **Majanja J.** in the **Harrison Kinyanjui Case [supra]** held that:

*“The Constitution does not define, “substantial question of law”. 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 not being less than three to determine a matter...”*

Further, in **Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** the Court of Appeal held:

*“...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;*
- (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 the matter for which the certification is sought.”*

*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.”*

I have considered all the arguments in support and those in opposition to the application. Ultimately, it is for the Court to determine whether the Petitions raise substantial questions of law. The Applicants came up with a list of what they considered were the substantial questions of law in the three Petitions. In my view, all these questions are connected to the Constitutionality and implementation of the impugned Act.

I have noted that indeed parties were ready to proceed on 18<sup>th</sup> May, 2020 and the Second Application for empanelling came rather late in the day. I have also considered that the issues in the three petitions are matters of interpretation of the Constitution, a question that Courts are called upon to determine on a daily basis.

As stated above, the issues before this Court are centred on the protection of members of the scheme and the constitutionality of the impugned Act. This Court being of the same status with the High Court, it is mandated under Article 165(3) (d) to hear any question respecting the interpretation of the Constitution and whether any law is inconsistent with the Constitution.

It is my opinion that there are no novel issues raised herein and the questions raised can adequately be addressed by a single judge. It is my further opinion that the intricacies of a three Judge bench are likely to delay the determination of the Petitions, all of which were filed under certificate of urgency.

I also note that certification of a matter as raising substantial question of law is largely a perception issue. This court is at the lowest rung of the superior courts and any litigant not satisfied with the decision at this level has recourse to the Court of Appeal and Supreme Court both of which sit in panels.

I have considered the urgency of the issues raised in the petitions and the complexities of empanelling a bench, as well as the administrative constraints that would normally be associated with benches. If I refer this matter to the Chief Justice today, I can vouch that the earliest the panel would be able to sit is perhaps early next year. This would be complicated by the current COVID -19 pandemic and the prevailing social distancing requirements. I think expediency would militate against the certification of this matter of empanelling of a bench.

In further declining the application for certification, I find that the intricacies of a three Judge bench are likely to delay the determination of the Petitions all of which were filed under certificate of urgency. There are no novel issues raised herein and the questions raised can adequately be addressed by a single judge as has been the case where other Acts of Parliaments or sections thereof have been declared unconstitutional.

**I therefore decline the application to certify the petitions herein for purses of empanelling of a bench and accordingly dismiss the application dated 26<sup>th</sup> May 2020 with no orders for costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF JULY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**