



REPUBLIC OF KENYA



KENYA LAW
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**Estate Sonrisa Limited v Leperes & 2 others (Petition E557 of 2025)
[2025] KEHC 12266 (KLR) (Constitutional and Human Rights) (29 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12266 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E557 OF 2025
AB MWAMUYE, J
AUGUST 29, 2025
IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA
IN THE MATTER OF ALLEGED CONTRAVENTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
10,19,27,40,47,48,50,73,159,160 AND 244 OF THE CONSTITUTION OF KENYA**

BETWEEN

ESTATE SONRISA LIMITED PETITIONER

AND

JUSTICE NAIKUNI LUCAS LEPERES 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

SAMUEL KAMAU MACHARIA 3RD RESPONDENT

RULING

1. The Court has perused and considered in Chambers the Petitioner/Applicant's Notice of Motion Application dated 27/08/2025 which was filed and allocated on 28/08/2025 and placed before this Judge on 29/08/2025.
2. The Petitioner/Applicant's Notice of Motion Application dated 27/08/2025 has three prayers. Those prayers are, verbatim:
 - a. This application be and is hereby certified urgent and admitted for hearing during the August 2025 Court vacation.



- b. An order be and is hereby made that the Petition herein dated 27th August, 2025 raises substantial questions of law under Articles 165 (3) (b) and (d) of the Constitution of Kenya.
 - c. The Petition herein dated 27th August, 2025 be and is hereby referred to the Chief Justice for assignment of an uneven number of Judges, being not less than five to hear it.
 - d. Costs of the application be provided for.”
3. After considering the Application and the Petition, I am satisfied that the Petitioner/Applicant’s Notice of Motion Application dated 27/08/2025 is one that is ripe for summary determination. The heart of the Application is the prayer for certification of the Petition herein as being one that raises substantial questions of law under Article 165 (3) (b) and Article 165(3)(d) of the Constitution and thus should be referred to the Honourable Chief Justice under Article 165(4) of the Constitution for empanelment of a bench comprising of an uneven number of Judges not being less than three.
 4. Summary determination of an Application is a tool available to a court that should be used rarely and only in the most clear of instances. Summary determination, to my mind, should be limited to clear-cut instances where the court is being invited to consider the exercise of its discretion in a manner in which an opposition to the Application would be unsuccessful or would not even arise.
 5. For instance, if an Application is filed seeking the vacation of directions and bringing forward a mention date so that the Petitioner may withdraw the Petition that was not served on the Respondent, insistence on service and inter partes hearing of that Application would not be a prudent use of scarce judicial time and resources, nor would it resonate with the Constitution’s directive contained at Article 159(2)(b) that “justice shall not be delayed.”
 6. In the present case, I take a view that even if the Petitioner/Applicant had not filed an Application seeking certification, the Court would nevertheless have arrived at a determination that the matter is one that requires hearing and determination by a bench comprising of an uneven number of judges not being less than three.
 7. The Constitution, (Article 165(4) does not define what a substantial question of law is, but from the reading of Article 165(3)(b) and (d), the question must on breach of the constitution, violation, denial or infringement of fundamental freedoms under the Bill of rights, or one on the interpretation of the constitution. where the question raised in the petition touches on an issue under Article 165 (3)(b) or (d), the court will then have to decide whether it is a substantial question of law before certifying it for purposes of empaneling a multi judge bench. Guidance, therefore, must come from municipal and also international authorities.
 8. Having perused the Petition dated 27/08/2025, I am satisfied that the five-prong test elucidated by the Supreme Court of India in the seminal case of Sir Chunilal V Mehta and Sons Limited -v- Century Spinning and Manufacturing Company Limited [1962 AIR 1314] has been met, albeit with the fifth test being modified in the present instance of a summary ruling to be whether the questions of law are capable of alternative views and interpretations. The Petition herein also touches on the questions of judicial immunity, decisional independence, transparency and accountability of judges of the superior courts, and the interplay between various constitutional provisions that are currently being considered in whole or in part by multi judge benches; and consequently, a referral to the Honourable Chief Justice pursuant to Article 165(4) of the Constitution was inevitable.



9. In the case of *Law Society of Kenya v the Attorney General & 10 Others* [2016] eKLR, Lenaola J, (as he then was) dealt with an Application for referral and stated that in deciding whether or not to refer a matter, the court exercises a discretion and in doing so the court should consider whether the matter is complex, raises a novel point, whether the matter requires substantial amount of time to be disposed of and the level of public interest generated by the Petition. In the present instance, the Petition before this Court raises novel points, would require a substantial amount of time and judicial application to be disposed of, and in concert with the high level of public interest that has been generated around the topics of judicial immunity, decisional independence, and transparency and accountability of judges of the superior courts.
10. It is important to note that jurisprudentially, a decision of the High Court issued by a single judge has the same jurisprudential weight as that issued by a multi judge bench. This has been the unanimously consistent position taken by the High Court in cases such as *Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi* [2017] eKLR and *Philomena Mbete Mwilu v Director of Public Prosecution & 4 others* [2018] eKLR; and by the Court of Appeal in cases such as *Peter Nganga Mutwiri -v Credit Bank Limited* [COA Civil Appeal No. 203 of 2006]. The reason for a multi judge bench is clear, some matters raise such novel, weighty, complex, and significant public interest questions of law that when tasked with charting the course into those new constitutional and legal territories the task before the High Court is best handled by three or more High Court judges.
11. The Petitioner/Applicant has prayed that this Court, in certifying the matter under Article 165(4), should specify to the Honourable Chief Justice that the uneven number of judges be no less than five (5). This ruling will not issue such a direction, as a plain reading of Article 165(4) of *the Constitution* does not confer such authority on the certifying judge. A judge who directs the number of uneven judges in the multi judge bench to be empaneled by a Chief Justice would be using judicial craft and innovation to add words to Article 165(4) in a circumstance that usurps the role of the drafters and the people of Kenya who promulgated their supreme law in the terms they wished.
12. A Chief Justice is after all, a Justice not only serving in our nation's apex court, but is also the President of that highest court; and thus, is fully able to exercise discretion in determining the number of judges that will form the multi judge bench. A Chief Justice's discretion to determine the uneven number of Judges of the High Court to sit, hear, and determine a matter certified under Article 165(4) cannot and should not be fettered and the certifying judge's role in the matter ends at certification, with the uneven number of judges being solely the responsibility and discretion of the Chief Justice.
13. As I conclude this summary ruling, and undertaking the formality of issuing the inevitable orders that must follow from the foregoing, I am compelled to state that in some other instances I have directed similar applications to be heard inter partes because the certification or otherwise in those cases was not clear cut and this Judge's decision-making required input from the parties. In this instance, the need for a multi judge bench to hear and determine this Petition is so manifest that it is unconceivable that any party would argue the contrary, or perhaps be able to convincingly argue that this is not a matter that requires certification.
14. These questions of judicial immunity, decisional independence, transparency and accountability of judges of the superior courts, and the interplay between various constitutional provisions under Chapters Four (The Bill of Rights), Chapter 6 (Leadership and Integrity), Chapter 10 (The Judiciary), Chapter 13 (The Public Service), and Chapter 15 (Commissions and Independent Offices) that this Petition seeks answered are tremendously significant and have profound implications. As a nation whose courts generate jurisprudence that persuades courts across the commonwealth and beyond, the task of answering those questions can only come from a multi-judge bench.



15. Noting that this matter was filed during the August Court Recess, and cognizant of the various considerations that arise from the Petition, this Court will not fix a mention date on behalf of the multi judge bench to be empaneled.
16. In light of the foregoing, this Court summarily determines the Petitioner/Applicant's Notice of Motion Application dated 27/08/2025 as follows:
 - a. This Court finds and declares that the Petition herein dated 27/08/2025 raises substantial question questions of law under Articles 165(3)(b) and (d) of *the Constitution*;
 - b. This Court, pursuant to the provisions of Article 165(4) of *the Constitution* certifies that the Petition herein raises substantial questions of law under Articles 165(3)(b) and (d) of *the Constitution* and consequently this Court file shall forthwith be forwarded to the Honourable Chief Justice for empanelment of a multi-judge bench of Judges of the High Court, not being less than three, to hear and determine this matter;
 - c. Administrative actions in this Division to be undertaken forthwith;
 - d. Noting that the Petitioner/Applicant's Notice of Motion Application was determined summarily and without service and inter partes hearing, there shall be no costs on the Application.

Orders accordingly. Administrative actions to be taken accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 29TH DAY OF AUGUST, 2025.

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BAHATI MWAMUYE
JUDGE

