REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(CORAM: Tunoi, Ibrahim, Ojwang, Wanjala, Ndungu, SCJJ)

REFERENCE NO. 1 OF 2012

IN THE MATTER OF AN APPLICATION BY THE KENYA NATIONAL COMMISSION ON HUMAN

RIGHTS FOR AN ADVISORY OPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION OF KENYA

-AND-

IN MATTER OF THE BILL OF RIGHTS AND FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 19, 20, 21, 22, 48 AND 50 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF SECTION 40 OF THE SUPREME COURT RULES, 2011 UNDER LEGAL

NOTICE NO. 141 OF 2011 MADE PURSUANT TO THE SUPREME COURT ACT (NO. 7 OF 2011) AND

ARTICLE 163(8) OF THE CONSTITUTION OF KENYA, 2010

-BY-

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS……APPLICANT

-AND-

THE HON. THE ATTORNEY-GENERAL…..1st INTERESTED PARTY

THE COMMISSION ON ADMINISTRATIVE JUSTICE

(OFFICE OF THE OMBUDSMAN)…….…….....2nd INTERESTED PARTY

R U L I N G

A. BACKGROUND

[1] The applicant herein is the Kenya National Commission on Human Rights. The applicant, by way of **Reference No.1 of 2012,** seeks to invoke the Supreme Court's Advisory Opinion Jurisdiction pursuant to the provisions of **Article 163 (6)** of the Constitution. The said Article provides that:

"**The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."**

[2] The applicant seeks an advisory opinion from this Court to the effect that "Rule 40 (1) of the Supreme Court Rules 2011 published under Legal Notice No. 141 pursuant to the Supreme Court Act No. 7 of 2011 and Article 163 (8) of the Constitution of Kenya is restrictive and requires re-drafting and/or amendment to enable parties other than the national government, county governments and State organs to seek the advisory opinion of this Honorable Court under Article 163(6) of the Constitution of Kenya. Further, the advisory opinion is sought based on the apprehension by the applicant that, the said Rule 40 (1) as presently drafted may violate Articles 19, 20, 21, 22, 48 and 50 of the Constitution of Kenya and should, therefore, be repealed, re-written, re-drafted and/or amended to conform to the Constitution of Kenya."

Rule 40 (1) of the Supreme Court Rules, 2011 reads as follows:

"**The national government, a State organ or county government may apply to the Court by way of reference for an advisory opinion under Article 163(6) of the Constitution"**

[3] Although the **Supreme Court Rules, 2011** have since been revoked vide **Rule 56 of L.N No. 123 of 2012,** the contents of **Rule 40(1)** of those Rules have been replicated word for word, as **Rule 41(1) of the Supreme Court Rules 2012.** Therefore, it is to this latter Rule that we shall make reference, in considering the merits of the application before us.

[4] In support of this reference, is an Affidavit sworn and filed by the applicant's Advocate, Senior Counsel Mr. Nzamba Kitonga. Counsel avers that this rule may be erroneously, wrongly and irregularly interpreted to mean that no person whether human or corporate, other than a national government, a State organ or a county government can seek an advisory opinion before this Court on any matter concerning county government, in terms of Article 163 (6) of the Constitution. Such a narrow and restricted interpretation, counsel further contends, would defeat the fundamental basis of the Constitution which gives citizens unlimited, unfettered and unrestricted access to justice and the Courts, in equal measure with all State organs.

[5] The applicant further expresses the view that a holistic reading of the Constitution and, in particular, Articles 1, 19, 20, 21, 22, 27, 48 and 50 thereof, supports the proposition that any person whether human or corporate, may seek an advisory opinion on county government under Article 163(6) of the Constitution, in addition to the national government, a State organ, or county government. Therefore, it is contended, limiting access to this Court in terms of Rule 41 (1) of the Supreme Court Rules, 2012 may amount to discrimination under the Constitution.

[6] In view of the averments thus highlighted, the applicant requests this Court ***"by way of an advisory opinion [to] advise the Honourable The Chief Justice, who is also the President of the Court, on his own behalf and on behalf of the Court, to re-write, redraft, repeal and/or amend Rule 40 (1) (now Rule 41(1)) of the Supreme Court Rules, 2012 in a manner that enables any person whether human or corporate to seek an advisory-opinion from this Court under Article 163(6) of the Constitution of Kenya."***

[7] A second affidavit in support of the contentions of the applicant is sworn by one Mohammed Hallo, who is also the secretary of the applicant. In his averments, Mr. Hallo reiterates the basic arguments advanced by the applicant's advocate, to the effect that Rule 41(1) of the Supreme Court Rules, 2012 is restrictive and should be amended or redrafted. However, this particular deponent makes a curious averment, to the effect that the applicant

had intended, in furtherance of its objectives, and for purposes of greater clarity of the Constitution of Kenya, to seek the advisory opinion of this Court on questions such as:

a. *the status of the Provincial Administration in relation to county governments in the current constitutional dispensation;*
b. *the status of the Constituency Development Fund in relation to county governments and the national government in the current constitutional dispensation; and*
c. *several other matters in relation to devolution and the role of the national government.*

[8] We say *"curious"* because, it is unusual for an affidavit sworn in support of a cause, to contain the deponent's intentions of future litigious action. Moreover, the use of the words *"had intended"* means that such intentions (as disclosed in paragraph 5 of the affidavit) have, in fact, been abandoned. One is left to wonder whether, if at all, the jettisoning of such a scheme is in any way connected to the reference herein.

B. **SUBMISSIONS**

[9] Be that as it may, the application is opposed by both the first and second interested parties, to wit, the Attorney-General and the Commission on Administrative Justice respectively. The second interested party submits that *this Court lacks jurisdiction to entertain the matter before it*, as requests for an advisory opinion are limited to matters concerning county government; and that the application before the Court does not in any way concern itself with county government. Mr. Chahole for the second interested party submits that Article 163(6) *limits both the parties and the scope for seeking an advisory opinion.* He urges that while the applicant passes the first test (being a state organ), it fails the second test, since the subject matter of the application is not one concerning county government. The request, he submits, is one that seeks the interpretation of the Constitution, more particularly, Article 163(6) thereof, and not an advisory opinion. Therefore, counsel urges, the application should be dismissed for want of jurisdiction. Learned counsel Mr. Moimbo, on the other hand, is of the opinion that *the Court has jurisdiction to entertain the application but should, however, decline to exercise it.* This opinion appears to be informed by the written submissions earlier filed by Mr. Munyi, learned counsel for the first interested party, in which he argues that Article 163 (6) *does not limit the national government and State organs, in terms of the nature of the issues on which they may seek an advisory opinion from this Court.* It is Mr. Munyi's view that only county governments are limited to matters concerning county government.

[10] The first interested party urges that the reference be dismissed on grounds that it is not only an abuse of the process of Court, but is based on a misinterpretation of the Constitution. The impugned Rule, counsel for the first and second interested parties (Mr. Moimbo and Mr. Chahole, respectively) contend, is a replica of Article 163(6) of the Constitution (both in content and word sequencing). That being the case, the two counsel submit, to grant an advisory opinion in the terms prayed for by the applicant, would be tantamount to amending the Constitution through the back door by this Court. They urge that Rule 41(1) of the Supreme Court Rules can only be amended/re-written or redrafted after Article 163 (6), of which it is a replica, has been amended. Counsel further submits that the Rule in question was deliberately drafted so as to reflect the constitutional provision in content and basic intent. They urge that the Constitution can only be amended in the manner provided, and not through an advisory opinion. It is their submission that if Rule 41(1) had been drafted in any manner other than in its present form, it would have been repugnant to Article 163(6) of the Constitution.

[11] Regarding the claim that Rule 41 (1) of the Supreme Court Rules is restrictive and has the effect of excluding persons other than the national government, state organ or county government from seeking an advisory opinion from this Court, counsel for the first and second interested parties submit that indeed the restriction is what the Constitution intended, and that Article 163(6) is categorical as to who may seek an advisory opinion from the Supreme Court. The Rule, it is submitted, has remained faithful to the letter and spirit of the Constitution.

[12] In response to the applicant's claim that Article 41(1) of the Supreme Court Rules offends the Bill of Rights, due to its discriminatory effect (restricting those who can seek advisory opinions from this Court), both counsel for the interested parties argue that the proper forum for adjudicating such a claim would be *the High Court*, in light of the provisions of Article 165 (3) of the Constitution. The reference, they contend, ought to have been filed as a constitutional reference before the Constitutional and Human Rights Division of the High Court, since it is basically seeking a declaration that the Rule offends the fundamental rights of the individual enshrined in the Constitution.

[13] The second interested party also considers the issue as to whether a constitutional provision can be deemed *"unconstitutional"*. This is based on the premise that what the applicant is seeking, in effect, is a *declaration of Article 163(6) as being "unconstitutional"*, through the guise of an advisory opinion. The second interested party argues that the intention of the makers of the Constitution was to limit the persons who may seek an advisory opinion to the *three entities specified in Article 163(6).*

[14] The second interested party further submits that in seeking an advisory opinion, the three entities i.e., the national government, State organs and county governments, would be doing so on behalf of "the people": which defeats the argument that Rule 41(1) discriminates against "the people".

[15] The interested parties urge that the reference be dismissed on grounds that it is incompetent.

C. ANALYSIS

i. *On Jurisdiction*

[16] This Court has had occasion to pronounce itself on the parameters within which an advisory opinion may be sought, pursuant to the provisions of Article 163(6) of the Constitution: ***In the Matter of the Interim Independent Electoral Commission: Constitutional ApplicationNumber 2 of 2011***. *A*t paragraph 83 (i) and (ii) in that decision, the Court was categorical that:

"For a reference to qualify for the Supreme Court's Advisory Opinion discretion, it must fall within the four corners of Article 163 (6): it must be ***'a matter concerning county government****.' The question as to whether a matter is one concerning county government, will be determined by the Court* ***on a case- by- case basis.***

"The only parties that can make a request for an Advisory Opinion are the ***national government, a State organ, or county government****. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as* ***an intervener (interested party) or as amicus Curiae."***

The two principles have been restated and reaffirmed in subsequent references to this Court for advisory opinions. Thus, there can be no doubt as to the import of Article 163 (6) of the Constitution, regarding *who* has the competence to request the Court for an advisory opinion. The Article itself is clear and unambiguous on this score. Secondly, the subject matter for an advisory-opinion must be one concerning *county government.* We therefore agree with Mr. Chahole in his reading of the meaning of Article 163(6), as far as the basis for seeking an advisory opinion is concerned. In equal measure, we disagree with Mr. Munyi's assertion that ***"the national government and State organs have not been limited on the nature of issues they may wish to[seek] advisory opinions on…."***

ii. *The Reference*

[17] The question to be answered is, whether the subject matter of the reference before us is one *concerning county government.* Can it be said that the applicant, a State organ, is seeking an advisory opinion from this Court on a matter concerning county government" The applicant seeks an advisory opinion in the following terms:

"1. THAT Rule 40 (1) of the Supreme Court Rules 2011 (now 41 (1) of the Supreme Court Rules of 2012) pursuant to the Supreme Court Act No. 7 and Article 163 (8) of the Constitution of Kenya is restrictive and requires re-drafting and/or amendment to enable parties other than the national government, county governments and State organs to seek the advisory opinion of this Honourable Court under Article 163(6) of the Constitution of Kenya.

"2. THAT the said Rule as presently drafted may violate Articles 19, 20, 21, 22, 48 and 50 of the Constitution of Kenya and should therefore be repealed, re-written, re-drafted and/or be amended to conform to the Constitution of Kenya."

[18] Is the applicant really seeking an advisory opinion" In our view, the applicant is not seeking an advisory opinion within the meaning of Article 163(6) of the Constitution. *Where is the matter concerning county government in the two paragraphs as framed by the applicant"* On the face of the application it is clear to us that, what the applicant seeks is not an advisory opinion, but a declaration that Rule 41(1) of the Supreme Court Rules of 2012 is unconstitutional. This *"reference for an advisory opinion"* is actually a *constitutional reference* in disguise. The main objective of the applicant is to elicit a declaration from this Court regarding the constitutionality or otherwise of Rule 41 (1). This is the true nature of the application, notwithstanding the contention by counsel for the applicant, Mr. Kitonga in his written submissions, to the effect that *"this application….squarely relates to county governments."*

[19] We agree with counsel for the interested parties in their contention that this application ought to have been filed at the High Court. The High Court is seized with original jurisdiction to determine whether a piece of legislation or subsidiary legislation is unconstitutional. Mr. Kitonga submits that it would be ridiculous to file a petition in the High Court to challenge rules made by the Supreme Court which is superior to the High Court. We, however, see no hierarchical impropriety if a party were to challenge a Supreme Court Rule in the High Court. What would be at stake in such circumstances is not the reputation of the Supreme Court, but the constitutionality of the rule in question. Moreover, it should be clear that Rules and Regulations are only *subsidiary legislation;* and, more emphatically than in the case of an *enactment*, they are subject to annulment by the High Court in exercise of its unlimited jurisdiction.

[20] The Constitution remains supreme over all other laws in the land. Mr. Kitonga will be aware that even the provisions of the Supreme Court Act itself have been questioned not just in this Court, but at the High Court. In ***Samuel KamauMacharia v. Kenya Commercial Bank Limited Civil Application No. 2 of 2011***, this Court declared Section 14 of the Supreme Court Act unconstitutional, for vesting in the Court a jurisdiction that exceeded the confines of the Constitution. Recently, in ***The Commission on Administrative Justice v. The Attorney-General, Petition No. 284 of 2012,*** the High Court declared section 16 (2) (b) of the Supreme Court Act, and Rules 17, 41, 42 and 43 of the Supreme Court Rules unconstitutional.

[21] Flowing from the foregoing, we must arrive at the conclusion that the reference before us, as framed by the applicant, is incompetent, and must be dismissed. This conclusion would have been sufficient to dispose of the matter at this stage. However, we take note of the fact that the issue of jurisdiction was not raised by the interested parties by way of preliminary objection. The matter was raised in the course of the substantive application. We therefore think it is proper to consider the entire application on its merits. This brings us to the question as to whether, as urged by the applicant, Rule 41 (1) of the Supreme Court Rules is *discriminatory* and ought to be amended.

[22] Rule 41 (1) of the Supreme Court Rules of 2012 provides that *"the National Government, a State organ or County Government may apply to the Court by way of reference for an advisory opinion under Article 163(6) of the Constitution."* The Rule is on all fours with the Article 163(6) of the Constitution. It actually replicates the provisions of that Article. Yet, Mr. Kitonga for the applicant strongly submits that the Rule as framed has the effect of excluding parties other than the ones specified, from making applications to this Court for advisory

opinions. He contends that individuals, Non-Governmental Organizations and professional bodies are excluded by the restrictive words of the Rule. Mr. Kitonga submits that Article 163 (6) of the Constitution has to be read broadly and holistically, taking into account the provisions of Articles 19, 21, 22, 27, 28 and 50 of the Constitution. It is his submission that the said Articles have opened the frontiers *"for all citizens to access justice by approaching the courts of law to vindicate their rights."* And so, he urges, Article 163(6) should not be interpreted in a manner that locks out other persons whether human or corporate, from making applications for advisory opinions.

[23] We are unable to appreciate the cogency of such an argument. *"Rights"*, as they are attributed to persons under the Constitution, bear the dictionary meaning *(Black's Law Dictionary,* 8th ed. (2004), at p. 1347):

> *"Something that is due to a person by just claim, legal guarantee or moral principle"*.

Do persons in general, have a *right to an advisory opinion* of the Supreme Court" We do not think so: for the rights declared in the Constitution are, by Article 22, enforceable by way of regular *"court proceedings"*. Such proceedings, in our perception, do not necessarily include the Supreme Court's *advisory opinions.* Such opinions, in our view, are of an exceptional nature and, by design, are meant to serve as a device in aid of the main tasks of the institutional conduct of governance. And thus, those entitled to resort to such opinion are: the national government; any State organ; or any county government (Article 163(6)).

[24] In the ***Interim Electoral Commission*** case, this Court duly considered the nature and purpose of the advisory-opinion mandate in common law and other jurisdictions. It was noted that where it exists, the advisory- opinion jurisdiction is closely defined both in terms of procedure, and juridical effect. In Kenya, the advisory-opinion jurisdiction is a creature of the Constitution of 2010. This Court found it necessary to set guidelines for the exercise of its advisory-opinion jurisdiction. One of the guidelines set by the Court reads as follows:

"The only parties that can make a request for an advisory-opinion are the ***national government, a state organ, or county government****. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as* ***an intervener (interested party) or amicus curiae****."*

[25] It is clear that this Court has already pronounced itself on the meaning of Article 163(6), as to who may move the Court for an advisory opinion. Rule 41 (1) accurately reflects Article 163(6) of the Constitution. It also reflects the Court's interpretation of the same. It cannot be said to be either restrictive or discriminatory, in any manner. Indeed, contrary to the applicant's apprehension, the Court's guideline makes it possible for parties *other than* the national government, State organ or county government, to participate in advisory-opinion proceedings, as interveners or *amici curiae.* So far, many persons have participated in such proceedings as have been initiated before this Court. We do not see how Rule 41 (1) of the Supreme Court Rules in any way hinders one's enjoyment of the Bill of Rights, as stipulated in Chapter 4 of the Constitution. All the rights therein are enforceable in the High Court, with avenues for appeal open all the way to the Supreme Court. The advisory-opinion jurisdiction, on the other hand, is not only discretionary, but exercisable in the manner provided for in Article 163(6).

[26] In his written and oral submissions, Mr. Kitonga has persistently urged us to holistically, broadly and robustly interpret the Constitution, so as to find that Article 163(6) means *all persons*, and not just the entities mentioned therein, can apply for advisory opinions. Counsel is, in effect, asking us to find that Article 163(6) of the Constitution does not mean what it says, through *"a holistic interpretation"*. But what is meant by a *'holistic interpretation of the Constitution'"* It must mean interpreting the Constitution *in context*. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

ORDERS

[27] In view of the foregoing, this reference for an advisory opinion is hereby dismissed. We make no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this **27th day of February, 2014.**

…… ……

P. K. TUNOI **MOHAMMED K. IBRAHIM**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…… ……

J. B. OJWANG **S. C. WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……..……...

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT