Case Number:	Miscellaneous Civil Application 56 of 2011
Date Delivered:	08 Nov 2012
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	-
Judge:	Ruth Nekoye Sitati
Citation:	MATIKO BOHOKO & ANOTHER V PRIME MINISTER AND MINISTER FOR LOCAL GOVERNMENT & 2 OTHERS[2012]eKLR
Advocates:	-
Case Summary:	**SUBSTANTIAL QUESTION OF LAW AS ENVISAGED BY THE CONSTITUTION** **Reported by Emma Kinya Mwobobia** **Issue** i. Whether the various issues based on political questions raised in this matter constituted a substantial question of law as envisaged in Article 165 (4) of the Constitution. Constitutional Law-interpretation of the Constitution – substantial question of law – constitutional provision setting out matters that ought to be heard by an uneven number of judges not being less than three to be assigned by the Chief Justice – need for such matters to be certified by court as raising a substantial question of law touching on jurisdiction – whether the issues based on political questions which were in

the realm of a political organ raised a substantial question of law? Read More...

Article 165 (4) of the Constitution, 2010 sets out the type of matters that ought to be heard by an uneven number of judges not being less than three to be assigned by the Chief Justice. Such matters are those that are certified by the court as raising a substantial question of law touching on jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been infringed, denied, violated or threatened or jurisdiction to hear any question respecting the interpretation of the Constitution.

Held:

1. The promulgation of the Constitution of Kenya, 2010 brought into being a whole new law that in every aspect raises substantial questions of law because the Constitution is new. The expanded bill of rights, citizenship issue, leadership and integrity and the issue of dealing with devolved government were matters that needed constant interpretation by the courts.

2. If every such question were to be determined by a bench of more than 2 judges, other judicial business would come to a standstill and if so, then the expectation of the public to have their cases decided expeditiously as provided under Article 159 (2) of the Constitution and section 1A and 1B of the Civil Procedure Act would never be realized.

3. The petition did not raise such a substantial question of law as envisaged by the Constitution which could only be decided by an uneven number of judges not being less than three. Therefore, there was no justification to refer the matter to the Chief Justice to empanel a bench of not less than three judges to hear and

	determine the same. 4. The Constitution had established the Supreme Court so that if the petitioners were not satisfied by the decision of a single judge they could move to the Court of Appeal and to the Supreme Court if need be. Application dismissed.
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

High Court of Kisii

Miscellaneous Civil Application 56 of 2011

NO.606

IN THE MATTER OF DEVOLUTION OF GOVERNMENT UNDER CHAPTER 11 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER CHAPTER 4 OF THE CONSTITUTION OF KENYA

BETWEEN

MATIKO BOHOKO

DANIEL CHACHA

Persons acting as members of the Kuria Community **……......................…....……….. PETITIONERS**

VERSUS

DEPUTY PRIME MINISTER AND MINISTER FOR LOCAL GOVERNMENT …….1ST RESPONDENT

CLERK TO THE NATIONAL ASSEMBLY ………………...… 2ND RESPONDENT

HONOURABE ATTORNEY GENERAL ………..………….… 3RD RESPONDENT

RULING

1. By the Further Amended Petition dated 11th September 2011 and filed in court on 13th September2011, the Petitioners pray that:-

a) A declaration be made that the proposed Devolved Governments Bills would deny the Kuria Community a fair, just and equitable representation of the Migori County Assembly and is therefore unconstitutional.

b) A declaration be made that in line with constitutional provisions that special seats be created or such steps be taken to afford marginalized communities fair just and equitable representation at the county assemblies.

c) A permanent injunction be issued to restrain the respondents from presenting the Devolved Government Bill 2011 to Parliament until special seats are created and such safeguards put in place to protect marginalized communities like the Petitioners.

d) Costs of the petition.

2. The grounds upon which the petition is premised are set out in the Further Amended Petition and in particular that the Kuria Community which falls within Migori County has only one constituency as opposed to 6 constituencies inhabited by the Luo Community which then means that the voice of the Kuria people shall be under represented in such a case. The Petitioners also argue that the proposed law does not have prescriptions or safeguards to protect minority communities such as the Kuria who would remain under represented at the Migori County Assembly. That such a situation will result in immense suffering to the Kuria Community, hence these proceedings.

3. Contemporaneously with the Petition, the Petitioners filed a Notice of Motion seeking injunctive orders to restrain the respondents jointly and severally from presenting/forwarding the Bills of Devolution as formulated by themselves to parliament for debate pending the hearing and determination of the application.

4. Both the application and the petition were opposed vide the Grounds of Opposition filed on 7th November 2011. These grounds are:-

1. *The issues raised by the petitioners are based on political questions and therefore are in the realm of political organ;*

2. *That the issues raised by the petitioners are non justiciable and are beyond the court's juridical determination;*

3. *That the issues raised in the application and petition are not ripe for determination;*

4. *That the issues raised by the petitioners' are moot, as the Bills in question are still being processed by the respondents and the interested parties;*

5. *That the petition offends the principle of separation of powers because it seeks the intervention of the judiciary to supervise the legislature in its exclusive constitutional mandate to legislate and*

6. *The application is misconceived and incompetent by failure of the petitioners to comply with the provisions of the* ***Judicature Act Cap 8 Laws of Kenya****.*

5. When this matter came up for hearing before me on 24th October 2011, counsel for the petitioner requested for orders to have the file placed before the Hon. the CJ empanel a Bench of at least 3 Judges to hear the Petition. The argument was that the issues raised by the Petition may require to be heard by such a Bench. The application was made under **Article 165 (3)** and **(4)**of the **Constitution of Kenya, 2010**.

6. By an order of this court made on 24th October 2011, this file was forwarded to the Hon. the CJ for directions as to the hearing of the Petition.

7. By a letter dated 8th November 2011, the file was forwarded back to this court with directions by the Hon. the CJ directing the matter to be placed before me for hearing of **"more arguments, including those of the respondents and interested parties, and thereafter make a decision that gives reasons why the matter should be certified as raising substantial questions of law"** requiring the Hon. the CJ to empanel a bench of an uneven number of judges being not less than three.

8. Consequent upon the directions as above indicated, the parties again took directions before me and agreed to present their arguments by way of written submissions on whether or not this petition raises such constitutional issues as should be heard by more than one judge. However the Petitioners did file any arguments within the prescribed time. The Petitioners were granted more time to file submissions, but have not done so to date.

9. The respondents filed their submissions dated 1st March 2012 on the 5th March 2012. In the submissions, counsel for the respondents condensed and argued grounds 1, 2 and 5 together saying that the questions raised in the petition are of a political nature and should therefore be left to a political process. Reliance was placed on the case of **Muscrat –vs- United States (219 vs 346 (1911)**. Counsel submitted that there is no proper case for determination before this court since the issue of the boundaries is yet to be determined. On this issue, the court must point out that the issue of boundaries has since been determined by the Independent Electoral and Boundaries Commission (IEBC) and that at the proper time, the Petitioners can be heard on the issues raised herein.

10. On the principle of separation of powers, it was argued that the judiciary should not interfere in this political issue because if that were to happen, the judiciary would be interfering with the legislature in which case the actions of the judiciary would be unconstitutional. Reliance was placed on **Heyburn's case, 2 Dall. 409** in which the U.S Supreme Court said the following:-

"--- neither the legislature nor the executive branch of government of the US can assign to the judicial branch any duties other than those that are properly judicial to be performed in a judicial manner ------."

11. The argument put forward on behalf of the respondent is that this court should not descend into issues that are purely of a legislative nature; as such a step would amount to one arm of government interfering with another arm of government.

12. Counsel also submitted that the issues raised in this petition are speculative and moot, but as already pointed out, the IEBC has already compiled and published its report on the new boundaries in line with **Articles 88 (4) (c)** and **89 (3)**, though as at the time of filing this petition, the IEBC was still in the process of compiling its report on the new boundaries.

13. After carefully reading through both the Further Amended Petition together with the Notice of Motion and the submissions by the respondents, the issue is not whether the Petition should be heard by a single judge bench or whether it should be heard by a judge comprising more than 3 judges, but whether the issues raised therein constitute a substantial question of law in terms of **Article 165 (4)** of the**Constitution**.

14. **Article 165 (4)** of the **Constitution** sets out the type of matters that ought to be heard by an uneven number of judges not being less than three, to be assigned by the Chief Justice. Such matters are those that are certified by the court as raising a substantial question of law touching on jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, or jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of:-

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be one under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

15. A question similar to the question that is now before me was raised in the case of **Gilbert Mwangi Njuguna –vs- Attorney General[2012] e KLR – Nairobi Petition NO. 267 of 2009**. The arguments put forward in that petition on behalf of the petitioner in seeking to have the petition decided by a bench of not less than 3 judges were based on the opinion of retired CJ Hon. Apaloo that **"many heads were better than one."** Hon Mumbi Ngugi, J. referred to recent thinking on the interpretation of **Article 165 (4)** of the **Constitution**with regard to what she called **"substantial question of law that merits reference to such a bench for disposal"**. The Court referred to the case of **Community Advocacy Awareness Trust & others –vs- The Attorney General – Nairobi HC Petition NO. 243 of 2011**where the Court made the following observation:-

"The Constitution of Kenya does not define "substantial question of law". It is left to the individual 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."

16. Other cases that have dealt with the question of substantial question of law include **Chunilal V. Mehta –vs- Century Spinning and Manufacturing Co. AIR 1962 SC 1314**. This is an Indian decision cited by the court in the **Mwangi Case** (above). The courttherein had the following to say as to what the term **"substantial question of law"** means:-

"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 or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or calls for discussions of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and

there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law."

17. In the instant case, I would say, as was said by the court in **Community Advocacy Awareness Trust case** (above) that the promulgation of the Constitution of Kenya 2010, has brought into being a whole new law that in every respect raises substantial questions of law because the constitution is new. The Expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue of Chapter Six and Chapter Eleven dealing with Devolved Government are matters that need constant interpretation by the courts. If every such question were to be determined by a bench of more than two judges, other judicial business would definitely come to a standstill. If that were to happen also, then the expectation of the public to have their cases decided expeditiously as provided under **Article 159 (2)** of the **Constitution** and **Sections 1A** and **1B**of the **Civil Procedure Act** would never be realized.

18. Applying the above principles to the matter before me, and in the absence of any submissions by the Petitioners, I am not persuaded that the Petition herein raises such a **"substantial question of law"** which can only be decided by an uneven number of judges not being less than three. The very same Constitution has also established the Supreme Court, so that if the Petitioners are not satisfied by the decision of a single judge they can move to the Court of Appeal and then the Supreme Court if need be.

19. In the result, I find no justification to refer this matter to the Honourable the Chief Justice to empanel a bench of not less than three judges to hear and determine the same. The parties shall therefore proceed to take a date for the hearing of this matter before a single judge here at Kisii.

20. Finally, the court regrets the delay in delivering this ruling for reasons beyond its control.

21. It is so ordered.

Dated and delivered at Kisii this 08th day of November, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Rono for Minda (present) for Petitioners

N/A for Respondents

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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