

THE LAW ON EMPANELMENT OF A BENCH

LA. 04/22

Legal Alert

16 September 2022

Introduction

It is trite law that the decision whether or not to empanel a bench of more than one Judge ought to be made where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions. (See Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & Amicus Curiae [2014] eKLR) This takes into account the fact that judicial resources, especially judicial officers, are scarce and that empanelment of a bench usually results in a delay thus increasing the backlog of cases. (See Coalition for Reform and Democracy & 2 Others -v- Republic of Kenya & Another (No. 1) [2015] eKLR)

Constitutional Perspective

A reading of **article 165** of the Constitution reveals that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is **Article 165(4)**. In all other cases, a single Judge is properly constituted to hear and determine any matter that falls within the jurisdiction of the High Court. Under the said express provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law under **Article 165 (3) (b) of (d)** and in any case in the following instances:

- a. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or
- b. That it involves a question respecting the interpretation of the Constitution and under this is included
 - (i) the question whether any law is inconsistent with or in contravention of the Constitution;
 - (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the 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.

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 the matter. (see Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011).

Case law

In Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR the Court (Majanja, J.) held 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.

Additionally, in Meru High Court Petition No. 16 of 2013 Amos Kiumo & Others -v- Cabinet Secretary Internal and Coordination of National Court and others, the Court (Lessit J.) also stated as follows: -

“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 weight one or that raises a novel issue of law or fact or one that is complex. Many provisions of our Constitution are ... and bring forth novel issues yet it is not every day that we shall call upon the Chief Justice to empanel a bench of not less than 3 judges. Public interest may be considered but it is not necessarily a decisive factor. It is the nature of Petitions...filed to enforce the provisions of our Constitution to be matters of Public interest generally. 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 ...the empaneling should be the exception rather than a [sic] rule. A higher burden is cast on the party who applies to court to certify the matter for reference to the Chief Justice”.

Further, in the Martin Nyaga case (supra) the Court (Odunga, J.) while placing reliance on the cases of (Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314 and Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179) held the view that a matter would be construed to raise a substantial question of law if inter alia any or all of the following factors are present:

- a) whether the matter is moot in the sense that the matter raises a novel point;
- b) whether the matter is complex;
- c) whether the matter by its nature requires a substantial amount of time to be disposed of;
- d) the effect of the prayers sought in the petition; and
- e) the level of public interest generated by the petition.

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