

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: P.M. Mwilu, DCJ & VP; Ibrahim; Wanjala; Njoki & Lenaola)

ADVISORY OPINION REFERENCE NO. E001 OF 2023

**IN THE MATTER OF AN APPLICATION BY KITUO CHA SHERIA FOR
AN ADVISORY OPINION UNDER ARTICLE 163(6) OF THE
CONSTITUTION**

BETWEEN

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.....APPLICANT

AND

ATTORNEY GENERAL.....RESPONDENT

Representation

For the Applicant

(Dr. John Khaminwa, Advocate & Mr. John Mwariri, Advocate)

For the Respondent

(Mr. Emmanuel Bitta, Principal State Counsel)

RULING OF THE COURT

A. INTRODUCTION

[1] The applicant, by way of **Reference No. E001 of 2023** and dated **31st May 2023**, seeks to invoke the Supreme Court's Advisory Opinion Jurisdiction pursuant to the provisions of **Article 163(6)** of the Constitution.

[2] The applicant seeks an advisory opinion from this Court on the following questions:

- a. *Whether there is a limitation to exercise the rights under Article 37 of the Constitution;*
- b. *Under what circumstances can this right provided for under Article 37 of the Constitution be invoked;*
- c. *Whether states can interfere with the right to freedom of assembly;*
- d. *In the event of executing the right under Article 37 of the Constitution, who should be held liable for losses and damages to property;*
- e. *Whether the police play any role regarding Article 37 in case the demonstrations lead to destruction of property, injuries and death;*
- f. *Whether the Bill of Rights under Chapter 4 of the Constitution (in particular freedom to demonstrate) should be enjoyed by some citizens at the expense of others;*
- g. *Whether there is need for reasonable restrictions to protect public safety, national security, public order or the rights and freedoms of others;*
- h. *Whether there is need to balance the interest of protestors and the interest of the public;*
- i. *Whether Courts and legal authorities can engage in a balancing exercise to weigh the rights of assembly, demonstration, picketing and petition against competing interests;*
- j. *Whether violence, destruction of property and disruption of public order can lead to legal consequences;*
- k. *Whether there is legal recourse for violations of the rights to assembly, demonstration, picketing and petition.*

[3] The Respondent filed a Notice of Preliminary Objection dated 21st July 2023 arguing that the applicant, being a Non-Governmental Organization, is not the National Government, a State organ, or County Government as provided for under

the provisions of Article 163(6) of the Constitution and, therefore, lacks *locus standi* to initiate the reference or be heard on the same as a party.

[4] That question raised in regard to *locus standi* of a party goes directly to the issue of whether the Court has jurisdiction to hear this matter. It is therefore imperative that this Court should settle this question at the onset before moving forward with the hearing of the reference itself.

B. PRELIMINARY OBJECTION: SUBMISSIONS

Respondent:

[5] The Attorney General (AG) filed his submissions on 26th October 2023. Mr. Bitta learned counsel for the AG observed that this Court has, on numerous occasions, rendered itself on who can seek an advisory opinion; that this Court has previously clarified what a State organ is and that the applicant had not made out a case for departure from those decisions. In view of the fact that the applicant is a Non-Governmental Organization and describes itself as such, it *ipso facto* fell outside the categories laid out in Article 163(6) of the Constitution.

[6] Counsel further cited the case of ***In the Matter of the National Gender and Equality Commission***, SC Reference No. 1 of 2023; [2014] eKLR where we held that a party moving the Court under Article 163(6) of the Constitution must have *locus standi*. The Court further held that it must, at the first instance, consider whether the party moving it falls within the categories of parties recognized as having *locus standi* by the Constitution.

[7] Counsel further cited the cases of ***Okoiti & another v Attorney General & another***, SC Petition 29 of 2020; [2021] KESC 28 (KLR) and ***Re Matter of the Interim Independent Electoral Commission***, SC Constitutional Application No. 2 of 2011; [2011] eKLR in support of their case.

The Applicant:

[8] Learned Counsel for the applicant, Dr. Khaminwa, submitted that the Court’s jurisdiction to issue Advisory Opinions stems from Article 163(6) of the Constitution. He cited Section 3A of the Supreme Court Act No. 7 of 2011 to the effect that the Court has powers to make such directions as may be necessary for the administration of justice.

[9] He further submitted that the power lies with the people of Kenya and the applicant was relying on the people; that indeed the National and County Governments referred to under Article 163(6) of the Constitution are made up of the people of the Republic of Kenya. He emphasized that it is a person that is provided for under the concept of National Government, County Government and State organ and that, therefore, the applicant was before the Court as a person, under the umbrellas of national government, county government and state organ. Counsel further submitted that the Court ought not to confine itself to the strict provisions set out, but should adopt a broad interpretation that confers *locus standi* on the applicant.

[10] Counsel quoted the definition of state as captured under the Black’s Law Dictionary, Eighth Edition at page 1443 which is as follows:

“The political system of a body of people who are politically organized, the system of rules by which jurisdiction and authority are exercised over such a body of people.”

[11] Further, according to the Black’s Law Dictionary, Eighth Edition at page 715, government is defined as follows:

“The structure of principles and rules determining how a state or organization is regulated. 2. The sovereign power in a nation or state. 3. An organization through which a body of people exercised political authority, the machinery by which sovereign power is expressed.”

[12] The Court was also referred to the definition of county government according to the Black's Law Dictionary, 8th Edition at page 377.

“The largest territorial division for local government within a state, generally considered to be a political subdivision and a quasi-corporation. Every county exists as a result of a sovereign act of legislation, either constitutional or statutory, separating it from the rest of the state as an integral part of its territory and establishing it as one of the primary divisions of the state for purposes of civil administration.”

[13] Counsel urged that a narrow interpretation of the Court's jurisdiction to issue advisory opinions would pose a challenge on the constitutional doctrine of ripeness that prohibits a party from approaching the Court before they are subjected to any form of prejudice. In support of this, he relied on Luis Franceschi et al, *The Constitution of Kenya, A Commentary*, wherein it is opined:

“However, the Supreme Court's mandate to give advisory is not as straightforward as it sounds as the Supreme Court will have to determine who is entitled to seek an advisory opinion, the subject matter of the advisory opinion and the effect of an advisory opinion. A question of contention with regard to the advisory opinion jurisdiction of the Supreme Court in the initial period of the implementation of the Constitution arose on whether the Supreme Court's advisory jurisdiction is constrained to devolved government or was it to be constrained broadly. A general concern about reading the Supreme Court advisory jurisdiction broadly is that it will present difficulties for the constitutional doctrine of ripeness. The rationale for the doctrine of ripeness is to prevent a party from prematurely

approaching a court when the party has not been subjected to prejudice.”

[14] Counsel drew comparative analysis from India where the president is allowed to, and can refer a question of public importance to the Supreme Court. Once a determination is made, the Supreme Court thereafter reports to the president with its opinion. It was urged that a reference of the president is a reference to the people. In support of this assertion, Counsel invited the Court to consider the publication by V.D. Kulshreshtha’s *Landmarks in Indian Legal and Constitutional History*.

[15] Further, counsel was of the view that jurisdiction can be conferred by necessity; that the Court ought to construe its jurisdiction broadly in a manner that will promote the values, purposes and principles of the Constitution, the rule of law and human rights.

[16] He therefore urged the Court to consider that the applicant’s complaint stemmed from allegations of violations of human rights, destruction of property and crimes, which could not be ignored.

[17] From the pleadings and submissions by the parties, we formulate a singular issue for determination by this Court: *Whether the applicant has the requisite locus standi to seek an advisory opinion from the Court?*

C. ANALYSIS

[18] The Court’s jurisdiction to give an advisory opinion is provided for in Article 163(6) of the Constitution, which states:

“(6) 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.”

Similarly, Section 13 of the Supreme Court Act, No. 7 of 2011 reads as follows:

(1) The Court may give an advisory opinion under Article 163(6) of the Constitution at the request of

(a) the national government;

(b) a State Organ; or

(c) a county government with respect to a matter concerning the county government.

Therefore, the only parties who may apply for an advisory opinion are, the National Government; a State organ; or any County Government with respect to any matter concerning county government.

[19] As submitted by the respondent's Counsel, the Court has previously pronounced itself on this question in many cases. For instance, ***In the Matter of Interim Independent Electoral Commission***, Constitutional Application No. 2 of 2011; [2011] eKLR pars.35, 36 & 83: ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Advisory Opinion No. 2 of 2012; [2012] eKLR, pars. 7: ***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*** Advisory Opinion Reference No. 1 of 2017; [2020] eKLR, pars. 41 & 42: and ***In the Matter of the National Gender and Equality Commission*** Reference No. 1 of 2013; [2014] eKLR.

[20] In the case of ***In the Matter of Interim Independent Electoral Commission***, Constitutional Application No. 2 of 2011; [2011] eKLR, this Court set out the guidelines for the exercise of the its advisory-opinion jurisdiction. They are:

“[83] With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, we are in a

position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction.

- (i) 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.***
- (ii) 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.***
- (iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.***
- (iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be***

required to demonstrate that the matter in question would not be amenable to expeditious resolution through an adversarial Court process.

[21] It is noteworthy to point out that since the issuance of the above Judgment in 2011, the Rules of this Court have since been changed and now disallow even interested parties as interveners or parties in a reference matter for advisory opinion. Rules 50(1) and 51(1), (2) and (5) of Supreme Court Rules 2020 now read and state as follows:

“50(1) The national government, state organ or a county government may make a request for an advisory opinion and briefly state the question upon which advice is sought.

.....

51.(1) A person filing a reference may propose that the Court may consider admitting any other person to participate in the reference.

(2) Despite sub-rule (1) the Court may on its own motion identify any other person to participate in the reference.

.....

(5) Any application for joinder as interested party in a reference shall not be allowed.”

[22] Article 260 of the Constitution defines what a State organ is. A State organ is defined as **“a commission, office, agency or other body established under the Constitution.”** Suffice it to say, the applicant does not fall within any of the bodies that may approach the Court for an advisory opinion. Neither has the Applicant been proposed by a person who has filed a reference in accordance with

Rule 50 nor has the Court admitted them to enjoin a filed reference. They cannot also be allowed to join as an interested party.

[23] On adopting a broader interpretation of this Court's jurisdiction, Dr. Khaminwa urged the Court not to confine itself to the provisions of the law. He also argued that the applicant was a person therefore falling under the umbrella of the national government, State organ and/or county government since they are also made of people.

[24] In answer to this, we refer to the guidelines of constitutional interpretation as postulated under Article 259(1) of the Constitution. It provides as follows:

This Constitution shall be interpreted in a manner that-

- (a) promotes its purposes, values and principles;***
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
- (c) permits the development of the law; and***
- (d) contributes to good governance.***

[25] This Court has on a number of occasions rendered itself on what ought to be considered when interpreting the Constitution. In essence, the Constitution ought to be construed holistically and in a manner that does not destroy any other constitutional provision, that is to say, in a complementary manner. It, however, goes without saying that it would create a total state of anarchy in the judicial system if any person could approach this Court for an advisory opinion based purely on the fact that they are 'the people' and in so doing, disregard the provisions, procedures and safeguards contained both in statute and the Constitution.

[26] Learned Counsel further invited us to declare that jurisdiction can be conferred out of necessity. There is a plethora of authorities on jurisdiction. Jurisdiction flows from the Constitution, statute law or by principles laid out in

judicial precedent. **See *In the Matter of Interim Independent Electoral Commission, (supra)***. In an Application by the Council of Governors for an Advisory Opinion, ***Council of Governors v Attorney General & 7 Others***, SC Reference No.2 of 2017; [2019] eKLR we were called upon to answer whether the Applicant, Council of Governors, is a State Organ within the provisions of Article 260 of the Constitution so as to be clothed with the *locus standi* to seek an advisory opinion before this Court. In declining to do so, despite concerted argument by COG and Katiba Institute to liberally interpret the constitution and exercise our discretion to render an Advisory opinion, we held as follows:

“[55] Hence we find that the definition of a State Organ under Article 260 to include agency or other body established under this Constitution, does not cover the Applicant. It is thus clear that the Applicant is not a commission, office, agency or body established under the Constitution. The constituting statute is the IRA which by any definition cannot grant the Applicant constitutional credentials.”

[27] In the same manner, we are not persuaded that the applicant herein has the requisite locus standi. While the High Court has unlimited original jurisdiction in criminal and civil proceedings as per Article 165(3)(a) of the Constitution, the parameters of the jurisdiction of the Supreme Court, are not as unlimited and are clearly set out in Article 163 of the Constitution and Sections 12, 13 and 13A of the Supreme Court Act, Cap 9B of the Laws of Kenya. We cannot arrogate jurisdiction to ourselves where the same is not expressly conferred. We therefore find the applicant has no *locus* before this court and the reference as filed must be dismissed. As for costs, the settled principle is that they should follow the event.

D. ORDERS

[28] Consequently, we make the following orders:

- (i) The Respondent’s Notice of Preliminary Objection dated 21st July 2023 is hereby allowed.*
- (ii) The Applicant’s Reference dated 31st May 2023 is hereby struck out and dismissed.*
- (iii) The Applicant shall bear the costs of this reference.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 12th Day of April 2024.

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

That I certify this as a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

