REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

[CORAM: KIMONDO, LIMO & MRIMA JJ]

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 254 OF 2019

KIRIRO WA NGUGI & 19 OTHERS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY, FOREIGN AFFAIRS.....2ND RESPONDENT

THE KENYA INTERNATIONAL BOUNDARIES OFFICE.....3RD RESPONDENT

JUDGMENT

Introduction

1. The amended petition revolves around the disputed maritime boundary along the Indian Ocean between the Republic of Kenya and the Federal Republic of Somalia.

2. Somalia instituted proceedings against Kenya on 28th August 2014 in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* before the International Court of Justice (hereafter *the ICJ*). Somalia requested the Court to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 nautical miles. It also requested the Court to determine the precise geographical coordinates of the single maritime boundary in the Indian Ocean.

3. The petitioners aver that the maritime delimitation case is fixed for hearing on 9th to 13th September 2019 (now past) and will result in a binding judgment. We however take judicial notice that the proceedings have since been adjourned upon the request by Kenya to the week of 8th June 2020.

4. The petitioners' case is that the ICJ has usurped jurisdiction; and, that the participation in the proceedings by the respondents contravenes the **Constitution**. They thus seek, among other reliefs, for a permanent injunction to restrain the respondents from further participation in the case.

The Parties

5. The 1st to 19th petitioners are Kenyan citizens. The 2nd petitioner is also a director of the 20th petitioner. The 20th petitioner is a limited liability company incorporated in Kenya. Some of its objectives are to "serve as a national centre for conflict prevention, management and resolution" and to "generally undertake advocacy work in all areas affecting the people of Kenya".

6. The 1st respondent is a creature of ***Article 156*** of the **Constitution** and sued in its capacity as the principal legal adviser to the Government charged with the responsibility of promoting, protecting and upholding the rule of law and defending public interest.

7. The 2nd respondent is appointed by the President under ***Article 132 (2)*** of the **Constitution** whose docket includes dealing with other states and international organizations.

8. The 3rd respondent was established by the Kenyan Cabinet and tasked with among other duties, establishing the status of each

international boundary; identifying contentious and non-contentious section(s) of each boundary; leading bilateral discussions with neighbouring countries; and, ensuring compliance with international obligations relating to boundaries and territorial integrity.

The Reliefs Sought

9. By an *amended petition* dated 1st October 2019 the petitioners crave the following 20 reliefs:

a) That a declaration be issued to declare that the Respondents' participation in the Maritime Delimitation in the Indian Ocean (Somalia v Kenya) case at the International Court of Justice is unconstitutional to the extent that the same has as one of the probable outcomes, the final alteration of Kenya's territory without a referendum as required by the Constitution of Kenya;

b) That an order of permanent injunction be issued restraining the Respondents from participating in the Maritime Delimitation in the Indian Ocean (Somalia v Kenya) case at the International Court of Justice terms that are in breach of the Constitution.

c) That an order of mandamus do issue against the 1st Respondent, to compel the 1st Respondent to perform its constitutional and statutory functions as necessary to ensure that Kenya is not party to international instruments and proceedings whose effect is to bypass the constitutional requirement of a referendum in the alteration of Kenya's territory.

d) That a declaration be issued to declare that by dint of Article 2 of the Constitution, the jurisdiction of the International Court of Justice over the Republic of Kenya is subject to the reservation of Kenya to the jurisdiction of the International Court of Justice contained in its Declaration dated 19th April, 1965.

e) That a declaration be issued to declare that within the meaning of Article 2(5) of the Constitution, Section 4(4) of the Maritime Zones Act, Cap 371 embodies the reservation of Kenya to the jurisdiction of the International Court of Justice contained in the Declaration dated 19th April, 1965.

f) That a declaration be issued to declare that upon the enactment of the Maritime Zones Act, Cap 371 to, inter-alia, establish and delimit an exclusive economic zone in the Western Indian Ocean the northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law.

g) That a declaration be issued to declare that under Article 2(5) and (6) of the Constitution read with Section 4(4) of the Maritime Zones Act Cap 371 the Memorandum of Understanding entered into between Kenya and Somalia on 9th April, 2009 must be implemented first before Kenya can submit to the jurisdiction of the International Court of Justice over its maritime border dispute with the Federal Republic of Somalia.

h) That a declaration be issued to declare that upon the International Court of Justice finding vide its judgment of 2nd February, 2017 that the MoU between Kenya and Somalia concerning the delimitation of their maritime boundary is a treaty under international law, the reservation of Kenya to the jurisdiction of the International Court of Justice prohibited further exercise of jurisdiction over Kenya in order for the said treaty to be given effect.

i) That a declaration be issued to declare that any real or alleged imprecision or lack of clarity in the MoU between Kenya and Somalia dated 7th April, 2009 cannot negate Kenya's reservation to the jurisdiction of the International Court of Justice with the consequence of the said Court asserting jurisdiction by default.

j) That a declaration be issued to declare that the assertion of jurisdiction by the International Court of Justice over the Somalia vs. Kenya maritime dispute by default is subversive of cordial principles of international law and amounts to a gross violation of Kenya's sovereignty.

k) That a declaration be issued to declare that the Republic of Kenya is entitled under international law to withdraw from legal proceedings before the International Court of Justice founded on a negation of its reservation to that court's jurisdiction and attendant violation of Kenya's sovereignty.

l) That a declaration be issued to declare that by dint of Articles 1, 2 and 3 of the Constitution the Respondents were enjoined to withdraw from the legal proceedings before the International Court of Justice upon delivery of judgment dated 2nd February, 2017 with twin findings that Kenya had declared reservations to the jurisdiction of the International Court of Justice and that the MoU between Kenya and Somalia dated 7th April, 2009 is an international treaty.

m) That a declaration be issued to declare that by dint of Kenya's reservation to the jurisdiction of the International of Court of Justice contained in its Declaration dated 19th April, 1965, Section 4(4) of the Maritime Zones Act, Cap 371 and the MoU between Kenya and Somalia dated 7th April, 2009, all proceedings of the International Court of Justice after the 2nd February, 2017 are null and void ab initio and not binding on the Republic of Kenya.

n) That an order of prohibition be issued to prohibit the Respondents from further participation in the legal proceedings before the International Court of Justice between Somalia and Kenya unless and until Section 4(4) of the Maritime Zones Act, Cap 371 has been complied with pursuant to the reservation of Kenya to the jurisdiction of the International Court of Justice contained in its declaration dated 19th April, 1965.

o) That an order of mandatory injunction be issued to compel the Respondents to withdraw Kenya's current participation in the legal proceedings before the International Court of Justice on the maritime border dispute between Kenya and Somalia.

p) That the Judgment of the International Court of Justice on jurisdiction made on 2nd February, 2017 constitutes a usurpation of jurisdiction in violation of Articles 2, 4 and 5 of the Constitution and Kenya's rights as a sovereign state under the provisions of the United Nations Convention on the Law of the Sea.

q) That a declaration be issued to declare that the International Court of Justice has no jurisdiction to adjudicate over the maritime dispute between Somalia and Kenya on account of Kenya's reservation to its jurisdiction and Section 4(4) of the Maritime Zones Act, Cap 371.

r) That by dint of Article 2 of the Constitution the Kenyan State or any of its organs and officers are prohibited from implementing a decision of any International Court or Tribunal in respect of which Kenya has not voluntarily given consent to its jurisdiction.

s) That the judgment of the International Court of Justice in respect of the maritime dispute between Somalia and Kenya is null and void ab initio on account of gross violation of Kenya's sovereignty.

t) Costs.

Petitioners' Case and Submissions

10. The petitioner submitted that Kenya signed the Statute of the ICJ (hereafter *the Statute*) on 19th April 1965 with re servations. The reservations were made under Article 36 paragraph 2 of the Statute which excludes the Court from dealing with disputes *"in regard to which the parties have agreed or shall agree to have recourse to some other method or methods of settlement"*.

11. Learned counsel for the petitioners, *Mr. Kibe Mungai*, submitted that both Kenya and Somalia accepted the jurisdiction of the ICJ on the basis of their respective Declarations made under the optional clause contained in Article 36, paragraph 2 of the Statute. Somalia made its declaration on April 11 1963.

12. He further submitted that Kenya recognized the compulsory jurisdiction by ICJ but limited this jurisdiction to:

a) Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;

b) Disputes with the Government of any State which, on the date of this Declaration, is a member of the Commonwealth of Nations or may so become subsequently;

c) Disputes with regard to questions which by general rules of International Law fall exclusively within the jurisdiction of Kenya;

d) Disputes concerning any question relating to or arising out of belligerent or military occupation or the discharge of any functions pursuant to any recommendation or decision of an organ of the United Nations, in accordance with which the Government of the Republic of Kenya have accepted obligation.

13. Counsel cited the example of the agreement between Kenya and Tanzania on their boundary on 17th December 1975. He submitted that in the present case, the jurisdiction of ICJ is limited by the *Memorandum of Understanding* with Somalia dated 7th April 2009 (hereafter *the MoU*) which provided *inter alia* that:

[1] The Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic, in the spirit of cooperation and mutual understanding have agreed to conclude this Memorandum of Understanding:

[6] The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles.

[7] This Memorandum of Understanding shall enter into force upon its signature.

IN WITNESS WHEREOF, the undersigned being duly authorized by their respective Governments, have signed this Memorandum of Understanding.

14. According to counsel, the ICJ cannot lawfully exercise jurisdiction over Kenya unless and until the said MoU is implemented. To the petitioners, the ICJ has usurped jurisdiction and transgressed upon Kenya's sovereignty. Learned counsel submitted that jurisdiction over a State can only be based on express consent and subject to any reservations.

15. The petitioners aver that the respondents' active participation in the legal proceedings at the ICJ is unconstitutional for a number of reasons. For instance, one of the probable outcomes of the litigation will be an alteration of Kenya's territory. The petitioners contend that such alteration *"goes to the heart of the sovereignty of the people of Kenya"* as defined under ***Articles 1, 2 and 3*** of the **Constitution.** It was submitted that such changes cannot be effected without a national *referendum* as decreed by ***Article 255*** of the **Constitution**.

16. Counsel was of the view that the respondents have no right to acquiesce in any act or omission that compromises Kenya's sovereignty. Reliance was also placed on sections 3, 4, 5 and 6 of the **Maritime Zones Act**. Counsel submitted that the Act recognizes the Southern Maritime Boundary. Section 3 (1) provides that the breadth of Kenya's territorial waters shall be 12 nautical miles. Section 3(4) stipulates that on the coastline adjacent to neighbouring states, the breadth of the territorial waters shall extend to every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters of each of the respective states is measured. Section 4 provides that the Northern Maritime boundary will be delimited in accordance with an agreement between Kenya and Somalia based on the principles of international law. Section 4 (4) provides further that the northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law.

17. Counsel submitted that any further participation in the ICJ case by the respondents is unconstitutional and null for three reasons: Firstly, the delegation of the sovereign powers of the people to the executive through the respondents is limited and does not include power to alter Kenya's territory and territorial except through a referendum. Secondly, any law or judgement purporting to erode, transgress or compromise Kenya's sovereignty is not binding; and, thirdly the Statute and the MoU between Kenya and Somalia dated 7th April 2009 form part of the laws of Kenya within the meaning of Article 2(5) and 2(6) of the **Constitution**.

18. Drawing from the dismissal of Kenya's preliminary objection to jurisdiction by the ICJ on 2nd February 2017 [I.C.J Reports 2017, p. 3], the petitioners strongly feel that the final judgment is a *fait accompli*. They thus pray, *inter alia*, for a *permanent injunction* to restrain the respondents from further participation in the case at the ICJ.

19. The petitioners argued that the impugned judgment recognized the *Memorandum of Understanding* between Kenya and Somalia dated 7th April 2009 as a treaty yet the Court blocked implementation of the MoU by asserting jurisdiction to determine Somalia's application.

20. According to the petitioners, Kenya's further participation in the case amounts to national surrender of its sovereignty to Somalia. They contend that since Somalia is *"a client state effectively controlled by third party states and multinational oil corporations and terrorists",* the respondents have a duty to stop further dealings with Somalia until a government that represents its people is established to negotiate the boundary in good faith.

21. The petitioners referred to Kenya's *Presidential Proclamation* of 9th June 2005 which replaced the 1979 proclamation on the maritime boundary between Kenya and Somalia. The petitioners contend that it settled the boundary between Kenya and Somalia as falling on eastern latitude South of Diua Damascian Island being latitude 1°39'34" degrees south, and as captured in the various maps issued by the Survey of Kenya.

22. Those matters are detailed at length in the original deposition of Dr. Michael Mugo dated 27th June 2019; and four other subsequent affidavits sworn by Kiriro wa Ngugi on 28th August 2019, 1st October 2019 and 8th October 2019.

23. Dr. Mugo deposes at paragraph 50 as follows:

Under international law a state has a right and duty to resist jurisdiction over it through non-participation in proceedings before such International Court or Tribunal and disavowal/rejection of its judgement.

24. At paragraph 48 he states further:

> *That the judgment of 2nd February 2017 left Kenya with two practical options in defence of its sovereignty namely-*
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> > *i) To immediately withdraw from the case before the ICJ.*
> >
> > *ii) To seek the implementation of the MoU dated 7th April 2009 and if the same is incapable of implementation on whatever good or bad reason to reach another agreement with Somalia as envisaged in its reservation to ICJ jurisdiction contained in its Declaration dated 19th April 1965.*

25. The petitioners also questioned the neutrality of ICJ. For instance, the President of the Court, *Justice Abdulqawi Ahmed Yusuf*, is a Somali national and continues to sit on the case. The petitioners are apprehensive that in view of precedents set by the court on the *equidistance line*, the application by Somalia is likely to succeed. Since the existing maritime boundary with Tanzania of 1976 follows a *parallel of latitude*, Kenya may become landlocked or be left with minimised access to the Indian Ocean to the detriment of her economy and future generations.

26. Learned counsel submitted that Kenya can choose to either *acquiesce* in the transgression of its sovereignty or proceed with the case; or, to defend its sovereignty by *withdrawing* from further proceedings before the Court. He drew parallels with China's defiance of the Permanent Court of Arbitration over claims in the South China Sea (***Philippines v China***, PCA case number 2013 -19). On 19th February 2013 China declared that it would not participate in the arbitration.

27. Regarding supremacy of the **Constitution**, learned counsel relied on ***R v Judicial Commission of Inquiry into the Goldenberg Affair and 2 others exparte George Saitoti*** Nairobi High Court Misc. Civ. Appl. 102 of 2006 [2006] eKLR where it was held:

> *In Kenya unlike some of the Commonwealth countries such as the United Kingdom, it is the Constitution that is supreme and not any of the three arms of Government and therefore the common law cases concerning the supremacy of Parliament in the United Kingdom must be read with this proviso in mind. The effect of this is that where any of the other arms encroach on a territory that is not theirs under the Constitution they can be challenged under the constitution*.

28. Counsel submitted that any treaty or convention that contravenes the Constitution is null and void to the extent of such inconsistency. He cited the US decision in ***Reid v Covert*** 354 U.S. 1 (1957) where it was stated:

> *This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty*

29. Counsel also relied on ***East African Community v. Republic*** [1970] E.A. 457, where the Court of Appeal for East Africa held:

> *First, it is quite clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict. The courts are the guardian of the Constitution and their duty is in all circumstances to enforce its provisions as they are interpreted by the courts…Thirdly, the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void*.

30. Counsel also cited ***Karen Njeri Kandie v Alassane Ba & Another*** Court of Appeal, Nairobi, Civil Appeal 20 of 2013 [2015] eKLR, where the Court stated:

> *We note also that other than declaring the Constitution's pre-eminence in Kenya's juridical system, the listing of the laws in the Article 2 of the Constitution does not denote any prioritization. That being so it is enough to observe that the international treaties and conventions are part of the laws of Kenya and are at least at par with other laws enacted by Parliament.*

31. Further reliance was placed on ***Beatrice Wanjiku & Another v the Attorney General & Others***, High Court Petition No. 190 of 2011 [2012] eKLR where *Majanja J*, held:

> *I take the position that the use of the phrase 'under this Constitution' as used in Article 2 (6) of the Constitution means that the international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94…..*
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> *Article 2 (5) and (6) regulates the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of the Constitution is emphasized in relation to international law.*

<u>Respondents' Case and Submissions</u>

32. The petition is opposed. There is a replying affidavit sworn by Kennedy Ogeto on 3rd July 2019.

33. He deposes that Kenya is a party to the Charter of the United Nations (hereafter *the UN Charter*), and *ipso facto*, a State Party to the Statute of the ICJ. He adds that Kenya is also party to the United Nations Convention on the Law of the Sea (hereinafter *UNCLOS*).

34. He avers that Kenya is in principle bound by Article 7 of the UN Charter establishing the ICJ as one of the principal organs of the United Nations, together with the General Assembly, the Security Council, the Secretariat, the Economic and Social Council and the Trusteeship Council.

35. He deposed that Kenya is bound by Article 33 requiring parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

36. He stated that Kenya is also bound by Article 94 of the UN Charter under which a State Parties undertook to comply with the decision of the ICJ in any case in which they are parties. The deponent enumerated at length the jurisdiction and procedures of the ICJ under Articles 36, 55 and 60 of the ICJ Statute. He averred that in the event of non-compliance, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

37. He further deposed that as a party to the UNCLOS, Kenya is in principle bound by certain obligations. For instance under Article 74 of the UNCLOS the delimitation of the exclusive economic zone (hereafter *the EEZ*) between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the ICJ, in order to achieve an equitable solution. If no agreement can be reached within a reasonable period of time, the States concerned should resort to the procedures provided for in Part XV.

38. He made further reference to Article 83 of the UNCLOS on the delimitation of the continental shelf, and Articles 279 and 280 which requires States Parties to settle disputes concerning the interpretation or application of the Convention by peaceful means.

39. He deposed that by dint of Article 2 of the Kenyan Constitution, the international instruments abovementioned form part of the laws of Kenya provided that they do not conflict with the Constitution.

40. Regarding the subject maritime boundary dispute he denied that the respondents' participation in the case amounts to *"acquiescence in transgression of Kenya's sovereignty by the ICJ, Somalia and its foreign backers that include Norway, Britain, Multinational Oil Companies and terrorist organisations led by Al-Shabaab, a twin affiliate of Al Qaeda and the Islamic State"* as alleged by the petitioners.

41. He enumerates various steps taken by the respondents to protect Kenya's territorial integrity and political independence including the MoU of 7th April 2009 on peaceful settlement of the maritime boundary dispute. He avers that the MoU was intended to have, and indeed has, the force of a treaty under international law, a fact which the ICJ itself affirmed at paragraph 50 of its Judgment of 2nd February 2017.

42. He averred further that the respondents filed the preliminary objection challenging both the jurisdiction of the ICJ over the said dispute and the admissibility of Somalia's Application at the ICJ. The objection was dismissed on 2nd February 2017.

43. The deponent was of the view that the petitioners' proposed practical option of Kenya withdrawing from the case before the ICJ is untenable at this point in time. He states at paragraph 23 as follows-

> *While the Constitution is the supreme law of the land, and all other laws, including international law, are subject to it, the same Constitution recognises the place of international law as part of the law of Kenya, to the extent that the said international law does not contradict the provisions of the Constitution. In this respect, while the sovereignty of the Republic of Kenya is a paramount constitutional edict, the same Constitution binds the respondents to certain National Values and Principles of Governance which, at Article 10 thereof, include the rule of law. Abiding by the rule of law certainly includes participating in court proceedings in which the respective courts have affirmed their jurisdiction over the subject matter, despite a party's objections to the same having been overruled.*

44. The respondents agree with the petitioners that the Constitution requires a referendum over the alteration of Kenya's territory. But the deponent avers that *"since the ICJ has asserted jurisdiction over the maritime boundary dispute between Kenya and Somalia and that Kenya is now required to participate in the ICJ proceedings, means that a balance must be struck between these positions"*.

45. The deponent denies that the respondents' continued participation in the ICJ proceedings is a manifest violation of any of Kenya's internal rules of fundamental importance. He opines that in the absence of such a finding, the petitioners' contention that the respondents have surrendered Kenya's sovereignty to the ICJ or other entities; and, that the respondents are violating the Constitution, have no basis.

46. Learned counsel for the respondents, *Mr. Nyamodi*, submitted that the issues raised in the amended petition revolve around policy decisions of the executive arm of Government; and, cannot be adjudicated by the High Court. He added that the amended petition challenges foreign policy which is not a constitutional issue that falls for determination under ***Article 165(3)*** of the **Constitution**.

47. Reliance was placed on ***Kenya Association of Stock Brokers and Investment Banks v Attorney General & another*** High Court, Nairobi, Pet. 22 of 2015 [2015] eKLR where Mumbi Ngugi J held:

> *[65] In effect, the petitioner is challenging the wisdom of re-introducing capital gains tax in Kenya, and inviting the Court to make a finding thereon. This, however, is not within the mandate of this Court. As observed by the Court in the case of* ***Kenya Small Scale Farmers Forum and 6 Others v Republic of Kenya and 2 Others****, Petition No 1174 of 2007-*
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> *Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in* ***U.S v Butler****, 297 U.S. 1 [1936], is apposite in this regard that; "… courts are concerned only with the power to enact statutes, not with their wisdom….For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*

48. Counsel further submitted that whereas the sovereignty of the people and the Republic is a paramount constitutional edict, the same Constitution in Article 10 binds the respondents to certain national values and principles of governance key among them being the rule of law. Counsel opined that since ICJ has asserted jurisdiction, the principle of rule of law enjoins the respondents to participate in the case. He argued further that it was in the public interest and that withdrawal from the case would attract other consequences under Articles 60 and 94 of the UN Charter.

49. He referred to ***Kenya Human Rights Commission v Attorney General & Another*** High Court, Nairobi, Pet. 87 of 2017 [2018] eKLR where the court stated as follows;

[58] In ***Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another*** *CCT 19/11(75/2015). Nkabinde, j observed that:-*

> *The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.*
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> *[59] In the case of* ***Canadian Metal Co. Ltd v Canadian Broadcasting Corp*** *(N0.2) [1975] 48 D.LR (30), the court stated that:*
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> *To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn… if the remedies that the courts grant to correct… wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.……..*
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> *[62] It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be*

overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.

50. Counsel submitted that Kenya as a member of the international community is bound by the provisions of the UN Charter, the ICJ Statute and the UNCLOS. He submitted further that those instruments are part of the laws of Kenya under by dint of Article 2(6) of the **Constitution**. Citing the principle of of *pacta sunct servanda* and Article 26 of the Vienna Convention on the Law of Treaties of 1969, he argued that Kenya is bound by the decision of the ICJ.

51. Lastly, counsel submitted that there are no real issues in controversy between the parties and argued that the amended petition is hypothetical: For instance the petitioners assume that Kenya will lose the case; or, that the eventual decision of the ICJ would be rejected in a referendum.

52. In support of that proposition, counsel cited ***National Conservative Forum v Attorney General*** High Court, Nairobi, Pet. 438 of 2013 [2013] eKLR where the court observed:

[21] Related to the question of the Court's jurisdiction is a second issue: whether there is a real issue or controversy for determination by the Court. It is, I believe, generally accepted in this and other jurisdictions that the court will not engage in determination of a matter for academic reasons. There must be a real controversy or dispute before it in order for it to exercise jurisdiction. In the case of ***John Harun Mwau & Others v The Attorney General*** *(supra), it was observed that the jurisdiction vested in the High Court to interpret the Constitution is not exercised in a vacuum; that there must be a real controversy or dispute between parties before the court in order for it to exercise its jurisdiction.*

Issues for Determination

53. From the pleadings, depositions and submissions the following issues arise for determination:

i) Whether the participation by the respondents in the proceedings before the ICJ is unconstitutional; and, whether the High Court should injunct them from any further participation in the case.

ii) Whether the petition is justiciable.

iii) Whether the High Court has jurisdiction over proceedings at the ICJ.

iv) Who will bear the costs?

Analysis and Determination

54. We shall commence by analysing the applicable legal framework and principles. The amended petition presents interplay between the domestic law and international law. The applicable law includes the **Constitution**, the **Maritime Zones Act** and various *international treaties* and *conventions* ratified by Kenya. The relevant treaties and conventions include the United Nations Charter, the Statute of the ICJ and the United Nations Convention of the Law of the Sea (UNCLOS).

55. ***Article 165(3)*** and ***(6)*** of the **Constitution** sets out clearly the jurisdiction of the High Court as follows:

(*3) Subject to clause (5), the High Court shall have —*

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this 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 done 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

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.

56. We remain alive that the **Constitution** reigns supreme; any provision in it is not subject to challenge before any court; and, any law inconsistent with it is void to the extent of the inconsistency. Furthermore, it recognizes that the general rules of international law and any treaty or convention ratified by Kenya shall form part of our law.

57. However, ***Articles 2 (5)*** and ***2 (6)*** of the **Constitution** clearly demarcates the place of international law in the hierarchy of Kenyan law. The latter, just like ordinary statutes are subordinate to the **Constitution**.

58. ***Article 2*** of the **Constitution** expressly provides as follows:

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

59. The interplay between the Constitution and international treaties and covenants was well explained by the Court of Appeal for East Africa in ***East African Community v. Republic*** [1970] EA 457:

First, it is quite clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict. The courts are the guardian of the Constitution and their duty is in all circumstances to enforce its provisions as they are interpreted by the courts…Thirdly, the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void.

60. A similar theme was adopted by the Kenya Court of Appeal in ***Karen Njeri Kandie v Alassane Ba & Another***, Nairobi, Civil Appeal 20 of 2013 [2015] eKLR, where the Court stated:

We note also that other than declaring the Constitution's pre-eminence in Kenya's juridical system, the listing of the laws in the Article 2 of the Constitution does not denote any prioritization. That being so it is enough to observe that the international treaties and conventions are part of the laws of Kenya and are at least at par with other laws enacted by Parliament.

61. The following passage from the decision of *Majanja J* in ***Beatrice Wanjiku & Another v the Attorney General & Others***, High Court Petition No. 190 of 2011 [2012] eKLR, is also illuminating:

I take the position that the use of the phrase 'under this Constitution' as used in Article 2 (6) of the Constitution means that the international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94…..

Article 2 (5) and (6) regulates the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of the Constitution is emphasized in relation to international law.

62. Both parties concede that any alteration to the territory of Kenya must be preceded by a national referendum. ***Article 5*** of the **Constitution** provides that the Kenya consists of the territory and territorial waters comprising Kenya on the effective date, and any additional territory and territorial waters as defined by an Act of Parliament.

63. ***Article 255 (1)*** states as follows:

A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—

(a) the supremacy of this Constitution;

(b) the territory of Kenya;

(c) the sovereignty of the people.……..

64. The **Maritime Zones Act** was enacted to consolidate the law relating to the territorial waters and the continental shelf of Kenya; to provide for the establishment and delimitation of the exclusive economic zone of Kenya; to provide for the exploration and exploitation and conservation and management of the resources of the maritime zones; and for connected purposes.

65. The Act provides at sections 3, 4 and 11 as follows:

3(1) Except as provided in subsection (4), the breadth of the territorial waters of Kenya shall be twelve nautical miles.

(2) The breadth of the territorial waters shall be measured in the manner set out in the First Schedule calculated in accordance with the provisions of the United Nations Convention on the Law of the Sea done at Montego Bay on 10th December, 1982.

4(1) There shall be an exclusive economic zone of Kenya.

(2) Subject to subsections (3) and (4), the exclusive economic zone shall comprise those areas of the sea, seabed and subsoil that are beyond and adjacent to the territorial waters, having as their limits a line measured seaward from the baselines, low waterlines or low tide elevations described in the First Schedule, every point of which is 200 nautical miles from the point on the baselines, low water marks or low tide elevations.

(3) The southern boundary of the exclusive economic zone with Tanzania shall be on an easterly latitude north of Pemba Island obtained by the northern intersection of two arcs one from the Kenya lighthouse at Mpunguti Ya Juu Island, and the other from Pemba Island lighthouse at Ras Kigomasha.

(4)The northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law.

11. The Minister may, from time to time, by notice in the Gazette, limit any provision of this Act so far as it is necessary to give effect to any Convention on the Law of the Sea or to any other international agreement or convention affecting the maritime zones

66. Kenya is a State Party to the United Nations Charter having signed the treaty in 1963 and ratified it in 1994. The preamble to the Charter of the United Nations opens with the following words: *to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.*

67. The centerpiece of the United Nations is the sovereign equality of the Member States. Article 2 (1) to (7) of the Charter provides:

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

68. Article 92 of the Charter establishes the ICJ. Kenya accepted the jurisdiction of the ICJ by its declaration of 19th April 1965. Articles 92 to 95 of the Charter are material to the matter at hand. We shall reproduce them *in extenso*:

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with

the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.

2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

69. It follows as a corollary that Kenya became a party to the Charter of the United Nations, it *ipso facto,* became a State Party to the Statute of the ICJ. In any case Kenya accepted with reservations the jurisdiction of the ICJ by its formal declaration of 19th April 1965.

70. We shall now turn briefly to the UNCLOS. This international treaty defines the rights and responsibilities of nations on the use of the world's oceans. Kenya signed the treaty on 10th December 1982 and ratified it on 2nd March 1989. Articles 74 and 83 deal with delimitation of the the exclusive economic zone (EEZ) and the continental shelf between States with opposite or adjacent coasts. The delimitation of both the EEZ and the continental shelf shall be effected by agreement on the basis of international law, as referred to in Article 38 of the ICJ Statute in order to achieve an equitable solution.

71. But if no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV. Articles 279 and 280 of Part XV are relevant here. Article 279 provides:

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

72. Article 280 on the other hand states:

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

73. The MoU between Kenya and Somalia dated 7th April 2009 was one such attempt by the disputants to resolve the maritime dispute peacefully. Article 282 allows States Parties with a dispute concerning the interpretation or application of the UNCLOS to enter into a general, regional or bilateral agreement or otherwise to resolve the matter peacefully. Such a dispute *"shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in [Part XV] unless the parties to the dispute otherwise agree".*

74. The MoU has the force of a treaty under international law, a fact which the ICJ itself affirmed at paragraph 50 of its judgment of 2nd February 2017.

75. Paragraph 6 of the MoU was in the following terms:

[6] The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles.

76. Based on the MoU, Kenya raised the preliminary objection at the ICJ that was two-pronged: Firstly that the ICJ lacked *jurisdiction;* and, secondly, that Somalia's application was *inadmissible.* The objections were both dismissed on the following grounds: That the MoU between Kenya and Somalia did not outline any method for settling the maritime boundary delimitation dispute between the two states; and, that in any event, the MoU only concerned the outer limits of the Continental Shelf to the exclusion of other maritime areas. ICJ also found that Part XV of the UNCLOS does not fall within the reservation by Kenya on the ICJ's jurisdiction because under Article 282 of the UNCLOS, Kenya's Optional Clause Declaration of consent to the ICJ prevailed over the rest of Part XV of UNCLOS.

77. Regarding *admissibility* of Somalia's Application ICJ held that since the MoU did not provide for a dispute settlement method, it could not be relied upon to raise objections on admissibility. The Court acknowledged that Somalia had breached the MoU. But it held that the fact that a party has breached the provisions of a treaty does not *per se* render its application to institute proceedings inadmissible.

78. The petitioners have raised compelling arguments over the assertion of jurisdiction by ICJ. For reasons that we shall give below, we do not pretend to have jurisdiction to review the decision of the ICJ. But we do have jurisdiction and power to order the respondents to stop further participation in the proceedings *if* we are satisfied that the respondents are flouting the **Constitution**.

79. The Commission on the Limits of the Continental Shelf (hereafter *CLCS*) facilitates the implementation of the UNCLOS on the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The coastal states establish those outer limits upon the recommendation of the CLCS. The recommendations are without prejudice to matters relating to delimitation of boundaries of states with opposite or adjacent coasts.

80. It is instructive that on 8th April 2009, a day after executing the MoU, Somalia submitted to the UN Secretary General *preliminary information indicative of the outer limits of the continental shelf.* Somalia's submissions to the CLCS also acknowledged that that the MoU had been validly concluded. It even enclosed a copy of the MoU in its submission to CLCS.

81. However on 2nd March 2010, Somalia wrote to the United Nations Secretary General informing him that the MoU *"was considered by the Transitional Federal Parliament of Somalia and that the members voted to reject the ratification of that MoU on August 1st 2009"*. On 4th February 2014 Somalia wrote to CLCS rejecting the MoU and objecting to Kenya's submission. On 28th August 2014, Somalia initiated the proceedings at the ICJ.

82. We shall now answer the four issues for determination that we framed earlier in this judgment.

Whether the participation by the respondents in the proceedings before the ICJ is unconstitutional; and, whether the High Court should injunct them from any further participation in the case.

83. The gist of the amended petition is that Kenya must defend its territorial boundaries in the wake of the multi-faceted endeavours by Somalia to appropriate Kenya's maritime territory in the Indian Ocean. As stated, the petitioners frown upon ICJ's assertion of jurisdiction that trumps Kenya's reservation and the MoU with Somalia.

84. The petitioners contend that any further proceedings at The Hague are an affront to Kenya's sovereignty and to that extent unconstitutional. The Petitioners claim that they are acting on their own behalf and other citizens to protect and defend the **Constitution** and the territorial integrity of the country. We were thus implored to restrain the respondents from any further participation in the maritime delimitation case at the ICJ.

85. As stated, we have no doubt that we are imbued with power and jurisdiction to restrain the respondents from further participating in the proceedings before the ICJ if their conduct infringes the **Constitution.**

86. We have already dealt with the pre-eminence and supremacy of **Constitution**. ***Article 2*** expressly provides that any law including customary law is subordinate to it. We have also seen that international treaties and covenants ratified by Kenya rank below the Constitution. In addition, ***Article 10*** enumerates the guiding values and principles of governance including the rule of law; accountability; democracy; and, participation of the people. It binds all state organs, state officers and public officers and any person who applies, enacts or interprets the same.

87. Kenya is a signatory of and a party to the United Nations Charter, a State Party to the Statute of the ICJ and also a State Party to UNCLOS. The Republic is therefore bound by Articles 7 and 33 of the United Nations Charter. As a result, Kenya is bound to participate in any proceedings lodged against it at the ICJ subject to Kenya's reservations.

88. We have highlighted above the nature and functions of the 2nd and 3rd respondents. It is important to look a little deeper at the office and duties of the Attorney General of Kenya (the 1st respondent). **Article 156** of the **Constitution** provides as follows:

> *(1) There is established the office of Attorney-General.*
>
> *(2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.*
>
> *(3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.*
>
> *(4) The Attorney-General—*
>
> *(a) is the principal legal adviser to the Government;*
>
> *(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and*

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

89. Section 5 (1) (j) of the **Office of the Attorney General Act** provides that in addition to the functions under Article 156 of the **Constitution**, the Attorney-General shall be responsible for representing the Government in matters before *foreign courts and tribunals*.

90. We accordingly find that the Respondents, as state and public officers, are bound by ***Articles 10*** and ***156*** to promote the rule of law.

89. The dispute at the ICJ is between Kenya and Somalia. Under ***Article 156(4)(b)*** of the **Constitution** the Attorney General bears the foremost constitutional responsibility to represent Kenya since the proceedings at The Hague are not criminal in nature. The Attorney General will therefore be keeping in tandem with the constitutional duty to defend the **Constitution** and to protect public interest by participating in the proceedings.

90. Kenya has already made an appearance in the proceedings and raised two preliminary objections that were dismissed in the judgment of 2nd February 2017. There are clear consequences of withdrawing from the proceedings specified in Article 53 (1) and (2) of the Statute of the ICJ which states:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.[Emphasis added]

91. Contrary to the Petitioners' assertion that the Attorney General's participation amounts to giving up the country's sovereignty, we find in the converse. To us, we are satisfied that it is the non-participation of the Attorney General in the proceedings that will infringe *inter alia* ***Articles 3*** and ***156(4)(b)*** of the **Constitution.**

92. The Attorney General's participation in the proceedings will accord an opportunity to demonstrate to the Court the Kenya's constitutional impediments in the implementation of the decision in the event the dispute is decided in favour of Somalia. How else is the ICJ expected to know for instance that under ***Articles 2, 3, 255*** and ***256*** of the **Constitution** that any alterations to the territorial boundaries of Kenya must be backed by a popular referendum?

93. Participating in the proceedings before the ICJ is consistent with defending the sovereignty and the **Constitution**. It is the non-participation or the withdrawal from the case that we see as a surrender of the County's sovereignty to the mercy of Somalia and the Court.

94. We therefore agree with the Attorney General's submission that the non-participation or the withdrawal from the case will be prejudicial to the interests of the Republic.

95. In the end we answer both limbs of this issue in the *negative*.

Whether the amended petition is justiciable.

96. The ***Black's Law Dictionary***, 9th Edition, Thomson Reuters Publishers at page 943-944 defines *justiciability* as follows:

"*proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision"*

97. A Court must satisfy itself that the case before it is not caught up by the bar of *non-justiciability*. The concept of non-justiciability is comprised of three doctrines: Firstly, the *Political Question Doctrine;* secondly, the *Constitutional-Avoidance Doctrine;* and, thirdly, the *Ripeness Doctrine.* The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.

98. We shall commence with the *political question doctrine*. ***Black's Law Dictionary***, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:

The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government. [underlining added]

99. The *political question doctrine* focuses on the limitations upon adjudication by Courts of matters generally within the area of responsibility of other arms of Government. Such matters mostly deal with foreign relations and national security. [See generally Ariel L.

Bendor; *Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of Israeli and American experience?]*

100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is *assigning discretion* on the issue to another branch of Government. [See generally Frietz W. Scharpf; *Judicial Review and the Political Question: A functional analysis and Herbert Weschler; Towards Neutral Principles of Constitutional law.]*

101. Courts have dealt with application of the doctrine. In ***William Odhiambo Ramogi & 2 others -v- Attorney General & 6 Others***, Mombasa High Court Petition No.159 of 2018 [2018] eKLR, the five-judge bench observed as follows:

> *[79] It was held in **Council of Civil Service Unions vs Minister for the Civil Service** [1985] AC 374 at 418 that a challenge is referred to as being non-justiciable because its nature and subject matter is such as not to be amenable to the judicial process. The "justiciability" doctrine is rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including a properly limited role of the courts in a democratic society. One justiciability concept is the "political question" doctrine—according to which courts should not adjudicate certain controversies because their resolution is more proper within the political branches.*
>
> *[80] In **Baker v Carr** 369 U.S. 186 (1962) the United States Supreme Court outlined six matters that could present political questions as follows:*
>
> > *[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*
>
> *[81] In the Kenyan context, the political question doctrine was discussed by the Court of Appeal in **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others** (supra) where the Court held as follows:*
>
> *98. In considering the issue, we are alive to the provisions of Article 159 (2) (c) of the Constitution which enjoins courts to promote alternative dispute resolutions mechanism inter alia through reconciliation, mediation or arbitration. We emphasize that these alternative dispute resolution mechanisms must be adopted and effectuated prior to judgment by the trial court. With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In Marbury -vs- Madison– 5 US. 137 it was stated that:*
>
> *The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion.*
>
> *100. In Ndora Stephen -v- Minister for Education & 2 Others, Nairobi High Court Petition No. 464 of 2012, Mumbi Ngugi, J. correctly observed that the formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to Article 43 (1) of the Constitution, the provisions of Article 20 (5) (c) of the Constitution must be borne in mind. Article 20 (5) (c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. We opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts.*
>
> *[82] It is evident from the case law that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional commitment and mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of majoritarian decision-making rather than by a deliberative constitutional judgment. This will include situations where a Court lacks the capacity to develop clear and coherent principles to govern litigants' conduct.*

102. In the ***William Odhiambo Ramogi & 2 others v Attorney General & 6 Others*** case [supra], the learned judges also dealt with the *exceptions* to the doctrine as follows:

> *[89]..…that there are constitutionally permissible situations where this Court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under the Constitution, or in violation of other provisions of the Constitution. The necessity of vindicating constitutionally secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the Courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the Petitioners is*

non-justiciable, even though it may concern the political process, or the internal workings of other government branches.

103. The above decision went on appeal in ***Kenya Ports Authority v William Odhiambo Ramogi & 8 Others*** Mombasa Civil Appeal No. 166 of 2018 [2019] eKLR. While approving the reasoning of the High Court on applicability of non-justiciability concept on intergovernmental disputes, the Court of Appeal held:

> *First, they [High Court] considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves.*

104. In ***Kenya Association of Stock Brokers and Investment Banks v Attorney General & another*** High Court, Nairobi, Pet. 22 of 2015 [2015] eKLR [2015] eKLR, *Mumbi Ngugi J* held:

> *[65] In effect, the petitioner is challenging the wisdom of re-introducing capital gains tax in Kenya, and inviting the Court to make a finding thereon. This, however, is not within the mandate of this Court. As observed by the Court in the case of* ***Kenya Small Scale Farmers Forum and 6 Others v Republic of Kenya and 2 Others****, Petition No 1174 of 2007:*
>
> *Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in U.S v Butler, 297 U.S. 1 [1936], is apposite in this regard that; "…courts are concerned only with the power to enact statutes, not with their wisdom….For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*

105. We shall now turn to the *Constitutional-Avoidance Doctrine.* The doctrine is at times referred to as the *Constitutional-Avoidance Rule*. ***Black's Law Dictionary***, 10th Edition at page 377 defines it as:

> *The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion*

106. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in ***Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others*** Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

> *[256].…The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.*

107. Lastly is the *Ripeness Doctrine.* The doctrine focuses on the *time* when a dispute is presented for adjudication. The ***Black's Law Dictionary*** 10th Edition, [supra] at page 1524 defines *ripeness* as:

> *The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made*

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.

109. The Court of Appeal in ***National Assembly of Kenya & another v Institute for Social Accountability & 6 others*** Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:

> *[72] The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.*
>
> *[74] Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.*

110. In ***National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others*** [supra] the Court of Appeal held:

> *[73] Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.*

111. In ***Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others*** Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, *Onguto J* stated:

> *[27] Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases.……The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.*

114. The issues now before us have been the subject of Parliamentary proceedings and debate through a joint motion sponsored by the Leader of the Majority and the Leader of the Minority in the National Assembly on 6th August 2019. The National Assembly passed the following five resolutions:

> *a) Uphold and respect the boundaries of the territory of Kenya, unless the people of Kenya resolved to alter it by way of referendum, to alter the territory of Kenya as contemplated under Article 255 (1) (b) of the Constitution as read with section 3 (3) of the Treaty Making and Ratification Act.*
>
> *b) Take urgent steps to implement, in full, the provisions of the Maritime Zones Act with regard to delimitation of the Northern Boundary of the Exclusive Economic Zone with the Federal Republic of Somalia through agreement as envisaged by UNCLOS*
>
> *c) As a first and most preferred option, engages the Federal Government of Somalia to resolve the boundary dispute for the benefit of both countries and the region, through diplomacy and dispute resolution mechanisms available under the Afriican Union (AU) Inter Governmental Authority for Development (IGAD) and East African Community (EAC).*
>
> *d) Expresses to the United Nations, the Republic of Kenya's protest against the assertion of jurisdiction by the ICJ over the maritime boundary conflict between the Federal Republic of Somalia and the Republic of Kenya, noting Kenya's express reservations to jurisdiction made in 1965 and the provisions of the Kenya Maritime Zones Act to delimit the maritime boundary boundary through agreements envisaged by UNCLOs; and,*
>
> *e) Explores other lawful and constitutional mechanisms for protecting the territory of the Republic including deploying the Kenya Defence Forces to the subject boundary to undertake the responsibility of protecting the sovereignty and territorial integrity of the Republic as contemplated under Article 241 (3) of the Constitution.*

115. We observe that the National Assembly, as the legislative arm of Government, is seized of the dispute. It is clear from the resolutions that the National Assembly called upon the Executive to undertake diplomatic, and, if need be military action to defend Kenya's territorial integrity.

116. Whereas the Court has power to restrain the Respondents from further participating in the proceedings before the ICJ if their conduct infringes the **Constitution,** we find that the issues emerging from the amended petition would be more effectively resolved by diplomatic, legislative, policy and other executive interventions rather than by a constitutional decision.

117. In the end this issue is also answered in the *negative*.

Whether the High Court has jurisdiction over proceedings at the ICJ.

118. We have stated that Article 92 of the United Nations Charter establishes the ICJ. The ICJ is the *principal judicial organ* of the United Nations. Kenya is a *Member State* of the United Nations. By dint of Article 93 of the Charter *"all Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice"*. Furthermore, as observed above Kenya accepted with reservations the jurisdiction of the ICJ by its formal declaration of 19th April 1965.

119. ***Article 2 (5)*** and ***(6)*** of the **Constitution** of Kenya expressly recognize treaties ratified by Kenya as part of our domestic law. As earlier noted, such treaties are however subordinate to the **Constitution**.

120. Kenya is accordingly bound by decisions of the ICJ by dint of Article 94 of the United Nations Charter. Kenya has made an appearance in the proceedings and raised two preliminary objections that were dismissed in the judgment of 2nd February 2017.

121. We remain alive that under Article 60 of the Statute of the ICJ, the decisions of the court are final; with no recourse to review or appeal. Furthermore, under Article 36 (2) of the Statute of the ICJ any dispute *"as to whether the ICJ has jurisdiction, the matter shall be settled by a decision of the ICJ"* by a majority vote of the judges.

122. We have dealt earlier with ***Article 165*** of the Kenya **Constitution** on the jurisdiction of the High Court. In ***John Muiruri Kimani v Attorney General; Myot Welfare Association (Kalenjin Council of Elders) (Interested party)*** Nairobi High Court Petition 88 of 2015 [2019] eKLR, the court was faced with the question whether it could call or impound evidence held by the International Criminal Court (ICC). The court observed as follows:

> *[99] Following the failure to establish the Special Tribunal, the sealed envelope was transmitted to the OPICC leading to the prosecution of six Kenyans. As observed above, the CIPEV wound up its activities; its Chairman was removed from these proceedings; and, the petitioner withdrew his case against the OPICC. Even assuming for a moment that the envelope is in the custody of the ICC, that court enjoys immunity from national courts. Accordingly, this court has no jurisdiction to compel the ICC to produce the sealed envelope. [Emphasis added]*

123. We readily find and hold that the jurisdiction of the High Court, as a municipal court, does not extend to the ICJ. Our answer to this issue is thus in the *negative*.

Final Orders

124. For all the above reasons, we find that the amended petition dated 1st October 2019 is devoid of merit and is hereby *dismissed*.

125. Costs ordinarily follow the event and are at the discretion of the court. We are satisfied that the petition was lodged in the *public interest*. In the interests of justice we order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of January 2020.

KANYI KIMONDO

JUDGE

ROBERT K. LIMO

JUDGE

A. C. MRIMA

JUDGE

Judgment read in open court in the presence of-

Mr. B. Njoba for Mr. Kibe for the petitioners instructed by Kinoti & Kibe Company Advocates.

Mr. Ogosso for the respondents instructed by the Honourable Attorney General.

Messrs Dominic, Ibrahim and Ms. Kagure Court Assistants.