



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MISC. APPLICATION NO.29 OF 2014

BETWEEN

HARON NDUBI.....1ST APPLICANT
NDUNG’U WAINAINA.....2ND APPLICANT
JAMES GONDI.....3RD APPLICANT
NJONJO MUE.....4TH APPLICANT

AND

THE REGISTRAR HIGH COURT OF KENYA.....RESPONDENT

AND

SAFARICOM LIMITED.....1ST INTERESTED PARTY
AIRTEL KENYA.....2ND INTERESTED PARTY
STEPHEN KAY, QC.....3RD INTERESTED PARTY

RULING

Factual Background

1. Sometime in 2013, the 3rd Interested Party instituted **Misc. Constitutional Application No.384 of 2013** before this Court. The Respondents were the present 1st and 2nd Interested Parties. Certain orders were sought therein relating to on-going proceedings at the International Criminal Court (ICC).
2. Noting the nature of the orders sought, the 3rd Interested Party applied and was granted orders that any other proceedings to be filed on the said issue would be confidential and open only to the present Interested Parties and the Court. All other matters arising therefrom were thereafter conducted confidentially.
3. On 22nd January 2014, by a Chamber Summons premised on **Articles 1, 2, 3, 10, 20, 21, 22, 23, 27, 28, 29, 31, 32, 33, 35, 47, 50(1), 159, 258 and 259 of the Constitution, Rules 20 and 4 of the Constitution**

of Kenya (**Supervisory Jurisdiction and protection of Fundamental Rights and Freedoms of the Individual**) **High Court Practice and Procedure Rules, 2006**, Inherent powers of this Court and all other enabling provisions of the law, the present Applicants have prayed for the following orders:

“1) ...

2) *Pursuant to Article 35 of the Constitution, the Respondent be compelled to produce and furnish the Applicants with any and/or all information and details pertaining to the suit and legal proceedings filed in the High Court of Kenya by Stephen Kay, QC and/or any other legal Counsel representing the Honourable Uhuru Kenyatta in connection with the proceedings before the International Criminal Court including but not limited to the following;*

i) *Details of the suit;*

ii) *Copies of all pleadings filed before the High Court in the subject proceedings;*

iii) *Status of the suit;*

iv) *Any other relevant information pertaining to the suit necessary for the Applicants to exercise their fundamental rights and freedoms on their own behalf and in the interest of the public.*

3) *Pursuant to Article 35 of the Constitution, the Applicants be granted unrestricted access to the Court file and records in respect of Miscellaneous Constitutional Application No.384 of 2013 to peruse and take copies of any and/or all documents and pleadings in respect of the proceedings from institution to date.*

4) *An order that the Applicants be enjoined to the aforesaid proceedings and/or matters as Interested Parties.*

5) *An order that all further proceedings within any of the aforesaid proceedings be stayed pending the hearing and determination of this Application.*

6) *Any further orders that the Court may deem just and fit to grant in the interests and furtherance of justice and public interest.*

7) *The costs of this Application be in the cause.”*

Case for the Applicants

4. The Applicants have described themselves as members of Kenyans for Justice with Truth and Peace (KPTJ) whose aim and that of its constituent members is to promote good governance, human rights and anti-corruption in Kenya. Harun Ndubi has also described himself as a conscientious Kenyan Citizen with a desire to see the respect, promotion and protection of human rights for himself and others some of whom may not have a voice of their own to speak. He is also a member of individual and civil society organisations under the umbrella of KPTJ while both he and Njonjo Mue are Advocates of this Court.

5. Both Applicants have stated in their respective Affidavits, in support of the Application, sworn on 22nd January 2014 that they have and continue to work with victims of Post-Election Violence in order to champion and promote their rights including in proceedings before the ICC.

6. Their case is firstly, that they have direct and indirect interest in **Misc. Constitutional Application No.384 of 2013** by fact of their involvement in the proceedings at the ICC, particularly because in the said Application, the 3rd Interested Party who is the defence Counsel for Hon. Uhuru Kenyatta at the ICC “*seeks among other things records and details of private communications of individual citizens who were victims of the Post-Election Violence and persons who have been working with them.*”

7. Secondly, that they have had reason to believe that unknown persons have and continue to unlawfully infringe upon the privacy of their electronic and telephonic communication in violation of **Article 31** of the **Constitution**. That the proceedings in issue therefore pose a direct threat and could and may have infringed upon the fundamental rights and freedoms of those whose records and details are sought.

8. Thirdly, that it is incumbent upon this Court to ensure that all its proceedings are conducted openly, objectively, impartially and in the presence of any affected party including by enjoining such a party to the said proceedings. That such an action would be in the interests of the public and the 1st and 2nd Interested Parties being providers of public service are also enjoined to act, at all times, in the public interest.

9. Fourthly, that any subjective infringement of **Article 31** rights also poses a direct threat to other rights guaranteed in **Articles 28 (human dignity), 29 (freedom and security of the person), 32(1) (freedom of conscience, religion, belief and opinion) and 33 (freedom of expression)**.

10. As to the attempts made by KPTJ to access the pleadings and proceedings in **Misc. Constitutional Application No.384 of 2013**, the Applicants exhibited a series of email communication with the Registrar of this Court where the latter informed KPTJ that the said Application was heard confidentially and an application for KPTJ to be enjoined as a party thereto was an option that the latter could exercise.

11. In addition, the Applicants deponed that they are apprehensive that the proceedings were held confidentially because of the status of the Hon. Uhuru Kenyatta on whose benefit the subject proceedings were instituted and it is in the interests of justice that the Application herein be granted in the wider interests of the administration of justice.

12. Lastly, both Applicants in their Affidavits indicated that they were seeking the orders elsewhere reproduced above on their own behalf and on behalf of Ndung'u Wainaina and James Gondi, their colleagues at KPTJ.

The Responses

For the Respondent

13. The Registrar of this Court, as Respondent filed Grounds of Objection on 24th March 2014 and they read as follows:

“1) The Respondent herein is not a party in the proceedings that are the subject matter of this application and the Applicants therefore has no cause of action against the Respondent.

2) The Applicants have not established in what manner the Respondent herein has infringed upon or contravened any of their constitutional rights.

3) The Applicants have never sought access to the details and records of the said proceedings from the parties who filed or are involved in Miscellaneous Constitutional Application No.384 of 2013.

4) The Applicants have not sufficiently disclosed what legal stake and/or interest they have in the information and documents sought.

5) The Application is frivolous, vexatious and an abuse of the Court process.”

For the 1st Interested Party

14. On 10th February 2014, the 1st Interested Party, Safaricom Ltd, filed the following Grounds of Opposition.

“1) The entire Chamber Summons is frivolous and vexatious, as it seeks remedies in respect of abstract complaints that cannot be the subject matter of a legal inquiry.

2) The entire Chamber Summons is an abuse of the process of the Court, as the Applicants have not demonstrated their interest if any, in the information and documents sought.

3) The Applicants’ request has been overtaken by events.”

For the 2nd Interested Party

15. On 13th October, 2014, the 2nd Interested Party, Airtel Kenya, filed the following Grounds of Opposition:

“1) The entire application is misconceived, frivolous, vexatious and totally unmerited as the Applicants have not established sufficient cause or locus for the grant of the orders sought.

2) The Applicants are on a fishing expedition and none of their constitutional rights have been violated or infringed.

3) The Applicants have not disclosed any viable interest in relation to the proceedings filed by the 3rd Interested Party.

4) The Application is merely speculative and hinged on abstract complaints.

5) The Applicants application has been overtaken by events.

6) The Application is an abuse of this Honourable Court’s process and should be dismissed with costs.”

For the 3rd Interested Party

16. In an Affidavit sworn on 9th February 2014 by Ken Ogetto on his behalf, the 3rd Interested Party opposed the Application and Mr. Ogetto deponed that he was an Advocate of this Court with 22 years’ standing and experience in International Criminal law and the Law of International Organisations. That he has previously served as Lead Counsel at the UN International Criminal Tribunal for Rwanda, Co-Counsel at the ICC and had also practised law at the Special Court for Sierra Leone. Amongst his clients at the ICC is Hon. Uhuru Kenyatta on whose behalf **Misc. Constitutional Application No.384 of 2013** was filed.

17. Regarding the said proceedings, he deponed that nowhere in them did the 3rd Interested Party seek information that touched on any victim in relation to the proceedings at the ICC. That he is familiar with the Code of Professional Conduct for Counsel appearing at the ICC and is similarly familiar with the ICC Statute, Rules of Procedure and Evidence as well as its Regulations particularly on matters of confidentiality of proceedings.

18. Further, that the proceedings instituted by the 3rd Interested Party related to matters, if disclosed to the public, would have undermined investigations in the ICC case against Hon. Uhuru Kenyatta and would also greatly imperil the integrity of that case.

19. Specifically, and as regards the Applicants, it is the 3rd Interested Party’s case that nowhere in the said proceedings was any information sought as regards the Applicants and therefore the present Application is premised on speculation and is frivolous, vexatious and an abuse of the Court process.

20. Regarding confidential proceedings, it is the 3rd Interested Party’s case that it is not unusual for

Courts to conduct such proceedings hence for example the provisions of **Article 50(8)** of the **Constitution** on proceedings in camera. In any event, that the proceedings, subject of this Application, were commenced with the consent of the Office of the Prosecutor at the ICC and subsequently, the ICC itself in a Ruling confirmed that the said proceedings were properly instituted and did not affect the interests, confidentiality and need to protect victims of the alleged ICC crimes.

21. Lastly, that it is in the interests of justice that the confidential proceedings should be kept as such and that any disclosure, as is sought by the Applicants, would be in violation of ICC Procedures and Regulations. That such an action may also constitute misconduct on the part of the disclosing party.

22. For the above reasons, the 3rd Interested Party prays that the Application herein be dismissed.

Determination

23. Having read the Application and responses thereto as well as submissions by the Applicants and the 3rd Interested Party (no other submissions are on record), I should begin by posing this question; what is the present Application all about?

24. In my understanding, the Applicants would like access to the pleadings and record in **Misc. Constitutional No.384 of 2013**, which matter was conducted confidentially by this Court, because:

- i. They are apprehensive that victims of the crimes forming the subject of the criminal trial against Hon. Uhuru Kenyatta at the ICC may have their interests and specifically their privacy under **Article 31** compromised by the orders issued therein.
- ii. They too are apprehensive that their privacy rights under **Article 31** may be compromised in the same manner.

25. In that context and in their submissions, they also stated that the information held by the Respondent is required to enable them exercise their rights and those of other individuals protected under **Article 31(c)** and **(d)** of the **Constitution**. Further, that they also seek to protect the threat to their rights and fundamental freedoms granted by **Articles 28, 29, 32, 33** and **36** of the **Constitution**, hence their reliance on **Article 35** of the **Constitution**.

26. The 3rd Interested Party on his part submitted that the Applicant's claims are purely speculative and they have failed to show why the information and details pertaining to the proceedings subject of this Application should be disclosed to them and how their rights would be infringed should the same not be done. That any disclosure of the information sought would undermine investigations at the ICC and would also imperil the proceedings in that Court.

27. In that context, I should address the following issues:

- a. What is the place of confidential proceedings in our judicial system and in the present circumstances, were they properly held?
- b. Have the Applicants properly invoked **Article 35** of the **Constitution**?
- c. Have any privacy rights under **Article 31** of the **Constitution** as regards the Applicants or any other person been breached or are they under threat of breach?
- d. Are the Applicants entitled to the remedies sought?

Confidential Proceedings

28. Confidentiality of proceedings i.e. the restriction of dissemination of information contained in those

proceedings, is an exception to the due process requirement that all judicial proceedings must be in public and before a competent judicial body - See **International Human Rights Law and Practice, Cases, Treaties and Materials, Rights International, Francisco Forest Marion et al.** Further, as was stated in **Mullane vs Central Hanover Bank & Trust Co. 339 U.S. 306, (1950) per Jackson J** one other requirement of due process is notice to the affected parties. He stated:

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ...”

29. Further **Article 50(1)** of the **Constitution** states as follows:

“1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.” (Emphasis added)

30. Conversely, **Article 50(8)** provides as follows:

“8. This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.” (Emphasis added)

31. The import of the above provisions is therefore that it is not in all instances and in all judicial proceedings that a public hearing must be conducted.

32. In addition to the above, the **International Crimes Act, Cap. 60 Laws of Kenya** which domesticates the Rome Statute provides as follows in **Section 25**:

“(1) A request for assistance and any documents supporting the request shall be kept confidential by the Kenyan authorities who deal with the request, except to the extent that the disclosure is necessary for execution of the request.

(2) Without limiting the generality of Subsection(1), if the ICC requests that particular information that is made available with a request for assistance be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses, and their families, the Kenyan authorities shall use their best endeavours to give effect to that request. (emphasis added).

33. **Article 68** of the **Rome Statute** also provides as follows:

“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses....where disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information ...”

34. The only conclusion that can be drawn from the above provisions is that there are instances in any judicial proceeding where persons, unaffected by the said proceedings, such as the media and the general public may be kept away from attendance of such proceedings for the reasons set out above.

35. To argue that all judicial proceedings ought therefore to be open to the general public or indeed

specified parties but who are unaffected by such proceedings, would be an argument that flies in the face of the law, as I understand it. I therefore and to that extent, find no fault in the conduct of the proceedings in issue.

36. As to whether the Applicants and those they claim to represent were entitled to notice of and participation in the proceedings under challenge; or that they are entitled to information with regard thereto, those are matters to be determined when addressing **Articles 31 and 35** of the **Constitution** herebelow.

Article 35 of the Constitution

37. For avoidance of doubt, **Article 35** provides as follows:

“35(1) Every citizen has the right of access to-

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publicise any important information affecting the Nation.”

38. The Applicants, in invoking the above Article have submitted that they have met all its expectations and at the minimum, the Respondent ought to inform them:

- i. Whether indeed the Application in issue exists.
- ii. The nature and purpose of the proceedings.
- iii. The reasons why the proceedings were conducted confidentially.

39. The 3rd Interested Party in response submitted that the Applicants are merely speculating on what information there may be in those proceedings and in any event, the proceedings have no effect on them or any other person they claim to represent. That having therefore failed to meet the threshold inherent in **Article 35** above, the orders sought should not be granted.

40. In the above context, I note that unlike the United Kingdom and South Africa, Kenya does not have a statute operationalising **Article 35**. I am aware however that there is, pending before the National Assembly, the **Access to Information Bill 2015** in that regard.

41. Further, in **Freedom of Information Manual by Marcus Turle, Sweet & Maxwell, 2005 edition**, Richard Thomas, UK Information Commissioner stated thus:

“It is scarcely an exaggeration to say that freedom of information could be one of the most significant legal developments in the UK for a generation ... Individuals, journalists, pressure groups and sophisticated Companies are bringing a very wide range of traditionally closed information into the open”

42. The above statement could very well apply to Kenya noting the increased litigation around **Article 35** rights and in that context, in **Charles Omanga & 8 Others vs AG & Anor, Petition No.29 of 2014** (as consolidated with **Petition No.65 of 2014**) the learned Judge in addressing the burden of proof placed upon a person invoking **Article 35** stated thus:

“Article 35 is part of the Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming, “that a right or fundamental freedom in the Bill of Rights has been denied, violated of infringed, or is threatened.” [Emphasis mine] ... A person moving the Court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated.”

He added that:

“... Under Article 35(1)(b) of the Constitution, the Petitioner must demonstrate the information sought is required for the protection or exercise of any right or fundamental freedom. In this respect the scope of Article 35(1)(b) is narrow than that of sub-Article 1(a). While sub-article 1(a) refers to the State ad its instrumentalities, the latter provision refers to any other person other than a State instrumentality. Sub-Article 1(b) is an implicit limitation on a person’s right to privacy and personal autonomy only to the extent necessary to enforce the right or fundamental freedom of another person. That is why the reference to right or fundamental freedom is limited to the exercise or protection of the rights contained in the Bill of Rights. It is not applicable to the enforcement or exercise of any other rights under the law or generally.”

43. He then added this as regards the need to have the existence of a controversy to warrant the intervention of the High Court:

*“This Court has always emphasised that although it has jurisdiction under Article 165(3)(d) of the Constitution to interpret the Constitution such interpretation is part of its ordinary jurisdiction to resolve disputes. ... In *Mwau vs The Attorney General High Court Nairobi Petition No.65 of 2011[2012] eKLR*, the Court 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. Likewise, in *Jesse Kamau and 25 Others vs The Attorney General, Nairobi Misc. App. No.890 of 2004 (Unreported)*, it was held that the Court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. In the absence of a real dispute between parties before it, the Court would be engaging in an academic exercise, or, at best, giving an advisory opinion, a role that is vested in the Supreme Court in this Country by the Constitution under Article 163(6) of the Constitution (See also *National Conservative Forum vs Attorney General Nairobi Petition No.438 of 2013 [2013] eKLR*).”*

44. On the same point, Moseneke, DCJ at the South African Constitutional Court in the case of **Director – General Department of Home Affairs, Minister of Homes Affairs vs Violetta Mukhamadiva [2013] ZACC 47** had this to say:

“It was not competent for the High Court, in the present circumstances where no live dispute existed between the parties, to issue an order requiring a report, raise a hypothetical question and direct the parties to present argument; and deliver a judgment that was intended to be an advisory opinion. And it would not be appropriate for this Court to decide a matter where no dispute exists.”

45. In applying the above principles to the present Application, it is indeed true that there are pleadings and the record in **Application No.348 of 2013** that were conducted confidentially but two issues then arise;

i. Is the right to that information absolute or is there an exemption to it? And;

ii. Is there a reason and or a controversy requiring this Court’s intervention?

46. On the first question, it is not in contest that **Article 35** rights are not absolute and are subject to the limitations in **Article 24** of the **Constitution** which provides thus:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and extent of the limitation;**
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

- a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;**
- b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and**
- c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**

3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

4. Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

- (a) Article 31—Privacy;**
- (b) Article 36—Freedom of association;**
- (c) Article 37—Assembly, demonstration, picketing and petition;**
- (d) Article 41—Labour relations;**
- (e) Article 43—Economic and social rights; and**
- (f) Article 49—Rights of arrested persons.”**

47. Further, by way of comparative jurisprudence, in the UK’s **Freedom of Information Act 2000**, and as explained by Marcus Turlle in the Manual cited above at page 11:

“Although the entitlement to information under FOIA is very wide, the law recognises that certain areas of Government need to retain some measure of secrecy and that freedom of access to information by the public should be balanced with legitimate commercial and confidential interests.

A person making a request is therefore not entitled to have information whatsoever. FOIA confers a general right – to – know, but with exemptions.”

48. Further, as I understand it, there are two types of exemptions to the above right:

- i. Absolute exemptions and
- ii. Qualified exemptions

49. **Sections 21, 22, 32, 34 and 41** of the **FOIA** *inter alia* explain that some of the absolute exemptions are on security matters, court records, parliamentary privilege, confidential information and in **Section 44**, other legal prohibitions on disclosure.

50. As I also understand it, The generally acceptable test for an exemption apart from the limitations in **Article 24** of the **Constitution** is whether the content of the information or the consequences of its disclosure would prejudice or would be likely to prejudice the particular interest which is the subject of the exemption – See **R (On the Application of Alan Lord) vs Secretary of State for the Home Department [2002] EWHC 2073 (Admin)**.

51. In **New Zealand’s Official Information Act, 1982** some of the exemptions in **Sections 6(c) and (d)** are disclosures which would prejudice the right to fair trial and likely to endanger the safety of another person.

52. In answer to the question I posed above therefore, it is obvious that the right to information can be limited in more than one instance. The 3rd Interested Party in that regard submitted that should the information sought be released, it would jeopardise on-going investigations at the ICC and prejudice would thereby be caused and the integrity of the ICC imperilled.

53. I have considered this matter and I am of the view that no prejudice whatsoever would be caused if the information is not released to the Applicants. I say so because the 3rd Interested Party has stated on oath that the details sought from the 1st and 2nd Interested Parties do not involve any of the Applicants, their electronic and telephonic communication inclusive. The Applicants did not respond to that deposition and failed to give any evidence of alleged interferences with their communication aforesaid what use will the access to the pleadings and record in **Application No.358 of 2013** then be? I submit none.

54. More fundamentally, after the conclusion of the said Application, the Legal Representative of the victims of the alleged crimes before the ICC instituted an “*application relating to possible disclosure of confidential information*”, by fact of the filing and determination of **Application No.348 of 2013**. He had sought orders *inter alia* that the Defence (represented by the 3rd Interested Party) should indicate whether “*it has communicated information which might lead to the identification of any victim of the crimes charged in the present case, or any protected witness, to any member of the public*” as defined in the ICC Protocol on confidential Information.

55. In dismissing the said Application, the Chamber (Ozaki, Fremr and Eboe-Osuji JJ) held as follows:

“On the basis of the information and documents provided in the Defence’s Response and the confirmation of that information by the Prosecution in its Reply, the Chamber is satisfied that ... would not, in the ordinary course, lead to the identification of any protected witnesses. As such, the Chamber considers that the disclosures did not amount to a violation of Article 8(4) of the

Code of Conduct or of paragraph 20 of the protocol on Confidential Information.

Specifically, the Chamber is satisfied, based on its own review of the relevant documentation and the assurances of the Defence and the prosecution, ...

Moreover, reasonable steps were taken to limit ... Specifically, the legal proceedings in the High Court of Kenya were filed confidentially ...

Finally, given that the ..., the Chamber is satisfied that the ...

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY;

DISMISSES, as moot, the relief sought in the Application;

REJECTS the Legal Representative's request for leave to reply to the Defence Response;

DISMISSES, as moot, the request for further information included in the observations;

DETERMINES that the relevant investigative steps taken by the Defence in conjunction with the prosecution did not violate Article 8(4) of the Code of Counsel or paragraph 20 of the Protocol on Confidential Information.”

56. The above findings of the ICC would only serve to confirm that any attempts by the Applicants to represent purported victims of the crimes allegedly committed by the suspects before it is a moot point because no identification of witnesses was made by the proceedings before this Court and no danger was posed to them. Of what purpose are these proceedings then?

57. In any event, it is obvious that like the ICC stated, the confidentiality of the proceedings before this Court was necessary and was properly done to protect the very same witnesses that the Applicants now purport to represent. In such circumstances, I am satisfied that the limitation to the enjoyment of **Article 35** rights by the Applicants are justifiable under **Article 24** aforesaid.

58. Having said so, the next question is whether indeed there is a controversy around **Article 35** that requires my determination?

59. I will take very little time on that question save to start by making further reference to the words of **Moseneke DCJ in Director – General Department of Home Affairs (supra)** where he stated thus;

“Long before our constitutional dispensation, the principle has always been clear; Courts should not decide matters that are abstract or academic and which do not have any practical effect either on the parties before the Court or the public at large. In Geldenhuis, Innes CJ stated, in the context of the granting of declaratory orders where no right have been infringed, that Courts of law exists to settle concrete controversies and actual infringements of rights, and not to pronounce upon abstract questions, or give advice on differing contentions.”

60. In that context, it is clear to me that the Applicants are apprehensive over nothing. Apprehension in unknown circumstances is human but in law, it must be based on tangible evidence. Where is that evidence? The 3rd Interested Party and the ICC have stated and I have independently found so, that **Application No.348 of 2013** has nothing to do with them or victims of the charges at the ICC. What then is the basis for the present Application, apprehension aside? I submit none at all and that is all I should say.

61. In concluding on **Article 35** of the **Constitution**, I am satisfied that it was invoked in error and based on misguided apprehension.

Privacy Rights under Article 31

62. **Article 31** provides as follows:

“Every person has the right to privacy, which includes the right not to have—

a. their person, home or property searched;

b. their possessions seized;

c. information relating to their family or private affairs unnecessarily required or revealed; or

d. the privacy of their communications infringed.”

63. What is privacy in the above context? In **ICCPR, Cases, Materials and Commentary by Sarah Josph and Melissa Castan at Page 533**, the authors opine thus:

“Privacy is a notoriously difficult term to define. It has been categorised as a choice, a function, a desire, a right, a condition. And/or a need. Privacy has also been defined as the desire of individuals for solitude, intimacy, anonymity, and reserve. It has been widely defined as ‘the right to be left alone’ and narrowly as a right to control information about one’s self”.

They go on to add that:

“A compromise definition could be that a right to privacy comprises freedom from unwarranted and unreasonable intrusions into activities that a society recognises as belonging to the realm of the individual ...”

64. I am persuaded by the above definitions but from what I stated elsewhere above, there is absolutely no evidence before me that there is a threat to the privacy of the Applicants or any other person in the context of the issues placed before. To delve into the matter further would therefore be akin to judicial groping in the dark. I refuse the invitation to join that exercise.

Other Issues Arising

65. It has been stated that **Articles 28, 29, 32, 33 and 36** of the **Constitution** may be violated by the Interested Parties hence the prayer for access to information under **Article 35**. I have held that **Article 35** rights are not available to the Applicants in the present circumstances and therefore any reference to other rights is a moot point.

Are the Applicants entitled to the remedies sought

66. The prayers sought in the Application have been reproduced elsewhere above. Given my findings on the main issues in contest, I see no reason to grant any of them.

It also seems to me that once the charges against Hon. Uhuru Kenyatta were withdrawn at the ICC, the present proceedings have been overtaken by events to that extent only. The constitutional issues arising have in any event been addressed as above.

Conclusion

67. Before I make my final orders, a curious issue was raised by the Applicants in their Affidavits in support of the Application and in their Submissions; that the status of Hon. Uhuru Kenyatta as President influenced or may have influenced the confidentiality of the proceedings, subject of the present Application. While I consider such a statement demeaning of the dignity and integrity of this Court, more so, coming from Advocates of this Court, where is the evidence leading a reasonable man to such a conclusion?

68. Hon. Uhuru Kenyatta, despite his status, has received no special treatment in this Court in any proceedings or indeed at the ICC where the Applicants have stated that they are involved in its proceedings.

69. This Court is enjoined by **Article 159(2)(a)** of the **Constitution** to do justice to all, “irrespective of status”. It has lived to that edict and to insinuate otherwise without proof is reckless and irresponsible. That is all I shall say on that matter.

Disposition

70. The Application dated 22nd January 2014 is dismissed and as for costs, the nature of the matter would necessitate that each Party ought to bear its own costs.

71. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Aulo for Applicant

Mr. Onyino holding brief for Mr. Ogunde for 2nd Interested Party

Miss Mutua for Respondent

Miss Chitili holding brief for Miss Ng’ama for 1st Interested Party

Order

Ruling delivered.

ISAAC LENAOLA

JUDGE