



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 40 OF 2013

IN THE MATTER OF ALLEGED CONTRAVENTION OF PREAMBLE, ARTICLE 1, 2, 3, 4, 38, 129, 131, 132, 143 AND 147 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF INTERNATIONAL CRIMES ACT, 2008

AND

IN THE MATTER OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

AND

IN THE MATTER OF UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

AND

IN THE MATTER OF THE ROME STATUTE

AND

IN THE MATTER OF INTERNATIONAL CRIMINAL COURT (ICC)

AND

IN THE MATTER OF SOVEREIGNTY OF THE PEOPLE OF KENYA AND SUPREMACY OF THE CONSTITUTION

AND

IN THE MATTER OF THE PRESIDENT AND DEPUTY PRESIDENT OF THE REPUBLIC OF KENYA

BETWEEN

WILLIAM KAMKET.....1ST PETITIONER

KEN BARTAL.....2ND PETITIONER

FELIX KIPRONO MATAGEI.....3RD PETITIONER

VERSUS

THE HONOURABLE, ATTORNEY-GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF FOREIGN AFFAIRS.....2ND RESPONDENT

THE HONOURABLE SENATE SPEAKER.....3RD RESPONDENT

THE HONOURABLE SPEAKER, NATIONAL ASSEMBLY.....4TH RESPONDENT

INSPECTOR-GENERAL, POLICE SERVICE COMMISSION.....5TH RESPONDENT

THE HONOURABLE CHIEF JUSTICE, REPUBLIC OF KENYA.....6TH RESPONDENT

RULING

This Ruling relates to a Notice of Motion premised upon Articles 1, 2, 3, 10, 73, 165(3)(d) 258 and 259 of the Constitution of Kenya 2010, and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) High Court Practice and Procedure Rules 2013 in which the Petitioners seek the following orders -

- (a) that pending the hearing and determination of this application, this honourable court be pleased to order the respondents to ensure that the President and the Deputy President do not absent themselves from the Country if such absence is attending proceedings at the International Criminal Court at the Hague Netherlands or wherever the Court is sitting.*
- (b) that pending the hearing and determination of this petition, this honourable court be pleased to order the respondents to ensure that the President and the Deputy President do not absent themselves from the country if such absence is attending proceedings at the International Criminal Court at the Hague Netherlands or wherever the court is sitting.*
- c. that the court be pleased to certify that the Petition raises grand and weighty Constitutional issues and the same should be referred to the Chief Justice to constitute a bench to determine it.*
- d. Costs of and incidental to the application be provided for.*
- (e) Such further and other reliefs that the Honorable Court may deem just and expedient to grant.*

2. The Petition is led by William Kamket, the Speaker of Baringo County Assembly. The other two Petitioners are private citizens of Kenya.

3. The First Respondent is Attorney-General of the Republic of Kenya and principal legal adviser of the Government pursuant to Article 156 of the Constitution. The Second Respondent is a State Officer in the Ministry of Foreign Affairs while the Third to Sixth Respondents are respectively the Speakers of the Senate and the National Assembly, the Inspector-General of Police and Hon. Chief Justice of Kenya.

4. The Notice of Motion is supported by the Affidavits of the three respective Petitioners all sworn on 14th October 2013 and the grounds that -

1. *there is a possibility of a constitutional crisis if the President and Deputy President are found guilty, convicted and imprisoned by the International Criminal Court.*
2. *that the Respondents have exposed Kenyans to neo- colonialism against the spirit of the Constitution.*
3. *the Respondents have failed to protect hallowed Constitutional principles of separation of sovereignty of the people and supremacy of the Constitution.*
4. *that the President of the Republic of Kenya and any person acting in that capacity is immune from civil or criminal prosecution while in office.*
5. *that allowing the Republic of Kenya to run without a substantive occupant of the Office of the President will alter the system of governance in a manner unprecedented and there is need for a referendum to determine whether Kenyans accept such a structural change in the governance architecture of the country.*
6. *the Respondents have capacity to prevent and/or not to allow the President and Deputy President to leave the country to attend to the ICC proceedings/trials.*
7. *that the actions and/or inertia by the Respondents will defeat the purpose and objectives of the Constitution of Kenya 2010 and more so fundamental rights and freedoms unless the court intervenes.*
8. *that the sovereignty of the people of Kenya is under threat as cartels may now run the Government of Kenya thus fleecing and impoverishing Kenyans.*

5. These grounds were substantially reiterated by the Petitioner's counsel, Mr. L. M. Karanja and B. Kipkoech, former Chairman and current Chairman of the Rift Valley Law Society. The Petitioners' claim as urged by both counsel is that the Respondents have abdicated their constitutional mandate by failing to enforce the President's right of immunity from criminal proceedings as enshrined under Article 143 of the Constitution without first following the procedure of removal of a President from Office by way of impeachment as laid down under Article 145(1) of the Constitution.

6. Counsel argued that Article 145 of the Constitution provides the only procedure for removal of a President through impeachment by the Senate and only where there is serious belief that the President has committed a crime. Counsel submitted that the Respondents have abdicated their duty and failed to inform the International Criminal Court of these provisions of the Constitution. There would thus be a serious breach of the Constitution if the President were allowed to be tried and convicted by the International Criminal Court. Such an eventuality counsel contended, would be both contrary to the provisions of the **International Convention on Civil and Political Rights** and the **Universal Declarations of Human Rights 1948** which entrench the sovereignty of the people.

7. Counsel argued that the removal of a democratically elected President by such trial at the ICC would be an act of neo-colonialism.

8. Counsel also argued that the Commission of Inquiry into the Post-Election Violence (of 2007/2008) failed to hand over its Report to the appointing Authority. Instead, the Report was given to Mr. Kofi Annan and Mr. Morino Ocampo, respectively former Secretary-General of the United Nations and Prosecutor of the International Criminal Court. Counsel further submitted that the International Criminal Court process is therefore rubbishing the entrenched provisions of the Constitution of Kenya which was universally adopted by the people of Kenya through a referendum and later promulgated by the President. Counsel therefore urged that unless the interim orders sought are granted, there will be serious alteration in the governance of Kenya,

9. On his part, Mr. Kipkoech argued that though Article 2(5) & (6) of the Constitution adopted the

Rome Statute as domesticated in the **International Crimes Act 2008**, the Statute is however a lesser norm than the Constitution. Statutes cannot override the provisions of Article 145 of the Constitution, that the President is immune from civil and criminal process, and the Petitioners therefore seek the court to declare those statutes unconstitutional to the extent that they seek to have a sitting President tried at the Hague, or at all.

10. Mr. Kipkoech submitted that this Country is at cross-roads, with its advanced democracy, a Supreme Court, a Court of Appeal, and an experienced High Court, and that it ought to be allowed to conduct its affairs, like it did during the past 4th March 2013 General Elections.

11. Counsel expressed concern that though some members of the U.N. Security Council are not members or signatories to the Rome Statute, yet they have a say in the affairs of the International Criminal Court. Their interest or objectives in that court are therefore not clear, as they are not members thereof.

12. Similarly, counsel expressed concern that were the President and Deputy President to be convicted, the Speaker of the National Assembly would become President of the Country. Such an eventuality, counsel declared, would radically change the architecture of Governance of Kenya in respect of which Kenyans should have a say. Counsel submitted that the trial of the President at the Hague should be a matter for a referendum before going to the Hague.

13. Counsel submitted that since the President would be required to go to the International Criminal Court in less than one month from now, and for that reason alone, the court should exercise its mandate under Article 165 (d) of the Constitution to protect the independence and sovereignty of this Nation, which was achieved through the blood and sweat of our fore-fathers, and grant the interim orders sought.

14. Article 165(4) of the Constitution donates to this court the jurisdiction to certify any matter as raising a substantial question of law under sub-article (3)(b) or (d) of the Constitution and to be heard and determined by an uneven number of judges, being not less than three, assigned by the Chief Justice.

15. Counsel for the Petitioners did not assist the court in framing the issues to be certified as raising substantial questions of law, and therefore requiring a three-judge bench to determine them. From their respective submissions I discern these to be the issues -

1. whether the impending trial of His Excellency, Uhuru Muigai Kenyatta at the International Criminal Court at Hague in the Netherlands is a violation of his right of immunity to prosecution as guaranteed under Article 143(1) of the Constitution,
2. whether such criminal proceedings can only follow after removal of a President following or through an impeachment process under Article 145(1) of the Constitution or after cessation of Office under Article 146(1)(b) of the Constitution,
3. whether the International Crimes Act 2008 is inconsistent with the Constitution of Kenya,
4. whether the trial of a President under the Rome Statute at the International Criminal Court in the Hague, Netherlands is a matter for determination by Kenyans in the exercise of their sovereignty as a people by way of a referendum, and
5. whether there would be a vacuum in the Governance architecture of Kenya in the event of cessation of Office by the President and Deputy President through the International Criminal Court processes.

And arising from the above issues whether any interim conservatory orders should be granted in this Petition.

16. I have reviewed with considerable care and anxiety the grounds in support of the Notice of Motion, the Petitioners' Affidavits and whereas I entirely agree with both Counsel that the Petition raises serious issues concerning the sovereignty of the people and the vested right of the people under Article 3 to defend and uphold the Constitution, I am not satisfied that the issues raised cannot be determined by a single judge. I therefore decline to certify the issues herein raise any substantial question of law requiring to be heard and determined by an uneven number of judges.

17. Being also of the said mind I decline to issue the interim orders sought and strike out the Notice of Motion with no order as to costs. I direct that the Petition herein be served upon all the Respondents forthwith. I further direct that the Petition be heard *inter partes* on 29th October, 2013 at 9.00 a.m.

18. It is so ordered.

Dated, signed and delivered at Nakuru this 18th day of October, 2013

M. J. ANYARA EMUKULE

JUDGE