



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R.M MWONGO, PRINCIPAL JUDGE)

CONSTITUTIONAL PETITION NO. 488 OF 2013

**IN THE MATTER OF ARTICLES 1,2,3,10,20,21,22,23,258 AND 259 OF THE CONSTITUTION
OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMNETAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27, 28, 41, 47 AND 50 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ICA, 2008 IN RESPECT OF THE REQUEST FOR ARREST AND
SURRENDER OF THE PETITIONER TO THE INTERNATIONAL CRIMINAL COURT
PURSUANT TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

AND

**IN THE MATTER OF THE ENFORCEMENT OF WARRANT OF ARREST ISSUED BY THE
INTERNATIONAL CRIMINAL COURT AGAINST THE PETITIONER ON 2ND AUGUST, 2013**

BETWEEN

WALTER OSAPIRI BARASA..... PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF INTERIOR

AND NATIONAL CO-ORDINATION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

AND

WILFRED NGUNJIRI NDERITU.....1ST INTERESTED PARTY

OKIYA OKOITI OMTATAH.....2ND INTERESTED PARTY

REV. JOHN MBUGUA.....3RD INTERESTED PARTY

RULING AND DIRECTIONS

1. There are three interrelated matters before me on which a ruling and or directions are required. The *first matter* is the substantive Petition herein, (hereinafter “the Petition”) filed on **8th October, 2013**, by the Petitioner. It is by this Petition that these proceedings commenced under the present file reference. Filed together with the Petition, is an application by way of notice of motion made under certificate of urgency (hereinafter the “First Application”) of the same date. The First Application seeks certain conservatory orders, including the prohibition of the Petitioner’s arrest pursuant to the request of the International Criminal Court (hereinafter “the ICC”), pending the hearing and determination of the Petition.
2. A further application, also under certificate of urgency, was filed by the Petitioner on 9th October, 2013 (hereinafter the “Second Application”). In it, the Petitioner seeks to be furnished with a copy of the Warrant of Arrest and supporting documents issued by the International Criminal Court, and a stay of any further proceedings premised on the First Respondent’s request.
3. The two applications came before Hon Justice Odunga, and in his Ruling dated 11th October, 2013, he directed that the file be placed before me for further directions or orders. In the interim, he granted the Petitioner an order that he be accorded police protection from arrest. I need not repeat the details of the prayers in the First and Second Applications, as these are set out fully in the Ruling of Odunga, J.
4. The *second matter* which is before me is an application dated 11th October, 2013, by Rev. John Mbugua, seeking to be enjoined as a party to the Petition (hereinafter the “Joinder Application”). It is opposed by all the Respondents and the 1st Interested Party. The Second Interested Party left the determination to the Court, and the Petitioner supports the application. I heard the Joinder Application on 15th October, 2013, and will issue my ruling in respect thereof herein. I should mention that the 1st and 2nd Interested Parties’ applications for Joinder were not opposed, and the Court enjoined them as parties
5. The *third matter* before me is not filed under these proceedings, but is central to the subject of the Petition and all the applications herein. It is a letter dated 4th October, 2013 written by the 1st Respondent, the Cabinet Secretary, Ministry of Interior and National Co-ordination, to the Principal Judge of the High Court. It transmits the ICC warrant of arrest and seeks issuance of a warrant for the arrest of the Petitioner under **Section 9** of the International Crimes Act, No 16 of 2008 of the Laws of Kenya (hereinafter “the **ICA, 2008**”). That section requires the Minister to *notify* a Judge that a requests for surrender has been issued and *requests* that a warrant of arrest be issued. I shall hereafter refer to the letter as the **Notification and Request**.
6. Upon receipt of the Notification and Request by the Principal Judge on 7th October, 2013, he wrote to the Honourable the Chief Justice for the appointment of a Judge of the High Court to consider the matter. The Chief Justice has since appointed the Principal Judge as the judge to preside over the matter.

7. The Notification and Request letter by the 1st Respondent, which is also annexed as **Exhibit “WOB 1”** in the Petitioner’s affidavit in support of the Second Application, is set out hereunder:

“ Hon. Justice Richard Mwongo

The Principal Judge

High Court of Kenya

....

I am in receipt of a warrant for the arrest of Mr. Walter Osapiri Barasa, a Kenyan Citizen, from the International Criminal Court, Pre-Trial Chamber II.

The International Criminal Court issued the warrant of arrest on 2nd August on 2nd August, 2013 acting on the International Criminal Court Prosecutor’s application dated 30th July 2013, in which the Prosecutor sought the arrest of the said person for alleged offences against the administration of justice under Article 70(1)(c) as read with Article 25(3)(a) of the Rome Statute. Thereafter on 2nd October 2013, the Court unsealed the arrest warrant.

In discharge of my responsibilities under Section 29(1) of the ICA, No. 16 of 2008, I hereby transmit the International Criminal Court’s arrest warrant for Mr. Walter Osapiri Barasa under the Law of Kenya.

Henceforth this matter will be handled in Court on behalf of the State by the Attorney General and/or the Director of Public Prosecutions.

Please find enclosed the International Criminal Court’s warrant of arrest for Mr. Walter Osapiri Barasa dated 2nd August 2013 for your action.

Joseph Ole Lenku, Cabinet Secretary”

8. At the mention for directions on 15th October, 2013, the Court received submissions of the parties on how the *first* and *third matters* should proceed, to enable the issuance of appropriate directions. As to the *second matter*, the submissions received are stated briefly in the following paragraphs, and are followed by my ruling thereon.

Application by Rev. John Mbugua to be Enjoined in the Proceedings

9. The applicant’s application states that he is a displaced citizen in respect of the 2007/2008; 2002; 1997 and 1992 post elections violence and the 1982-1986 forest evictions. He seeks to be enjoined in the petition:

“...to seek verification of some issues in the ongoing matter:

- 1. That whether the warrant issued in the ICC by the ICC Court had an application or file number and whether the Mr. Walter Barasa had been served with the notice to appear in Court which he may have filed then the warrant was issued.*
- 2. That whether the ICC Court did do any effort to advertise in the local daily newspapers as required by law so that Mr. Barasa, Kenya and the world at large would read in broad daylight the contents in the said warrant.*
- 3. That whether the affidavits of the said victims that were to be bribed are attached therein.*

4. *That whether all the necessary provisions of law have been followed to the letter.*
 5. *That whether ICC had made arrangements and provisions for Mr. Barasa, his legal team and family to travel to the Hague to argue his innocence in the first place.*
 6. *That when the warrant reached Kenya to the Minister of National Security and Coordination, did he put a paid advert on all dailies as required by law so that Mr. Barasa could read and have an opportunity to respond.*
 7. *That whether the Minister did any effort to write to Mr. Barasa through SMS, email or any form of communication and send him all the attachments for the said warrant”*
10. The application is supported by an affidavit deposed by him. During the hearing of his application, he averred that he wants to represent the citizenry of this country and defend the Constitution.
 11. The application was opposed by the Respondents and Mr. Nderitu the 1st Interested Party. Counsel for the 1st, 2nd and 4th Respondents, Ms. Munyi, argued that the application is difficult to comprehend and does not contribute to the matter before the court.
 12. Mr. Mule, Counsel for the 3rd Respondent, submitted that the applicant has not demonstrated the interest he has in the matter. Further, that the Petitioner does not need an intermediary as he is ably represented by his Counsel. As regards the Petitioner’s constitutional rights, Counsel argued that it had not been demonstrated that these rights will not be accorded.
 13. Mr. Nderitu associated himself with sentiments by Counsel for the Respondents.
 14. Mr. Omtatah, the 2nd Interested Party left the decision to the court.
 15. Mr. Kibe, for the Petitioner, did not oppose the application. He submitted that the matter before the court being public interest litigation, the reasons stated by the applicant were sufficient for him to be enjoined as he is a Kenyan Citizen. As regards whether or not the applicant would make useful contributions, Counsel submitted that this should not be a subjective process. As such, the applicant should be enjoined as an Interested Party.
 16. I have considered the application of Rev John Mbugua, and the representations of all parties in respect thereof.
 17. I am guided, firstly, by the provisions of **Article 22(1) and 22(2)(c) of the Constitution, 2010** which provides, inter alia, as follows:
 - “22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**
 - (a).....**
 - (b)....**
 - (c). a person acting in the public interest;...”**

18. The question of joinder where a person claims to act in the public interest recently arose in a

petition in the High Court at Milimani in the case of **Nyambene Miraa Traders Association (Nyamita) and National Agency For The Campaign Against Drug Abuse (Nacada) and The Hon Attorney General, Petition No. 374 Of 2013**. There, Majanja J stated as follows:

“The court is entitled to join parties as interested parties under rule 7 of the Constitution of Kenya (Protection of Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Legal Notice 117 of 2013) (“the Rules”) which provides;

7 (1) A person, with leave of the court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to proceedings before it.”

Rule 2 of the Rules defines an interested party as ‘a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’.

In my view, all that an interested party has to show is that it has an identifiable and not trifling interest in the matter which is the subject of the litigation. Such interest must be over and above the normal interest any person may have in litigation which is of a public nature. Further, the court ought to consider the course of litigation and whether such joinder will lead to delay, impose additional costs or prejudice the parties. As the decision is discretionary, the exercise of discretion will ultimately depend on the facts of the case.”

19. It is true, as argued by some of the respondents, that the applicant’s application is inelegant and inarticulate. As such, it is not very clear, and may appear to add nothing to the proceedings. The applicant describes himself as a church minister, not an advocate, and the inelegance of the application should not otherwise be held against him. It has not been demonstrated, however, that his inclusion as an interested party would affect the proceedings in any inappropriate manner, or that any party is likely to suffer prejudice by his inclusion.

20. I am satisfied in the present circumstances that the applicant may properly be enjoined in the Petition proceedings.

Ruling on Application by Rev. John Mbugua to be Enjoined

21. In light of the foregoing, I rule that Rev. John Mbugua be and is hereby enjoined in the Petition as an Interested Party. He shall hereafter be referred to as the 3rd Interested Party.

Submissions on the Petition

22. Mr Kibe for the Petitioner submitted that the petition should be heard without delay. Under **Article 23** of the **Constitution**, the Petitioner would be entitled to a determination under the **ICA, 2008**. With regard to the process under the **ICA**, Counsel submitted that any action there-under would presume jurisdiction of the ICC. Counsel submitted that in the Petitioner’s view, co-operation with the ICC is prohibited. The success of the petition would therefore mean that no other proceedings can go on.

23. As regards the First and Second Applications, Mr Kibe submitted that one of their applications seeks copies of the Arrest Warrant and supporting documents. Counsel submitted that the petition was not premature since at the time of filing, there was public knowledge that the court had been moved under **section 29** of the **ICA, 2008**. This, he stated, was part of the basis upon which the Ruling by the Hon. Justice Odunga was predicated.

24. On whether both proceedings can run together, Counsel submitted that under **sections 29-30** of the **ICA**, the scope of the court to exercise its jurisdiction is extremely limited. However, it was Counsel's submission that **Article 165** of the **Constitution** provides for a broader jurisdiction invoked by Barasa and thus he is entitled to a decision by the court. Therefore in the Petition, the petitioner seeks reliefs, whereas in the other matter the State seeks an arrest warrant.
25. Mr. Kamula, for the 3rd Respondent submitted regarding the petition, that under **section 18** of the **ICA, 2008**, the High Court has jurisdiction to hear matters under **sections 9-17** of the **ICA, 2008** and **Article 70** of the **Rome Statute**. Further, that looking at **sections 18** and **55** of the **ICA**, one could not tell whether there is a complaint or investigation under the Kenyan courts, thus the question of jurisdiction cannot be argued.

Submissions on the Notification and Request Letter

26. Mr. Kibe, submitted that, the existence of court proceedings for purposes **Part IV** of the **ICA, 2008** would presuppose the court being moved by something more than a mere letter like that of 4th October, 2013. Counsel submitted that it should involve various considerations such as those premised under **Article 50** of the **Constitution, 2010**. He argued that the Minister, the Attorney General and the Director Public Prosecutions (DPP) would have to undertake an involvement of the Petitioner. Thus, the movement by the Minister under **Section 29** of the **ICA, 2008** must be made with full knowledge that the rights of a Kenyan citizen would be affected.
27. Counsel further submitted that there are safeguards under the law. In reference to **section 29** as read together **section 50** of the **ICA**, Counsel submitted that the Minister would carry out this function in appreciation of the rights of the Petitioner. According to Counsel, the first of these rights would be that the Petitioner should be furnished with the documents from the ICC. To date, Counsel averred, these documents have not been furnished.
28. It was Counsel's submission that before the Hon. Justice Odunga, the Attorney General and the DPP took the position that there are parallel proceedings going on before the court. Accordingly, Counsel submitted that the first question is whether a decision has been made under **section 29**. If the answer was in the affirmative, Counsel averred that the prayers sought by the Petitioner are readily available. He submitted that if the Attorney General wants to recall the letter and restart the process then that would be for them to decide.
29. Mr. Kibe also submitted that assuming a decision had been made under **section 29** of the **ICA, 2008**, and the Attorney General agrees to file a formal application, nothing would prevent the petition from being heard. Counsel urged the court to hear the petition for at least three reasons;
- a. First, the Petitioner contends in the petition that **Part IV** of the **ICA, 2008** is unconstitutional, thus the constitutionality of the **ICA** must be confirmed.
 - b. Second, that the offences for which an Arrest Warrant has been issued by the ICC are triable before a Kenyan Court. Thus jurisdiction to try him vests in Kenyan Courts. If the petition succeeds, the Minister needs not act at all, and there would be no need for other proceedings.
 - c. Under **section 19(2)** of the **ICA** as read with the Constitution, the DPP is enjoined to consider whether trying the Petitioner at the Hague would occasion upon him injustice or oppression. The Petitioner contends that there are exceptional circumstances that would require the DPP to ensure a local trial.
30. Ms. Munyi for the 1st, 2nd and 4th Respondents on the issue of the letter from the Cabinet Secretary, submitted that as regards the arrest warrant, **section 30** of the **ICA, 2008** provides that the judge 'may' issue a warrant in the prescribed form on the basis of the information presented to him. That was a discretion he could exercise.
31. As regards the issue of procedure, Counsel submitted that the same was clearly set out in the **ICA**, wherein parties are obliged to follow the procedures as set.

32. Ms. Munyi submitted that this matter is criminal in nature and in view of separation of powers between the office of the Attorney General and the DPP; the same can be replied to and dealt with by the DPP. On jurisdiction, Counsel submitted that under **Section 18 (1)** of the **ICA** a person alleged to commit an offence against the administration of justice may be tried and punished in Kenya.
33. Mr. Kamula on the issue of the aforementioned letter from the Cabinet Secretary submitted that under **section 29 (2)** of the **ICA, 2008**, the letter constitutes a notice. It is not a mere letter, moves the court. The court having been seized of the letter, has therefore been moved and can therefore give directions.
34. It was Counsel's submission that the matters before the ICC were investigated there, and therefore the ICC has jurisdiction. Accordingly, the argument that such a crime must be heard in Kenya in the first instance is not supported by law.
35. As regards co-operation, Counsel submitted that no article of the Constitution was cited in prevention of co-operation. Counsel asserted that The **Rome Statute** is part of Kenyan Law under **Article 2** of the **Constitution, 2010**. Further, that the procedure is clearly set out under the **ICA, 2008**.
36. On **section 19 (2)** of the **ICA, 2008**, it was Counsel's submission that exceptional circumstances must be raised by the Minister or the Attorney General to show that it would be unjust or oppressive to surrender the person. According to Counsel, **section 19 (2)** operates only if the Minister decides not to submit a request to court for surrender.
37. It was Mr. Kamula's submission that it is not correct that the court can sit as a Constitutional Court or in exercise of jurisdiction under the **Rome Statute**. The court is a High Court with unlimited jurisdiction under the Constitution, and can hear all matters in the same proceedings, a point Counsel contends was canvassed before Odunga, J.
38. Counsel submitted that these are criminal proceedings and the DPP exercises all powers under the Act. Further, that the Attorney General plays a role, not in the request for surrender, but in conjunction thereto under the Act. Counsel pointed out that under **section 37** of the **ICA, 2008** the High Court has all the powers under criminal proceedings and that the Petitioner has all the safeguards available within the criminal proceedings regime.
39. Mr. Nderitu, an Interested Party submitted that there are proceedings before the ICC relating to the arrest warrant, being, **The Prosecutor vs. Walter Osapiri Barasa No: ICC – 01/09-01/13**. On the issue of the letter aforesaid, Counsel argued that under the **ICA**, the Minister was merely facilitating the proceedings before the ICC on behalf of the Government of Kenya as a State Party. Thus there was no need for the institution of fresh proceedings before the High Court. The Minister's role was to forward or transmit the warrant. Further, that under **section 29** of the **ICA, 2008**, all that was required was that the formal requirements are complied with and annexures availed.
40. Mr. Nderitu also made reference to the **Article 159 (1)** of the **Rome Statute** which requires a state party to take immediate steps to arrest the person in accordance with its laws and provisions of Part 9. Also, that **section 4 (1)** of the **ICA, 2008** makes provision for the Rome Statute to have force of law in Kenya. It was Mr. Nderitu's submission that **section 4 (1) (a) (b) and (c)** are relevant to this matter as well as **section 4 (2)**.
41. It was his further submission that **section 9-17** of the **ICA, 2008** are not relevant in the present circumstances as they relate to offences with regard to which a complaint or an investigation has been undertaken locally, where the DPP has received a complaint and commenced investigations. Mr. Nderitu submitted that the present circumstances are different in that the complaint was made by the Prosecutor in the ICC and further, the proceedings leading to the warrant of arrest were by

the Prosecutor. The correct position according to Mr.Nderitu is as envisaged by **Article 70** of the **Rome Statute**, where the ICC shall have jurisdiction which is expressly given under **Section 4** of the **ICA, 2008**.

- 42.Mr.Nderitu also submitted that it is for the ICC to determine whether or not to exercise jurisdiction, which in the present circumstances, it has chosen to do for reasons in the unsealed warrant. Further, that the High Court's role and how parties should proceed is provided for under **Article 59** of the Rome Statute. It is limited to taking steps to arrest in accordance with national laws. According to Mr.Nderitu, co-operation is automatic. Further, that the **Constitution** under **Article 2 (6)** recognises ratified treaties as part of the laws of Kenya.
- 43.Mr.Omtata, also an Interested Party submitted that the Rome Statute is a treaty, thus the court cannot assume that the membership of Kenya is constitutional. According to Mr. Omtatah, the **Constitution of Kenya, 2010** bars the enforcement of the **Rome Statute**. Thus, the ICC has no jurisdiction in Kenya. He further submitted that the court should ensure that constitutional issues are addressed in this matter.
- 44.In his rejoinder, Mr. Kibe submitted that the position that the court can be moved by a letter conflicts with the position that demands existence of a file which would then have a case number and file for proceedings. Until that happens, he argued, it could not be said that any judge is seized of a given matter. Counsel further submitted that the Minister is supposed to make rules of procedure for enforcement. On this, Counsel cited **section 172** and **173** of the **ICA, 2008**. This, according to Counsel, explains the dilemma and why they should be heard first.
- 45.Mr. Kibe criticised the DPP's assertion that the High court has been moved pursuant to **section 29 (1)** of the **ICA**. He pointed out that the DPP had submitted that Odunga J did not commit himself on whether the jurisdiction of the court had been invoked; the learned Judge simply took the position that the Minister had made some decision under **section 29** of the **ICA**.
- 46.On **section 18** and **55** of the **ICA**, Counsel submitted that the issue of Barasa's nationality was not confirmed. Thus, the provisions apply especially in relation to whether the ICC has jurisdiction over Barasa.
- 47.Counsel submitted on behalf of the Petitioner that co-operation is done on a case by case basis, and there is no duty to co-operate all the time. He added that the Constitution prohibits co-operation except on that basis.
- 48.As regards **section 19** of the **ICA, 2008**, Mr. Kibe submitted that it operates when a request has been made. On the DPP's assertion that the Minister did not see exceptional circumstances, Counsel averred that this reinforces Barasa's grievance because he was not contacted or asked, and further, that no one knows Barasa's exceptional circumstances.

Analysis and Determination on the procedures to be applied

- 49.I have carefully considered the submissions by the parties. That the Petition is properly filed in apprehension of the threatened arrest of the Petitioner, is not in issue. I will deal with each of the two matters separately, in order to identify the procedures which will be applicable to the matters before me.

Petition

- 50.A person's right to institute legal proceedings cannot be curtailed under the Constitution. This is particularly so where, as in this case, the person claims that the Constitution has been contravened or is threatened with contravention. See **Article 258 Constitution, 2010**.
- 51.In the Petition, the Petitioner seeks ten orders and declarations of varied nature. Some contest the

applicability and constitutionality of the **ICA**; others suggest that his fundamental rights would be abrogated by an arrest and so seek prohibition of the same and any further proceedings without first hearing him; others seek injunctive relief to compel his protection and furnishing him with a copy of the Notification and Request.

52. The First and Second Applications seek interim reliefs grounded on the main Petition, pending its hearing. In my view, it would be superfluous to hear the applications were the court to direct that the parties proceed with the substantive petition, to expedite the conclusion of the matter

53. Since the promulgation of the **Constitution, 2010**, the new dispensation demands that courts shall be guided by, inter alia, the principle that justice shall not be delayed. See **Article 159(2)(c)**.

54. None of the parties have argued that this court cannot proceed with the hearing of the petition whilst seized with the Notice and Request for Arrest. Accordingly, I am inclined to order that the matters proceed concurrently. This will give succour to the Petitioner and avail him the opportunity to defend his constitutional rights without the feeling of being unfairly treated. Likewise, no prejudice will be suffered by the Respondents and Interested Parties.

Notice and Request for Arrest

55. For the avoidance of doubt, I must commence by indicating that no steps towards making a decision on the Notice and Request for Arrest, have as yet been taken by this court pursuant to **Section 29** or **30** of the **ICA**. The only action taken is the appointment of a Judge to consider the matter.

56. It is not in dispute that the actions sought to be taken under the **ICA** are criminal proceedings in nature. However, it is clear that under the Constitution, a challenge to criminal proceedings, whether national or international in nature, could be brought by an action under criminal procedures or directly under the Constitution, for example, by way of petition.

57. In my view, part of the dilemma facing the court and the parties, is the absence of a clear procedure for the actions surrounding the steps to be taken upon the issuance of the Notice and Request. **Section 172(a)** **ICA** enables the Minister to make rules for the procedure to be followed in dealing with requests made by the ICC. The provision states:

***“172. The Minister may make regulations, not inconsistent with this Act, for any of the following purposes -
(a) prescribing the procedure to be followed in dealing with requests made by the ICC, and providing for notification of the results of action taken in accordance with any such request;..”***

The Minister has not made any such regulations.

58. The Notice and Request is issued under **Part IV** of the **ICA**. **Section 37** of the **ICA** under that Part, requires that the procedures to be followed under that Part should be the same as those for an offence alleged to have been committed in Kenya. The provision reads:

“37. In proceedings under this Part, except as expressly provided in this Act or in regulations made under this Act, the High Court shall have the same jurisdiction and powers, and shall conduct the proceedings in the same manner, as if the person were charged with an offence alleged to have been committed within Kenyan jurisdiction.”

59. Criminal proceedings in Kenya can be instituted pursuant to **Section 89** of the **Criminal Procedure Code, Chapter 75**, of the Laws of Kenya. The section provides as follows:

“ 89(1) Proceedings may be instituted either by the making of a complaint or by the

bringing before a magistrate of a person who has been arrested without warrant

60. In the present case, this provision cannot apply in the form in which it is set out without amendment, because under the **ICA**, only a High Court Judge is entitled to deal with a Notice and Request.

61. The **ICA, 2008** is part of the laws of Kenya. It was part of the existing law at the time of promulgation of the Constitution, 2010. Although it and the **Rome Statute** are impugned in the Petition, no pronouncements have been made by the courts in Kenya declaring them unconstitutional or otherwise inapplicable.

62. **Section 7** of the **Sixth Schedule** to the **Constitution** provides that:

“7.(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

So the law must be construed with such alterations and adaptations as are necessary to enable it to properly apply to the relevant circumstances and within the constitutional framework.

63. My reading of **Articles 22(3)(b); 22(3)(d); 22 (4) and 159(2)(d)** of the **Constitution**, persuades me that the Constitution demands that the rules providing for judicial proceedings in respect of protection of fundamental rights should satisfy certain important minimum criteria in relation to procedures. I am able to identify at least three such minimum criteria. The first is that formalities relating to the commencement of proceedings should be kept to a minimum. The second is that the court shall not be unreasonably restricted by procedural technicalities and justice shall be administered without undue regard thereto. The third is that absence of clear rules cannot limit the right of any person to commence court proceedings

64. I am persuaded that these criteria, or criteria along similar lines, should also provide over-arching guidance to the procedure which I should direct for the expeditious determination of the matters before me.

65. For good administrative order and judicial convenience, it is necessary that where a warrant is sought to be issued pursuant to a Notice and Request, and the same has been brought before a Judge, it is deemed to be a criminal proceeding and a file should be opened. The file becomes constituted as the repository of all documents and proceedings in that matter, present and future. Taking cognizance of the statutory requirements for confidentiality under **Section 25** of the **ICA**, it is proper that such file be under the supervision of the Judge who is seized of the matter for consideration.

66. In this case, and given the circumstances and the constitutional attitude towards procedural strictures, there is no harm that the proceedings may be commenced under the same file as the constitutional petition herein.

67. I will therefore make the orders and directions which follow, for the expeditious and just determination of the matters before me

Orders and Directions Issued by the Court:

a. In respect of the Notification and Request

1. The 1st Respondent as the State Party, shall, for good order and administrative convenience, file in this Court by way of a miscellaneous application under the present file reference, a formal Notification and Request through a complaint or application to institute the proceedings therein;
2. The said Notification and Request in **a)1**, above, shall be substantially in the form of a complaint

under **Section 89** of the **Criminal Procedure Code**, with necessary alterations and shall contain the statutory matters set out in **Section 29** of the **ICA, No. 16 of 2008**.

3. The said Notification and Request shall be filed on or before Monday, 28th October, 2013, and thereby presented to the Principal Judge.

b. In respect of the Petition

1. The Petitioner shall forthwith and no later than close of business on 18th October, 2013, make copies of and serve upon the Interested Parties the Petition. In order to expedite the conclusion of this litigation, the Petition shall be heard without the necessity of first hearing the First and Second Application.
2. Every party wishing to respond to the Petition shall file and serve their Responses thereto on or before 28th October, 2013.
3. (i) Parties shall, in addition, on or before 28th October, 2013, file written skeletal submissions together with lists of and authorities intended to be relied upon in respect of the hearing of the Petition.

(ii) Such submissions shall be limited to no more than five pages in twelve point font size, one – and – a half spacing using standard font such as Times New Roman, Arial, Calibri or similar font type.

c. Hearing and Consideration

1. Due to the urgency indicated by all parties, and considering the nature of the matters herein, the Petition shall be heard on 29th October, 2013, at 9.30 am to 12.00 noon, or on the earliest date as will be mutually agreed by the parties, or imposed by the court.
2. Time allocations to the parties shall be agreed prior to the hearing.
3. The Notice and Request shall be considered on the same date, but after the hearing of the Petition.

d. Other or Consequential Orders

1. The interim orders issued by Odunga, J, for protective security of the Petitioner by the Police are hereby extended;
2. No extensions of time shall be granted;
3. Should any party fail to comply with any of the orders or directions herein, the matters subject to the proceedings and orders herein shall nonetheless proceed in terms of these orders.

68.Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 18thday of October, 2013

R.M. MWONGO

PRINCIPAL JUDGE, HIGH COURT OF KENYA

Ruling and Directions read in open court in the presence of:

1.Mr. Kibe Mungai for the Petitioner

2.Ms. Stella Munyi for the Attorney General for the 1st 2nd and 4th Respondents

3.Mr. Kioko Kamula and Victor Mule for the DPP the 3rd Respondent

4.Mr. Wilfred Nderitu the 1st Interested Party

5.Rev John Mbugua the 3rd Interested Party

6.No appearance for Mr. Okiya Omtatah Okoiti the 2nd Interested Party