



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 438 OF 2013**  
**NATIONAL CONSERVATIVE FORUM .....PETITIONER**  
**VERSUS**  
**ATTORNEY GENERAL .....RESPONDENT**  
**JUDGMENT**

**Introduction**

1. In this petition which was filed under Certificate of Urgency on 3<sup>rd</sup> September 2013, the petitioner seeks orders which would have the effect of stopping the President of the Republic of Kenya, His Excellency President Uhuru Kenyatta, as well as the Deputy, President, His Excellency William Ruto, from proceeding to the Hague to attend their respective trials for alleged crimes against humanity, arising out of the post-election violence of 2007, at the International Criminal Court (ICC).
2. The petitioner, which describes itself as a national forum concerned with the conservation and promotion of national values and dignity of the people of Kenya, argues that a situation in which the President and his Deputy are out of the Country at the same time would cause an imbalance of power and result in a government vacuum. They submit that allowing the President and Deputy President to proceed to the seat of the International Criminal Court at the Hague to attend their respective hearings would have the net effect of interfering with the constitutional principle of checks and balances.

**The Petition**

3. In the petition dated 2<sup>nd</sup> September 2013, the petitioner first seeks a declaration framed in the form of several questions to which it seeks answers from the court, and then seeks various declarations, as follows:

**1. A DECLARATION WHETHER:-**

- A. *Whether the constitutional provision in Article 2(6) that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution” means that treaties or conventions will be enforced regardless of their inconsistency with or contravention of the*

*Constitution itself.*

- B. Whether Article 2(6) implies that any treaty or implementing act is on the same footing as a provision of the Constitution of Kenya, 2010, and consequently, can overrule the Constitution.*
- C. Whether by dint of Article 255, 256 and 257 of the Constitution of Kenya 2010, the government can amend the Constitution using its power to make treaties.*
- D. Whether the government's treaty power is limited by the Constitution.*
- E. Whether, being a creature of the Constitution, Government has the capacity to cede any aspect of Kenyan sovereignty to the ICC, under the Constitution of Kenya, 2010.*
- 2. A DECLARATION THAT when both the President and the Deputy President are out of the country at the same time, there shall be a vacuum in governance on the part of the executive and this shall occasion an imbalance of power in the country.*
- 3. A DECLARATION THAT the constitution does not contemplate on a scenario where both the President and the Deputy President re out of the country at the same time.*
- 4. A DECLARATION THAT the respondent and the Executive at large is duty bound to ensure that at no time is there a vacuum in governance nor an imbalance of powers as delegated by the Constitution.*
- 5. A DECLARATION THAT the sovereign power by the people should be exercised only through their democratically elected representatives as far as the Office of the President and the Office of the Deputy President are concerned, and the deletion of the sovereign power under the constitution.*
- 6. A DECLARATION THAT a scenario where both the president and the deputy president shall be out of the country at the same tine shall occasion practical difficulties in running the affairs of the Country.*
- 7. A DECLARATION THAT both the president and or the Deputy President can only leave the Country if on normal and official state duties of their respective duties.*
- 8. A DECLARATION THAT the Constitution requires both the President and the Deputy President to be in the country unless any and only one of them is out of the Country on normal and official state duties of their respective de duties.*
- 9. A DECLARATION THAT both the President and the Deputy President should attend to their trial at the International Criminal Court at the end of their tern to avert a constitutional crisis and vacuum in the Republic of Kenya.*
- 10. That this honourable court doo issue any other necessary orders to avoid a vacuum in governance and consequently an imbalance of powers as delegated by the Constitution.*
- 11. Costs of this petition.*

**The Petitioner's Submissions**

- 4. With regard to the orders sought in respect of the Deputy President, this petition is moot. It is within the public domain that the trial of the Deputy President was set to commence, and did commence, on 10<sup>th</sup> September 2013, and is now well under way.*
- 5. Nonetheless, at the hearing hereof on 20<sup>th</sup> September 2013, the petitioner, through its Counsel, Dr.*

John Khaminwa and Mr. Mwangi, contended that the issues before the Court are of paramount importance to Kenya and the outside world as it involves the question whether the President and his Deputy can be out of the country on matters or issues essentially personal to themselves. It contends that the duties of the President and Deputy President, who are full time state officers, are full time duties to be performed inside and outside the country; that the President is the custodian of the Constitution and the Commander in Chief of the Kenya Armed Forces and Chairman of the Defence Council; that he and his Deputy are both in the Cabinet of Kenya and they are the only politicians in the Cabinet and the only ones with a national constituency; that Cabinet meetings are supposed to be held regularly and if the two are absent, the Cabinet will be denied the input of politicians.

6. According to the petitioner, the President and Deputy President can only be absent from their duties if sick or on holiday; and that they cannot be out of the country on personal matters as their being out of the country would interfere with the balance of power.
7. Dr. Khaminwa made reference to the '*precautionary principle*' which he urged the court to apply in relation to the security and defence of the country. He submitted that the principle is an environmental law principle in which the government takes measures to protect the environment. He argued that similarly, the presence of the President and Deputy President within the Country is to ensure security and their absence may destabilise the country and the region. The petitioner relied in this regard on the book by Dr. Henry Kissinger titled '**Years of Renewal**' and the observation by Dr. Kissinger that the United States was engulfed in a domestic crisis as a result of the impeachment of then President Nixon following the Watergate scandal.
8. The petitioner takes the view that the country has gone through a traumatic period; that the closely fought elections between the Cord and Jubilee Alliances has brought division; that it is important that the President and Deputy are present in the country in order to bring healing to the country; that the principle of separation of powers is intended to ensure that anarchy is avoided; and that once one arm of government is not functioning, there is likely to be anarchy. He maintained that the issues being raised before the Court are not academic and asked the court to grant the orders sought.

### **The Response**

9. In its response to the petition, the respondent relied on the affidavit sworn by the Attorney General, Hon. Githu Muigai, on 6<sup>th</sup> September 2013 and written submissions dated 12<sup>th</sup> September 2013. Ms. Muthoni Kimani, Deputy Solicitor General, and Mr. Emmanuel Bitta, Litigation Counsel, appeared for the respondent.
10. In her submissions, Ms. Kimani invited the Court to consider the declarations sought by the petitioner and find that the questions that the petition raises are abstract and academic questions which the Court should not entertain. She urged the Court to dismiss the petition with costs.
11. The respondents summarised the issues that this petition raises as follows:
  - i. Whether the Rome Statute establishing the ICC is inconsistent with the Constitution of Kenya;
  - ii. Whether the President and his Deputy can be outside the country at the same time;
  - iii. Whether, if they were outside the country at the same time, this would cause an imbalance of power.
12. With regard to the first issue, it is the respondent's position that the Rome Statute is not inconsistent with the Constitution as it was ratified in accordance with the practice then mandated under the former constitution; that the petition relates to the on-going ICC process in which the Republic of Kenya has been allowed to make submissions as an *amicus curiae*; that in the event

that there was a likelihood that the scenario feared by the petitioner would arise, the respondent would be in a position to make the necessary submissions before the ICC.

13. It was the respondent's case that the question raised by the petitioner is an abstract question which the Court should not entertain as it should only deal with real issues; The respondent relied on the decision of the Court in the case of **John Harun Mwau –vs- The Attorney General High Court Petition No. 65 of 2011** in support of the proposition that the High Court should not deal with academic issues and the jurisdiction to interpret matters is not exercised in a vacuum.
14. Ms Kimani submitted further that the petitioner is challenging the decision of the Executive to ratify the Rome Statute and contended that the declarations being sought would have the effect of directing the Executive on how it conducts foreign relations, which the court cannot do.
15. It was Ms. Kimani's submission that the petitioner had not, in any event, demonstrated how, by ratifying the Rome Statute, the country is acting unconstitutionally; and that the Constitution does not prohibit the state from entering into treaties and ceding authority to international bodies, provided that a legal procedure is followed.
16. With regard to the precautionary principle relied on by the petitioner, it was the respondent's view that the said principle, though good, was not applicable in the present circumstances.
17. Ms. Kimani contended that the petitioner had not shown how the country has been destabilized because the Deputy President is outside the country; that the court has no jurisdiction over the matters before the ICC; that the Court should exercise restraint and refuse to grant any of the declarations sought as the petitioner has not shown how the International Crimes Act contravenes the Constitution; and that the petitioner was reading provisions of the Constitution selectively and leaving out those which command the state to obey its international obligations.

### **Rejoinder**

18. In his reply to the respondent's submissions, Dr. Khaminwa argued that Article 159 of the Constitution vests judicial power in the Courts; that there is no mention of ICC in the Constitution; that since Kenya has a written constitution, if there was an intention to include the ICC in the system of courts, it would have been provided for in the Constitution; that countries with written constitutions had to amend their constitutions to provide for the ICC; and that Kenya should therefore have amended its Constitution to provide for the ICC.

### **Determination**

19. In directing my mind to the matters before me, I believe that the starting point is to consider the jurisdiction vested in this Court by the Constitution. It is now trite law, as clearly enunciated by Nyarangi, JA in the oft quoted case of **Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1**, that:

*“Jurisdiction is everything. Without it, a Court has no power to make one more step.”*

20. Article 159 of the Constitution vests judicial authority in the Courts. At Article 165, the Constitution deals with the jurisdiction of the High Court by providing, among other things, as follows:

165. (1)...

(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) ....

**(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;**

...

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 –vs- 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.

22. I am also persuaded in that regard by the decision of the United States Supreme Court in **Muskrat v United States 219 US 346(1911)**, relied on in the **John Harun Mwau** case, in which the Supreme Court observed that judicial power is the right to determine *actual controversies* arising between adverse litigants, duly instituted in courts of proper jurisdiction. A similar observation was made centuries ago by Justice Marshall in **Marbury v Madison 5 US 137; 2 L.Ed 60 (1803). 1 Cranch** when he stated that the right to declare an Act of Congress unconstitutional could only be exercised when a proper case between opposing parties is submitted for judicial determination.

23. Within this jurisdiction, the High Court has also held in the case of **Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported), (the Kadhis Court case)**, 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).

24. As I understand it from the petitioner's pleadings and submissions, the petitioner seeks from the Court one or both of two things. The first is prospective in effect and asks the Court to make determinations on the basis that something may happen in the future. Related to this is the whole question of whether or not there is a real controversy or dispute before the court presented by this petition. Whether there is such a controversy can be gleaned from the facts set out in the pleadings in this matter, particularly the petition, the affidavit in support, and the replies thereto.

#### **Whether There is a Real Dispute or Controversy**

25. In her affidavit sworn in support of the petition on 2<sup>nd</sup> September 2013, at paragraphs 4, 5 and 6 thereof whose contents I set out hereunder verbatim, **Ms. Jennifer Shamallah** depones as follows:

4. ***The constitution does not indicate and/or provide for on who assumes the office and powers of the President when both the President and the Deputy President are away from the country and especially so if both the President and the Deputy President are away from the country for a considerable amount of time.***

5. ***The constitution does not indicate and/ or provide for on who assumes the office and powers of***

*the Deputy President when both the President and the Deputy President are away from the country and especially so if both the President and the Deputy President are away from the country for a considerable amount of time.*

6. *That if the situation as emulated (sic) in Nos 4 & 5 above materialize, there shall be a vacuum in governance on the part of the executive and this shall occasion an imbalance of power in the country.'*

26. Ms. Shamalla then makes various averments with regard to the need for ensuring national and regional security, and observes that the President and the Deputy may be outside the country at the same time which would jeopardise both national and regional security.

27. As is evident from the above averments, save for the fact that the Deputy President is currently undergoing trial at the ICC, and that the President's trial is scheduled to start in the same court on 12<sup>th</sup> November 2013, this petition is not based on any facts or actual events that have occurred to precipitate its filing. It is based on the petitioner's apprehensions with regard to what might happen at some point in the future: that the Constitution does not provide who would act in the absence of both the President and his Deputy; that the President and his Deputy may both be away for extended periods of time; that there is therefore likely to be a vacuum in government should the President and Deputy President happen to be out of the country at the same time. Paragraph 6 of Ms. Shamallah's affidavit is particularly telling:

***"That if the situation as emulated (sic) in Nos 4 & 5 above materialize, there shall be a vacuum in governance on the part of the executive and this shall occasion an imbalance of power in the country.***

28. In other words, the petitioner is apprehensive that **if** the President and the Deputy President happen to be outside the country at the same time, a vacuum in government may occur and lead to an imbalance in power.

29. I agree with the petitioner that this would be a clearly undesirable situation, should it happen. Indeed, it is acknowledged that Kenya finds itself in a totally peculiar and unprecedented situation. Two of its citizens who now hold the top leadership positions in the country are facing trial for serious offences allegedly committed against its people some five years prior to the election of the two leaders. It is indeed a regrettable situation.

30. However, as the petitioner correctly avers, the situation that it fears, in which both the President and the Deputy President are outside the country at the same time attending the hearing of their trials at the ICC, is yet to '**materialise**'. As is evident from the annexures to Ms. Shamalla's affidavit in support of the petition, namely an article from the **Standard** newspaper of 22<sup>nd</sup> August 2013 and the **Star** newspaper of 26<sup>th</sup> August 2013, the petitioner's apprehensions are based entirely on media reports culled from the opinions of political analysts. Nothing has been placed before me that would suggest the possibility that both the President and the Deputy President will be out of the country at any point at the same time. At best, the petition before me can be described as based on hypothesis and speculation. It does not raise any real issue or controversy that the court can be called upon to determine.

### **Retrospective Application of the Constitution**

31. The second thing that the petitioner asks of the Court is to make orders that have retrospective effect with regard to the application of the Constitution. A consideration of the petition and the oral and written submissions will illustrate this point.

32. After setting out at some length the provisions of the Constitution with regard to the structure of government, the election and or appointment of various officers within the Republic, particularly the office of the President and the Deputy President, and the powers and functions vested in each

office or institution by the Constitution, all of which, in my view, are not in dispute, the petitioner then sets out various matters with regard to the Rome Statute establishing the ICC.

33. It notes that the Rome Statute was signed and then ratified by Kenya on 11<sup>th</sup> August 1999 and 5<sup>th</sup> March 2005 respectively. It contends, however, that the Statute was not correctly adopted to be included into Kenyan law as the Constitution was never amended to incorporate the Rome Statute as one of the Laws of Kenya. The petitioner contends therefore that the Constitution of Kenya 2010 must be amended to enable the government ratify the Rome Statute.
34. The petitioner also contends that Kenya's ratification of the Rome Statute was null and void for various reasons, inter alia that the government and Parliament lack capacity to ratify a treaty that is inconsistent with the Constitution; and that they cannot enter into treaties that relinquish the rights and fundamental freedoms in the Constitution or alter the structure of the Republic.
35. As I understand it, the petitioner is seeking orders to declare the ratification of the Rome Statute by the government of Kenya in 2005, and the International Crimes Act, unconstitutional. This is not, in my view, within the jurisdiction of this court to do. To begin with, the petitioner has not placed before me, either in the petition, the affidavit in support or in the two sets of written submissions dated 7<sup>th</sup> and 9<sup>th</sup> September 2013, anything that demonstrates that the Rome Statute or the domesticating legislation is inconsistent with the Constitution of Kenya 2010. Secondly, even if it were, the Constitution was not in force at the time that the Rome Statute was signed and ratified in 1999 and 2005 respectively. As the Supreme Court of Kenya held in the case of **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others Supreme Court of Kenya Application No. 2 of 2011 [2012] eKLR**, the Constitution does not have retrospective application. Its provisions cannot therefore be used to declare unconstitutional that which was constitutional and lawful prior to its enactment and promulgation.
36. In any event, section 7 of the **Transitional and Consequential** Provision of the Constitution provides a guide on what should happen if there is need to bring any legislation into conformity with the Constitution:

***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.***

37. From the material before me, however, there is nothing that indicates that the International Crimes Act requires any alterations or modifications in order to bring it into conformity with the Constitution.
38. Thirdly, nothing has been placed before me that would suggest that the state or Parliament failed to adhere to the process then in force for the signing and ratification of treaties provided under the former constitution and legislation made thereunder. Indeed, it is noteworthy that apart from signing and ratifying the Rome Statute for the establishment of the International Criminal Court, the state went further when, in 2008, Parliament, in exercise of its legislative mandate, incorporated the Rome Statute into the laws of Kenya by enacting the **International Crimes Act, Act No. 16 of 2008**. The Act states that it is '***An Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions.***' (Emphasis added.)

### **Separation of Powers**

39. More importantly in this regard in my view, however, is whether this or any other Court has jurisdiction to declare acts of state with regard to the ratification of treaties unconstitutional, null and void as the petitioner asks this Court to do. In my view, and I wholly agree with the

respondent on this issue, the Court would be encroaching on the Executive function were it to purport to direct the Executive on how to perform its foreign relations, including the signing and ratification of treaties, or to purport to ‘allow’ or not allow the President or his deputy to co-operate or not co-operate with the ICC by attending or failing to attend the hearing of their cases at the ICC.

40. The doctrine of separation of powers requires that the executive function of the state be performed by the Executive and the legislative function by Parliament, and the judiciary can only interfere in very limited circumstances as illustrated in the case of **Trusted Society of Human Rights -vs- The Attorney General High Court Petition No. 292 of 2012**, a position that the Court of Appeal agreed with in its decision in **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & Others Court of Appeal Civil Appeal No. 290 of 2012**.

41. There are no doubt many in Kenya today who are unhappy with the signing and ratification of the Rome Statute, and with the enactment of the International Crimes Act. It is not, however, within the jurisdiction or power of this Court to take the country and its President and Deputy President out of the situation which many, such as the petitioner, see as an unhappy and, doubtless, an undignified one. It must nonetheless be acknowledged that before the current situation arose, the state and the legislature deemed the Rome Statute important enough in the circumstances then prevailing for the state to sign and ratify it in 1999 and 2005, and then to domesticate it through the International Crimes Act in 2008.

42. The circumstances may have changed, and some now question the wisdom of Kenya becoming a state party to the Rome Statute. However, if I may borrow the words of the dissenting opinion in the United States Supreme Court case of **U.S. v. Butler 297 U.S. 1 (1936)**:

*‘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’.*

43. Should a need to reconsider the presence of the International Crimes Act in our statute books arise, assuming that the good and cogent reasons that one hopes informed its enactment no longer exist, that is something that lies within the power and mandate of the legislature which, at the time of its enactment, thought it a wise and necessary legislation to enact. One may have serious reservations about the wisdom of enacting or removing legislation from the statute books to suit the exigencies of the moment, but our democratic processes, as enshrined in the Constitution, have vested in the legislature the power to do that should it be so minded.

44. However, in so far as the Court is concerned, unless it can be shown clearly that any part of the International Crimes Act which domesticated the Rome Statute establishing the International Criminal Court is inconsistent with the Constitution, which the petitioner in this case has failed to do, this Court has no basis for interfering with it, or with anything done pursuant to or consequent upon the application of its provisions.

45. For the above reasons, this Court is unable to issue any of the declarations that the petitioner seeks, and this petition must fail. It is hereby dismissed with no orders as to costs.

**Dated Delivered and Signed at Nairobi this 17<sup>th</sup> day of October 2013**

**MUMBI NGUGI**

**JUDGE**

**Dr. Khaminwa and Mr. Mwangi instructed by the firm of Khaminwa & Khaminwa Advocates or the Petitioner**

**Ms. Muthoni Kimani, Deputy Solicitor General, and Mr. Emmanuel Bitta, Litigation Counsel, for the Respondent**