

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 485 of 2012

MARTIN WINFRED NJOROGE KIBIRO PETITIONER

AND

THE HON ATTORNEY GENERAL RESPONDENT

RULING

1. The petitioner in the petition dated 23rd October 2012 seeks the following declarations;

(a) That a declaration be issued to declare that the Rome Statute of the International Criminal Court and the ICC established therein breaches the sovereignty of the Republic of Kenya and her people and are therefore unconstitutional;

(b) That a declaration be issued that the Ethics and Anti Corruption Commission mandated with enforcement of Chapter Six of the Constitution and of the Leadership and Integrity Act, 2012 should not take into consideration any unconstitutional acts or omission of the ICC in determination whether a Kenyan is suitable to hold a Public Office.

(c) That the Honourable Court do issue any other declarations and or orders that serve the cause of justice.

(d) That the costs of this petition be borne by the Respondent.

2. The petition is ostensibly brought under the provisions of **Article 258(1)** which entitles every person to institute proceedings where the Constitution has been intervened or threatened.

3. According to the petitioner there are some Kenyans who are facing charges in the Criminal Court and there is a case, **Nairobi Petition No. 21 of 2012**, contesting their right to vie for public office. The petitioner argues that if the matter proceeds, his constitutional rights to elect a person of his choice will be infringed. He also avers the International Criminal Court (ICC) undermines the Kenya's sovereignty and that the Legislature and Executive failed the people of Kenya by ratifying the Rome Statute of the International Criminal Court without due diligence. He contends that a foreign court has no jurisdiction to try any person from Kenya.

4. When this matter came up before me for certification as whether it was urgent, I directed counsel for the petitioner to show cause why this matter should not be dismissed as the petition, on its face, did not disclose a dispute or controversy as contemplated by **Article 165**.

5. Mr Makori argued that the petitioner, as a citizen, is aggrieved by the breach of the Constitution by State organs and he is entitled to seek relief of this Court in light of the supremacy of the Constitution. He also noted that the petitioner was likely to suffer as a citizen as he may lose to elect a leader of his choice as a result of the cases pending before the ICC and that only the Kenyan Court have jurisdiction to try Kenyan citizens. In counsel's view the High Court should not be dragged to uphold decisions of the ICC which were clearly contrary to the Constitution.

6. In my view, the court's jurisdiction is to be exercised when there is a threat or contravention of the Constitution or there is a threat or violation of the petitioner's fundamental rights and freedoms. Though

the Court under **Article 165** is empowered to determine questions concerning the Constitution, these questions must be real and not merely academic. In my view what the petitioner requires is a dissertation on the ICC without a real controversy or dispute. The mere ratification of a treaty or enactment of legislation, without more, cannot amount to a dispute or a threat of the Constitution and particularly not in the circumstances of this case. This course, I hold is contrary to the general principles of exercise of judicial power (See *Peter Kaluma v Attorney General Nairobi Petition No. 79 of 2011 (Unreported)*, *Harun Mwau and Others v Attorney General and Others Nairobi Petition No. 65 of 2011 (Unreported)* and *Jesse Kamau and 25 Others v The Attorney General, Nairobi Misc. App. No. 890 of 2004 (Unreported)*).

7. It is in these circumstances that I decline to exercise the jurisdiction of the Court. Consequently, the petition be and is hereby struck out.

DATED and DELIVERED at NAIROBI this 17th day of December 2012.

D.S. MAJANJA

JUDGE

Mr Makori instructed by Orina and Company Advocates for the petitioner.