Okoiti v Attorney General (Petition 451 of 2012)
[2023] KEHC 17757 (KLR) (Civ) (14 April 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

PETITION 451 OF 2012

M THANDE, J

APRIL 14, 2023

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

1. By an amended Petition dated 4.10.12, the Petitioner seeks the following reliefs: -

    a. That a declaration be issued to declare that by dint of article 2(4) and 2(6) of the *Constitution* of Kenya, 2010, all treaties ratified by Kenya must be consistent with the *Constitution* for them to enjoy the force of law.

    b. That a declaration be issued to declare that even though "the general rules of international law shall form part of the law of Kenya" (Article2(5) and "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution (Article 2(6)) Kenya's ratification of the Rome Statute is a nullity under the *Constitution* of Kenya 2010.

    c. That a declaration be issued to declare that by dint of Sections 47 and 60 to 67 of the *Former Constitution*, Kenya's ratification of the Rome Statute in 2005 violated the *Former Constitution* of Kenya and was therefore illegal, null and void.

    d. That a declaration be issued to declare that by ratifying the Rome Statute without reference to section 47 of the *Former Constitution* of Kenya the Government abused its treaty making power.

    e. That a declaration be issued to declare that dint of Article 159(1) of the *Constitution* of Kenya,2010, the ICC cannot exercise any jurisdiction in Kenya as judicial authority is derived

from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the *Constitution*.

f. That a declaration be issued to declare that by dint of Articles 1 and 159(1) as read with Article 255(1)(c), the Government of Kenya is not the source of judicial authority in the Republic of Kenya and, therefore, it cannot purport to cede or donate the same to the ICC via the illegal ratification of the Rome Statute without the express approval of the people via a national referendum as stipulated in Article 255(2).

g. That a declaration be issued to declare that the power to make treaties does not give the Government the capacity to amend the *Constitution* without reference to Articles 255, 256 and 257, of the *Constitution* of Kenya,2010.

h. That a declaration be issued to declare that the Government can make no treaty which shall be repugnant to the spirit of the *Constitution*, or inconsistent with the delegated powers.

i. That a declaration be issued to declare that treaties do not override the *Constitution*, and cannot, in any fashion or shade, amend it.

j. That a declaration be issued to declare that given the Rome Statute requires the Kenyan State to cede aspects of its sovereignty to the ICC, the government can only ratify it after amending the *Constitution* via a national referendum to allow the ratification.

k. That a declaration be issued to declare that a national referendum as provided for in Article 255(2) is the exclusive mechanism or lawful device to ratify the Rome Statute.

l. That a declaration be issued to declare that since the ICC is not a subordinate court in the meaning of the *Former Constitution* of Kenya, Parliament did not have the capacity to ratify of the Rome Statute by invoking its power to establish subordinate courts in Section 65(1) of the *Former Constitution*.

m. That a declaration be issued to declare that since the ICC is not a subordinate court in the meaning of the *Constitution* of Kenya,2010, Parliament cannot ratify the Rome Statute by invoking its power to establish subordinate courts under the Article169(1)(d) of the *Constitution* of Kenya ,2010, which empowers the National Assembly, by an Act of Parliament, to establish “any other court or local tribunal”.

n. That a declaration be issued to declare that the *International Crimes Act*, 2008, is illegal, unconstitutional, null and void.

o. That a declaration be issued to declare that the Special Protocol signed on 3rd September, 2010, between the Government of Kenya and the ICC granting the ICC diplomatic status is unconstitutional, illegal, null and void.

p. That a declaration be issued to declare that any cooperation between the Government of Kenya and the ICC is unconstitutional, illegal, null and void for being in total and contemptuous disregard of the *Constitution* of Kenya, 2010.

q. That a declaration be issued to declare that if Kenyans wish for Kenya to become a State Party to the ICC, they must follow the law by amending the *Constitution* via a national referendum to allow the State to ratify the Rome Statute.

r. That a declaration be issued to declare that by dint of Article 3(2) of the *Constitution* of Kenya,2010, the current ratification of the Rome Statute is null, and void and it is an unlawful attempt to establish a government otherwise than in compliance with the *Constitution*.

s. That a declaration be issued to declare that by dint of Article3(2) of the *Constitution* of Kenya,2010, Kenya can only become a State Party to the ICC after the *Constitution* is amended to allow the State to ratify the Rome Statute, or if a referendum is held and the people directly ratify the Rome of Statute.

t. That declaration be issued to declare that since the ICC is not one of the courts established in the *Constitution* of Kenya, 2010, anybody collaborating or aiding the Court to exercise jurisdiction in Kenya in attacking the *Constitution* of Kenya, 2010.

u. That a declaration be issued to declare that if the Republic of Kenya is already a party to any treaty of treaties which may have the effect of altering or repealing some portion of the *Constitution*, such a treaty or treaties are null and void to the extent of the inconsistency and contravention of the *Constitution* in accordance with Article 2(4).

v That a declaration be issued to declare that the Rome Statute is not the same or to be equated to the principle of universality that obligates any state to bring to trail persons accused of international crimes regardless of the place of the commission of the crime, or the nationality of the offender, since in this case the obligated State does not lose its sovereignty but enforces it.

w. That a declaration be issued to declare that in the event of a conflict between a treaty and a statute that conforms to the *Constitution* the treaty shall be nullified by the statute.

x. That a declaration be issued to declare that since a ratified treaty is not part of the *Constitution* , such a treaty may be abrogated in its entirety by statute.

y. That a declaration be issued to declare that Parliament has the power to change or abolish any treaty by enacting legislation superseding it.

z. That a declaration be issued to declare that the High Court has the right to annul or disregard the provisions of a treaty if they violate the *Constitution*.

aa. That a declaration be issued to declare that in as far as the ICC is concerned Prof.Githu Muigai has failed in his duties as the Attorney General of the Republic of Kenya.

ab. That a declaration be issued to declare that in as far as the ICC is concerned Mr.Keriako Tobiko has failed in his duties as the Director of Public Prosecutions of the Republic of Kenya.

ac. That a declaration be issued to declare that in as far as the ICC is concerned Mr. Mathew Iteere has failed in his duties as the Commissioner of Police of the Republic of Kenya.

ad. That a declaration be issued to declare that in as far as the ICC is concerned Mr. Willy Munywoki Mutunga has failed in his duties as the Chief Justice of the Republic of Kenya.

ae. That a declaration be issued to declare that in as far as the ICC is concerned Maj.Gen. Michael Gichangi has failed in his duties as the Director General of the National Security Intelligence Service of the republic of Kenya.

af. That a declaration be issued to declare that in as far as the ICC is concerned Mr. Charles Nyachae has failed in his duties as the Chairperson of the Commission for the Implementation of the *Constitution* of the Republic of Kenya.

ag. That a mandatory order be issued against the Respondent compelling him to release to the Petitioner all the information on the process that led to Kenya's ratification of the Rome Statute, and the Government's engagement with the ICC since then.

ah. That a mandatory order be issued against the Respondents to ensure that the Government of Kenya stops all cooperation with the International Criminal Court of the Rome Statute.

ai. That an order be issued to the Commission for Implementation of the *Constitution* and Mr. Charles Nyachae, the Chair, ordering them to exercise their constitution implementation mandate in a manner that cures the unconstitutionally of the Rome Statute.

aj. That the Honourable Court do issue any other declarations and/or orders that serve the cause of justice.

ak. That the costs of this Petition be borne by the Respondents.

2. The Petitioner's case as set out in his Petition and supporting affidavit sworn on even date, is that, the International Criminal Court (ICC) is a permanent tribunal of voluntary membership to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression. The ICC sits in the Hague, Netherlands, but its proceedings may take place anywhere. The ICC's jurisdiction may only be exercised in cases where the accused is a national of a state party, where the alleged crime took place in the territory of a state party, or where a situation is referred to the ICC by the United Nations Security Council (UNSC) (which in effect brings non-members under the Court's jurisdiction).

3. The Petitioner avers that the involvement of the UNSC in the affairs of the ICC makes the Court an outrageous forum opposed to natural justice since nonmembers can dictate its affairs. The USA, Russia, and China, are not members of the ICC and do not recognize the Court's jurisdiction over, their citizens or territory. Notably however, these 3 of the 5 veto wielding permanent members of the UNSC can and have referred matters to the ICC, such as the case of President Bashir of the Sudan. This goes against his reasonable and legitimate expectation of equality before the law and the independence of the Judiciary, and other aspects that define the rule of law under Kenya's constitutional framework. He avers that the Rome Statute does not include universal jurisdiction. Further that under the 'Principle of Complementarity', the Rome Statute states that it only has jurisdiction in cases where a government proves unwilling or unable to investigate and prosecute crimes. The ICC is designed to complement existing national judicial systems. Hence the primary responsibility to investigate and punish crimes is left to individual states. Therefore, in the foregoing, then according to the ICC, the respondent failed in their mandate by being either unwilling or unable to investigate and prosecute international crimes and crimes against humanity. According to the Petitioner, the 'Principle of Complementarity' confers upon the ICC the powers of judicial review over a country's criminal justice system in aspects where the ICC has jurisdiction. Such is inconsistent with and contravenes the *Constitution* of Kenya, 2010.

4. It is his case that the Rome Statute which established or is the treaty founding the ICC, was done at Rome on or about the 17th day of July, 1998 and Kenya signed the Rome Statute, on or about the 11th August 1999 which entered into force on or about July 1, 2002 and it can prosecute only crimes committed on or after that date.

5. It is the Petitioner's case that the on 15.3.05, the Republic of Kenya illegally ratified the Rome Statute through a secretive process that did not involve the people. The Rome Statute came into force for Kenya on 1.6.05. This allowed the ICC illegal and illegitimate jurisdiction over war crimes, crimes against humanity, and genocide committed by Kenyan nationals, or on Kenyan territory, after that

date. Since then, the ICC has exercised its jurisdiction in Kenya, or has impacted the Kenyan polity in the following ways:

a. Kenya enacted the *International Crimes Act*, 2008, to domesticate the Rome Statute.

b. On 3.9.10, the Government of Kenya signed a protocol granting the ICC special diplomatic privileges.

c. 6 Kenyans accused of being most responsible for the 2007/8 post-election violence have been put on trial by the ICC at The Hague. 2 were discharged at the preliminary stages, while 4 are awaiting full trial at The Hague.

d. Many Kenyan citizens have been taken out of the country as protected witnesses for purposes of prosecuting the 4 indicted Kenyans.

e. The Government of Kenya has spent taxpayers' money worth millions of shillings addressing matters associated with the case of the Kenyans accused at The Hague.

f. Petition No 21 of 2012, pending at the High Court at Nairobi, was seeking court orders to bar 2 of the 4 Kenyans on trial at the ICC from contesting presidential elections at the forthcoming general elections, on the grounds that being charged at the ICC for heinous crimes denies them the capacity to participate in the elections.

g. On 28.11.11, in Misc. Criminal Application No 685 of 2010, filed by the ICJ Kenya and where the Petitioner was an Interested Party, the High Court of Kenya at Nairobi domesticated the ICC warrants of arrest issued against President Omar Ahmad Hassan Al Bashir of The Sudan. 2 appeals on the matter are lying at the Court of Appeal (Civil Appeal No 275 of 2011, filed by the Attorney General, and Civil Appeal No 105 of 2012, filed by the Petitioner herein), and one at the Supreme Court (Supreme Court Appeal No 1of 2012, filed by ICJ-Kenya).

h. Meetings on the comprehensive peace process in republics of The Sudan and South Sudan had since been relocated from Nairobi to Addis Ababa, Ethiopia, so as to allow President Bashir to participate. This resulted major economic and geopolitical losses for Kenya.

6. The Petitioner states that the Twenty-third Amendment of the *Constitution of the Republic of Ireland* permitted the State to become a party to the ICC. The amendment was effected by the *Twenty-third Amendment of the Constitution Act, 2001*, which was approved by referendum on 7.6.01, and signed into law on the 27.3.02. A new Article 29.9 was inserted into the Constitution of Ireland, and it read: "The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998." The Petitioner further states that the twenty-third Amendment of the Constitution of Ireland was necessary because the Rome Statute granted to the ICC certain powers the Constitution, as it stood, vested exclusively in the organs of the national government, just as it is with Kenya.

7. According to the Petitioner, what obtained in Ireland obtains in Kenya today, and the *Constitution* of Kenya, 2010, must be amended to allow the Kenyan State or the Government of Kenya to ratify the Rome Statute. The Government of Kenya can only act within the competences granted to it through the *Constitution* and amendment to the *Constitution*, which requires the strict adherence to the amendment procedures in Articles 255, 256, and 257 of the *Constitution* of Kenya, 2010. Treaties cannot amend the *Constitution*. He referred to *Commentaries on the Constitution of the United States*, published 1833, in which Supreme Court Judge Joseph Story wrote that if, indeed, treaties can override the Constitution then we have an omnipotent government unchecked by any of the protections for life, liberty, and property found in the *Constitution* of Kenya, 2010. The Petitioner averred that since the Executive and Legislature are strictly and explicitly forbidden by the *Constitution* to deny the

protections and immunities guaranteed by the Bill of Rights and other provisions of the *Constitution*, they have no authority to conclude a treaty that would have the same result. Any such treaty signed and ratified by the political arms of Government under the circumstances would, on natural principles, be null and void.

8. It is the Petitioner's case that pursuant to its duty to promote and safeguard constitutionalism and the rule of law, it is incumbent upon this Court to interpret the constitutionality of Kenya's ratification of the Rome Statute, and by extension the constitutionality of the *International Crimes Act*, 2008.

9. The Respondent filed grounds of opposition dated 5.12.12. The grounds are that:

    a. Judicial notice should be taken by the Court that Kenya just like any other state, has no autonomous existence outside the framework of the community of nations, and that on this account, her regime of law and her constitutional order, interface with those of other States under the overreaching umbrella of international law.

    b. The purposive and harmonized interpretation of the *Constitution* calls for a collective reading of the articles on the supremacy of the *Constitution*, the sovereignty of the people and the articles that recognize international law as forming part of laws in Kenya in order to reach a finding that the sovereignty of Kenya is to be enhanced through complementary mechanisms at the international arena.

    c. The complementary mechanism is reaffirmed both in the Rome Statute and in the *International Crimes Act*, 2008.

    d. the *Constitution* of 2010 is not to be regarded as rejecting the role of international institutions such as the ICC and the prosecutions of crimes against humanity. Indeed, by dint of Article 2(5) and (6) of the *Constitution*, the general rules of international law are declared to form part of the law of Kenya and Kenya is obligated to give effect to these principles hence the enactment of the *International Crimes Act*, 2008.

    e. the *Constitution* by the operation of Article 2(5) and (6) and Articles 143(4) which specifically recognizes the prosecution of international crimes under any international law to which Kenya is a party, have in effect ratified the applicability of the Rome Statute and the *International Crimes Act*, 2008 by extension.

    f. No part of the *Constitution* can be declared unconstitutional or overriding another and this calls for a harmonized and purposive interpretation.

    g. The ratification of treaties and the actual domestication are the preserve of the executive and the legislature. As such, under the doctrine of separation of powers and the delegation of the people's sovereign power, courts cannot and should not interfere with the practical political realities of the exercise of the delegated sovereign power.

    h. Section 47 of the *Former Constitution* specifically granted Parliament the power to legislate. The sole power of the court in this case therefore is to decide and enforce the law as is and not what it should be now and in future, unless it is unconstitutional, and no particulars have been provided.

    i. The prerogative powers of the President including to ratify a treaty is not to be questioned in any court of law unless the same is in excess of the procedural underpinnings thereof.

    j. The substances of law in the *International Crimes Act*, 2008 are matters of international customary law affecting all countries, Kenya included.

k. The Petition has thus not demonstrated the unconstitutionality of the *International Crimes Act*, 2008, and is hence bad in law, not merited and should be dismissed with costs.

10. Parties filed their written submissions which I have duly considered. The following issues arise for determination:

i. Whether this Petition is res judicata.

ii. Whether Kenya's ratification of the Rome Statute was in violation of the *Former Constitution*.

iii. Whether Kenya's continued membership of the Rome Statute is in violation of the *Constitution* of Kenya, 2010.

iv Whether it requires a national referendum to make Kenya a State Party to the ICC

v Whether the *International Crimes Act* is in conflict with the express provisions of the *Constitution* and therefore a nullity

Whether this Petition is res-judicata

11. The Respondent submitted that by dint of the pronouncements of Mumbi Ngugi J in *National Conservative Forum v Attorney General* [2013] eKLR and J.B Ojwang in *Joseph Kimani Gathungu v Attorney General &5 others* [2010] eKLR the issues raised herein are res judicata. This was countered by the Petitioner who contended that the parties in the cited cases are different and the issues canvassed therein are different from those in the present case.

12. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act* which provides:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

13. For a party to succeed in an objection on ground of res judicata, such party must demonstrate the existence of each of the elements in Section 7 of the *Civil Procedure Act*. This requirement was set out by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, as follows:

> Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

14. I have looked at the 2 cited cases and note that the parties are indeed different, save for the Attorney General who appears in all the 3 suits. Further, the case of Joseph Kimani Gathungu was not determined on merit. It was dismissed for want of jurisdiction and non-justiciability pursuant to a preliminary objection. As regards the case of National Conservative Forum, the issues raised by the petitioner therein are as reproduced below:

    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.

15. As can be seen from the foregoing, the issues raised in the cited case are different from those raised in the Petition herein. The elements of res judicata have not all been satisfied. Accordingly, the objection on res judicata fails.

Whether Kenya's ratification of the Rome Statute was in violation of the *Former Constitution*

16. It is the Petitioner's contention that both Parliament and the Executive lacked the capacity to ratify the Rome Statute, which altered Chapter IV of that Constitution on the judicature. Relying on Sections 1, 1A, 3, 23(1), 26, 30, 123(2), 60-67, 65(1), 77(1), 86 and 47 of the *Former Constitution*, he submitted that nothing in the said Sections or elsewhere in the *Constitution* can be construed as giving the Executive and/or the President, the Attorney General and even Parliament (except by two thirds majority vote under Section 47) the capacity to cede the sovereignty of Kenyans to third parties. Hence, the ratification of the Rome Statute and the resultant ceding of the sovereignty in aspects of criminal justice to the ICC by Executive, amounted to the irregular and unconstitutional altering of the *Constitution*.

17. The Petitioner further submitted that the sovereignty of the people, and the democratic character of the Kenyan State under the *Former Constitution* was exercised through Parliament, which included the President. The legislative power of Parliament was only exercisable by bills passed by the National Assembly under Section 46(1). The Petitioner contends that no bill to alter the *Constitution* was ever introduced in Parliament, let alone debated and passed by two thirds majority to allow the Government to ratify the Rome Statute and, by so doing, cede to the ICC, the sovereignty of the Republic in aspects of criminal justice. The Petitioner argued that ratification of the Rome Statute had the effect of establishing the ICC as a Kenyan court with powers vested exclusively in the Kenyan judiciary. As such the ratification could only be legitimate via alteration of the *Constitution* under Section 47 of the *Former Constitution*. Hence the failure to observe this constitutional requirement rendered their ratification of the Rome Statute null and void ab initio.

18. The Respondent submitted that prior 2010, the repealed Constitution did not have any express provision on treaty making and ratification. There was also no statute on treaty making and ratification. The role and power to sign treaties solely lay with the Executive. Nonetheless, Kenya entered into and ratified various treaties subjecting Kenya to obligations under international law. It was further submitted that prior 2010, the sources of law in Kenya were the *Constitution*, Kenyan legislation, various customary laws, English Common Law and some English Acts of general application as provided for under Section 3(1) of the *Judicature Act*. There being no domestic law governing treaty making and ratification in Kenya, English law would apply, given that Kenya was a formerly a British colony. Under English law, the signing of treaties was the preserve of the executive, but such international instruments would only form part of the laws of Kenya after domestication via legislation by Parliament. This position has been upheld in English Courts in various cases such as in *Maclaine Watson v Department of Trade and Industry* |1989| 3 AlI ER 523 at pp. 544-5 and further buttressed by local superior courts. Ratified treaties or conventions did not however form part of the laws of Kenya unless domesticated by an Act of Parliament. They relied on the case of *Peter Anyang' Nyong'o & 10*

others v Attorney General & another [2007] eKLR. Parliament approved the ratification of the Rome Statute by enacting the *International Crimes Act*, 2008 to domesticate the Rome Statute. The claim that Parliament was not consulted therefore holds no water.

19. The Respondent further asserted that the pre-2010 era did not require public participation through a referendum or otherwise, as claimed by the Petitioner since the same was not a requirement under the law. The ratification of the Rome Statute cannot therefore be faulted for not adhering to a law that did not exist at the time, or for want of public participation. Reliance was placed on the case of *RM & another v Attorney General* [2006] eKLR in which the High Court at Par, 58 – 61; *Doctors for Life Case Doctor's for Life International v The Speaker National Assembly and others* 9CCT12/05) [2006| ZACC I1.

20. It was further submitted that the ratification of the Rome Statute which introduced an entirely new system of rules that cannot be termed to have been amendments to any rules or laws that existed at the time of its enactment. In as much as the Statute confers judicial authority, it did not take away that authority from Chapter IV of the *Former Constitution* and grant it to the ICC. The international crimes of genocide, crimes against humanity and war crimes, provided for in in the Rome Statute were not and are still not provided for under any statute and as such the judicial authority under Chapter IV could not extend to non-existent crimes. It is trite law in criminal law spheres that one cannot be charged for crimes that do not form part of the existing law. In light of the foregoing, the Respondent contended that the Petitioner has not proved that the Rome Statute was and is inconsistent with both Constitutions or offends the spirit of both Constitutions, which would be the only justification for it to be declared null. Consequently, the ratification of the Rome Statute was proper and legal and did not contravene the *Former Constitution*. The authority and jurisdiction of the ICC did not and does not oust the judicial authority of national courts under both Constitutions.

21. The Rome Statute was passed on 17.7.98 and came into force on 1.7.02. Kenya ratified the Rome Statute on 15.3.05. It is not disputed that prior to the promulgation of the *Constitution* of Kenya 2010, there was no express provision under law, on treaty making and ratification. Treaty making was the preserve of the Executive which negotiated and concluded treaties with other states. In the case of *Peter Anyang' Nyong'o &10; others v Attorney General & another* [2007] eKLR, Nyamu, J (as he then was) stated:

> To reinforce this point author PL Keir in Cases In Constitutional Law 3rd Edition at page 298, as if to emphasise on what is now laid down in the Vienna Convention on the Law of Treaties has authoritatively written:
>
> "There is no doubt that the crown has full power to negotiate and conclude treaties with foreign states and that, the making of a treaty being an act of state, treaty obligations cannot be enforced in a municipal court."

22. In the previous constitutional dispensation, Kenya was a dualist state and treaties and conventions ratified by Kenya had no force of law unless and until they were domesticated by an act of Parliament. This was aptly stated by the Court of Appeal in *David Njoroge Macharia v Republic* [2011] eKLR as follows:

> Kenya is traditionally a dualist system, thus treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing

legislation. However, this position may have changed after the coming into force of our new Constitution.

23. Following the ratification of the Rome Statute, the National Assembly proceeded to domesticate the same by enacting the *International Crimes Act*, 2008 in order for the Statute to have force of law in Kenya.

24. Did the ratification of the Rome Statute amount to ceding of the sovereignty of Kenya in aspects of criminal justice to the ICC by Executive? A careful reading of the Rome Statute shows that the ICC does not overrun or take over the criminal jurisdiction of State parties but complements the same. Paragraph 10 of the preamble states as follows:

> Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions. (emphasis)

25. By the mere act of ratification, the Rome Statute did not automatically become part of the law of Kenya hence the enactment of the *International Crimes Act*, 2008. The Act describes itself as 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. Further, the jurisdiction of the ICC may only be invoked where a State is unable or unwilling to investigate or prosecute. Article 17(1)(a) of the Rome Statute provides:

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

26. From the foregoing, it is quite evident that the Rome Statute and the ICC is complementary to national criminal jurisdictions of member States. The ICC only steps in where a member State is unwilling or unable to carry out investigation or prosecution of cases relating the international crimes set out in the Rome Statute. Further, there is nothing in the Rome Statute or the *International Crimes Act* that can be said to amount to ceding of a member State's sovereignty in aspects of criminal justice to the ICC.

27. The Petitioner has contended that the ratification of the Rome Statute amounted to the irregular and unconstitutional altering of the *Constitution*. Section 47 of the *Former Constitution* provided for alteration of the *Constitution* as follows:

> 1. Subject to this section, Parliament may alter this Constitution.
>
> 2. A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members).
>
> 3. If, on the taking of a vote for the purposes of subsection (2), the Bill is supported by a majority of the members of the Assembly voting but not by the number of votes required by that subsection, and the Bill is not opposed by thirty-five per cent of all the members of the Assembly or more, then, subject to such limitations and conditions as may be prescribed by the standing orders of the Assembly, a further vote may be taken.

4. When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for his assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was first introduced into the Assembly.

5. A certificate of the Speaker under subsection (4) shall be conclusive as regards proceedings in the Assembly, and shall not be questioned in any court.

6. In this section –

   (a) references to this Constitution are references to this Constitution as from time to time amended; and

   (b) references to the alteration of this Constitution are references to the amendment, modification or reenactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision

28. It is clear from the foregoing that alteration of the *Former Constitution* could only be done by Parliament, by means of a Bill for an Act of Parliament to alter the same. Such Bill required support on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members). The ratification of the Rome Statute was done by the Executive and not by Parliament. The *International Crimes Act* was enacted for the purpose of domesticating the Rome Statute. Indeed, there is nothing in the *International Crimes Act* to suggest that the same was intended to alter the *Constitution*. My finding is that the Petitioner has not demonstrated that the ratification of the Rome Statute was done contrary to the law that existed then. Accordingly, the contention that the said ratification was in violation of the *Former Constitution* is without merit.

Whether Kenya's continued membership of the Rome Statute is in violation of the new *Constitution of Kenya, 2010*

29. The Petitioner submitted that the Rome Statute irregularly grants the ICC what the Kenya Constitution vests exclusively and jealously in organs of the national government. He relied on Articles 159, 157, 244, 245 and 245 of the *Constitution*. He contended that the continued jurisdiction of the ICC in Kenya is unconstitutional. Further, by dint of Articles 159 to 173 of the *Constitution*, the ICC cannot exercise jurisdiction in Kenya because it is not one of the courts and tribunals established by the *Constitution* and is therefore not part of the judicial power in Kenya. The Rome Statute lost its legitimacy on the effective date, by dint of Articles 159 to 173 as read with Section 7(1) of the Sixth Schedule to the *Constitution*.

30. The Petitioner further submitted that under Article 2(4) as read with 2(6) of the *Constitution*, treaties that are ratified must be consistent with the *Constitution*. Hence the Executive cannot also legally use its treaty making powers to alter the constitutional structures of the sovereign Republic of Kenya, such as the system of courts. The Executive cannot also ratify treaties which relinquish the rights and fundamental freedoms of Kenyan citizens enumerated in the *Constitution* especially the right to fair trial under Article 50 of the *Constitution*. Also, that the power to ratify treaties does not confer on the political arms of government the capacity to amend the *Constitution* through the back door in a manner not sanctioned by Articles 255, 256 and 257 as this would be a major violation of the *Constitution*. His posited that under Article 1 as read with Articles 159(1) and 255(1)(c), only the people of Kenya via a national referendum, can cede sovereignty over aspects of criminal law to the ICC by ratifying

the Rome Statute. According to the Petitioner therefore, Kenya's continued membership of the Rome Statute is in violation of the *Constitution* because it is in conflict with the *Constitution*, in particular, the Preamble and Articles 1, 4, 25(c) and 50, 160(1), 162 thereof. Further, that the ICC is an alien court that was not established by the Parliament of Kenya, or under the *Constitution*

31. The contention was opposed by the Respondent. Relying on the cases of *Samuel Kamau Macharia v Kenya Commercial Bank*; SC Application No 2 of 2011, [2012] eKLR ; *Town Council of Awendo v Nelson O. Onyango & 13 others ; Abdul Malik Mohamed & 178 others (Interested Parties)*, SC Petition No 37 of 2014; [2019] eKLR, and *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* [2021] ; and *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR, the Respondent submitted that by virtue of Section 8 of the *International Crimes Act*, the ratification and domestication of the Rome Statute did not have the intention of ceding judicial authority to the ICC as claimed by the Petitioner, but to comprehensively legislate on international crimes both on a national and international scale. The Respondent wishes to highlight that though States are sovereign and equal, in reality, however, due to the inter-dependence in international commercial and political affairs, no state can afford to act in isolation.

32. The Petitioner appears to seek the retrospective application of the *Constitution* of Kenya, 2010 in relation to the Rome Statute. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* Sup. Ct. Application No 2 of 2011; [2012] eKLR, The Supreme Court pronounced itself of the retrospective application of the *Constitution* as follows:

> At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the *Constitution* to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the *Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the *Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the *Constitution*."

33. In *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR, the Supreme Court held:

> (41) We reiterate the above holding, and from a plain reading of Article 2(6) of the *Constitution*, it appears that the *Constitution* is silent on whether treaties ratified prior to the 2010 Constitution also form part of the laws of Kenya. In our view, however, the language of Article 2(6) itself should be the beginning of the resolution of the question of retrospectivity, and we note in that regard that, it does not distinguish the types of treaties and conventions that form part of Kenyan law; because the language plainly commands that any treaty or convention that Kenya has ratified becomes part of the laws of Kenya. The provision does not also distinguish treaties and conventions ratified before or after the *Constitution* of 2010, and therefore, in this particular instance, the agreements and Conventions that Kenya entered with Shelter Afrique, although ratified before 2010, are in force, have remained unrevoked, and therefore, form part of the laws of Kenya, only subject to the *Constitution*.

(42) We, further, and as a consequence of the above finding, restate our position in *Samuel Kamau Macharia*, that the *Constitution* cannot be subjected to the principles of statutory interpretation that prohibit retrospective application of laws generally; and where need be, only the language of the *Constitution* should be a guide as to whether a provision applies retrospectively or not. We also agree with the Court of Appeal, in the present case, that an interpretation of Article 2(6) of the *Constitution* in a manner that distinguishes treaties which Kenya ratified prior to, and after the 2010 Constitution, is not tenable, and we believe that this interpretation is also in line with Section 7(1) of the Sixth Schedule which reads:

> "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."

It is our finding, in a nutshell, that our reading of Article 2(6) of the *Constitution* can only lead to the conclusion that there is no bar to its provisions being applied retrospectively.

34. Article 2(6) of the *Constitution* provides:

> (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

35. It is fairly clear that the intention of the *Constitution* is that any treaty that has been ratified by Kenya shall form party of the law of Kenya. As to whether the Rome Statute which was ratified before 2010 is still applicable in Kenya after promulgation of the *Constitution* of Kenya, 2010, the wording in Article 2(6) is quite plain and requires no fancy interpretation. It states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the *Constitution*. To borrow from the words of the Supreme Court in the *Karen Njeri Kandie case* (supra), Article 2(6) does not make a distinction between treaties and conventions ratified before or after the *Constitution* of 2010. Accordingly, the Rome Statute though ratified in 2005 forms part of the laws of Kenya, subject only to the *Constitution*. The Rome Statute does not usurp the mandate of the Judiciary in Kenya but complements it. Notably, Section 8 of the *International Crimes Act* confers upon Kenyan courts the jurisdiction to try the offences of genocide, crimes against humanity and war crimes. In light of the foregoing, I am not persuaded that Kenya's continued membership of the Rome Statute in any way violates the *Constitution* of Kenya, 2010.

Whether a national referendum was required to make Kenya a State Party to the ICC

36. It is the Petitioner's case that by dint of Article 1 as read with Articles 159 (1) and 255(1)(c), only the people of Kenya through a national referendum, can cede sovereignty over aspects of criminal law to the ICC by ratifying the Rome Statute. The Respondent asserted that Chapter Sixteen provides for amendment of the *Constitution*. As such, the only requirement to hold a referendum is espoused under Article 255(1). The ratification of an international instrument is not among the issues that should be subjected to a referendum as per the *Constitution* 2010. However, Article 255(3) provides that all other matters that do not fall under Article 255 (1) of the *Constitution* shall be enacted either by Parliament in accordance with Article 256 or by the people and Parliament in accordance with Article 257.

37. The concept of a national referendum was introduced in our laws by the *Constitution* of Kenya 2010. Chapter Sixteen of the *Constitution* provides for amendment of the *Constitution* 2010. The *Former Constitution* made no provision for a referendum. As such the contention by the Petitioner that a national referendum was required to make Kenya a State Party to the Rome Statute is not grounded on any provision of the repealed or current Constitution. In any event, the Rome Statute being a treaty that had been ratified by Kenya shall form part of the law of Kenya under this Constitution. The issue of ratification cannot therefore be revisited by way of a national referendum or otherwise. The Petitioner's submission in this regard are therefore unmerited.

Whether the *International Crimes Act* is in conflict with the express provisions of the *Constitution* and therefore a nullity

38. The Petitioner relied on Section 7(1) of the Sixth Schedule of the *Constitution* to submit that that the *International Crimes Act* was voided and nullified in the effective date by the *Constitution*. This is because the substance of the Act is totally in contravention of the *Constitution* and cannot be construed with the alterations, adaptations, qualifications and exceptions necessary to bring into conformity with the *Constitution*. The Petitioner argued that the jurisdiction of the ICC is unconstitutional both under the former and the present Constitution. The Respondent defended the Act and submitted that the same is not in conflict with the 2010 Constitution and that the Petitioner has failed to demonstrate the alleged conflict.

39. Section 7(1) of the Sixth Schedule of the *Constitution* provides:

> 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.

40. The constitutionality of the Act has been the subject of judicial consideration. In the case of *National Conservative Forum v Attorney General* (*supra*), Mumbi J, stated:

> 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 7th and 9th 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 v 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.

41. The learned Judge went on to state:

> 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.)

42. After considering the material before me, I have found as the learned Judge did, that there is nothing to suggest that the *International Crimes Act* requires any alterations or modifications in order to bring it into conformity with the *Constitution*.

43. It is trite law that whoever alleges must prove as stipulated in the *Evidence Act* as follows:

Section 107. Burden of Proof

34. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

35. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 107. Burden of Proof

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

44. The above provisions impose the evidentiary burden on the Petitioner to prove to the satisfaction of the Court that the Rome Statute is in conflict with the *Constitution*. The Petitioner has however failed to place any material before Court that would suggest that the executive in signing and ratifying the Rome Statute or Parliament enacting the ICC Act to domesticate the same, failed to adhere to the process then in force under the *Former Constitution* and legislation made thereunder.

45. The Petitioner faults the *International Crimes Act*, terming it a nullity and void in its entirety, for being founded on the Rome Statute, which according to him was ratified unconstitutionally. The Respondent argued that the Act is evidence that the ratification of the Rome Statute was proper and gained the approval of Parliament.

46. As has been stated herein, the only way the Rome Statute was to have the force of law in Kenya was through domestication. The *International Crimes Act* was thus enacted for that purpose. Both

the ratification of the Rome Statute and the enactment of the *International Crimes Act* took place before the promulgation of the *Constitution* of Kenya, 2010. Neither the ratification nor the enactment was declared unlawful under the retired Constitution. The provisions of the present Constitution cannot be used to declare unconstitutional, that which was constitutional and lawful under the retired Constitution.

47. In this regard, I associate with the sentiments of Ngugi, J. (as she then was) in the case of *National Conservative Forum v Attorney General* (*supra*). The learned Judge stated:

> 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.

48. On costs, Rule 26(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, provides that the award of the costs is at the discretion of the Court. Sub Rule (2) provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. This Petition was filed in the public interest. Accordingly, condemning the Petitioner to pay costs will deter public spirited persons like him to move to Court seeking to right wrongs in society.

49. In the end, I find that the Petition dated 4.10.12 lacks merit and the same is hereby dismissed. There shall be no order as to costs.

DATED AND DELIVERED IN NAIROBI THIS 14TH DAY OF APRIL 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondent

..... Court Assistant