



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.88 OF 2015

BETWEEN

DAVID NYEKORACH MATSANGA.....1ST PETITIONER

JOHN MUIRURI KIMANI.....2ND PETITIONER

AND

HON. MR. JUSTICE PHILIP WAKI.....1ST RESPONDENT

THE OFFICE OF THE PROSECUTOR OF

INTERNATIONAL CRIMINAL COURT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE MYOT WELFARE ASSOCIATION

(KALENJIN COUNCIL OF ELDERS).....INTERESTED PARTY

RULING

Factual Background

[1] On 10th March 2015, the Petitioners brought a Petition in this Court in which they prayed for the following orders:

***“(1) A declaration that the Commission of inquiry into Post-Election Violence (CIPEV) abdicated its legal and mandatory obligation under the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya, by failing to handover the full and/or its entire Report to the President of the Republic of Kenya as required by the aforesaid law and the Constitution of Kenya.*”**

- (2) A declaration that the failure by CIPEV to hand over and/or transmit the full and/or its entire Report to the President of the Republic of Kenya and the concealment and/or non-disclosure of part of the said Report by CIPEV was unlawful, improper, illegal and unconstitutional.**
- (3) A declaration that the Government of the Republic of Kenya abdicated its legal and constitutional mandate by failing to acquire, obtain and/or demand for the full and entire Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV).**
- (4) A declaration that the handing over and/or transmission of part of the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, to the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan was unlawful, improper and/or illegal.**
- (5) A declaration that the handing over and/or transmission of part of the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, by the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan to the Prosecutor of the International Criminal Court (ICC), Mr. Luis Moreno Ocampo (as he then was) was unlawful, improper and/or illegal.**
- (6) A declaration that the continued concealment and/or withholding of the contents of the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of person suspected to have borne the greatest responsibility for the Post-Election Violence, and the Office of the prosecutor of the International Criminal Court is a violation of the Petitioner's right of access to information as guaranteed under Article 35 of the Constitution of Kenya, 2010.**
- (7) An order compelling the Honourable Justice Philip Waki to submit to His Excellency the President of the Republic of Kenya the Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV), being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, which was submitted by himself to the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan.**
- (8) A mandatory injunction be and is hereby issued directing and/or compelling the Office of the Prosecutor of the International Criminal Court to return and/or disclose to the Republic of Kenya the concealed contents of part of the Report by CIPEV being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the violence that erupted during and after the General Elections held in 2007.**
- (9) An order of Mandamus compelling the Honourable the Attorney General to obtain and disclose to the Republic of Kenya the concealed contents of part of the Report by CIPEV being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the violence that erupted during and after the General Elections held in 2007.**
- (10) That the Respondents be and are hereby ordered to publish and/or publicize, the entire, full and proper Report prepared by the Commission of Inquiry into the Post-Election Violence (CIPEV) including the sealed/secret envelope containing the names of persons suspected to have borne the greatest responsibility for the Post-Election Violence, which was submitted and/or hand-over to the Chair of the Panel of Eminent Persons, Dr. Koffi Atta Annan.**
- (11) Any other and further orders as the Honourable Court may deem fit.**
- (12) The Respondents to pay the Petitioners cost of these proceedings in any event."**

[2] The above prayers emanate from the following background and context: Following the 2007-2008 disputed election violence, a Commission of Inquiry into the Post-Election Violence (CIPEV) was set up to make investigations and recommendations on the issue. Upon the appointment of the Commission, the African Union (AU) appointed a panel of Eminent African Personalities to mediate and monitor the process. After the Commission had completed its work, it submitted its report to the then President of the Republic of Kenya H.E Mwai Kibaki and gave the Chair of the Eminent African Personalities a sealed envelope with a list of people suspected to have borne the greatest responsibilities in the post-elections violence. This was done with a view that the Government of Kenya would first establish a Special Tribunal which would then be handed the envelope to prosecute the suspects. But when the Special Tribunal was not set up, the Chair of the Eminent African Personalities forwarded the envelope to the Chief Prosecutor of the International Criminal Court (ICC). The report has since been used at the ICC including in the case of **Prosecutor vs William Samoei Ruto and Joshua Sang**.

The Petitioners' case

[3] The Petitioners' case is essentially that the aforesaid envelope is part of the Commission's report and should have been handed to the President together with the report. They submit that the conduct of the 1st Respondent, Chair of the Eminent African Personalities and Chief Prosecutor of the ICC concerning the sealed envelope is both unlawful and unconstitutional and violated **Section 7(1) and (1A) of Commissions of Inquiry Act 11 of 1962** which provides that:

“(1) It shall be the duty of a Commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and on completion of the inquiry, to report to the President and to the National Assembly, in writing, the result of the inquiry and the reasons for the conclusions arrived at.

(1A) The report of a commissioner under subsection (1) shall include a full record of the proceedings of the commission.”

[4] It is their case that the above provisions required the Commissioner to hand over to the President a full report including the names contained in the sealed envelope and that the Petitioners are entitled to a full report including the names in the sealed envelope in order to successfully prosecute an application at the ICC in which they allegedly challenged the admission of the report as evidence in the case of **Prosecutor vs William Samoei Ruto and Joshua Arap Sang**.

The 1st Respondent case

[5] The 1st Respondent filed a Preliminary Objection on the 18th of March 2015 in which he raised, among others, the following arguments against the Petition:

- a. That the Commission is defunct and that since it concluded its work before the Constitution came into operation, the Constitution cannot apply retrospectively.
- b. That no civil action or suit can lie against him by virtue of **Section 14 of the Commissions of Inquiry Act**.
- c. That the 1st Petitioner lacks standing to invoke the provisions of **Article 35 of the Constitution** because he is not a citizen of the Republic of Kenya and further that he has failed to indicate the rights he seeks to protect or enforce.

On 27th March 2015, the 1st Respondent filed written submissions in which he extrapolated on the above points.

The 3rd Respondent's case

[6] The 3rd Respondent associates himself with the 1st Respondent's submissions and urged that the right under **Article 35** of the **Constitution** is only available to citizens and since the 1st Petitioner is not a Kenyan citizen, he cannot claim it and that in any event he had failed to establish any rights that he sought to enforce or protect and that the information sought is also not in the 3rd Respondent's possession. He further argued that the Petitioners never made any request for information from the Respondents and that the latter have failed to provide the same. Accordingly and on that basis, he submitted that the application is not ripe for adjudication until that precondition is satisfied.

[7] It is his further submission that in view of the application allegedly pending at the ICC, it is not proper for this Court to interfere with its determination and that the orders sought have a bearing on the entities not joined before this Court and that this implicates on their right to fair hearing under **Article 50** of the **Constitution**. He further argued that the right to information is not without limitations and in that regard the ongoing investigations based on the report, the need to preserve evidence in order to ensure that further investigations proceed without interruption are all justifiable limitations to the Petitioners' rights.

[8] By consent, the parties reached an agreement in Court that this Court should make a determination on whether this case should be referred to the Chief Justice for the constitution of a bench of Judges in terms of **Article 165(4)** of the **Constitution** based on the matters on record.

Determination

[9] **Article 165(4)** of the **Constitution** provides that a matter must raise a substantial question of law for it to be referred to the Chief Justice for the constitution of a bench of Judges to determine such a question and whether a substantial question of law arises from a particular case depends on several factors and some of these factors have been succinctly summarised in **County Government of Meru vs Ethics and Anti-Corruption Commission [2014] eKLR** as follows:

“(a) The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.

(b) The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

(c) Public interest may be considered but is not necessarily a decisive factor. It is in the nature of Petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.”

[10] Further, in **Martin Nyaga Wambora and Others vs Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR** they were summarised as follows:

- a. Whether the matter is complex.
- b. Whether the matter raises a novel point.
- c. Whether the matter by itself requires a substantial amount of time to be disposed of.
- d. The effect of the prayers sought in the petition.
- e. The level of public interest generated by the Petition.

[11] Some of the above guidelines were borrowed from the Indian Supreme Court decision in **Chunilal vs Mehta vs Century Spinning and Manufacturing Co, AIR 1962 SC 1314**. However, since each case is dealt with on its merits, different factors are considered in the determination of a particular case. In that context, the question that arises here is therefore whether on the appraisal of the record of the proceedings of this case, a substantial question of law arises. In **David Nyekorach Matsanga and Another vs Philip Waki and 3 Others [2015] eKLR**, a case in which this Court dealt with the admission of Myot Welfare Association as an Interested Party, it was submitted that the report in issue adversely affected the members of the Interested Party and were never afforded an opportunity to present their side of the story or to challenge the findings of the report. This submission goes into the content of **Article 50(1) of the Constitution** (the *audi alteram partem* principle) and the question is whether this right can be effectively enforced in Commissions of Inquiry.

[12] Further, the Petition raises the question whether this Court can revisit and determine the veracity of the findings of a Commission of Inquiry at a stage when that report has been admitted at the ICC and is the basis of the ongoing prosecution of some Kenyans. Can this Court for example compel the ICC to disregard the report as unreliable and unconstitutional and to hand it over to the President of Kenya and to no other party? These are all novel questions and there are no readily available answers.

[13] A further question which, in my view deserves judicial scrutiny by a bench, concerns the interpretation of **Section 14 of the Commissions of Inquiry Act**. The Section shields a commissioner of a Commission of Inquiry from being held liable in civil suits while going to, presiding on or returning from the place of inquiry. The Section provides:

“No commissioner shall be liable to arrest under civil process while going to, presiding in or returning from the place where an inquiry under this Act is being held by him.”

The ambit of the Section is not clear. For instance, does this mean that once the Commissioner has completed his work, like in the present case, the protection falls away? In addition, the Interested Party’s grievance is that its members were not afforded an opportunity to challenge the report or to state their case. This submission implicates **Article 50(1) of the Constitution** and its consideration would raise the question whether the ambit of **Section 14** shields a Commissioner from being held liable for breach of constitutional provisions. In my view, these are also novel matters and their determination would not be without difficulties.

[14] The Petitioners’ prayers also test the competence of this Court on certain matters in relation to the ICC. They raise the question whether this Court can make an order declaring that evidence that has already been admitted and utilised in a case pending at the ICC is unlawful and unconstitutional and should be withdrawn. These are weighty and delicate issues that test the power relations between our courts and the ICC under both the **Rome Statute** and the **International Crimes Act No.16 of 2008**.

[15] The larger issue of public interest also looms in this Petition, Kenyans have debated and hold divergent views on the sealed envelope in question as well as the proceedings at the ICC. The decision to be made in the present Petition will also greatly impact on the geo-politics of Kenya in ways that cannot be easily anticipated. A delicate balancing act would therefore be required of the Judges who should be more than one in addressing those issues.

Conclusion

[15] Having reflected on the record of the proceedings in this case, therefore the nature of the issues involved and the impact and implication of the orders sought, I am satisfied that the matter deserves to be referred to the Chief Justice for the Constitution of a bench in terms of **Article 165(4) of the Constitution**.

Disposition

[16] I therefore certify that the matter be referred to the Chief Justice for the constitution of a bench in

terms of **Article 165(4)** of the **Constitution**.

[17] Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

1st Petitioner present

Miss Barasa holding brief for Mr. Oraro for 1st Respondent

Miss Kirui holding brief for Mr. Arusei for Interested Party

Mr. jKuria for 2nd Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

5/2/2016