



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.317 OF 2011

BETWEEN

MORAA GESICHO.....APPLICANT

AND

HON. ATTORNEY GENERAL.....RESPONDENT

CONSOLIDATED WITH

KISII PETITION NO.1 OF 2010

MORAA GESICHO.....APPLICANT

AND

HON. ATTORNEY GENERAL.....1st RESPONDENT

**THE TRUTH, JUSTICE AND RECONCILIATION
COMMISSION.....2nd RESPONDENT**

RULING

Factual Background

- (1) The Petitioner in both **Nairobi Petition No.317 of 2011** and **Kisii Petition No.1 of 2010** has in summary challenged the manner in which the Commission of Inquiry into the 2007-8 Post-Election Violence (CIPEV) conducted its work. The Commission was appointed by the then President of Kenya H.E Mwai Kibaki in terms of the **Commissions of Inquiry Act CAP 102** to conduct investigations into the 2007-8 post-election violence. After completing its work, the Commission submitted its report to the President but also gave the Chairperson of the **Eminent African Personalities** a sealed envelope with the names of people suspected to have borne the greatest responsibility in the post-election violence and the envelope was later forwarded to the Chief Prosecutor of the **International Criminal Court (ICC)**.
- (2) Against the above background, the Petitioner has made certain allegations against the

Commission, its report and the processes it followed in conducting its work and these allegations are largely contained in her Amended Petition dated 27th April 2012 in **Nairobi Petition no. 317 of 2011**.

Petitioner's case

(3) The Petitioner alleges that the President ceded his authority to the ICC when the envelope containing the names of the individuals suspected to be responsible for the post-election violence was forwarded to the ICC. In the same vein, she alleged that the President ceded his authority to implement the recommendations of the Commission to the Chairperson of the **Panel of the Eminent African Personalities**, H.E Kofi Annan.

(4) It is therefore the Petitioner's case that the crimes committed during the post-election violence did not require the intervention of the ICC and further, that the President should not have cooperated with the ICC because the individuals implicated in the findings of the Commission are the wrong people and further, that the Commission did not find that the violence was planned, organised or financed by anyone.

(5) The Petitioner also alleged that the Commission failed to conduct a full, faithful and impartial inquiry in accordance with the **Commissions of Inquiry Act CAP 102** and in addition, that the **Truth, Justice and Reconciliation Commission (TJRC)** was ill-equipped to pursue justice for victims of the post 2007-8 election violence and other forms of injustice.

(6) In her statement of issues dated 27th April 2012 and in relation to the above background, the Petitioner framed the issues for determination as follows:

“1 Whether the President failed to safeguard the sovereignty of the Republic of Kenya in as far as crimes committed in Kenya during and after the 2007 Presidential election are concerned.

2. Whether the President failed to ensure protection of human rights and fundamental freedoms of individuals alleged to have been responsible for the violence that followed the 2007 Presidential election.

3. Whether the Commission of Inquiry into the Post-Election Violence failed to conduct a full, faithful and impartial inquiry.

4. Whether the Truth, Justice and Reconciliation Commission was ill-equipped to pursue justice for victims of post 2007[8] election violence and other forms of injustice.

5. Who should bear the costs [of the Petition]?”

Respondents' case

(7) In his Grounds of Opposition dated 12th January 2012, the 1st Respondent, the Hon. Attorney General argued that the Petitioner is seeking the same relief sought in **Petition No. 1 of 2010** (Kisii) which, at that time, was still pending determination separately and before consolidation. He further argued that the Petition was made in bad faith and is a gross abuse of court process and should therefore be dismissed with costs.

(8) He also contended that the Petitioner had failed to demonstrate that her rights were denied, violated or threatened with violation or that there was a breach or violation of the Constitution or any other law. That in any event, the mandate of CIPEV came to an end when it submitted its report to the then President and the Petitioner cannot, at this time, seek the orders set out in the Petition.

(9) He further argued that it is not open for the Petitioner to challenge the substantive findings of the Commission because it was entitled to make the report as it did based on the provisions of the **Commissions of Inquiries Act CAP 102** and it also had the mandate conferred to it by **Gazette Notice Number 4473** of 23rd May 2008.

(10) The 1st Respondent in addition contended that this Court in any event lacks the competence to grant the Prayers sought in the Petition as doing so would violate the doctrine of separation of powers and would further amount to directing the ICC on how to conduct its proceedings.

Substance of this Ruling

(11) On 27th January 2012, this Court made an order to the effect that **Petition No.1 of 2010** (Kisii) be transmitted to this Court forthwith and be consolidated with the present Petition because the Petitioner and the issues raised in both Petitions are the same hence the consolidation.

(12) It was also agreed by the Parties that this Court should address itself on the issue whether, based on matters on the record, a substantial question of law arises warranting the empanelling of a bench in terms of **Article 165(4)** of the **Constitution**. This Ruling is limited to that question only.

Determination

(13) I have had the benefit of applying my mind to the matters on record in both Petitions before me and the core issue appears to be the question whether the CIPEV was mandated to act in the manner it did as described above and corollary to that issue, whether the former President abdicated his authority when he allegedly failed to prevent the referral of the list of those implicated in the report to the ICC. The other issues concern the veracity of the evidence used by the CIPEV in compiling its report and the legitimacy of the processes it followed in gathering evidence leading to its recommendations.

(14) The question for determination instantly is whether the issues outlined above raise a substantial question of law that warrants the empanelling of a bench in terms of **Article 165(4)** of the **Constitution**. In my view, the answer has to be in the affirmative because the issues involved are novel, weighty and complex. In his ruling in **Petition 1 of 2010**, Musinga J alluded to the same view concerning the novelty of the issues involved. Further, the fact that the Commission has since downed its tools and its Report has been used as evidence in the prosecution of certain Kenyan individuals in the ICC, adds to the intricacy of the issues involved.

(15) In saying so, I am mindful of the view expressed in **County Government of Meru vs Ethics And Anti-Corruption Commission [2014] eKLR** where the Court pointed out that whether a substantial question of law arises depends on the circumstances of each case and that the fact that a matter is weighty, of public importance or novel, without more, does not necessarily mean it raises a substantial question law. I can only add that the presence or absence of either of the guidelines outlined in that case is not indicative of the absence or presence of a substantial question of law. As correctly pointed out in that case, however, each case should be determined on its own circumstances.

(16) In this case, I am persuaded by the guidelines set out by the Court in **Martin Nyaga and Others vs Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR** where it stated that whether a substantial question of law arises would in some cases depend on:

- 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.**

(17) Against the above context, I am therefore satisfied that the present Petition raises complex and novel matters and the effect of the Prayers sought will have overreaching implications on the functionary relations between the ICC and Kenyan Courts under the **Rome Statute** and the **International Crimes Act No 16 of 2008**.

(18) Further, issues surrounding the challenged report occupy a sensitive and special place in Kenyan history and debatable or contentious questions arising therefrom are of general public importance.

Conclusion

(19) For the above reasons, I am satisfied that the issues in contest in the consolidated Petitions raise a substantial question of law warranting referral to the Chief Justice for the constitution of a bench in terms of **Article 165(4)** of the **Constitution**.

Disposition

(20) The matter is certified for referral to the Chief Justice in terms of **Article 165(4)** of the **Constitution**.

(21) Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Miss Irari for Respondent

No appearance for Petitioner

Order

Ruling duly delivered. Mention on 8/4/ for directions.

ISAAC LENAOLA

JUDGE