REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 451 of 2012

OKIYA OMTATAH OKOITI …..... PETITIONER

AND

THE ATTORNEY GENERAL .....RESPONDENT

RULING

Introduction

1. It is not in doubt that prior to my appointment to the bench in August 2011, I was the Assisting Counsel to the ***Commission Investigating the 2007 Post Election Violence*** ("CIPEV") commonly referred to as the ***Waki Commission***. This petitioner requests me to recuse myself from presiding over this matter on account of my position in the Commission. There is no suggestion that I have any proprietary, pecuniary or financial interest in the outcome of the litigation.

Application and submissions

2. The Petitioner's application dated 9th October 2012 seeks the following orders:

(1) That the Honourable Justice David Amilcar Shikomera Majanja, presently hearing the petitioner's petition do disqualify himself.

(2) That the matter be placed before the Head of the Constitutional and Human Rights Division for directions.

(3) That a three judge bench be appointed to hear both the pending application and the petition herein.

(4) That the respondent be ordered to produce the Waki Envelope and the list of names therein under Article 35 to help the petitioner prosecute his case to the effect that in contemptuous disregard of the Constitution of Kenya, 2010, the ICC is virtually the illegitimate fourth arm of Government, which is more powerful than the other three.

(5) That the court do give any other or further orders that will favour the cause of justice.

(6) That costs be in the cause.

3. The grounds upon which the application is made are set out on the face of the application and are as follows;

(a) That it has recently come to the attention of the petitioner herein, Okiya Omtatah Okoiti that the

Honourable Justice David Shikomera Majanja, who is presiding in this matter, was the Assisting Counsel to the Waki Commission, officially, The Commission of Inquiry on Post Election Violence (CIPEV) which the petitioner avers overthrew or ousted Kenya's constitutionally established criminal justice system and created an illegitimate political by-pass called a Local Tribunal for the express purpose of irregularly getting the ICC to intervene in the Kenyan cases without observing the Principle of Complementary of the Rome Statute is based, upon which the International Criminal Court is founded.

(b) That the learned judge and other members of the Waki Commission are likely to be witnesses or respondents in this matter.

(c) That the Honourable Justice David Amilcar Shikomera Majanja was the assisting counsel to the Waki Commission, officially, The Commission of Inquiry on Post Election Violence (CIPEV), which the petitioner avers overthrew or ousted Kenya's constitutionally established criminal justice system and created an illegitimate by-pass for the ICC to intervene in the Kenyan cases without observing the Principle of Complementarity, upon which the Rome Statute is based.

(d) That against the former Constitution of Kenya and the laws in force at the time, the complete post-election violence report by the Waki-Commission, commonly known as the "Waki Report", was handed over to President Mwai Kibaki and Prime Minister Raila Odinga on October 15, 2008.

(e) That the incomplete report handed to the President and the Prime Minister did not publicly disclose the alleged perpetrators of the violence.

(f) That the Waki Commission instead illegally handed a sealed envelope, said to contain the list of alleged perpetrators, to Kofi Annan. In July, 2009 Kofi Annan handed the envelop to Luis Moreno-Ocampo, the Prosecutor at the ICC.

(g) That the Kenyan Government was then given 1 year, beginning July 2009 to set up a "Local Tribunal" to deal with issue. Failure to do this would see the ICC pick up the matter beginning August 2010.

(h) That in making the Complementarity Principle of the Rome Statute applicable to the failure of the political process of setting up a Local Tribunal and not to the failure of the national Criminal Justice System to put to trial the alleged perpetrators of the violence contained in the secret envelope, the Waki Commission, grossly violated the law of Kenya in a manner bordering on committing treason against the Republic of Kenya.

(i) That the ultimate referral of the Kenyan case to the ICC by the two principals was premised on the failure to make provision for the special tribunal recommended by the Waki Commission as opposed to the failure of the criminal justice system established by the Constitution of Kenya and other laws in existence during the PEV atrocities.

(j)That the object of this Application may well be defeated if the matter continues to be heard by Honourable Justice David Amilcar Shikomera Majanja.

(k) That the petitioner/Applicant herein will suffer irreparable detriment if the order sought herein is not granted.

(l) That this Honourable Court has unfettered powers and jurisdiction to make the orders sought.

(m) That this application is made in good faith.

4. The grounds are supported by the petitioner's affidavit sworn on 9th October 2012. According to the petitioner, *"that in order to avoid exposing the learned judge to a conflict of interest in the matter, and to safeguard the constitutional rights of the Petitioner and other Kenyans, it is imperative that this application be heard …. The orders sought are justified and meant to cushion the Petitioner from gross*

miscarriage of justice."

5. Apart from setting out the grounds upon which the application is premised, Mr Nguring'a, counsel for the petitioner stated that as a Judge I may be called as a witness in the matter and it would be improper for me to continue to preside over the matter. Counsel further submitted that the enactment of the Rome Statute in Kenya and co-operation with the International Criminal Court were matters triggered by the CIPEV Report. As I participated in the process, I should not deal with the matters raised in this petition as justice must not only be done but be seen to be done.

6. The application was opposed by the Attorney General on the ground that the work of the Waki Commission was completed upon the handing over of the Report to the President and as the assisting counsel I did not have any further responsibility for the report which is a matter for the Commissioners. Mr Moimbo, counsel for the Attorney General, also submitted that no grounds have been made out for my disqualification.

Analysis and determination

7. The question to be answered is whether I should disqualify myself from sitting and hearing this matter.

8. The right of any litigant to apply for recusal of a judge is derived from the right to fair hearing. The right of a fair hearing before an independent impartial and unbiased tribunal is enshrined in **Article 50** of the Constitution. This right is buttressed by **Article 159(2)(a)** which requires that judicial authority should be guided by the principle that justice shall be done to all, irrespective of status and **Article 160(1)** which emphasises the independence of the judiciary. At common law, the rule against bias, the *nemo judex* rule underpins the fair process and public confidence in the administration of justice. It is within this context that this application should be determined.

9. I must also emphasise that every judge takes an oath to, *"diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with the Constitution …… without any fear, favour, bias, affection, ill will, prejudice or any political, religious or other influence."* (see **Third Schedule** to the Constitution)

10. Requesting a judge to recuse himself is a serious matter going to the heart of the administration of justice and that is why the Court of Appeal in ***Galaxy Paint Company Ltd v Falcon Guards Limited*** **Nairobi Civil Appeal No. 219 of 1998 (Unreported)** stated that, ***"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour."***

11. In the case of ***R v Jackson Mwalulu and Others*** **CA Civil Apl, No. NAI 310 of 2004 (Unreported),** the Court of Appeal addressed itself to the test to be applied when a judge is requested to disqualify themselves from acting in a matter. The court adopted the principle set out in ***Metropolitan Properties Co. Ltd v Lannon*** **(1969) I QB 577** in which the court stated, ***"Also in a case where bias is being alleged against a court or judge it is not the real likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias."***

12. In ***Republic v David Makali and Others,*** **CA Criminal Application Nos NAI 4 and 5 of 1995 (Unreported)** Tunoi JA stated that, ***"the test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where such allegation is made, the court must carefully scrutinise the affidavit on either side....."***

13. The reason I am asked to disqualify myself is that I was an Assisting Counsel to the Waki Commission. It is true that the Commission did ground breaking work in the area of International

Criminal justice. But am I to be disqualified for that reason alone? I think not. Every judge who is appointed from the bar is expected to have done substantial work on a variety of issues prior to joining the bench. Indeed, it is a requirement that prior to being appointed a person must for example, *"demonstrate commitment to public and community service..."* this means that there must be a level of public engagement required of a prospective judge (see **Part V**, **First Schedule** to the ***Judicial Service Act, 2011***). An advocate who has achieved the position of being appointed to the position of High Court Judge must have distinguished himself or herself in legal practice and in that breath dealt with many of the difficult issues of the day and associated, either directly or indirectly with persons and corporations that litigate in the courts from time to time.

14. In fact in the case of ***R v Jackson Mwalulu and Others*** **(Supra)** the issue was whether Hon. Justice Deverell, Ag JA, should be disqualified from dealing with the matter before the court because he was a partner in the well-known firm of ***Kaplan and Stratton Advocates***. It was alleged that a partner in the firm was acting for one of the people adversely mentioned in the Goldenberg Commission proceedings and was among the persons sought to be compelled to go and testify. In considering the matter the court noted that it would be a dangerous proposition to lay down as law that irrespective of the nature of the dispute a judge who was previously a partner in a law firm must not sit on any matter in which his previous firm was involved. In this case the court concluded that there was no reasonable basis for thinking that the learned judge would be biased merely because he was in the same law firm. The issue, the court asserted, must be resolved based on the facts in each case.

15. I would also refer to the case ***Kaplan and Stratton Advocates v L.Z. Engineering Construction Ltd and Others*** **(2000) KLR 364,**where the applicants therein applied for Hon. Justice Lakha J.A., disqualify himself from hearing a matter before him for the reason that the judge had previously had lunch on two occasions with one of the advocates who was now appearing for one of the parties. Dismissing the application, the court observed, ***"In making his application for my disqualification, Mr. Deverell, for the applicant did not suggest that I had any proprietary or pecuniary interest in this litigation or any actual bias against his client. His own affidavit speaks of it having been unwise to have had two luncheons with Mr. Ismail, Advocate who now appears before me on behalf of the first respondent however innocent it may have been. He expressly relied on the oft-quoted dictum in R –vs- Sussex Justices that Justice should not only be done, but should be seen to be done."*** The judge continued, ***" I am satisfied that there was no such danger in the instant case for the following reasons.***

1) I have no pecuniary or financial interest in the outcome of the litigation.

2) I have no proprietary interests in the outcome of the litigation.

…….

6) The actual evidence of apparent bias in this case is no more than that I had about two years ago the two luncheons with Mr. Ismail, Advocate at a public restaurant under the gaze of public eye. There is no evidence or even suggestion that he discussed any of the cases then pending before me, which he certainly did not.

7) There is no actual evidence that there are real grounds for doubting my ability to ignore extraneous considerations prejudices and predilections and bring an objective judgment to bear on the issues before me."

16. I now turn to the facts of this case and I called upon to examine the all facts and depositions to determine whether I should recuse myself. In this case, the petitioner specifically sets out issues for determination and various prayers as follows;

Issues for determination

(a) Whether Article 2(4) of the Constitution of Kenya, 2010 applies to Article 2(6) of the Constitution of Kenya, 2010 to assert the supremacy of the Constitution over treaties ratified by Kenya.

(b) 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 a contravention/violation of the Constitution itself.

(c) 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.

(d) Whether there is a Trojan horse provision in the Constitution which is standing upon the two legs of Article 2(5) and 2(6) that Kenyans may someday discover that the citadel of their liberty has been invaded without their knowledge.

(e) Whether by dint of Articles 255, 256 and 257 of the Constitution of Kenya, 2010 the Government can amend the constitution using its power to make treaties.

(f) Whether the Government's treaty power is limited by the Constitution.

(g) 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.

(h) Whether Parliament and the Executive can cede some of the people's sovereignty (i.e., their judicial jurisdiction with respect to certain crimes) to third parties without the peoples direct approval via a referendum, or amendment to the Constitution via a referendum;

(i) Whether under the former constitution of Kenya, the March 15, 2005 ratification of the Rome Statue and the enactment of the International Crimes Act 2008, both without reference to Article 47 gave the International Criminal Court legitimate and legal jurisdiction in Kenya.

(j) Whether by dint of Article 255(1)(c) of the Constitution of Kenya, 2010, the Rome Statute, which grants the ICC jurisdiction over certain crimes committed in Kenya can constitutionally be ratified without recourse to a referendum.

(k) Whether Kenya's March 15, 2005 ratification of the Rome Statute giving the ICC jurisdiction over certain crimes committed in Kenya by Kenyans violates the judicial structure and the excise of judicial power as set out in the Constitution of Kenya, 2010.

(l) Whether provisions for mending the Constitution in Article 255, 256 and 257 is an absolute bar to any treaty whose content is unconstitutional or whose impact effectively amends constitutional provisions,.

(m) Whether to become a party to the ICC and give the Court jurisdiction in Kenya it is necessary to amend the Constitution to allow the State to ratify the Rome Statute, because the constitution, as it stands.

(i) In Article 157, vest all prosecutorial powers of the people of Kenya in the Director of Public Prosecutions.

(ii) In Article 159, vest all judicial authority of the sovereign people of Kenya exclusively in the Kenya Judiciary as an organ of the national government, to be exercised by the Courts and tribunals established by or under the Constitution of Kenya, 2010.

(iii) In Article 245(4a&b), vests the investigation of any particular offence or offences and the enforcement of the law against any particular person or persons in the Police.

(n) Whether by dint of Article 255(1)(c) the said amendment to Article 159(1) of the Constitution can only be via a referendum since the Judiciary is an expression and institutionalisation of the judicial authority of the sovereign people of Kenya.

(o) Whether the International Crimes Act 2008, is constitutional in view of the fact that Kenya's ratification of the Rome Statute upon which it is founded is unconstitutional, illegal null and void

(p) Whether treaties ratified by Kenya are to be valid even if they contravene constitutional provisions,

(q)Whether the ratification of the Rome Statute in 2005 violated the former Constriction of Kenya.

(r)Whether in the event of a conflict between a treaty and a statute that conforms to the Constitution the treaty can be nullified by the statute.

(s)Whether having failed in his mandate as the Attorney General to advice the Government against embracing the ICC in contravention of the Constitution of Kenya as designed by the Sovereign people of Kenya, Prof Githu Muigai is suitable to continue serving as the Attorney General of the Republic of Kenya.

(t) Whether having failed in his mandate to protect the independence of the Office of the Director of Public Prosecutions as designed by the sovereign people of Kenya, by jealously guarding the institution from encroachment by the ICC on its prosecutorial jurisdiction, Mr Keriako Tobiko is suitable to continue serving as the Director of Public Prosecutions of the Republic of Kenya.

(u) Whether having failed in his mandate to protect the independence of the Kenya Police Service as designed by the sovereign people of Kenya, by jealously guarding the institution from encroachment by the ICC on its investigative jurisdiction, Mr Mathew Iteere is suitable to continue serving as the Commissioner of Police of the Republic of Kenya.

(v) Whether having failed in his mandate to protect the independence of the Judiciary as designed by the sovereign people of Kenya, by jealously guarding the institution from encroachment by the ICC on its judicial jurisdiction, Dr Willy W Mutunga is suitable to continue serving as the Chief Justice of the Republic of Kenya.

(w) Whether having failed in his mandate to protect the independence of the NSIS as designed by the sovereign people of Kenya, by jealously guarding the institution from encroachment by the ICC on its intelligence gathering jurisdiction, Maj Gen Michael Gichangi is suitable to continue serving as the Director General of the National Security Intelligence Service of the Republic of Kenya.

(x) Whether having failed in his mandate to protect the constitution as designed by the sovereign people of Kenya from encroachment of legislation and administrative procedures required to protect the Constitution from violation by the ICC as part of implementing the Constitution of Kenya, 2010 Mr Charles Nyachae is suitable to continue serving as the Chairperson of the Commission for the Implementation of the Constitution f the Republic of Kenya.

The orders sought in the petition are as follows*;*

(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 Kenya under Article 2(5) and any treaty under Article 2(6) of this Constitution, 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 by 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 an 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 Article 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 denote 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 Statue 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 decide 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 have capacity to ratify 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 Article 169(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 as 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 Article 3(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 Statue.

(t) That a 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 is 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 or 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 Rome Statute is not the same or to be equated to the Principle of universality that obligates any State to bring to trial 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 statute.

(y) That a declaration be issued to declare that Parliament as 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 to 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.

(bb) 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.

(cc) 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 the Republic of Kenya.

(dd) 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.

(ee) 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.

(ff) 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 of the Implementation of the Constitution of the Republic of Kenya.

(gg) 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 o the Rome Statute, and the government's engagement with the ICC since then.

(hh) 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.

(ii) 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 unconstitutionality of the Rome Statute.

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

17. A careful consideration of the issues framed and the declarations sought show that the issues the court is called upon to determine are really matters of interpretation and application of the law and the Constitution. I have read and re-read the petition and there is nothing that implicates the Waki Commission in the cause of action the petitioner seeks to agitate before the court. In my view, the petition does not raise any issues which a reasonable person with knowledge of the facts should come to the conclusion that I will be biased. The issues raised are matters of the legal interpretation which I am able to appreciate and apply my mind.

18. The chamber summons has raised issues of the so called ***"Waki Envelope"*** and the fact that I may be a potential witness in the matter as a result of my work at the Waki Commission. I think these issues are red herrings and they do not fall within the purview of the matters set out in the petition or even the matter which the petitioner himself has framed for determination. The issues as framed and the prayers sought deal with the ratification of the Rome Statute and the enactment of the ***International Crimes Act*** within the context of Constitution.

Disposition

19. Having scrutinised the petition and affidavits, I have come to the conclusion that no reasonable person applying themselves to the matters in issue would conclude that I would be biased.

20. That application for me to recuse myself is therefore rejected and dismissed.

DATED and **DELIVERED** at **NAIROBI** this 11th October 2012

D.S. MAJANJA
JUDGE

Mr Nguring'a instructed by P. M. Kahiga and Company Advocates for the petititioner.

Mr Moimbo, Litigation Counsel, instructed by the State Law Officer for the respondent.