IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & KANTAI, JJ.A.) CIVIL APPEAL NO. 121 OF 2014

BETWEEN

WALTER OSAPIRI BARASA...APPELLANT

AND

THE CABINET SECRETARY MINISTRY OF INTERIOR

AND NATIONAL CO-ORDINATION...........................1ST RESPONDENT

HON. ATTORNEY GENERAL.................................... 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS......3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE..............4TH RESPONDENT

WILFRED NGUNJIRI NDERITU................................5TH RESPONDENT

OKIYA OKOITI OMTATAH....................................... 6TH RESPONDENT

REV. JOHN MBUGUA..7TH RESPONDENT

(Being an appeal from the Ruling, Directions and Orders of the High Court of Kenya at Nairobi

made by the Hon. Justice R.M. Mwongo delivered on 18th October 2013

in

Nairobi Constitutional Petition No. 488 of 2013)

****

JUDGMENT OF THE COURT

The post-election violence of 2007-2008 in Kenya and the subsequent involvement of the International Criminal Court (the ICC) is well documented. For this appeal, what is relevant is that in the course of the proceedings at the ICC, and pursuant to an *ex parte* application by the ICC Prosecutor, the single Judge of the Pre-Trial Chamber II issued a warrant for the arrest and surrender of the appellant, a former intermediary between the ICC Office of the Prosecutor and Kenyan witnesses. The warrant alleged that the appellant was involved in corruptly influencing witnesses and attempting to corruptly influence the witnesses. Those charges are the subject of case No: ICC-01/09-01/13, **The Prosecutor V. Walter Osapiri Barasa** at the ICC. The request was transmitted to the Cabinet Secretary, Ministry of Interior and Co-operation of Kenya for execution in terms of **Article 89** of the Rome Statute. Upon receipt, the Cabinet Secretary, for his part forwarded the request together with the accompanying documents to the Principal Judge of the High Court of Kenya, under cover of a letter dated 9th October, 2013.

Upon learning of his impending arrest, the appellant petitioned the High Court in **H.C. Petition No.488 of 2013.** He also filed two notices of motion, one filed contemporaneous with the petition. In that motion the appellant asked the court to stay the request for his arrest, further proceedings by the Cabinet Secretary and to prohibit all the respondents from taking any other action in furtherance of the request. Finally,

the appellant also sought mandatory order of injunction to compel the Inspector General of Police to avail to him security and protection against his arrest by ICC agents. In the application filed subsequent to this, the appellant applied to be furnished with copies of the warrant and all the relevant documents issued by the ICC and an order staying the decision of the Cabinet Secretary requesting the court to issue a warrant of arrest contained in the letter dated 9th October, 2013. Also placed before the Judge, was an application dated 11th October, 2013, to join in the proceedings Rev. John Mbugua, the 7th respondent. This and the application for provision of security were allowed and no issue therefore arises from them in this appeal.

The petition and the earlier two applications were placed before the Principal Judge of the High Court, who at the time was Mwongo, J. for directions.

In his ruling of 18th October, 2013, in which the directions impugned in this appeal were issued, the Judge considered a third matter; the letter from the Cabinet Secretary transmitting the ICC request. This is how he understood the task before him;

> **"I have carefully considered the submissions by the parties. That the Petition is properly filed in apprehension of the threatened arrest of the Petitioner, is not in issue. I will deal with each of the two matters separately, in order to identify the procedures which will be applicable to the matters before me."**

Because in his hands the Judge had a letter from the Cabinet Secretary, a petition by the appellant and two applications. He went on to state that, since;

> **"None of the parties have argued that this court cannot proceed with the hearing of the petition whilst seized with the Notice and Request for Arrest. I am inclined to order that the matters proceed concurrently. This will give succour to the Petitioner and avail him the opportunity to defend his constitutional rights without the feeling of being unfairly treated. Likewise, no prejudice will be suffered by the Respondents and Interested Parties "**

He then noted that the actions sought to be taken under the International Crimes Act (ICA) are criminal proceedings in nature and could be brought by an action under the criminal procedures or directly under the Constitution by way, for example, of a petition; that the dilemma the court and the parties faced was the absence of a clear procedure for the steps to be taken upon the issuance of the Notice and Request; and that the Cabinet Secretary had not made rules under **Section 172(a)** of the ICA to prescribe the procedure to be followed in dealing with requests made by the ICC, and providing for notification of the results of action taken in accordance with any such request. The lacuna notwithstanding, the Judge was of the view that by the provisions of **Section 37** of the ICA, the procedure to be followed was the same as those for an offence alleged to have been committed in Kenya and that **section 89** of the Criminal Procedure Code would apply but with "alterations, adaptations, qualifications and exceptions" necessary to bring it into conformity with the law in terms of **Section 7** of the Sixth Schedule to the Constitution; that this was necessary because under the ICA, only a High Court Judge is empowered to deal with a Notice and Request.

The learned Judge also observed that in order to protect rights and fundamental freedoms in judicial proceedings, formalities relating to the commencement of proceedings should be kept to a minimum; procedural technicalities should be avoided and absence of rules cannot limit the right of any person to commence court proceedings. He opined that;

> **"For good administrative order and judicial convenience, it is necessary that where a warrant is sought to be issued pursuant to a Notice and Request, and the same has been brought before a Judge, it is deemed to be a criminal proceeding and a file should be opened. The file becomes constituted as the repository of all documents and proceedings in that matter, present and future. Taking cognizance of the statutory requirements for confidentiality under Section 25 of the ICA, it is proper that such file be under the supervision of the Judge who is seized of the matter for consideration".**

Being of that persuasion, the Judge saw no harm if proceedings were commenced in the same file as the constitutional petition and issued the following directions;

> **"67. I will therefore make the orders and directions which follow, for the expeditious and just determination of the matters before me.**
>
> **a) In respect of the Notification and Request**
>
> **1) the 1st Respondent as the State Party, shall, for good order and administrative convenience, file in this Court by way of a miscellaneous application under the present file reference, a formal Notification and Request through a complaint or**

application to institute the proceedings therein;

2) The said Notification and Request in a)1, above, shall be substantially in the form of a complaint under Section 89 of the Criminal Procedure Code, with necessary alterations and shall contain the statutory matters set out in Section 29 of the ICA, No. 16 of 2008.

3) The said Notification and Request shall be filed on or before Monday, 28th October, 2013, and thereby presented to the Principal Judge.

b) In respect of the Petition

1) The Petitioner shall forthwith and no later than close of business on 18th October, 2013, make copies of and serve upon the Interested Parties the Petition. In order to expedite the conclusion of this litigation, the Petition shall

1)

be heard without the necessity of first hearing the First and Second Applications.

2) Every party wishing to respond to the Petition shall file and serve their Responses thereto on or before 28th October, 2013.

……

1) Due to the urgency indicated by all parties, and considering the nature of the matters herein, the Petition shall be heard on 29th October, 2013, at 9.30 am to 12.00 noon, or on the earliest date as will be mutually agreed by the parties, or imposed by the court.

....

1) The interim orders issued by Odunga, J, for protective security of the Petitioner by the Police are hereby extended…".

We clarify here that, although the appellant was aggrieved by the above directions and even filed a notice of appeal a few days after it was issued, intending to challenge them, the parties, including the appellant appeared to have complied with them and since there were no orders of stay of execution or proceedings, the petition was heard on 4th and 11th December, 2013, as directed. Though strictly not relevant here, the learned Judge disposed of the petition by dismissing it in its entirety save for extension of the order directing the 4th respondent to provide the appellant with security.

On the question of lack of regulations the Judge stated;

"Accordingly, I do not consider that overall there is any basis upon which to hold that the proceedings commenced by the Minister are invalid, on account of his not exercising his discretion to promulgate rules under Sections 172 or 173 of the ICA.

....

Considering that I have already found that Part IV of the ICA is not unconstitutional, I have no difficulty in answering this issue in the positive. The High Court has such jurisdiction".

The entire determination aggrieved the appellant is the subject of Civil Appeal No.136 of 2014 which ought to have been heard, back to back on the same day with this appeal but for failure by the appellant to file and serve written submissions was adjourned to be heard on a date to be fixed by the Court registry.

Suffice also to clarify at this stage that that judgment was rendered on 31st day of January, 2014 and four months later, on 20th May, 2014 this appeal was lodged. Civil Appeal No. 136 of 2014 was itself lodged 7 days later on 27th May, 2014.

Back to the subject of this appeal, which are the directions of 18th October, 2013. Dissatisfied with the directions, the appellant lodged this appeal in which he faulted the learned Judge on 17 grounds. Those grounds were however condensed and argued in four clusters.

It was submitted in the first cluster that in giving directions the Judge usurped the role of the Cabinet Secretary who had failed to make regulations under **section 172 (a)** of the ICA; and that having identified the lacuna it was not open to the Judge to fill it in as by so doing he violated the principles of separation of powers.

It was contended in the second cluster that the Judge misconceived the true objects, purpose and limits of the Court's power under **Rule 3** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, to make directions to facilitate adjudication of disputes; that instead he applied the rules to advance the State's objection to the appellant's case to the detriment of

the appellant; that in applying **Articles 22(3)** and **(4)** and **159(2)(d)** of the Constitution to remedy the Cabinet Secretary's non-compliance with **section 172** of the ICA, the learned Judge committed a grave error; that there was no legal basis for the Judge to hold that there would be no harm in commencing the proceedings under Part IV of the ICA in the same file as that where the appellant's petition was contained.

Thirdly, it was argued that by ordering the first respondent to file a miscellaneous criminal application under **section 89** of the CPC, the learned Judge effectively applied and enforced the request for the appellant's trial before the ICC notwithstanding the appellant's contention that he could only be tried in Kenya; and that it was in error for the Judge to invoke the procedure under **section 89** of the CPC as it did not apply to proceedings before the High Court.

Finally, it was argued for the appellant that the procedure adopted by the Judge to hear the applications together had adverse consequences on the appellant's pending petition; that under **Articles 20, 21, 22, 23, 35** and **50** of the Constitution the appellant was entitled to have the two applications heard and determined separately.

Accordingly, the appellant has urged us to find that the directions of 18th October, 2013 pre-empted his petition and the procedure employed excluded the appellant from attendance. Therefore, the *ex-parte* criminal proceedings brought pursuant to those directions in H.C. Misc. Cr. Appl. No. 488 of 2013 were null and void *ab initio.*

The 1st, 2nd, 3rd, 4th and 5th respondents opposed the appeal and submitted that Kenya as a signatory to the Rome Statute, is obligated to co-operate with ICC which fact is not negotiable; that pursuant to **Article 46** of the Vienna Convention a state party cannot invoke paucity of its laws for its failure to comply with a request; that there was no allegation that the appellant would be denied a fair trial at the ICC; and that the learned Judge gave directions for proper administration of justice.

Further, it was conceded that under the doctrine of separation of powers, where there are no rules, directions cannot take the place of rules. But in this case, it was argued, the Judge only gave directions as to the hearing of all the matters before him and did not make rules; that in exercise of judicial authority granted under **Article 159** the learned Judge only simplified the procedural steps in the absence of Rules; that the Rules were not mandatory as under the ICA the word "may" is used; that Part IV under which the directions were taken is comprehensive; and that in the absence of Rules, the power of the court to grant a relief for the fulfillment of the purposes of the Act cannot be impeded.

It was contended that when the directions were issued on 18th October, 2013 the appellant was present and his rights were not taken away thus, no prejudice was occasioned; that the state cannot invoke internal rules or lack of them to escape compliance with its international obligations. It was posited that Part IV of the ICA is constitutional since no part of the Act has been declared to be inconsistent with the Constitution; and that there was no violation of the doctrine of separation of powers and the issue cannot be raised at this stage as it was not canvassed before the trial court.

In view of the foregoing it was urged that the appeal should be dismissed as it has been overtaken by events as the petition was filed and determined.

The powers of this Court on appeal from the High Court under ICA are set out as follows, in relevant part in **section 66**;

> **"66. (1) The Court of Appeal shall hear and determine the question or questions of law arising on any case transmitted to it, and do one or more of the following things—**
>
> **(a) reverse, confirm, or amend the determination in respect of which the case has been stated;**
>
> **.......**
>
> **(d) make any other order in relation to the determination that it thinks fit".**

In the determination of this appeal we bear in mind that what has been challenged in it is the directions of 18th October, 2013 and not the judgment on the petition issued on 31st day of January, 2014. It is important to clarify this fact because submissions made before us tended to encroach on issues touching on the latter judgment. In Constitutional Petition No. 488 of 2013, ten grounds were raised and determined. Those grounds ranged from whether the absence of Regulations under **Sections 172 & 173** ICA invalidated the proceedings commenced by the 1st respondent; whether the High Court had jurisdiction to order the arrest and surrender of the appellant to the ICC; whether the appellant was entitled to the evidence and information in support of the ICC's request for his arrest and surrender; whether the appellant should be tried in Kenya or at the Hague; whether the decision of the Cabinet Secretary conveyed in his letter under review was constitutional; whether the appellant's right to a fair hearing was violated; and whether or not Part IV of the ICA is constitutional. The learned Judge answered all these questions in the judgment which we have said is the subject of Civil Appeal No. 136 of 2014. In our determination of this appeal we shall therefore stay clear of any of the areas enumerated above to avoid determination of issues subject of another appeal. Save to observe that the Judge having rejected all the prayers in the petition, except one for the extension of the order for security, the only application pending is H.C. Misc. Criminal Application No. 488 of 2013. We also express our doubt whether this appeal is compliant with **section 66** aforesaid; what points of law could possibly arise from the directions of 18th October, 2013?

A decision or an order made at the stage of case management, similar to those made by the learned Judge in the form of directions are discretionary in nature, and it is now established that whenever this Court is called upon to interfere with the exercise of judicial discretion, it ought to be guided by the principles well enunciated in a string of its own decisions. For example in **Coffee Board of Kenya V. Thika Coffee Mills Limited & 2 Others,** Civil Appeal No. 94 of 2003, it was reiterated that the Court ought not to interfere with the exercise of

such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and in the process occasioned injustice.

Lord Greene MR in **Associated Provincial Picture Houses Ltd V. Wednesbury Corporation** [1948] 1 KB 223, explained how judicial or quasi- judicial discretion ought to be exercised thus,

> **"For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.**

Before the learned Judge, as observed earlier was a petition, two applications taken out by the appellant, one by the 7th respondent, and a letter from the Cabinet Secretary, all relating to the warrant issued by ICC for the arrest of the appellant. What has been impugned in this appeal are the orders issued by the learned Judge by way of directions. Our rules of procedure are replete with provisions encouraging the giving of directions in the life cycle of a case. This is so because directions play a vital role in case management.

Section 1A (3) of the Civil Procedure Rules (the overriding objective), for example enjoins all parties to civil proceedings or an advocate for such a party to;

> **“ assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.**

Order 11 of the Civil Procedure Rules too in an elaborate manner requires courts to embrace and adopt pre-trial directions and conference in all suits, except in small claims, **“with a view to furthering expeditious disposal of cases”.** In addition to those general powers, the court will have powers at the case conference to specifically;

> **“ (a) deal with any interlocutory applications or create a suitable timetable for their expeditious disposal;**
>
> **.........**
>
> **(f) make any procedural order;**
>
> **(g) by consent of the parties, or where appropriate on its own motion make an order for interlocutory relief;**
>
> **..........**
>
> **(j) give any suitable directions to facilitate expeditious disposal of the suit or any outstanding issues;**
>
> **...........**
>
> **(n) deal with as many aspects of the case as it can on the same occasion;**
>
> **(o) make any such orders as may be appropriate. ”**
>
> **(n)**

See **Order 11 rule 3(1)** and **(2)**.

Upon conclusion of the case conference the court, in terms of **sub rule 4** issues a Case Conference Order or pre-trial directions.

By Gazette Notice No. 1340 of 29th February, 2016, the Chief Justice in exercise of the powers under **Articles 159** and **161 (2) (a)** of the Constitution and pursuant to **section 10** of the Judicature Act, issued Guidelines for Active Case Management of Criminal Cases in Magistrate Courts and High Courts **“in the interest of effective case management for the expeditious disposal of criminal cases in the Magistrate’s courts and the High Court of Kenya”**. The Guidelines encourage the giving of directions for expeditious conclusion of cases and enjoins both lawyers and parties comply with directions given by the court. Gazette Notice No. 5179 of 28th July, 2014 relates to Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court, also aimed at expedition in the hearing and determination of cases.

The learned Judge in giving directions on how all the questions raised in the petition, in the applications as well as in the letter before him would be tried was merely complying with the practice we have set out in the preceding paragraphs that guide courts to achieve a just and fair resolution and determination of those matters in the most cost effective manner. This was a procedural matter that did not go to the root of the dispute.

In our view by directing that the matters proceed to argument concurrently, the learned Judge considered the prejudice, if any, to any of the parties and found

none. He was right. The appellant has not demonstrated how he was prejudiced by the directions that only dealt with how the matters would be heard together in the same file. The Judge was right in his observation that as he was giving directions no steps had been taken in giving effect to the Notice and Request for Arrest; and that the only action taken at that stage was the appointment of a Judge to consider the matter.

Lack of regulations by the Cabinet Secretary by itself could not bar the judge from giving directions. We remain cautious on this point as the Judge made the observations below in the judgment of 31st day of January, 2014, and the issue involved is the central plank in Civil Appeal No. 136 of 2014.

He said;

> **"129. I am not satisfied that the petitioner was able to demonstrate that any of the above criteria applied in his case. Accordingly, I do not consider that overall there is any basis upon which to hold that the proceedings commenced by the Minister are invalid, on account of his not exercising his discretion to promulgate rules under Sections 172 or 173 of the ICA".**

The appellant's other grievance is on the procedure adopted by the Judge in applying **section 89** of the Criminal Procedure Code and directing the 1st respondent to file a miscellaneous application in the petition; and that it was erroneous for the Judge, even after appreciating that there were no regulations, to step in and issuing directions that were prejudicial to the appellant.

Once again as this is one of the questions to be determined in Civil Appeal No. 136 of 2014, the less said about it the better, save only to say that, for the purpose of directions the learned Judge properly exercised his discretion and no prejudice or hardship was occasioned by directing that the proceedings be commenced as a miscellaneous application under the same file as the constitutional petition. This was merely a matter of procedure with no direct consequence on the main issue; the warrant of arrest.

Just as an example the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 vests in the courts inherent power **"to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".** See **Rule 3(8)**.

In exercise of that power the court under **Rule 21**;

> **(1) "May give directions on the hearing of the case; require that parties file and serve written submissions within fourteen days of such directions or such other time as the Judge may direct.**
>
> **(2) A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court.**
>
> **(3) The Court may frame the issues for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case."**

Bearing all that we have said in mind, it is our considered view that this appeal was premature at the time it was filed and is now overtaken by the conclusion of Petition No. 488 of 2013. The focus ought to have been on that appeal where the real determinations were reached as outlined above. There will be occasion at the hearing of Misc. Criminal Application No. 488 of 2013 for the court below to test whether the safeguards built in the ICA are not sufficient to guarantee the appellant the necessary protection.

In conclusion, the appeal lacks substance. It is accordingly dismissed. We make no orders as to costs.

Dated and delivered at Nairobi this 26th day of August, 2019.

W. OUKO, (P)

…………………….. JUDGE OF APPEAL

W. KARANJA

…………………………. JUDGE OF APPEAL

S. ole KANTAI

……………………………. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR