THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(CORAM: Johnston Busingye PJ, Mary Stella Arach-Amoko DPJ; and

Isaac Lenaola J))

APPLICATION NO 5 OF 2012

(ARISING FROM REFERENCE NO.1 OF 2012)

BETWEEN

TIMOTHY ALVIN KAHOHO……APPLICANT

AND

THE SECRETARY GENERAL OF THE

EAST AFRICAN COMMUNITY……RESPONDENT

DATE: 19TH JULY, 2012

RULING OF THE COURT

This is an application brought by Notice of Motion under Articles 38(2) and 39 of the Treaty for the Establishment of the East African Community (the "Treaty"), and Rules 21, 41 and 73 of the East African Court of Justice Rules of Procedure, 2010. The Applicant is Timothy Alvin Kahoho, a citizen of Tanzania resident in Dar es Salam. The Respondent is the Secretary General of the East African Community (the "EAC"). He is sued in his capacity as the Principal Executive Officer of the EAC.

The Applicant filed Reference No. 1 of 2012 praying for orders that the Summit directives set out in paragraphs 6 and 10 of the communiqué issued at the 13th Ordinary Meeting in Bujumbura, Burundi be declared null and void as they were issued in breach of Articles 6,7 and 123(6); 73 and 138 of the Treaty.

Pending determination of the Reference, however, the Applicant has filed the instant application seeking for an interim order to restrain the Respondent, his agents and servants from executing the said activities, namely:

i) the purported approval of the Protocol on Privileges and Immunities for East African Community, its Organs and Institutions for conclusion ;
ii) Producing a road map for establishing and strengthening institutions identified by the Team of Experts as critical for the functioning of the Customs Union, Common Market and Monetary Union;
iii) Formulating an action plan for the purpose of operationalising the other recommendations in the report of the Team of Experts;
iv) Proposing an action plan on and a draft model structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting.

The Applicant also prays for the costs of the application and any other relief(s) this honourable Court may deem fit to grant.

The grounds for the application are set out in the affidavit in support of the application sworn on the 16th May 2012 by the Applicant wherein he states that he was prompted to file this application following a report of the 24th

Extraordinary Meeting of the Council of Ministers Ref. EAC/EX/CM24/2012, convened by the Respondent in Arusha between 20th to 26th April 2012, which he came across on the internet recently, where the Respondent has already re-allocated USD 109, 020.00 for undertaking the project of formulation of the Model Work Plan towards the EAC Political Federation.

This was after he had on the 20th January 2012, lodged Reference No. 1 of 2012 in this Court.

He contends that by calling that meeting, the Respondent violated Article 38 (2) of the Treaty which provides that where a dispute has been referred to the Court, the Partner Stares shall refrain from any action which might be detrimental to or aggravate it. He argues therefore that unless restrained by an interim order, the Respondent, his agents and servants will carry out the disputed functions before the disposal of the Reference, thereby rendering the relief sought therein nugatory.

The Respondent opposes the application for the reasons set out in the affidavit in reply sworn on his behalf by Mr. Jean Claude Nsengiymunva, the EAC Deputy Secretary General (Finance and Administration), on the 9th July 2012 wherein he asserts very strongly that the Respondent has not breached the Treaty at all as alleged by the Applicant in that :

i) The Summit decision regarding approval of a Protocol on Immunities and Privileges of the EAC Organs and Institutions is consistent with Article 11(1) and does not breach Articles 73 and 138 of the Treaty but implements them when read together with Article 151 of the Treaty to create a common platform to guide the issue of immunities and privileges in all agreements signed by the Secretary General with the governments of the Partner States;

ii) The Summit directive to the Secretariat to produce a road map for establishing and strengthening the Institutions identified by the Team of Experts as critical for the Customs Union, the Common Market and

Monetary Union is consistent with the functions of the Secretariat as set out in articles 71(b), (c), (d) and (l) of the Treaty;

iii) The Summit directive to the Secretariat to formulate an action plan to operationalise the recommendations in the Report of Experts is consistent with the functions of the Secretariat under Articles 71(b) and (d) of the Treaty;

iv) The Summit directive to the Secretariat to propose a model structure for the EAC Political Federation for consideration by the Summit at its 14th Ordinary Meeting is consistent with the functions of the Secretariat under Articles 71(b), (c), (d) and (l) of the Treaty.

v) The Summit did not contravene Articles 6, 7, and 123(6) of the Treaty in that under Article 123(6) of the Treaty, the process of Political Federation was actually initiated by the Council when it appointed a Team Of Experts whose recommendations the Secretariat is now improving on.

vi) The actions of the Respondent are consistent with its mandate and are not detrimental to the resolution of the dispute.

He submitted that the USD 109, 020.00 had in fact already been allocated and utilized, pursuant to **Council Directive Ref. EAC/CM24/Decision 21**, towards formulating a Model Work Plan for the EAC Political Federation and the issue had been overtaken by events.

He argued that the Reference is, for the foregoing reasons, therefore misconceived and it should be dismissed with costs to the Respondent.

For the purposes of this application, it is necessary, in our view, to reproduce right from the outset, the contents of the impugned paragraphs 6 and 10 of the communiqué that has caused grievance to the Applicant. It stated that:

"6.The Summit approved the Protocol on Immunities and Privileges For the East African Community, its Organs and institutions for conclusion.

…..

10. The Summit considered and adopted the Report of the team of Experts on Fears, Concerns and Challenges on the Political Federation. The Summit noted that the Team of Experts had studied and made recommendations for addressing the Fears, Concerns and Challenges. The Summit mandated the Secretariat to:

I. Produce a road map for establishing and strengthening the Institutions identified by the Team Of Experts as critical to the functioning of a Customs Union, Common Market and Monetary Union.

II. Formulate an action plan for purposes of operationalising the other recommendations in the Report of the Team of Experts; and

III. Propose an action plan on and a draft model of the structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting".

The Applicant appeared in person, while Mr. Anthony L. Kafumbe, a Legal Officer at the EAC Secretariat, appeared for the Respondent.

Both parties adopted the written submissions they had filed in Court where they basically repeated the averments in their respective pleadings and the affidavits on record. They then made brief supplementary oral submissions.

In addition to his written submissions, the Applicant emphasized that the Respondent has continued to implement the activities he is disputing even after he had lodged his documents in Court. That is why he is requesting this Court to issue the order so that the Respondent is prevented from calling the Council of Ministers to be handed recommendations and the Model Structure of the Political Federation for consideration by the Summit at its 14th Ordinary Meeting. Article 38(2) of the Treaty is, according to the Applicant, mandatory and clear. It does not require a party to first obtain a temporary injunction as alleged by the Respondent's Counsel. In support of this proposition, he relied on the decision of this Court in **The E.A Law Society and 3 Others vs The A.G of Kenya and 3 Others, Reference No. 3 of 2007.**

On his part, Mr. Kafumbe vehemently opposed the application on the ground that it did not meet the conditions for the grant of the order sought as set out in the celebrated case of **Giella v Cassman Brown Ltd** which this Court adopted in **The East African Law Society vs The Attorney General of Kenya** (supra)which are that**:** the Applicant must show a *prima facie* case with a probability of success; secondly, an injunction will not be granted unless the Applicant might otherwise suffer an irreparable injury that cannot be compensated by an award of damages ; and lastly, when court is in doubt, it will decide the application on the balance of convenience.

He submitted that the Applicant had not established that he has a *prima facie* case with a probability of success. He is challenging functions that the Treaty confers on the Summit and the Secretariat. The Respondent has, however, shown that the Team of Experts with which the Applicant is very uncomfortable was not appointed by the Respondent but by the Council.

On the second condition, Mr. Kafumbe argued that the position of the Respondent is that this is a case which can be compensated by way of damages which the Applicant has already asked for. He will not therefore suffer irreparable injury if the injunction is refused.

Lastly, on the balance of convenience, Mr. Kafumbe submitted that the USD 109, 020.00 has not only been allocated but has been utilized by the Secretariat which has already formulated an action plan and drafted a proposed Model Structure of the Political Federation ready for consideration by the Summit. That since the activities complained of by the Applicant have been implemented, the balance of convenience favours the Respondent.

He asked the Court to dismiss the application with costs, for these reasons.

The Applicant insisted, in his brief response, on his prayers. He emphasized that he had also filed the Reference because he is aggrieved by the said directives in his capacity as a concerned citizen of East Africa who cannot sit by and look on as the Treaty is being violated and the tax payers' money is being squandered for implementation of an illegal directive.

He contended that the central issue in his application is whether the 13th Summit of the Heads of States breached Articles 6, 7, 73, 123 (6) and 138 of the Treaty in issuing the impugned directives directly to the Secretariat. The Respondent should not therefore be allowed to proceed with those activities in preparation for the next Summit before this Court determines the issue.

He disagreed with the Respondent's assertion that the application was overtaken by events and argued that the Respondent's Counsel had stated in his submission that the Secretariat is duly executing its mandate under the Treaty and the outcome of the exercise will in the fullness of time be brought to the attention of the Council and the Partner States.

According to the Applicant, the process is still ongoing because everything will be handed to the Council for submission to the next Summit of Heads of State, therefore, the Respondent will be asking for allocation of more funds to undertake the process. He maintained the prayer that if this court does not grant the interim order requested for, the reference would become irrelevant since the impugned activities would have been discharged.

The clear purpose of the application is for the grant of an interim injunction to prevent the implementation of directives contained in Paragraphs 6 and 10 of the communiqué issued by the Summit at the close of the 13th EAC Heads of States Meeting held in Bujumbura, Burundi on the 12th November 2011, until this Court determines whether they infringe the articles of the Treaty specified in the Reference. Undoubtedly this court has the power to issue the order sought, pending determination of the Reference filed in the court.

The grant or refusal to grant a temporary injunction is an exercise of the Court's judicial discretion which must be exercised judiciously. The purpose of a temporary injunction is to maintain the status quo. The conditions for the grant of a temporary injunction are well settled in our jurisdiction although they have been stated in various terms over the years. We state them below:

a) For a temporary injunction to issue, the applicant must show to the satisfaction of the court that he has a *prima facie* case with a probability of success.
b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
c) If the Court is in doubt, it will decide the case on the balance of convenience. (**see: Giella v Cassman Brown & Co. Ltd (1973) E.A 358** followed by this court in a number of cases including **Professor Peter Anyang' Nyongo And 10 Others v The Attorney General Of The Republic of Kenya and 5 Others, Ref. No. 1 of 2006; East African Law Society and 4 Others v The Attorney General of the Republic of Kenya and 3 Others, Application No. 9 of 2007;** and more recently, in **Mary Arividza and Okotch Mondoh v The Attorney General of The Republic of Kenya and The Secretary General Of the EAC, Application No. 3 of 2010.)**

The conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third one can be addressed.(**See: Kenya Commercial Finance Co. Ltd. V Afraha Education Society [2001] E.A 86 at p. 87.**

It is no function of this court at this stage, of course, to delve into the merits of the Reference or to determine difficult questions of law which will be determined after a full hearing of the Reference and detailed arguments based on the facts and applicable law.

The sole issue before us for determination is thus, whether, in the circumstances, an interim restraining order should be issued.

We have carefully perused the pleadings of both parties in the Reference and in the Motion. We have also considered the very able submissions by the Applicant as well as the one of Counsel Kafumbe together with the authorities cited and the law applicable to the matter before us.

With regard to the first condition, the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there are serious questions to be tried. (See: **American Cynamid v Ethicon [1975] ALL ER 504 AT 505).**

From the material before us, we note that the Applicant has raised in his pleadings and submissions the contention that the probability of success of his Reference lies in the fact that nowhere in the Treaty is it indicated that the Summit can mandate any of its functions directly to the Secretariat. He asserts that, under the Treaty, the Summit must always pass through the Council or the Secretary General and not directly to the Secretariat. His contention is that the directive by the Summit to the Secretariat is thus a breach of the various articles, including 6, 7, 73, 123(6) and 138 and of the Treaty.

On his part, the Respondent contends that there is no breach of the Treaty by the Summit because the Treaty confers on the Summit and the Secretariat the functions the Applicant is challenging. By issuing the impugned directives, the Summit thus acted within its mandate under the Treaty, particularly Article 11(1) read together with Article 151; 71(b), (c), (d) and (l) as well as Article 123(6).

From the foregoing, it is apparent that the Applicant is challenging the process not the substance of the Summit directives in question. Resolution of this dispute will necessarily involve the interpretation of those specified Articles of the Treaty and the court will have to address itself, inter alia, to the following issues:

i) Whether the Summit directives contained in paragraphs 6 and 10 of the Communiqué issued by the Summit at its 13th Ordinary Meeting held at Bujumbura breached Articles 6, 7, 73, 138, and 123(6) of the Treaty as alleged by the Applicant;
ii) If so, what effect, if any, would it have on the implementation thereof by the Secretariat?

These issues are in our view, neither frivolous nor vexatious. They require interpretation by the Court of the Articles of the Treaty mentioned. Consequently, we have no doubt that the applicant has crossed the first hurdle.

As to whether the Applicant and East Africans will suffer irreparable injury if the injunction is not granted, with due respect to him, we do not find this from the affidavit on record. Injury, whether reparable or irreparable cannot be presumed. It is a question of evidence and must be proved. In the instant application, the Applicant merely pleaded that the Reference will be rendered nugatory or, useless, to use his own words, if this application is refused, because the Respondent will go ahead and implement the impugned directives, to the detriment not only of himself but of East Africans as well . However, he did not show us that if the directives are implemented, it will necessarily result in irreparably injury to him or to anybody else. As for injury to East Africans we can only remind the Applicant that he filed this Reference in his personal capacity, not in a representative capacity and he can only speak for himself.

His assertion that the injury he fears is that some Head of State might dream up something one night, wake up the following morning and implement it, was, with due respect, a hypothetical statement, made from the bar and was unsupported by the evidence on record. We also failed to find any direct relationship to the facts of the instant application. It amounts in our view, to nothing more than fear mongering.

That being so, we find that the Applicant has failed to meet the second condition for the grant of the order sought.

Balance of convenience means the prejudice to the Applicant if the injunction is refused weighed against the prejudice to the Respondent if the order is granted. A close examination of the pleadings and the evidence before us shows that the Secretariat has gone a long way in the process of implementing the impugned decision and directive. This simply means that the status quo intended to be maintained by the application is no longer in place. Above all, when the totality of the circumstances of the case are examined, we find that stopping the process at this stage would in our view occasion more injury to the citizens of East Africa whom the Applicant purports to be fighting for since a substantial sum of tax payers money has already been spent on the process. As we stated earlier, the Applicant seems to be challenging the procedure not the substance of the

directives in question. We are accordingly of the considered view that the balance of convenience favours the Respondent.

As for the provisions of Article 38 (2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of an injunction is a function of the Court in exercise of its discretionary power. Therefore Article 38(2) cannot be seen to be removing that long held position without expressly saying so. Further, in the authority the Applicant referred to us, that is, **The East African Law Society and 3 Others and the Attorney General Of Kenya and 3 Others; Reference No. 3 of 2007**, the Applicant did not show us, neither were we able to find where the Court held that Article 38(2) acts as an automatic injunction once a dispute has been referred to the Court or to the Council.

In the result, and for the reasons given herein, we find that the application does not meet the conditions for the grant of an interim order. It is accordingly dismissed. The costs of the application shall abide the outcome of the Reference.

However, in order to examine the fears expressed by the Applicant, the Registrar is requested to ensure that the hearing of the Reference is fast tracked.

It is so ordered.

Dated and Delivered at Arusha on this ---------- day of July, 2012

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JOHNSTON BUSINGYE

PRINCIPAL JUDGE

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MARY STELLA ARACH-AMOKO

DEPUTY PRINCIPAL JUDGE

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ISAAC LENAOLA

JUDGE