IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA FIRST INSTANCE DIVISION

(Coram: Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, Monica **K. Mugenyi, J.)**

APPLICATION NO 5 OF 2014

(Arising from Reference No. 3 of 2014)

&

APPLICATION NO. 10 OF 2014

(Arising from Reference No. 5 of 2014)

1. MBIDDE FOUNDATION LTD ..... 1st APPLICANT

2. RT. HON. MARGARET ZZIWA .....2nd APPLICANT

VERSUS

1. SECRETARYGENERAL OF EAST AFRICAN COMMUNITY.....1st RESPONDENT

2. ATTORNEY GENERAL OF REPUBLIC OF UGANDA.....2nd ESPONDENT

29TH MAY, 2014

RULING OF THE COURT

1. On 27th March 2014, a Notice of Motion for the removal of the Hon. Speaker of the East African Legislative Assembly (EALA) was tabled before the Assembly. When the Petition was presented, the Hon. Speaker (Second Applicant herein) adjourned the Assembly *sine die* before the said Petition had been referred to the Committee on Legal, Rules and Privileges for investigation as provided by the Assembly's Rules of Procedure. She thereafter filed **Reference No. 5 of 2014** in this Court alleging that the procedure for removal of a Speaker infringed the EAC Treaty provisions. Shortly before this, the first Applicant had filed **Reference No. 3 of 2014** in this Court similarly alleging that the procedure for removal of a Speaker as enshrined in the Assembly's Rules of Procedure infringed the East African Community (EAC) Treaty's provisions. Both Applicants filed separate applications for Interim orders restraining the EALA from investigating or removing the Hon. Speaker from office, or moving any Motion the purpose of which would be to cause such investigation or removal, pending the determination by this Court of the above References. The applications in issue are **Application No. 5 of 2014 – Mbidde Foundation Ltd vs. The Secretary General of the East African Community & the Attorney General of the Republic of Uganda**, on the one hand; and **Application No. 10 of 2014 – Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community** on the other hand.

2. In a nutshell, **Application No. 5 of 2014** is premised on the following grounds:
   a. The EALA Rules of Procedure, including the Rules for the removal of the Speaker, have never been formally adopted as

provided by Rule 88 thereof and Article 49(2)(g) of the Treaty, therefore, there is no provision for such action by EALA.

b. The Respondents have to date not responded to a Petition by the Applicant for them to seek an advisory opinion from this Court over the interpretation of the EAC Treaty and EALA Rules of Procedure in so far as they pertain to the removal of the Speaker.

c. The Applicant is a legal person resident in Uganda, a Partner State in the EAC; has an interest in the efficient functioning of the EALA and the larger East African Community, and is concerned that the removal of the Speaker with no provision for a Deputy Speaker will bring the legislative function of the EAC to a halt and cause grave economic, political, social and legal ramifications, including creating confusion as to the replacement of the Speaker in the absence of any provision therefor in the Rules.

d. Rule 9 of the EALA Rules of Procedure contravenes Articles 6(d), 7(2), and 53(3) of the EAC Treaty, as well as the principles of natural justice in so far as it limits the time available to the Speaker to be heard in her defense and does not substantiate the grounds for the removal of the Speaker outlined in the Treaty.

e. There is a pending Reference to this Court that has a high probability of success given that the purported impeachment of the Speaker would contravene the provisions of the EAC Treaty.

f. The Speaker would suffer irreparable damage if the EALA is permitted to proceed with the impeachment process as her right

to a fair hearing would be compromised and the pending Reference would be rendered nugatory.

3. On the other hand, **Application No. 10 of 2014** is premised on the following grounds:
   a. The existence of **Reference No. 5 of 2014** pending before this Court.

   b. The said Reference raises triable issues and establishes a prima facie case.

   c. No reference has been made to the Assembly's Committee on Legal, Rules and Privileges for investigation, therefore, the application is made to preserve the status quo.

   d. Unless the orders prayed for are granted, the second Applicant stands to suffer irreparable damage and harm.

4. All Parties conceded to the consolidation of the two References and the applications arising therefrom, so they were duly consolidated. At the hearing of the consolidated application, this Court was extensively referred to the decision in **Giella vs. Cassman Brown (1973) EA 358** (CA) as applied in **Prof. Peter Anyang' Nyongo & 10 others vs. The Attorney General of the Republic of Kenya & 3 others, EACJ Ref. No. 1 of 2006** in support of the preposition that an Applicant who seeks a temporary injunction must show; first, a *prima facie* case with a probability of success; secondly, that non-grant of the temporary injunction would expose such an Applicant to irreparable injury that would not be justly compensated by an award of damages, and, thirdly, that where a court is in doubt, it would decide the application on a balance of

convenience. For ease of reference, we reproduce the decision in **Giella** (supra) below (per Spry, VP):

> "**The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience**. **(E. A. Industries vs. Trufoods [1972] EA 420)**."

5. As depicted above, in deciding as he did in **Giella** (supra), Spry VP relied upon his earlier decision in **E. A. Industries vs. Trufoods [1972] EA 420**. We reproduce the relevant part of the judgment in the latter case for clarity:

> "**There is, I think, no difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages**." *(emphasis ours)*

6. Applying the foregoing principles to the application before him, the learned judge then held (p.422, 423):

> "**I think that a prima facie case has been shown but I am not prepared to say that the outcome is so certain one way or**

the other that the application ought not to be decided on the balance of convenience."

7. The distinguished judge then considered the balance of convenience thus:

   "**I think the harm the respondent company would suffer as the result of an injunction, if it succeeded in the suit, is likely to be greater and graver than that which the appellant company would suffer from the refusal of an injunction, should it be successful. Moreover, and I attach particular significance to this, I cannot see that the appellant company would suffer any loss that could not be sufficiently compensated by an award of damages, and it has not been suggested that the respondent company would not be able to meet any award that might be made. For these reasons, I think the judge was right to refuse an injunction**." *(emphasis ours)*

8. It seems to us that in **E. A. Industries vs. Trufoods** (supra) the learned judge identified only one condition for the grant of injunctions, that is, the existence of a prima facie case with probability of success. In that case, although a prima facie case was ruled to have been shown, the court was unable to determine the case's prospects for success one way or another. The court therefore determined the application on balance of convenience, but in so doing gave due consideration to whether or not the loss suffered by the applicant could be adequately compensated by damages. On the contrary, however, in the latter case of **Giella** (supra) the same court (East Africa Court of Appeal) applied the principles in **E. A. Industries vs. Trufoods** (supra) in such a manner as has been deduced to mean that recourse may only be sequentially made to the balance of convenience of a matter where

a court was in doubt as to the incidence of a prima facie case with a probability of success and proof of injury that cannot be compensated by damages.

9. We agree with the above holdings but do also find most persuasive exposition on the principles governing the grant or refusal of temporary injunctions, as well as the rationale for such injunctions in English authorities. They do also provide a pertinent historical perspective.

10. In the case of **Hubbard vs. Vosper (1972) 2 QB 84** the Court of Appeal of England deprecated any attempt to fetter courts' discretion by laying down rules that would have the effect of curtailing the flexibility inherent in the objective of interlocutory injunctions. However, in that case the court left intact the 'rule' that when considering an application for interlocutory injunction, a court had to be satisfied that a prima facie case had been established.

11. In **American Cyanamid vs. Ethicon Ltd (1975) AC 396** that rule too was undone by the House of Lords in the following terms (per Lord Diplock):

> "**Your Lordships should, in my view, take this opportunity of declaring that there is no such rule. The use of such expressions as '*a probability*', '*a prima facie case*', or '*a strong prima facie case*' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.**

(However**) It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial**."

12. The House of Lords thus reversed the requirement for a prima facie case as a condition for grant of an injunction in preference for demonstration by the applicant of a serious question to be tried. In the same case, the court articulated the objective of interlocutory injunctions viz the other two 'conditions' demarcated in **Giella** (supra), that is, irreparable injury that cannot be adequately compensated by damages and balance of convenience, as follows:

"**The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies**."

13. It does appear, then, that the 'compensatability' of either party by damages is simply one of the considerations to be weighed by the court in determining where the balance of convenience lies, and

not necessarily a condition for the grant or refusal of an injunction. The conditions for grant of a temporary injunction would appear to be most persuasively summed up in **Halsbury's Laws of England, Vol. 11 (2009), 5th Edition, para. 385** as follows:

> **"On an application for an interlocutory injunction the court must be satisfied that there is a serious question to be tried. The material available to court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial. The former requirement that the claimant should establish a strong prima facie case for a permanent injunction before the court would grant an interim injunction has been removed."**

14. In the instant application, the first Applicant faulted both Respondents for ignoring its petition to them to seek an advisory opinion of this Court as to the applicability of the EALA's Rules of Procedure for purposes of the removal of the Speaker. It was the said Applicant's contention that the inaction by the Respondents contravened Article 36(1) of the EAC Treaty.

15. The first Applicant also took issue with the legality of the said Rules of Procedure and invited this Court to declare them void *ab initio* for having never been formalized into law as provided under Rule 88 thereof or, in the alternative, declare Rule 9 of the Rules null and void to the extent of its contravention of Articles 6(d), 7(2) and 53(3) of the EAC treaty.

16. The second Applicant identified herself with the latter contention that the procedure for the Speaker's removal outlined in Rule 9 of the EALA's Rules of Procedure infringed Treaty provisions in so far as it contravened the doctrine of natural justice. The first

Applicant's grievance with the Rules is premised on the alleged haste inherent in the hearing accorded to the Hon. Speaker in her defense, while the second Applicant's grievance is rooted in the perceived bias that would accrue to an investigation by the Assembly's Committee on Legal, Rules and Privileges as presently constituted.

17. At face value, without recourse to the merits of the consolidated References, we find that the first Applicant's interpretation of Article 36 of the Treaty may not represent the spirit and letter of the Treaty. A plain reading of the said Article reveals that the entities that are mandated to seek an advisory opinion from the court are not obliged to do so whether of their own volition or when so requested by a purportedly interested party. Therefore, subject to more intrinsic arguments at the hearing of the consolidated Reference, the grounds of this application that are premised on such interpretation would appear not to raise serious triable issues.

18. Similarly, and perhaps more importantly, we are unable to accept the first Applicant's interpretation of Rule 88 of the Assembly's Rules of Procedure. We agree with Mr. Wilbert Kaahwa, learned counsel for the first Respondent, that such interpretation goes to the root of EALA's existence and, indeed, any issues for determination herein that emanate from the Assembly's Rules of Procedure. Rule 88(1) states that '*the*' first sitting of the Assembly elected under the Treaty shall be for purposes of adopting the Assembly's Rules of Procedure. It was argued by Mr. Mukasa Mbidde that each 'Assembly' was required to adopt the said Rules of Procedure as the definition of 'Assembly' in the said Rules pertained to each Assembly of the House, the present one being the 3rd Assembly. With respect, we are unable to agree with this

interpretation. It seems quite clear to us that use of the word 'the' rather than 'every' first meeting of the Assembly refers to the very first meeting following the inception of the EALA. Further, Rule 88(1) makes reference to the first meeting of '*the*' Assembly defined in Rule 1 as the East African Legislative Assembly; it does not refer to the first meeting of 'an' Assembly, as appears to be learned counsel's argument. Therefore, that ground does not demonstrate a serious triable issue either.

19. Furthermore, at this stage without the benefit of more detailed evidence and arguments by either party, we are unable to fathom how the submission of the Motion for the Speaker's removal to EALA's Committee on Legal, Rules and Privileges would contravene principles of good governance. It seems to us that subjecting such an action to due process as outlined in Rule 9 would, in principle, promote rather than violate the principle of rule of law outlined in Articles 6(d) and 7(2) of the EAC Treaty.

20. Be that as it may, we take the view that the Applicants' allegation of bias by the Committee on Legal, Rules and Privileges is neither idle, nor frivolous or vexatious. The material available to this Court in the second Applicant's Affidavit does seem to underscore this position - (See annexures A, D, and E thereof). The question, however, is whether the issue of bias is properly before this Court at this stage, pending the proceedings before the EALA.

21. It was argued by Mr. Kaahwa that the consolidated Application did not disclose a cause of action either under Article 30 or 39 of the Treaty. Learned Counsel entreated this Court to give due consideration to the doctrine of separation of powers viz the Assembly's designated functions, and wondered what action was

under scrutiny for purposes of Article 30 of the Treaty given that EALA was yet to debate the Motion for the removal of the Speaker. In reply, Mr. Justin Semuyaba for the first Applicant contended that the action that gave rise to a cause of action under Article 30 of the Treaty was the EALA's action of presenting the Petition for the Hon. Speaker's removal before the House. Mr. Semuyaba further faulted the procedure outlined in Rule 9 of the Assembly's Rules of Procedure for being too hasty, violating the doctrine of natural justice and thus infringing Article 6(d) of the Treaty. According to him, any infringement of the Treaty would give rise to a cause of action thereunder.

22. First and foremost, we are unable to agree with the Applicants that the presentation of the Petition to the Assembly, in itself, constituted an infringement of the Treaty. This procedure is prescribed under Rule 9(4) of the Assembly's Rules of Procedure. As explicitly stated in the long title thereto, those Rules of Procedure were promulgated under Articles 49(2) and 60 of the Treaty. No material was availed to this Court as would suggest that the Rules *per se* infringe Treaty provisions. We understood both Applicants' case to be that the implementation of the said Rules would violate the doctrine of natural justice and, therefore, Article 6(d) of the Treaty, hence this consolidated Application to restrain further implementation thereof beyond the presentation of the petition to the House. Subject to more detailed scrutiny of this contention during the hearing of the consolidated Reference, at this stage we find that the presentation of the Petition to the House was in compliance with Rules duly promulgated under the EAC Treaty and, therefore, in compliance with the said Treaty.

23. Secondly, the removal of the Speaker of the Assembly is a function of the EALA as provided by Article 53 of the Treaty. The procedure for such removal is detailed in Rule 9 of the Assembly's Rules of Procedure. Article 49(2)(g) of the Treaty does indeed mandate the Assembly to formulate its own rules of procedure, as well as those that pertain to its committees. The Committee on Legal, Rules and Privileges is one such committee. In the instant case, where both Applicants fault the Assembly's Rules of Procedure, Rule 83 of the said Rules does make provision for the amendment thereof by the EALA. Although both Applicants are members of the said Assembly, there is no indication before us that recourse has been made to such course of action.

24. Similarly, on the question of bias there is no material before us that indicates that the issue has been duly raised before the Assembly and the said body has declined or omitted to address it by recusal from the Committee of Legal, Rules and Privileges of the members perceived to be biased; amendment of the Rules of Procedure to address the perceived bias or, by the Assembly otherwise effecting necessary measures to address the said complaint. In the premises, we find that the incidence of bias has not crystallized so as to give rise to a cause of action under Article 30(1) of the Treaty or invoke the jurisdiction of this Court under the same provision. We do agree with Mr. Kaahwa that provision for the respective mandates of each Organ of the Community is reflective of the renowned doctrine of separation of powers that this Court is enjoined to observe and uphold.

25. Accordingly, whereas the material available to this Court with regard to the perceived bias of the Assembly's Committee on Legal, Rules and Privileges is neither frivolous nor vexatious; at this stage,

without prejudice to the merits of the consolidated Reference, we find that the said material does not *prima facie* demonstrate an act of Treaty infringement such as would invoke the provisions of Article 30(1) of the Treaty. Having so found, we do not deem it necessary to consider the balance of convenience in this matter.

26. Be that as it may, had we considered the balance of convenience in this matter an important consideration in this balancing exercise would be whether any potential injustice to either party could be adequately compensated for by damages. If the injury likely to be suffered by either party could be quantified financially we would be inclined to grant or refuse the injunction accordingly. For instance, if the injury to the second Applicant may be adequately compensated by damages, this Court would be inclined not to grant the injunction; and similarly if the injury likely to be suffered by the Respondents may be compensated in damages, this Court would be inclined to grant the injunction. The Applicants bore the burden of demonstrating that grant of the injunction was necessary to protect them against irreparable injury. With respect, we are not satisfied that the first Applicant demonstrated any injury it is likely to suffer. The affidavit of one Moses Kyeyune Mukasa is to the effect that the first Applicant seeks to protect Uganda's rotational interest in the office of the Speaker, as well as the rights of the incumbent Speaker herself, but it does not provide material that demonstrates the injury that party is likely to suffer if the injunction is refused.

27. With regard to the second Applicant, we are mindful of the possible damage to her reputation should the injunction not be granted and she emerges successful in the Reference after her removal from the office of Speaker. This was ably articulated by Mr. John Tumwebaze, although it might have been neater if it had

been addressed in pleadings rather than raised in arguments from the Bar. The material availed to us in this application lends credence to the possible reputational damage to the second Applicant, as well as the EAC as an institution. However, whereas we recognize that in certain circumstances reputational injury is difficult to meaningfully compensate by damages; in our considered view such injury is relatively easier to assess and quantify with regard to an individual such as the second Applicant than would be the case in assessing the cost thereof to the future prospects of relatively young but pivotal regional institutions such as the EAC and EALA.

28. Further, weighing the likely inconvenience or damage that would be suffered by the Applicants if the injunction is not granted against the likely inconvenience or cost to the Respondents if it is granted; we take the view that whereas the office of the Speaker is vital to the operations of the EALA and the removal of the holder thereof should never be approached casually or flippantly, in our judgment the first Respondent in his representative capacity as enshrined in Article 4(3) of the Treaty stands to suffer inconvenience with more far reaching repercussions to the entire Community should we grant a temporary injunction, than the second Applicant would suffer should we refuse the injunction.

29. In the result, with the greatest respect, we decline to grant the interim orders sought and do hereby dismiss this consolidated Application.

30. The costs thereof shall abide the outcome of the consolidated Reference.

31. We direct that it be fixed for hearing as a matter of priority.

It is so ordered.

Dated, Delivered and Signed at Arusha this 29th day of May, 2014

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JEAN BOSCO BUTASI
PRINCIPAL JUDGE

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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

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MONICA K. MUGENYI
JUDGE