IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ, Charles O. Nyawello & Charles Nyachae, JJ)

APPLICATION NO. 3 OF 2019

(Arising from Reference No. 9 of 2019)

FRANCIS NGARUKO ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF BURUNDI ..... RESPONDENT

5TH FEBRUARY 2020

RULING OF THE COURT

Introduction

1. This is an Application by Francis Ngaruko ('the Applicant') for interim orders against the Attorney General of the Republic of Burundi ('the Respondent') pursuant to Article 39 of the Treaty for the Establishment of the East African Community ('the Treaty) and Rule 21(2) of this Court's Rules of Procedure.

2. The Applicant is a natural person resident in the Republic of Burundi, the son and beneficiary of the Estate of Evariste Sebatutsi (deceased) and a shareholder of property at the heart of this dispute. He lays claim to part of his deceased father's land that is registered as Reg. File E.XXXVI folio 129 of 28/8/1972, as well as an additional 10 acres of land adjacent to it that he personally acquired ('the Suit Premises').

3. On 11th November 2014, the Respondent State's National Commission of Land and Other property (Municipality of Bujumbura) dismissed a claim that had been brought in respect of the Suit Premises by proprietors of neighboring properties but disentitled the Applicant and his father's Estate of the same land too. Following an unsuccessful appeal to the National Commission of Land and Other property (National Level), the Applicant sought legal redress in Burundi's Special Court of Land and Other Property (first degree) but it declared the Suit Property 'a property without master for the (State's) benefit', a decision that was subsequently upheld by the same Partner State's Special Court of Land and Other Property (second degree).

4. The Applicant has since filed **Reference No. 9 of 2019** in this Court, essentially challenging the legality of what he perceives to be a compulsory acquisition of the Suit Premises by the Republic of Burundi without either due process or compensation. It is his contention that the said Partner State is under a Treaty obligation to put in place mechanisms that would ensure the expeditious disposal of disputes in a fair and just manner. The Applicant did also file the present Application on the premise that in the absence of preservative measures, the suit property is susceptible to execution of the orders of the Special Land Court including its alienation and alteration in a manner that would cause irreparable injury to him. The Application was initially heard ex parte and allowed on 20th June 2019, pending its determination *inter partes*.

5. At the hearing of the Application *inter partes*, the Applicant was represented by Mr. Hannington Amol, while Mr. Diomede Vizikiyo appeared for the Respondent.

Applicant's Submissions

6. Learned Counsel for the Applicant highlighted the principles governing the grant of interim injunctions by this Court as expounded in the cases of **Forum pour le Renforcement de la Societe Civile (FORSC) & Others vs. Attorney General of the Republic of Burundi, EACJ Application No. 16 of 2016**; **British American Tobacco (BAT) vs. the Attorney General of Uganda, EACJ Application No. 13 of 2017** and **Ololosokwan Village Council & Others vs. the Attorney General of the United Republic of Tanzania, EACJ Application No. 15 of 2017**. The principles advanced in that regard are the demonstration of first, a serious

triable issue in the underlying Reference; secondly, irreparable injury that cannot be compensated by damages, and finally, where the Court is in doubt on proof of any of those two principles, a determination of the matter on the balance of convenience.

7. Citing this Court's decision in **BAT vs. the Attorney General of Uganda** (supra), where it was held that within the context of Community Law a cause of action under Article 30(1) of the Treaty did demonstrate a serious triable issue; it was argued for the Applicant that to the extent that the decision of the Special Land Court had been challenged for violating the principles enshrined in Article 6(d) of the Treaty, a serious triable issue had been established. With regard to the question of irreparable injury, Mr. Amol proposed that in the absence of conservatory orders by this Court, the Applicant would be dislodged from the Suit Premises, which entail his residential home and business/ commercial property. Learned Counsel drew a comparison between the circumstances of this case and those that prevailed in **Ololosokwan & Others vs. the Attorney General of the United Republic of Tanzania** (supra), arguing that the eviction of the Applicant from the Suit Premises would be similarly catastrophic to his existential livelihood as this Court had deduced to be the case with the Applicants in the **Ololosokwan** case. As to where the balance of convenience lies in this matter, he argued that the grant of the Application would cause no prejudice to the Respondent State; on the contrary, it would benefit from any additional commercial developments made on the Suit Premises as at the date of the judgment in the Reference.

Respondent's Submissions

8. On his part, learned Respondent Counsel argued his case on two (2) fronts. He raised a point of law as to the competence of the Application prior to responding to the Applicant on the principles governing the grant of interim orders. In terms of the point of law, Mr. Vizikiyo argued that the Application should be dismissed for having been entertained outside the 1-month time frame prescribed in Rules 21(3) and 73(2) of the Court's Rules of Procedure. With regard to the merits of the Application, on the other hand, we understood it to be his contention that the Reference presented no triable issue given that the decision of the national court had been executed with the Applicant's knowledge and purported acquiescence. With regard to the irreparable injury the Applicant allegedly stood to suffer, learned Counsel argued that Applicant's residential property was not subject to the execution that ensued from the national courts' decision and he therefore stood to suffer no irreparable injury in that regard.

Submissions in Reply

9. In a very brief reply, it was contended for the Applicant that he could not be held responsible for an administrative matter in respect of the Court's judicial calendar that was clearly out of his domain. Furthermore, Mr. Amol contested the Respondent's claims with regard to the execution process. He maintained that the Applicant was neither notified of the execution, nor was he present; categorically asserting that his client had not consented to the exercise but preferred to challenge it before this Court rather than the national courts.

Court's Determination

10. We commence our interrogation of this matter by addressing the points of law raised by learned Counsel for the Respondent. It is indeed true that the general provisions of Rule 21(3), as well as the more specific Rule 73(2) in respect of applications for interim orders, do enjoin the Court to fix within 30 days of granting *ex parte* orders, the hearing of the same application *inter partes*. It would suffice to point out that this Court, sitting as it does on adhoc basis albeit temporarily, applies its Rules of Procedure with necessary adaptation. Until such time as the operational status of the Court is varied by the East African Community's decision-making organs, the application of the Rules would continue on that basis. Nonetheless, as quite rightly argued by learned Counsel for the Respondent, this is an administrative matter that should not under any circumstances be visited upon the Applicant.

11. We now turn to the application before us. The grant of interim orders is governed by Article 39 of the Treaty. It reads:

> **The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. Interim orders and other directions issued by the Court shall have the same effect *ad interim* as decisions of the Court.**

12. This Court has had occasion to consider numerous interlocutory applications for interim orders. It has upheld a trifold test for the grant of interim orders laid out in **Giella vs. Cassman Brown (1973) EA 258**, albeit with deference to the demonstration of a serious triable

issue rather than a *prima facie* case as the first principle that should be satisfied in an application for the grant of interim orders. *See* ***FORSC & Others vs. Attorney General of the Republic of Burundi*** *(supra)* and ***BAT vs. the Attorney General of Uganda*** *(supra)*. Consequently, we categorically state that applications for interim orders should be subjected to the following trifold test. First, the court needs to be satisfied that there is a serious question to be tried on the merits of the applicant's Reference, that the applicant has a cause of action that depicts substance and reality.[1] 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.[2]

13. As has been severally held, within the context of EAC Community law, a cause of action demonstrating the prevalence of a serious triable issue has been held to exist where the Reference raises a legitimate legal question under the Court's legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights. *See* ***Sitenda Sebalu vs. The Secretary General of the East African Community & Others EACJ Ref. No. 1 of 2010***, ***Simon Peter***

[1] See American Cyanamid Company vs. Ethicon Limited (1975) AC 396, *Blackstone's Civil Practice 2005*, para. 37.19 – 37.20, pp. 392, 393 and The Siskina (1979)AC 210.

[2] See Giella vs. Casman Brown (1973) EA 258, Prof. Peter Anyang' Nyong'o & 10 Others vs. the Attorney General of Kenya & 3 Others, EACJ Application No. 1 of 2006 and Timothy Alvin Kahoho vs. the Secretary General of the East African Community, EACJ Application No. 5 of 2012.

Ochieng & Another vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 11 of 2013 and ***FORSC & Others vs. Attorney General of the Republic of Burundi*** *(supra).*

14. In the matter before us presently, the Reference underlying this Application depicts a challenge to the decision of a national court of Burundi in so far as it purportedly entrenches the compulsory acquisition of the Applicant's property without due process. Whereas the Respondent sought to impute acquiescence on the part of the Applicant with regard to execution of the impugned decision, that allegation was flatly rejected by the Applicant thus leaving it too in contention. Hence, without recourse to the merits thereof, it is apparent on the face of the Reference that it presents a legal question as to the legality of the impugned court decision. In **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others, EACJ Appeal No.4 of 2016**, it was held that this Court does have jurisdiction to interrogate the decisions of national courts to deduce their compliance with the Treaty (or the lack of it). That is the Court's interpretative mandate. In the result, we are satisfied that the present matter raises serious triable issues. We so hold.

15. We now turn to the question of irreparable injury. Irreparable injury would arise in applications of this nature where an award of damages would not be sufficient recompense for the loss or injury suffered by an applicant. That legal principle was stated thus in **Giella vs. Cassman Brown (1973) EA 258** and cited with approval by this Court in **Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa** (supra):

The object of an interlocutory injunction or in this case an interim order 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 for the defendant to protect 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 certainty were resolved in the defendant's favour at the trial.

16. Indeed, it is trite law that where damages in the measure recoverable at common law would be an adequate remedy and a respondent would be in a position to pay them, no interim injunction should normally be granted. *See* ***American Cyanamid Company vs. Ethicon Limited (1975) AC 396 at p. 408***. ***Blackstone's Civil Practice 2005*** goes a bit further to *inter alia* opine that damages would be inadequate where they would be difficult to assess, for instance where there is disruption of business.[3]

17. In the Application before us, it has been suggested that the Applicant stands to lose his residential premises and commercial facilities, properties that go to his existential wellbeing, should the impugned court decision be executed by the Respondent State. Conversely, it is the Respondent's contention that the execution that the Applicant seeks to temporarily forestall has already ensued and the Applicant's

[3] At para. 37.22, p.394

residential property was not affected by it. He relied on Annex 2 to the Affidavit in Reply, a document titled *Minutes of the Execution of the Case CSTB 0263*, which at page 12 states that '**Francis NGARUKO followed and got 28 ares (25 m on 112 m).**' This drew a sharp rebuttal from learned Respondent Counsel who relied on the following statement in the Minutes to argue that his client's residential property was also affected by the execution. It reads:

> ***Those who were executing the case have directly measured these meters from the river KIZINGIWE to the high side of the fence of FRANCIS NGARUKO and his houses are part of these meters.***

18. We have carefully considered Annex 2 to the Affidavit in Reply. In our considered view, not only is it inconclusive as to whether indeed the alleged 'execution' was concluded, more importantly, it does not clearly demarcate which of the Applicant's properties is liable for execution. Mr. Vizikiyo did explain the execution process as it transpires in Burundi, proposing that the execution of the impugned decision was concluded. However, helpful as his clarification might otherwise have been, it is tantamount to unsworn evidence from the Bar. In like vein, testifying from the Bar, Mr. Amol clarified that the execution had not been concluded hence the Applicant's recourse to this Court for conservatory orders. Consequently, it is not readily apparent to us whether the Applicant's right to quiet enjoyment of his property is in fact in jeopardy or which property is in contention in that regard, even before considering the adequacy of damages to atone for such an alleged violation. The material on record by either party is simply inconclusive on that issue.

19. It is now well settled law that where an application for an interlocutory injunction cannot be determined on the existence of a serious triable issue or the adequacy of damages to atone for possible injury to an applicant, the court shall decide the matter on a balance of convenience. *See* ***East African Industry vs. True Foods (1972) E.A. 420***. Such inability on the part of court would obviously include instances such as the present case where a court is in doubt as to the adequacy of damages to redress a purportedly impending injury to an applicant for interim orders. *See* ***Giella vs. Cassman Brown*** *(supra).*

20. In the present case, whereas it was argued that the Respondent stood to suffer no prejudice from the grant of interim orders thus tilting the balance of convenience in favour of the Applicants, we were not addressed on the subject by learned Respondent Counsel. As this Court did observe in **BAT vs. the Attorney General of Uganda** (supra), the balance of convenience in applications for interim orders is largely determined on a case-by-case basis. In **E. A. Industries vs. True Foods** (supra) the court weighed the harm that the respondent company was likely to suffer in the event that the injunction was granted against the harm that the applicant stood to suffer if it was not granted, and attached particular importance to the fact that the harm suffered by the applicant could be adequately compensated by damages, to uphold the refusal of the injunction by the lower court. On the other hand, in **American Cyanamid vs. Ethicon Ltd** (supra) it was proposed that the applicant's need for protection against violation of its right must be weighed against the corresponding need for the respondent to be protected against injury accruing from its having been prevented from exercising its own legal

rights, the court weighing one need against the other to determine where 'the balance of convenience' lies. Meanwhile, in **Cayne vs. Global Natural Resources PLC (1984) 1 AllER 225**, the court asserted that it was not mere convenience that needed to be weighed, but the risk of doing an injustice to one side or the other.[4]

21. In the **American Cyanamid** case,[5] the court further espoused the determination of the balance of convenience on the basis of the status quo sought to be preserved in the following terms:

> **Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.**

22. In the case of **Garden Cottage Foods vs. Milk Marketing Board (1984) AC 130**, the status quo sought to be reserved was clarified as follows (per Lord Diplock):

> **The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion.**

[4] *Blacstone's Civil Practice 2005*, para. 32.27, pp. 396, 397.
[5] At p.408

23. Thus the applicable status quo *ante* is the state of affairs before a respondent commenced the conduct complained of by an applicant, unless there has been unreasonable delay in filing the application for interim orders, in which case it would be the state of affairs immediately before the application.

24. As we have held earlier in this Ruling, the material on record is inconclusive about whether or not the execution of the impugned decision ensued. Whereas it was the Respondent's contention that it did ensue thus rendering the present Application superfluous, the Applicant maintained the need for conservatory orders given that he was still in constructive possession of the Suit premises, the purported execution notwithstanding. It was that status quo that we understood the Applicant to seek to maintain. It seems to us to be common ground in that regard that whether or not the alleged execution was concluded, the Applicant had (as at the time he filed this Application) not been evicted from the Suit Premises. In the premises, we are hard pressed to deduce what prejudice the Respondent stands to suffer by deferring the operationalization of the alleged execution a little bit further pending the determination of the substantive Reference that underpins this Application.

25. We do appreciate that the grant of an interim injunction in this case would inhibit the Respondent's right to take possession of the Suit premises; however, that right must be weighed against the injustice of leaving the Applicant susceptible to eviction before the determination of the Reference. The fact that the dynamics of the execution would appear to be subject to multiple interpretations and requires clarification by this Court only compounds matters. Thus, on interim

basis, would it be more just to subject the Applicant to an unclear execution decree or to temporarily stay its implementation until the matters in contention in the Reference are resolved? We take the considered view that the justice of the matter is that the Applicant stands to suffer graver injury as a consequence of possible eviction from the Suit Premises if the interim orders sought in the present Application were not granted, than the Respondent would suffer from being temporarily prevented from exercising its right to operationalize the alleged execution order. We so hold.

Conclusion

26. In the result, we do grant the interim orders sought and hereby uphold this Application. The costs thereof shall abide the outcome of the Reference. We direct that it be fixed for hearing forthwith.

27. It is so ordered.

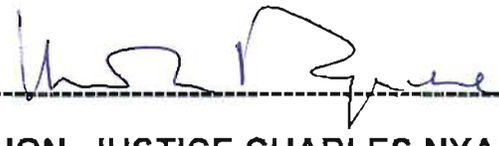
Dated, signed and delivered at Arusha this 5th day of February, 2020.

HON. LADY JUSTICE MONICA K. MUGENYI

PRINCIPAL JUDGE

HON. DR. CHARLES O. NYAWELLO

JUDGE



HON. JUSTICE CHARLES NYACHAE

JUDGE