IN THE EAST AFRICAN COURT OF JUSTICE AT

ARUSHA FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; FaustinNtezilyayo, DPJ; Fakihi A. Jundu,J;Charles Nyawello, J;& Charles Nyachae, J)

APPLICATION NO.10 OF 2018

(Arising from **Reference No13 of 2017**)

PROF. ELIAS BIZURU..... APPLICANT

VERSUS

INTER-UNIVERSITY COUNCIL OF EAST AFRICA

(IUCEA) .....RESPONDENT

5TH JULY, 2019

RULING OF THE COURT

A. INTRODUCTION

1. This is an application by one Prof. Elias Bizuru, the Applicant, seeking for an order from this Court to provisionally restrain the Respondent from making any recruitment for the position of Chief Research and Innovation Coordination Officer until the final determination of the main Reference, that is, **Reference No13 of 2017,** in which the Applicant seeks for an order to nullify the Respondent's decision to re-advertise the said position while he had emerged the best candidate in the earlier original advertisement. The Application was lodged pursuant to Article 39 of the Treaty for the Establishment of the East African Community ("The Treaty") and under Rule 73 of the East African Court of Justice Rules of Procedure 2013 ("The Rules").

2. The Respondent is the Inter-University Council of East Africa (IUCEA), an entity set up by Inter-University Council for East Africa Act, 2009.

3. The grounds for the Application are set out in the Notice of Motion, and supported by an Affidavit deposed by the Applicant himself on 7th May, 2018 and filed in this Court on 16th May, 2018. In short, the Applicant's complaint is that the Respondent had originally advertised for the position of Chief Research and Innovation Coordination Officer, which he applied for and emerged the best candidate in an interview conducted by the Respondent. However, on 17th November, 2017, the Respondent re-advertised the aforesaid position despite the fact that the Respondent had already been served with a copy of the main Reference. The Applicant therefore seeks an interim order restraining the Respondent from making any recruitment in respect of

the aforesaid position until the final determination of the main Reference by this Court.

B. **REPRESENTATION**

4. At the hearing of the Application Mr. Janvier Tuyisenge Bayingana, represented the Applicant while the Respondent was represented by Dr. Antony Kafumbe and Mr. Alex Mukunzi Ruharo.

C. **PRELIMINARY MATTERS THAT AROSE**

5. In the course of the proceedings in respect of this Application, the following matters or issues arose for consideration:

   i. ***Whether Mr. Ruharo, Learned Counsel for the Respondent has locus standi to represent the Respondent before this Court pursuant to the Treaty;***
   ii. ***Whether the Counsel to the Community (CTC) could delegate the powers vested to him under Article 37(2) of the Treaty to represent the Community and its institutions before this Court and;***
   iii. ***Whether the Respondent was the right party to be sued by the Applicant under the provisions of the Treaty.***

D. **DETERMINATION OF PRELIMINARY MATTERS**

6. We propose to determine the aforesaid points of law collectively. We will briefly refer to the arguments made by Mr. Ruharo and Dr. Kafumbe. Mr. Ruharo contended that he is a Senior Legal Officer of the Respondent entity, which is an institution of the Community, and he had appeared on behalf of the office of the Counsel to the Community (CTC). He argued that he had *locus standi* before this

Court as he was appearing in the capacity of CTC, the latter having so delegated him to do so. However, he could not cite any provision of the Treaty that allows the CTC to so delegate the functions of his office. Nonetheless, he further argued that in terms of the Inter-University Council for East Africa Act, 2009, the law that established the Respondent, the latter is a corporate body with powers to sue and be sued in its own corporate name, hence, it was a proper and right party to be sued by the Applicant in this Court.

7. Pursuant to an order of the Court, the CTC did subsequently appear before the Court in this matter in person. Dr. Kafumbe contended that Mr. Ruharo is a Senior Legal Officer of the Respondent entity and had replaced Mr. Stephen Agaba in the conduct of the present caseas Mr. Agaba was no longer an employee of the Community. Dr. Kafumbe argued that in this Application the Applicant had sued the right party because in terms of the Act that established the Respondent, the latter is a body corporate with powers to be sued. He further argued that in terms of Article 37(2) of the Treaty, the Respondent was an institution of the Community that could implicitly be brought before this Court as a party, meaning that it can be sued. He contended that he had been closely working with the Respondent in this Application, and had instructed Mr. Ruharo to appear and represent the Respondent in place of Mr. Stephen Agaba.

8. We have carefully considered the arguments of Mr. Ruharo and Dr. Kafumbe. We have also carefully read the relevant provisions of the Treaty, the Court's Rules of Procedure and the Inter-University Council for East Africa Act, 2009 which established the Respondent. First, there is no doubt whatsoever, that the Respondent is an

institution of the Community. The Act itself states as much. It reads thus:

> **An Act of the Community to provide for the Establishment of the Inter-University Council for East Africa and for other related matters.**

9. The said Act is explicitly '**enacted by the East African Community and assented to by the Heads of State.**'It thus falls squarely under Article 9(2) of the Treaty as an institution of the Community. Article 9(2) provides as follows:

> **The institutions of the Community shall be such bodies, departments and services as may be established by the Summit.**

10. Secondly, Section 3(1) and (2)(b) of the Act establishing the Respondent is relevant as to its legal status. It reads thus:

> ***3*** **(1) There is established a Council known as Inter-University Council for East Africa;**
>
> **(2) The Council is a body corporate with perpetual succession and a Common Seal and may:-**
>
> **a) .....**
>
> **b) sue and be sued in its corporate name.**
>
> **c) .....**

11. However, all the aforesaid provisions of the Act clothe the Respondent with status of a corporate body with powers to sue and be sued but do not resolve the points of law raised hereinabove. Rather, we find appropriate direction on the said points of law in the

provisions of Article 37(2) of the Treaty and Rule 17(2) of the Court's Rules of Procedure. Article 37(2) reads thus:

> **The Counsel to the Community shall be entitled to appear before the Court in any matter in which the Community or any of its institutions is a party or in respect of any matter where the Counsel to the Community thinks that such an appearance would be desirable.**

12. In the same vein, Rule 17(2) of the Rules reads thus:

> **The Counsel to the Community may appear and represent the Community or any of its institutions in anywhere the Community or any of its institutions is a party or where the Counsel thinks that such appearance is desirable.**

13. In our considered view, the succinct and clear import of Article 37(2) of the Treaty and Rule 17(2) of the Rules as quoted above is: firstly, to provide *locus standi* to the CTC to appear and represent the Community or any of its Institution before this Court, in the event of such institution being a party or if the CTC thinks desirable to do so. Secondly, the said provisions are clearly indicative that institutions of the Community, such as the Respondent, can be made parties before this Court. In other words, institutions of the Community such as the Respondent can be sued before this Court. It therefore follows that the Respondent is the proper and right party to be sued by the Applicant before this Court in terms of Article 37(2) of the Treaty and Rule 17(2) of the Court's Rules of Procedure. Furthermore, as we have already stated, Article 37(2) and Rule 17(2) quoted above

provide *locus standi* to the CTC to appear before this Court to represent the Community or any of its Institutions when the same have been made parties thereto. However, the said provisions do not provide power to the CTC to delegate that function of his office to anyone else that is not deployed in the office of the CTC. Therefore, the contention of Mr. Ruharo and Dr. Kafumbe that there was such delegation giving *locus standi* to Mr. Ruharo before this Court in this Application is untenable.

14. Having disposed of the foregoing points of law, we now proceed the Application before us on its merits.

E. **THE APPLICANT'S CASE**

15. The Applicant's case as depicted in his Notice of Motion, supporting Affidavit and his arguments before this Court is that he seeks an interim order to provisionally restrain the Respondent from making any recruitment to the position of Chief Research and Innovation Coordination Officer until the main Reference has been finally determined by this Court. His complaint, which is subject of the said **Reference No.13 of 2017,** is that originally the Respondent had advertised for the said position and that he applied for the same and emerged the best candidate in the interview. However, on 17th November, 2017, the Respondent re-advertised the said position.

16. The Applicant contends that the fresh recruitment initiated by the Respondent is a duplication of the initial recruitment process, an additional cost to the Community and will trigger unnecessary litigation in this Court to prospective candidates in addition to the present case. He further contends that the Application seeks to avoid rendering the Reference superfluous given that the hearing date

thereof is not yet known. In the meantime, on 5th December, 2017, he had communicated to the Respondent on the matter but had got no response todate.

17. In his oral submissions before this Court, Learned Counsel for the Applicant submitted that the Application had been conceded by the Respondent hence urged the Court to grant the same. He argued in that regard that the Affidavit in Reply reveals that the Respondent had since undertaken consultative meetings on the impugned recruitment process and agreed to halt the said recruitment until the determination of **Reference No.13 of 2017**.

18. With regard to the principles governing the grant of interim orders, learned Counsel argued that since the Respondent had agreed to halt the recruitment process, the said principles were in favour of the Applicant. On irreparable injury, he contended that in the event that the Applicant lost the main Reference, he stood to lose the position of Chief Research and Innovation Coordination Officer that he had successfully applied for, arguing that such an eventuality would amount to irreparable loss given that the said position was unique to the Partner States in the East African Community and the forfeiting thereof cannot be remedied or redressed by an award of damages.

19. Mr. Bayingana strongly rejected Dr. Kafumbe's counter-argument that the Application lacked merits, was moot and did not warrant the grant of the sought interim orders. He maintained that since the Respondent had in its Affidavit in Reply and before this Court agreed to suspend the recruitment process for the position in question, it should be concluded that the Application had been conceded and the interim orders sought should be granted by this Court.

F. **THE RESPONDENT'S CASE**

20. The Respondent filed a Reply Affidavit on 2nd November, 2017 deponed by one Jolly Atuhaire Kamwesigye on 21st October, 2017. It deposed that the Executive Committee of the Respondent is mandated to approve terms and conditions of service of staff and had, in its 24th sitting held on 28th June, 2017 in Zanzibar, deliberated the appointment of the Applicant and directed the Respondent's Secretariat to re-advertise the position he had applied for (Chief Research and Innovations Coordination Officer)

21. The said Affidavit in Reply further attested to the Respondent's Secretariat having been served with a copy of **Reference No.13 of 2017** on 28th November 2017, following which the Respondent's Executive Committee directed it to halt the recruitment of the re-advertised job pending legal guidance from the CTC. Following the advice of the CTC, the recruitment process for the aforesaid position was halted pending settlement of the matter by this Court and no short listing of candidates or interview process had ensued to date.

22. At the hearing of the Application, Dr. Kafumbe, Learned Counsel for the Respondent, opposed the Application on various grounds. First, he contended that the Application was now moot following the Respondent's decision to suspend and halt the recruitment process for the position in question pending the final determination of the main Reference by this Court. He argued that the Application did not satisfy the principles governing the grant of interim orders as set out by this Court in its various decisions. He further argued that under Article 39 of the Treaty, the issuance of interim orders was not

automatic but at the discretion of the Court, which discretion was to be exercised judicially. Learned Counsel urged the Court to apply the principles governing the grant of interim orders, maintaining that any injury suffered by the Applicant could be compensated by an award of damages.

G. DETERMINATION OF THE COURT

23. We have carefully considered the pleadings and arguments of the Parties in this Application. The grant of interim orders in this Court is governed by Article 39 of the Treaty and Rule 73 of the Rules. Article 39 of the 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.**

24. On the other hand, Rule 73(1) provides as follows:

> **Pursuant to the provisions of Article 39 of the Treaty, the Court may in any case before it upon application supported by affidavit issue interim orders or directions which it considers necessary and desirable upon such terms as it deems fit.**

25. No doubt, in our considered view, the Applicant has complied fully with what is required of him by the aforesaid provisions of the law. He has filed the main Reference and thereunder lodged this Application supported by his Affidavit.

26. This Court has rendered itself severally on the law and principles governing the grant of interim orders. They have their genesis in the famous case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA. 358,** where it was held (per Spry VP):

> **The conditions for the grant of an interlocutory injunction are now well settled in East Africa:-**
>
> **(a) Firstly, an applicant must show a prima facie case with a probability of success;**
> **(b) 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;**
> **(c) Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. E.A. Industries vs. Trufoods [1972] E A 420.**

27. In **E. A Industries vs. Trufoods** (supra), Spry, V.P had held thus:

> **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 face 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.**

28. The foregoing precedents were cited with approval in **Prof. Peter Anyang Nyong'o and 10 Others vs. The Attorney General of the Republic of Kenya & 3 Others, EACJ Ref. No.1 of 2005; The Democratic Party & Another vs. The Secretary General of the East African Community, EACJ Application No.6 of 2011; Timothy Alvin Kahoho vs. The Secretary General of The East African Community, EACJ Application No.5 of 2012**, and **Venant Masenge vs. The Attorney General of The Republic of Burundi, EACJ Application No.5 of 2013.**

29. However, this Court has since adopted the approach of the House of Lords in the renown case of the **American Cyanamid Co vs. Ethicon Ltd. [1975] AC 396** in which the said court underscored the need for courts dealing with an application for an interlocutory injunctions to be satisfied that the claim was not frivolous or vexatious but that there was a serious question to be tried, without attempting to resolve conflicts as evidence, as has previously been required in the determination of prima facie case with probability of success. See **Mbidde Foundation Ltd & Another vs. The Secretary General of the East African Community & Another, EACJ Consolidated Application Nos. 5 & 10 of 2014; East African Civil Society Organization Forum (EACSOF) vs. The Attorney General of the Republic of Burundi & 2 Others, EACJ Application No.5 of 2015; Alice Nijimbere vs. East African Community Secretariat, EACJ Application No.11 of 2015; Rwenga Etienne & Another vs. The Secretary General of the East African Community, EACJ Application No.8 of 2015; FORSC & Others vs. Attorney General of the Republic of Burundi & Another, EACJ Application No.16 of 2016; British American Tobacco (BAT) vs. The Attorney General**

of the Republic of Uganda, EACJ Application No.13 of 2017; Prof. Paul Kiprono Chepkwony vs. The Attorney General of the Republic of Kenya, EACJ Application No. 17of 2018, and Hassan Basajjabalaba & Another vs. The Attorney General of Uganda, EACJ Application No. 9 of 2018.

30. Against that background, the question would be whether or not the circumstances of this Application warrant or justify the grant of the interim orders sought. In our considered view, although Dr. Kafumbe at the hearing of the Application stated that the Respondent was opposing the Application, he went ahead to argue that the Application was now moot because the Respondent had agreed to suspend and halt the recruitment process in issue pending the determination of the Reference.

31. We hasten to state that we do not subscribe to Dr. Kafumbe's contention that the Application is now moot. In our considered view, this is not a hypothetical or abstract application. It is based on a known Reference, a dispute that is yet to be resolved by this Court. Indeed, Mr. Bayingana, learned Counsel for the Applicant emphatically maintained that, given the suspension of the recruitment process as averred, this Court should proceed to grant the Application since (in his view) it had been conceded by the Respondent.

32. Paragraphs 11 and 12 of the Affidavit in Reply would appear to support the Applicant's contention. For clarity we reproduce them below.

> *11. That at the sitting of the 25th Executive Committee of IUCEA, the Committee was informed by IUCEA*

Secretariat that, following advice from Counsel to the Community (CTC), the recruitment process in respect to the position of Chief Research and Innovation Officer had been halted pending settlement of the matter at the EACJ;

12 *That IUCEA Secretariat has fully complied with the directive of the Executive Committee to halt the recruitment process and that, no shortlisting or interviewing process has been carried out in regard to filling the position of the Chief Research and Innovation Coordination Officer till to date.*

33. In our considered view, the aforesaid averments, as well as the Respondent's submissions at the hearing of the Application, do concede the order sought in the Application, namely, '**an order to provisionally restrain the Respondent from undertaking any recruitment before a final ruling on Reference is rendered.**' It is now trite law that a party in a suit is bound by his pleadings. Accordingly, the Respondent is bound by the averments in its Affidavit in Reply. Much more so, when the averments in question are contained in a sworn pleading such as an affidavit.

34. In the circumstances, we are satisfied that this Application has been conceded by the Respondent. Learned Respondent Counsel's submissions that the Application does not establish the conditions for the grant of interim orders fades in relevance against the express averments in the Respondent's Affidavit in Reply

H. **CONCLUSION**

35. In the upshot, this Application is granted. We do hereby issue an order restraining the Respondent from pursuing the recruitment process in respect of the position of Chief Research and Innovation Coordination Officer in the Inter-University Council of East Africa until the determination of **Reference No.13 of 2017** by this Court. Costs shall be in the cause.

It is so ordered.

Dated, signed and delivered at Arusha this 5th Day of July, 2019.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Dr. Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE

Hon. Justice Fakihi A. Jundu
JUDGE

Hon. Justice Dr. Charles A. Nyawello
JUDGE

Hon. Justice Charles Nyachae
JUDGE