THE EAST AFRICAN COURT OF JUSTICE AT

ARUSHA FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Audace Ngiye, Charles Nyawello, & Charles Nyachae, JJ)

APPLICATION NO.5 OF 2019

(Arising from Reference No.6 of 2019)

MALE H. MABIRIZI K. KIWANUKA..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA..... RESPONDENT

6TH JANUARY, 2020

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application for interim orders arising out of **Reference No.6 of 2019, Male Mabirizi K. Kiwanuka vs. The Attorney General of Uganda**, which challenges the enactment of the *Uganda Constitution (Amendment) Act 2018* for allegedly violating Articles 6 and 7 of the Treaty for the Establishment of the East African Community ('the Treaty'). The Application is grounded in Article 30 of the Treaty and Rules 1(2), 30(1), and 73 of the East African Court of Justice Rules of Procedure, 2013 ('the Rules').

2. Mr. Male Mabirizi K. Kiwanuka ('the Applicant') is a resident of the Republic of Uganda, a lawyer by profession and a self-styled civically active Ugandan; while the Attorney General of Uganda ('the Respondent') is sued in representative capacity as legal advisor to the Government of Uganda. The Application was opposed by the Respondent State.

3. The Applicant seeks the following orders:

> ***1) An interim order of injunction doth issue restraining the Government and State of the Republic of Uganda, its agencies, bodies, Commissions and any setting by whatever name called, from implementing any of the provisions of the Uganda Constitution (Amendment) Act 2018, and hence:***
>
> ***a. Halt the implementation of the Uganda Electoral Commission Strategic Plan and Road Map for 2020/2021 electoral period of any such similar/related plans;***

b. Halt all the processes and/or preparations for the 2020/2021 general elections including but not limited to undertaking any step in pursuit to electoral laws to align with the Uganda Constitution (Amendment)Act 2018, recruitment of employees, calling of bids and/or entering into contracts, gazetting and publishing of polling stations display and updating of the National Voters' Register, issuing of nomination, nomination of candidates, conducting of elections and declaration of election results until final determination of Reference No.6 of 2019 now pending before Court;

2) The Respondent pays the costs of this Application.

4. The Applicant was self-represented at the hearing. The Respondent, on the other hand, was represented by the Hon. Attorney General, Mr. William Byaruhanga, Deputy Attorney General, Hon. Mwesigwa Rukutana; Solicitor General, Mr. Francis Atoke; Acting Director of Civil Litigation, Ms. Christine Kahwa; Commissioner of Civil Litigation, Mr. Martin Mwambushya, and the following State Attorneys:

1. Mr. Philip Mwaka	-	Principal State Attorney
2. Mr. George Karemera	-	Principal State Attorney
3. Mr. Richard Adrole	-	Principal State Attorney
4. Mr. Geoffrey Madete	-	State Attorney
5. Ms. Imelda Adongo	-	State Attorney
6. Ms. Akello Susan Apira	-	State Attorney
7. Mr. Johnson Natuhwera	-	State Attorney
8. Mr. Allan Mukama	-	State Attorney
9. Mr. Sam Tusubira	-	State Attorney

B. **APPLICANT'S SUBMISSIONS**

5. Taking cue from Article 39 of the Treaty and Rule 73(1) of the Rules, the Applicant invited this Court to consider the notions of necessity

and desirability in making its decision as to whether or not to grant the Application. It was the Applicant's contention that the parameters for determining such necessity and desirability have been developed and set out by the Court. Mr. Mabirizi referred to this Court's decision in **British American Tobacco (U) Ltd vs. Attorney General of the Republic of Uganda, EACJ Application No.13 of 2017**, where it was held:

> **Court only needs to be satisfied that there is a serious question to be tried on merit. All that needs to be shown is that the claimant's cause has substance and reality.**

6. And Further:

> **Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which will 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.**

7. The Applicant submitted that in his Reference he had challenged the governance system in Uganda, and the exercise of executive, legislative and judicial authority with regard to the impugned constitutional amendment viz a viz Articles 6 and 7 of the Treaty. In his view, the Reference thus raises a serious question to be tried on its merit.

8. Having thus faulted the conduct of domestic courts in Uganda, the Applicant further referred us to the case of **Basajjabalaba & Another vs. The Attorney General of the Republic of Uganda, EACJ Application No.8 of 2018** where this Court held:

It is now a well established principle of International Law that State Parties may be held accountable for all actions of State Organs including Judicial Organs. The decisions under domestic Courts may be interrogated to determine their compliance with the express provisions of the Treaty.

9. The Applicant further submitted that he stood to suffer irreparable injury that cannot be compensated in damages if the Court declined to grant the orders sought and he emerged successful in the Reference. In his view, in matters of the rule of law, democracy and good governance, injury caused to an applicant cannot be adequately compensated in damages. To buttress this argument, the Applicant sought to rely on this Court's decision in the **British American Tobacco (U) Ltd vs. Attorney General of the Republic of Uganda** (supra) as well as the Ugandan case of **Tusingwire vs The Attorney General of Uganda, Constitutional Application No. 6 of 2013** to argue that, in any event, the circumstances of the matter were such that the balance of convenience was in the Applicant's favour. In conclusion, the Applicant opined that the Court had introduced an additional condition for the grant of interim reliefs, to wit, **'flagrant illegality'**. Citing this Court's decisions in **Francis Ngaruko vs. Attorney General of the Republic of Burundi, EACJ Application No.3 of 2019** and **Wani Santino Jada vs. Attorney of The Republic of South Sudan, EACJ Application No.8 of 2017**, it was the Applicant's submission that the implementation by the Respondent State of the *Uganda Constitution (Amendment) Act, 2018* would be a flagrant irregularity, which the Court should avert by granting the interim orders sought.

C. **RESPONDENT'S SUBMISSION'S**

10. On his part, the learned Solicitor General, on behalf of the Attorney General, argued that for the Court to exercise its power to grant interim orders under Article 39 of the Treaty, the line of authorities decided by the Court establish three (3) principles for consideration. The Authorities cited by the Respondent in that regard were **British American Tobacco (U) Ltd vs. Attorney General of the Republic of Uganda** (supra); **Mbidde Foundation Limited & Another vs. Secretary General of the East African Community, EACJ Application No.5 of 2014** and **Timothy Alvin Kahoho vs. Secretary General of the East African Community, EACJ Application No.5 of 2012**. On the strength of these authorities, the Respondent submitted that (a) the Applicant must show that he has a *prima facie* case with a probability of success; (b) the order should not be granted unless the Applicant might otherwise suffer an irreparable injury that cannot be compensated by an award in damages, and (c) where the Court was in doubt, the application should be decided on the balance of convenience.

11. It was the learned Solicitor General's contention that the Applicant had not established a *prima facie* case, the Reference being (in his view) frivolous and vexatious, and devoid of a serious triable issue. He argued that although all the matters raised by the Applicant in the Reference had been comprehensively and conclusively determined by the Supreme Court of Uganda; the Applicant sought to approach this Court as an appellate court and re- open issues that had been resolved by the apex court of the Respondent State. The learned Solicitor General sought to buffer his argument with this Court's decision in **East African Civil Society Organization Forum vs. the**

Attorney General of the Republic of Burundi, EACJ Reference No.2 of 2015.

12. With regard to the second condition for the grant of interim orders, it was submitted for the Respondent that the Applicant had failed to demonstrate the irreparable injury that he stood to suffer. The Solicitor General relied on this Court's reasoning in **Mbidde Foundation Ltd. & Another vs. Secretary General of the East African Community** (supra) where it was held that '**the applicant bore the burden of demonstrating that the grant of an injunction was necessary to protect them against irreparable injury.**' He further argued that by seeking an award of general damages in the Reference, the Applicant had essentially conceded that an award of damages was a remedy that would compensate him for any loss. Finally, it was argued that the balance of convenience lay in favour of the Respondent given that halting the electoral roadmap of Uganda, which is delineated in the impugned Act, would present dire consequences including constitutional anarchy.

D. **SUBMISSIONS IN REJOINDER**

13. In rejoinder, the Applicant maintained that the case law emanating from this Court did not require the demonstration of a *prima facie* case with a probability of success but, rather, that the Reference raised a serious question and demonstrated a cause of action that had substance and reality. He reiterated his earlier submission that his Reference raised issues that were distinct from those that had been presented in the national courts of Uganda, arguing that whereas the former dealt with constitutional breaches, the Reference raised Treaty infringements. He cited **Burundian Journalists' Union**

vs. Attorney General of Burundi, EACJ Reference No. 7 of 2013 in support of this contestation. Addressing us on the balance of convenience, the Applicant argued that the impugned Act having been challenged, it had been rendered 'uncertain' and it would be extremely prejudicial to him and the people of Uganda if the Respondent State implemented it.

E. COURT'S DETERMINATION

14. As was correctly submitted by both Parties, this Court does derive its powers to grant interim orders from Article 39 of the Treaty, which provides:

> **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.**

15. The Court has had occasion to clarify the considerations applied in exercise of its discretionary mandate to grant or deny interim orders. In the **British American Tobacco** case, to which we were extensively referred, it upheld a trifold test for the grant of interim orders as laid down in the case of **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 condition that should be satisfied in an application for the grant of interim orders. This position was reinforced in the recent case of **Francis Ngaruko vs. Attorney General of the Republic of Burundi, EACJ Application No. 3 of 2019** in the following terms:

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]

16. As this Court did clarify in **Mbidde Foundation Ltd & Another vs. Secretary General of the East African Community** (supra), the principles above evolved from the law as laid down in the Court of Appeal case of **Giella vs. Cassman Brown** (supra), which principles were subsequently modified in the House of Lords case of **American Cyanamid vs. Ethicon Limited (1975) AC 396**. This jurisprudential shift is further captured in the following text in *Blackstone's Civil Procedure, 2005* as cited with approval by this Court in **FORSC & Others vs. Attorney General of the Republic of Burundi and Another, EACJ Application No.16 of 2016**:

Therefore, the Court only needs to be satisfied that there is a serious question to be tried on merit. The result is that the Court is required to investigate the merits to a limited extent

---

[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.

only. All that needs to be shown is that the Claimant's cause of action has substance and reality.

17. It is now, therefore, the well-established jurisprudence of this Court that in the exercise of its powers to grant interim orders under Article 39 of the Treaty, the trifold principles set out in **Giella vs. Cassman Brown** (supra) remain the underpinning applicable law, subject to the modification of the first principle therein as spelt out in **American Cyanamid Company vs. Ethicon** (supra) and articulated in paragraph 16 hereof. Before we take leave of this legal position, we deem it necessary to dispel forthwith the notion advanced by Mr. Mabirizi that the Court had in the cases of **Francis Ngaruko vs. Attorney General of the Republic of Burundi** (supra) and **Wani Santino Jada vs. Attorney General of The Republic of South Sudan** (supra) introduced another condition, to wit, flagrant injustice. That consideration was only applied to applications for interim orders *ex parte*. It is not applicable to applications for interim orders *inter partes*, such as the present Application.

18. Turning to the matter before us, as has severally been held by this Court, within the context of EAC Community law a cause of action demonstrating the prevalence of a serious triable issue would have been established where the Reference raises a legitimate legal question within the precincts of the Court's legal regime as spelt out in Article 30(1); more specifically, where 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 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).*

19. In **American Cyanamid Company vs. Ethicon Limited** (supra) it was opined that a frivolous or vexatious claim would negate the incidence of a serious question to be tried. It was held:

> **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.***

20. In the instant case, it was argued for the Respondent that the **Reference No. 6 of 2019** was indeed frivolous and vexatious. With respect, we are unable to agree with this preposition for reasons we do expound forthwith. 'Frivolous' and 'vexatious' suits are defined in **Black's Law Dictionary (10th Edition)** as follows[3]:

> Frivolous Suit:
>
> **A law suit having no legal basis, often filed to harass or extort money from the defendant.**
>
> Vexatious Suit:
>
> **A law suit instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued.**

21. On the face of it, subject to a determination of the merits thereof at trial, we do not find **Reference No.6 of 2019** to abide the foregoing definitions. It seems to us that in a fairly dramatic manner, the Applicant therein takes issue with the legality of the actions, directions

[3] At pages1663 and 1796 respectively.

and decisions of all the 3 branches of government in Uganda in the promulgation of the impugned law, questioning the compliance of the said acts and the resultant law with Articles 6(d) and 7(2) of the Treaty. This brings to bear the question as to whether the impugned law, including the process of making the same, was in fact consistent with the Respondent State's obligations under the Treaty. Clearly, that poses a legal question that invokes the Court's interpretative mandate as encapsulated in Article 27(1) of the Treaty.

22. With regard to the issue of the Court's jurisdiction that was also raised by the Respondent, first and foremost, *jurisdiction* is a separate and distinct principle from the notion of a *cause of action* as known at law. For present purposes, it is the existence (on the face of the record) of a cause of action in the Reference that would denote a serious triable issue therein. Secondly, and perhaps more importantly, the question of the Court's jurisdiction has been raised in the Respondent's Answer to the Reference. It is thus an issue for determination at trial. We would therefore refrain from succumbing to an intrinsic interrogation thereof to forestall its pre-emption without the benefit of detailed arguments by either party. Suffice to note at this stage, nonetheless, that it seems to us that the national courts enjoy a distinct and distinguishable jurisdiction from that demarcated to this Court in Article 27(1) of the Treaty. This Court is clothed with exclusive jurisdiction in matters pertaining to Treaty interpretation.

23. The upshot of our interrogation of the first condition for the grant of interim orders by this Court is that the present Application does present a serious triable issue. We now turn to consider whether the Applicant stands to suffer irreparable injury that would not be adequately compensated in damages.

24. Ground Number 8 of the Application reads as follows:

> *The Applicant shall suffer irreparable damage if the impugned Act is implemented since subjecting him and Ugandans to a law whose process is under challenge for having infringed on the core principles of Rule of Law, Democracy, Governance and universally accepted Standards of Human Rights cannot be adequately compensated in damages.*

25. Further, in paragraph 29 of his Affidavit in support of the Application, the Applicant avers:

> *That I shall suffer irreparable damage if the impugned Act is implemented since subjecting me and Ugandans to a law whose process is under challenge in the Court for infringing on the core principles of Rule of Law, Democratic Governance and universally accept standards of Human Rights cannot be adequately compensated by damages.*

26. In **Timothy Alvin Kahoho** (supra), this Court held that **'injury whether irreparable or reparable cannot be presumed but must be proved by evidence.**' Similarly, in **Mbidde Foundation Ltd. & Another vs. Secretary General to the EAC** (supra) this Court held that the applicant therein **'bore the burden of demonstrating that the grant of an injunction was necessary to protect them against irreparable injury.'**

27. We have carefully considered the material before us in the present Application. In the instant case, beyond the general averments in the Notice of Motion and Supporting Affidavit, the Applicant does not offer the Court any more precise indication of the irreparable damage that he stands to suffer. He did advance the disingenuous argument that

once a law is contested it immediately loses its legality and gets subjugated into a mere proposal. Without belabouring this point, that argument would negate outright the foundational basis of a Reference, such as the present one, that seeks the annulment of an impugned law. If, as proposed by Mr. Mabirizi, the said law has since lost its legality this Court would be reluctant to engage in a redundant charade of a judicial process. Courts do not sit in vain.

28. Be that as it may, in the **British American Tobacco Case** (supra) this Court cited with approval a passage from **Blackstone's Civil Practice, 2005** that damages would be inadequate where:

> **(a) The defendant is unlikely to be able to pay the sum likely to be awarded at trial;**
> **(b) The wrong is irreparable e.g. loss of the right to vote;**
> **(c) The damage is non-pecuniary e.g. libel, nuisance, trade secrets;**
> **(d) There is no available market;**
> **(e) Damage would be difficult to assess. Examples are loss of good will, disruption of business and where the Defendant's conduct has the effect of killing off a business before it is established.**

29. It was the Applicant's contention that the above position suggests that damages arising out of matters of rule of law, democracy and good governance are matters that cannot be atoned by way of damages. With utmost respect, that argument has no grounding in the jurisprudence of the Court. On the contrary, on the basis of paragraph (b) above, it seems to us that disenfranchising an electorate by staying an electoral process could present an

irreparable loss to the Respondent State. In any event, in terms of the Court's exposition in **Mbidde Foundation & Another** (supra), the Applicant cannot obviate the obligation upon him to demonstrate the irreparable injury he (or anyone else) stands to suffer if the impugned law is implemented. In our considered view, this duty was not satisfactorily discharged. We are not satisfied, therefore, that the Applicant does stand to suffer irreparable injury.

30. Our finding on the issue of irreparable injury would dispose of the present Application. However, this being a matter of significant public interest to citizens of the Republic of Uganda, as well indeed, to all residents of the East African Community, we deem it appropriate that we interrogate albeit briefly, the question on where the balance of convenience lies in this Application.

31. In **Timothy Alvin Kahoho** (supra) this Court stated that **'balance of convenience means the prejudice to the Applicant if his injunction is refused weighed against the prejudice to the Respondent if the order is granted.'** Similarly, 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 AIIER 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]

32. As we have observed earlier herein, the effect to the electoral process of granting the interim orders sought cannot be ignored. From the material on record, it seems abundantly clear to us that were this Court to grant the orders sought in the Application, the effect would be to halt all preparations for and processes designed to lead to the General Elections in the Respondent State that are scheduled for 2021. This would include putting a stop to processes intended to align all electoral laws and regulations to the impugned *Uganda Constitution (Amendment) Act, 2018*. It is clear that the electoral timetable is quite constrained, and to halt any part of it for any length of time would certainly throw the electoral cycle into disarray, with obvious political, social and economic not to mention Constitutional ramifications. That is the prejudice that would be suffered by the Respondent. On the other hand, should the Court decline to grant the orders sought and the Applicant subsequently succeeds in the Reference, huge levels of public resources would have been effectively spent in vain, causing him and other Ugandan taxpayers' significant monetary loss.

33. In the **American Cyanamid** case,[5] the court further considered the balance of convenience on the basis of the status quo sought to be preserved. It held:

> **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.**

---

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

34. Applying that judicial counsel to the present Application, even if we considered the prejudice to be suffered by either Party to be evenly balanced, it would be prudent to preserve the status quo. It is apparent from the material on record that the implementation of the impugned Act and the preparation for the 2021 General Election are well underway. That is the prevailing status quo. Consequently, mindful as we are of the legitimate concern that the Applicant may have as regards the financial cost incidental to the implementation of an impugned law; we would nonetheless exercise our discretion to decline to grant the interim orders sought given their far-reaching repercussions to the constitutional order of the Respondent State. We take the view that the judicious and expeditious determination of the substantive Reference would redress the Applicant's concerns about the legality of the impugned law viz a viz the Treaty.

F. **CONCLUSION**

35. In the result, and for the reasons that we have set out hereinabove, we do hereby dismiss the Application. In exercise of our discretion under Rule 111(1) of the Court's Rules, we order that the costs of this Application shall abide the outcome of the Reference. We direct that the Reference be fixed for hearing at the earliest opportunity.

It is so ordered.

Dated, signed and delivered at Arusha this 6th Day of February, 2020.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Dr. Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE

Hon. Justice Audace Ngiye
JUDGE

Hon. Justice Dr Cahrles O. Nyawello
JUDGE

Hon. Justice Charles Nyachae
JUDGE