IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, Fakihi A. Jundu, Audace Ngiye & Charles O. Nyawello, J J)

APPLICATION NO. 16 OF 2016

(Arising from Reference No. 12 of 2016)

1. FORUM POUR LE RENFORCEMENT DE LA SOCIETE CIVILE
2. ACTION DES CHRETIENS POU L'ABOLITION DE LA TORTURE
3. ASSOCIATION BURUNDAISE POUR LA PROTECTION DES DROITS HUMAINS ET DES PERSONNES DETENUES
4. FORUM POUR LA CONSCIENCE ET LE DEVELOPPEMENT
5. RESEAU DES CITOYENS PROBES ..... APPLICANTS

VERSUS

1. THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI
2. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY..... RESPONDENTS

23RD JANUARY 2018

RULING OF THE COURT

Introduction

1. This is an Application by five (5) non-profit, civil society organisations for interim orders against the Attorney General of the Republic of Burundi ('the First Respondent') and the Secretary General of the East African Community ('the Second Respondent') pursuant to Article 39 of the Treaty for the Establishment of the East African Community ('the Treaty) and Rule 73 of this Court's Rules of Procedure.
2. The organisations in question are Forum pour le Renforcement de la Societe Civile (FORSC); Action des Chretiens pour l'Abolition de la Torture (ACAT); Association Burundaise pour la Protection des Droits Humains et des Personnes Detenues (APRODH); Forum pour la Conscience et le Developpement (FOCODE), and Reseau des Citoyens Probes (RCP), (hereinafter referred to collectively as 'the Applicants').

3. The Applicants were banned by the Minister of Home Affairs and their bank accounts frozen by the Prosecutor General pursuant to *Ministerial Ordinance No. 530/1922*, whereupon they filed **Reference No. 16 of 2017** challenging the legality of the Ordinance for violating provisions of the Burundi *Presidential Decree No1/11 of 1992*, as well as the principle of good governance.

4. The Applicants did also file the present Application that *inter alia* seeks a stay of the operation of the Ordinance, a cancellation thereof by the Minister of Home Affairs and the quashing of the Prosecutor General's decision to freeze the Applicants' bank accounts.

5. At the hearing of the Application, the Applicants were represented by Mr. Donald Deya, while Mr. Nestor Kayobera and Ms. Brenda Ntihinyurwa appeared for the First and Second Respondents respectively.

Submissions

6. Learned Counsel for the Applicants relied on the principles governing the grant of interim orders in this Court as stated in the case of **Giella vs. Cassman Brown (1973) EA 258** and re-echoed by this Court in **Prof. Peter Anyang' Nyongo & 10 Others vs. The Attorney General of the Republic of Kenya & 3 Others, EACJ Application No. 1 of 2006** to argue, first, that in so far as the Applicants were banned and subsequently purportedly suspended in contravention of Articles 30, 36, 37 and 38 of the *Presidential Decree No. 1/11 of 1982*, the law governing the operations of civil society organisations in Burundi, a *prima facie* case had been established under Articles 6(d) and 7(2) of the Treaty. Mr. Deya sought to discredit any contrary averments in the First Respondent's Affidavit in Reply for lacking proof and specificity.

7. Secondly, with regard to the principle of irreparable injury, we understood Mr. Deya to argue that the leaders of the applicant organisations were in exile, in their absence the organisations' work hung in the balance and that void to their clientele could not be compensated by an award of damages. He countered the First Respondent's attestations that the Applicants' activities had destabilised Burundi and cases arising from their activities as such had been filed by the Government of Burundi, with the submission that the Applicants conducted their work within well established global and regional parameters governing human rights defenders and, in any event, the First Respondent had not furnished specific proof in support of its allegations.

8. Finally, it was argued for the Applicants that following their ban and the freezing of their accounts they lacked the *locus standi* or the means to operate therefore the balance of convenience in this matter lay with them. It was learned Counsel's contention that, contrary to the First Respondent's unproven allegations about their having destabilised the country, the Applicants advocate for constitutionalism, democracy, good governance, the rule of law and the protections of human rights in Burundi.

9. We understood him to further contend that the Respondents stood to suffer no inconvenience or injury given that if the Applicants lost the substantive Reference the ban in issue presently would simply be reinstated by this Court.

Respondents' Submissions

10. In a very brief response to the Applicants' submissions, it was argued for the First Respondent that the Applicants had been banned because they had acted beyond their mandate, and the present Application lacked merit and should be dismissed to pave way for proof by the First Respondent vide the Reference of the violations by the Applicants of their own objectives.

11. In the same vein, the Counsel for the Second Respondent briefly argued that there was no reference whatsoever to her client in the Application therefore there was no cause of action against that office or *prima facie* case established by the Applicants in that regard. Consequently, it was the contention that the Application fell short of the grounds for the grant of interim injunctions as against the Second Respondent and should be dismissed.

Submissions in Reply

12. In reply, Mr. Deya reiterated his earlier submission that there was no proof of any of the allegations made by the First Respondents in support of the Applicants' ban. He maintained his argument that a prima facie case had been established by virtue of the Applicants having been banned and their accounts frozen without due process, actions that could not (in his view) be atoned by damages in the event that the Applicants were successful in the Reference. On the other hand, Mr. Deya did concede that the Applicants had no cause of action against the Second Respondent for purposes of the present Application, neither was the Application applicable to that Party.

Court's Determination

13. The grant of interim orders by this Court 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.**

14. This Court has pronounced itself on numerous applications for the grant of interim orders. In **Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya** (supra) and **Timothy Alvin Kahoho vs. The Secretary General of the EAC, EACJ Application No. 5 of 2012** the renown principles for the grant of temporary injunctions, as laid out in **Giella vs. Cassman Brown** (supra), were underscored as follows:

> **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.**

15. On the other hand, in **Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community Consolidated Applications 5 & 10 of 2014** the foregoing legal position was juxtaposed against the position advanced in the case of **American Cyanamid Company vs. Ethicon Limited (1975) AC 396**, in which the previous emphasis on a *prima facie* case had been discounted in the following terms:

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. 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.

16. It would appear that the principles for the grant of interim orders have since evolved, with emphasis presently on the judicial approach advanced in **American Cyanamid Company vs. Ethicon Limited** (supra). This could not be stated any better than it was succintly espoused in ***Blackstone's Civil Practice 2005*, para. 37.19 – 37.20, pp. 392, 393** as follows:

In *American Cyanamid Company vs. Ethicon Limited (1975) AC 396* Lord Diplock laid down guidelines on how the court's discretion to grant interim injunctions should be exercised in the usual types of cases. Although these guidelines are of great authority, they must not be read as if they were statutory provisions, and in practice they are applied with some degree of flexibility. However, it is not unknown for judges to give reasoned judgments in interim injunction cases following the sequence of steps set out by Lord Diplock. The court must also be careful to apply the overriding objective, and to grant an injunction only if it is 'just and convenient. .... Before *American Cyanamid Company vs. Ethicon Limited (1975) AC 396*, the courts would only grant an interim injunction if the applicant could establish a prima facie case on the merits. Consequently, the courts needed to consider the respective merits of the parties' cases in

some detail... Therefore, the court only needs to be satisfied that there is a serious question to be tried on the merits. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. *(Our emphasis)*

17. Meanwhile, a serious triable issue has been held to have been established where the substantive suit underlying the interlocutory application discloses a cause of action. *See* ***The Siskina (1979) AC 210.***

18. We stand most respectfully persuaded by the foregoing summation of current judicial practice on the grant of interlocutory injunctions. For present purposes, therefore, we take the view that should the Reference be found to raise a legitimate legal question under this Court's legal regime, a serious triable issue would have been duly established. It is to that legal regime that we now revert. The circumstances that may give rise to a cause of action before this Court are delineated in Article 30(1) of the Treaty as follows:

> **Subject to the provisions of Article 27 of this Treaty** (on the Court's jurisdiction), **any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is *unlawful or is an infringement of the provisions of the Treaty*.** *(Our emphasis)*

19. In our considered view, Article 30(1) demarcates two (2) scenarios that would give rise to a cause of action: first, the *illegality* of a law of or action[1] by a Partner State or EAC Institution; secondly, the *infringement of any Treaty provision* by a law enacted by a Partner State or EAC Institution, or of an action, directive or decision made by

[1] The term 'law' in this context includes regulations as encapsulated in Article 30(1), while the term 'action' in includes 'directives and decisions' as stated therein too.

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them. The operative words would be the illegality *per se* of the law or action, or their infringement of a Treaty provision. This position is clearly articulated in **Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 11 of 2013**, where it was held:

> **Therefore, for a matter to be justiciable before this Court the subject matter in question must be an Act or statute, or a regulation, directive, decision or action. Further, it must be one, the legality of which is in issue viz the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty.**

20. The question as to when a Reference is deemed to disclose a cause of action under Article 30(1) of the Treaty was specifically addressed in the case of **Sitenda Sebalu vs. The Secretary General of the East African Community & Others EACJ Ref. No. 1 of 2010** as follows:

> **In the instant case, like in the ANYANG' NYONG'O case (supra), the Applicant is not seeking a remedy for violation of his common law rights but has brought *an action for interpretation and enforcement of provisions of the Treaty* through the requisite procedure provided by the Treaty. In the premise, we have no hesitation in reiterating what this Court said in Anyang' Nyong'o (supra) about the import of Article 30(1) of the Treaty, namely, that a claimant is not required to show a right or interest that was infringed and/ or damage that was suffered as a consequence of the matter complained of in the Reference in question. *It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner.*** *(Our emphasis)*

21. We respectfully abide by that decision, but would hasten to add a second scenario under which a cause of action would arise, namely, where it is alleged that the matter complained of violates the national law of a Partner State or is otherwise deemed unlawful.

22. It is apparent on the face of the record that the Reference does indeed raise a legal question as to the legality of Ministerial Ordinance No. 530/1922 viz Burundian national laws, as well as the Treaty. Quite clearly the Reference raises questions as to the Ordinance's compliance with the principles of good governance and rule of law that are encapsulated in Article 6(d) and 7(2) of the Treaty. It is trite law in EAC Community Law that non-compliance with a Partner State's national laws amounts to a violation of the principle of the rule of law enshrined in Article 6(d) and is, to that extent, a violation of the Treaty. *See* ***Plaxeda Rugumba vs. The Attorney General of the Republic of Rwanda, EACJ Ref. No. 8 of 2010*** *and* ***Samuel Mukira Mohochi vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 5 of 2011***. Consequently, it seems abundantly clear to us that the Reference does indeed raise pertinent legal questions for interrogation by the Court. In the result, we are satisfied that the present Application does raise a serious triable issue. We so hold.

23. With regard to the question of irreparable injury, it was Mr. Deya's contention that the absence of the Applicants' leadership had left their work and clientele unattended to. The Applicants' pleadings did allude to their ban leading to the inhibition of their freedom of association and a disruption of their right to execute their mandate as human rights defenders. It was the Applicants' affidavit evidence that they were leading human rights organisations in Burundi, collaborating with international human rights and accountability mechanisms such as the International Criminal Court (ICC) in documenting human rights abuses and identifying their perpetrators, and thus their ban had impacted negatively on the said international organisations' work.

Conversely, the First Respondent attested to the Applicants having been behind the insurrection and attempted coup that had happened in Burundi in 2015, accusing them of destabilising the country and fanning hatred within the population.

24. Quite clearly, the Applicants' ban would have disrupted and stopped all their activities. The question would be whether the activities disrupted by the ban can be compensated by an award of damages. It is now well established law that 'if 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***.

25. Further, in ***Blackstone's Civil Practice 2005, para. 37.22, p. 394*** it was opined 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) **Damages would be difficult to assess. Examples are loss of goodwill, disruption of business and where the defendant's conduct has the effect of killing off a business before it is established.**

26. We have carefully considered the Application and the Affidavit in support thereof. First and foremost, it was neither pleaded, attested to nor argued before us that the Respondents were unable to recompense the Applicants in damages should the circumstances so dictate. As was rightly opined in **Giella vs. Cassman Brown** (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.**' Clearly

therefore, had it been established before us that the Respondents were not in a position to recompense the Applicants for any injury suffered as a result of the actions complained of it would have been an exercise in futility for us to interrogate the merits of this issue. The inability by a respondent to recompense an applicant for injury s/he stands to suffer pursuant to a trial would most certainly render moot the question, at this stage of the proceedings, of the adequacy of damages to recompense such loss.

27. Turning to the merits of this issue, in a nutshell it was pleaded in the Application that the ban on the Applicants' activities had denied them freedom of association and assembly, as well as disrupted their role as human rights defenders. However, the Applicants' averments were not supported by the evidence adduced. An Affidavit in support of the Application was deponed by one Pierre Claver Mbonimpa, the Founding President of the Third Applicant, the gist of which was that the decision to ban the Applicants' operations and freeze their bank accounts flouted Burundian domestic law, as well as the Treaty; that following the Applicants' ban, international human rights and accountability mechanisms with which they had been working to bring to book the perpetuators of human rights abuses in Burundi stood suffer tremendous difficulties in the realisation of their mandate and, finally, that the loss that the Applicants had incurred could not be adequately compensated by an award of damages. It seems to us that the legality of the First Respondent's decision goes to the merits of the substantive Reference and is not helpful in itself to the Applicants' assertion that they had suffered irreparable injury. Neither, in the same vein, can the impact of the ban on the activities of international human rights and accountability mechanisms with which the Applicants ordinarily work be equated to irreparable injury suffered by the Applicants themselves. We find nothing in the supporting Affidavit that establishes the specific injury the Applicants stood to suffer, let alone whether or not such injury could or could not be conmpensated by an award of damages.

28. Mr. Deya did argue that the Applicants' 'principals' were in exile purportedly as a result of the decision in issue in this Application, and the Applicants were currently in limbo and unable to operate given their ban and the freezing of their accounts. He did also allude to the Applicants' clientele suffering the brunt of their ban by being denied their services. Suffice to note that these statements from the Bar were not borne out by the evidence on record. No mention whatsoever was made in the Affidavit in support of the Application that any 'principals' were in exile, neither was any averment made therein with regard to the effect of the ban and freezing of accounts on the Applicants. The effects cited by learned Counsel could very well have been experienced by the Applicants but a finding of fact on an issue so critical to an application such as the one before us presently can only be arrived at on the basis of evidence properly adduced before the Court, and not on the basis of statements from the Bar, however plausible or logical they might be. We do find, therefore, that it was not established before us that the Applicants stood to suffer the injury alleged in the Application.

29. Consequently, in the absence of any averment of the inability of the Respondents to recompense the Applicants for any injury they might have suffered as a result of the actions complained of herein and in the absence of the proof of any such injury, we are not satisfied as to the inadequacy of damages as a relief to the Applicants in the event that they emerge successful in the Reference. We are duly persuaded by the following preposition in **American Cyanamid Company vs. Ethicon Limited** (supra) on when the need to consider the balance of probabilities would arise:

> **It is where there is doubt as to the adequacy of the respective remedies in damages available as to either party or to both, that the question of balance of convenience arises.**

30. In the instant case where no such doubt has been established, it cannot be suggested that the Applicants would suffer irreparable injury. Suffice to note that general damages are '**given for a loss that is incapable of precise estimation such as pain and**

suffering.'[2] In the absence of satisfactory proof to the contrary, we take the view that any pain and suffering the Applicants might reasonably be expected to experience would be adequately atoned by an award of damages.

Conclusion

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

31. It is so ordered.

Dated, signed and delivered at Arusha this 23rd day of January, 2018.

HON. LADY JUSTICE MONICA K. MUGENYI
PRINCIPAL JUDGE

HON. DR. JUSTICE FAUSTIN NTEZILYAYO
JUDGE

HON. JUSTICE FAKIHI A. JUNDU
JUDGE

HON. JUSTICE AUDACE NGIYE
JUDGE

HON. DR. JUSTICE CHARLES O. NYAWELLO
JUDGE

[2] See ***Oxford Dictionary of Law***, Oxford University Press, 2009 (7th Ed.), p.246