IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

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

APPLICATION NO. 23 OF 2020

(Arising from Application No. 6 of 2020 & Reference No. 2 of 2019)

THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA ..... APPLICANT

VERSUS

STEPHEN KALALI ..... RESPONDENT

26TH NOVEMBER 2020

RULING OF THE COURT

A. Background

1. On 11th November 2019, a scheduling conference was held in respect of **Reference No. 2 of 2019** and, with due consultation with both parties, they were directed to file additional affidavits in the matter as follows: the applicant to file and serve his affidavits by or on 25th November 2019; the respondent state to file and serve its affidavits by or on 9th December 2019, and any affidavit in rejoinder to be filed and served by or on 23rd December 2019. The applicant therein did file his additional affidavit within time but served it upon the respondent ten (10) days late. Conversely, the respondent did not file its additional affidavits until 14th January 2020, when it lodged them in the Court alongside its written submissions; and only served them upon opposite party in February 2020.

2. After the filing of written submissions by both parties, learned Respondent Counsel lodged **Application No. 1 of 2020** in this Court seeking the extension of time within which to file his client's additional affidavits. In essence, he sought to file additional affidavits alongside his own written submissions. The Application was disallowed principally for the following reasons. First, it was considered procedurally improper for learned counsel with sole personal conduct of the case to purport to depose the affidavit in support of the application, or seek to file additional affidavits after submissions had been filed. Secondly, the Court was of the view that learned Counsel had not furnished sufficient reason for his failure to comply with its orders of 11th November 2019.

3. The Applicant did thereupon lodge **Application No. 6 of 2020** in this Court that essentially seeks to have the rejected additional affidavit evidence duly admitted on the Court record, albeit having corrected the anomaly of counsel with sole conduct of the case doubling as the deponent of the supporting affidavit. Before that Application could be heard, the same party filed **Application No. 23 of 2020** seeking to have **Reference No. 2 of 2019** and all the applications thereunder heard by a full bench on account of its being a matter of public importance and the complexity of the laws entailed. To date, the only application filed under the said Reference is **Application No. 6 of 2020**.

4. The Respondent opposed the Application, and did depose an affidavit in reply to that effect that was lodged in this Court on 4th September 2020. In a nutshell, it was his evidence that the Application was brought in bad faith and is an abuse of court process; the Court has the discretion to constitute 3- or 5-judge benches depending on the availability of judges; the Application does not entail the interpretation of complex legislation as portended by the Applicant, and whereas the Applicant stands to suffer no prejudice if the Application is not granted, the Respondent stands to suffer the cost of a retrial should the Application be allowed. In his view, the ends of justice would best be served by the expeditious disposal of **Reference No. 2 of 2019**.

5. At the hearing thereof, and having heard both Parties therein, the Court dismissed **Application No. 23 of 2020** and reserved its reasons therefore as is its prerogative under Rule 79(2) of the East African Court of Justice Rules, 2019 ('the Court's Rules of Procedure'). The Applicant was represented at the hearing by Mr. Nicholas Ntarugera and Ms. Specioza Kabibi (both Senior State

Attorneys), while Mssrs. Jasphert Mutesasira, Joseph Geoffrey Mutyaba and Richard Wananda appeared for the Respondent.

B. **Applicant's Submissions**

6. Learned State Counsel argued that **Reference No. 2 of 2019** and all the applications emanating therefrom should be heard by a full bench of the Court. It was his contention that considering the importance and gravity of the matter, particularly the cited Reference, this is a case of public importance. In his view, in so far as the case had supposedly attracted the attention of the whole population of this Region and beyond; involves the sovereignty of the Republic of Rwanda and the national security thereof, it does invoke public importance and public interest.

7. Mr. Ntarugera further opined that the case involves complex laws and legislations, so that the Court's determination of **Application No. 6 of 2020** was critical to the determination of the Reference. He urged that the Court first makes a ruling on this **Application No.23 of 2020**, prior to the determination of **Application No.6 of 2020**, emphasizing that the latter application should be heard by a full Bench otherwise his client would be prejudiced in the Reference yet better results and 'real justice' were expected therein. In his estimation, since the Rules made provision for a full bench **Application No. 6 of 2020** should be determined on that basis.

8. It was argued that whereas Rule 69 of the Court's Rules of Procedure provides for corams of three (3) or five (5) judges, the same Rule makes reference to a full bench thus suggesting that a coram is different from a full bench. In that regard, the definition of 'full bench' was cited to suggest that a full bench entails all the judges of a court.

C. **Respondent's Submissions**

9. It was the Respondent's contention that the attestation in paragraph 2 of the affidavit in support of the Application underscored the Applicant's intention to delay the court proceedings in **Reference No. 2 of 2019** until a judge from the Applicant State had been appointed and included on the bench. The said paragraph reads:

> *That I have read the content in this notice of motion filed by the Applicant seeking that Reference No. 02 of 2019 pending before this Honourable Court and Application No. 06 of 2020 arising from it therein, be heard and determined by a full bench after the appointment of a Rwandan judge by the Summit.*

10. Learned Respondent Counsel complained that this *modus operandi* was unreasonable and cited the maxim *'justice delayed is justice denied'* to support his contention that this course of action was intended to impede the expeditious adjudication of the matter. He further argued that in so far as the Applicant had participated in the scheduling conference in the Reference without raising issues to with the Court coram, the doctrine of estoppel would forestall any attempt to raise the issue at this stage.

D. **Submissions in Reply**

11. In reply, Ms. Kabibi maintained that this Application was not intended to cause delay but, rather, was lodged in the interests of justice. She opined that given how pivotal **Application No. 6 of 2020** was to the determination of **Reference No. 2 of 2019**, presenting the Applicant with the opportunity to introduce evidence that would guide

the Court in its determination of the Reference; the said Application would engender a fair and just decision and should be determined by a full bench *'so that there is a blend of legal brains from different Judges'.*

E. **Court's Determination**

12. We carefully listened to both parties in this Application. It was brought under the substantive provisions of Rule 69(1) of the Court's Rules of Procedure. For ease of reference, we reproduce Rule 69 in its entirety.

> **1. The quorum of the Court shall be three (3) or five (5) Judges, one of whom shall be the Principal Judge or Deputy Principal Judge:-**
>
> **Provided that having regard to the public importance of the matter or to any conflict or other complexity in the law applicable, the Principal Judge or on application by any party, the Court may direct such matter to be heard and determined by a *Full Bench*.**
>
> **2. The following interlocutory matters may be dealt with and determined by a single Judge:-**
>
> **a. Applications for extension of time prescribed by these Rules or by the Court;**
> **b. Applications for an order for substituted service;**
> **c. Applications for examining a serving officer;**
> **d. Applications for leave to amend pleadings, and**
> **e. Applications for leave to lodge one or more supplementary affidavits under Rules 52(6) and 54(2).**
>
> **3. A party dissatisfied with a decision of a single Judge may apply informally to the Judge at the time when the decision is given or by writing to the Registrar within seven (7) days after the decision of the Judge to have it varied, discharged or reversed by a *Full Court*.**

4. **At the hearing by the *Full Court* of an application previously decided by a single Judge, no additional evidence shall be allowed.**

13. The matters raised in the present Application are in *pari materia* with the issues posed by the earlier **Application No. 22 of 2020** that was lodged in this Court by the same Applicant. That application has since been determined by this Court therefore the doctrine of *stare decesis* would come to bear in the Court's determination of the present Application.

14. *Stare decesis* is '**a maxim expressing the underlying basis of the doctrine of precedent, i.e that it is necessary to abide by former precedents when the same points arise again in litigation.**'[1] Black's Law Dictionary[2] similarly defines it as '**the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.**' Simply put therefore, the doctrine of *stare decesis* binds courts to abide by legal precedents set by previous decisions.

15. In **Application No. 22 of 2020** the following definition of the term *full bench* was adopted:

> **A Full Court (less formally, a full bench) is a court of law with a greater than normal number of judges. For a court which is usually presided over by one judge, a Full Court has three (or more) judges; for a court which, like many appellate courts, normally sits as a bench of three**

[1] See definition of *stare decesis* in **A Dictionary of Law**, Oxford University Press, 7th Edition, p. 524.
[2] 8th Edition, p. 1443.

judges, a Full Court has a bench of five (or more) judges.[3]

16. With specific reference to the First Instance Division of this Court, which is manned by a total of 6 judges presently, a full bench was expounded as follows:

> **It thus becomes apparent that a Full Bench of the First Instance Division of the Court would comprise of five, seven or nine judges of that Division as the Court would determine. In the instant case, where the First Instance Division is comprised of a total number of 6 judges, we take the decided view that 5 judges would constitute the Full Bench of the Division.**[4]

17. Nonetheless, noting the inter-relation between the notion of judicial economy and the good governance principle enshrined in the Treaty, it was observed:

> **We do take judicial notice of the fact that the judicial resources available to the Court in terms of judges are quite constrained, the First Instance Division having been down to four (4) out of the requisite 6 judges as at the date the present Application was heard. ... In that context, not only would it have been practically impossible to constitute a full bench to hear *Application No. 5 of 2020* as sought by the Applicant; more importantly, given the provision for a 3-judge coram under Article 69(1), insistence on a 5-man bench unduly**

[3] EACJ Application No. 22 of 2020, para. 21.
[4] Ibid. at para. 24.

and unnecessarily obviates the notion of judicial economy. Such an eventuality would be inimical to the principle of good governance that this Court is enjoined to uphold under Articles 6(d) and 7(2) of the Treaty.[5]

18. On that premise, therefore, the Court was disinclined to grant the application for a Full Bench as sought therein. We do abide by that decision, and hereby decline to grant the present Application on the same premise.

19. In any event, a determination of the present Application would not salvage the Applicant's case for the reasons we expound below. First, the Applicant urges the Court to constitute a full bench for purposes of **Application No. 6 of 2020** on account of its vitality to the determination of **Reference No. 2 of 2019**. It was argued that the issues that arise from the Reference are of immense public importance and interest regionally in so far as they pertain to the sovereignty and national security of the Republic of Rwanda. Hence it was critical that **Application No. 6 of 2020** be determined by a full bench so as to guarantee a fair trial and just result in a Reference that supposedly hinges on complex (national) laws. The emphasis on the constitution of a full bench after the appointment of a Rwandan judge to the Court raises the inference that the present Application for the constitution of a full bench is pegged on the inclusion on such a coram of a judge that was nominated for appointment by that Partner State.

20. We are constrained to observe that not only does the Applicant's stance in that regard run contrary to existing legal precedent

[5] EACJ Application No. 22 of 2020, pp. 12, 13, paras. 27, 28. See also **Basajjabalaba & Another vs. The Attorney General of Uganda, EACJ Reference No. 8 of 2018, pp. ....., paras. .....**

established by the Court, it offends the *United Nations (UN) Basic Principles on the Independence of the Judiciary*, which enjoins governments to recognise and engender the institutional independence of judiciaries.

21. With regard to established legal precedent, we would restate our decision in **Application No. 22 of 2020**, citing with approval **Advisory Opinion No. 1 of 2015: A Request by the Council of Ministers of the East African Community**, where it was observed:

> **The Court's judges being an integral part of the Community's Executive leadership (as are the Secretary General and Deputy Secretary Generals), similarly assume the status of international civil servants upon their appointment and are no longer beholden to any single Partner State in the execution of their judicial duties.**

22. The foregoing observation is indeed in tandem with international best practice on judicial conduct as encapsulated in the *Bangalore Principles of Judicial Conduct, 2002* ('the Bangalore Principles'), Principle 1 of which underscores the independence of judges from any form of external influence.

23. Perhaps more importantly, Basic Principle 1 of the *UN Basic Principles on the Independence of the Judiciary* obligates UN Member States to respect the institutional independence of the Judiciary in the following terms:

> **The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law**

of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

24. Against that background, the Applicant's covert attempt to influence the coram of the Court with the inclusion of a preferred judge of choice does, with respect, smirk of such interference with the Court's independence as would defeat the notion of a fair trial. Otherwise, we would be hard pressed to appreciate how the inclusion of a judge from the Applicant State would entrench a fairer trial and a more just result than would other judges of the Court.

25. Our consternation is compounded by the fact that by virtue of Basic Principle 2 of the *UN Basic Principles on the Independence of the Judiciary*, judges of any judicial branch of the State (as is the Court within the EAC body politic) are expected to '**decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressure, threats or interferences, direct or indirect, from any quarter or for any reason**.' Moreover, Article 24(1) of the Treaty prescribes such onerous qualifications and competencies for persons appointed as judges of the Court as should negate any innuendos of inefficiency or inability to interpret any set of laws, however complex.

26. Consequently, we do abide by our decision in **Application No. 22 of 2020** as follows:

The fact of the matter is that the judges of the Court are international public officials that serve at the behest and in the interests of the Community; beholden to no

particular Partner State and representing none, and with utmost fidelity to the dictates of the law. Consequently, the question of Community (or, in this case, Rwandan) **representation on a bench would not arise; any bench constituted to determine a matter before the Court is reflective of that organ of the Community in its entirety.**

27. We might add that Basic Principle 14 of the *UN Basic Principles on the Independence of the Judiciary* delineates the assignment of cases to judges as an internal matter of judicial administration that should not be interfered with on flimsy grounds. It reads:

> **The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.**

28. In the present case, the complexity of the applicable law was not established before us, it being but a mere allegation by learned State Counsel. However, without delving into the merits thereof, undoubtedly **Reference No. 2 of 2019** does seem to raise grave issues that would be of interest to the Community, and more specifically to two Partner States: the Republic of Rwanda and the Republic of Uganda. It does thus raise '**issues of importance to a sufficiently large section of the public to be of general public importance**.' See **Human Rights Awareness & Promotion Forum vs. The Attorney General of the Republic of Uganda & Another**[6] and **R (on the application of Corner House Research) vs. Secretary of State for Trade and Industry**.[7]

[6] EACJ Reference No. 6 of 2014.
[7] (2005) 4 All ER 1 at 36.

29. However, it has not been established before us that a 3-judge coram or a 5-judge coram that does not include a nominee from the Applicant State would be incapable of effectively adjudicating the dispute as between the parties. The prejudice that might be occasioned to the Applicant in that eventuality was not established before us either. The mere availability of a procedural option of hearing before a Full Bench does not warrant an automatic right to parties to access or obtain it, as we understood Mr. Ntarugera to contend. The merits of the application must be duly established.

30. In the instant case, we are not persuaded that the matters raised in **Application No. 6 of 2020** are of such public importance, or entail such conflict of or complexity of laws as to warrant determination by a Full Bench of the Court. That application essentially seeks the extension of time within which to lodge additional affidavits that were irregularly filed alongside the Applicant's written submissions and after the opposite party had also filed its written submissions. Without considering the merits thereof, **Application No. 6 of 2020** was filed after a similar application (**Application No. 1 of 2020**) had been considered and dismissed on its merits. Rule 69(2)(a) of the Court Rules provides for a single judge to handle applications for extension of time, the said applications being neither complex nor novel in any way. We therefore find no reasonable justification for its determination by a Full Bench.

31. To compound matters, the hearing of **Reference No. 2 of 2019** was in its final stage by the time the present Application for the constitution of a full bench was made. In **Mani, V. S, *'International Adjudication: Procedural Aspects'***, it was opined that fundamental procedural rights in international adjudication find expression in the

principle of *audi alteram partem* (or due process) and the principle of equality of parties.[8] It is also opined in **Halsbury's Laws of England** that, save where it is negated in unequivocal terms by statute or court rules, the inherent jurisdiction of courts abounds as a residual source of powers that courts may draw from whenever it is just or equitable to do so, particularly to ensure the observance of the due process of the law, to prevent vexation or oppression; to do justice between the parties and to secure a fair trial between them.[9]

32. In the instant case, re-constituting a full bench for the Reference would have the effect of re-opening a trial that was at its tail end, with the resultant cost in terms of time and resources. Not only is this an affront to the principle of good governance that this Court is under obligation to uphold; it is clearly the sort of abuse of court process that Rule 4 of the Court's Rules purposively enjoins it to avert. We would therefore disallow **Application No. 23 of 2020**.

33. On the question of costs, Rule 127(1) of the Court's Rules of Procedure provides that costs shall follow the event unless the Court for good reason decides otherwise. This rule was emphatically reinforced in the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another**.[10] We find no reason to depart from that general rule.

[8] (1980), pp. 25 – 36.
[9] Civil Procedure, Volume 11, (2009), 5th Edition, para. 15.
[10] EACJ Appeal No. 2 of 2019

F. **CONCLUSION**

34. The upshot of the Court's determination of this matter is that **Application No. 23 of 2020** is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered by Video Conference this 26th Day of November, 2020.

Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE

Hon. Justice Audace Ngiye

JUDGE

Hon. Justice Dr. Charles O. Nyawello

JUDGE

Certified as True Copy of the original

26 NOV 2020

Registrar

EAST AFRICAN COURT OF JUSTICE