IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION

*(**Coram:** Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles A. Nyachae, Richard Muhumuza, & Léonard Gacuko, JJ)*

APPLICATION NO. 1 OF 2022
(Arising from Reference No. 46 of 2021)

PETER ODIWUOR NGOGE T/A
O.P NGOGE AND ASSOCIATES
ADVOCATES...APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE
REPUBLIC OF KENYA.. RESPONDENT

20TH NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Peter Odiwuor Ngoge T/A as O.P. Ngoge & Associates, Advocates for interim Orders against the Attorney General of the Republic of Kenya. The Application is brought pursuant to Rules 4 and 84 of the East African Court of Justice Rules of Procedure, 2019 ("the Rules") and Articles 6(d), 7(2) and 39 of the Treaty for the Establishment of the East African Community ("the Treaty").

2. The Applicant is a natural person resident in the Republic of Kenya. He is a practicing Advocate of the High Court of Kenya and describes himself as a Barrister and Human Rights Defender. The Applicant's address for service is c/o Coffee Plaza, 4th Floor, P.O. Box 3430 – 00200 Nairobi, Off Haille Sellasie Avenue in Nairobi.

3. The Respondent is the Attorney General of the Republic of Kenya, sued in the instant proceedings in a representative capacity, as the Principal Legal Adviser of the Respondent State. The Respondent's address for service is c/o Office of the Attorney General and Department of Justice, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100, Nairobi.

4. This Application arises from **Reference No.46 of 2021**. In the Reference, aside from the Respondent, the Applicant has included nine (9) other Parties as intervenors, which parties are not included in the instant Application.

5. In the Reference, the Applicant claims that the High Court of Kenya at Nairobi (in **Constitutional Petition No. 471 of 2013** and in **Constitutional Petition No. 125 of 2015**); the Court of Appeal of

Kenya(in **Civil Appeal No. 49 of 2014** and in **Civil Appeal No. 18 of 2015);** and the Supreme Court of Kenya in **Petition No. 18 of 2015**, each respectively violated the Treaty, in particular Articles 6(d) and 7(2) thereof, by denying him, the Applicant, a fair trial, and by violating the Rules of Natural Justice. It is an integral part of the Applicant's claim that the three Judicial bodies, each violated the Constitution of Kenya in those respective proceedings.

B. REPRESENTATION

6. At the hearing, the Applicant appeared in person while the Respondent was represented by Mr C. N. Menge, Deputy Chief State Counsel, and Mr J. Mutari Matunda, Principal State Counsel.

C. THE APPLICANT'S GROUNDS FOR APPLICATION AND SUBMISSIONS

7. The Applicant's grounds for the Application are contained in the Notice of Motion dated 17th January, 2021 and the Affidavit sworn by the Applicant, also dated 17th January, 2021.

8. In **Reference No. 46 of 2021** in this Court the Applicant has impugned proceedings of and decisions by three Courts of the Republic of Kenya as set out in paragraph 5 above, all as being decisions rendered contrary to the rules of Natural Justice and in contravention of Articles 6(d) and 7(2) of the Treaty.

9. The Applicant ostensibly brings the instant Application because he is apprehensive that costs awarded against him in the respective Courts in the decisions referred to in paragraph 8 of this ruling are likely to be taxed, to his detriment, and that the said taxation of costs will in turn likely result in the Applicant either being jailed as a civil prisoner

in execution of a decree, or being disbarred, or declared bankrupt or otherwise harassed, humiliated, or intimidated by the decree holders.

10. The Applicant, therefore, seeks in the instant Application, that the said respective Courts of the Respondent State, be restrained from taxing and enforcing the respective Bills of costs, pending the hearing and determination of **Reference No.46 of 2021** by this Court.

11. At the hearing, it was the Applicant's substantive submission that the Supreme Court of Kenya denied him a fair hearing, contrary to the rules of Natural Justice, and contrary to Provisions of the Constitution of Kenya, and in particular Articles 10, 19, 20, 21, 25, 27, 48 and 50 thereof. Specifically, the Applicant submitted that in the proceedings in the Supreme Court of Kenya, the President of the Court, then Chief Justice David Maraga, and Vice President, Deputy Chief Justice Philomena Mwilu, both ought to have disqualified themselves from hearing the Applicant's Petition, as the Applicant had specifically laid complaints against the two Judges in the Judges and Magistrates Vetting Board.

12. The said Judges in his view, sat as Judges in their own cause and thereby contravened Articles 6(d) and 7(2) of the Treaty in addition to the said provisions of the Constitution of Kenya.

13. The Applicant submitted at some length on the Report of the said Judges and Magistrates Board. He submitted that the Board made a finding in his favour, to the effect that as an Advocate, he could not be treated fairly by the Judiciary of Kenya. In his view, the subsequent actions of the Supreme Court of Kenya demonstrated the truth of the findings of the Vetting Board.

14. That the proceedings in the said Petition were therefore null and void and any taxation of costs predicated upon the Petition must therefore, similarly be null and void.

15. The Applicant thus, sought the following orders, (reproduced verbatim):

    a. **This Application be certified extremely urgent for hearing and disposal and interim orders be issued forthwith *Exparte* and in the first instance to restrain the Court of Appeal of Kenya at Nairobi in Civil Appeal No.51 of 2014 and the Supreme Court of Kenya in Petition of Appeal No.18 of 2015, whose impugned decisions are the subject matter of the Applicants pending Reference No. 46 of 2021, from taxing and enforcing the Bill of Costs already lodged against the Applicant therein pending the hearing and determination of this Application on merits;**

    b. **Further, on in the alternative, this Application be certified extremely urgent for hearing and disposal and interim orders be issued forthwith *exparte* and in the first instance to restrain the High Court of Kenya at Nairobi Milimani Commercial Courts from hearing and disposing the Applicants High Court Civil Suit No. 48 of 2013, which is also the subject matter of the Applicants pending Reference No. 46 of 2021, pending the hearing and determination of this Application on merits;**

    c. **This Honourable Court be pleased to stay Taxation and enforcement of the Bills of Costs already lodged against the Applicant herein in Nairobi Court of Appeal Civil No. 51 of 2014 and in the Supreme Court of Kenya Petition No.**

18 of 2015 pending the hearing and determination of the Applicants Reference No. 46 of 2021 on merit;

d. **This Honourable Court be pleased to stay the proceedings in Milimani Nairobi High Court Civil Suit No.48 of 2013 pending the hearing and determination of the Applicants Reference No.46 of 2021 on merit; and**

e. **This Honourable Court be pleased to make such other interim orders and/or directions as it may deem necessary in the circumstances to meet the ends of Justice pending the hearing and determination of the Applicants Reference No. 46 of 2021 on merit.**

D. RESPONDENT'S REPLY AND SUBMISSIONS

16. The Respondent did not file an Affidavit in response to the Notice of Motion. Rather, the Respondent filed a Notice of Preliminary Objection and a second document titled **"The Respondent's Further Grounds of Opposition."** Both documents were filed on 1st November 2022.

17. At the hearing, the Respondent submitted only on points of law.

18. In essence, it was the Respondent's position that this Court does not have jurisdiction to entertain and grant a stay of proceedings of a taxing master as the Applicant has not exhausted the appeal mechanism provided for under domestic laws. Further, the Application offends the doctrine of exhaustion of local remedies and hence is premature.

19. That, the Court does not have jurisdiction to hear and determine taxation of disputes which have been heard and concluded in a Partner State as it will be re-opening of the concluded matter.

20. That in addition, the Application is frivolous, vexatious and an abuse of the Court process.

21. The Respondent thus, prayed that the Application be dismissed with Costs.

E. THE COURT'S DETERMINATION

22. The issue of jurisdiction having been raised by the Respondent, it is appropriate that we consider it first.

23. In addressing the issue of jurisdiction which he contended the Court lacks in respect of this Application, the Respondent submitted that the Court lacks jurisdiction as the Application does not include the intervenors in the Reference. Thus, the Respondent argued, any orders given in the Application would also be as against the intervenors without them having been heard, thus violating the Rules of Natural Justice.

24. On intervenors, Article 40 of the Treaty provides as follows:

> **"A Partner State, the Secretary General or a resident of a Partner State who is not a party to a case before the Court may, with leave of the Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case."**

25. Further, Rule 59 of the Rules, makes provision for the mode and process of intervenors becoming parties in proceedings.

26. The introduction of parties described as intervenors at the very outset of the filing of a reference, and seemingly without regard to either Article 40 or Rule 59 referred to above, is a matter that will

appropriately be addressed at the hearing of the Reference and need not detain us in the instant Application.

27. That said, we see nothing in the Treaty or in the Rules that prevents an application being brought only against one of several parties in the Reference. That fact alone cannot in our view deny the Court jurisdiction to consider the Application.

28. In submissions, the Respondent argued that: **"This Honourable Court has no jurisdiction to deal and entertain a decision of taxing masters within the municipal jurisdiction as the same is not provided under the Treaty establishing the East African Court of Justice".**

29. This Court has had occasion to state several times that it is no part of its mandate to superintend the National Courts in their discharge of their responsibilities in the Partner States. However, it is squarely within the mandate of this Court, to take up jurisdiction to hear and determine a matter wherein a resident of a Partner State alleges that a Partner State, or any of its organs, including its Courts, has violated the Treaty.

30. The Jurisdiction of this Court is derived from Articles 27(1) and 30(1). Article 27(1) provides that:

> **"The Court shall initially have jurisdiction over the interpretation and application of this Treaty:**
>
> > ***Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States."***

Article 30(1) provides that:

> **"Subject to the provisions of Article 27 of this Treaty, 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 this Treaty."**

31. It is now trite law, as established by this Court in its interpretation of Article 30 of the Treaty, that where a resident of a Partner State refers for determination by the Court, the legality of any Act, regulation, directive, decision, or action of a Partner State or Institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or an infringement of the provisions of the Treaty, then the Court has jurisdiction to consider that matter and determine the same.

32. To the extent, therefore, that the Applicant herein alleges infringement of the Treaty by the National Courts, the Court cannot decline jurisdiction.

33. Nor will the Court decline jurisdiction as was argued by the Respondent, on the doctrine of exhaustion of local remedies. This Court has also on many occasions reiterated the non-applicability of the doctrine of exhaustion of local remedies as known in international law, in so far as concerns access to Court under the Treaty. Indeed, we can do no better than to adopt what the Court stated in **<u>Plaxeda Rugumba vs The Secretary General of the East African</u>**

Community and the Attorney General of the Republic of Rwanda, EACJ Reference No.8 of 2010 where it was stated:

> **"We shall spend little time with these questions because it is not in doubt that there is no express provision barring the court from determining any matter that is otherwise properly before it, merely because the Applicant has not exhausted local remedies."**

34. In this regard, this Court is, with respect, unable to agree with the submissions by the Respondent that *"once the Kenyan courts made determination on applications or litigation that the applicant submitted before the Kenyan Courts, the Applicant ought to have been satisfied with those decisions."*

35. Whereas the Respondent did invite the Court to hold that the Applicant was a frivolous and vexatious litigant, there is no basis laid before the Court to sustain such a finding.

36. We hold, therefore, that this court has jurisdiction to hear and determine the Application, and we overrule the preliminary objections.

37. We turn to consider and determine the Application on its merits.

38. This Court has had several opportunities to pronounce itself on the test to be applied in an application for interim orders, brought pursuant to Article 39 of the Treaty. Article 39 provides as follows:

> **"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."**

39. In **Francis Ngaruko vs the Attorney General of the Republic of Burundi, EACJ Reference No.3 of 2019**, the Court set out the test and stated as follows:

> **"This Court has had occasion to consider numerous interlocutory applications for interim orders. It has upheld a trifold test for the grant of interim orders laid out in Giella vs Cassman Brown [1973] EA 258, albeit with deference to the demonstration of a serious triable issue rather than a *prima facie* case as the first principle that should be satisfied in an application for the grant of interim orders. See: FORC & Others vs Attorney General of the Republic of Burundi and BAT vs the Attorney General of Uganda. 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. 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."**

40. In the **Francis Ngaruko** case, the Court went further to state that:

> **"As has been severally held, within the context of EAC Community Law, a cause of action demonstrating the prevalence of a serious triable issue has been held to**

exist where the Reference raises a legitimate legal question under the Court's legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the National Law of a Partner State or infringes any provision of the Treaty."

41. Yet, further, the Court made reference to the Appellate Division decision of the **East African Civil Society Organizations' Forum (EACOSOF) vs the Attorney General of Burundi and Others, EACJ Appeal No.4 of 2016** where, it was held that: **"this Court does have jurisdiction to interrogate the decisions of the national courts to deduce their compliance with the Treaty (or the lack of it). That is the Court's interpretative mandate."**

42. Applying the first of the trifold test, we are satisfied that in the instant Application, the Applicant's claim in the Reference that the stated Courts of the Partner State have violated the Treaty, raises serious triable issues in the context of compliance or otherwise, with Articles 6(d) and 7(2) of the Treaty.

43. So, there being a serious triable issue, if the interim order sought is not granted, will the Applicant suffer irreparable loss that cannot be compensated in damages?

44. Unlike with the first test, where the Applicant did go some way in demonstrating the serious triable issue, the Applicant did not either in evidence or in submissions even attempt to demonstrate that he would suffer irreparable loss that could not be compensated in damages, if the order sought was not granted, and the Applicant succeeds in the main Reference.

45. In **Mbidde Foundation Ltd and Rt. Hon. Margaret Zziwa vs Secretary General of the East Africa Community and Attorney General of Republic of Uganda, EACJ Application No. 5 of 2014**, this Court cited with approval, the principle set out in the case of **Giella vs Cassman Brown [1973] EA 258** as follows:

> **"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 would not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. But the Plaintiff's need for such protection must be weighed against the corresponding need for the defendant to protect against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the certainty were resolved in the Defendant's favour at trial."**

46. Further, in **Issa Muzamil Sebit and South Sudan Bar Association vs The Attorney General of the Republic of South Sudan, EACJ Application No. 2 of 2021** this Court stated:

> **"In Mary Ariviza & Another vs Attorney General of the Republic of Kenya & Another, EACJ Application No. 3 of 2010, citing with approval the decision of Giella & Cassman Brown Co. Ltd, E.A Industries vs Trufoods [1972] EA 420, the Court stated that "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."

47. Further, in the case of **Castro Pius Shirima vs Attorney General of Burundi & 6 Others, EACJ Application No. 11 of 2016,** it was established that an injunctive order is not allowed where the Applicant fails to establish that they would suffer an irreparable injury that could not be compensated by an award of damages.

48. Similarly, in **Timothy Alvin Kahoho vs The Secretary General of the East African Community, EACJ Application No. 5 of 2012**, the Court was clear that injury, *"whether reparable or irreparable, is a question of evidence and must be proved."*

49. In the instant Application, aside from repeatedly and strenuously stating that he was being subjected to torture and suffering, the Applicant did not demonstrate the irreparable injury that could not be compensated in damages.

50. In the absence of evidence offered to the contrary, or indeed any submissions, it is our considered opinion that in the event of the Court not granting the order sought herein, and the Applicant succeeding in the main Reference, the Applicant could adequately be compensated in damages. Nor indeed has any foundation been laid to suggest that the Respondent would not be able to pay any such damages.

51. We find, therefore, that the Applicant has not demonstrated that he is likely to suffer irreparable loss that cannot be compensated in damages should the order sought not be granted, and the Applicant succeeds in the Reference.

52. The Applicant, thus, fails on the second of the trifold test.

53. In the circumstances of our finding in the preceding paragraph, we do not consider that there is any necessity to address the third of the trifold test, the balance of convenience.

F CONCLUSION

54. In the result, we decline to grant the interim orders sought in the Application. We accordingly dismiss the Application in its entirety.

55. We further order that the costs of the Application abide the outcome of the Reference.

56. It is so ordered.

Dated, signed and delivered at Arusha this 20th Day of November 2023.

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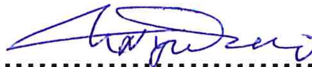
Hon. Justice Yohane B. Masara

PRINCIPAL JUDGE



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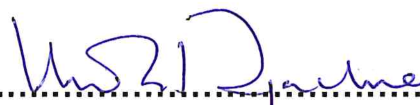
Hon. Justice Dr Charles O. Nyawello

DEPUTY PRINCIPAL JUDGE



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Hon. Justice Charles A. Nyachae

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Hon. Justice Richard Muhumuza

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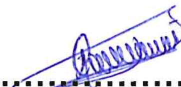

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Hon. Justice Dr Léonard Gacuko

JUDGE