



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



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

APPLICATION NO. 14 OF 2022
(Arising from Reference No. 24 of 2022)

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

VERSUS

THE ATTORNEY GENERAL OF THE
REPUBLIC OF KENYA..... RESPONDENT

27th NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. On 24 May 2022, Mr Peter Odiwuor Ngoge T/A O.P. Ngoge & Associates Advocates (hereinafter, “the Applicant”), filed **Reference No. 24 of 2022** against the Attorney General of the Republic of Kenya (“the Respondent”).
2. In **Reference No. 24 of 2022**, the Applicant impugns what he refers to as the unlawful conduct of the High Court of Kenya at Nairobi **High Court Civil Suit No 813 of 2017** and the Court of Appeal in **Civil Appeal No. 261 of 2017**, where he particularly complains of lack of impartiality of judges of the said Courts.
3. The Applicant alleges that the above-mentioned Courts denied him his right to a fair hearing and access to justice, contrary to Articles 10, 19, 20, 21, 25, 27, 48, 50 and 159 of the Constitution of Kenya, 2010 in violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of East African Community, (“the Treaty”).
4. Pending hearing of the said Reference, the Applicant filed this Application on 27 May 2022 pursuant to Article 39 of the Treaty and Rules 4 and 84 of the East African Court of Justice Rules of the Court, 2019 (“the Rules”).
5. The Application seeks an order for a mandatory injunction in order to stay the proceedings pending in the Court of Appeal of Kenya regarding taxation and an order for injunction to restrain the High Court of Kenya at Nairobi from proceeding with the Defamation case filed by Hon. W.M. Muiruri against him.
6. The Applicant is a natural person, a resident and citizen of the Republic of Kenya. He describes himself as a practicing Barrister based in

Nairobi. His Address of service for the purposes of this Suit is: *c/o O.P Ngoge & Associates Advocates, Coffee Plaza, 4th Floor, P.O BOX 3430-00200 Nairobi, Off Haile Selassie Avenue, Nairobi.*

7. The Respondent is the Attorney-General of the Republic of Kenya, sued in his capacity as the Principal Legal Advisor of the Respondent State. His address for service for the purposes of this Suit is: *c/o The Attorney General & Department of Justice, Sheria House, Harambee Avenue PO Box 40112-00100-Nairobi.*

B. REPRESENTATION

8. At the hearing, the Applicant appeared in Court in person. The Respondent was represented by Ms Elizabeth Mwalozya, State Counsel, from the Office of the Attorney General of Kenya.

C. BACKGROUND

9. According to the Applicant, he successfully lodged a complaint against a judicial officer called Hon. W.M. Muiruri, who was removed from his position as a result of the complaint.
10. That, while the said complaint was pending before the Chairman of the Judicial Service Commission of Kenya (The former Chief Justice, Evans Gicheru), the said Hon. Muiruri (Chief Magistrate), nonetheless, instituted a defamation Suit against him in the High Court of Kenya at Nairobi, his working Station and where he was serving Judges as the Senior-most Deputy Registrar of the High Court and thereby having the leverage to handle his own court-file, being **Nairobi High Court Civil Suit No 813 of 2017**, and to list the same before a Judge of his preference and choice, to the Applicant's detriment.
11. In the Applicant's view, as the said complaint was validly lodged by him with the then Chairman of the Judicial Service Commission of Kenya,

Hon. Mr Justice Evans Gicheru against Hon. W.M. Muiruri under Articles 37, 168 and 172 of the Constitution of Kenya 2010, as a victim of Judicial impunity arising from the conduct of Judicial Proceedings in Nairobi High Court Misc. Applications No. 670, 671, 672, 673 and 679 of 2006, was and still is absolutely Privileged from inquiry by the High Court of Kenya under the Law of Defamation.

12. That, the High Court of Kenya at Nairobi wants to use the defamation Suit to clean the said Hon. Muiruri and is of the view that the said Court lacks jurisdiction to do so.
13. Further, the Applicant approached the Court of Appeal in **Civil Appeal No. 261 of 2017** to have the Suit filed by Mr. Muiruri for defamation struck out but the Court of Appeal did not consider whether the High Court had jurisdiction or not and proceeded to dismiss his appeal with costs.
14. It is the Applicant's apprehension that the Court of Appeal intends to use the High Court of Kenya to impose very heavy economic sanctions against him which the already disgraced Hon. Muiruri and his Advocates on record could then swiftly use as a smokescreen to disbar him in retaliation, contrary to Article 10 of the Constitution of Kenya, 2010 and contrary to the United Nations Basic Principles on the Role of Lawyers; further, in contravention of Articles 6(d) and 7(2) of the Treaty.

D. THE APPLICANT'S GROUNDS FOR THE APPLICATION

15. The Applicant's grounds for the Application are set out in the Notice of Motion dated 26th May 2022, in the Affidavit in support of the Notice of Motion dated 26th May 2022 as well as in the Further Affidavit both deponed by the Applicant on 27th February 2023.

16. In the Notice of Motion, the Applicant urges the Court to certify the Application as extremely urgent and that the same be heard on priority to any other matter in this Reference.
17. As stated in the background, it is the Applicant's averment that he appealed against the decision of the High Court of Kenya which had rendered a decision against him and which ordered that he had to bear costs. That the appeal against the High Court was dismissed by the Court of Appeal.
18. The Applicant states that the High Court of Kenya at Nairobi lacks impartiality in the sense that he was condemned contrary to rules of natural justice and that he cannot be accorded fair trial in respect of the matter which is pending in the said Court.
19. In the Applicant's view, the Court of Appeal in **Civil Appeal No. 261 of 2017** cannot accord him fair justice in the matter regarding the Taxing of the Bill of Costs.
20. Consequently, the Applicant prays that this Court stays the hearing in the Courts in Kenya pending determination of **Reference No. 24 of 2022**. That an interim mandatory injunction be issued forthwith to restrain the Court of Appeal from Taxing a Bill of Costs therein and enforcing the same against him as was ordered by the Court of Appeal in **Civil Appeal No. 261 of 2017** dated 13th May 2022, contrary to Rules of Natural Justice.
21. Additionally, the Applicant seeks that the Court issues an interim mandatory Injunction to restrain the High Court of Kenya in Nairobi from proceeding with the impugned Defamation Suit filed by Hon. W.M. Muiruri in **Nairobi High Court Civil Suit No. 813 of 2007** and from entering judgment and issuing Execution Proceedings against him in said case.

22. In the alternative, the Applicant seeks that the Proceedings in **Nairobi HCCC NO. 813 of 2007** be stayed, including but not limited to execution Proceedings therein as may be issued against him pending hearing and determination of **Reference No. 24 of 2022.**

E. THE RESPONDENT'S REPLY

23. The Respondent did not file an affidavit in Reply to the Applicant's Affidavit supporting the Application.

24. In response to and in opposing the prayer for the interim orders sought by the Applicant, the Respondent only raised Preliminary Objections.

25. The Respondent contends that the Court has no jurisdiction to entertain the instant Application by virtue of Article 30(3) of the Treaty. In his view, the Court has no jurisdiction to hear and determine the dispute where the Respondent's State has the mandate to hear and determine the same.

F. PARTIES' SUBMISSIONS

a. The Applicant's submissions

26. During the submission highlights, Ms Elizabeth Mwalozya, on behalf of the Respondent, encapsulated her submissions dated 17th March 2023 by which she had raised a preliminary objection grounded on the fact that the issues raised by the Applicant are triable before the Respondent State's Courts.

27. In her view, the Applicant enjoyed a fair hearing in the Respondent State.

28. To buttress her argument, Counsel relied on the case of **Alcon International Limited vs Standard Chartered Banks and Others, EACJ Reference No. 6 of 2010**, where the Court held that:

“We find it necessary to associate ourselves with the submission of the learned counsel for the First Respondent that there is overwhelming evidence from the material now before us that there have been and still are several cases in the Courts of Uganda in which the instant Claimant is directly interested.”

29. Counsel for the Respondent concluded her submissions by urging the Court to dismiss the Application for lack of jurisdiction.
30. On his part, the Applicant, objected vehemently to the Respondent’s Preliminary Objection, on the ground that the decision cited was not served upon him to enable him to respond to it appropriately.
31. From the start, the Applicant alleged that the Counsel for the Respondent was unable to distinguish whether the facts in the authority cited is the same as the facts in this case. For him, facts and circumstances are different and therefore that authority cannot be applied to his case.
32. On the preliminary point raised, the Applicant maintained that the impartiality of the impugned Court is questioned. He argued that he was condemned contrary to rules of natural justice and that he cannot be accorded a fair trial in respect of the matter which is pending in the High Court.
33. The Applicant relied on Article 25 of the Constitution of the Republic of Kenya, in which a fair trial is a right which cannot be limited.
34. In addition, the Applicant is of the view that the Kenyan Courts cannot accord him fair hearing and invoked the decision of the Judges and Magistrate Vetting Board to buttress the fact.

35. Further, the Applicant argued that in the case relied upon by the Respondent, there were no allegations that a Ugandan Court could not accord that party fair hearing. He accordingly urged this Court to dismiss the Preliminary Objection as raised by the Respondent.

36. Regarding the merits of the Application, the Applicant submitted that his Notice of Motion and the facts given in support thereof were not controverted by the Respondent. That the High Court of Kenya lacks jurisdiction to hear and determine a complaint lodged against a Judicial Officer under Article 168 and 172(b) of the Constitution of Kenya and, in such a situation, the Applicant still feels that the High Court is unable to accord him a fair hearing and justice.

37. In his attempt to persuade the Court of the relevance of his case, the Applicant referred to Article 20 of the United Nations Basic Principles on the Role of Lawyers which reads as follows:

“Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith, in written or oral pleadings or in their professional appearance before a court, a tribunal, or other legal or administrative authority.”

38. In the same line, the Applicant referred to Article 16 of the same Principles, which states that:

“Government shall ensure that lawyers:

- a) are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference;**
- b) ...; and**
- c) Shall not suffer or be threatened with prosecution or administrative, economic or other sanctions for any**

action taken in accordance with the recognized professional duties, standards and ethics.”

39. The Applicant maintained that in complaining before the Judicial Service Commission, he acted in good faith. That he should not be subjected to economic sanctions through the bill of costs, which is the reason why the Court should allow his Application.

40. The Applicant is convinced that if the interim orders to stay the proceedings are not issued, the Court will tax the bill of costs and then use it to instruct auctioneers to go and attach his Law Firm, to intimidate him, to arrest him, or even to declare him bankrupt, which, according to him, is contrary to the provisions of the United Nations Basic Principles on the Role of Lawyers.

b. The Respondent's submissions

41. In her reply submissions, Counsel for the Respondent drew the attention of the Court to the fact that the issue of staying the proceedings has a root in the Suit between the Applicant and an individual party who was awarded tax and which party is not before the Court.

42. In her view, the interim orders sought by the Applicant once given, will prejudice a party, an Applicant to the bill of costs, who obtained orders and that party is not a party in the instant matter before this Court.

43. Further, the Respondent's Counsel insists that the Applicant does not meet the criteria required for a grant of an injunction as set out in **Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358.**

44. Regarding the objection raised by the Applicant on the referred to case, which had not been availed to him, Counsel stated that the authority cited is in the EACJ website and hence available to the Applicant.

45. Additionally, Counsel of the Respondent asserted that the jurisdiction of this Court cannot be said to be proper where there are two parallel proceedings; especially because the Applicant is also taking part in the proceedings in the Respondent State.

46. As to the issue of the jurisdiction of the Courts of Kenya regarding the Defamation case against the Applicant, she responded that the Applicant raised the issue of jurisdiction before the High Court of Kenya and before the Court of Appeal, and that the Court of Appeal dismissed his appeal on the same.

G. COURT'S DETERMINATION

47. Having outlined the evidence and varying submissions of the parties herein, it behoves us to determine whether the Application before us has merits. From the pleadings filed and the oral submissions on record, it appears that two issues crave for determination. These are:

a) Whether this Court is clothed with the Jurisdiction to hear and determine the Application; and

b) Whether the interim injunction prayed for can be granted.

48. Owing to the jurisprudence of this Court, where a jurisdictional issue is raised, the Court has to deal with it before delving into the substance of the matter before it. Therefore, we will determine whether we have jurisdiction here under.

ISSUE NO 1. Whether the Court has jurisdiction to hear and determine the Application

49. As stated before, the Respondent contended that this Court lacks jurisdiction pursuant to Article 30(3) of the Treaty. Both in her written submissions and oral highlights before the Court, Counsel for the Respondent emphasized the same.

50. It is the Respondent Counsel's assertion that the jurisdiction of this Court cannot be said to be proper where there are two parallel proceedings considering that the Applicant is also taking part in the proceedings in the Respondent's State.

51. That proposition was objected to by Applicant. The Applicant maintained that the impartiality of the impugned Courts is questioned. To him this Court has jurisdiction as he was condemned contrary to rules of natural justice and that he cannot be accorded a fair trial in respect of the matter which is pending in the High Court of Kenya.

52. Article 30 (3) of the Treaty relied upon by Counsel for the Respondent states as follows:

“The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”

53. Before we discuss and determine whether the cited provision is relevant to the matter at hand and whether this Court has jurisdiction or otherwise, to determine the Application on its merits, it is important to define what the term “jurisdiction” means.

54. “Jurisdiction” as per *Words and Phrases Legally Defined*, 2nd Edition, Volume 3, p. 113, refers to: **“... the authority which a court has to define matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision.”**

55. In the same vein, *The Dictionary of Law*, 7th Edition, defines the jurisdiction as **“the power of a court to hear and decide a case or make a certain order”**.

56. The jurisdiction of this Court is provided for in Article 27(1) of the Treaty which states 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.”

57. In **Alcon International Ltd vs the Standard Chartered Bank of Uganda** (supra), the Appellate Division of this Court cited with approval, the decision of the Court of Appeal of Kenya, in the **Owners of the Motor Vessel “Lilian” vs Caltex Oil (Kenya) Limited [1989] KLR** wherein Nyarangi, JA, stated:

“Jurisdiction is everything. Without it, a Court has not power to make one step. Where a court has no Jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

58. In **Eric Kabalisa Makala vs The Attorney General of the Republic of Rwanda, EACJ Reference No. 1 of 2017**, the Court instructively noted that:

“...to succeed on a claim of lack of jurisdiction in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdiction: *ratione personae/locus standi, ratione materiae and ratione temporis*. Simply stated, these 3 jurisdictional elements respectively translate into jurisdiction on account of the person concerned, matter involved and the time element.”

59. In the case at hand, the objection to the Court's jurisdiction hinges on the subject matter; that is jurisdiction *ratione materiae*.

60. In Steven Denis vs the Attorney General of Burundi and Others, EACJ Reference No. 3 of 2015, this Court stated:

“... we must begin by reiterating that this Court's jurisdiction is well set out in Articles 23, 27 (1) and 30 (1) of the Treaty. In sum those Articles provide that the Court shall have jurisdiction to interpret and apply the Treaty and to determine whether any Act, regulation, directive, decision or action of a Partner State or an institution of the Community is unlawful or is as an infringement of the process of the Treaty.”

61. Thus, it is evident from the above that this Court has jurisdiction *ratione materiae* to entertain a reference or application as long as the non-compliance of the Treaty is invoked by a litigant pursuant to Article 30 (1) of the Treaty.

62. Counsel of the Respondent contended that the issues raised by the Applicant are triable before the Respondent State's Courts and can be dealt with properly in those municipal Courts. Indirectly, Counsel raised the question of the exhaustion of local remedies.

63. This Court has noted time and again that it will not abdicate from the exercise of its mandate where a litigant invokes violation of the Treaty as a cause of action. As the Applicant invokes violation of some provisions of the Treaty through the action of the Respondent's institution, this Court is clothed with the Jurisdiction to hear and determine the Application, an application which arises from the Reference which was legally filed and is still pending before the Court; regardless of whether it is or is not well-founded.

64. We understood Counsel for the Respondent to be of the view that the Applicant had to exhaust local remedies before approaching this Court. That assertion is erroneous. Exhaustion of local remedies is not a prerequisite for a litigant to undertake before approaching the Court for redress on a Treaty violation. This was the holding in **Plaxeda Rugumba vs The Secretary General of the East African 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.”

65. In the same line, the Court stated in **Malcom Lukwiya vs The Attorney General of the Republic of Uganda and The Attorney General of the Republic of Kenya, EACJ Reference No. 6 of 2015** that *“the Applicant need not exhaust local remedies before filing his Reference before this Court because Article 30(1) of the Treaty gives him direct access to the Court.”*

66. Thus, we hold and decide that the Court has jurisdiction to hear the matter before us.

ISSUE NO 2: Whether the interim injunction prayed for can be granted

67. In the Notice of Motion, the Applicant sought from the Court an injunction to restrain the Court of Appeal of Kenya from Taxing a Bill of Costs therein and enforcing the same against him as was ordered by the Court of Appeal in **Civil Appeal No. 261 of 2017** dated 13th May 2022, on the one hand and, on the other hand, to restrain the High Court

of Kenya from proceeding with the impugned Defamation Suit filed by Hon. W.M. Muiruri, currently pending before the High Court of Kenya against the Applicant.

68. Pursuant to this Court's jurisprudence, there are necessary conditions to be fulfilled before the Court can issue an order for interlocutory injunction or any interim order. In **Forum pour le Renforcement de la Societe Civile & Others vs The Attorney General of the Republic of Burundi & Another, EACJ Application No 16 of 2016**, citing the decision in **Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358**, the Court held that:

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa:

- i. First, an applicant must show a *prima facie* case with a probability of success;**
- ii. 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; and**
- iii. Thirdly, if the Court is in doubt, it will decide the case on the balance of convenience.”**

69. Other than asserting that he had no trust that Courts in Kenya will do him justice, the Applicant failed to discharge the burden of proving each of conditions set out and to which the grant of the injunction sought is pegged. Particularly, the Applicant failed to establish that the Reference filed in this Court contains serious triable issues, as the first condition for issuance of an interim order by this Court.

70. Further, there is no iota of evidence to suggest that the Applicant stands to suffer an irreparable injury that could not be compensated by an award of damages, were this Court to withhold the grant of the injunctive order sought, if subsequently his claims succeed in the Reference.

71. Failure to meet any of the conditions above stated, renders this Court unable to grant the injunctive orders against the High Court and the Court of Appeal of Kenya sought by the Applicant.

72. Regarding costs, as this is an Application pegged upon a Reference that is yet to be heard and determined, costs, if any, shall be dealt with in the main Reference.

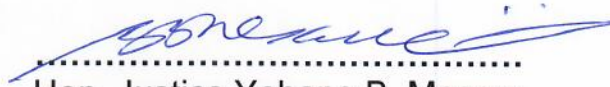
H. CONCLUSION

73. Having regard to the foregoing, the Application for grant of temporary injunction fails and is accordingly dismissed.

74. Costs to abide the outcome of the Reference.

75. It is so ordered.

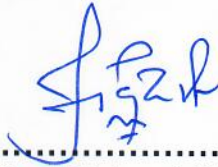
Dated, signed and delivered at Arusha this 27th day of November 2023.



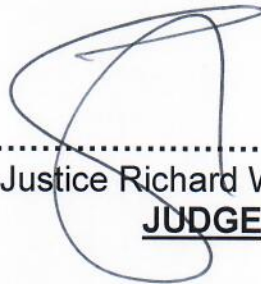
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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



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Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE



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