



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



*(Coram: Yohane B. Masara, PJ; Richard Muhumuza, Richard Wabwire Wejuli,
Leonard Gacuko & Kayembe Ignace Rene Kasanda, JJ)*

APPLICATION NO. 36 OF 2022
(Arising from **Reference No. 55 of 2022**)

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

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA RESPONDENT**

26TH NOVEMBER 2024

RULING OF THE COURT

A. INTRODUCTION

1. This Application was filed against the Attorney General of the Republic of Kenya (“the Respondent”) by Mr Peter Odiwuor O. P Ngoge T/A as Ngoge & Associates Advocates (“the Applicant”) pursuant to Rules 4 and 84 of the East African Court of Justice Rules of the Court, 2019 (“The Rules”), Article 39 of the Treaty for the Establishment of the East African Community (“The Treaty”) as well as other enabling provisions of the law.
2. This Application emanates from **Reference No. 55 of 2022** lodged in Court on 27th October 2022.
3. The Applicant is a natural person, resident in the Republic of Kenya, a Partner State of the East African Community. He is a practicing Advocate of the High Court of Kenya and describes himself as a Barrister and Human Rights Defender. His address for service is c/o Coffee Plaza, 4th Floor, P.O. Box 3430 – 00200 Nairobi, Off Haille Sellasie Avenue in Nairobi.
4. The Respondent is the Attorney General of the Republic of Kenya, sued in a representative capacity, as the Principal Legal Adviser of the Government of the Republic of Kenya. 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.

B. REPRESENTATION

5. At the hearing, the Applicant appeared in person while the Respondent was represented by Ms Eve Mbedda, Principal State Counsel; Ms Wilkista Mumbi, Senior State Counsel and Ms Wanjiru Wanja, State Counsel.

C. THE APPLICANT'S GROUNDS FOR APPLICATION AND SUBMISSIONS

6. The Applicant's grounds for the Application are contained in the Notice of Motion filed in Court on 3rd November 2022. The Notice of Motion is supported by the Affidavit deponed by the Applicant on 1st November 2022.

7. As earlier stated, this Application arises from **Reference No. 55 of 2022** pending before this Court, in which the Applicant impugns decisions by the Courts of the Republic of Kenya; including the ruling by the Supreme Court of Kenya in **Supreme Court Petition of Appeal No. 33 of 2014**, whose effects led to the auctioning of the Claimants' Law Firm, in contravention of Articles 6(d) and 7(2) of the Treaty.

8. The Applicant filed the instant Application due to his apprehension that the respective decisions: **Nairobi HCCC No. 599 of 2010; Court of Appeal Civil Appeal No. 174 of 2017; Court of Appeal Civil Application No. NAI.47 of 2011** and **Supreme Court Petition of Appeal No. 33 of 2014** are likely to be taxed and enforced to his disadvantage, and that the said taxation of Bills of costs will in turn likely result in the auctioning of the Applicant's Law Firm, thereby causing him irreparable losses, humiliation, harassment, damages

and harm, contrary to the United Nations Basic Principles on the Role of Lawyers and in contravention of Articles 6(d) and 7(2) of the Treaty.

9. Thus, the Applicant seeks that the aforementioned Courts of the Respondent's State be restrained from taxing and enforcing the respective Bills of costs, pending the hearing and determination of **Reference No. 55 of 2022** by this Court.
10. At the hearing held on 20th September 2024, it was the Applicant's substantive submission that the bills of cost are yet to be filed and the purpose of filing the Reference is to seek protection from the unlawful actions which the courts of Kenya intend to take against him.
11. The Applicant avers that the decision made by Justice Mwera in **Nairobi HCCC No. 599 of 2010**, in a preliminary matter, is prejudicial to his case as he gave a substantive order, disposing of almost the entire suit. That his appeal, **Civil Appeal No. 174 of 2017**, to challenge it in the Court of Appeal was dismissed with costs and that in dismissing the said appeal, the Court of Appeal made orders prejudicial to him regarding the matter pending before the High Court.
12. The Applicant urged this Court to stay the orders which the Court of Appeal granted, awarding the Respondent costs because those costs will be used to harass him before the determination of **Reference No. 55 of 2022**.

13. In addition, he prays that the Court stops the Coffee Board of Kenya from carrying out any evictions until **Reference No. 55 of 2022** is heard and determined by this Court.

14. Further, the Applicant uphold that he cannot get fair hearing in the High Court of Kenya, contrary to natural justice.

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

- i. **This Application be Certified Extremely Urgent and the same be heard electronically via Video Conference forthwith in the first Instance and on priority to any other matter in the above-captioned Statement of Reference;**
- ii. **THAT pending the hearing and determination of the Applicants Reference No. 55 of 2022 interim Mandatory injunction and Orders be issued forthwith to Restrain the Court of Appeal at Nairobi sitting in Civil Appeal No. 174 of 2017 and The High Court of Kenya at Nairobi sitting in MILIMANI HCCC No. 599 of 2010 from Taxing the Respondents/Defendants Bill of Costs in the said matters if at all and from enforcing the same against the Applicant herein as was ordered by the Court of Appeal at Nairobi in Civil Appeal No. 174 of 2017 on the 21 October 2022 against the Applicant herein in contravention of Articles 6(d) and 7(2) of the East African Treaty;**

- iii. THAT pending the Hearing and determination of the Applicants Reference No. 55 of 2022 interim Mandatory injunction and Orders be issued forthwith to restrain the High Court of Kenya in Nairobi from proceeding with the impugned Suit i.e. to say HCCC No. 599 of 2010 and from entering Judgment against the Applicant in the matter and from issuing Execution Proceedings against the Applicant herein in Nairobi HCCC No. 599 of 2010;
- iv. THAT Further or in the alternative, the said Proceedings in Nairobi HCCC No. 599 of 2010 be stayed including but not limited to execution Proceedings therein as may be issued against the Applicant herein pending the hearing and determination of the Applicants Reference No.55 of 2022;
- v. THAT pending the hearing and determination of the Applicants Reference No. 55 of 2022, the Defendants in Nairobi HCCC. No. 599 of 4 2010 be restrained from Evicting the Applicant herein from the Business Premises situated on LR No. 209/6545 within the Central Business District of Nairobi; and
- vi. THAT the Costs of this Application be provided for.

D. RESPONDENT'S REPLY AND SUBMISSIONS

16. The Respondent did not file an Affidavit in response to the Notice of Motion. Instead, on 16th September 2024, the Respondent filed a document titled **“The Respondent’s Grounds of Opposition.”**

17. In that document, the Respondent stated that this Court lacks jurisdiction to hear and determine this Application under Articles 9, 27 and 30 of the Treaty. The Respondent contended that the issues raised in the Application are either concluded or pending litigation before the High Court in Kenya.
18. In that regard, relying on Articles 162(1) and 163(7) of the Constitution of Kenya, the Respondent asserts that Article 27 of the Treaty does not confer the Court jurisdiction to reopen, review or quash decisions of national courts of Partner States and decide whether such decisions are or are not in line with either the Constitution of the Partner State or the Treaty.
19. Thus, the Respondent is of the view that the Application offends the doctrine of exhaustion of local remedies as the High Court matter is still pending and the Applicant has a right of appeal to the Court of Appeal and the Supreme Court of Kenya.
20. On the substance, the Respondent contends that the Application does not meet the threshold required for an interlocutory injunction.
21. To buttress that stand, the Respondent relied on the case of **Giella vs Cassman Brown [1973] EA 258.**
22. At the hearing, the Respondent reiterated his stance on jurisdiction and submitted on the substance of the Application.
23. In essence, Counsel for the Respondent submitted that it is premature for this Court to be involved in resolving any issues that might arise between parties when they have not yet exhausted their national court's remedies.

24. In the Respondent's view, if the Applicant was aggrieved, nothing stopped him from proceeding to the Supreme Court of Kenya before filing the current Reference and Application before this Court.
25. The Respondent's Counsel maintained further that the Applicant wants this Court to take over powers conferred upon national States' apex courts and, consequently, this Court lacks the proper jurisdiction to hear and determine the Application and also to issue any orders that might affect the determination of suits in the Kenyan Courts.
26. That, in addition, the Application is speculative and, therefore, it will be a waste of judicial time to handle matters where parties are private and the dispute involved is contractual in nature.
27. Submitting on the substance of the Application, the Respondent contends that the Applicant, in seeking interim orders, has not met the principles for the issuance of interlocutory injunctions. In this connection, the Respondent states that the Applicant failed to establish a *prima facie* case. Furthermore, the Respondent argues that the Applicant has not demonstrated how he is likely to suffer irreparable damages.
28. It is, therefore, the Respondent's contention that the Applicant should not be granted the interlocutory orders sought.
29. In rejoinder, the Applicant reiterated his earlier submissions and argued that **Reference No. 55 of 2022** raises weighty and serious issues of law under Articles 6(d) and 7(2) of the Treaty. Consequently, the Applicant reaffirms that this Court is vested with jurisdiction to hear and determine the matter.

30. As to the threshold to be satisfied in an application for the grant of interim orders, the Applicant avers that his case raises a weighty issue for trial.

31. In the same breath, it is the Applicant's assertion that if the prayers sought are not granted, he will suffer irreparable loss, not only himself, but also his clients, especially if eviction is enforced against him before the Reference is determined.

32. Regarding damages, the Applicant firmly asserts that damages will not be adequate to him because the Supreme Court has stated that this Court's decisions are not binding.

E. COURT'S DETERMINATION

33. From the pleadings filed and the oral and written submissions on record, two issues for determination by this Court arise; namely:

- i. **Whether this Court has Jurisdiction to entertain Reference No. 55 of 2022 from which Application No. 36 of 2022 arises; and**
- ii. **Whether the interim orders sought by the Applicant can be granted.**

ISSUE 1: Whether this Court has Jurisdiction to entertain Reference No. 55 of 2022

34. The question of jurisdiction is paramount and must be determined *in limine*.

35. Determination of jurisdiction before trodding the substance of the matter before the Court has had numerous pronouncements by this Court. As was pointed out by this Court in the **Attorney General of**

the United Republic of Tanzania vs African Network for Animal Welfare, EACJ Appeal No. 3 of 2011:

“Jurisdiction is a most, if not the most fundamental issue that the Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without Jurisdiction, a Court cannot even take the proverbial first Chinese step in its judicial journey to hear and dispose of the case.”

36. In the same vein, in the case of **ALCON International Limited vs Standard Chartered Bank of Uganda and 2 Others, EACJ, Appeal No. 3 of 2013**, the Appellate Division of this Court cited with approval the Kenyan Court of Appeal decision in **Owners of the Motor Vessels ‘Lillian S’ vs Caltex Oil (Kenya) Limited (1989) KLR** where Nyarangi, JA, noted that:

“Jurisdiction is everything. Without it, a Court has no 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.”

37. In the case of **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 the 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 an infringement of the Provisions of the Treaty’.”

38. Further, in Eric Makala vs the Attorney General of Rwanda, EACJ Reference No.1 of 2017, this Court held:

“Thus, 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 jurisdictions: *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. In the instant case, the Respondent has challenged the Court’s jurisdiction on account of the *ratione personae* (person concerned) and *ratione materiae* (matter involved).”

39. In the instant Application, the Respondent challenges the Court’s jurisdiction on account of the matter involved, *ratione materiae*.

40. The Respondent’s Counsel argues that this Court lacks jurisdiction to entertain the Reference as the impugned matters are pending determination by the Respondent’s judicial bodies. This Court had occasion to state in Mary Ariviza & Another vs Attorney General of Kenya and the Secretary General of the East African Community, EACJ Appeal No. 3 of 2012 that:

“The East African Court of Justice (EACJ) is not a Court of Appeal vis-à-vis decisions of the municipal courts and tribunals of the Partner States. Neither the First Instance Division, nor this Appellate Division, has jurisdiction to review the judicial decisions and judgments of those municipal courts and tribunals.”

41. However, even if it is not part of the Court’s mandate to superintend national courts in their discharge of their responsibilities in the Partner States, “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”. (See: **Peter Odiwuor Ngoge vs the Attorney General of the Republic of Kenya, EACJ Application No. 1 of 2022**).

42. The Jurisdiction of this Court is derived from Articles 27(1) and 30(1) of the Treaty. 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.”

43. 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.”

44. Thus, the Court has jurisdiction under Articles 27(1) read together with Article 30(1) to interpret and apply the provisions of the Treaty as well as ensure compliance of the same. We note that in the main Reference, the Applicant has alleged that there was an infringement of the provisions of the Treaty, specifically Articles 6(d) and 7(2).

45. In numerous past decisions, this Court has asserted itself regarding its jurisdiction. It has repeatedly stated that once there is an allegation of an infringement of the provisions of the Treaty, then it is seized with jurisdiction to interpret and apply the same (See: **Samuel Mukira Muhochi vs Attorney General of the Republic of Uganda, EACJ Reference No. 5 of 2011**; **Venant Masenge vs The Attorney General of the Republic of Burundi, EACJ Reference No. 9 of 2012**, **Audace Ngendakumana vs the Attorney General of the Republic of Burundi, EACJ Reference No. 11 of 2014** and **Peter Odiwuor Ngoge vs the Attorney General of the Republic of Kenya** (*supra*).

46. In the same vein, this Court held in the case of **Mr Bonaventure Gasutwa & 3 Others vs the Attorney General of the Republic of Burundi, EACJ Reference No. 13 of 2014** that:

“In similar cases, which were all brought against the Attorney General of the Republic of Burundi, the Court

had the opportunity to state clearly that issues that fell into the interpretative jurisdiction conferred upon it by Article 27(1) had to be entertained...”

47. A similar position was reiterated in the case of Steven Denis vs The Attorney General of the Republic of Burundi and Others (*supra*) where this Court stated that:

“There is also no doubt that this Court can determine the questions whether any action of a Partner State or an Institution of the Community is a violation of the Treaty.”

48. Flowing from the above consistent position taken by this Court, we hold that this Court is vested with jurisdiction *ratione materiae* on the subject matter raised in Reference No. 55 of 2022.

49. The Respondent raised another point regarding the jurisdiction of this Court. That is, the requirement by the Applicant to exhaust local remedies open to him. We find that contention erroneous. It is worth recalling that it is not mandatory to exhaust local remedies before filing a Reference in this Court.

50. 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, this Court held:

“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.”

51. Relatedly, this Court stated in Malcom Lukwiya vs Attorney General of Uganda & Another, EACJ Reference No. 6 of 2015 that:

“Article 30(1) of the Treaty reproduced herein above gives *locus standi* to any person to have direct access to the Court and the Treaty has not provided the exhaustion of domestic remedies as a condition for the admissibility of petitions brought by individuals before this Court.”

52. In this regard, we hold that the Applicant did not need to exhaust local remedies open to him before filing a dispute before this Court. Consequently, this Court has jurisdiction to hear and determine the Reference No. 55 of 2022 from which arises the instant Application.

ISSUE 2: Whether the Interim Orders sought by the Applicant can be granted

53. Before discussing the merit of the Application, we deem it necessary to recall succinctly the gist of the present Application.

54. The Application seeks from this Court to stay proceedings pending before the municipal courts in the Respondent’s State between the Applicant and private parties.

55. In view of the Applicant’s prayers, it behoves us to consider and determine the Application on its merits.

56. This Court has in a number of cases pronounced itself on the tests to be applied while dealing with an application for interim orders, brought pursuant to Article 39 of the Treaty.

57. Article 39 provides that:

“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.”

58. It is trite law that the granting of an interim injunction or order is an exercise of judicial discretion which must be exercised judiciously (see: **The Democratic Party & Mukasa Fred Mbidde vs The Secretary General of the East African Community & The Attorney General of Uganda, EACJ Application No. 6 of 2011**).

59. In the case of **Francis Ngaruko vs the Attorney General of the Republic of Burundi, EACJ Application No. 3 of 2019**, the Court held 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.

Consequently, we categorically state that applications for interim orders should be subjected to the following trifold tests:

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.”

60. The Court added 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.”

61. Citing with approval the decision in **East African Civil Society Organizations’ Forum (EACSOFF) vs the Attorney General of Burundi and Others, EACJ Appeal No. 4 of 2016**, this Court stated in **Francis Ngaruko’s** case 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.”

62. Applying the first of the trifold tests, we are satisfied that in the instant Application, the Applicant’s claim in the main Reference that the stated Courts of the Respondent’s 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.

63. Having been satisfied with the first test, we now turn to the question of irreparable injury. In this regard, the Applicant has to demonstrate that if the interim order sought is not granted, he will suffer irreparable loss that cannot be compensated in damages.

64. In the case of **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** (*supra*) 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."

65. 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.*"

66. Furthermore, in the case of Castro Pius Shirima vs Attorney General of Burundi & 6 Others, EACJ Application No. 11 of 2016, this Court declined to grant an injunctive order for the simple reason that:

"The Applicant failed to establish that he would suffer an irreparable injury that could not be compensated by an award of damages..."

67. In such a situation, the Applicant bears the *onus probandi* that the harm incurred, if the order sought is not granted, cannot be compensated by damages.

68. At the hearing, the Applicant stated that the award of damages will not be adequate to him because the Supreme Court of Kenya has

since stated that the decisions of this Court are not binding. In our view, that alleged statement by the Supreme Court is not supported by any evidence from the Applicant.

69. We further note from the submissions of the Applicant that what is intended to be stayed by this Court is taxation of costs yet to be filed. We need not say that, such prayer is an abuse of this Court's process. This Court cannot stay a non - existing order lest its decisions are looked at as meaningless.

70. Therefore, the Applicant failed to discharge his burden of proving that he will suffer irreparable loss that cannot be compensated in damages if the orders sought are not allowed.

71. Failure to meet the conditions above stated, renders this Court unable to grant the injunctive orders against the Courts of the Respondent's State 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.

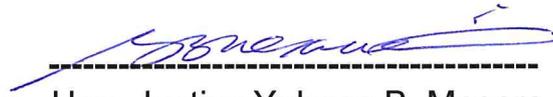
F. CONCLUSION

73. Having regard to the foregoing, we hereby dismiss the Application.

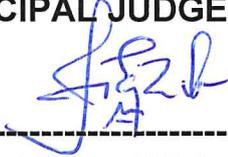
74. Costs to abide the outcome of the Reference.

75. It is so ordered.

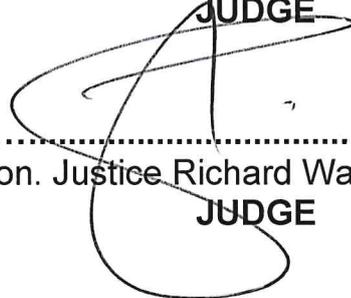
Dated, Signed and Delivered at Arusha this 26th Day of November
2024.



Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



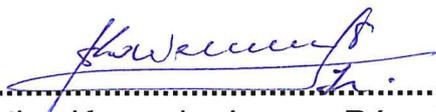
Hon. Justice Richard Muhumuza
JUDGE



Hon. Justice Richard Wabwire Wejuli
JUDGE



Hon. Justice Dr Léonard Gacuko
JUDGE



Hon. Justice Kayembe Ignace Réne Kasanda
JUDGE