



THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
(FIRST INSTANCE DIVISION)

APPLICATION NO. 7 OF 2012 (Arising out of Reference No. 3 of 2011)

Coram: (Johnston Busingye PJ, Jean Bosco Butasi J and Isaac Lenaola, J)

**ATTORNEY GENERAL OF THE REPUBLIC
OF UGANDA APPLICANT**

VERSUS

EAST AFRICAN LAW SOCIETY RESPONDENT

AND

**ATTORNEY GENERAL OF THE REPUBLIC
OF KENYA 1ST INTERESTED PARTY**

**SECRETARY GENERAL OF THE
EAST AFRICAN COMMUNITY 2ND INTERESTED PARTY**

14TH FEBRUARY, 2013

RULING OF THE COURT

I. Background

This is an Application brought on 5th December 2012 by Notice of Motion under Rule 1(2) and Rule 21(1) of the East African Court of Justice Rules of Procedure (hereinafter, "The Rules") by the Attorney General of the Republic of Uganda.

The Applicant who is also the Respondent in **Reference No. 3 of 2011** from which this Application arose, was represented by Mr. Wanyama Kodoli, Principal State Attorney and Ms Nabaasa Charity, State Attorney.

The Respondent is the East Africa Law Society, the Premier Regional Lawyers' Association in East Africa and was represented by Prof. Fredrick Ssempebwa.

The 1st Interested Party was represented by Mr. Muiruri Ngugi, State Counsel.

The 2nd Interested Party was represented by Mr. Steven Agaba, Principal Legal Officer.

The Applicant seeks that this Court stays proceedings in **Reference No. 3 of 2011** pending the determination of **Appeal No. 2 of 2012**, which is pending before the Appellate Division of this Court.

For the sake of clarity, we need to recall, in a succinct way, the nexus between **Reference No. 3 of 2011** and **Appeal No. 2 of 2012**.

Reference No. 3 of 2011 was brought before this Court by the East Africa Law Society, the Respondent, in this Application, on 31st May 2011. The Applicant stated in the said Reference that; *“On or about the 11th July 2010, a group of terrorists claiming to be members of the Al Shabab militants (sic) perpetrated and carried out terrorist bomb attacks at the Kyadondo Rugby Club and the Ethiopian Restaurant (Kabalagala) in Kampala, Uganda, that claimed the lives of over 82 people. Following the attacks, the security forces arrested, detained and charged a number of suspects.....”*.

Some of the suspects were from Kenya and in the Reference, the Applicant alleged that the arrest, detention and the prosecution of some, or all Kenyan suspects was unlawful, and contravened the laws of the Republic of Uganda and Articles 5(3) (f), 6(d), 7(2), 27, 29, 30, 38 and 71 of the Treaty for the Establishment of the East African Community (hereinafter, *“the Treaty”*).

The Respondent, the Applicant in this case, denied any violation of Uganda laws or infringement of the Treaty but, as a preliminary issue, argued that under Article 30(2) of the Treaty, the Reference was time barred and prayed that **Reference No. 3 of 2011** be stayed pending determination of **Appeal No. 2 of 2012**.

Appeal No. 2 of 2012 is an appeal from this Court’s ruling in **Application No. 4 of 2011** which arose from **Reference No. 4 of 2011** lodged in this Court on 9th June 2011. **Reference No 4 of 2011** was brought by one, Omar Awadh and 6 Others against The Attorneys General of Uganda and Kenya as well as the Secretary General of the East African Community. The complaint therein, in brief, is that a number of Kenyan nationals were allegedly arrested and abducted from Kenya to Uganda in connection with the 11th

July 2010 terrorist bombings in Kampala, and that their alleged capture and abduction from various locations in Kenya by officers from Kenya, Uganda and the United States of America's Federal Bureau of Investigation, and spiriting them across the border to Uganda where they are facing charges of murder, terrorism and suicide attacks that occurred in Kampala, without invoking due legal process in the respective countries, violated the Treaty, the African Charter on Peoples and Human Rights, the United Nations Charter, and the Universal Declaration of Human Rights.

In **Application No. 4 of 2011**, the Attorney General of Uganda claimed that **Reference No. 4 of 2011** was barred by limitation of time and this Court upon hearing parties to it ruled that it was not time barred. The Attorney General of Uganda, not being satisfied by our Ruling filed **Appeal No 2 of 2012**, which is pending before the Appellate Division of this Court, praying that it be set aside and that the Reference be declared time barred and consequently struck off.

The nexus between the two References is that they both challenge the legality of the alleged arrest, abduction, detention and prosecution, in Uganda, of Kenyan nationals in connection with the 11th July 2010 bombing in Kampala, Uganda. The other connection is that the Attorney General of Uganda claims that both are time barred.

2. Grounds of the Application

The instant Application is based on the following four grounds, contained in the affidavit of Patricia Mutesi, Principal State Attorney sworn on 7th June, 2012;

- i) That the **Reference No. 3 of 2011** is time barred;
- ii) That the Applicant is the Respondent in **Reference No. 4 of 2011, Omar Awadh Omar and 6 Others Vs the Attorney General of the Republic of Uganda** which has similarity of facts and in which it is also averred that the Reference is filed out of time.
- iii) That **Appeal No. 2 of 2012**, which arose from **Reference No.4 of 2011**, aims to plead limitation and therefore the outcome of that Appeal will substantially affect **Reference No. 3 of 2011**.
- iv) That it is in the interest of justice to stay proceedings pending hearing and determination of **Appeal No. 2 of 2012**.

Mr. James Aggrey Mwamu, the President of the East Africa Law Society, in a reply to the sworn affidavit, averred as follows:

- i) That the Respondent is not a party in **Reference No. 4 of 2011** aforesaid;
- ii) That the interests of the Respondent are not intertwined with the interest of any party in the aforesaid Reference;
- iii) That the outcome of that Reference does not affect the interests or relief sought by the Applicant in **Reference No. 3 of 2011**;
- iv) That the issue of limitation of time is not a factor to be determined in **Reference No. 3 of 2012**;
- v) That the outcome of **Appeal No. 2 of 2012** does not have relevance to the determination of **Reference No. 3 of 2011**;
- vi) That the grant of the orders sought may delay justice and prejudice the Respondent;

It is the Respondent's argument in a nutshell that the orders should not be granted.

3. Submissions

Mr. Wanyama Kodoli, learned Counsel for the Applicant in his submissions, told the Court that the Application was brought under Rules 1(2) and 21 (1) of the Rules and he stated that it was an Application for orders to stay proceedings in **Reference No. 3 of 2011** pending the determination of **Appeal No. 2 of 2012** by the Appellate Division of this Court.

He repeated the grounds on which the Application was based but more specifically submitted that the Applicant is the Respondent in **Reference No. 4 of 2011** which arose out of the same events and the same facts and in which the Attorney General of the Republic of Uganda pleaded limitation of time and that the outcome of that Appeal will substantially affect **Reference No. 3 of 2011**. The reason it will substantially affect it, in his view, is that if the Appeal is allowed, **Reference No. 3 of 2011** will collapse. He further submitted that in case the Appeal is dismissed, the Applicant will apply for consolidation of the two References in order to expedite their hearing.

Counsel finally submitted that the interests of justice dictate avoidance of a multiplicity of the Court's decisions in similar matters and invited the Court to exercise its inherent power conferred by Rule 1(2) of the Rules and grant the stay sought.

Mr. Muiruri Ngugi, Counsel for the 1st interested party, on his part, associated himself with the submissions of the Applicant and argued that the two References have the same genesis and facts. He contended, therefore, that for proper administration of

justice, it would be prudent to stay proceedings pending the determination of that Appeal for avoidance of conflicting decisions.

Mr. Steven Agaba, Counsel for the 2nd Interested Party associated himself completely with the Applicant on the main ground; that they are both Respondents in the aforesaid References which have similar facts and the stay order should therefore be granted.

Prof. Frederick Ssempebwa, Counsel for the Respondent opposed the Application. He conceded, however, that it is in the inherent powers of the Court to stay proceedings in deserving cases.

Counsel's objections were based on the following grounds:

- i) That the Rules do not prescribe any circumstances under which the Court's inherent powers to stay proceedings can be exercised;
- ii) That the Respondent's main interest would be the expeditious disposal of proceedings in the matter.
- iii) That contrary to the Respondent's interest in the Reference, the Applicant has never shown any desire to expeditiously ensure the disposal of this matter and if it has had any, it would not have argued for the consolidation of **Reference No. 3 of 2011** and **Reference No. 4 of 2011** at this stage; that rather the Applicant should have raised it at the Scheduling Conference.
- iv) That it is a fact that the question of limitation of time was listed among the other issues to be argued at the hearing and that delay to proceed as agreed connotes a lack of interest in the disposal of the Reference from which the present Application arises.

- v) That the Applicant appears to be convinced that it will succeed in **Appeal No. 2 of 2012** so that **Reference No. 3 of 2011** will automatically collapse, yet each case is decided on its own facts.
- vi) That it was the Respondent's submission that, while conceding that the Court needs to avoid conflicting decisions, the Application should be dismissed on the ground that it would delay the disposal of **Reference No. 3 of 2011** which has to be determined on different issues in any event.

In reply (rejoinder), the Applicant conceded that limitation of time was one of the issues agreed upon at the Scheduling Conference. But that thereafter the Attorney General of the Republic of Uganda realized during consultations that in **Reference No. 4 of 2011**, an Appeal had been instituted. Therefore given that both References have the same content and the same facts, it appeared prudent to file this Application to stay the instant Reference and seek guidance from the Appellate Division of the Court on the issue of limitation of time.

4. Determination

We have carefully considered the evidence and submissions of the parties to this Application and we opine as follows:

This Application was brought under Rules 1(2), and 21(1) of the Rules.

Rule 1 (2) in particular reads as follows:

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

It is clear that the inherent power in granting or refusing the stay of proceedings derives from this Rule.

We share the Respondent's view that this Application should have been raised at the Scheduling Conference and that would also have saved time. In the interest of justice, however, this Court must consider the other factors to grant or to dismiss the application.

The first is the possibility of conflicting decisions. It is our considered view that a stay may be granted where there are multiple proceedings pending in both Divisions of the Court and the decision of the Appellate Division might affect the outcome of the other proceedings. In the instant Application, we think that due to the nexus between both References as shown above, the outcome of **Appeal No. 2 of 2012** might have an impact on **Reference No. 3 of 2011**. At this stage we cannot say that such impact will be substantial or not, but it suffices that we foresee an impact. We believe that a common sense justification to a stay such as is sought here, is to aim at avoiding conflicting decisions and the possibility of rendering some of them nugatory. Consequently we find it prudent to await for the outcome of **Appeal No 2 of 2012**.

The second consideration is balance of convenience. The questions which the Appellate Division is handling in **Appeal No. 2 of 2012** do overlap some aspects of **Reference No. 3 of 2011** as shown elsewhere above while discussing the nexus

between the two cases. The balance of convenience, in our view, lies in favour of all parties. It is therefore in the interest of good and equitable justice for this Court to await their determination by the higher Court.

We are comforted by the same approach taken by Justice Adamu Dalhatu of the Court of Appeal of Lagos, Nigeria in **CA/L/255/05 MOBIL PRODUCING NIGERIA UNLIMITED V. HIS ROYAL HIGHNESS OBA YINUSA A. A** where he stated:

“...it will be futile to allow the proceedings at the lower Court to continue while an appeal is before this court challenging its jurisdiction to hear and determine the suit against them at the lower court. At the end of the day, if their appeal hereat succeeds, the whole proceedings of the lower court will be declared a nullity and be struck out however well conducted it might have been. It is therefore necessary to avoid this undesirable result by ordering a stay of proceedings in the present case pending the determination of the appeal against the trial court jurisdiction.”

We are in complete agreement with the sentiments of the learned Judge.

The final consideration is one of injury. We do not see any injury to the Respondent which cannot be adequately compensated if this Application is granted. If there is one, like the delay to dispose of the Reference as argued by the Respondent, it would be compensated later by the final disposal of the Reference after the outcome of the Appeal is known and taken into consideration.

We are also fortified by this Court's position in **Reference No. 3 of 2010, (The Independent Medical Legal Unit case)** where, on a similar question, we held as follows:

“This Court has discretion to stay proceedings for sufficient cause. ... We nevertheless find that in the circumstances of this case, the delay is not fatal. We are of the view that an appeal on grounds of jurisdiction of this Division to the Appellate Division should be disposed of first before we can comfortably proceed to determine the Reference on the merits because jurisdiction is the matter that goes to the root of the Reference.”

We reiterate the above findings as applicable in the circumstances of the Application now before us.

In view of the foregoing, we find that despite the possible delay, it is nevertheless appropriate to await the outcome of the aforesaid Appeal. The interest of justice would be better served by granting a stay and we accordingly grant the Application as prayed.

Costs thereof shall abide the outcome of **Appeal No. 2 of 2012**.

It is so ordered.

DATED, Delivered and Signed at Arusha thisday of2013

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Johnston Busingye
PRINCIPAL JUDGE

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Jean Bosco Butasi
JUDGE

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Isaac Lenaola
JUDGE