IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Fakihi A. Jundu, J & Audace Ngiye, J)

APPLICATION NO.11 OF 2015

(Arising from Reference No. 7 of 2015)

ALICE NIJIMBERE ..... APPLICANT

VERSUS

EAST AFRICAN COMMUNITY SECRETARIAT ..... RESPONDENT

24TH NOVEMBER, 2015

REASONED RULING OF THE COURT

1. In June 2015, the process for the recruitment of a Registrar for the East African Court of Justice commenced with the publication of an advertisement Ref. EAC/HR/2014-2015/033. The Applicant, a citizen of the Republic of Burundi, was one of the shortlisted candidates in that recruitment process. On the other hand, we understood the Respondent to have been the office responsible for oversight of the recruitment process.

2. On 28th October 2015, the Applicant filed **Alice Nijimbere vs. The East African Community Secretariat EACJ Reference No. 7 of 2015**, as well as the present Application before this Court. The Application sought purportedly interim orders pending the hearing of the Reference. It specifically sought the following Orders:

    a. The nullification of the Respondent's decision of 28th September 2015 rejecting the Applicant's request of dispensation to be interviewed at the EAC Headquarters in Arusha rather than in Bujumbura, Burundi.

    b. The suspension of the recruitment process in reference above until pleadings were closed.

    c. The relaunch of the interview process as well as 'organization' (sic) of a different interview panel in accordance with the East African Community Staff Rules and Regulations, 2006.

3. The Application was *inter alia* premised on the following grounds:

   a. Article 45(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty') provided the requirements for the appointment of a Registrar of the East African Court of Justice (EACJ)

   b. A Reference had been filed before the said Court challenging the Secretary General to the Community for organizing the interviews for the position in reference above in contravention of Articles 6(d), (e) and (f) of the Treaty, as well as Regulations 20(8) and 21(1) of the East African Community Staff Rules and Regulations, 2006(hereinafter referred to as 'the Staff Rules and Regulations'). We hasten to point out here that it is the presumption herein that these are the Regulations in issue herein as the cited 'East African Court Rules and Regulations 2006' are not known to exist.

   c. The matter presented to the Court for determination was a matter of Treaty infringement.

   d. Rather than be allowed to infringe Treaty provisions, the Respondent should be guided on how to comply with the Treaty in the recruitment process in issue presently, as well as the appointment of the Registrar by the Council of Ministers.

   e. Unless the Orders sought were granted, the Applicant stood to suffer irreparable injury.

4. The Applicant represented herself at the hearing of the Application, while the Respondent was represented by Dr. Anthony Kafumbe.

Upon hearing the Parties, this Court did, on 11th November 2015, deliver a summary Ruling disallowing the Application and reserved reasons therefor to be given on notice to the Parties. This course of action is duly provided for in Rule 68(3) of the East African Court of Justice Rules of Procedure (hereinafter referred to as 'the Rules'). We do hereby deliver our reasoned Ruling in this matter.

5. In a nutshell, Ms. Nijimbere argued that the need for interim orders was premised on the fact that the recruitment and appointment of a registrar was due to be concluded by the end of November 2015, therefore closure of the recruitment process in the absence of interim orders by the Court would render her Reference academic. In her opinion, she thus stood to suffer irreparable damage and injury. The Applicant, in what amounted to evidence from the Bar, enumerated her extensive work experience that, in her submission, formed the basis for her being shortlisted as a candidate for the position of Registrar. She questioned the Respondent's decision not to grant her request for dispensation despite having presented what, according to her, was a genuine reason to wit the sickness of her 7 year old daughter. Ms. Nijimbere did also take issue with the reasons advanced for rejection of her request, as well as the untimely manner in which the said decision was communicated to her. We have deduced from the documentation on record in **Ref. No. 7 of 2015** that the reasons advanced for the Respondent's decision were twofold: first, that the medical documents availed to it indicated that the child was not admitted in hospital but simply under observation therefore the Applicant could have made alternative plans for the child's care and,

secondly, for purposes of a level playing field, all candidates were required to be interviewed in their respective home countries.

6. Responding to questions from the Bench, it was the Applicant's unsubstantiated submission from the Bar that the said decision was communicated to her on the very day of the interview. In addition, the Applicant clarified that her Reference was premised on Articles 6(d), (e) and (f), as well as 30 and 31 of the Treaty. She further clarified that she had sued EAC Secretariat and not the Secretary General to the Community, as prescribed in Article 4(3) of the Treaty, on the assumption that upon suing the latter entity the Secretary General would be directly involved in the case. Ms. Nijimbere intimated that the crux of her case was, first, that she was given only 2 days to travel to Bujumbura for the interview; secondly, that the communication of the Respondent's decision with regard to her request for dispensation was communicated only one (1) hour to the interview and, finally, that she had been requested to meet the cost of travel to and accommodation in Bujumbura, regardless of her ability to do so.

7. Conversely, the Respondent premised its case on the principles governing the grant or refusal of interim orders as stated in the cases of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358** and **East African Law Society & 4 Others vs. Attorney General of Kenya & 3 Others EACJ Application No. 9 of 2007**. The principles advanced in the foregoing cases include the demonstration by the Applicant of a *prima facie* case with probability of success; occasioning irreparable injury to the Applicant that cannot be adequately compensated by damages should the interim orders not be granted, and a determination of the

balance of convenience of the matter in the event that the Court had doubts about the first 2 principles.

8. We understood it to be the Respondent's contention that the Applicant had, in bringing **Reference No. 7 of 2015** against the EAC Secretariat, sued the wrong party contrary to Article 4(3) of the Treaty. Dr. Kafumbe argued that by suing the wrong party, the Applicant fell short of establishing a *prima facie* case with a probability of success. Without further elaboration, learned Counsel did also argue that neither the Treaty nor the Staff Rules and Regulations had been breached by the Respondent therefore no *prima facie* case had been established in that regard. On the question of irreparable injury, it was the Respondent's submission that the Applicant had not demonstrated what injury she stood to suffer should the interim orders she sought not be granted that could not be adequately compensated by damages. In oral submission highlights, Dr. Kafumbe argued that whatever injury she had suffered could be compensated by damages. Finally, on the balance of convenience, it was Dr. Kafumbe's submission that it would be superfluous for the Court to restrain the Respondent at this stage as interviews for the position in contention had already been concluded. In oral highlights, learned Counsel argued that the recruitment process had been concluded on 28th September 2015, therefore a suspension or repetition of the process would be a terrible inconvenience to the Respondent.

9. In reply, Ms. Nijimbere questioned Dr. Kafumbe's submission that all candidates had to be interviewed in their home country in order for the Respondent to verify their nationalities. She argued that this would have been the role of M/s Deloitte & Touche Limited, the

recruitment consultants; that argument by the Respondent was not cited in its decision rejecting her application for the dispensation of some recruitment rules and, in any event, the Respondent would have been aware of her nationality given that she was married to an employee thereof. Ms. Nijimbere agreed with learned Respondent Counsel that the grant or refusal of an application for interim orders was a matter for judicial discretion, but challenged the Respondent to demonstrate to the Court how her issue had been administratively addressed. Finally, with regard to the requirement of a *prima facie* case, we understood the Applicant to contend that, having been shortlisted for the position in question, she did have the requisite experience for the position applied for and the Respondent was not at liberty to doubt her prospects of success in the interview. She further argued that she had suffered moral injury having been denied the opportunity to be interviewed yet she had a sick child.

10. The grant of interim orders before this Court is governed by Article 39 of the Treaty as read together with Rules 21 and 73 of the Court's Rules of Procedure. Article 39 reads:

> "**The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable**. ...."

11. This Court does recognise the principles governing the grant or refusal of interim orders as cited by learned Counsel for the Respondent. An applicant for interim orders must demonstrate a *prima facie* case with a probability of success, but the interim orders sought would not normally be granted unless such an applicant might otherwise suffer irreparable injury that could not be adequately compensated by an

award of damages. If a court faced with such an application was in doubt as to whether or not a *prima facie* case had been established and/or the injury the applicant was liable to suffer could not be adequately compensated by an award of damages, the court was enjoined to determine the application on a balance of convenience. See **Prof. Peter Anyang' Nyongo & 10 others vs. The Attorney General of the Republic of Kenya & 3 others EACJ Ref. No. 1 of 2006**.

12. This Court has also adopted the principles governing an application of this nature as stated in the case of **American Cyanamid vs. Ethicon Ltd (1975) AC 396**, where it was held that a court considering an application for temporary relief had to be satisfied that the claim was not frivolous or vexatious but, rather, presented a serious question to be tried; without necessarily delving into questions of law and/or fact upon which the substantive suit hinges. See **Mbidde Foundation & Another vs. Secretary General of the East African Community & Another EACJ Consolidated Application No. 5 & 10 of 2014**.

13. We must state from the onset that we do not find the Applicant's recourse to Article 31 of the Treaty tenable. That legal provision pertains to employees of the East African Community, not prospective employees thereof such as the Applicant. Nonetheless, her claim against the Respondent is premised on Article 30 as well. We do, therefore, revert to that aspect of her claim.

14. As stated hereinabove, it was argued for the Respondent that the wrong Party had been sued by the Applicant therefore **Ref. No. 7 of 2015**, from which the present Application arises, did not establish a

prima facie case. Learned Counsel for the Respondent cited Article 4(3) of the Treaty in support of his submission. It reads:

> **"The Community shall, as a body corporate, be represented by the Secretary General."**

15. This Court has had occasion to pronounce itself on what would amount to a *prima facie* case within the context of the East African Community jurisdiction. In that regard, the Court has found a *prima facie* case to have been established where an issue for Treaty interpretation has been raised on the face of an Applicant's pleadings as required by Article 27(1) of the Treaty. See **Venant Masenge vs. Attorney General of Burundi EACJ Application No. 5 of 2013**. In the present case, the Applicant does in paragraph 30 (page 4) of the Reference seek this Court's determination as to whether or not the rejection of her request for dispensation of the interview rules by the Respondent constitutes a breach of Article 6(d), (e) and (f) of the Treaty. On the face of the Applicant's pleadings, therefore, a *prima facie* case would appear to have been established within the ambit of Article 27(1) of the Treaty.

16. However, the issue of a wrongful Party as raised by the Respondent invokes the question as to whether the Reference does raise a serious triable issue. Quite clearly, should the wrong Party have been sued, the Reference cannot be said to present any legal claim whatsoever against the Respondent. Without delving into the merits of the Reference, it seems to us that the Treaty draws a distinction between the 'Community' established by Article 2(1) thereof and the Respondent entity as established by Article 9(1)(g). We do recognize that it is no part of this Court's function while considering an

interlocutory application to determine intrinsic questions of law which call for detailed legal arguments and considerations; those are matters to be dealt with at the hearing of the substantive Reference. See **American Cyanamid vs. Ethicon Ltd** (supra). For present purposes, the question as to whether or not the present Respondent has recourse to the provisions of Article 4(3) of the Treaty is one such question of law that calls for detailed legal arguments and cannot be entertained at this stage. Consequently, subject to more intrinsic arguments at the hearing thereof, we are unable to agree with learned Counsel for the Respondent that the wrong Party has been sued in **Ref. No. 7 of 2015**. We do, therefore, deem it necessary to determine the questions of irreparable injury and balance of convenience.

17. The decision in **E. A. Industries vs. Trufoods [1972] EA 420** that was referred to in **Giella vs. Casman Brown** (supra) is quite instructive in this regard. In that case, it was held (Spry VP):

> **"There is, I think, no difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages."** *(our emphasis)*

18. Learned Counsel for the Respondent questioned the injury the Applicant stood to suffer in the event that this Application was

disallowed. The Applicant did not address this issue satisfactorily, simply alluding to the injury she had suffered by virtue of the Respondent's actions. That is not the sort of injury envisaged in an application for interim orders. The injury envisaged in such an application is to do with whether or not the preservation of the pre-application *status quo* would avert injury to an applicant that cannot be compensated by damages. The Applicant did not satisfy us that whatever injury she might suffer should the present *status quo* not be preserved could not be adequately compensated by an award of damages. Consequently, we find that the Applicant has not sufficiently demonstrated the irreparable injury she stood to suffer if this Application were disallowed or that the said injury could not be compensated by damages.

19. In **American Cyanamid vs. Ethicon Ltd** (supra), the objective of interlocutory reliefs was aptly stated as follows (Lord Diplock):

> **"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could 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 of the defendant to be protected 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 uncertainty were resolved in the defendant's favour at trial. The court must weigh**

one need against another and determine where 'the balance of convenience' lies."

20. In the present Application, the Applicant sought to protect her right to employment from violation by halting the appointment of a substantive Registrar for the Court prior to a determination of **Ref. No. 7 of 2015**. Learned Counsel for the Respondent, on the other hand, intimated that the recruitment process commenced in June 2015 and had since been concluded in accordance with a directive to the Respondent by the Council of Ministers to conclude the recruitment of the Registrar by 31st October 2015.

21. We have already found above that the Applicant has not established the injury she stood to suffer or whether such alleged injury could not be adequately compensated by an award of damages. Yet, she seeks the nullification of the Respondent's decision of 28th September 2015, the suspension of the recruitment process and the relaunch of the interview process under a different panel of interviewers. As aptly stated in **American Cyanamid vs. Ethicon Ltd** (supra), a court faced with an application for interim orders must weigh the protection of an applicant that is likely to suffer irreparable injury against the corresponding protection of the respondent from irreparable injury as a result of foregoing his/ her own legal right. The court must determine where the balance of convenience in the matter lies.

22. In the instant case, we are unable to determine the Applicant's prospects of success in the interviews from the pleadings presented. This would have provided a guide as to the magnitude of her injury should the recruitment process not be halted. Save for her

submissions on the subject, no documentary proof was furnished in support of her claims. On the other hand, we are faced with a recruitment process that seems to be at an advanced stage and only awaits appointment of the successful candidate by the appointing authority to wit the Council of Ministers. It is apparent from the record that the recruitment process involved the engagement of consultants, M/s Deloitte & Touche Ltd, as well as other costs and logistics attendant to the interview of the candidates in their home countries by teleconference. In that regard, Dr. Kafumbe did allude to time as having been of essence following a directive by the Council of Ministers that the recruitment process be concluded by 31st October 2015.

23. We find that the totality of the circumstances of this case are such that halting the recruitment process in the absence of satisfactory proof of injury to be suffered by the Applicant would occasion greater injury to the Respondent that has discharged its duty as far as the said recruitment process is concerned. It is for the foregoing reason that this Court respectfully disallowed the present Application with no order as to costs.

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MONICA MUGENYI
PRINCIPAL JUDGE

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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO
JUDGE

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FAKIHI JUNDU
JUDGE

.....

AUDACE NGIYE
JUDGE