



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



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

APPLICATION NO. 08 OF 2015

(Arising from Reference NO. 5 of 2015)

RWENGA ETIENNE 1ST APPLICANT

MOSES M.MARUMBO 2ND APPLICANT

VERSUS

SECRETARY GENERAL,

EAST AFRICAN COMMUNITY..... RESPONDENT

24th November 2015

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REASONED RULING OF THE COURT

A. INTRODUCTION

1. The Applicants, Mr. Rwenga Etienne and Mr. Moses Marumbo, are natural persons, adult citizens of the Republic of Rwanda, and the United Republic of Tanzania, respectively. The Respondent is self-defining and sued as such under Article 4(3) of the Treaty for the Establishment of the East African Community (“The Treaty”).
2. On 9th September 2015, the Applicants filed **Reference No. 5 of 2015 Rwenga Etienne and Moses Marumbo vs. The Secretary General, East African Community**, as well as the present Application before this Court.
3. The Applicants by the said application sought interim orders pending the hearing of **Reference No. 5 of 2015** and specifically sought orders restraining the Respondent, his agents, assignees, servants or any other persons drawing orders from the Respondent from continuing with the process of the recruitment of the Registrar of the East African Court of Justice (“The Court”).
4. The Application is premised on the following grounds:-
 - a) That Article 45(1) of the Treaty provides for requirements for the appointment of the Registrar of the East African Court of Justice;*

- b) That a reference has been made to the East African Court of Justice challenging the act of the Secretary General to recruit the Registrar of the East African Court of Justice on the basis of requirements other than the ones set out by Article 45(1) of the Treaty;*
- c) That the matter presented to this Court for determination is a matter of infringement of the Treaty;*
- d) That the Respondent should not be allowed to infringe on the provisions of the Treaty but should instead be guided on how to comply with its provisions in the process of the recruitment of the Registrar and onward appointment by the Council of Ministers;*
- e) That unless the orders prayed for are herein granted, the Applicants stand to suffer irreparable injury;*
- f) That this matter ought to be dispensed within a timely manner as it is a matter of urgency, the resolution of which is important to guide the recruitment of the Registrar of the Court.*
5. At the hearing of the Application, the Applicants were represented by Mr. Paul Ng'arua, while the Respondent was represented by Dr. Anthony L. Kafumbe. Upon hearing the Parties, this Court did, on 30th October 2015, deliver a summary Ruling disallowing the Application and reserved reasons thereof 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 (“The Rules”). We hereby deliver our reasoning.

B. CASE FOR THE APPLICANT

6. **Reference No. 5 of 2015** principally challenges the process of recruitment of the Registrar of this Court on the grounds *inter alia* that it was not transparent nor fair because the Respondent:-

i) Selectively applied the quota system and denied citizens of Rwanda and Tanzania the opportunity to competitively participate in the said process. Such an action, they argue, undermines the spirit of integration enshrined in Article 6(d) of the Treaty; and

ii) Declined to abide by the directive of the Council of Ministers which directed him to recruit the Registrar in accordance with Article 45 of the Treaty as well as the EAC Staff Rules and Regulations. Instead, he purported to amend the directive by demanding qualifications for the office of Registrar beyond what is set out in Article 45.

7. Further, the Applicants have argued that unless the interim orders are granted, qualified potential applicants will stand to suffer discrimination in the process of recruitment.

8. The Applicants argued that their Application for interim orders stands the test of *prima facie* case, irreparable prejudice to the Treaty and the Decision Making Protocol which only a grant of interim orders can cure in so far as the impugned requirement that the Registrar should have an LLM degree and 15 years of relevant service, qualified as extraneous qualifications, is in essence an amendment to Article 45(1) without due process, and therefore a breach of the Treaty. On that point, the Applicants contended that there is a substantial question to be determined, and as such, a *prima facie* case that has prospects of success on the merits had been established. They added that the impugned action to exclude citizens of Tanzania and Rwanda from running for the post is not backed up by any decision of Council.
9. On the expectations that an applicant seeking interim orders must establish that, on the balance of convenience it is so entitled, learned Counsel for the Applicants contended that public interest is at stake in this Application in so far as the injustices meted out by the Respondent are going to affect the integrity of the Treaty and Protocols of the East African Community, the citizens (including the Applicants) and the integrity of the office of the Registrar. He argued also that in the event, the recruitment of the Registrar has not been concluded and as such no inconvenience whatsoever will

be occasioned to the Respondent if the process is stayed to remedy the error and to uphold the integrity of the Treaty.

C. CASE FOR THE RESPONDENT

10. On its part, the Respondent, in opposing the prayer for interim orders pleads that, in the instant case, there is no *prima facie* case with probability of success that has been established against him and that the entire Applicants' prayers are based on flawed misinterpretation of the Treaty and the East African Community Staff Rules and Regulations. Dr. Kafumbe, the learned Counsel for the Respondent, did also argue that it has not been shown how granting an injunction against the Respondent will enable Applicants get the quota that they have already exhausted in any event. He added that the Applicants had failed to show how, if the injunction was not granted, they will suffer irreparable injury that cannot be compensated by award of damages. Finally, he stated that the balance of convenience favors the Respondent the recruitment of the Registrar being at its final stage and the successful candidate is awaiting his appointment. He referred to the decision in **Sergent vs. Patel 1972 16 EACA63** in support of his view that interim orders should not be based on speculation and reliance on misinformation as the Applicants are doing in this case.

D. COURT'S DETERMINATION

11. 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. 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. ...”

12. It is also trite law within this Court, that an applicant who seeks an interim injunction must show; firstly, a *prima facie* case with a probability of success; secondly, that non-grant of the temporary injunction would expose such an applicant to irreparable injury that would not be justly compensated by an award of damages, and, thirdly, that where a court is in doubt, it would decide the application on balance of convenience. This position is reflected in cases such as **Prof. Peter Anyang' Nyongo & 10 others vs The Attorney General of the Republic of Kenya & 3 others, EACJ Ref. No. 1 of 2005; Mbidde Foundation Ltd & Rt. Hon. Margaret Zziwa vs. Secretary General of the East African Community & The Attorney General of the Republic of Uganda, EACJ consolidated Applications No. 5 & 10 of 2014, and East African Civil Society Organisations Forum (EACSOFF) vs The Attorney General of the Republic of Burundi and 2 others, EACJ Application No. 5 of 2015.**

13. In the instant Application, it was strongly argued by the Applicants that the act of the Respondent to recruit the Registrar of the East African Court of Justice on the basis of requirements other than the ones set out by Article 45(1) of the Treaty, as well as the Decision Making Protocol and the East African Community Staff Rules and Regulations was in contravention of the said legal instruments. It was also the said Applicants' contention that the Respondent's action of adding extraneous qualifications to Article 45(1) of the Treaty as contained in the impugned selection process without due process has illegally amended and undermined Article 45(1) in violation of Article 14 of the Treaty.

14. The Applicants also took issue with the legality of the said process of the recruitment of the Registrar of the East African Court of Justice and invited this Court to stop the Respondent from continuing with the process.

15. Conversely, Dr. Kafumbe strongly opposed this Application. He argued that at the time of running the advert for Registrar, the staffing of the Court did in fact show that the Republic of Rwanda and the United Republic of Tanzania had exhausted their quota points. The advert did not therefore allow Rwandan and Tanzanian citizens to apply for the said position knowing that they would not be selected.

16. The Respondent also pleaded that Article 45(1) should not be cited in isolation but must be read together with Article 45(3) in so far as the conditions of service for executive staff justify the requirement of a higher degree and minimum years of experience as set out in the East African Community Job Description Manual. It is in the same vein that the Council exercising its mandate under the Treaty, specifically Article 14(3)(a), set a 15 years' experience for the position of Registrar (Grade D1) given the senior nature of the appointment.
17. He finally contended that the claim that the Treaty or the Staff Rules and Regulations of 2006 were breached does not arise and added that there are no Partner States or East Africans citizens that have been favored or discriminated in the recruitment exercise.
18. We have read the pleadings and documentary annexures so far filed in Court both in the Motion and the Reference. We also benefited tremendously from the very able submissions by all learned Counsel who addressed us.
19. Article 30(1) of the Treaty explicitly prescribes the jurisdiction of this Court. It reads:-

“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.”

20. Therefore, for a matter to be justiciable before this Court, the subject matter in question must be an Act or statute, or a regulation, directive, decision or action of a Partner State or an Institution of the East African Community. Further, it must be one, the legality of which is in issue vis-à-vis the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty.
21. In the present case, the Reference raises issues of due process in the appointment of the Registrar of the East African Court of Justice. The action or decision giving rise to a cause of action in that conflict would be the decision to recruit the Registrar on the basis of a job advertisement that purportedly flouts the cited provisions of the Treaty and related EAC instruments.
22. Applying the above cited principles for the grant of an interim injunction, we are satisfied that the Applicants have shown that Reference No. 5 of 2015 raises a triable issue, because the matter before this Court touches upon an alleged breach of Article 45(1) of the Treaty. Another issue for determination by this Court is whether the Respondent has taken steps to amend and/or to augment article

45(1) by creative, illegal and erroneous reasoning that the Council of Ministers had, by operation of Article 45(3) of the Treaty, amended and/or augmented the Registrar's qualifications without due process. The Applicants also alleged that Article 14 of the Treaty was breached in so far as the directive to change the qualifications of the Registrar by whatever means were not communicated in a gazette as contemplated by Article 14(5).

Taking into account all the above issues and without pre-determining any of them, we are satisfied that there is a valid question for Treaty interpretation, and we find, therefore, that a *prima facie* case has been established.

23. With regard to the second criterion for the grant of an interim injunction, there is no material before us that indicates that the Applicants are likely to suffer irreparable injury that cannot be compensated by an award of damages. The Applicants, with respect, failed to demonstrate that they had the requisite skills and qualifications for the job of Registrar and that they are people who should have been considered if the door had been opened for them. Mr. Ng'aru, learned Counsel for the Applicants, strenuously argued that the fact that Article 45(1) of the Treaty has been misinterpreted, misconceived and passed through as similar to Article 45(3) is a big prejudice towards the Applicants as observant citizens. And, for him, such an action cannot be cured by damages.

With due respect to Counsel for the Applicants, it appears to us that he was not able to address us satisfactorily (despite repeated questioning by the Court) on what would bring the Applicants into the category of people that would be injured if the interim orders were not granted. In any event, we were not also satisfactorily addressed on the issue of whether or not whatever injury the Applicants were likely to suffer if at all, could not be adequately compensated by damages. Consequently, we find that the Applicants have not sufficiently demonstrated the irreparable injury they stood to suffer if this Application was disallowed or that the said injury could not be compensated by damages. Having so found, we do not deem it necessary to consider the balance of convenience in this matter.

24. Having so said, had we considered the balance of convenience in this matter, an important consideration in this balancing exercise would be whether any potential injustice to either party could be adequately compensated by damages. If the injury likely to be suffered by either Party could be qualified financially, we would be inclined to grant or refuse the injunction accordingly. For instance, if the injury to the Applicants may be adequately compensated by damages, this Court would be inclined not to grant the injunction; and similarly if the injury likely to be suffered by the Respondent may be compensated in damages, this Court would be inclined to

grant the injunction. The Applicants bore the burden of demonstrating that the grant of the injunction was necessary to protect them against irreparable injury. With respect, we are not satisfied that the Applicants demonstrated any injury they were to suffer should the injunction not be granted. In their affidavit, the Applicants stated that they seek to protect The Republic of Rwanda and the United Republic of Tanzania interests and their citizens, as well as the rights of the Applicants but they did not provide material that demonstrates the injury that any such party is likely to suffer if the injunction is refused. Further, there is no reference or application on this matter tabled before this Court by the Attorney General of the Republic of Rwanda or the United Republic of Tanzania who are entitled to protect their Partner States and citizens' interests before this Court.

25. Further, weighing the likely inconvenience or damage that would be suffered by the Applicants if the interim orders were not granted against the likely inconvenience or costs to the Respondent or the Community if it is granted, we take the view that the Respondent in his representative capacity as enshrined in Article 4(3) of the Treaty stands to suffer inconvenience with more far reaching repercussions to the Community should we grant the interim orders prayed for than the Applicants would suffer should we refuse the same.

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27. The costs thereof shall abide the outcome of the Reference.

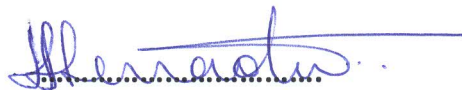
28. We further direct that the Reference be fixed for hearing as a matter of priority.

29. It is so ordered.

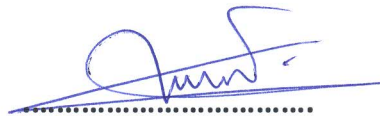
Dated and delivered at Arusha this 24th day of November 2015.



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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



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AUDACE NGIYE
JUDGE