IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, J & Fakihi A. Jundu, J)

APPLICATION NO.1 OF 2016

(Arising from Reference No.17 of 2014)

HON. DR. MARGARET NANTONGO ZZIWA ..... APPLICANT

VERSUS

THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY..... RESPONDENT

24TH JUNE, 2016

RULING OF THE COURT

INTRODUCTION

1. This Application is premised on Article 20 of the Treaty for the Establishment of the East African Community (The Treaty), Rules 1(2), 21(1),(2),(5), (56)(1), 2, 3, 4, 5 and 6 of this Court's Rules of Procedure as well as Form 7 of the Second Schedule to the Rules.

2. The Applicant is a member of the East African Legislative Assembly (hereinafter "the Assembly") and former Speaker of the Assembly.

3. The Respondent is the Secretary General of the East African Community and is sued as such.

4. In **Reference No.17 of 2014**, the Applicant challenges certain actions leading to her removal as Speaker of the Assembly and claims that they are in violation of the Treaty. The Reference is yet to be heard and by the present Application, she now seeks the following orders:

    a) **That the Applicant be allowed to obtain Court's Witness Summons to summon the following whose attendance is required either to give evidence or to produce document(s) and the Witness Summons specifies the time and place of attendance and states whether attendance is required for giving evidence and/or for producing documents. The following are the Applicant's possible witnesses, namely:**

        i) **Hon. Dr. Margaret Nantongo Zziwa;**
        ii) **Hon. Mumbi Ngaru Agnes;**
        iii) **Hon. ShyRose Bhanji; and**
        iv) **Hon. Nyerere Makongoro.**

b) Alternatively, The East African Court of Justice on its own motion summon the above mentioned witnesses to give evidence or to produce any document(s) which in the Court's opinion, the evidence or document is essential for the just determination of Reference No.17 of 2015; and

c) Costs of the Application be provided for.

THE APPLICANT'S CASE

5. In the grounds in support of the Application, the Affidavit sworn on 22nd January, 2016, the Supplementary Affidavit sworn on 9th March, 2016, as well as Submissions on her behalf, the Applicant has stated that in view of the provisions of Section 20 of the EALA (Powers and Privileges) Act, 2003, her witnesses named above cannot adduce evidence in this or any other forum, without complying with that section of the Community Law.

6. It is her further case that on 9th September, 2015 and 15th September, 2015, she wrote to the Speaker of Assembly seeking leave to prosecute her case, adduce evidence and call witnesses from the Assembly on the events leading to her removal including producing such documents as are necessary in that regard. No response was given to her until 22nd September, 2015 when the Speaker wrote to her advising her to seek such leave from the Assembly during its plenary meeting on 14th – 16th October, 2015 in Nairobi.

7. Subsequently, according to the Applicant, the issue of leave was not placed on the Order Paper of the Assembly during the said meeting as there was pending delivery before this Division a Ruling on matters touching relating to Section 20 aforesaid and that the issue was therefore *sub judice*.

8. The Applicant then wrote to the Speaker on 6th November, 2015 renewing her quest for the leave to adduce evidence and by a letter dated 13th November, 2015, the Speaker advised her to make the necessary application before the Assembly at its plenary meeting of 23rd November – 3rd December, 2015 in Kigali. A motion to that effect was then tabled on 3rd December, 2015 but it was defeated by a majority vote of 23 and 3 abstentions while 5 members voted in its favour.

9. It is her case therefore that since it is clear that neither the Clerk, the Speaker nor the Assembly would ever grant her and her witnesses the required, leave it is in the interest of justice that the orders sought should be granted for the just determination of **Reference No.17 of 2014**. That unless the said orders are granted, she stands to suffer irreparable damage and prejudice in total violation of the Treaty and the Rules of this Court. It is also just and equitable that the Application be granted as it is merited, so she argued.

10. In addition to the above, the Applicant states that her Application is not an attempt at circumventing Section 20(1) aforesaid but is rather, a last resort on her part, to avoid further frustration by the Assembly. That without the leave or orders of this Court, she cannot properly prosecute her Reference with relevant evidence surrounding her removal by the Assembly.

11. It is her further case that the Application is not an affront on the powers and privileges of the Assembly but rather an enforcement of the Principles of Checks and Balances as well as Separation of Powers enshrined in the Treaty.

12. In his submissions, Counsel for the Applicant, Mr. Tumwebaze and Mr. Semuyaba while reiterating the above facts added that under Rule 56(3) of the Rules of this Court, the Court may on its own motion summon any person to give evidence or produce any document if in the opinion of the Court such evidence or document is essential for the just determination of any matter before it. That in that context, it is the Applicant's contention that the evidence to be produced by the named witnesses fits the expectation of the Rules.

13. Referring to Section 20 aforesaid and the application for leave made by the Applicant, Counsel submitted that whereas the Speaker was under duty to address it while the Assembly was in recess, he deliberately refused to do so, delegated it to the Assembly where a vote was taken against grant of leave hence the present Application.

14. Relying on our Ruling in **Reference No.17 of 2014** (between the same Parties) reported as **[2012-2015] EACJLR 496]** , Counsel stated that this Court has previously invoked Rule 56 to summon the Clerk of the Assembly to produce certain documents and it can still do so at the present instance.

15. He also relied on this Court's decision in **AG of the Republic of Uganda vs. East African Law Society & Anor Application No.17 of 2014** and **African Network for Animal Welfare vs. The Attorney General of the Republic of Kenya, Reference No.9 of 2010** where this Court in the former case, allowed electronic evidence to be adduced despite opposition by one party and in the latter case, the Court stated that it had inherent jurisdiction to give directions as to how each case should be heard.

16. Counsel finally relied on the International Criminal Court decision in the case of **Prosecutor vs. William S. Ruto and Jushua Arap Sang ICC Case No.1/09-01/11** to argue that the Court can summon witnesses if it determines that those witnesses are necessary for the determination of the truth in any case before it. In doing so, that Court relied on International Law Principles to the effect that for witnesses summons to issue they must meet the threshold of:

    i) Relevance
    ii) Specificity; and
    iii) Necessity.

17. He added that the present Application has met that threshold and ought to be granted as prayed.

THE RESPONDENT'S CASE

18. In responding to the Application, the Respondent filed a Replying Affidavit sworn on 5th February, 2016 by Enos Bukuku, Deputy Secretary General (Planning and Infrastructure). Mr. Agaba, representing the Respondent, also made Oral Submissions.

19. His case is that he is opposed to any attempt by the Applicant to circumvent the requirements of Section 20(1) aforesaid by seeking this Court's help in securing witnesses who are members or officers of the Assembly, who have not requested leave of the Assembly as is required by the said Section.

20. He has also argued the point that summons are wholly unnecessary in the present instance because the named persons are in fact witnesses who have voluntarily agreed to come and testify on behalf of the Applicant and that the Applicant cannot in the same breathe

seek summons for her own testimony as is apparent from the Application.

21. On the contention that the Assembly frustrated the Applicant's application for leave, it is the Respondent's case that it was in fact the Applicant who invoked the *sub judice* rule at the first instance and cannot now deny that fact.

22. He further states that to grant the orders sought would not only be unfair and inequitable but would also lead to clash between the Assembly and the Court as such an action may be viewed as an affront to the powers and privileges of the Assembly.

23. In his Submissions, Mr. Agaba added that whereas the Applicant had by a Ruling of this Court in **Reference No.17 of 2014** *(supra),* been precluded from using any documents from the Assembly where leave had not been granted for her to do, she was instead liberally making reference to them in the present Application and was therefore in breach of the Law.

24. Further, while relying on the definition of the word "summon" in **Black's Law Dictionary**, he submitted that court summons are a compulsory measure to compel a person to attend court but that the witnesses named in the Application have agreed to attend, voluntarily, and no summons are thereby required. In any event, that this Court cannot take over the role of the Assembly in terms of Section 20(1) aforesaid and summon witnesses to refer to documents that the Assembly has refused to grant leave for release thereof.

25. It was also Mr. Agaba's contention that, save for the Applicant, no other witness has sought leave as is required by Section 20(1) and there is therefore no basis for the prayers in that regard.

26. On the legal authorities submitted by Counsel for the Applicant, he stated that the Court User's Guide adds no value as it merely reproduces and applies Rule 56 of the Rules of this Court.

27. Regarding the Ruling in **Reference No.17 of 2014** aforesaid, he stated that it is of no use in the present case because the Summons issued to the Clerk of the Assembly were so issued because the Clerk, unlike the Applicant and the witnesses, was not willing to testify in the Reference, hence the summons and he was therefore a compellable witness.

28. For the above reasons, the Respondent prays that the Application herein be dismissed with costs.

DETERMINATION

29. At the heart of this Application is the question whether this Court should issue Summons to the Applicant and her witnesses or in the alternative, whether on the Court's own motion such summons should be issued for the witnesses to testify in **Reference No. 17 of 2014.**

30. Before addressing that question, we had reserved one issue for quick determination within this Ruling: *Whether the Applicant can make reference to any documents including the Hansard of the Assembly in the present Application.* In that regard, upon reading the record of 18th March 2016 when this Application was heard, we note that Counsel for the Applicant steered clear of those documents although they were exhibited to the Supporting Affidavit. In any event upon perusing our Ruling dated 6th November 2015 in **Reference No. 17 of 2014**, we note that we addressed the same issue in the following terms:

"Be that as it may, as depicted above, the evidence that must be subjected to the leave of the Assembly before it can be adduced elsewhere includes contents of minutes, oral evidence, documentation, proceedings or examination laid before or arising in the Assembly or a committee thereof."

31. We reiterate the above finding and for purposes of this Ruling, where necessary, we shall make no reference to any of the above documents or evidence. Letters exchanged between the Applicant and the Speaker of the Assembly are however not privileged and it is obvious why.

32. Turning back to the Application proper, Summons under the Rules of this Court are provided for in Rule 56 of the Rules which provides:

"56(1): Any party in a claim or reference may obtain on application to the Court, summons to any person whose attendance is required either to give evidence or to produce documents.

56(2): Every witness summons shall specify the time and place of attendance, and whether attendance is required for the purpose of giving evidence or to produce a document, or for both purposes. The summons shall describe with reasonable accuracy the document required.

56(3): The Court may on its own motion summon any person to give evidence or document if in the opinion of the Court such evidence or document is essential for the just determination of any matter before it.

56(4): Where a person summoned to give evidence or to produce a document fails to appear or refuses to give evidence to produce the document, the Court may in its discretion impose upon the witness a pecuniary penalty not exceeding USD 200.

56 (5): A penalty imposed under this Rule shall be enforceable as an order in accordance with Article 44 of the Treaty.

56 (6): Summons under this Rule shall be in accordance with Form 7 in the Second Schedule and shall be served in the manner prescribed for service of notification."

33. In the Ruling in **Reference No. 17 of 2014**, between the present Parties, we rendered ourselves as follows regarding Rule 56(1) and (4):

"Therefore, the order that emanates from Rule 56(1) is tantamount to witness summons compelling a person to give evidence or produce documents in his or her possession, failure of which he/she would be penalized. Thus, in the present case, the Clerk to the Assembly was compelled to produce documentation in his custody. He did indeed dutifully produce the required documentation and it was duly admitted on the Court record."

34. We reiterate the above finding and Rule 56, in our view, speaks for itself and requires no more than a literal interpretation. We only need to add that Mr. Agaba is quite right, that a summon by its very nature, is an order issued to compel the attendance of a person at a judicial proceeding. It is what is called in other jurisdictions a *subpoena*. A *subpoena* that commands a person to bring certain evidence, usually

documents or a paper, is called a *subpoena Duce Tutem* from the latin *"under a penalty to bring with you."* A famous example of such a *subpoena* was in **United States vs. Nixon 418 U.S. 683, 94 S.Ct 3090 41 L. Ed 2d 1039 (1974)** where **President Richard Nixon** was, by summons, compelled to produce certain evidence in his custody. Rule 56(1) and (4) certainly create such a *subpoena*.

35. In the Application before us and in the above context, for summons to be issued either on the application of the Applicant or on its own motion by the Court, it must be shown that the witnesses are either unwilling or reluctant to testify hence the need for summons to compel them to do so. In the case of witness No.(i), the Applicant herself, this cannot be the case for the obvious reason that having chosen to give evidence, she would have to testify and produce whatever documents she wishes to produce without any summons being issued for her to do so. Similarly, proposed witnesses Nos. (ii) – (v) have voluntarily chosen to give evidence in support of the Reference. They too do not require any summons to do that. What is certainly an issue therefore is whether the Applicant and her witnesses can lawfully be compelled to produce documents within the purview of Section 20 of the EALA (Powers and Privileges) Act, 2003.

36. That section for avoidance of doubt provides thus:

> **"20 (1): Notwithstanding the provisions of any other law, no member or officer of the Assembly and no person employed to take minutes or record evidence before the Assembly shall, except as provided in this Act, give evidence elsewhere in respect of the contents of such minutes or evidence or of the contents of any document laid before the Assembly or such**

committee, as the case may be, or in respect of any proceedings or examination held before the assembly or such committee, as the case may be, without special leave of the Assembly first hand and obtained in writing."

37. In addressing the import of that Section, this Court in the Ruling in **Reference No. 17 of 2014** rendered itself as follows:

> **"Thus, for the present purposes: the Applicant would be acting well within her legal rights to adduce evidence before this Court that has nothing to do with the minutes, evidence, documentation, proceedings or examination laid before or arising in the Assembly or Committee thereof.**
>
> **Secondly, Section 20(1) expressly prohibits the tendering of the contents of the above evidence only and not all evidence *per se*. Thus, in principle, reference may be made to minutes or documentation placed before the Assembly without adducing the contents thereof as captured in a specific minute, and similarly, reference may be made to the proceedings of the Assembly without relaying the specific contents of such proceedings as captured by the Hansard. That is not to say that mere reference to such documentation is sufficient proof thereof; rather, as we have stated hereinabove, proof of the documents enlisted in Section 20 would necessitate their production with the requisite leave of the Assembly."**

38. We reiterate the above holding as applicable to the present Application, a matter we have also partly addressed elsewhere above.

39. It is in the above regard that the Applicant invoked Section 20 which is part of Community Law and is operative but her application to have the witnesses testify and produce certain documents was rejected by the Assembly. Can she now have the same evidence presented to this court by way of summons?

40. We have held that summons cannot be issued to voluntary witnesses but more fundamentally, summons cannot be used as an appeal against a decision of the Assembly taken within Community Law which has not been invalidated. We say so because the East African Community was created with the Principle of Separation of Powers firmly in place, hence the fact that it has, like a modern State, an independent court, legislature and executive. None of the organs can lawfully direct the work of the other one by the Principle of Separation of Powers as well as Checks and Balances entrenched in the Treaty. This Court for example, can only interfere with decisions of the Assembly or the Sectoral Council if they are in violation of the Treaty – See **Calist Andrew Mwatela and others vs. East African Community, Application No. 1 of 2005, (2005 – 2011)EACJLR1.**

41. We are fortified in our findings above by the decision of the Appellate Division in **Appeal No. 7 of 2015** between the present parties where the Division stated thus:

> **"From the perspective of adjective law (Procedural Law), such minutes, records, documents, proceedings or examinations are privileged evidence. As such, they are inadmissible in any forum other than the Assembly itself unless the privilege is waived by such Assembly. And the proof of the waiver of the privilege is a written permission from the Assembly. We**

hasten to add that the witnesses themselves are not incompetent to testify. They are competent. It is the specified material from EALA they may seek to adduce in evidence which is privileged.

It is thus manifestly clear to us that before the sword of section 20(1) of the Privileges Act can be drawn to strike a witness, it is necessary to establish that the witness to whom the sword is pointed, and thus whose evidence is sought to be shut out is (i) a member or officer or staff of EALA; (ii) he or she intends to give evidence of the contents of minutes taken in, evidence given in, documents laid before, or any proceedings, or an examination held before the EALA or any of its committees and (iii) he or she does not have written special leave of the assembly to do so."

42. We are duly guided and it is obvious to us that summons, even if they could be issued to voluntary witnesses, cannot be used to circumvent, defeat or act as an appeal or review of a decision of the Assembly under Section 20(1) aforesaid.

43. The above findings would then necessitate a consideration of an alternative issue arising from the Application; if summons cannot be issued on the Application of the Applicant, can and should the same be issued through a motion by the Court?

44. In that regard, Rule 56(3) of the Rules indeed grants this Court the power to *"summon any person to give evidence and produce any document"* if in its opinion such "*evidence or document is essential for the just determination of any matter before it."* The evidence and documents in issue in the present Application relate to proceedings

before the Assembly and documents relating to the Applicant's removal as Speaker of the Assembly. Two factors would however preclude us from taking that course of action, even if the evidence and documents are indeed essential.

45. The first is that we cannot, by Rules of Procedure, purport to ignore, circumvent or overturn a decision of the Assembly made pursuant to Section 20(1) aforesaid and without first declaring that Section a violation of the Treaty. Our hands are therefore tied.

46. Secondly, prior to the Ruling in **Reference No.17 of 2014,** certain documents required from the Assembly were ordered, by summons, to be produced by the Clerk to the Assembly, hence our statement in the Ruling aforesaid as follows:

> **"We now revert to the documentation presented to the Court by the Clerk to the Assembly. The facts of the present case are that the Clerk to the Assembly did produce documentation that was admitted on the court record. The said documentation was produced pursuant to Summons issued by this Court following an Application for that purpose by the Applicant that was not contested by the Respondent."**

47. In that context, any call upon this Court to demand other documents from the Assembly contrary to Section 20(1) and without a lawful basis, other than the Applicant's dissatisfaction with a decision of the Assembly, would be a travesty of justice. If, at a later stage, such a course of action is rendered necessary, for example, after evidence has been tendered by parties, and a *lacunae* in evidence is noted by the Court, then it can, on its own motion, demand such documents. To do so in the present circumstances and at this stage of the

proceedings would only force the Court to descend to the arena of contested facts, an invitation we decline to accept – see **Appeal No. 7 of 2015 at Para. 49.**

48. From the aforegoing, it is obvious that the two substantive prayers in the Application under consideration (one in the alternative) cannot be granted.

CONCLUSION

49. Before we dispose of the Application, it would be remiss of us not to address a matter of grave concern to us that was raised by Mr. Agaba in his submissions. While purporting to address us on the Principle of Separation of Powers, he took a detour and made the startling submission that should the orders sought by the Applicant be granted then *"EALA may be forced to invoke such oversight powers in the activities of the Court as well."*

50. When pressed to explain himself, Mr. Agaba stated that in view of certain past decisions of the Court, including in the case of Hon Sitenda Sebalu (we know it to be **Hon Sitenda Sebalu vs. The Secretary General of the East African Community Reference No. 8 of 2012 (2012-2015) EACJLR 120)**, the Sectoral Council on Judicial Affairs composed of the Attorneys General of Partner States, was studying *"how this Court may not continue to go overboard."* He went even further to state that "*when (EALA) starts to consider that the Court in making an affront on its own powers, its making an affront on its own immunity, its making an affront on its own integrity, the matters that are discussed within the House which are supposed to remain within the confines of the House, Court is now using its own powers to summon witnesses and bring documents and allow the*

dirty linen of the Assembly to come and be washed in this Court room. Then I see a big problem, that's just my anticipation, My Lord."(sic)

51. We were and are astounded by the intent and letter of Mr. Agaba's statements above. Even more so because they would appear to suggest an underlying feud between two branches of the Community's governance organs. Without giving the said statements undue attention, we do hereby clarify that such an insinuation could not be further from the truth. For avoidance of doubt, the East African Court of Justice is a recognized organ of the Community, whose paramount duty is to dispense justice to all manner of persons, natural and juridical, whatever their station in life. Accordingly, members of the Bench are bound by and committed to the judicial oath of office that enjoins them to discharge their functions with due brevity, courage and civility. Therefore, any threats, real or perceived, to the independence and impartiality of the Court, as well as individual members thereof shall be regarded with the contempt they have so dubiously earned. Needless to say, the above unfortunate submission and conduct have no bearing on the outcome of this Application.

DISPOSITION

52. For reasons set out above, we see no merit in the Application dated 22nd January 2016 and the same is hereby dismissed.

53. Costs shall abide the outcome of the Reference.

54. Orders accordingly.

Dated, Delivered and Signed at Arusha this 24th Day of June 2016.

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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO
JUDGE

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FAKIHI A. JUNDU
JUDGE