IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ & Fakihi A. Jundu, J)

APPLICATION NO. 15 OF 2017

(Arising from Reference No. 10 of 2017)

1. **OLOLOSOKWAN VILLAGE COUNCIL**
2. **OLOIRIEN VILLAGE COUNCIL**
3. **KIRTALO VILLAGE COUNCIL**
4. **ARASH VILLAGE COUNCIL ..... APPLICANTS**

VERSUS

THE ATTORNEY GENERAL OF

THE UNITED REPUBLIC OF TANZANIA ..... RESPONDENT

25TH SEPTEMBER 2018

RULING OF THE COURT

Background

1. Ololosokwan Village Council, Oloirien Village Council, Kirtalo Village Council and Arash Village Council ('the Applicants') are all legally registered villages that are created by statute and located in Ngorongoro District, Arusha Region, Tanzania. They are the legally registered owners of land that borders the Serengeti National Park.Owing to the sub-division of villages in Tanzania over the years and with a view to ending the ensuing land disputes, the Government of the United Republic of Tanzania undertook a re-mapping of the Applicants' land to re-ascertain their boundaries. Subsequently, in August 2017, residents of the Applicants' villages were advised to remove their cattle and *bomas* (homesteads) from the Serengeti National Park, and the Applicants directed to vacate their residents from areas bordering the said Park.

2. The Respondent has since allegedly embarked on the forceful eviction of the said residents and their livestock, hence the filing of **Reference No. 10 of 2017** by the Applicants, *inter alia* seeking orders for a permanent halt to their residents' eviction, arrest and prosecution, as well as the destruction of their property. The Reference also seeks orders of restitution, reinstatement of the Applicants and the villagers to their properties, as well as reparations.

3. The Applicants did also file the present Application dated 21st September 2017 *inter alia* seeking a temporary halt to the residents' eviction and the destruction of their property pending the

determination of the Reference. Before this Application could be heard, the Applicants (through their Advocate) wrote a letter dated 1st June 2018 to the Court seeking urgent interim orders against the office of the Inspector General of Police pending the determination of the present Application. That letter was subsequently reduced into an application dated 6th June 2018 and supported by a duly commissioned affidavit of the same date, but both documents had not been filed in Court by the time the present Application was heard. At the hearing of the present Application, with the consent of opposite Counsel, the said unfiled application was formally admitted on the Court record.

4. Learned Counsel for the Applicants did thereupon move the Court on both Applications, although the latter Application was presented with some oral adjustments the effect of which was to seek interim orders pending the determination of the Reference rather than the present **Application No. 15 of 2017**, as had been initially stated therein and in the letter in reference above.

5. The Applicants were represented at the hearing by Mssrs. Donald Deya, Jebra Kambore and Nelson Ndeki, while Mssrs. Mark Mulwambo and Abubaker Mrisha jointly appeared for the Respondent.

Applicants' Case

6. The Application dated 21st September 2017 ('the earlier Application') was brought under Articles 6(d), 7(2), 27(1), 30 and 39 of the Treaty for the Establishment of the East African Community ('the Treaty'), as

well as Rules 1(2), 21, 22, 23, 84 and 85 of this Court's Rules of Procedure. Pending its determination *inter partes*, the Application sought interim *ex parte* orders restraining the Respondent from evicting the Applicants' residents from the disputed land, assaulting or prosecuting them; and from confiscating of their livestock or burning of their homesteads on the disputed land. It was, however, heard *inter partes* and we understood it to have been premised on the following grounds:

a. **A directive from the Respondent (through Ngorongoro District Commissioner) dated 5th August 2017 asking the Applicants to vacate the land bordering Serengeti National Park is illegal given that the land in issue legally belongs to the Applicants and the Respondent has not complied with the legal procedure governing the transfer of land from one usage to another.**

b. **The Applicants' residents purported to resist the eviction but have been forcefully evicted, and had their livestock confiscated or lost and their homesteads burnt down on routine basis.**

c. **The Respondent's acts, orders and decisions violate Articles 6(d) and 7(2) of the Treaty.**

d. **Unless the Respondent is restrained from evicting the Applicants' residents, confiscating their livestock and burning their homesteads, the Applicants will suffer irreparable damage in so far as their residents' livelihood**

will be adversely affected, thus rendering the Reference nugatory.

7. It was supported by four (4) affidavits deposed by Mssrs. Kerimbot Osesiay Dukuny, Nekitio Victor Ledidi,Yohana Kasosi Toroge and Lazaro Molono Sikoyo, residents of Ololosokwan, Oloirien, Kirtalo and Arash villages respectively. The 4 Affidavits were virtually identical, the collective gist of which is as follows:

    a. **The deponents are current Chairmen of their respective village councils, and the respective villages represented by the Applicants are listed under Ngorongoro District Council and holders of valid land titles for their land.**

    b. **In 2013 the Minister of Natural Resources and Tourism had communicated the Government of Tanzania's intention to acquire 1,500 square kilometers of land that otherwise belonged to the Applicants for purposes of establishing a new Game Controlled Area, but that decision was subsequently halted by the then Rt. Hon. Prime Minister of the United Republic of Tanzania, who acknowledged the villages' legal ownership of the sought land.**

    c. **The majority of the villages' inhabitants are Masai patoralists whose livelihood depends on their livestock and agriculture.**

    d. **Whereas the Wildlife Conservation laws that had been in place in Tanzania since 1974 did not prohibit the use, settlement or grazing of livestock on the disputed land,**

new laws that were enacted in 2009 purport to restrict settlement or human activities in the Game Controlled Area.

e. **Following the 2013 directive by the then Rt. Hon. Prime Minister, the villages had continued with their activities without interference until a 5th August 2017 directive by the Ngorongoro District Commissioner that led to the formation of a Task Force, which begun to evict people from the disputed land and destroy their houses and properties, an exercise that commenced on 13th August 2017.**

f. **Pursuant to this allegedly illegal exercise, thousands of the villages' residents had lost houses and properties, had their livestock confiscated and were subjected to arbitrary arrests, leaving them destitute and without shelter or food.**

8. On the other hand, the Application dated 6th June 2018 ('the latter Application) *inter alia* sought an urgent interim order against the Respondent, directing the office of the Inspector General of Police to desist from harassing, intimidating or otherwise engaging the Applicants pending the determination of the Reference. It also sought the issuance of summons against the Officer Commanding the Police District of Loliondo (OCD Loliondo) to explain to the Court the measureshis office had taken with regard to the matters in issue in **Reference No. 10 of 2017**, as well as the present Application. We deduced this Application to have been premised on more recent actions the OCD Loliondo and his staff had allegedly meted out on

the Applicants since the filing of the Reference. In a nutshell, that application was premised on the following grounds:

a. **Since 18th May 2018 the Applicants had been allegedly harassed, intimidated, their representatives detained and interrogated in intimidating circumstances and seven (7) of their residents had been summoned to Police, amid demands for the withdrawal of their signatures from the Reference and the present Application.**

b. **Unless the Respondent was restrained from such blatant intimidation, the Applicants would suffer irreparable damage, which would have the effect of abusing the process of this Court in the Reference, as well as the present formal Application.**

9. The latter Application was supported by the Affidavit of one Kootu Tome, a resident of Ololosokwan village and member of the First Applicant village council since 2009. Duly commissioned by a Commissioner for Oaths and admitted on the record, the affidavit sought to substantiate details of the harassment, intimidation and detention referred to in the grounds above in the following terms:

a. **The OCD Ngorongoro summoned some members of the Applicant village councils, the members of the deponent's village council being summoned on or about 29th May 2018. She found members of the Kirtalo village at the police station as well.**

b. The deponent escorted members of her village council to the police station, where she acted as translator for 3 women in her village's team as they were not fluent in Kiswahili.

c. The OCD inquired whether the Ololosokwan Chairman or Village Executive Officer had attended a meeting that was held on 18th August 2017 and signed the Minutes, to which the Chairman answered in the affirmative and the Village Executive Officer in the negative. Whereas the Village Executive Officer was thereupon discharged, the Chairman was threatened with imprisonment.

d. The members of Kirtalo village were asked the same questions which they answered in the negative and stated that a similar meeting in their village had been conducted by members of the Third Applicant village council only.

e. The 3 women from Ololosokwan village that attended the OCD's meeting described the events of a 13th August 2017 operation as having entailed the eviction of people, burning of houses, arbitrary arrests and confiscation of livestock and other properties, and affirmed their attendance of the 18th August village meeting, as well as their endorsement of the Minutes.

f. The OCD threatened to imprison the 3 women in the event that they were later discovered to have been peddling untruths.

10. In Submissions that covered both Applications, it was argued for the Applicants that it did appear from paragraphs 1, 3, 5 and 10 of the Response to the Reference, as well as the Affidavits in Reply to the earlier Application deposed by one Aidah Kisumo, that the Respondent did not contest the fact of the Applicants having been registered villages with legal title to land in respect of which evictions had ensued. We understood it to be the Applicants' submission that in so far as the Respondent contends that the evictions were legal yet the Applicants had established their legal ownership of the disputed land, the latter party had established a *prima facie* case. Learned Counsel for the Applicants cited the case of **Democratic Party & Another vs. The Secretary General of the East African Community & Another, Application No.6 of 2011** in support of his argument that the merits of the foregoing assertions would await the determination of the Reference.

11. In terms of irreparable injury, Mr. Deya argued that the 4 Affidavits in support of the earlier Application had all attested to a Task Force including the District Police, Representatives of Ngorongoro Conservation Area, and officials from the Ministry of Natural Resources and Tourism, Tanzania Wildlife Authority and Serengeti National Park having evicted, burnt and destroyed properties of residents of the 4 villages in an allegedly ongoing exercise that also had the residents' livestock confiscated, numerous people subjected to arbitrary arrests and left destitute, without either shelter or food. It was his contention that whereas an award of damages would ultimately help, in the interim an award of damages would not be able to recreate the homes or the families as they were given family

separations as a result of the evictions, neither could it guarantee food security for the evicted communities and the physical injuries might not be easy to recover from.

12. Making reference to Ms. Tome's Affidavit in support of the latter Application, Mr. Deya further argued that an award of damages could not atone for the injury that allegedly continued to be suffered by the affected communities, alluding to a renewed onslaught of intimidation of the villagers with a view to securing the withdrawal of the earlier Application, as well as **Reference No. 10 of 2017**. Accordingly, it was his contention that the foregoing circumstances necessitated the grant of an interim order halting the actions of the District and other public officials pending the determination of the Reference, and justified the issuance of summons against the OCD Loliondo requiring him to appear before this Court at a convenient time and at the cost of the Respondent to explain the measures that his office had taken with regard to the matters in issue presently.

13. Finally, it was opined by Mr. Deya that the balance of convenience lay in granting the interim orders sought and expediting the hearing of the Reference such that in the event that the Applicants emerged successful in the Reference this Court would have minimized the damage to them, as well as any damages, reparations or costs that could be incurred by the Respondent. However, were the Respondent to succeed in the Reference, all it would have cost him (in learned Counsel's view) would have been a little more time in pursuit of the eviction. Mr. Deya thus concluded that it would be in the interest of all

Parties to have the status quo maintained, to wit, leaving the villagers peacefully on the land pending the determination of the Reference.

Respondents' Case

14. On 9th November 2017, the Respondent filed 4 Affidavits of Reply, all of which were deposed by one Aidah Kisumo, a Senior State Attorney. They were more or less identical and, in a nutshell, stated:

    a. **The letter from the then Rt. Hon. Prime Minister of The United Republic of Tanzania had communicated the Government's intention to review the laws related to land and wildlife management and assess the infrastructure within the Wildlife Conservation Area, as well as the challenges associated with retaining the disputed 1,500 sq km of land ('the disputed land') within that Area.**

    b. **The Wildlife Conservation Area in issue had no relation whatsoever with the registered villages.**

    c. **The Rt. Hon. Prime Minister's letter sought to clarify the Government's directives and assure the villagers that the retention of the disputed land would be undertaken as by law required, albeit in consultation with them to address the challenges engrained in the process.**

    d. **The Minister for Natural Resources and Tourism is by law empowered to review game controlled areas.**

e. **No orders were issued by any State Authority directing that the houses and properties of civilians within the registered villages be burnt down.**

f. **Any eviction that had been carried out was lawful and in respect of individuals living outside the established boundaries of their villages and conducting activities within the game reserve.**

g. **The Government had not burnt any homesteads or individual properties in the registered villages.**

15. In submissions, Mr. Mulwambo did strongly fault the Affidavits in support of the earlier Application for being fraught with misrepresentations and 'forgeries' in the Minutes that had purportedly authorized the filing of **Reference No. 10 of 2017** and the present Application. It was his submission that he was unable to file an affidavit in reply within time as the State official that was due to avail material in proof of the above allegations and depose the affidavit had been taken ill as he travelled to Arusha for that purpose. He successfully applied to file 4 additional affidavits in respect of each of the 4 Applicants for purposes of furnishing appointment letters of the purportedly rightful Chairpersons of each of the respective villages. However, the affidavits that he did subsequently file furnished appointment letters of Village Executive Officers, as well as letters from the said Officers either denying participation in or the incidence of the meetings that authorized the present proceedings. Both categories of letters pertained to only three (3) of the Applicant Village Councils, leaving the allegations in respect of the Fourth Applicant

uncontroverted. We propose to return to these affidavits later in this Ruling.

16. Be that as it may, learned Counsel did also argue that in so far as the Applicants had failed to prove that the evictions complained of had been carried out within the villages as opposed to Serengeti National Park, they had not established a *prima facie* case so as to warrant the grant of the interim orders sought. In support of this argument, we understood him to seek to make reference to a letter from one Rashid M. Taka dated 5th August 2017 that had been attached to all the Affidavits in support of the Application and referred to in all the Affidavits in reply thereto. However, learned Counsel subsequently misdirected himself as to whether or not that letter had been duly translated from Kiswahili to English so as to bring it in conformity with Article 137(1) of the Treaty, before abandoning it altogether. He did, however, maintain his argument that no *prima facie* case had been established in the absence of proof that the evictions took place within the legally recognized boundaries of the Villages.

17. It was Mr. Mulwambo's contention that having negated the incidence of a *prima facie* case, it would be superfluous to consider whether there was irreparable injury or where the balance of convenience of the matter lay. In any event, in his view, the villagers could not have suffered irreparable injury if they were conducting their activities within the registered villages given that the evictions had been restricted to persons within the National Park. With regard to the balance of convenience, Mr. Mulwambo argued that it could not be

convenient for the Court to allow the Applicants to continue grazing or living inside the National Park as this was destructive to flora and fauna, and could cause economic instability given its interference with economic activities. He accordingly prayed for the dismissal of the Application.

Applicants' Submissions in Reply

18. In reply, Mr. Deya maintained his position that the interim orders sought from the Court were in respect of evictions conducted within the 4 villages and not evictions carried out in the Serengeti National Park. He opined that, even if the letter that learned Counsel for the Respondent had sought to rely upon was found not to have been translated, the affidavit evidence encapsulated in paragraphs 16, 14, 16, and 16 of the respective Affidavits in support of the earlier Application was sufficient to prove the incidence of the impugned evictions in the deponents' villages. He faulted learned Respondent Counsel for purporting to attack the veracity of that evidence in the absence of an affidavit in rejoinder thereto yet he had had ample time to do so. Mr. Deya reiterated his clients' prayers for interim orders to accrue in respect of the impugned actions of the Respondent's agents and that the OCD Loliondo be summoned to appraise this Court on the status of the investigations into the actions complained of from the bar by learned Respondent Counsel.

Court's Determination

19. We have carefully considered the Applications before us, as well as their respective supporting affidavits. Even without recourse to the

merits (or lack thereof) of the Respondent's allegations in respect of the veracity of the Affidavits in support of the earlier Application, it is abundantly clear that the said Affidavits do contain falsehoods or misrepresentations. Paragraph 2 of all 4 Affidavits wrongfully equates the deponents to village councils, notwithstanding the fact that in paragraph 1 of the same Affidavits all of the deponents had attested to being *male adults* and Chairpersons of the village councils depicted as the Applicants. In the Affidavits of Mssrs Nekitio Victor Ledidi and Yohana Kasosi Toroge, the said deponents then go ahead to erroneously equate the Second and Third Applicants respectively to villages.

20. Obviously individual male adults such as the respective deponents in the impugned Affidavits cannot by any shade of imagination be equated to the village councils they purport to preside over, neither can village councils mean one and the same thing as villages. A look at the literal and legal meanings of those terms is instructive. The term 'council' literally refers to a group elected to govern a town or region.[1]On the other hand, section 3(1) of the Tanzanian Local Government (District Authorities) Act clearly draws a distinction between villages and village councils, referring to a village as '**a village registered under this Act**,' while a village council is '**in relation to a village, the village council of that village**'. On that premise, it becomes abundantly clear that a village council cannot be equated to an individual male adult as has been done in all 4 Affidavits in question, neither can it be tantamount to a village, as 2 of the deponents thereto purported to attest on oath.

[1] Oxford English Mini Dictionary, Oxford University Press, 7th Ed., 2008, p. 122

21. This Court has had the occasion to consider the import of falsehoods in affidavits in **The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa, EACJ Application No. 12 of 2015**. It was held:

> **In our considered view, the core value of an affidavit as a document made on oath presupposes the veracity and truthfulness of the statements contained therein. Indeed, while rejecting an affidavit, the Supreme Court of Uganda upheld a decision of the Court of Appeal that had held the importance of affidavit evidence to be rooted in the fact that it is made on oath. *See* *Kakooza vs. Electoral Commission and another Election Petition No. 11 of 2007*. We are respectfully persuaded by the reasoning in that case. Applying the same analogy to the present facts, we find that it would undermine the importance of affidavit evidence to leave intact on the record a document purportedly made on oath that contains apparent falsehoods, even if such falsehoods were made on an innocent but mistaken application of the law.**

22. We find no reason to depart from the foregoing decision. The question is what would be the implications of such a defect in an affidavit? Section 47(1)(c) of this Court's Rules of Procedure provides for the expunging of all or part of a pleading that is an abuse of the court process. It reads:

> **The Court may, on application of any party, strike out or expunge all or part of a pleading or other document, with or**

without leave to amend, on the ground that the pleading or other document: –

(a).....

(b).....

(c) **is an abuse of the process of the Court**.

23. We take the view that a false affidavit or false affidavit evidence is indeed an affront to court process in so far as it defeats the purpose of evidence on oath, an indelible and indispensable tenet of judicial proceedings. Indeed, Rule 21(5) of this Court's Rules underscores the vitality of truthful affidavit evidence to the extent that it is quite emphatic on the deposition of affidavits in support of formal applications by 'persons having knowledge of the facts.' It reads:

> **"Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts..."**

24. To our minds, it cannot be said that false affidavits such as the ones in issue presently could have been deposed by persons with knowledge of the facts. Had the document in issue before us been a pleading in terms of a Notice of Motion, Statement of Reference or Response to a Statement of Reference, we could have considered expunging only such part of the pleading as is offensive or otherwise violates the procedural rules that pertain thereto. In the instant case, however, we are faced with affidavit evidence on oath that contains obvious falsehoods. A Court's duty to preserve the sanctity of the

evidence that is adduced before it cannot be overstated. Authentic, unassailable evidence is the bedrock of a fair and just trial and cannot be sacrificed at the altar of lackluster, incoherent and false pleadings.

25. We are acutely aware of the lacuna in Rule 47(1) that seemingly obviates the Court's recourse to the remedies prescribed therein on its own motion, but as was held in **The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa** (supra), that mischief is curable by the indefatigable Rule 1(2) of the Rules. It reads:

> **"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 the abuse of the process of the Court."**

26. We do therefore strike out all the 4 Affidavits in support of the formal Application dated 21st September, 2017 from the Court record in their entirety.

27. The question then would be whether the striking out of the Affidavits would obliterate the said Application. Again, Rule 21(5) is instructive on this. We deduce from it a mandatory requirement for all formal applications filed in this Court to be supported by affidavits, albeit truthful ones. Thus, having expunged the 4 impugned Affidavits, it follows that the formal Application in respect of which they had been deposed remains unsupported by any affidavit and, to that extent, contravenes the mandatory provisions of Rule 21(5). We are fortified in the strict application of the Rules governing affidavits by a related

approach in **Bombay Flour Mill vs. Chunibhai M. Patel (1962) EA 803** as follows:

> **"The strictures upon defective affidavits in Chandrika's case[2], however, as in the earlier cases there relied on[3], are phrased in terms that are as general in their application as they are emphatic; and I do not think I would be justified in distinguishing affidavits in support of applications for leave to appear and defend, which applications are required by O. XXXVII, r. 3 (1) to be supported by affidavits of facts and in no other manner."**

28. Quite clearly, the strict application of the rules governing affidavits would obtain regardless of the nature of the application in support of which an affidavit has been deposed. Nonetheless, for present purposes, it is now trite law that an application for an interlocutory injunction that is premised on a fatally defective affidavit would be unsustainable. Thus, in **Noormohammed Janmohamed vs. Kassamali Virji Madhani (1952) 20 EACA 8**, where a defective affidavit had been expunged, an appeal against the issuance of an interlocutory injunction premised on such an affidavit was upheld in the following terms:

> **"In my view there was no admissible evidence before the Judge on which he could be satisfied that there was an immediate danger of these** (furniture and other chattels) **being sold off..."***(Our emphasis)*

[2] Chandrika Prashad Singh & Others vs. Hira Lal & Others (1924) AIR 312
[3] Noormohamed Janmohamed vs. Kassamali Virji Madhani (1952) 20 EACA 8

29. We are satisfied, therefore, that the formal **Application No. 15 of 2017**, being unsupported by admissible affidavit evidence, contravenes the express provisions of Rule 21(5) of the Court's Rules and is, to that extent, incompetent and improperly before us. Further, in so far as there is no cogent evidence in support of the allegations stipulated therein, the said Application is unsustainable. We so hold.

30. Having so held, we now turn to the latter Application that was also argued before us. Having accepted the said Application on the court record with the consent of opposite Counsel that Application would be deemed to have been formally admitted as such and, to that extent, could be considered a formal application within the precincts of the Rules. However, given the informal manner in which it was presented, and for completion this being a court of first instance, we deem it necessary to address ourselves to the Rules governing informal applications. Such informal applications are aptly provided for under Rule 21(7). It reads:

> **"The provisions of this rule shall not apply to –**
>
> **(a) applications made in the course of a hearing, which may be conducted informally;**
>
> (b) **applications made by consent of all parties, which may be made by letter."**

31. Having been presented informally *at the onset* of the hearing of **Application No. 15 of 2017**, rather than *in the course of* the hearing, it is reasonable to posit that the application under scrutiny presently does not quite fall within the ambit of Rule 21(7)(a) of the Rules.

However, it was made by consent of the Respondent and certainly the Applicants did consensually make it, therefore it was made by consent of all the Parties herein. Consequently, it would be covered by Rule 21(7)(b) of the Rules. We must point out that the reference in that Rule to the possibility of an application there under being made by letter is not a mandatory requirement. We therefore take the view that the provisions of Rule 21(7)(b) sufficiently address the present scenario, where the contents of a letter were subsequently reduced into a written application in the anticipation that it would be filed within time to be entertained at the hearing of the formal Application. Thus the unfiled 'application' was informally presented by consent of the Parties.

32. Be that as it may, that latter Application *inter alia* sought the following order:

> ***"This Honourable Court be pleased to hear the motion*** **ex parte** ***and grant urgent interim order addressed to the Respondent, to direct the Inspector General of Police and officers subordinate to him to cease and desist from harassing, intimidating or otherwise approaching and engaging the Applicants in this case, pending the hearing of Application No. 15 of 2017, which this Honourable Court has scheduled for Thursday 7th June 2018."***

33. It was supplemented by the oral representations of learned Counsel for the Applicant. We reproduce them verbatim below for ease of reference:

"We plead that an interim order staying the evictions and asking or directing that the arbitrary arrests and intimidation be stopped pending hearing of this case on the merits would be an apposite order and it is in that context my Lords, that in the additional elements brought by the notice of motions that we filed today, we seek the urgent interim order, addressed to the Respondent the learned Attorney General to direct the Inspector General of Police and officers subordinate to him to cease and desist from harassing, intimidating or otherwise approaching or engaging the applicants in this case with regard to the issues in this case and that issues if any can be raised by the learned Attorney General by way of additional pleadings, supplementary pleadings in the course of this case."(Our emphasis)

34. In our view, the sum effect of the foregoing statements is to present an application for interim orders before this Court, pending the determination of **Reference No. 10 of 2017**. Though not the most astute *modus operandi* for an application as convoluted as an application for interim orders, we find nothing in the Court's Rules that obviates this course of action (with consent of the parties) given the express provisions of Rule 21(7)(b). It is, therefore, to the merits of the latter Application before us that we now revert.

35. The grant of interim orders by this Court is governed by Article 39 of the Treaty. It reads:

"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."

36. The foregoing Treaty provision has since been buttressed by numerous decided cases that have extensively considered the principles that inform the grant of interim orders by courts. We are alive to the more recent decisions of this Court that have underscored the demonstration of a serious triable issue by an applicant (rather than the establishment of a *prima facie* case) as one of the considerations taken into account in an application for interim orders. *See* ***British American Tobacco (U) Ltd vs. Attorney General of Uganda, EACJ Application No. 13 of 2017*** *and* ***FORSC & Others vs. Attorney General of the Republic of Burundi & Another, EACJ Appl. No. 16 of 2016.*** The rationale for this position of the law is by no means whimsical. It is grounded in the sound preposition espoused in the case of **American Cyanamid Company vs. Ethicon Limited (1975) AC 396** that courts faced with an application for an interlocutory injunction should be satisfied that the claim was not frivolous or vexatious but, rather, that there was a serious question to be tried; they should not attempt to resolve questions of evidence, as would be necessary in the determination of 'a *prima facie* case with probability of success', as those were matters to be dealt with at trial.

37. We hasten to add that the foregoing position does not negate the applicability of the principles of irreparable injury or balance of

convenience to applications for the grant of interim orders or injunctions. Indeed, it is trite law that 'if damages in the measure recoverable at common law would be an adequate remedy and a respondent would be in a position to pay them, no interim injunction should normally be granted'. *See* ***American Cyanamid Company vs. Ethicon Limited (1975) AC 396 at 408***.It is also well settled law that where an application for an interlocutory injunction cannot be determined on the existence of a serious triable issue or the adequacy of damages to recompense an applicant for possible injury, the court shall decide the matter on a balance of convenience. *See* ***East African Industry vs. True Foods (1972) E.A. 420***. Stated differently, an interlocutory injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury that could not adequately be compensated by an award of damages. Where a court is in doubt as to the incidence of a serious triable issue or the adequacy of damages to atone the foreseeable injury, it will decide an application on the balance of convenience. *See* ***Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 3 Others EACJ Application No. 1 0f 2006*** *and* ***Timothy Alvin Kahoho vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2012***.

38. As we did observe in **British American Tobacco (U) Ltd vs. Attorney General of Uganda** (supra), at the stage of an application for interim orders the court need only be satisfied that there is a serious question to be tried on its merits. A court considering such an application need not interrogate the merits of the substantive suit in detail but, rather, to a limited extent only. It is sufficient at that stage

for a court to deduce a cause of action where a claim is substantial and not frivolous, vexatious or misguided. *See* ***Blackstone's Civil Practice 2005, para. 37.19 – 37.20, pp. 392, 393***, ***FORSC & Others vs. Attorney General of the Republic of Burundi*** *(supra),* ***American Cyanamid Company vs. Ethicon Limited (1975) AC 396***, *and* ***The Siskina (1979) AC 210.*** In that case[4], it was further held that under EAC Community law a cause of action is considered 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. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights.'**[5] We find no reason to depart from this position.

39. Turning to the matter before us, paragraphs 13 and 14 of the Reference encapsulate the dispute between the Parties as follows:

> *13.* ***That the Respondent has not adhered to nor followed the legal recourse as provided under the laws regarding neither transfer of ownership of land not the change of land uses pursuant to the laws presently in force in the United Republic of Tanzania.***

[4] The **British American Tobacco (U) Ltd** case

[5] See **Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of Kenya & 3 Others** (supra) and **Timothy Alvin Kahoho vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2012**.

14. ***That the acts, omissions and conduct of the Respondent herein are a violation of the Treaty for the Establishment of the East African Community in that:-***

    (a) The Respondent is in complete contravention of Article 6(c) of the Treaty for the Establishment of the East African Community.

    (b) The Respondent is in contravention of Article 6(d) of the Treaty for the Establishment of the East African Community.

    (c) The Respondent is in contravention of Article 7(2) of the Treaty for the Establishment of the East African Community.

    (d) The Respondent is in contravention of Article 15(1) of the Protocol on the Establishment of the East African Community Common Market.

    (e) The Respondent is illegally evicting the Applicants' members and residents, burning homes, confiscating livestock, threatening, interfering with the liberty of the Applicants' members and residents by locking them up and vandalizing their private property.

40. Conversely, the Response to the Reference *inter alia* highlighted the following defence:

    10. ***That the contents of paragraphs 10, 11, 12 and 13 of the Reference are denied and the Applicants are put to strict proof thereof. The Respondent states that evictions are***

lawful, the villages have been designated areas for reallocation and the exercise is being performed in compliance with the laws of the land.

11. ***That the contents of paragraph 14 of the Reference are disputed and the Applicants are put to strict proof thereof.***

41. As was quite rightly stated by both Counsels in submissions, the gravamen of the dispute in **Reference No. 10 of 2017** is the legality of the actions complained of by the Applicants viz their alleged property rights. The legality of the evictions is, in our view, a formidable legal question that falls squarely within the ambit of Article 30(1) of the Treaty as an issue that this Court may interrogate. We reproduce Article 30(1) for ease of reference:

> **"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 ... on grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the Treaty."**

42. Consequently, without recourse to the merits thereof, it is apparent on the face of the Reference that it presents a substantial cause of action. We are, therefore, satisfied that the informal application before us raises serious triable issues. We so hold.

43. Turning to the question of irreparable injury, we have carefully considered the rival submissions of both Parties on this issue. As we

did acknowledge earlier in this Ruling, where damages would be adequate recompense and a respondent would be in a position to pay them, no interim injunction would normally be granted. In that regard, we rely on the following definition of damages in the ***Oxford Dictionary of Law*, Oxford University Press, 2009 (7th Edition), p. 246**:

> **"General damages are given for losses that the law will presume are the natural and probable consequence of a wrong. .... General damages may also mean damages given for a loss that is incapable of precise estimation such as pain and suffering or loss of reputation. In this context special damages are damages given for losses that can be quantified."**

44. ***Blackstone's Civil Practice 2005*, para. 37.22, p.394** postulates (quite correctly, in our view) that damages would be inadequate where:

a. **The defendant is unlikely to be able to pay the sum likely to be awarded at trial.**
b. **The wrong is irreparable e.g. loss of the right to vote.**
c. **The damage is non-pecuniary e.g. libel, nuisance, trade secrets.**
d. **There is no available market.**
e. **Damages would be difficult to assess. Examples are loss of goodwill, disruption of business and where the defendant's conduct has the effect of killing off a business before it is established.**

45. Obviously the foregoing list is by no means conclusive. It is simply a reasonable guide for the courts. In the instant case, it was deposed in support of the Applicants that residents of the registered villages continued to suffer an onslaught of harassment and intimidation intended to secure the withdrawal of the impugned Application, as well as the Reference. The Applicants thus sought interim orders that would halt further 'engagements' by public officials with the residents pending the determination of the Application and the Reference. We do note, however, that to the extent that the latter Application was argued together with the impugned earlier Application, the prayer for interim orders pending the earlier Application's determination was rendered redundant. Nonetheless, the orders sought pending the determination of the Reference remain valid. It then becomes necessary to interrogate whether or not the claim in the latter Application for restraining interim orders is justified. It is to the evidence on record that we turn.

46. Our construction of the sole affidavit in support of the latter Application is that it affirms the incidence of the eviction of persons, burning of houses, arbitrary arrests and confiscation of livestock and other properties; attests to harassment and intimidation of some officials of the village councils and some residents of the villages for attending the meeting of 18th August 2017 and endorsing the Minutes thereof; and establishes that whereas the meeting that was organized by Third Applicant was solely attended by the said village council, a similar meeting organized by the First Applicant was also attended by some residents of Ololosokwan village, but the Village Executive Officer was not in attendance. It certainly paints a picture of

widespread social upheaval in Ololosokwan village and an attempt to stifle village representatives' and/or the affected persons' access to justice.

47. Conversely, the Respondent's Affidavits in Reply alluded to the Wildlife Conservation Area in issue in the present dispute having no relation whatsoever with the registered villages; asserted that any evictions were legally conducted in respect of individuals living outside the established boundaries of their Villages and conducting activities within the game reserve; and averred that no orders had been issued by any State Authority for the burning of houses and or destruction of properties within the registered villages, neither had the Government carried out such acts. In a nutshell, the Respondent underscored the legality of the evictions and denied responsibility for the houses burnt or property destroyed.

48. Whereas the evictions, destruction and loss of property and arbitrary arrests that characterized the social upheaval in that village could, if subsequently found to have wrongfully happened at the instance of the Respondent, be compensated by an award of damages; we are not persuaded that an award of damages in itself would be adequate recompense for the magnitude of loss that they represent. On the other hand, the stifling of people's right to access justice, if subsequently proven, does appear to us to fall within the category of wrongs that might occasion irreparable injury given that once that right is lost in relation to specific facts and given limitation provisions, it may not be readily available at a later date. In the instant case, a forced withdrawal of the Reference could decisively avert the

Applicants' access to justice in this matter. We are inclined, therefore, to consider this latter eventuality (aversion of access to justice) in the category of irreparable injury. Consequently, our finding on the irreparability of the aversion of access to justice notwithstanding, given our doubts as to the adequacy of damages to recompense the affected persons for loss of land, property and arbitrary detention; the circumstances of this case make it necessary to consider the balance of convenience in this matter.

49. The essence of the balance of convenience in applications such as the one before us is perhaps most appositely captured in the following exposition from the **American Cyanamid** case:

> **"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."**

50. That case did also posit that '**where other factors appear to be evenly balanced it is a counsel of prudence to take such**

measures as are calculated to preserve the status quo.'[6]The nature of the status quo under reference therein was clarified as follows in **Garden Cottage Foods vs. Milk Marketing Board (1984) AC 130** (Lord Diplock):

> **"The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion."**

51. Thus, the applicable status quo *ante* is the state of affairs before a respondent commenced the conduct complained of by the applicant, unless there has been unreasonable delay in filing the application for interim orders, in which case it would be the state of affairs immediately before the application. Therefore it behoves an applicant for interim orders to act quickly. *See* **Blackstone's Civil Practice 2005, *para. 37.29, p. 397***.

52. We did carefully listen to the rival submissions of both Parties as reproduced earlier in this Ruling. On the face of the record, the matter to be gravely weighed by this Court is the livelihood, security and safety of a multitude of affected villagers and families viz the preservation of flora and fauna and unexplained economic instability.

[6] **American Cyanamid** case, at p.408

The Applicants' claim to protection from the violation of their property rights, as well as the right to access justice, would be weighed against the Respondent's right to implement the Tanzanian natural resources laws to protect the Wildlife Conservation Area from unlawful human activity, as well as its duty to ensure compliance by all persons with the Tanzania legal regime generally. We are constrained to add that compliance with Tanzanian laws does extend to the respect of citizens' right to access neutral arbiters for the settlement of their concerns. Contrary to the assertion of Learned Counsel for the Respondent, the weighty issue hanging in balance presently has more to do with the *justice* of the matter, rather than mere *convenience*. Indeed, in **Cayne vs. Global Natural Resources PLC (1984) 1 AllER 225** the court asserted that it was not mere convenience that needed to be weighed, but the risk of doing an injustice to one side or the other.[7]

53. On that premise, we ask ourselves the question: in the instant case would it be just in the interim to abandon to the dictates of law enforcement by the State, residents of 4 villages at the risk of eviction from parcels of land which they have historically occupied and from which they derive their security of tenure and livelihood OR would it be more just to temporarily defer the evictions by the State that, though commenced have not yet been concluded, pending the determination of the legal remedies sought by such citizens? With utmost respect to well acknowledged environmental considerations, would the injustice to flora and fauna, in the short term, be graver

[7] *Blacstone's Civil Practice 2005*, para. 32.27, pp. 396, 397.

than the injustice to the social existence of communities of human beings?

54. We have carefully considered the totality of the circumstances of this case. We take the view that, in the short term, the important duty to avert environmental and other ecological concerns pales in the face of the social disruption and human suffering that would inevitably flow from the continued eviction of the Applicants' residents. It is undoubtedly apparent to us that the justice of the matter dictates a temporary intervention in favour of the residents' representatives, to wit, the Applicants. That Party stands to suffer significantly more injustice should we decline to grant a temporary injunction in this matter than does the opposite party, therefore the balance of convenience is heavily skewed in its favour. We so hold.

55. Having so held, quite clearly the factors informing the balance of convenience in this matter are not evenly balanced so as to warrant recourse to the preservation of the status quo as a matter of prudence, as was opined in the **American Cyanamid** case.[8] They are significantly skewed in favour of the Applicants. Nonetheless, had we considered a preservation of the status quo, as was held in **Garden Cottage Foods vs. Milk Marketing Board** (supra), that status quo that we would have sought to preserve would be the status quo *ante* that is applicable to applications for interlocutory injunctions, which is 'the state of affairs before a respondent commenced the conduct complained of by the applicant.' In this case, that would be the state of affairs that pertained prior to the commencement of the alleged

[8] Ibid.

eviction by the Respondent. Stated differently, a grant of the interim orders sought in this case would in effect forestall the continued eviction and harassment of the Applicants' residents until the determination of the Reference. We so hold.

56. Before we take leave of this Application, we deem it necessary to consider the evidential worth of the 4 additional affidavits that were filed by the Respondent. We construed them to have sought to discredit the authority of the Chairpersons of the Applicant village councils to convene the meetings that apparently sanctioned the Reference and the present proceedings. Learned Respondent Counsel appeared to have sought to rely on these affidavits to buttress his contention that there were ongoing investigations about fraud and misrepresentation in the procurement of the decision to institute the said legal action. However, obviously the investigations were not yet complete when this Application was heard therefore the purported proof of fraud and misrepresentation was premature and superfluous.

57. In any event, it would appear that the affidavits were themselves self-defeating in that regard. By way of illustration, whereas in justifying his application to file them, Mr. Mulwambo had suggested that the chairpersons cited in the now impugned Affidavits in support of the earlier Application had impersonated the rightful chairpersons of the village councils in question; the letters that he did furnish through the additional affidavits pointed to the contrary. It transpired that a one Leni Emil Sayingo that Mr. Mulwambo had alluded to as being the rightful Chairperson of the Second Applicant deposed an

affidavit attesting to simply being the Village Executive Officer instead. Further, the additional affidavits did appear to corroborate Ms. Tome's assertions of harassment and intimidation in her affidavit in support of the latter application. Perhaps more importantly, having struck down the Affidavits the deponents of which are being investigated, we do not readily discern the evidential value of the Respondent's additional affidavits to the present application.

Conclusion

58. In the result, having held as we have in this Ruling above, we do hereby allow the subsisting Application with the following Orders:

    a. **An interim order doth issue restraining the Respondent, and any persons or offices acting on his behalf, from evicting the Applicants' residents from the disputed land, being the land comprised in the 1,500 sq km of land in the Wildlife Conservation Area bordering Serengeti National Park; destroying their homesteads or confiscating their livestock on that land, until the determination of Reference No. 10 of 2017.**

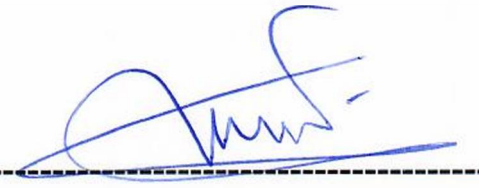
    b. **An interim order doth issue against the Respondent, restraining the office of the Inspector General of Police from harassing or intimidating the Applicants in relation to Reference No. 10 of 2017 pending the determination thereof.**

    c. **The costs hereof shall abide the outcome of the Reference. We direct that it be fixed for hearing forthwith.**

It is so ordered.

Dated, signed and delivered at Arusha this 25th Day of September, 2018.

HON. LADY JUSTICE MONICA K. MUGENYI
PRINCIPAL JUDGE



HON. DR. JUSTICE FAUSTIN NTEZILYAYO
DEPUTY PRINCIPAL JUDGE

HON. JUSTICE FAKIHI A. JUNDU
JUDGE