IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Fakihi A. Jundu; Audace Ngiye and Charles Nyachae, JJ)

APPLICATION NO. 17 OF 2018

(Arising from REFERENCE NO. 17 OF 2018)

PROF. PAUL KIPRONO CHEPKWONY..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA..... RESPONDENT

29TH March 2019

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Prof. Paul Kiprono Chepkwony (hereinafter referred to as **"the Applicant")** for interim orders against the Attorney General of the Republic of Kenya (hereinafter referred to as "**the Respondent**") pursuant to Articles 6(d), 7(2) and 8(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as "**the Treaty**") and Rule 21(1) of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "**the Rules**").

2. The Applicant is the Governor of Kericho County, one of the 47 devolved governments within the Republic of Kenya under the Constitution of Kenya 2010. He, however, brought the Application in his personal capacity and on behalf of the minors whose parents were allegedly evicted from areas within the Mau Complex. His address of service is C/O J.K. Bosek & Company Advocates, Social Security House, Block A, Ground Floor, Western Wing, Bishop Road, P.O. BOX 49482 – 00100, Nairobi, Kenya.

3. The Respondent is the Attorney General of the Republic of Kenya who is sued in his capacity as the Principal Legal Advisor of the Republic of Kenya. His address of service for the purposes of this Reference is Office of the Attorney General and Department of Justice, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100 Nairobi, Telephone: +254 020 2227461/2251355; Mobile:

+254 700072929/+254 732529995; Fax: +254 020 213956; Email: info@ag.go.ke.

4. The instant Application arises from **Reference No. 17 of 2018** filed on 10th September 2018 where the Applicant alleged that the Respondent, through its officers and/ or agents had forcefully evicted civilian population from dwelling places and homes in most insensitive, cruel, horrifying, degrading, traumatizing and inhumane manner, and that that was done without due processes of the law and in violation of the principles of the rule of law and good governance enshrined in the Treaty.

5. The Application was brought to this Court under a certificate of urgency seeking grant of the following interim orders:

   (i) ***That this Application be certified as urgent and be heard ex-parte in the First Instance.***

   (ii) ***That the Respondent do provide temporary school facilities to enable the pupils whose schools have been closed or destroyed by the government agents pursue their education and prepare for the national examination (Kenya Certificate of Primary Education) pending the hearing and determination of this Application*** **inter-partes.**

   (iii) ***That the Respondent do provide temporary school facilities to enable the pupils whose schools have been closed or destroyed by the government agents pursue their education pending the hearing and determination of this Reference.***

(iv) ***The costs of this Application be provided for.***

6. The Application was heard *ex parte* on 27th September 2018 where the Applicant prayed the Court to grant an order that the Respondent provides temporary school facilities to enable pupils whose schools were allegedly closed or destroyed by the Respondent's agents pursue their education and prepare for the national examination (i.e. Kenya Certificate of Primary Education) pending determination of the same Application *inter partes.* The Court disallowed the Application and ordered that the Application for interim orders *inter partes* be fixed for hearing forthwith.

7. The *inter partes* Application was heard on 7th November 2018, the Applicant being represented by Mr. Kimutai Bosek and Ms. Emmy Chelule, while Mr. Oscar Eredi and Ms. Fatuma Ali appeared for the Respondent.

II. Applicant's Case and Submissions

8. The Application is supported by the Affidavit of Prof. Kiprono Chepkwony, the Applicant herein, sworn on 11th September 2018. The Applicant/deponent asserted that the minors and their parents/guardians referred to in the Application resided in several areas within parcels of lands adjacent to the Mau Forest Complex and the minors' parents/guards had over the years built several schools on their own initiatives and had also received financial support from the Government of Kenya which also had posted teachers through the Teachers Service Commission (TSC).

9. In his Affidavit, Prof. Kiprono Chepikwony deponed that between July and August 2018, the Respondent, through its officials and/or

agents embarked on a programme of forcefully evicting the civilian population from their dwelling places and homes in the most cruel, horrifying, degrading, traumatizing and inhumane manner. He stated that, as a conseque 23 primary schools in the area were destroyed and pupils denied of their rights such as food, shelter, health facilities and access to pre-primary and primary education. He further asserted that more than 5,000 minors had been forced out of school as a result of the eviction and destruction of schools, and that the Respondent, through the Ministry of Education, had not offered alternative centers of learning.

10. In this regard, the Applicant contended that it is the legal and constitutional duty of the Respondent under the provisions of the Treaty, the Constitution of Kenya, 2010 and several international instruments as well as the Respondent's policy on education to ensure that the minor's education and general wellbeing are well catered for. Reliance was especially made upon Article 53 of the Constitution where it is stated that every child shall be entitled to education, the provision of which shall be the responsibility of the Government and of the parents, to contend that failure by the Respondent to guarantee the right of education is actually a violation of the Treaty, being a breach of good governance. As the children were out of school, the Respondent must be ordered by this Court to provide education to them since it would be discriminatory to let them out of the system because they are children of displaced persons, the Applicant's Counsel submitted.

11. To further buttress his argument that this Court should grant the interim order sought, the Applicant's Counsel submitted that the affected children should be allowed to have their education

uninterrupted since leaving them out of school could not be compensated with the grant of damages as no damages could be atone for a pupil who had been chased out school, for somebody who, without the intervention of this Court could not even go back to school. He argued that monetary damages could not adequately compensate them in the absence of being allowed to continue their schooling.

12. It was also submitted on behalf of the Applicant that there was no prejudice to be suffered by the Respondent if the interim order was granted, if the Respondent performed well its governmental duty of sending pupils back to school. In addition, that would be in line with the provisions of Section 39 of the Basic Education Act, 2015 that actually states what the Cabinet Secretary in Charge of Education must do even to marginalized vulnerable groups, the Applicant's Counsel further argued.

13. To sum up his submissions, Counsel contended that the Applicant had established that the pupils were not in school, that the injury of being left out of school or not passing exam could not be compensated and that, if the Respondent was to set aside funds and create schools, even temporary, in order to accommodate these children who were out of school, there would be no prejudice under the Basic Education Act, Section 39. Counsel, however, cautioned that if the Court did not intervene, then the future life of these pupils would actually suffer irreparable damages and there would be grave injustice since the Respondent had not given any assurance that it had taken steps to ensure that pupils were in school, considering that going to school is mandatory. In light of the foregoing submissions, the Applicant reiterated his prayer that

the Court grants an interim order that the Respondent do provide temporary school facilities to enable the pupils whose schools had been closed or destroyed by the government agents to pursue their education pending the hearing and determination of the Reference.

III. Respondent's Case and Submissions

14. The Respondent opposed the Application and the orders sought through a Replying Affidavit sworn on 31st October 2018 by Mr. Habat Abdi Sheik Abdullah, Director of Primary in the Ministry of Education (Kenya). The deponent asserted that there had been no evictions per se in the Mau Forest Complex and that instead, the Respondent had removed unlawful encroachments in the Maasai Mau Forest Reserve in an effort to preserve the forest from destruction.

15. On this matter, Counsel for the Respondent recognized that there were evictions, but contended that they did not affect any pupils. He averred that after the evictions, there were communal clashes not related to the forest evictions in parts of Nakuru and Narok Counties which prompted the intervention of the Respondent in order to restore order. He further asserted that following those clashes between communities, for schools that were affected, measures were taken to cater for the needs of displaced students It was thus learned Counsel's submission that the Respondent had fulfilled its responsibility in ensuring that the right to education of the affected students was respected as required by Article 53 of the Constitution of Kenya, 2010.

16. In the same vein, Mr. Habat Abdi Sheik Abdullah averred that several weeks after the forest evictions were completed in July 2018, communal clashes had arisen between several communities residing in some parts of Narok and Nakuru Counties and there was possibility that as a result of those communal clashes and attendant insecurity, some school going children were adversely affected and could not access regular education. In that respect, he stated that appropriate measures had been taken by the Ministry in order to address the needs of the affected students, including those who had to seat K.P.C.E. examinations, as shown in a report of the Ministry of Education to the Chairperson of the Parliamentary Committee on education. The said report provided information on two points, namely: (1) Number of schools and students affected by inter-communal conflicts in Narok and Nakuru Counties and the demolitions in Kibra Constituency, Nairobi County; and (2) Measures put in place by the Ministry of Education to ensure uninterrupted learning and sitting of National Examinations by candidates in the affected schools. On the first question, the Ministry's representative stated that on, 14th September 2018, a high level Directors team was dispatched to the area to assess the situation and make concrete recommendations on the way forward. It is reported that for Narok South Sub County, as at 9th October 2018, the rate of absenteeism had drastically reduced with only 110 students yet to resume and that a team of officers from the Ministry had been in the area to facilitate 100% resumption. And in Narok North Sub County, it is stated that relative calm had returned to the area, schools had re-opened and pupils, including the candidates to the KCPE

private-owned, it must possess and submit to the Ministry of Education a copy of a Title deed registered in the name of the School seeking registration, and that the inability of the alleged schools to obtain registration proved that they had never been registered as such and did not therefore exist.

20. The deponent further buttressed his arguments stating that the education in Kenya is governed by the Basic Education Act, 2015 and the Government deals with registered and recognized schools, which could be public or private. He also stated that unregistered or informal schools should seek registration and meet the conditions set out in the Basic Education Act, 2015 before providing education, otherwise, they would be violating the Basic Education Act, which violation is an offence punished under Section 78 of the said Act.

21. Finally, Counsel for the Respondent submitted that the Court should not grant the interim orders sought since the Applicant had not made out a *prima facie* case of the violation of the right to education of the affected children. He prayed instead, that the Reference should be fixed for hearing, where it would adduce evidence on all the measures taken to address the problems that arose from moving people from the Mau Forest Complex in an effort to assure its conservation.

IV. Applicant's Submissions in Reply

22. In reply, Counsel for the Applicant contended that the Application was brought not pursuant to clashes, but to evictions carried out by Respondent's Police officers and that the evidence shown by the

Respondent's Affidavit was about clashes which were in Nakuru and Narok Counties.

23. Counsel for the Applicant reasserted that pupils could not go to school because their schools had been destroyed or closed and the Court should therefore look at the fate of these children (their interests) who are not schooled for whatever reason. Counsel further submitted that even if those schools were not registered, they did exist; therefore the Respondent should fulfil its responsibility and legal duty to ensure that all students enjoy their right to education enshrined in Article 53 of the Constitution of Kenya, 2010. He reiterated his prayer that the Respondent should be ordered to provide temporary school facilities to the affected children since, contrary to its averments, it had failed to do so,

IV. Court's Determination

24. We have carefully examined arguments presented by Parties in support of their respective cases. The grant of interim orders by this Court is governed by Article 39 of the Treaty as read together with Rules 21 and 73 of the Court's Rules of Procedure. Article 39 of the Treaty 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.**

Rule 73(1) provides:

> **Pursuant to the provisions of Article 39 of the Treaty, the Court may in any case before it upon application supported by affidavit issue interim orders or directions which it considers necessary and desirable upon such terms as it deems fit.**

25. Principles governing the granting of interim orders have been set out in the landmark case of **Giella Vs. Cassman Brown** as follows: **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

26. In another decision, however, in the case of **American Cynamid Company Vs. Ethicon Limited (1975) AC 396**, the House of Lords pointed out the need for courts faced with an application for an interlocutory injunction to be satisfied that the claim was not frivolous or vexatious – but that there was a serious question to be tried, without attempting to resolve conflicts of evidence, as previously required in the determination of a '*prima facie case with probability of success'*, as those matters were to be dealt with at trial. In this regard, in **Forum pour le Renforcement de la Société Civile & Others Vs. Attorney General of the Republic of Burundi & Another, EACJ Appl. No. 16 of 2016,** this Court

adopted the following position stressing the demonstration of a *serious triable issue* rather than a *prima facie* case in applications for interlocutory injunctions as follows:

> **Therefore, the court only needs to be satisfied that there is a serious question to be tried on the merits. The result is that the court is inquired to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality.**[1]

27. It can be deduced from the above that for a serious triable issue to be established, the substantive suit should, on the face of it, without recourse to the merits, disclose a cause of action.[2] On the latter matter, in **British America Tobacco (BAT) Vs. The Attorney General of the Republic of Uganda, EACJ Appl. No. 13 of 2017**, this Court held thus:

> **Within the context of EAC Community law, a cause of action demonstrating the prevalence of a serious triable issue has been held 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 parties' recourse to the Court's**

[1] See Blackstone's Civil Practice 2005, para. 37.19 – 37.20, pp. 392, 393.

[2] See, Hassan Basajjabalaba & Another Vs. The Attorney general of the Republic of Uganda, Application No. 9 of 9 of 2018 citing SISKINA (OWNERS OF CARGO LATELY ON BOARD) V DISTOS COMPANIA NAVIERA SA: HL 1979

interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights."[3]

28. We are guided by the Court's aforementioned position in considering the present Application before us. Having carefully examined both Parties' respective submissions, it appears that the gravamen of the Applicant's contention is that the eviction of the population from the Mau Forest Complex which subsequently led to the discontinuation of the pupils' schooling within the affected area is a violation of the pupils' fundamental right to education enshrined in Article 53 of the Constitution of Kenya, 2010, and thus, a violation of Kenya's treaty obligations under Articles 6(d) and 7(2) of the Treaty.

29. We have also heard the Applicant stressing the point that it is a matter of utmost urgency that temporary school facilities be provided to the affected students regardless of the consideration that the affected schools are registered or unregistered since under the Kenyan law, it is the responsibility of the Respondent to uphold each child's constitutional right to education by ensuring the continuity of the enjoyment of this right if a situation such as the alleged evictions of the affected population in issue occurs. He further argued that not doing that would be discriminatory against the affected children.

30. The Respondent, on its part, contended that evictions that occurred did not affect the students' education and that for the

[3] See Sitenda Sebalu Vs. The Secretary General of the East African Community & Others, EACJ Ref. No. 1 of 2010; Simon Peter Ochieng & Another Vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 11 of 2013; and FORSC & Others Vs. The Attorney General of the Republic of Burundi, EACJ Appl. No. 16 of 2016.

ones that were moved following clashes between communities in the affected areas, it had already taken appropriate measures to ensure that each and every affected pupil was in school in accordance with the Kenyan law. In that regard, the Respondent averred that affected students had been transferred to other schools and that it would give evidence of that when arguing the Reference.

31. Still on this matter, it is worth recalling that the Respondent has pointed out that, since Section 78 of the Basic Education Act, 2015[4] makes it an offence to run a school without being licensed or accredited and registered, it was not proper that it would be asked to provide school facilities to unregistered or informal schools deemed non-existent under the Kenyan Law.

32. Furthermore, when the Applicant was pressed to explain the kind of temporary school facilities which the Respondent should be ordered to provide pending the determination of the Reference, although he gave some indication to that effect, he seemed to leave the matter of the determination of those facilities to the discretion of the Respondent and later on, stated that they were looking for basic infrastructure for the affected pupils.

33. From the above exposition of the Parties' diametrically opposite positions on the issue at hand, it appears on the face of the record that the Reference raises pertinent legal issues that need to be

[4] Section 78 of the Kenya's Basic Education Act, 2015 provides:

(1) A person shall not engage in the promotion, management, or teaching of basic education unless such person is accredited and registered in accordance with the provisions of this Act.

(2) (....)

(3) Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to a fine not exceeding twenty million shillings or a term of imprisonment not exceeding three years or to both.

determined by the Court. These are *inter alia* the legality of the alleged evictions of people from the Mau Forest Complex, and the alleged violation of the right to education of the students affected by those events.

34. We now turn to the second test to be carried out, that is whether the Applicant stands to suffer an irreparable injury if the order sought was not granted. It is settled law that an interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury which could not be adequately compensated by an award of damages. Where a Court is in doubt as to the adequacy of damages to atone the foreseeable injury, it will decide an application on the balance of convenience (See ***Prof. Peter Anyang' Nyng'o & 10 Others Vs. The Attorney general of the Republic of Kenya & 3 Others, EACJ Application N0. 1 of 2006*** and **Timothy Alvin Kahoho Vs. The Secretary general of the East African Community, EACJ Application No. 5 of 2012).**

35. The question now is to know if the Court were to find that the Respondent had violated the right to education of the affected students, would that injury be adequately compensated by the award of damages? The Applicant contended that the injury suffered by the students by being left out of school or not passing exams could not be compensated by any award of damages. Conversely, the Respondent argued that no injury had been suffered by the said students given that, as explained in Annex BK3 to the Affidavit in Reply, appropriate measures had been taken to address the education needs of the affected students.

36. As stated herein above, the right to education is recognized by the Respondent's Constitution, Article 53(1)(b) of which states that every child has a right to free and compulsory basic education. The International Covenant on Economic, Social and Cultural Rights states in its General Comment No' 13 that the right to education, like all human rights, imposes on States parties[5] the obligations to respect, protect and fulfil.

> **The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide while the obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfill or facilitate requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. (See *International Covenant on Economic, Social and Cultural Rights General Comment No. 13* at Paras. 46, 47).**

37. In the instant case, it is not in dispute that the events that occurred in the area in question did affect the schooling of students from families that had been displaced from their places of residence. It is also worth noting, as stated herein above, that the Respondent asserted that it had taken measures to enable the affected students sit the KCPE Examinations and continue their

[5] Kenya is a party to the Covenant.

education. In this regard, it would appear that there was, at most, a temporary interruption of the schooling of the affected students following the impugned events. Given these circumstances, it is debatable whether such an interruption constitutes the kind of irreparable injury that can or cannot be compensated by damages. Since the Application cannot be determined on the adequacy of damages to recompense an applicant for possible injury, we deem it necessary to consider the balance of convenience in this matter.

38. In the **American Cyanamid** case, the balance of convenience has been captured as follows:

> **The object of 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 defendant to be protected against injury resulting from having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.**

39. In the abovementioned case, it is also stated 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* was clarified in **Garden Cottage Foods Vs. Milk Marketing Board (1984) AC 130** (Lord Diplock) as follows:

> **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.**

40. As per the foregoing case law, 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, the Applicant for interim orders ought to act quickly. See **Blackstone's Civil Practice 2005, para. 37.29, p. 397.**

41. In the present case, the Applicant asserted that prior to the alleged evictions, education in the affected area was provided in schools built by parents and that the Government had given support in providing teachers through the Teachers Service Commission (TSC). On its part, the Respondent asserted that

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

following the inter-ethnic clashes that had affected students in the area in question, it had taken measures as detailed herein above and normalcy had returned in the schooling of the said students. This evidence was not controverted by the Applicant. Given these circumstances, therefore, it is our considered view that the balance of convenience lies in favour of the Respondent.

42. In light of all our findings, the Applicant's prayer for an order that the Respondent provides temporary school facilities to enable the pupils whose schools have been allegedly closed or destroyed by the government agents pursue their education pending the hearing and determination of the Reference is not granted. **Reference No.17 of 2018** shall be fixed for hearing forthwith.

V. Conclusion

43. **Application No. 17 of 2018** is disallowed with no order as to costs.

It is so order.

Dated, Signed and Delivered at Arusha this 29th March 2019

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MONICA K. MUGENYI
PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO
DEPUTY PRINCIPAL JUDGE

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FAKIHI A. JUNDU
JUDGE

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AUDACE NGIYE
JUDGE

.....

CHARLES NYACHAE
JUDGE