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. 9 OF 2018

(Arising from Reference No. 8 of 2018)

1. **HASSAN BASAJJABALABA**
2. **MUZAMIRU BASAJJABALABA** ..... **APPLICANTS**

VERSUS

THE ATTORNEY GENERAL OF UGANDA .....RESPONDENT

27th MARCH 2019

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Mssrs. Hassan and Muzamiru Basajjabalaba ('the Applicants') seeking interim orders against the Attorney General of the Republic of Uganda ('the Respondent') pending the determination of **Reference No. 8 of 2018, Hassan Basajjabalaba & Another vs. Attorney General of Uganda**. The Application is brought under Article 39 of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 1(2), 17, 21, 24 and 73 of this Court's Rules of Procedure.

2. A brief background to the Application is pertinent. In 2013, the Applicants were arraigned before the Chief Magistrates Court of Buganda Road, Uganda on charges of conspiracy to defraud tax laws, forgery of a judicial document and uttering a false document but, vide ***Application No. 22/ 2013***, were released on bail. They were subsequently re-arrested and arraigned before the Anti-Corruption Division of the High Court of Uganda in ***Criminal Case No. 3/2013, Uganda vs. Hassan Basajjabalaba & Another***, and were again subsequently released on bail. The Applicants thereupon filed ***Constitutional Petition No. 12/2013, Hassan Basajjabalaba & Another vs. The Attorney General*** in the Constitutional Court of Uganda, challenging the constitutionality of the Respondent's actions as described above and did secure a temporary injunction staying the criminal trial in the High Court pending the determination of the Constitutional Petition. No further mention whatsoever is made in the Reference to the criminal proceedings before the Buganda Road Court.

3. While the temporary injunction issued by the Constitutional Court was still in place, the Applicants were on 9th April 2018 issued with criminal summons by the Uganda Police and the Directorate of Public Prosecutions (DPP), compelling them to report to the Criminal Investigation Department (CID) offices for interrogation. The Applicants unsuccessfully sought the intervention of the Constitutional Court and Minister of Justice and Constitutional Affairs to avert what they perceived as an abuse of court process, as well delayed justice arising from the then pending judgment of the Constitutional Court in ***Constitutional Petition No. 12/2013.*** The Applicants thereupon filed **Reference No. 8 of 2018** in this Court challenging the legality of the criminal summons and the delayed justice in the Ugandan Constitutional Court, which they viewed as an affront to the rule of law principle enshrined in the Treaty.

4. They simultaneously filed **Application No. 9 of 2018** before the same Court seeking *ex parte* interim orders pending the hearing of the Application *inter partes* and the subsequent determination of the Reference. The interim orders sought in that Application pertained to injunctive orders restraining the Respondent State and its agents from acting upon the criminal summons for interrogation; or arresting, re-issuing fresh summons, initiating fresh criminal charges against the Applicants or constituting a new panel of judges to re-hear ***Constitutional Petition No. 12/2013***. The *ex parte* Application was disallowed by this Court on 24th April 2018 whereupon the Applicants were ordered to serve **Application No. 9 of 2018** on the Respondent for hearing *inter partes.* However, before this Court could hear the parties *inter*

partes, the Constitutional Court of Uganda did on 17th May 2018 deliver its judgment in ***Constitutional Petition No. 12/2013*** and ordered the resumption of the High Court criminal trial thus essentially vacating the temporary injunction that it had previously granted. Consequently, the Applicants amended the Reference and Application for interim orders in reference above, filing the amended pleadings in this Court on 1st June 2018.

5. It is to the Amended Notice of Motion (Amended Application) that we now revert. In a nutshell, the Applicants seek injunctive orders restraining the Uganda Police or any other security agency of the Ugandan Government, the DPP and the Anti-Corruption Division of the Uganda High Court from either recommencing the criminal proceedings that are still pending against them; or summoning, interrogating, arresting or otherwise requiring them to appear before any organ of the said Government on the basis of the judgment and orders of the Constitutional Court in ***Constitutional Petition No. 12/2013***, pending the determination by this Court of the Amended Reference. For reasons highlighted later in this Ruling, the Respondent did not file an Affidavit in Reply to the Amended Application but did throughout the hearing rely on Mr. Oburu Odoi's Affidavit referred to earlier herein.

6. At the hearing, the Applicants were represented by Mssrs. Caleb Alaka and Joseph Kyazze, while Ms. Patricia Mutesi, Ms. Goretti Arinaitwe and Ms. Charity Nabasa appeared for the Respondent.

B. **APPLICANT'S CASE**

7. We deduced the Application before us to have been premised on the following broad grounds:

   i. **The Amended Reference does raise serious triable issues in so far as it challenges the legality of the delayed judgment by the Constitutional Court of Uganda which, when eventually delivered (purportedly upon the prompting of the Applicants by filing the Amended Reference) was signed by only four (4) of the five (5) judges of the coram that had heard the Petition, three (3) of whom had since vacated the said court. It does also challenge the legality of the Constitutional Court's Order for the commencement of the criminal proceedings against them. Further, the Applicants maintained their original challenge to the summons issued by the Uganda Police and DPP compelling them to appear at the CID offices for interrogation in spite of a (then) subsisting temporary injunction issued by the Constitutional Court; the inaction of the Government of Uganda in the wake of the (then) delayed Constitutional Court judgment, as well as the Applicants' perceived persecution by organs of the State.**

   ii. **The impugned acts of the Respondent State constitute a violation of the Applicants' right to a fair and expeditious hearing, which amounts to a breach of the principle of rule of law and access to justice contrary to Articles 6(d)**

and 7(d) of the Treaty, as well as Article 7(1)(d) of the African Charter on Human and Peoples' Rights.

iii. **Given the Constitutional Court's Order for the Applicants' trial before the High Court to resume and against the backdrop of the now lapsed temporary injunction, there is imminent danger of the Respondents pursuing the impugned actions thus rendering the Amended Reference nugatory given that there is no bar to the Applicants' arraignment before the Anti-Corruption Division of the High Court for trial in respect of *Criminal Case No. 3/2013*.**

iv. **The commencement of the Applicants' trial would force them to submit to an illegal process which is the subject of challenge in the Amended Reference thus causing them irreparable injury incapable of being atoned by an award of damages.**

v. **The balance of convenience lies in favour of the Applicants given that they are likely to suffer more inconvenience if they are tried and adjudged in a manner that constitutes an abuse of the rule of law, and the legality of which is being challenged in the Amended Reference.**

8. The Application is supported by an Affidavit deposed by the First Applicant and filed on 1st June 2018 that essentially regurgitates the grounds of the Application as stated above. It does also re-state the remedies sought in the Amended Reference and makes the following attestations:

i. There is imminent danger of the Amended Reference being rendered nugatory by the pending actions of the Respondent and its organs given that the Constitutional Court's judgment had cleared the Uganda Police, Directorate of Criminal Investigations, the DPP and indeed the trial court to resume actions that are being challenged in the Amended Reference.

ii. The imminent danger and irreparable injury lies in the fact that, unless restrained by order of this Court, the impugned actions by the various players in the Respondent State's criminal justice system would be enforced pursuant to that judgment, which is itself being challenged before this Court.

iii. The Respondent's agents having acted with disregard for lawful court orders before, they are likely to reactivate and continue with the Applicants' prosecution and allegedly inevitable conviction, given the orders of the Constitutional Court.

iv. The balance of convenience lies in the Applicants' favour given the inconvenience they were likely to suffer if tried and adjudged in a manner that constitutes an abuse of the rule of law.

v. It is fair, just, equitable, necessary and befitting that an injunction be issued in order to preserve the Applicants' right to be heard in the Amended Reference and the relevance of the reliefs being sought therein.

9. In Submissions, the Applicants presented a two-fold argument: first, that the Application was properly before the Court, and secondly that it did meet three (3) preconditions for the grant of interim orders. The thrust of the first limb of their argument was that for an application for interim orders to be properly before the Court, it had to be established that the Reference from which the application arose had been served on the opposite party, and the application was required to demonstrate its intention to preserve the status quo and minimize loss to an applicant before the determination of the Reference. In other words, there must be a status quo that an applicant for interim orders seeks to preserve. Citing the cases of **Castro Pius Shirima vs The Attorney General of Burundi & Others, EACJ Appl. No. 11 of 2016** and **Venant Masenge vs. The Attorney General of the Republic of Burundi, EACJ Appl. No. 5 of 2013**, it was the Applicants' submission that they had duly served the Amended Reference upon the Respondent and the Application did indeed seek to preserve the status quo pending the determination of the Reference, therefore the Amended Application was properly before this Court.

10. By the same token, the Applicants argued that they had satisfied the preconditions for the grant of interim orders, having established the existence of a *prima facie* case with a probability of success; the inability of damages to atone for the injury they were likely to suffer in the event that the interim orders sought were not granted, and proposed that the balance of convenience was tilted in their favour given the inconvenience they stood to suffer if they were subjected to an illegal prosecution. Learned Counsel grounded his

case on the principles for the grant of interim orders before this Court as espoused in **The Democratic Party & Another vs. The Secretary General of the East African Community, EACJ Appl. No. 6 of 2011**; **Timothy Alvin Kahoho vs.The Secretary General of the EAC, EACJ Application No. 5 of 2012** and **Venant Masenge vs. The Attorney General of the Republic of Burundi** (supra).

C. **RESPONDENT'S CASE**

11. In an Affidavit of Reply deposed by Jimmy Oburu Odoi and filed on 17th May 2018, the following assertions in rebuttal were made.

    i. **The Applicants had, in *Constitutional Petition No. 12 of 2013*, sought orders for the permanent stay of all pending criminal proceedings against the Applicants and their discharge from all the charges against them; the permanent prohibition of any fresh charges in connection with a compensatory payment to Haba Group (U) Limited (a company associated with the First Respondent), and an order compelling the President of the Republic of Uganda and the Uganda Judicial Service Commission to appoint more judges to fully constitute the Constitutional Court and Supreme Court of the same country.**

    ii. **On 2nd May 2018 the Constitutional Court had delivered its judgment in *Constitutional Petition No. 12 of 2013*, disallowing the prayer for permanent stay of the proceedings in *Criminal Case No. 3 of 2013* and directed the High Court of Uganda to proceed with the**

Applicants' trial in that case. The temporary injunction that had been issued by the Constitutional Court had lapsed upon delivery of the judgment and there was no bar to further investigations or the prosecution of the Applicants in ***Criminal Case No. 3 of 2013***.

iii. The trial court before which the Applicants had been arraigned is mandated to adjudicate ***Criminal Case No. 3 of 2013*** and the Applicants have a right of appeal from the judgment arising therefrom; Chapter 12 of the Constitution of the Republic of Uganda does mandate the Uganda Police to perform the functions of protecting life and property, as well as preserving law and order and preventing crime, and the Directorate of Criminal Investigations does similarly have the mandate to collect and provide criminal intelligence information, detect and prevent crime, maintain criminal records and undertake investigations on crime.

iv. The impugned summons as issued on 9th April 2018 was well within the mandate of the Criminal Investigations Department.

v. The Application does not raise a *prima facie* case with probability of success, neither do the Applicants stand to suffer irreparable injury such as would warrant the grant of the Orders sought; rather, the Application is an abuse of court process that is intended to delay the proceedings in ***Criminal Case No. 3 of 2013***.

12. The Respondent did not deem it necessary to file another Affidavit following the amendment of the Application but, rather, on 29th May 2018 went ahead to file Written Submissions. We pause here to recall that in its Ruling of 24th April 2018 in respect of the application for *ex parte* interim orders, this Court did explicitly state that '**parties were at liberty to file and exchange skeletal written submissions**' before 5th June 2018, the date that had been reserved for hearing the parties in this Application *inter partes*. We cannot then fault the Respondent for its adopted course of action.

13. In the event, however, the Respondent opted to rely on its previously filed Written Submissions rather than file fresh Submissions in response to the Amended Application. In that regard, learned Counsel for the Respondent took issue with the present Application for seeking to delay the course of a criminal trial, as well as inhibit the constitutional functions of the Uganda Police, CID, DPP and Uganda Judiciary by purporting to have them restrained from investigating, interrogating or arresting the Applicants in respect of ***Criminal Case No. 3 of 2013***, or reconstituting a fresh coram of judges to re-hear ***Constitutional Petition No. 12 of 2013*** or otherwise retry the matter *de novo*. Propounding the principles governing the grant of interim orders as encapsulated in the renowned case of **Giella vs. Cassman Brown Co. Ltd 1973 EA 358** and upheld by this Court in **Prof. Anyang Nyong'o & Others vs. The Attorney General of Kenya & Others, EACJ Ref. No. 1 of 2006** and **East African Law Society & Others vs. The Republic of Kenya & Others, EACJ Appl. No. 9 of 2007**, Ms. Mutesi argued that the Applicants had neither

established a *prima facie* case nor the irreparable injury they stood to suffer if the injunctive remedy sought was not granted.

14. In what appeared to be a tacit reference to the original Reference, it was her contention that the orders sought by the Applicants had been overtaken by events rendering their entire case nugatory and the Application had neither specified the injury the Applicants stood to suffer nor why it could not be atoned by an award of damages. With regard to the Amended Reference, we understood learned Counsel to argue that whereas it challenged the legality of the Constitutional Court's judgment and the orders that cascaded from it, the Amended Reference did not question the legality of the criminal prosecution in issue or the investigations in respect thereof. In her view, it thus fell short of establishing a *prima facie* case.

15. She maintained that the Applicants had not demonstrated the injury they stood to suffer by facing criminal prosecution for offences by law prescribed; neither had they adduced any evidence of the eminent danger of prosecution. On the contrary, Ms. Mutesi obviated any such impending threat by furnishing this Court with a Supreme Court Ruling dated 11th July 2018 that had effectively stayed the execution of all the Constitutional Court's Orders pending the determination of an Appeal therefrom by the Supreme Court. Ms. Mutesi further argued that the balance of convenience in this matter was such that it was neither in the public interest nor in the Applicants' own interest that their prosecution for legally prescribed offences was delayed by the grant of interim orders. She opined that it should be in the

Applicants' interests to seize the opportunity of an expeditious trial to defend themselves against the charges preferred against them.

D. APPLICANTS' SUBMISSIONS IN REPLY

16. In a brief reply, it was clarified for the Applicant that the gist of the Amended Reference was to interrogate the legality of an entire criminal prosecution process, which had since been sanctioned by the Constitutional Court, to determine a Partner State's compliance with the rule of law as enshrined in the Treaty. It was Mr. Alaka's contention that to that extent a *prima facie* case had been established. On the adequacy of damages to atone for the alleged wrongs, learned Counsel conceded that the Supreme Court of Uganda had indeed granted interim orders, but appeared to insinuate that there was a possibility of the Supreme Court's Order being flouted in the same way that Criminal summons had been issued against the Applicants in spite of the subsistence of a temporary injunction. He further opined that the Supreme Court's Order was silent on the pre-prosecution investigative process, having restricted itself to only a stay of the Constitutional Court's Orders on the resumption of the criminal trial. It was his contention, in any event, that only this Court could secure proceedings before it and the present Application sought to *inter alia* preserve the relevance of the Amended Reference.

E. COURT'S DETERMINATION

17. We propose to deal from the onset with the small technical matter of the reliance by the Respondent on a pre-amendment Affidavit. Following the hearing and determination of this Application for interim orders *ex parte*, the Constitutional Court of Uganda did

deliver Judgment in ***Constitutional Petition No. 12 of 2013***, thus rendering nugatory some aspects of **Reference No. 8 of 2018** and indeed the present Application. On 5th June 2018 when the present Parties appeared before us for hearing the Application *inter partes*, the Applicants presented an Amended Reference and Application that had been filed on 1st June 2018 to address the above development. On that day, this Court did give the Respondent up to 12th June 2018 to file an Affidavit in Reply to the Amended Application. It did not file any.

18. At the hearing of the Amended Application the Applicants sought to make procedural mileage of this omission. However, as did later transpire in the course of oral highlights of the Parties' Submissions, the Applicants had themselves filed their amended pleadings in the wrong Registry making it impossible for the Respondent to access them in good time. In any event, the Respondent maintained that the substance of the Application remained the same hence its decision at the hearing to rely on its original Affidavit in Reply.

19. We have carefully considered this issue. We take the view that a respondent to an application would do well to file an affidavit in reply in respect of the factual matters in issue in the application, but may very well opt not to file any affidavit of reply should s/he intend to respond to the application purely on points of law. In so positing we are alive to the fact that affidavits are tantamount to evidence on oath, albeit in the form of affidavit evidence. Conversely, questions of law derive their potency from the law itself and need not be proved or deposed to in affidavit evidence. Consequently, if indeed the Affidavit in Reply in this case only

addressed matters pertaining to the original Reference, then obviously there would be no affidavit in reply attesting to factual matters arising from the Amended Application. That, however, would not prohibit the Respondent from responding to the Application in submissions on points of law. A court faced with this eventuality would simply ensure that such a respondent does not purport to invoke matters of fact in submissions that are not grounded in an affidavit in reply. We do therefore interrogate the Application before us presently on that premise.

20. 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.**

21. We are alive to the tri-fold principles for the grant thereof advanced in **Giella vs. Cassman Brown** (supra) to which we were referred by learned Counsel for the Respondent, namely, '**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.'**

22. However, as this Court has severally observed, in a latter decision of **American Cyanamid Company vs. Ethicon Limited (1975) AC 396**, the House of Lords espoused 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 was previously required in the determination of '*a prima facie case with probability of success*', as those were matters to be dealt with at trial. Thus in **FORSC & Others vs. Attorney General of the Republic of Burundi & Another, EACJ Appl. No. 16 of 2016**, this Court upheld the following text in ***Blackstone's Civil Practice 2005*, para. 37.19 – 37.20, pp. 392, 393**, in deference to the demonstration of *a serious triable issue* rather than a *prima facie* case in applications for interlocutory injunctions:

> **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 required 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.**

23. Stated differently, for a serious triable issue to be established the substantive suit should, on the face thereof without recourse to the merits, disclose a cause of action.[1] Indeed, as we did reiterate in **British America Tobacco (BAT) vs. The Attorney General of the Republic of Uganda, EACJ Appl. No. 13 of 2017**:

[1] See also **The Siskina (1979) AC 210**

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 interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights.[2]

24. We find no reason to depart from that position as we consider the matter before us presently. We carefully listened to both Parties in submissions. It is quite apparent that we have before us 2 sets of impugned actions: a set of actions that transpired before the delivery of the Constitutional Court's judgment and another that arise from the impugned judgment itself. In the former category falls the legality of the summons issued by the Uganda Police and DPP compelling the Applicants to appear at the CID offices for interrogation in spite of a (then) subsisting temporary injunction issued by the Constitutional Court; the inaction of the Respondent State in the face of the (then) delayed judgment, and the alleged persecution of the Applicants by various State organs. In the latter

[2] 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**.

category, on the other hand, lies the legality of the Constitutional Court judgment and Orders.

25. Having carefully considered the Amended Reference at its face value, it becomes abundantly clear that any questions as to the legality of the criminal summons issued by the Respondent's agents compelling the Applicants to report for interrogation on or about 24th April 2018 have indeed been overtaken by events and are, to that extent, moot. Similarly moot, in our considered view, is the challenged inaction of the Respondent State in the face of the then delayed judgment. On the Applicants' own admission the impugned judgment has since been delivered, and it is with the form, content and import thereof that they do now take issue. We take the view that the legality of summons that have since lapsed or inaction in respect of a delayed judgment that has since been delivered cannot constitute live diputes before this Court.

26. The question of moot issues was addressed as follows in **Legal Brains Trust vs. Attorney General of Uganda, EACJ Appeal No. 4 of 2012**:

> **In this regard it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical issues – namely, those concerning which no real dispute exists. A court will not hear a case in the abstract, or one which is purely academic or speculative in nature – about which there exists no underlying facts in contention. .... Absent from such a dispute, the resulting exercise would be an abuse of the court's process.**

27. By the same token, the foregoing position was reiterated in **Human Rights Awareness & Promotion Forum (HRAPF) vs Attorney General of Uganda & Another, EACJ Ref. No. 6 of 2014**, and this Court had occasion to address the rationale for that stance on moot question as follows:

> **The mootness doctrine is rooted in an adversarial legal system that is synonymous with the Common Law and necessitates a live controversy in adjudicated matters; as well as the judicial economy principle that obviates the squandering of scarce judicial resources on moot and hypothetical questions.**

28. Whereas we find no reason to vacate the well elucidated position of the law in the foregoing case; we are, needless to say, bound by the position in the **Legal Brains Trust** case. We do therefore find that the legality of the criminal summons and the inaction by the Respondent State, being moot questions, do not demonstrate serious triable issues for purposes of the Application before us presently. We so hold.

29. We now turn to the question as to the legality of the judgment and orders of the Constitutional Court, and whether indeed any act undertaken pursuant thereto would be an affront to the Applicants' right to a fair hearing or the rule of law principle encapsulated in Articles 6(d) and 7(2) of the Treaty. This Court acknowledges that it is not clothed with appellate jurisdiction over the decisions of domestic courts in the EAC Partner States. Nonetheless, Articles 27(1) of the Treaty does adorn the Court with original jurisdiction over the interpretation and application of the Treaty. Article 30(1)

then provides the context within which such interpretation and application of the Treaty may ensue. For present purposes, such interpretation may be undertaken in respect of any actions or decisions of Partner States.

30. The question then is whether the matters in issue before us presently are actions or decisions of the Respondent State. It is now a well established principle of international law that States parties may be held responsible for all actions of State Organs, including judicial organs. Article 4(1) of the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts, 2001* [3] provides:

> **The Conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.** *(Our emphasis)*

31. Thus the International Court of Justice (ICJ) did, in its Advisory Opinion in **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p.62 at pp. 87-88**, hold:

> **According to a well-established rule of international law, the conduct of an organ of a State must be regarded as an act of that State. ... the conduct of an organ of a State**

[3] Reported in the **Yearbook for the International Law Commission, 2001, Vol. II (Part 2)**, these Articles on State Responsibility are widely acknowledged as a source of customary international law.

– even an organ independent of the executive power – must be regarded as an act of that State.

32. The foregoing legal position unequivocally holds States internationally responsible for the conduct of their judicial organs. It follows then that we cannot fault the Applicants herein for proposing to hold the Respondent State responsible for the allegedly wrongful actions of its Constitutional Court. This principle would appear to be well settled in international law. We do respectfully uphold it.

33. In the present context, therefore, the decisions and/ or actions of domestic courts may be interrogated to determine their compliance with the express provisions of the Treaty. Accordingly, such actions or decisions, as well as any actions flowing therefrom when challenged in terms of their Treaty compliance would *prima facie* give rise to a cause of action before this Court. To that extent, therefore, any questions as to the legality of the Uganda Constitutional Court's decision and the actions that would cascade from it, do pose serious legal issues for determination by this Court. Consequently, we are satisfied that the present Application does raise serious triable issues. We so hold.

34. It is to the question of irreparable injury that we now turn. The Applicants went to great lengths to argue that no award of damages could adequately compensate the violation of individuals' fundamental rights. This position was roundly dismissed by the Respondent who, conversely, contended that the Application was an abuse of court process that was intended to delay the proceedings in ***Criminal Case No. 3 of 2013***. The Respondent

buttressed this position with the most persuasive argument that given that the Supreme Court of Uganda had since granted a stay of the criminal proceedings pending in the High Court as sought by the Applicants, there was no imminent threat of prosecution posed to them and therefore they did not stand to suffer any irreparable damage.

35. We have carefully considered the elaborate submissions of either Party on this issue. 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 p. 408***.

36. Damages at common law may in general terms be defined as follows:

> **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.**[4]

37. It has, nonetheless, been proposed that there do exist some irreparable wrongs, such as the loss of the right to vote, for which damages would be awardable but inadequate. Similarly so where the damage is non-pecuniary, for instance in respect of the torts of

[4] Oxford Dictionary of Law, Oxford University Press, 2009 (8th Ed.), p.246

libel or nuisance or a violation of trade secrets.[5] With utmost respect, however, we are not sufficiently persuaded that the category of wrong(s) before us presently fall within the ambit of irreparable wrongs for which damages would be inadequate. Without attempting to delve into the merits of the Reference, it does appear that the Applicants may have endured some degree of pain and suffering. Against the backdrop of the nature and import of general damages elucidated above, such pain and suffering seem to us to be precisely the sort of circumstances that (if proven) would warrant and be adequately recompensed by an award of general damages.

38. In the matter before us, the Applicants fault various State organs for seeking to hold them to account for alleged criminality. That course of action is well within the impugned Organs' constitutional mandate. We did not hear the Applicants to portend that they have been denied either the right to representation, defence or opportunity to affirm their innocence. On the contrary, it seems to us that they are being offered the opportunity to have their day in court to dispute the charges preferred against them. They do have a right of appeal from the verdict in the criminal trial, as well as the option to seek appropriate recompense by instituting civil proceedings for wrongful prosecution should the occasion so warrant. We do therefore respectfully decline the invitation to equate the wrongs alleged herein to the category of wrongs that, once lost, cannot be *adequately* atoned by an award of damages.

39. In any event, as was most ably argued by Ms. Mutesi, the Applicants are the proud holders of a Stay of Execution Order

[5] See Blackstone's Civil Practice 2005, p.394

issued by the Supreme Court that effectively insulates them from any imminent or impending prosecution in the High Court of Uganda. It effectively preserves the status quo, rendering superfluous any attempt by this Court to issue the interim orders sought in the present Application. The nature of temporary injunctions is that they are equitable remedies that seek to preserve such interests of parties as would otherwise render meaningless the final remedies sought in litigation proceedings. If this end has already been achieved, as is the case presently, we see no reason to purport to reinforce an effective court order. As we did have occasion to observe in our determination of this Application *ex parte*, we do reiterate here that '**we see no irreparable injustice that the Applicants may suffer if we do not grant any** *(ex parte)* **orders as they are already the beneficiaries of protective orders**.'

40. Having so held, we find no reason to consider the balance of convenience of this matter. It is trite 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 atone for possible injury to an applicant, or where the court nurses any doubts as to the adequacy of either of those preconditions to settle an application for interim orders; it a question of prudence that the court shall decide the matter on a balance of convenience. *See* ***East African Industry vs. True Foods (1972) E.A. 420***. In the present Application, we do not entertain any doubt in our minds that the Applicants are aptly insulated from any impending injury, let alone irreparable injury. We do not deem it necessary, therefore, to delve into the balance of convenience.

F. **CONCLUSION**

41. On the question of costs, we are mindful of Rule 111(1) of this Court's Rules, which postulates that costs should follow the event '**unless the Court, for good reason, decides otherwise**'. Given that this is an interlocutory application, we would exercise our discretion that costs be in the cause.

42. In the result, we decline to grant the interim orders sought by the Applicants and do hereby dismiss this Application. We order that costs shall be in the cause.

It is so ordered.

Dated, delivered and signed at Arusha this 27th Day of March 2019.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Dr. Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE

Hon. Justice Fakihi A. Jundu
JUDGE