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.20 OF 2018
(Arising from REFERENCE NO. 19 OF 2018)

GARANG MICHAEL MAHOK..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF SOUTH SUDAN..... RESPONDENT

5TH DECEMBER 2019

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application filed under a certificate of urgency by Mr. Garang Michael Mahok, a citizen of the Republic of South Sudan, resident in Nairobi in the Republic of Kenya, (hereinafter referred to as **"the Applicant")** for interim orders against the Attorney General of the Republic of South Sudan (hereinafter referred to as "**the Respondent**"), pursuant to Article 39 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "**the Treaty**") and Rules 1(2), 21 and 73 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "**the Rules**").

2. The instant Application arises from **Reference No. 19 of 2018** filed on 30th October 2018 where the Applicant stated that he was a personal friend and colleague of the subject of the Reference, and was, *inter alia,* the Coordinator of Nile Foundation, a non-governmental organization (NGO)/Charity Organization in South Sudan. The subject of the Reference is Mr. Kerbino Agok Wol, a citizen of the Republic of South Sudan, stated to be a businessman and philanthropist. He has allegedly been in arbitrary detention since 27th April 2018, without being informed of the reasons for his arrest, and without being charged or brought before a competent impartial court or tribunal, in violation of the Constitution and laws of the Respondent State and Articles 6(d), 7(2) of the Treaty.

3. The Application was brought to this Court under a certificate of urgency seeking grant of the following orders *ex parte*:

   (i) ***That this Application be certified as extremely urgent;***

(ii) *This Application be heard* ex parte, *in the first instance;*

(iii) *The Respondent files an Affidavit, within seven (7) days of the proposed* ex parte *Orders of this Court, and in such Affidavit, the Respondent: -*

a. *Provides this Honourable Court with precise and credible information as to the exact whereabouts of the subject, Mr. Kerbino Wol Agok (Hereinafter referred to as 'Mr. Wol);*

b. *Provides assurance to this Honourable Court that the Respondent will immediately allow access to Mr. Wol by his family, friends, associates, legal counsel and doctors;*

c. *Provides this Honourable Court with the reasons for the arrest and continued detention of Mr. Wol;*

d. *Provides this Honourable Court with reasons for the freezing of Mr. Wol's personal and corporate bank accounts, the confiscation of monies therein and the closure of Mr. Wol's businesses.*

(iv) *Pursuant to the Orders proposed in paragraph 3 above, this Application be fixed for* inter partes *hearing in the shortest time possible, and at any rate, in the time envisaged by Rule 21(3);*

(v) *Pursuant to the Orders proposed in paragraph 3 above, the Applicant be expressly granted leave and allowed to file supplementary Affidavits to update this Honourable Court on the state of implementation of its Orders;*

(vi) ***The Respondent either releases Mr. Wol or arraigns him before a competent, impartial and effective Court or Tribunal;***

(vii) ***Pending the determination of the instant Reference, the Respondent, with immediate effect, reverses the closure of Mr. Wol's businesses and personal and corporate bank accounts;***

(viii) ***This Honourable Court be pleased to issue further or other Orders as it deems fit and just under the circumstances.***

4. The *inter partes* Application was heard on 25th March 2019, the Applicant being represented by Mr. Donald Deya and Mr. Nelson Ndeki, while Mr. Bieng Piek Kol appeared for the Respondent.

B. <u>Applicant's Case and Submissions</u>

5. The Application is supported by the Affidavit of Mr. Garang Michael Mahok, the Applicant herein, sworn on 30th October 2018. The Applicant averred that Mr. Wol is the founder and Chief Executive Officer of the Kerbino Agak Security Services (KASS), and the KASS Group of companies, which includes Kerbino Executive Conference and Kerbino Flame and Grill Restaurant, all of which are headquartered in Juba, Republic of South Sudan.

6. He contended that Mr. Wol was arrested by agents of the Respondent on 27th April 2018 and has continued to be arbitrarily detained, *incommunicado,* at the headquarters of the Respondent's National Security Service (NSS) and/or at such other places only known and controlled by the Respondent.

7. He also alleged that Mr Wol had neither been charged nor formally informed of the reasons for his arrest and continued detention and that

during the entire period of his incarceration, he had not been allowed formal access to his family, friends, associates, legal counsel or doctor.

8. He further alleged that despite the provisions of the Revitalized Agreement on the Resolution of the Conflict in South Sudan, signed on 12th September 2018 and the Republican Order (Presidential Decree) No. 17 of 27th September 2018, agents of the Respondent had failed, refused or neglected to release Mr. Wol and others in a similar situation as him.

9. It was also the Applicant's contention that later in the month of May 2018, he had received a hand-written note from Mr. Wol, attesting to his conditions in detention and especially saying that 2 ½ weeks into his detention, there had been 2 separate investigations, which had found no evidence of the purported allegations that he had planned to overthrow the government; and that instead of releasing him, 7 armed and masked soldiers attempted to forcefully abduct him from the National Security prison (*Blue House*), his place of detention, with the intention of taking him to an unknown location, but failed to do so; and that for those reasons, he feared that the subject would be killed or severely tortured.

10. During the hearing of 25th March 2019, Mr. Deya, prayed that, since there was no written response to the Notice of Motion and affidavit, their averments be deemed to have been admitted in accordance with Rule 43(1) of the Court's Rules.

11. He also averred, from the bar, that, as a new development in the present case, they were aware that, starting February 2019, there had been some limited access to the subject (Mr. Wol) from his brother, his sister and one lawyer although that access had been *ad hoc*,

discretionary and non-confidential. He also informed the Court that, on 21st March 2019, the subject and six other accused persons were taken before the High Court in Juba in the Respondent State and that from what they could determine from public sources, the accused were not formally charged, as no charge sheets were supplied to them nor any other formal documentation.

12. With regard to the interim orders sought and with respect to the three-step standards that have to be met, learned Counsel contended that there is a serious question to be tried on the merits. He argued that the Respondent had, in his Response to the Reference, admitted that it had had the subject in its custody since 27th April 2018. Furthermore, he stated that the Respondent had admitted that the Revitalized Agreement on the Resolution of the Conflict in South Sudan was signed and that the said Agreement has provisions relating to political detainees and prisoners of war and the Respondent seemed to argue that it had a right to waive Mr. Wol's human rights and constitutional and statutory guarantees, which the Applicant contests. In that regard, Counsel contended that there was a serious question to be tried basing on the Applicant's contention in the Notice of Motion and the affidavit that the Respondent had violated various laws of South Sudan, namely the Constitution, the Penal Code, the Code of Criminal Procedure, the Police Service Act, the National Security Act, the Revitalized Agreement for the Resolution of Conflict in South Sudan signed on 12th September 2018 and the Republican Order No. 17 of 27th September 2018.

13. Learned Counsel also contended that, without showing cause, the Respondent had also violated Mr. Wol's right to property, which is a further violation of Articles 15(1) of the East African Community Common Market Protocol and Article 14 of the African Charter on

Human and People's Rights. In that regard, he averred that on 12th October 2018, KCB was ordered by the Bank of South Sudan, which had also received from the Respondent's National Security Service, to close all bank accounts in the name of Mr. Kerbino Wol Agok, Kerbino Agok Security Services Limited (KASS) and any other related financial accounts. It was also submitted that on the same date, uniformed officers from the National Security Services closed KASS' premises and that the damages therefrom had already run into millions of dollars. The Applicant argued that with that situation, the subject could be rendered bankrupt, which could affect over 2000 employees, their families and dependants and that it would be difficult to quantify the loss of the businesses.

14. Counsel for the Applicant also submitted that failure to grant the Interim Orders sought would result in irreparable harm, which could not be adequately compensated by damages. In support of that argument, he referred the Court to the cases of **Forum pour le Renforcement de la Société Civile and 4 Others Vs. The Attorney General of Burundi, EACJ Application No. 16 of 2016** and the Court's decision of 23rd January 2018, in which at paragraph 25, the Court has highlighted, citing **Blackstone's Civil Practice of 2005,** that damages would be inadequate where the defendant is unlikely to pay the sum likely to be awarded at trial if successful, the wrong is irreparable, the damage is non pecuniary such as there is no available market or the damages would be difficult to assess.

15. Counsel further referred to the Court's decision in **Ololosokwan Village Council & 3 Others Vs. The Attorney General of the United Republic of Tanzania, EACJ Application No. 15 of** 2017 where at paragraph 48 the Court opined that:

"Stifling of a people's right to access justice might fall in the category of wrongs that might occasion irreparable injury given that once the right is lost in relation to specific facts and given limitation provisions, it might not readily be available at a later date."

16. Counsel for the Applicant also submitted that granting the interim orders sought would not cause any prejudice or inconvenience to the Respondent. He argued that the Respondent had had the subject in his custody for 11 months and had had sufficient opportunity to investigate the subject, his businesses and any other things they wanted. In addition, he contended that even in spite of the events of 7th October 2018, which Counsel for the Respondent referred to in his Response, the Respondent had had over 5 months to take action that it deemed fit.

17. In those circumstances, the Applicant's Counsel contended that the Orders sought might not affect any on-going or future investigations or trials given that the Respondent had had enough time and given that the Orders sought merely guarantee the subject's access to his human rights, especially his right to access his family, friends, doctors and lawyers and his rights to due process and to a fair trial within a reasonable time. Having so stated, Counsel contended that any prejudice as slightly to be suffered by the Respondent or inconvenience pales in comparison with the prejudice being suffered by the subject and therefore, the balance of convenience tilted in favour of the Applicant.

18. The Applicant's Counsel then went through the orders sought. The Court reminded him that some of them were premised on the prayer that Court granted *ex parte* orders and might have been overtaken by events, given that the Court did not proceed *ex parte,* but *inter partes.*

The Court pointed out that in paragraph 3 of the Notice of Motion, the only order sought is to direct the Respondent to file an affidavit containing a number of information. Paragraph 4 is overtaken by events since the matter is now being heard *inter partes*. In paragraph 5, the Applicant sought leave to file a supplementary affidavit to update the Court on the state of the implementation of its orders in case the Respondent had filed the said Affidavit.

19. On the foregoing, the Applicant's Counsel insisted that they be allowed to file affidavit should they get any person willing to swear affidavits giving credible updates on the developments within the Respondent State.

20. As for paragraph 6 of the Notice of Motion, the Applicant sought that the Respondent either releases the subject or arraigns him before a competent, impartial and effective Court or tribunal. In this respect and based on the information received informally, the Applicant's Counsel requested that the Court orders the Respondent to supply it with charge sheets or other formal documentation of any legal process with proof of service on the subject and/or his Counsel so that at the very least, the Court would have a formal way of knowing whether or not there is a legal process going on within the Respondent State.

21. With regard to paragraph 7 of the Notice of Motion, the Applicant sought that pending the determination of the instant Reference and the Application, the Respondent with immediate effect, reverses the closure of the subject's business and the freezing of his personal and corporate bank accounts. Learned Counsel submitted that they still sought from the Court to direct the Respondent to undertake that or show cause why it could not.

C. Respondent's Case and Submissions

22. The Respondent did not file an Affidavit in Reply. Counsel for the Respondent only made oral submissions at the hearing of the Application.

23. Talking about the Revitalized Agreement on the Resolution of the Conflict in South Sudan, he submitted that the Agreement should not be taken out of context as it refers to the events that occurred in the period of 2013-2016 and constituted a current civil war in the Respondent State, and not the individual crimes that were recently committed, including the crime committed by the subject, Captain Kerbino Wol Agok. He added that the latter is still an active Security Officer in the National Security Service.

24. Moreover, learned Counsel did concede that Mr. Wol had been in detention for a considerable period of time due to the poor facility of investigation. He contended that the crime that Mr. Wol has committed is a sensitive one, a crime against the State. Apart from the poor facility that delayed the investigation, Counsel for the Respondent pointed out that there was also an issue as to whether Mr. Wol should be tried by the Court Martial as an active officer of the National Security Service, or by another competent court of law.

25. Regarding the closure of the bank accounts, the Respondent's Counsel contended that the subject's bank accounts have been closed when it became apparent in the investigations that some of the accounts were in a way or another related to the crime that was committed and therefore, the closure of the accounts was for the purpose of investigations. He added that since the subject had been brought before the court, the request might be made to the Court to release the said accounts.

26. Turning to the legal grounds for grant of interim orders, Counsel submitted that there was no legal justification for the orders sought since the subject had been brought before a special court formed to deal with the case and was facing a fair trial in which he is represented by his lawyers and that his situation was normal, as was his mental or physical ability.

27. Counsel for the Respondent also submitted that the subject had not suffered any damages as his businesses were there and activities could resume at any time.

28. He concluded his submissions by contending that the Reference was time-barred within the meaning of Article 30(2) of the Treaty as it was filed on 12th October 2018, 6 months after the arrest of the subject, which took place on 27th April 2018. In that regard, he submitted that the said event (i.e. arrest of the subject) came to the knowledge of the Applicant immediately the same day because he was with Mr. Wol when the latter was taken by the security personnel to the National Security Service Headquarters. He therefore prayed for the dismissal of the Reference for having been filed far beyond the two-month period set out in the aforementioned Article 30(2) of the Treaty, and that, consequently, the instant Application also ought to be dismissed as it arose from the Reference.

D. <u>Applicant's Submissions in Rejoinder</u>

29. In rejoinder, the Applicant's Counsel submitted that there was no affidavit that could lay the basis for any of the averments made by Counsel for the Respondent in his oral submissions.

30. As to whether there was any ongoing trial on the day of the hearing of the Application, learned Counsel contended that it was impossible to answer in the affirmative since proceedings that had taken place in the

Respondent's Court did not amount to anything solid that could show the beginning of a trial. He submitted from the bar that bringing the people, including the subject, before the court was aimed at defeating proceedings before this Court, since no proper charges as provided by the Criminal Procedure Code of the Respondent State were laid against the subject. He therefore argued that nothing showed that there was any due process or a fair trial that had commenced in respect of the subject.

31. Counsel also refuted the Respondent's allegation that some of the security equipment in the security business of the subject could interfere in one way or another with national security. He thus submitted that even if they were to give some weight to the allegation in the response as yet unproven as regards the alleged interference that still did not justify the closing of other businesses that had no security equipment such as the restaurant and the conferencing facility.

32. On the time bar issue, it was submitted for the Applicant that nothing on record was provided by the Respondent that could enable the latter to aver that the Reference was time-barred. He pointed out that, whereas they had laid the historical background of the violation of the rights of the subject that led to this case, the latter is based on decisions made first by the Respondent State in the Revitalized Agreement on the Resolution of the Conflict in South Sudan followed by the Republican Order No17 of 2018 on the release of prisoners of war and political detainees and subsequent continuous violations of the rights of the subject.

Court's Determination

33. We have carefully examined arguments presented by Parties in support of their respective cases.

34. Before addressing the merits of the instant Application, we deem it apposite to first deal with a point of law raised by Counsel for the Respondent as to whether the Reference is time-barred and consequently, the instant Application arising from it should be dismissed. The second issue is the admissibility of submissions from the bar made by both parties.

35. The Respondent has contended that the Reference is time-barred for having been filed on 12th October 2018, 6 months after the arrest of the subject, which took place on 27th April 2018, a period that is far beyond the prescribed two months to lodge a reference in accordance with Article 30(2) of the Treaty. The Applicant counter-argued that the Reference is not based on the arrest of the subject, but on the decisions taken by the Respondent State, that is, the signing of the Revitalized Agreement on the Resolution of the Conflict in South Sudan, on 12th September 2018 and the Republic Order No. 17 of 27th September 2018 on the release of prisoners of war and political detainees and the non-implementation by the relevant organs of the provisions of the Agreement and the Republican Order and subsequent continuous violations of the rights of the subject. In the circumstances, therefore, the Applicant contended that the filing of the Reference complied with the provisions of Article 30(2) of the Treaty.

36. Considering the foregoing submissions of both parties on the issue at hand, it is not in dispute that Mr. Wol was arrested on 27th April 2018 and had been in detention since then. It is also worth noting that in the

Statement of Reference filed on 12th October 2018, the Applicant stated that the Reference is premised on '**the Respondent's failure:**

(a) **To release the subject, as required by the Revitalised Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCISS) which was signed on 12th September 2018;**

(b) **To release the subject, as directed by the President of the Republic of South Sudan, (...) through his Republican Order (Decree) Number 17 of 27th September 2018;**

(c) **To protect the property rights of the subject, by the action of 11th October 2018, of closing his personal and corporate bank accounts.**'[1]

37. As indicated in paragraph 36 herein above, the impugned acts (i.e. failure to release Mr. Wol and failure to protect his property) did happen following the signing of the Revitalized Agreement on 12th September 2018 and the signing of the Republican Order (Decree) of 27th September 2018, as well as the closing of Mr. Wol's personal and corporate bank accounts which took place on 11th October 2018. The Reference having been lodged on 12th October 2018, we find that it was filed within the two months prescribed by Article 30(2) of the Treaty.

38. Turning to the matter of submissions from the bar made by both parties during the hearing of 25th March 2019, the Court first brought to the attention of Counsel for the Respondent that all his statements as summarized herein above amounted to statements from the bar as there were not made under oath. He was reminded that the right way to proceed would have been for him to file an Affidavit in Reply containing all the factual evidence he wanted to adduced (See Rule

[1] See paragraphs 14, 15 and 30 of the Statement of Reference filed on 12th October 2018.

23 of the Court's Rules of Procedure). Having failed to do so, the Court will only consider facts that are not contested by the other Party.

39. Similarly, statements from the bar made by Counsel for the Applicant on what he termed 'new developments' in the case will only be considered in as much as they are not contested by the Respondent.

40. We now turn to the merits of the Application. 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 provides that:

> **"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) reads:

> **"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."**

41. It is settled law that the granting of an interlocutory injunction is governed by three main principles. First, the court must be satisfied that the claim was not frivolous or vexatious – but that there was a serious question to be tried on 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.'[2] (See **British American Tobacco Vs Attorney General of the Republic of Uganda**, EACJ, Application No. 13 of 2017, citing with approval **American Cynamid Company Vs. Ethicon Limited (1975) AC 396**).

42. 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.[3] 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 interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights."**[4]

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[2] See Blackstone's Civil Practice 2005, para 37.19 – 37.20, pp. 392, 393. This position was upheld by this Court in **Forum pour le Renforcement de la Société Civile & Others Vs. Attorney General of the Republic of Burundi** (Supra).

[3] 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

[4] 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.

43. The second principle is that 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. According to the third principle, if the court is in doubt, it will decide an application on the balance of convenience. (See **British American Tobacco Vs. Attorney General of the Republic of Uganda** (supra); **Prof. Peter Anyang' Nyong'o & 10 Others Vs. The Attorney General of the Republic of Kenya & 3 Others** (supra).

44. We are guided by the Court's aforementioned position in considering the present Application before us. Having carefully examined both Parties' rival submissions, it appears that the gravamen of the Applicant's contention is the alleged arbitrary arrest and detention of Mr. Wol without access to his family, friends, associates, legal counsel and doctor; the failure to bring the subject before a competent court of law so as to know the charges laid against him; the alleged illegal freezing of the Mr. Wol's personal and corporate bank accounts; and the alleged illegal closure of his's businesses.

45. It was the Applicant's submission that all the foregoing actions or omissions were committed by the Respondent in violation of its laws, namely the Constitution, the Penal Code, the Code of Criminal Procedure, the Police Service Act, the National Security Act, the Revitalized Agreement on the Resolution of the Conflict in South Sudan signed on 12th September 2018 and the Republican Order No. 17 of 27th September 2018 on the release of prisoners of war and political detainees, as well as Articles 6(d) and 7(2) of the Treaty.

46. As reflected in the Respondent's oral submissions above, those allegations were strongly contested by the Respondent, but nothing

can attest to the veracity of the averments made from the bar, since no Affidavit in reply was filed by the Respondent.

47. In light of the foregoing, looking at the issues formulated in the Reference and without recourse to the merits thereof, we are of the view that the Reference does on the face value raise serious questions for interrogation by this Court as to whether the abovementioned impugned actions or omissions of the Respondent constitute a violation of the afore-cited Respondent's domestic laws and the Treaty. In the result, we hereby hold that the present matter raises triable issues.

48. We now turn to the second test as to whether the Applicant stands to suffer irreparable injury if the orders sought were not granted. It is settled law that an interlocutory injunction will not normally be granted unless the Applicant 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' Nyong'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).**

49. In the present Application, the Applicant initially contested the unlawful and wrongful arrest and continued detention *in communicado* without access to his family, lawyer or doctor, alleging that those acts could lead to irreparable injury of Mr. Wol in terms of his physical, mental and emotional well-being. However, Counsel for the Applicant has conceded from the bar, that since February 2019, there has been limited access to Mr. Wol by his family and lawyer and that the subject

had been brought before the court in the Respondent State, though learned Counsel did not agree with the Respondent Counsel's contention that due process of law was being followed in dealing with the case, since allegedly, no formal charges were laid against the subject.

50. Given those circumstances, though we are mindful that allegations of unlawful, wrongful arrest and detention, as well as violation of the right to a fair and public hearing before a competent court are serious matters touching on Mr. Wol's constitutional rights,[5] we are constrained to observe that the material before the Court cannot allow us to assess, at this interlocutory stage, whether due process of the law has been followed by the Respondent in addressing Mr. Wol's case and if not, whether that constitutes an irreparable injury. In any event, should we have concluded that the alleged unlawful arrest and detention of Mr. Wol and failure to bring him before a competent court constitute an irreparable injury, it is trite law that such an injury can be compensated by an award of damages (See for example, **De Klerk V Minister of Police** (CCT 95/18) [2019] ZACC 32, Constitutional Court of South Africa).[6] In the result, we are not satisfied that in such a situation, the Applicant has made a case that not granting the interim orders sought would cause an irreparable injury which cannot be compensated by award of damages to Mr. Wol.

51. Concerning the freezing of Mr. Wol's personal and corporate bank accounts, and the closure of his businesses, the Applicant deponed that '**the effect of shutting down of all of Mr. Wol businesses, including his sensitive security business, and also the Nile Foundation, without due process, could end up terminally killing the businesses and the Foundation, and further that this will**

[5] See Article 19 of the Transitional Constitution of the Republic of South Sudan, 2011
[6] Accessible at http://www.saflii.org/za/cases/ZACC/2019/32.html

have a devastating effect on the lives and livelihoods of the direct employees, their families and dependents, and thousands of other beneficiaries of Mr's Wol's Charity.' The Court was thus urged to issue interim orders for the reopening of Mr. Wol's businesses and the de-freezing of the bank accounts unless the Respondent could show cause why that should not be done.

52. On that matter, the Respondent's Counsel did not deny the impugned acts of freezing the subject's personal and corporate bank accounts and the closure of the subject's businesses. He simply submitted from the bar that since investigations in the subject's case had been closed and the matter was brought before the Court, it was up to the subject to seize the Court and seek the de-freezing of the bank accounts and reopening of his businesses. No evidence was adduced in support of those averments.

53. Considering the parties' respective submissions on this issue, we find that the Respondent has not shown under which legal grounds Mr. Wol's personal and corporate bank accounts should remain frozen and the continued closure of his businesses. On this matter, in his Affidavit in support of this Application, the Applicant stated that '**the effect of shutting down of all of Mr. Wol's businesses, including his sensitive security businesses, (...), without due process, could end up terminally killing the businesses...**' That statement having not been controverted by the Respondent, it is very likely that the continued freezing of Mr. Wol's bank accounts and closure of his businesses may severely disrupt his businesses. Having so stated, the question that now arises is as whether this injury can be adequately compensated by award of damages. In the present case, it is our view that any loss due to the freezing of Mr. Wol's personal and corporate bank accounts and to the closure of his businesses is

quantifiable and therefore, it can be compensated by award of damages. In this regard, it was held 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 **British American Tobacco Uganda Ltd Vs. Attorney General of Uganda (supra)**, citing with approval **American Cyanamid Company Vs. Ethicon Limited (1975) AC 396 at p. 408**). We find no reason to depart from this position.

54. Moreover, it is settled law that an interlocutory injunction is a court order made at an interim stage during the trial and is usually issued to maintain the *status quo* until judgment can be made. (See **British American Tobacco Vs. The Attorney General of the Republic of Uganda** (supra). In the present case, it is not disputed that Mr. Wol's personal and corporate bank accounts have been frozen and that his businesses have been closed. In these circumstances, we are not convinced that granting the interim orders sought by the Applicant would serve any purpose.

E. **Conclusion**

55. In light of all our findings herein above, the interim orders sought by the Applicant are not granted. **Application No. 20 of 2018** is dismissed.

The costs of the Application shall abide the outcome of **REFERENCE NO. 19 OF 2018**. We direct that it be fixed for hearing forthwith.

It is so ordered.

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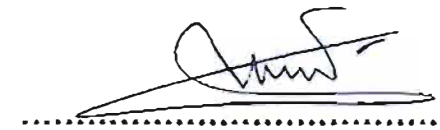
MONICA K. MUGENYI
PRINCIPAL JUDGE



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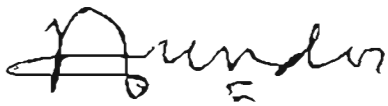
FAUSTIN NTEZILYAYO
DEPUTY PRINCIPAL JUDGE



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***FAKIHI A. JUNDU**
JUDGE

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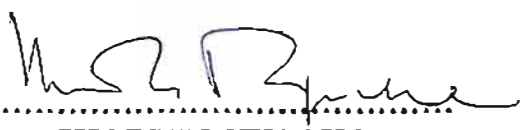

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CHARLES NYACHAE
JUDGE

[*Hon. Justice Fakihi A. R. Jundu retired from the Court with effect from 30th June, 2019, but he has signed the Judgment in terms of Article 25(3) of the Treaty.]