IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Audace Ngiye, Charles O. Nyawello & Charles Nyachae, JJ)

APPLICATION NO. 2 OF 2019

(Arising from Reference No. 3 of 2019)

FREEMAN A. MBOWE & 4 OTHERS ..... APPLICANTS

VERSUS

THE ATTORNEY GENERAL OF

THE REPUBLIC OF TANZANIA ..... RESPONDENT

17th June 2020

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Mssrs. Freeman A. Mbowe, Zitto Z. Kabwe, Hashimu Rungwe, Seif Sharif Hamad and Salum Mwalim ('the Applicants') for interim orders against the Attorney General of the United Republic of Tanzania ('the Respondent') pursuant to Articles 6(d), 7(2) and 39 of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 21(1), 48(a) and 73(1) of the East African Court of Justice Rules of Procedure 2013 ('the Rules').

2. The Applicants are natural persons, citizens and residents of the United Republic of Tanzania. They are also leaders or members of political parties registered in the United Republic of Tanzania. Their address of service for the purpose of this Application is c/o John Mallya, P.O.Box 62066, Ufipa Street, 91, Dar es Salaam.

3. The Respondent is the Attorney General of the United Republic of Tanzania who is sued in his capacity as the Principal Legal Advisor of the United Republic of Tanzania. His address of service for the purpose of this Application is the Attorney General of the United Republic of Tanzania, Office of the Solicitor General, 20 Kivukoni Road, P.O. Box 9050, Dar es Salaam.

4. The Application arises from **Reference No. 3 of 2019** filed on 12th April 2019, where the Applicants alleged that Sections 3 and 23 of the *Political Parties (Amendment) Act, No. 1 of 2019* ('the Act') violate the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty.

5. It is the Applicants' contention that the Act contains unjustified restrictions on the freedom of association, is discriminative, and restricts people's right to participate in public affairs, denies people's right to

personal security and safety and contravenes the principles of democracy, rule of law, and good governance (including human rights), which the Respondent committed to abide by through the Treaty, amongst many other international instruments.

6. The Application was filed under a certificate of urgency and subsequently heard *ex parte* but disallowed, with orders for the Applicants to serve it upon the Respondent for hearing *inter partes.* The Applicants did later file an amended Notice of Motion (Amended Application), in a nutshell seeking the following interim orders:

    (i) **That the Respondent be refrained from applying and using:**

    a. **The new subsection (5)(b) and (f) of section 4 of the Political Parties Act Cap. 258 of the Laws of the United Republic of Tanzania which was amended by Section 3 of the Political Parties (Amendment) Act, 2019;**

    b. **The new section 5A(1), (2),(3),(4),(5) and (6), 5B(1), (2), (3) and (4) of the Political Parties Act Cap. 258 which were enacted by section 4 of the Political Parties (Amendment) Act, 2019;**

    c. **The new 6A(5), 6B(a) of the Political Parties Act Cap. 258 enacted by section 5 of the Political Parties (Amendment) Act, 2019;**

    d. **The new section 8C(2), (3) and (4) and 8E(1), (2) and (3) of the Political Parties Act Cap. 258 which were enacted by section 9 of the Political parties (Amendment) Act, 2019;**

    e. **The new section 11A(2), (3), (4) and (5) of the Political Parties Act Cap. 258 enacted by section 15 of the Political Parties (Amendment) Act, 2019;**

f. **The new section 18(6) and 18(7) of the Political Parties Act Cap. 258 as enacted by section 23 of the Political Parties (Amendment) Act, 2019;**

g. **The new section 21D and 21E of the Political parties Act cap. 258 as enacted by section 29of the Political Parties (Amendment) Act, 2019.**

(ii) **That the costs of this Application be provided for.**

B. REPRESENTATION

7. At the hearing of the Application, the Applicants were represented by Mssrs. John Mallya and Jebra Kambole, while Ms. Alicia Mbuya, Mr. Yohana Marco, Ms. Vivian Methodi and Mr. Stanley Kalokola appeared for the Respondent.

C. APPLICANT'S CASE

8. In their affidavits in support of the Application that are dated 14th and 18th June 2019 respectively, Mssrs. Godbless Jonathan Lema and Hebron Mwakagenda attested to the following:

i. They are the respective Arusha Representative in the National Assembly of the United Republic of Tanzania and Chairman of Jukwaa La Katiba Tanzania (a non-government organization) and, as such, have the mandate and duty to disseminate civic education on citizens' participation in the Permanent Voters Register upgrading exercise.

ii. The *Political Parties (Amendment) Act* required them to inform the Registrar of Political Parties 30 days in advance of their intention to engage in civic education.

iii. On 7th June, 2019 the Respondent State's National Electoral Commission had issued an official schedule for the upgrading of the National Permanent Voters Register ('the Register') for

the Registrar upgrading exercise to ensue within 17 days thus rendering it practically impossible for them to give the Registrar of Political Parties the 30 days' notice that was legally required of them.

iv. Under the Act, their participation in civic education without due notice to the Registrar of Political Parties made them liable *inter alia* to arrest, detention, criminal prosecution being arrested and penalties, or the suspension of their party membership, all of which amount to irreparable loss.

v. The Act gave absolute powers and discretion to the Registrar of Political Parties to approve the kind of civic education and training that members of political parties should receive, as well as decide whether a political party could receive civic education and training from a specific institution or individual.

vi. If they did not provide civic education, the population of Arusha was susceptible to widespread apathy about the importance of participating in the Register upgrading exercise and might ultimately be denied the right to vote, loss that is irreparable.

vii. Prior to the enactment of the Act, there was and still is a *Political Parties Act, Cap 258*, and which had no such restrictive and punitive provisions.

9. On the other hand, Mr. Christopher Mbajo and Mrs. Nusrat Shaban Hanje deposed as follows:

i. They were registered Tanzanian voters with the right to civic education without any impediments.

ii. Not undergoing proper civic education could cause them and other members of the public to elect corrupt or bad leaders, and thus render them unable to participate in national affairs.

iii. To the extent that the Act granted the Registrar of Political Parties absolute powers and discretion to approve the kind of civic education to be given, as well as decide whether a specific individual could conduct civic education; it empowered the Registrar to determine who should give political parties civic education and the content of that education.

iv. The Act criminalizes conducting civic education without approval from the Registrar of Political Parties, such that a person arrested, interrogated, detained and prosecuted under this law would suffer irreparable loss, as well as the inability to get timely civic education, similarly an irreparable loss.

10. It was the submission of learned Counsel for the Applicants that they had demonstrated a *prima facie* case with probability of success given that they had outlined the provisions of the *Political Parties (Amendment) Act* that contravened the Treaty. It was further argued that in so far as damages were unable to atone for the injury attes*ted to in t*he affidavits in support of the Application, the Applicants had satisfied the preconditions for the grant of interim orders. Learned Counsel did also propose that the balance of convenience was tilted in their favour given the inconvenience they stood to suffer if the Respondent was not refrained from applying the cited provisions of the impugned law.

11. Counsel for the Applicants further submitted that granting the interim orders sought wou*ld* not cause any prejudice or inconvenience to the Respondent, asserting that the Respondent still had other laws at its disposal that would serve the same purpose. In support of his oral submissions, Counsel referred us to the principles for the grant *of interim or*ders before this Court as espoused in **The Democratic Party**

& Another vs. The Secretary General of The East African Community, EACJ Application No. 6 of 2011.

D. RESPONDENT'S CASE

12. The Application was vehemently opposed by the Respondent, which filed numerous affidavits in reply in that regard. At the hearing, Counsel for the Respondent contended that the Applicants had filed supplementary affidavits without either the leave of Court or their consent as opposite party, and questioned the fact of Mr. John Mallya being an advocate and a witness in the same cause. She therefore prayed that all the supplementary affidavits be struck off the court record.

13. In written submissions, it was the Respondent's contention that the requirement to notify the Registrar on the intention to provide civic education was limited to NGOs and institutions that exclusively provide civic education to political parties and not members of the general public that are not affiliated to political parties. Further, there was no requirement for any citizen to inform the Registrar of Political parties of his/ her intention to upgrade their information on the Permanent Voter Register unless such person intended to provide civic education to political parties. The need to so inform the Registrar was intended to ensure transparency, accountability and protection of state security and order.

14. It was further argued that the time frame issued by the National Election Commission was merely a demarcation of the period for upgrading Voters information and not a restriction to any persons that sought to upgrade their information with the Voter Register, neither did it

have anything to do with the requirement for notice to the Registrar as outlined in the *Political Parties (Amendment) Act*. On the contrary, it was argued, the process of upgrading the Permanent Voters Register was beneficial to all members of the public that were eligible for registration, and not restricted to members of political parties.

15. Learned Respondent Counsel maintained that the requirement for NGOs and other institutions to secure approval from the Registrar for civic education to members of political parties had nothing to do with the process of upgrading the Permanent Voters Register; rather, the right to vote remained guaranteed by the Constitution of the United Republic of Tanzania and was available to all eligible voters in accordance with the laws of Tanzania.

16. She reiterated that the Act required every registered political party or institution that sought to provide civic education to observe the law as embodied therein, arguing that penalties imposed under the Act would be restricted to the acts or omissions of institutions and individuals with regard the obligation to notify the Registrar of their intention to conduct civic education to members of political parties. In her view, the Act did not give absolute power to the Registrar to determine what constituted acceptable civic education; rather, s/he was required to furnish reasons for a decision that questions the acceptability of the information provided under civic education, which is a manifestation of rule of law and good governance.

17. It was further argued for the Respondent that the Act did not pose any problem as envisaged by the Applicants, but sought to hold the civic education given to members of political parties to the standards set therein, as well as the changes in the national political arena. It thus

sought to regulate the conduct of political parties with a view to promoting institutionalism, intra-party democracy and political and financial accountability, which are critical to any modern democratic state and compatible with the principles of rule of law, good governance, democracy and human rights as enshrined in the Constitution of the United Republic of Tanzania, the Treaty, the African Charter on Human rights. In learned Counsel's view, therefore, the Act was compatible with the fundamental and operational principles of the Treaty.

18. Finally, Counsel for the Respondent contended that the Court should not grant the interim orders sought given that the Applicants had not made out a *prima facie* case of the violation of their alleged legal rights. She prayed that the Reference be fixed for hearing to enable the Respondent State to adduce evidence on all the measures cited in the Act.

E. APPLICANTS' SUBMISSIONS IN REJOINDER

19. In rejoinder, Mr. Mallya argued that there were no supplementary affidavits on record, clarifying that such reference to the affidavits on record was a typing error; otherwise, the affidavits in issue had been filed together with and in support of the Amended Notice of Motion as required under Rule 21(5) of the Court's Rules. He therefore urged the Court to ignore the word 'supplementary'. As to whether the said affidavits were filed without leave of the Court or consent of opposite party, learned Counsel for the Applicants contended that, by replying to them, the Respondent had acknowledged their existence and thereby given its consent. He did, however, withdraw the affidavit deposed by himself.

F. COURT'S DETERMINATION

20. Having carefully listened to both parties, we deem it necessary to address the point of law raised with regard to the Applicant's affidavits from the onset. The Respondent sought to have all the supplementary affidavits struck off the Court record for violating Rule 21(6) of the Court's Rules. Rule 21(6) reads:

> **An applicant may, with leave of the First Instance Division or with the consent of the other party, lodge one or more supplementary affidavits. Application for such leave may be made formally.**

21. On the other hand, Rule 21(5) that was invoked by the Applicants provides:

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

22. Clumsy as the Applicants actions might appear, we are inclined to agree with Mr. Mallya that reference to the Affidavits in question as 'supplementary affidavits' was done in error but they were essentially affidavits in support of the Amended Notice of Motion in accordance with Rule 21(5). All the so-called supplementary affidavits were the only affidavits filed in support of the Amended Application. We do therefore over-rule the Respondent's point of law in this regard, save for Mr. Mallya's 'supplementary' affidavit that does stand duly withdrawn by him.

23. We now turn to the merits of the Application. As this Court has severally held, the grant of interim orders is governed by Article 39 of

the Treaty, while Rules 21 and 73 of the Rules outline the procedure entailed therein. 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.**

24. On the other hand, 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. As was quite rightly opined by both sets of Counsel, this Court has had occasion to consider numerous interlocutory applications for interim orders and has since clarified the practice on the grant of interim orders. Hence, in **Francis Ngaruko vs. Attorney General of the Republic of Burundi, EACJ Application No. 3 of 2019** and **Male H. Mabirizi K. Kiwanuka vs Attorney General of the Republic of Uganda, EACJ Application No. 5 of 2019**, it reiterated the tri-fold test for the grant of interim orders in the following terms:

> **First, the court needs to be satisfied that there is a serious question to be tried on the merits of the applicant's Reference, that the applicant has a cause of action that depicts substance and reality. 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. The conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one is satisfied and, only when the court is in doubt would recourse be made to the third condition.

27. With regard to the first condition, the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. See **British American Tobacco vs. Attorney General of the Republic of Uganda, EACJ Application No. 13 of 2017**, citing with approval **American Cyanamid Company vs. Ethicon Limited (1975) AC 396**. Such a serious triable issue is deemed to have been established where, on the face of it (without recourse to the merits thereof), the substantive Reference discloses a cause of action within the precincts of the Treaty. Thus, in the **British American Tobacco (BAT)** case, it was held:

> **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 a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights. 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. 11 of 2013 and FORSC & Others vs. Attorney General of the Republic of Burundi (supra).

28. We find no reason to depart from the foregoing position. In the instant Application, the Applicants seek to halt the implementation of some provisions of the *Political Parties (Amendment) Act* pending this Court's determination of their compliance with the Treaty. Undoubtedly, such a determination would invoke the Court's interpretative mandate and does, at face value, raise serious questions for interrogation. In the result, we are satisfied that the present matter raises serious triable issues. We so hold.

29. We now turn to the second test as to whether, in the absence of interim orders, the Applicants stand to suffer irreparable injury that cannot be adequately compensated in damages were they to emerge successful in the Reference. It is well settled law that an interlocutory injunction will not normally be granted unless the Applicant might 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 No. 1 of 2006**; **Timothy Alvin Kahoho vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2012** and **British American Tobacco** (supra).

30. In the present Application, it was submitted for the Applicants that they were likely to suffer irreparable damage if the impugned law was allowed to stand as it is given that, in their view, a person that is arrested, detained and prosecuted under the impugned provisions of the Act would suffer irreparable loss. It was further argued that the inability

to get timely civic education would occasion irreparable harm. The Applicants' contestations drew sharp rebuttals from the Respondent, on whose behalf it was argued that the Applicants stood to suffer no loss, any alleged injury to them only arising if they disobeyed the provisions of the Act.

31. It is common ground in this Application that the *Political Parties (Amendments) Act* was duly enacted, is valid law in the United Republic of Tanzania and was already in force when the Reference was filed. The Applicants' only bone of contention is the allegedly impracticable provisions thereof. Indeed, beyond the general averments in the Amended Notice of Motion and Supporting Affidavits, the Applicants do not offer the Court any more precise indication of the irreparable damage that they stand to suffer, save for the fear that they are at risk of running afoul of the said law. This, quite clearly, is speculative.

32. First and foremost, we are constrained to clarify that the possible incidence of lawful arrests and prosecution *per se* would not necessarily amount to irreparable injury, as we understood the Applicants to suggest. Any such eventuality arising from breach of a lawful obligation would not automatically constitute irreparable injury unless it can be demonstrated that, if subsequently found to have been illegal, such wrongful arrest, detention and/ or prosecution cannot be compensated by an award of damages. On the contrary, it is quite commonplace within the respective Partner States' jurisdictions for such eventualities to attract an award of general damages. Consequently, whereas we do appreciate the gravity of wrongful arrest, detention and prosecution, they would not fall within the category of injury that cannot be compensated by damages; they can be so compensated.

33. In **British American Tobacco** (supra), this Court cited with approval the preposition in **Blackstone's Civil Practice 2005, para. 37.22, p.394**

that damages would *inter alia* be inadequate where '**the defendant is unlikely to be able to pay the sum likely to be awarded at trial.**' No such averment was made in this Application, neither has any evidence to that effect been adduced. We are therefore unable to deduce the Respondent herein to be unable to pay a sum of damages awardable against him if the situation arose. In the result, we would disallow the assertion that not granting the interim orders sought would cause the Applicants irreparable injury that cannot be compensated by an award of damages.

34. Our finding on the issue of irreparable injury would conclusively dispose of the present Application. However, for completion, we deem it necessary to consider the balance of convenience in this matter.

35. It was opined by Counsel for the Applicants that if the *Political Parties (Amendment) Act* was temporally suspended, the management and affairs of political parties would be conducted in accordance with other pre-existing laws, and events pertaining to the local election would not be affected. This position was contested by his counterpart from opposite party who, arguing that the balance of convenience tilted in his client's favour, asserted that halting the operation of the impugned Act would obviate civic education for political parties. In his view, the impugned Act specifically addresses the regulation of civic education and political parties' funds to avert unacceptable ideologies such as radical and extremist hate teachings.

36. In the **American Cyanamid** case, the balance of convenience was addressed 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.

37. As we have observed earlier herein, the *Political Parties (Amendment) Act* was already in operational when the Reference from which this Application is derived was filed. Therefore, the effect to the electoral process of granting the interim orders sought cannot be ignored. From the material on record, it seems abundantly clear to us that were the Court to grant the orders sought in the Application, the effect will be to halt all activities relating to civic education with huge implications on the electoral process in the United Republic of Tanzania. It is also clear that the electoral timetable is quite constrained, and to halt any part of it for any length of time would certainly throw the electoral cycle into disarray. On the other hand, should the Court decline to grant the orders sought and the Applicants subsequently succeed in the Reference, civic education in the manner advanced by the Applicants would not have ensued at considerable cost to their members and the general population in terms of targeted civic knowledge. Certainly if the head of a political organization were detained for non-compliance with the impugned Act it would throw his party's campaign into disarray.

38. Nonetheless, we are mindful that when considering the balance of convenience of a matter it is not mere convenience that needs to be weighed but, rather, the risk of doing an injustice to one side or the

other. See **Cayne vs. Global Natural Resources PLC (1984) 1 ALIER 225** and **British American Tobacco** (supra). Where both parties stand to forego substantial ideological considerations, even if we considered the balance of convenience to be evenly balanced, we are enjoined to yield to the counsel of prudence and take such measures as would preserve the status quo pending the determination of the Reference. See **American Cyanamid (supra) at p. 408**.

39. Consequently, mindful as we are of the legitimate concern that the Applicants may have as regards the implementation of the impugned Act and given the far-reaching repercussions to the constitutional order of the Respondent State of staying the application of such a vital law, we would exercise our discretion to preserve the current status quo with the Act remaining operational.

G. CONCLUSION

40. For the above reasons, we decline to grant the interim orders sought by the Applicants and do hereby dismiss the Application. The costs thereof shall abide the outcome of the Reference. We direct that it be fixed for hearing forthwith.

It is so ordered.

Dated and delivered by Videoconference this 17th day of June 2020.

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Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE

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***Hon. Justice Dr. Faustin Ntezilyayo**

DEPUTY PRINCIPAL JUDGE

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Hon. Justice Audace Ngiye

JUDGE

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Hon. Justice Dr. Charles O. Nyawello

JUDGE

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17 JUN 2020

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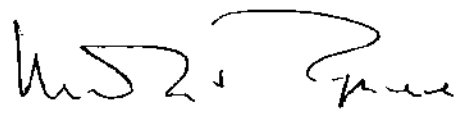
EAST AFRICAN COURT OF JUSTICE



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Hon. Justice Charles Nyachae

JUDGE

[Hon. Justice Dr. Faustin Ntezilyayo resigned from the Court in February 2020 but signed this ruling in terms of Article 25(3) of the Treaty.]