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

(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, *Charles A. Nyachae, Richard Muhumuza & Richard Wabwire Wejuli, JJ)*

APPLICATION NO. 8 OF 2022

(Arising from Reference No. 17 of 2020)

TRIBERT AYABATWA RUJUGIRO ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF RWANDA ..... RESPONDENT

27TH SEPTEMBER 2022

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Tribert Ayabatwa Rujugiro ("the Applicant") for Interim Orders against the Attorney General of the Republic of Rwanda ("the Respondent"), brought under Articles 27(1), 30(1) and 39 of the Treaty for the Establishment of the East African Community, 1999 (as amended) ("the Treaty") and Rules 52(1) and 84(1) of the East African Court of Justice Rules, 2019 ("the Rules").

2. The Applicant is a natural person, a male adult of Rwandan nationality and resident in East Africa. His address of service *is c/o ALP Advocates, Lotis Towers, 5th Floor, Plot No.16 Mackinnon Road, P.O. Box 28611, Uganda* and *ALP, Kenya Westpark Towers, 5th Floor Mpesi Lane, Parklands Road, P.O Box 102942-00101, Nairobi, Kenya.*

3. The Respondent is the Attorney General of the Republic of Rwanda, a Partner State of the East African Community, and is sued in the capacity of Principal Legal Advisor to the Government of the said Republic of Rwanda. The Respondent's address of service is *Ministry of Justice/Office of the Attorney General, KG1 Roundabout, Kigali, Rwanda.*

4. The Application arises from **Reference No.53 of 2021** filed on 30th December 2021, wherein the Applicant alleged that by its actions touching on the liquidation of Nshili Kivu Tea Plantation Limited, the Respondent through its liquidation officials and its Courts, contravened Rwanda's own law, and that their actions constituted an infringement of Articles 5(3)(g), 6(d), 7(1)(b) and (2), 8(1)(a) and (c), 79(a)-(c) and 80(c) of the Treaty.

5. The Applicant seeks for orders that:

a) **A temporary order of injunction be granted, prohibiting the Respondent from proceeding with the liquidation of and offering for sale, Nshili Kivu Tea Plantation Limited or take any action to affect, diminish, or otherwise dispose of the Applicant's interest in the subject company, pending the hearing and determination of Reference No.53 of 2021; and**

b) **The costs of and incidental to this Application abide the result of the Reference.**

B. REPRESENTATION

6. At the hearing of the Application, the Applicant was represented by Mr Hannington Amol, Advocate. The Respondent was represented by Mr Emile Ntwali, Principal State Counsel, and Mr Nicholas Ntarugera, Senior State Counsel.

C. THE APPLICANT'S CASE AND SUBMISSIONS

7. The Applicant's case is provided for in the Affidavit of Mr Tribert Ayabatwa Rujugiro, the Applicant herein sworn on 21st March 2022. In the said affidavit, the Applicant deponed *inter alia* (reproduced verbatim):

a) **THAT Nshili Kivu Tea Plantation Limited, the subject of the Reference, is in danger of being alienated, altered, or otherwise dealt with in a manner that will lead to irreparable injury and loss to the Applicant as a shareholder;**

b) **THAT following the Court order placing Nshili Kivu Tea Plantation Limited under a court appointed liquidator, there are efforts by the Respondent to sell or offer for sale the company to a prospective buyer/foreign investor;**

c) **THAT there is a high chance that the liquidation and plans to sell Nshili Kivu Tea Plantation Limited will be swiftly carried out unless interim measures of protection are put in place; and**

d) **THAT the subject liquidation proceedings are in non-compliance of the Respondent's National laws and in non-observance of the principles of good governance, the rule of law, and transparency, and raise issues of interpretation of the provisions of the Treaty and their infringement by actions of the Respondent.**

8. Further, the Applicant's case is supported by a Rejoinder to the Respondent's Affidavit in Reply, sworn by the Applicant on 5th April 2022.

9. In written submissions, also highlighted at the hearing of the instant Application, the Applicant urged the Court to exercise its discretion in favour of the Applicant, to grant the temporary injunction. It was the Applicant's submission that, in terms of the Courts jurisprudence, the Applicant needed to demonstrate that there is a triable issue before the Court, that if the orders sought were not granted the Applicant stood to incur irreparable injury that could not be compensated in damages, and that in the circumstances the balance of convenience was in favour of granting the Applicant the orders sought. The Applicant thus, prayed for the orders set out in paragraph 5 above.

D. THE RESPONDENT'S CASE AND SUBMISSIONS

10. The Respondent relied on the Affidavit of Mungakuzwe Yves filed on 3rd March 2022. In the said Affidavit, the deponent averred that the order of placing the subject company under liquidation by the

Court, was done pursuant to an application by one of the shareholders alleging fraud on the part of the other shareholders, including the Applicant.

11. In written submissions, also highlighted at the hearing of the Application, the Respondent raised a preliminary issue regarding *locus standi* of the Applicant, alleging that the Applicant was not a resident of Rwanda or any other Partner State of the East African Community.

12. The Respondent argued that the liquidation order by the National Court of Rwanda was properly made, having followed all legal procedures and, thus, was consistent with the principles of good governance and the rule of law as enshrined in the Treaty.

13. The Respondent submitted that there was no *prima facie* case with probability of success and that the Applicant's prayers are based on flawed interpretation of the Treaty, EACJ Rules and National Laws of Rwanda.

14. The Respondent further submitted that the Applicant had not evidenced how he will suffer irreparable injury that cannot be compensated in damages if the orders sought are not granted.

15. It was also the Respondent's submission that the balance of convenience lay in favour of not granting the orders. Accordingly, the Respondent prayed that the Court dismisses the Application with costs.

E. ISSUES FOR DETERMINATION

16. From the pleadings of the parties and submissions by Counsel, two issues require a determination by this Court. These are:

a) **Whether the Applicant has *locus standi* before this Court; and**

b) **Whether the Applicant's prayer for interim orders should be granted**.

F. COURT'S DETERMINATION OF THE ISSUES

ISSUE NO. 1: Whether the Applicant has *locus standi* before this Court

17. At the onset of submissions at the hearing of the Application, the Respondent contended that this Court could not have jurisdiction over the instant Reference and the Application because the Applicant has no *locus standi*, not being a resident of a Partner State of the East African Community. Ostensibly, the Respondent's reasoning was that the Applicant had not demonstrated that he was a resident and, in any event, in a different case, the Applicant at that point stated, he was resident in South Africa.

18. For the purposes of this Ruling, we think that the issue of *locus standi* and jurisdiction need not detain us unduly. The very first paragraph of the Reference states that **"The Applicant is a male adult Rwandese National, of sound mind duly resident in East Africa within the meaning of Article 30 of the Treaty for the Establishment of the East African Community."** While the issue of residence is not stated in the Application, it is our considered opinion that if the same is contested by the Respondent, then it becomes a matter that requires evidence, and cannot therefore be dealt with as a preliminary issue. To the extent that in the Application the Respondent sought to rely on the Applicant's stated residence in a different case, this in and of itself was clearly not helpful as residence is not static, it may be dynamic.

19. We hold the view that the issue of residence, to the extent that it is a contested issue, is one which may be raised at the hearing of the Reference, with evidence being adduced by the parties as necessary in accordance with the applicable rules of evidence.

20. Having so held, we turn to consider the substance of the Application for the grant of the interim orders.

ISSUE No. 2: <u>Whether the Applicant's prayer for interim orders should be granted</u>

21. The grant of interim orders by the Court, is governed by Article 39 of the Treaty, which provides:

> **"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."**

22. In **<u>Francis Ngaruko vs The Attorney General of the Republic of Burundi EACJ, Application No.3 of 2019</u>**, this Court stated with reference to its jurisprudence on the granting of interim orders:

> **"... we categorically state that applications for interim orders should be subjected to the following trifold test. 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."

23. This test was reiterated by the Court in **Male H. Mabirizi Kiwanuka vs The Attorney General of The Republic of Uganda, EACJ Application No. 5 0f 2019** and also in **Adam Kyomuhendo vs The Attorney General of The Republic of Uganda and Six Others, EACJ Application No.11 of 2020.**

24. In the **Kyomuhendo** case, the Court went further to state that:

> **"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."**

25. In **Kyomuhendo**, the Court went further to state, in respect of the first condition that **"... 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."**

26. In the **Le Forum Pour le Renforcement de la Societe Civile (FORSC) & 4 Others vs The Attorney General of the Republic of Burundi & Another, EACJ Application No. 16 of 2016**, this Court set out most succinctly the jurisprudence of the Court, when dealing with the Application for interim orders, in particular, when the Applicant alleges a contravention of the Treaty by a Respondent State. The Court stated:

> **"...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 the ultimate cause of action has substance and reality."

27. The Court further stated **"... we take the view that should the Reference be found to raise a legitimate legal question under this Court's regime, a serious triable issue would have been established."**

28. In the instant matter, the Applicant's claim is that the Respondent State violated its own laws; to wit, the *Insolvency and Bankruptcy Act 2018*, as well as *the Companies Law 2018*. The Applicant further alleges that the Respondent violated Article 6(d) of the Treaty.

29. In the **FORSC case** as regards allegations of violation by a Partner State of its domestic law, this Court was clear that:

> **"It is trite law in EAC Community Law that non-compliance with a Partner State's National Laws amounts to a violation of the principles of the rule of law enshrined in Article 6(d), and is, to that extent a violation of the Treaty. See: Paxeda Rugumba vs Attorney General of Rwanda, EACJ Reference No.8 of 2010 and Samuel Mukira Mohochi vs Attorney General of the Republic of Uganda, EACJ Reference No.5 of 2011."**

30. As regards establishment of the cause of action under Article 30(1) of the Treaty, in **Sitenda Sebalu vs. the Secretary General of the East African Community and Others, EACJ Reference No.1 of 2020**, the Court citing **Anyang Nyong'o's case** stated:

> **"That a claimant is not required to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the Reference in question. It is enough if it is alleged that the**

matter complained of infringes a provision of the Treaty in a relevant manner."

31. In the Reference from which the instant Application arises, the Applicant alleges violations by the Respondent State, both of the provisions of the Treaty as well as the Respondent State's own Laws. These are legitimate questions that the Court is called upon to exercise its jurisdiction to interpret and apply the Treaty in terms of Article 27(1) thereof.

32. We find therefore that there is, for purposes of the trifold test set out above, a serious triable issue.

33. On the second test regarding irreparable injury which cannot be compensated in damages, this Court, citing with approval the case of **Giella vs Cassman Brown (KAB) EA 258**, stated in **Mbidde Foundation Limited & The Rt Hon. Margaret Zziwa vs The Secretary General of the East African Community, EACJ Application No. 5 of 2014** as follows:

> **"The object of an interlocutory injunction or in this case an interim order 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 for the defendant to protect against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the certainty were resolved in the defendant's favour at the trial."**

34. In **Timothy Alvin Kahoho vs The Secretary General of the East African Community, EACJ Application No. 5 of 2012**, the Court was clear that injury, whether reparable or irreparable, is a question of evidence and must be proved. Further, in **Kioo Limited vs The Attorney General of the Republic of Kenya, EACJ Application No. 9 of 2020,** the Court stated:

> **"Meanwhile, Blackstone's Civil Practice 2005 provides pertinent direction as to when damages would be considered inadequate. This would arise in the following circumstances:**
>
> **a) The defendant is unlikely to be able to pay the sum likely to be awarded at trial;**
> **b) The wrong is irreparable e.g. loss of the right to vote;**
> **c) The damage is non-pecuniary e.g. libel, nuisance, trade secrets;**
> **d) There is no available market; and**
> **e) Damages would be difficult to assess. Examples are loss of goodwill, disruption of business and where the defendant's conduct has the effect of killing off a business before it is established..."**

35. The Court went further to state:

> **"Ultimately, where damages are available as a remedy but are inadequate, it is the duty of a court considering an application for interim orders to exercise its discretion so as to determine whether it would be just in the circumstance that an applicant be constrained to so ineffective a remedy."**

36. In the instant case, apart from the Applicant, in his Affidavit, deponing that he believes that if the orders sought are not granted, he will suffer injury that cannot be compensated in damages, no evidence was offered to support that statement. Submitting from the bar, Counsel for the Applicant did endeavour to persuade the Court that the liquidation of the subject company would result in unquantifiable loss of share value and reputation loss by the Applicant. Applying the jurisprudence set out in **Timothy Kahoho,** however, we are not persuaded in this regard, in the absence of evidential proof.

37. Indeed, in the absence of any such evidence, we are inclined to agree with the submission of Counsel for the Respondent that there is no basis for the Court to conclude that the Applicant would suffer irreparable injury that cannot be compensated in damages. Counsel for the Respondent also submitted that in the event of the Applicant succeeding in the Reference, the Respondent would be able to pay any damages.

38. We find that the Applicant did not prove that if the interim orders are not given, he stands to suffer irreparable injury that cannot be compensated in damages.

39. As stated earlier in this ruling, the established jurisprudence of this Court on the trifold test for the granting of interim orders is that the three tests are considered sequentially. In the instant Application, whereas we find that there is a serious triable issue, we are not persuaded that in the absence of granting the orders sought, the Applicant stands to suffer irreparable damage that cannot be compensated in damages. In the premise, we do not find it either necessary or appropriate to consider the third test; namely, where does the balance of convenience lie?

G. CONCLUSION

40. In the result, we decline to grant the interim orders sought by the Applicant. We hereby dismiss the Application in its entirety.

41. The costs of the Application shall abide the outcome of the Reference.

42. It is so ordered.

Dated, signed and delivered at Arusha this 27th Day of September 2022.

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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

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Hon. Justice Dr Charles O. Nyawello
JUDGE

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Hon. Justice Charles A. Nyachae
JUDGE

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Hon. Justice Richard Muhumuza
JUDGE

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Hon. Justice Richard Wabwire Wejuli
JUDGE