IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Yohane B. Masara, PJ; Audace Ngiye, DPJ; Charles Nyachae, Richard Muhumuza & Richard W. Wejuli, JJ)

APPLICATION NO.11 OF 2020
(Arising from **Reference No.11 of 2020**)

ADAM KYOMUHENDO .....APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....1st RESPONDENT**
2. **THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....2nd RESPONDENT**
3. **THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA.....3rd RESPONDENT**
4. **THE ATTORNEY GENERAL OF THE REPUBLIC OF RWANDA.....4th RESPONDENT**
5. **THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI.....5th RESPONDENT**
6. **THE ATTORNEY GENERAL OF THE REPUBLIC OF SOUTH SUDAN.....6th RESPONDENT**
7. **THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY.....7th RESPONDENT**

5th APRIL, 2022

RULING OF THE COURT

A. INTRODUCTION

1. This is an Application by Mr Adam Kyomuhendo ("**the Applicant**") for interim orders against the Attorney General of the Republic of Uganda & 6 Others ("**the Respondents**") pursuant to Articles 3(2)-(4), 6(d), 7(1)(a) and (2), 8(1)(a) and (c), 23, 27(1), 30, 38(2), 67(3), 123(3)(c), 9(1)(a), 10(1), 11(1)-(9), 12(1)-(4) of the Treaty for the Establishment of the East African Community ("**the Treaty**") and Rules 4 and 25 of the East African Court of Justice Rules of Procedure 2019 ("**the Rules**").

2. The Applicant is a natural person, a citizen and a resident of the Republic of Uganda. His address of service is c/o Parkhill Advocates, 2nd Floor, Suite C4, Block C, Rovis Apartments, Plot 49, P.O. Box 34902, Kampala, Uganda.

3. The 1st to the 6th Respondents are the Attorneys General of the Republic of Uganda, the Republic of Kenya, the United Republic of Tanzania, the Republic of Rwanda, the Republic of Burundi and the Republic of South Sudan, respectively, who are sued in their representative capacities as Principal Legal Advisors of their respective Governments. The 7th Respondent has been sued pursuant to Article 4(3) of the Treaty as the Principal Executive Officer of the East African Community ("**the Community**").

4. The Application arises from **Reference No. 11 of 2020** filed on 4th May 2020, where the Applicant alleged that the Democratic Republic of Congo, through its action of arbitrarily and *incommunicado* detaining Samuel William Mugumya and Others,

is in violation of Articles 3(a) (b) and (f), 6(d), 7((2), 8(1)(c), 30 and 123(c) of the Treaty as well as International Law.

5. Consequently, it is the Applicant's contention that the Democratic Republic of Congo ("**DRC**") is ineligible to be admitted to the Community by the Summit of Heads of State and Government of the East African Community.

6. The Application seeks for orders to:

   i. **restrain the Summit of Heads of State and Government of the Partner States of the East African Community - or any such organ(s) of the Community as may be delegated by the Summit - from sitting, considering, deliberating upon and or taking any decision relating to and or concerning the Application by the Democratic Republic of Congo to join the Community - until the full hearing, determination or disposal of *Reference No. 11 of 2020*;**

   ii. **restrain the 7th Respondent from tabling before and or taking any positive action to facilitate the sitting of the Summit to consider, deliberate upon and or take any decision relating to and or concerning the application by the Democratic Republic of Congo to join the Community until the full hearing and disposal of *Reference No. 11 of 2020*; and,**

   iii. **that the costs of the Application be provided for.**

7. The Application was heard *inter partes* on 19th November, 2021, more than a year after it was filed. Therefore, the urgency which presumably underscored the Application for *ex parte* interim orders no longer prevailed.

B. REPRESENTATION

8. At the hearing, the Applicant was self-represented. The 1st Respondent was represented by Mr Hillary Nathan Ebila; Ms Schola Mbilo represented the 2nd Respondent; Ms Vivian Ishengoma and Mr Hangi Chang'a represented the 3rd Respondent; Mr Nicholas Ntarugera represented the 4th Respondent; Mssrs Diomède Vyizigiro and Pacifique Barankitse represented the 5th Respondent; Mr Biong Kuol represented the 6th Respondent and Dr Anthony Kafumbe represented the 7th Respondent.

C. APPLICANT'S CASE AND SUBMISSIONS

9. The Application is supported by the Affidavit of Mr. Adam Kyomuhendo, the Applicant herein, sworn on 18th May 2020. The Applicant asserted that the Summit of the Heads of State and Government of the Partner States of the East African Community ("**the Summit**") will be in flagrant violation of the Treaty if it takes the decision to admit the Democratic Republic of Congo into the Community.

10. In his affidavit, Adam Kyomuhendo deponed that **Reference No. 11 of 2020** has very great prospects of success if it is eventually given the chance to be heard and determined on full merits by this Court and that it bears far reaching consequences for promotion of a culture of respect for the rule of law and human rights. He stated

that it is urgently imperative that the orders sought in this Application are granted to preserve the status quo as well as to meet the ends of justice. He further stated that the Democratic Republic of Congo is equally affected by the Coronavirus Pandemic and that the populations most seriously at risk or direly affected are those with high concentration of people including prison facilities; that Samuel William, Stephen Mugisha, Aggrey Kamukama, Joseph Kamugisha, Nathan Bright and 35 other Ugandan citizens in continuous *incommunicado* and arbitrarily detention by the Democratic Republic of Congo are at most risk of contracting the stated virus.

11. In this regard, the Applicant contended that Samuel William, Stephen Mugisha, Aggrey Kamukama, Joseph Kamugisha, Nathan Bright and 35 other Ugandan citizens in continued arbitrary detention by DRC will suffer irreparable damage or injury if this Application is not urgently heard and granted.

D. RESPONDENTS CASE AND SUBMISSIONS

12. The Respondents, in their replies to the Application, vigorously resisted the Application.

i. The 1st Respondent's Case and Submissions

13. The 1st Respondent opposed the Application and the orders sought through a Replying Affidavit sworn on 15th June 2021 by Wanyama Kodoli, Principal State Attorney in the Attorney General's Chambers of Uganda. The deponent asserted that this Court does not have jurisdiction to determine whether an application by an independent State to join the Community as a member state should be entertained by the Summit or not, and to

inquire into adherence to or observance of acceptable Human Rights and democratic credentials of a non-member state of the Community as it is the case in this Application. He, therefore, argued that **Reference No. 11 of 2020** has no prospects of success when heard on its merits as this Court has no jurisdiction to entertain it.

14. It was the 1st Respondent's further contention that the Applicant failed to discharge its duty to prove a *prima facie* case against the 1st Respondent. In addition, the Applicant will not suffer irreparable damage that cannot be atoned for by damages in case this Application is not granted while the member States and Summit of the East African Community will gravely be inconvenienced in case this Court grants this Application.

15. In that respect, the 1st Respondent stated that the Application is without merit, an abuse of Court process and, thus, should be dismissed with costs.

ii. The 2nd Respondent's Case and Submissions

16. The 2nd Respondent's case was supported by the Affidavit deponed by Dr Kevit Desai, Principal Secretary, State Department for East African Community in the Ministry of East African Community and Regional Development in the Republic of Kenya. His grounds for opposing the Application were similar to those presented herein above by the 1st Respondent. It was, however, his further contention that the Applicant has failed to establish a violation of the Treaty in the assumption of the mandate to receive and consider an application for admission of DRC, a foreign State, into the Community or in the procedure entailed in consideration.

He maintained that the Respondents have demonstrated adherence and fidelity to the letter and spirit of the Treaty in the course of the process being undertaken by the relevant Organs of the Community.

17. It is the 2nd Respondent's contention that, given that the admission of membership to the Community is a procedural issue, both the Application and Reference have not pleaded any breach of the stipulated procedure and therefore they are premature and consequently ought to be struck out. He also argued that the Application and the Reference disclose no cause of action against the Respondents and particularly the Republic of Kenya as the facts pleaded by the Applicant do not disclose any of the matters contemplated under Article 30(1) of the Treaty.

18. He further contended that the reliefs sought require the Court to act outside its jurisdiction as it is the prerogative of the Summit to grant membership to a foreign country, and issues involving nonparties to the Treaty are not subject to the Court's jurisdiction. In addition, he asserted that the issues raised herein touching on human rights infringement have been dealt with through bilateral measures undertaken between the Republic of Uganda and DRC and therefore, the filing of the Application and Reference herein violate the doctrine of *forum non conveniens*.

iii. The 3rd Respondent's Case and Submissions

19. The 3rd Respondent's case is contained in the affidavit deponed by Gallus Lupogo, a State Attorney in the Office of the Solicitor General of the United Republic of Tanzania. In addition to the grounds for opposing the Application presented by the 1st and the

2nd Respondents, the 3rd Respondent stated that the averments by the Applicant are mere speculations and that no violation of the Treaty is likely to occur when the Summit considers application to membership by DRC as in the exercise of the said mandate, Partner States are guided by criteria, conditions and other considerations as provided in the Treaty.

iv. **The 4th Respondent's Case and Submissions**

20. The 4th Respondent's case opposing the Application is contained in the Affidavit deponed by Alex Mutamba Fidel, Senior Officer, EAC and Eastern Africa Affairs in the Ministry of Foreign Affairs and International Cooperation of the Republic of Rwanda. He opposed the Application on the same grounds as those presented above. He contended that the 21st Ordinary Summit has already given a direction and the Council has already commenced the process of assessing the said application and as such the Application has been overtaken by events and should be dismissed in its entirety with costs to the 4th Respondent.

v. **The 5th Respondent's Case and Submissions**

21. The 5th Respondent's case is supported by the Affidavit of Mr Hajayandi Gervais, the Permanent Secretary in the Ministry of Justice of the Republic of Burundi. His Reply opposing the Application was based on the same arguments as those advanced above. He further contended that the Applicant did not have a cause of action against the 5th Respondent.

vi. **The 6th Respondent's Case nd Submissions**

22. It was the 6th Respondent's position that since he did not file a Response to the Application, he had nothing to tell the Court.

vii. **The 7th Respondent's Case and Submissions**

23. The 7th Respondent's case is supported by the Affidavit deponed by Suma Mwakyusa, Principal International Relations Officer at the East African Community. Apart from similar grounds for opposing the Application as those presented above by the other Respondents, the 7th Respondent further contended that he has no knowledge of the arbitrary arrest and detention of Samuel Mugumya, Stephen Mugisha, Aggrey Kamukama, Joseph Kamugisha, Nathan Bright and the 35 unnamed prisoners in DRC as alleged by the Applicant. He averred further that such matters ought to be directly pursued by the Applicant with the responsible authorities in the Democratic Republic of Congo for expeditious trial and extradition to Uganda as appropriate.

24. It was the 7th Respondent's contention therefore, that this Application does not deserve the Court's favorable exercise of discretion to grant the prayers for interim reliefs since they are not merited and the same should be dismissed in its entirety with costs to the 7th Respondent.

E. COURT'S DETERMINATION

25. Having carefully listened to all parties, we deem it necessary to address the point of law raised with regard to the jurisdiction of the Court from the onset.

26. The jurisdiction of this Court is stated in Article 27(1) of the Treaty as follows:

> **"The Court shall initially have jurisdiction over the interpretation and application of this Treaty."**

27. Further, Article 30(1) provides for Reference to the Court by legal and natural persons as follows:

> **"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of an Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."**

28. Read together, Articles 27(1) and 30(1) provide that this Court has jurisdiction to *interpret* and *apply* the Treaty in the case of a Reference by a legal or natural person that is resident in a Partner State, where the impugned act is an Act, regulation, directive, decision, or action of a Partner State or an Institution of the Community, on the grounds that such impugned act is unlawful or is an infringement of the provisions of the Treaty.

29. The case of **The Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu, EACJ Appeal No. 2 of 2015** delineated three types of jurisdiction: *ratione personae, ratione materiae* and *ratione temporis.* Lack of *ratione personae* will arise where one of the parties is devoid of the requisite capacity or *locus standi* to appear before a court. On the other

hand, court's *ratione materiae* may be questioned on the basis of the invoked subject matter, an international court having no *ratione materiae* to try a matter where the treaty or convention under which it derives its mandate does not grant it jurisdiction over designated actions. In the case of the Treaty for the establishment of the East African Community, such *ratione materiae* is outlined in Articles 30, 31 and 32 thereof. *Ratione temporis,* on its part, refers to time-frame prescribed for the institution of cases in a court.

30. In the instant case, it would appear that the Respondents challenge the Court's jurisdiction on account of the *ratione materiae*. The Applicant's *locus standi* and time-frame to institute the present proceedings were not challenged.

31. In terms of the *ratione materiae,* it was the Respondents' submission that the declarations and orders sought by the Applicant are a prerogative of the Summit under Article 11(9)(c) of the Treaty and involves a set of criteria, terms and conditions laid down in Article 3 of the Treaty as well as policy issues, balance of best interests, political considerations, and relations with foreign countries, all of which the Court is ill suited to adjudicate upon. For the Court to grant the orders sought would be in violation of the principle of separation of powers. They relied on the case of **Patrick Ntege Walusimbi & 2 Others vs. Attorney General of the Republic of Uganda & 5 Others, EACJ Reference No. 8 of 2013** where this Court, while citing the Nigerian decision of **Hon. Abdallah Macciado Ahmed vs. Sokoto State House of Assembly and Another (2004) 44 WRN 52**, held that such powers are in any event political in nature and involve political value judgment which is not suitable for judicial adjudication under

the principle of separation of powers and justiciability as held in **Oetjen vs. Central Leather Company 2046 U.S 297.**

32. On his part, the Applicant opined that the Democratic Republic of Congo, having formally applied to join the East African Community, is in violation of the principles enshrined in the Treaty and the African Charter on Human and Peoples' rights as far as she continues to arbitrarily detain some Uganda citizens.

33. It is not in dispute that, as far as the application of the Democratic Republic of Congo is concerned, no final decision had been made by the Summit at the time the Application was heard. At each of the prescribed steps in the consideration of an application to join the East African Community, the Summit is expected to make a decision one way or the other. In its meeting of 27th February 2021, the Summit gave directives to the Council of Ministers in respect of the said application.

34. In our view, the question whether the directives of the Summit on the said application as contained in the Communiqué of the 21st Ordinary Summit amount to an infringement of Articles 3(2)-(4) as read with Articles 23 and 27(1) of the Treaty, is a matter within the jurisdiction of this Court. In **Samuel Mukira Mohochi vs. Attorney General of the Republic of Uganda, EACJ Refererence No. 5 of 2011** this Court stated as follows:

> **"What matters, in our view, is that the application seeks that this Court determines whether the actions and decisions of the Respondent were an infringement of specific Treaty provisions. It is the interpretation and application of these provisions in order to determine**

whether the impugned actions and decisions are infringements that provides the jurisdiction of the Court under Article 27(1)."

35. We hold the same view in this Application and accordingly, we must agree with the Applicant on the issue of jurisdiction.

36. As regards the contention of the Respondents that DRC is not yet a member of the East African Community and is therefore not bound by the Treaty, we have carefully considered the rival arguments of the parties on the foresaid point. We do agree with the Respondents that DRC is not a member of the East African Community and is therefore not bound by the provisions of the Treaty.

37. We now turn to the merit of the Application. As this Court has severally held, the grant of interim orders is governed by Article 39 of the Treaty, while Rules 52 and 84 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."**

38. On the other hand, Rule 84(1) provides:

> **"Pursuant to the provisions of Article 39 of the Treaty, the Court may in any case before it, upon application supported by an affidavit, issue interim orders or**

directions which it considers necessary and desirable upon such terms as it deems fit."

39. As was rightly opined by both parties, this Court has had occasion to consider numerous interlocutory applications for interim orders and has 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 doubts, it will decide an application on the balance of convenience."**

40. 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.

41. 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** case, it was held that:

> **"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. No. 11 of 2013 and FORSC & Others vs. Attorney General of the Republic of Burundi (supra)*.**

42. We find no reason to depart from the foregoing position. In the instant Application, the Applicant argued that if the Summit takes the decision to admit DRC into the Community, it will be in flagrant

violation of Articles 3(2)-(4), 6(d), 7(1)(a) and (2), 8(1)(a) and (c), 23, 27(1), 30, 38(2), 67(3), 123(3)(c), 9(1)(a), 10(1), 11(1)-(9), 12(1)-(4) of the Treaty, hence, in terms of Article 30(1) of the Treaty, it is clear that a cause of action has been established and calling for interpretation of the alleged infringed Articles. Further, the Applicant contended that he is a natural person residing in the Republic of Uganda who in terms of Article 30(1) of the Treaty has a *locus standi* to bring an action before this Court. In the result, we are satisfied that the present matter raises serious triable issues.

43. We now turn to the second test whether, in the absence of interim orders, the Applicant stands to suffer irreparable injury that cannot be adequately compensated in damages was he 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).

44. In the present Application, it was submitted by the Applicant that he was likely to suffer irreparable damage if the orders sought were not granted. It was further argued that the Ugandan citizens in continued arbitrary detention by DRC will suffer irreparable

damage or injury if this Application is not urgently heard and granted. He relied on the case of **Ananias Tumukunde vs. The Attorney General of the Republic of Uganda, Constitution Application No. 3 of 2009** where the Uganda Constitutional Court held that a court of law, which has been approached to protect human rights should not engage in the business of doubting the harm that would be done if the injunctions prayed for are not granted because it goes without saying that that damaged constitutional right is irreparable.

45. The Applicant's contestations drew sharp rebuttals from the Respondents who, conversely, contended that this Court does not have jurisdiction to inquire into the Human Rights record and adherence to or observance of acceptable Human Rights and democratic credentials of a non-member state of the East African Community and, thus, the Application is without merit and an abuse of Court process. In addition, it was argued that the present Application is premature, having been filed prior to a decision on the admission of DRC and in the absence of proof that such decision had been taken without due regard to the consideration and criteria set out in Article 3 of the Treaty. That the decision as to whether DRC qualified to join the Community could only be taken after the verification process was complete and recommendations thereof had been accepted, before which, there is no basis for an allegation of violation of Treaty provisions. It was also the Respondents' contention that the 21st Ordinary Summit has already given direction in respect of the application of DRC to join the Community and the Council is already in the process of assessing the said application and as such the instant Application

has been overtaken by events. Further, The Respondents argued that the Applicant stood to suffer no loss as he will not be individually affected by whatever he has stated that is going on in DRC. In the Respondents' view the Applicant cannot be heard to argue that he is going to suffer injury that cannot be compensated while at the same time, in his pleadings, he is praying for damages and costs.

46. Having considered the rival positions by the parties, it is not in dispute that the events that triggered the Reference are the alleged violations of Human Rights by DRC. It is also worth noting, as stated above, that DRC is not a member of the Community. In this regard, it would appear that all the issues raised against DRC are not justiciable before this Court, in that it is not in the province of this Court to compel a non-member state to comply with the Treaty. In fact, DRC could not be properly sued within the contemplation of the Treaty since, at the time the Reference and this Application were filed, it was yet to be admitted as a member of the Community. Therefore, mindful as we are of the legitimate concerns that the Applicant may have as regards the Ugandan citizens detained in DRC, we are not convinced that the orders sought against DRC could be of any help to the said detainees. On the contrary, we believe that the admission of DRC could expedite the ongoing negotiations between the Republic of Uganda and DRC on the same.

47. Further, the Applicant has not adduced any evidence that in the process of admission of DRC the Respondents have contravened any provision of the Treaty or clarified what they had done or failed to do in terms of Article 3 of the Treaty.

48. In any event, as was ably argued by the Respondents, since the Applicant is not the one who has suffered all the damages, it would be improper for this Court to grant orders sought as the detainees that the Applicant talked about are not the Applicants in this case.

49. With utmost respect, and without attempting to delve into the merits of the Reference, we see no irreparable injustice that the Applicant may suffer if we do not grant the orders sought.

50. 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 or those preconditions to settle an application for interim orders; it is 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 Applicant is not likely to suffer any injury, let alone irreparable injury.

F. CONCLUSION

51. In the result, we decline to grant the interim orders sought by the Applicant and do hereby dismiss this Application in its entirety.

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

53. It is so ordered.

Dated and signed at Arusha this 5th day of April 2022.

.....

Hon. Justice Yohane B. Masara

PRINCIPAL JUDGE

.....

Hon. Justice Audace Ngiye

DEPUTY PRINCIPAL JUDGE

.....

Hon. Justice Charles Nyachae

JUDGE

.....

Hon. Justice Richard Muhumuza

JUDGE

.....

Hon. Justice Richard W. Wejuli

JUDGE