



**IN THE EAST AFRICAN COURT OF JUSTICE AT
ARUSHA-1ST INSTANCE DIVISION**



**(Coram: Johnston Busingye, P.J; Mary Stella Arach-Amoko, DPJ;
John Mkwawa, J)**

**APPLICATION NO. 6 OF 2011
[Arising from Reference No. 6 of 2011]**

- 1. THE DEMOCRATIC PARTY**
- 2. MUKASA FRED MBIDDE].....APPLICANTS**

VERSUS

- 1. THE SECRETARY GENERAL OF THE EAST AFRICAN
COMMUNITY**
- 2.**
- 3. THE ATTORNEY GENERAL OF UGANDA
].....RESPONDENTS**

DATE: 30TH OF NOVEMBER 2011

RULING OF THE COURT

INTRODUCTION

1. We have before us an application made by the above applicants under Article 39 of the Treaty For The Establishment Of The East African Community Treaty (hereinafter referred to as the “Treaty” and Rules 1(2), 17, 21, 24 and 73 of the Rules of The East African Court Of Justice , 2008, whereby they are praying for orders that:

2. (a) Pending determination of their Reference filed in this Court, an interim order be issued against the Respondents restraining the East African Legislative Assembly, the Attorney General and the Parliament of the Republic of Uganda, from conducting and carrying out any elections, assembling, convening, recognizing any names of nominees as duly nominated and elected to the East African Legislative Assembly “EALA”, administering the Oath of office and ultimately sending the representatives of Uganda to the EALA until Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedures of the Parliament of Uganda, 2006 are amended to conform to the provisions of Article 50 of the Treaty.

(b) They be granted such other orders and directions as may be appropriate in the circumstances.

(c)The costs of the application be provided for.

3. The application is supported by the affidavit of the Second Applicant. In opposition to the application, there are replying affidavits sworn by the Attorney General of the Republic of Uganda, Hon. Peter Nyombi and Dr. Julius Tangus Rotich, the Deputy Secretary General (Finance and Administration) of the East African Community, on behalf of the 1st and 2nd Respondents, respectively. Hon. Lubega Medad Ssegona and Hon. Susan Namaganda, Members of Parliament representing the Democratic Party in the 9th Parliament swore supplementary affidavits in rejoinder to the two affidavits in reply.

BACKGROUND

4. It behoves us to mention right from the outset that the instant application arises from **Reference No.6 of 2011** filed in this Court by the first Applicant, a Political Party Organisation duly registered in the Republic of Uganda and the second Applicant, its legal advisor.

5. The gravamen of the complaint of the Applicants, if we may put it in a nutshell, is that the Government of Uganda and its Parliament have not to-date amended the **Rules of Procedures of Parliament, 2006** (hereinafter referred to for brevity as the “Rules”), in order to conform to the provisions of **Article 50 of the Treaty** which provides for election of members of the EALA.

The Applicants contend that **Rules 11(1) and Appendix B r 3, 10 and 11** of the Rules in question do not only contravene Articles 21 (1) and (2); 29(1) (e); 89 (1) and 94(1) of the Uganda Constitution but Article 50 of the Treaty as well to the extent that they discriminate against and limit the freedom and right of association of members of the opposition to vie for election to the EALA and do not allow members of the Uganda Parliament to elect the EALA members. The Applicants blame the second respondent for failure to supervise the Uganda Parliament to ensure that the Rules are amended in conformity to Article 50 of the Treaty. It is the Applicants' fear that, unless constrained by Court, the Parliament of Uganda is going to use the said Rules in the forthcoming election of Uganda's representatives the EALA to their detriment.

6. In the Reference, the Applicants are seeking the following declaratory orders:

(a) That **Rules 11(1) and Appendix B r 3, 10 and 11** of the **Rules of Procedure of the Parliament of Uganda, 2006** which are going to be used by the Parliament of Uganda in the election of the members of the East African Legislative Assembly in the upcoming elections are inconsistent with and contravene **Articles 21(1) and (2), 29 (1) (e), 89(1) and 94 (1)** of the Constitution of the Republic of Uganda in that the aforesaid infringement will have the effects of limiting the freedom and rights of the First Applicant to associate in vying

for the upcoming elections for the representatives of EALA. Apart from the foregoing, the aforesaid Rules complained of do not allow the Members of Parliament of Uganda to elect the Members of EALA.

(b) That the inaction and the loud silence by both the Government and the Parliament of Uganda in not amending and realigning the aforesaid Rules which are going to be used by the Parliament of Uganda in the upcoming elections for members of EALA in accordance with **Article 50 of the Treaty**, is an infringement of the said Article.

(c) That the Secretary General of the East African Community has failed to supervise the Government of Uganda to ensure that the Parliament of Uganda amends its laws in order to make them conform to **Article 50 of the Treaty**.

SUBMISSIONS:

7. It was strenuously argued by Mr. Justine Semuyaba, who appeared for the Applicants, that the EALA's current term expires in June 2012. That campaigns for election of the new Representatives from Uganda are already under way and elections are to be held sooner than later. That there is every likelihood that the new Representatives for the EALA will be elected in accordance with the Rules of Procedure of the Parliament of Uganda, 2006 as was the

case when the Representatives to the Pan-African Parliament were elected.

8. It was Mr. Semuyaba's main argument that the aforesaid Rules are not in conformity with **Article 50 of the Treaty**. He added that in the case of **Jacob Oulanya versus the Attorney General of Uganda, Constitutional Petition No.28 of 2006**, which was before the Constitutional Court of Uganda, the Court held, *inter-alia*, that the aforesaid Rules of Procedure infringe several Articles of the Constitution of the Republic of Uganda. It is his stance that no election should be held until the aforesaid Rules are amended by the Parliament of Uganda which does not seem ready to do so.

9. It is his contention that if the order sought is not granted, the Uganda Parliament will go ahead and elect the EALA representatives using the impugned Rules. In that case, the Applicants will suffer irreparable damage in that they will be disenfranchised because the Uganda Parliament will conduct the elections on the basis of the **numerical strength** rule. Further, it is also his contention that it is not only the instant Applicants, but also the EALA and the East African Community in general, that stand to suffer irreparable damage, if it turns out that one third of the EALA's members were not legally elected.

10. In support of his stance, he has invited us to invoke the principles enunciated in the cases decided by this Court, namely

Professor Anyang' Nyongo And Ten Others vs The Attorney General Of The Republic Of Kenya And Five Others, Ref. No.1 of 2006 and the decision in **Application No.9 of 2007** arising from **Ref. No.3 of 2007**, which was between the **East African Law Society And Three Others and The Attorney General Of The Republic Of Kenya And Three Others.**

11. Learned Counsel further contented that the Reference which is before this Court awaiting a hearing raises more than a **prima facie** case with a probability of success. He maintained that the Reference pending in Court raises serious issues which have to be considered and decided by this Court.

12. Further to the foregoing, the learned Counsel stressed that the Applicants are trying to stop an election which has not taken place and that they are not going to wait until the elections are conducted under the impugned Rules because then, there will be more problems. Citing an observation by this Court in the case of **Professor Anyang' Nyongo**, (supra) , he contended that it is better to stop a mischief before it takes place than wait until it has happened.

13. Learned Counsel in support of his submission on this point, also relied on the case of the **European Parliament vs The Counsel of The European Communities, Case N.C-70 of 1988**, where the European Court of Justice intervened in a matter where

Parliamentary Procedures were infringing the European Community Treaty.

14. He thus urged this Court, not unlike in the case he cited, to intervene where Rules of Procedure of Parliament of a Partner State are infringing the Treaty, pending the hearing of the main Reference, which may not take place soon.

15. In rebuttal, it was contended by Mr. Wilbert Kaahwa, learned Counsel for the First Respondent, that **Article 50(1) of the Treaty** places the responsibility for the process of the election of the members of the EALA on the respective National Assemblies and that the elections are conducted “**in accordance with such proceedings as the National Assembly of each Partner State may determine**”. He maintained that there is no evidence to show that at the material period, the process of election of members of the EALA is on-going in Uganda as alleged by the applicants. Learned Counsel relying on paragraph 7 of Dr. Rotich’s affidavit, contended that the Secretary General has no supervisory role in matters vested in Partner States of the EAC, “**save as is provided under Article 29 of the Treaty**”. He further submitted that the letter from the Speaker’s Office which was in response to the First Applicant’s letter dated 19th July, 2011, cannot be taken as evidence to support the assertion that the elections are underway. He thus urged this Court to dismiss the application with costs.

16. Ms. Christine Kaahwa, learned Counsel for the Second Respondent, was very brief in her response. The thrust of her argument was that the Applicants' contentions are premised on mere speculation. It is on the basis of the foregoing that she urged the Court to find and hold that the Applicants have failed to establish a **prima facie** case.

17. Basing himself on the affidavit of Hon. Peter Nyombi, Mr. Phillip Mwaka, learned State Attorney, also representing the Second Respondent submitted that subsequent to the decision in the case of **Jacob Oulanya versus the Attorney General of Uganda** (supra), the Government of Uganda commenced the process of amending the Rules of Procedure of the Parliament of Uganda, 2006 to conform to Treaty and the Constitution of Uganda.

18. It is also Mr. Mwaka's submission that the 8th Parliament of the Republic of Uganda considered and reviewed the Rules of Procedure of the Parliament of Uganda including the Rules challenged in this Reference and made proposals to the Government of the Republic of Uganda for consideration. Consequently, the instant application is premature and it is not in the interest of justice that it be granted.

DETERMINATION OF THE APPLICATION BY THE COURT

19. We have carefully gone over the materials placed before us in this application and after considering the oral submissions of both

sides and the law on the subject, our findings and conclusions are as follows:

20. One, it is trite law that the granting of an interim injunction is an exercise of judicial discretion which must be exercised judiciously. (See: **Sargeant V. Patel (1972) 16 EACA 63; Giella V Cassman Brown Co. Ltd (1973) E.A 358 and Mary Ariviza & Another Vs. The Attorney General Of The Republic Of Kenya And Another, Application No. 3 of 2010 arising from Ref. No.7 of 2010.**

21. Two, the principles for granting an application for an interim injunction by courts is well settled although they have been expressed in various terms over time. They are that:

1. For an interim injunction to issue, the Court must be satisfied that the applicant has a ***prima facie*** case with a probability of success.
2. An interim injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would adequately be compensated by an award of damages. . (See: **Professor Anyang' Nyongo** (supra).
3. If the court is in doubt, it will decide the application on the balance of convenience. (See: **E.A. Industries vs Trufoods (1972) E.A. 420 and Giella vs Casman Brown** (supra), to mention just a few decisions.

22. In light of these general principles, we now turn to the facts of the present case.

23. Regarding the first principle, the court must be satisfied that the claim is not frivolous or vexatious and that there is a serious case to be determined by court. (See: **American Cyanamid v Ethicon [1975] All ER 504 at 510 per Lord Diplock**).

24. It is evident from the Applicants' affidavits in support of the instant application and the affidavit deposed by Hon. Peter Nyombi, the Attorney General of Uganda, sworn on behalf of the Second Respondent, that the impugned Rules were subject of litigation in the Constitutional Court of Uganda in the **Jacob Oulanya's** case (supra). It is common ground that the said Court found *inter-alia* that the Rules in question to be infringing several Articles of the Constitution of the Republic of Uganda. It is further common ground that the Constitutional Court went ahead to declare the aforesaid rules to be inconsistent with both the Constitution and Article 50 of the Treaty.

25. It is further amply clear from the evidence on record and the submissions of both sides that at the moment, the execution of the aforesaid decision of the Constitutional Court has been stayed, pending the determination of the appeal before the Supreme Court of Uganda. Here, we are respectfully in agreement with Mr.

Semuyaba, learned Counsel for the Applicants, that in law, those Rules are operational.

27. Further, Hon. Nyombi deponed in paragraphs 4, 5, 6 and 8 of his affidavit in reply that the application is premature in:

“4. That pursuant to the decision of the Constitutional Court of Uganda in Constitutional Petition No 38 of 2006; Jacob Oulanyah *versus* the Attorney General, the Government of Uganda commenced the process of amending the Rules of Procedure of the Parliament of Uganda to conform to the East African Treaty (sic) and the Constitution of Uganda.

5. That the Rules of Procedure are in the process of amendment in order to provide for the conduct of the election of members of Parliament representing Uganda at the East African Legislative Assembly when the current term expires.

6. That I was the Chairperson of the Rules, Privileges and Discipline Committee in the 8th Parliament of the Republic of Uganda which considered and reviewed the Rules of Procedure of the Parliament of Uganda including the Rules challenged in this Reference and made proposals to be presented to the 9th Parliament of the Republic of Uganda for consideration.”

27. However, it is also instructive from the Second Respondent's affidavit in support of this application, that on the 19th July, 2011, the First Applicant wrote to the Speaker of the 9th Parliament of Uganda inquiring about the number of slots available to the First Applicant in the EALA for which its members may contest.

28. One Helen Nanteza Kawesa, who replied to the aforesaid letter on behalf of the Speaker on the 26th July 2011, stated *inter-alia*, as follows:

“Please note that the slots in EALA are determined by the numerical strength of the Party. It is, therefore, most probable that the Opposition will be entitled to at least two slots. The final decision will be determined on the floor of the House”.

29. Based on the foregoing, therefore, we find that the complaint by the Applicants is neither frivolous nor vexatious considering the 1st Applicant's numerical strength in Parliament as indicated in the annexures to the affidavits filed on behalf Applicants *vis avis* the clear provisions of Article 50 of the Treaty.

30. We are thus of the considered view that the totality of the facts, without expressing a concluded view, discloses *bona fide* serious issues that need to be investigated by this Court. In other words, there is an arguable or *prima facie* within the meaning enunciated

in the **Giella's** case, to mention just one decision in respect of this area of the law.

31. As stated before in applications of this nature, the finding that there is a prima facie case with a probability of success is to say no more than that if the Respondents do not put up any plausible defense or response the Applicants would succeed.

32. The reason is obvious, that at this stage, we must of course, refrain from making any determination on the merits of the application or any defense to it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference.

33. We have also carefully read the case of the **European Parliament versus the Council of the European Communities** (supra) where the European Court of Justice intervened in a matter where Parliament Procedures were infringing the European Community Treaty. We are fully aware, of course, that although it is not binding on us, it is of persuasive value to this Court.

34. We now come to the second hurdle that the Applicants have to cross, namely, whether an irreparable injury will be occasioned to the Applicants if the Court does not interfere.

35. We are of the considered view, based on the totality of the available affidavit evidence on record, that if the application is denied and the elections of Uganda's Representatives to the EALA take place under the impugned Rules and if the Reference is eventually determined in favour of the applicants, not only the Applicants but also the EALA and the East African Community itself, stand to suffer irreparable injury. This is not only because the Applicants will have been denied an opportunity to send Representatives to the EALA but, as this Court observed in a similar application in the **Anyang' Nyongo Reference** (supra), there will be improperly elected Representatives in the EALA and the credibility of the EALA will be questionable. It is our view that no amount of damages would ever be able to adequately compensate the Applicants for that kind of injury.

36. We, therefore, find and hold that the second criterion for the grant of an interim injunction has also been satisfied.

37. On the question of balance of convenience, while we note from the affidavit of the Attorney General Hon. Peter Nyombi that the Government of Uganda has commenced the process of amending the said Rules, and we have no reason to doubt the Hon. Attorney General, the process seems to be too slow in the circumstances. It is accordingly our considered view that since the matter is already before this court, it would do no harm to the Respondents if the

election process of Representatives of the Republic of Uganda to the EALA is halted for the time being to await the final outcome of the Reference which is pending in the Court. It is our finding, therefore, that the balance of convenience favours the Applicants.

38. In the premises and for the reasons given, we allow the application and issue the following orders:

1) The Attorney General and the Parliament of the Republic of Uganda are hereby restrained from conducting elections of Representatives of the Republic of Uganda to the EALA until the determination of the Reference No. 6 of 2011.

2) The costs of the application shall be in the cause.

It is so ordered.

Dated and delivered at Arusha this 30th day of 2011

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JOHNSTON BUSINGYE

PRINCIPAL JUDGE

MARY STELLA ARACH-AMOKO

DEPUTY PRINCIPAL JUDGE

JOHN MKWAWA

JUDGE