IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica Mugenyi, PJ; Isaac Lenaola, DPJ; & Fakihi A. Jundu J)

APPLICATION NO.5 OF 2015

(Arising from Reference No. 2 of 2015)

EAST AFRICAN CIVIL SOCIETY ORGANISATIONS FORUM

(EACSOF)..... APPLICANT

VERSUS

1. **ATTORNEY GENERAL OF BURUNDI.....**
2. **COMMISSION ELECTORALE NATIONALE ..... INDEPENDENTE (CENI)**
3. **SECRETARY GENERAL EAST AFRICAN COMMUNITY .....**

RESPONDENTS

29TH JULY, 2015

REASONED RULING OF THE COURT

1. The Applicant, East African Civil Society Organisations Forum (EACSOF), is a platform for Civil Society Organisations in East Africa that seeks to build 'a critical mass of knowledgeable and empowered civil society in the region in order to foster their confidence in articulating grassroots needs and interests to the EAC (East African Community) and its various organs, institutions and agencies.' On the other hand, the Second Respondent is the body responsible for conducting national elections in Burundi. The First and Third Respondents are self-defining.

2. On 6th July 2015, the Applicant filed **Reference No. 2 of 2015 EACSOF vs. Attorney General of Burundi and 2 Others**, as well as the present Application before this Court. The Application sought interim orders pending the hearing of the Reference. It specifically sought Orders for the stay of Decree No. 100/177 of the 9th June 2015 that postponed the Presidential and Senatorial Elections to 15th and 24th June 2015 respectively, as well as the stay of the Second Respondent's decision dated 12th June 2015 that apparently approved the nomination of Mr. Pierre Nkurunziza as a candidate in the Presidential Election. The Application further sought an Order directing the Second Respondent and the Government of the Republic of Burundi to postpone the Presidential and Senatorial Elections.

3. The Application was *inter alia* premised on the following grounds:
   a. The situation in Burundi required urgent attention.

b. If no action was taken, President Nkurunziza would run for an unconstitutional third term of office.

c. The procedure used by the Second Respondent in arriving at the decision to submit and accept the candidacy of President Nkurunziza ran afoul of the Constitution of Burundi and the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (hereinafter referred to as 'the Arusha Peace Agreement'), both of which limit Presidential office in Burundi to two (2) terms.

d. It is therefore imperative that the interim orders sought be granted as the Reference raised serious and fair questions for democracy, the rule of law, good governance and transparency, the erstwhile people (presumably of Burundi) continued to suffer and their suffering could not be quantified or appeased by damages, and the balance of convenience lay in favour of allowing the main Reference.

e. It was in the best interests of justice that the orders sought be granted.

4. On 14th July 2015, the Application was heard *ex parte* but the Court declined to grant the Orders sought for the following reasons. First, Decree No. 100/177 of the 9th June 2015 by President Nkurunziza, as well as the Communique by the Second Respondent dated 12th June 2015, both of which were principally in issue in the Application were submitted in French and no English translations thereof had been availed to the Court. This was deemed to contravene the provisions of Article 137(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty'), which prescribes

English as the official language of the Community. Indeed, Article 46 of the Treaty explicitly designates English as the official language of the Court. Secondly, and perhaps more importantly, when the Court sat on 14th July 2015 it transpired that the Burundi Presidential Election had been postponed to 21st July 2015 therefore the urgency that presumably underscored the Application for *ex parte* interim orders no longer prevailed. It was, therefore, ordered that the Application be heard *inter partes* on 20th July 2015.

5. At the hearing of the Application *inter partes,* the Applicant was represented by Mr. Donald Deya, while the First Respondent was represented by Mr. Nestor Kayobera. The Second and Third Respondents did not make any appearances, the latter reportedly having instructed Mr. Kayobera that he would abide by the Court's decision in the Application. Upon hearing the parties that were represented at the hearing hereof, this Court did deliver a summary Ruling dismissing the Application and reserved reasons therefor to be given on notice to the Parties. This course of action is duly provided for in Rule 68(3) of the East African Court of Justice Rules of Procedure (hereinafter referred to as 'the Court's Rules'). We do hereby deliver our reasoned Ruling in this matter.

6. In a nutshell, it was argued for the Applicant that the Application disclosed a *prima facie* case in so far as the implementation of a Constitutional Court decision by the First and Second Respondents constituted a violation of the Constitution of Burundi and the Arusha Peace Agreement, and therefore, the Treaty. Mr. Deya did also argue that attempting to hold the Presidential Elections as

scheduled may lead to a further deterioration of the security situation in Burundi and the wider East African Community (EAC), and the irreparable damage and harm accruing therefrom could not be adequately compensated by damages. Finally, on the balance of convenience, learned Counsel contended that whereas the First and Second Respondents only stood to suffer the inconvenience of a delayed election, which they had already postponed on several occasions anyway; the people of Burundi, as well as the greater EAC region were likely to suffer absence of rule of law, peace and security.

7. Conversely, the First Respondent argued that Communal and Legislative Elections had already been held in accordance with Decree No. 100/177 of the 9th June 2015 and, therefore, the prayer for the stay of that Decree was superfluous and, in any event, Article 39 of the Treaty entreated the Court to grant interim orders or issue directions that it considered necessary or desirable, but the orders sought in the present application were neither necessary nor desirable. Citing this Court's decision in **Timothy Alvin Kahoho vs. Secretary General of EAC & Another Application No. 5 of 2012** that the discretion to grant or refusal of an injunction must be exercised judiciously, the main purpose of a temporary injunction being to maintain the status quo; Mr. Kayobera questioned the intentions of the Applicant, wondering whether it wished to maintain the current status quo in Burundi of insecurity, anarchy and chaos. On that premise, learned Counsel contended that the Applicant had not established a *prima facie* case herein. Mr. Kayobera did also argue that an award of damages could

compensate any purported injury suffered by the Applicant, but questioned the injury the Applicant stood to specifically suffer in the event that President Nkurunziza was re-elected President of Burundi. Finally, on the balance of convenience, learned Counsel cited the following decision in **Timothy Alvin Kahoho** (supra) in support of his view that stopping the election process in Burundi at this stage would occasion more injury to the citizens of Burundi and East Africa that the Applicant purported to represent:

> "**Above all, when the totality of circumstances of the case are examined, we find that stopping the process at this stage would in our view occasion more injury to the citizenS of East Africa whom the Applicant purports to be fighting for since a substantive sum of tax payers money has already been spent on the process. As we stated earlier, the Applicant seems to be challenging the procedure not the substance of the directives in question. We are accordingly of the considered view that the balance of convenience favours the Respondent.**"

8. In a brief reply, Mr. Deya reiterated his earlier position that this Court does have the jurisdiction to entertain the issues raised in the present Application, as well as the Reference in respect of which it arose. Learned Counsel did also acknowledge that one Janvier Bigirimana, a deponent of an affidavit in support of the Application, was indeed a member of the Applicant entity. Finally, Mr. Deya distinguished the case of **Timothy Alvin Kahoho** (supra) as cited by learned Counsel for the First Respondent from those in the present Application in so far as

the Applicant in that case had challenged the procedure leading to the decisions that were in issue therein, which was not the case presently.

9. The grant of interim orders before this Court is governed by Article 39 of the Treaty as read together with Rule 21 of the Court's Rules of Procedure. Article 39 reads:

> "**The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable**. …."

10. In the case of **Prof. Peter Anyang' Nyongo & 10 others vs. The Attorney General of the Republic of Kenya & 3 others, Ref. No. 1 of 2006**, the Court relied on the following dictum from **Giella vs. Casman Brown (1973) EA 358** (CA) to define the parameters for consideration in the grant or refusal of interim orders in the EAC jurisdiction:

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. 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. (E. A. Industries vs. Trufoods [1972] EA 420)**."

11. On the other hand, the case of **American Cyanamid vs. Ethicon Ltd (1975) AC 396** underscored the need for a court considering an application for temporary relief to be satisfied that the claim was not frivolous or vexatious but, rather, presented a serious question to be tried; without necessarily delving into the determination of a *prima facie* case, an exercise that could entail the resolution of questions of law and/or fact upon which the substantive suit hinges. This position is reflected in **Halsbury's Laws of England, Vol. 11 (2009), 5th Edition, para. 385**, and was cited with approval by this Court in the case of **Mbidde Foundation & Another vs. Secretary General of the East African Community & Another Consolidated Application No. 5 & 10 of 2014**.

12. In the present Application, it was strongly argued for the Applicant that the Constitutional Court of Burundi misinterpreted the Constitution of Burundi, as well as the Arusha Peace Agreement and, therefore, the Second Respondent's acceptance of Mr. Nkurunziza's nomination as a Presidential Candidate on the basis of the erroneous court interpretation was in contravention of the said legal instruments. It was posited that, to the extent that Mr. Nkurunziza's nomination thus contravened the prevailing legal regime in Burundi, it contravened Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c), and 8(5) of the Treaty. We understood Mr. Deya to advance two (2) positions; first, that the decision of the Constitutional Court was itself in issue within the precincts of Article 30(1) of the Treaty and, secondly, he equated the said court decision to an 'action' attributable to the First Respondent within

the purview of the same provision of the Treaty. Both positions go to the question of the jurisdiction of this Court in this matter.

13. Conversely, in response to a question from the Bench on this issue, it was Mr. Kayobera's contention that this Court did not have jurisdiction to review or inquire into a decision of a National Court as this was, in his view, expressly prohibited by Article 30(3) of the Treaty. Article 30(3) of the Treaty reads:

> **"The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State."**

14. We have carefully considered the provisions of Article 30(3) of the Treaty. That legal provision negates the jurisdiction of the Court over matters that have been reserved under the Treaty to an institution of a Partner State. Whereas the Treaty does not expressly reserve the business of national courts as one of those matters over which this Court has no jurisdiction, we find that Articles 9(4) and 27(1) are quite instructive on the intention of the framers of the Treaty on this issue. We reproduce the said articles below for ease of reference.

> "**Article 9(4):**
>
> **The organs and institutions of the Community shall perform the functions, and act within the limits of powers conferred upon them by or under this Treaty.**
>
> **Article 27(1):**
>
> **The Court shall have jurisdiction over the interpretation and application of this Treaty."**

15. We do recognize that it is no part of this Court's function while considering an interlocutory application to determine intrinsic questions of law which call for detailed argument and detailed considerations; those are matters to be dealt with at the hearing of the substantive Reference. *See* ***American Cyanamid vs. Ethicon Ltd*** *(supra)*. Accordingly, subject to more detailed consideration of these points of law at the hearing of the Reference, at this stage we find that a purposive interpretation of the foregoing legal provisions would *prima facie* support the preposition that this Court's jurisdiction is restricted to matters of Treaty interpretation. Therefore, by exclusion, the Court would have no jurisdiction to entertain a matter of constitutional interpretation.

16. With specific regard to the present application, it would appear that this Court has no jurisdiction to interpret the provisions of the Burundi Constitution or Arusha Peace Agreement for purposes of determining the correctness of the Burundi Constitutional Court's decision, as appears to be the thrust of the present application. That is entirely different from the Court reviewing the provisions of a Partner State's national law with a view to determining its compliance with the Treaty. This Court has explicitly pronounced itself on having jurisdiction to entertain the latter scenario. *See* ***Attorney General of Kenya vs. The Independent Medical Legal Unit EACJ Appeal No. 1 of 2011*** *and* ***Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011.***

17. In the same vein, this Court is not clothed with appellate jurisdiction over the decisions of national courts. Article 23(3) of the Treaty specifically designates it as a Court of First Instance in matters of Treaty interpretation.

18. Without prejudice, therefore, and subject to more intrinsic arguments at the hearing thereof, we are not persuaded that **Reference No. 2 of 2015** raises matters of Treaty interpretation. To that extent, we are not persuaded that the said Reference raises serious questions for determination by this Court. However, we would not go so far as to hold that we have been satisfied to the required standard of proof by either party's position on this issue. We do, therefore, deem it necessary to determine the questions of irreparable injury and balance of convenience.

19. The decision in **E. A. Industries vs. Trufoods [1972] EA 420** that was referred to in **Giella vs. Casman Brown** (supra) is quite instructive in this regard. In that case, it was held (Spry VP):

> **"There is, I think, no difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages**."*(our emphasis)*

20. A common thread in the Applicant's case was that the situation in Burundi was dangerously perilous hence the need for urgent intervention, and if Mr. Nkurunziza ran for another term in office the situation would degenerate and occasion untold suffering to the Burundian and EAC citizenry. This argument was advanced as demonstration of the irreparable injury that the Burundian people stood to suffer, as well as in support of the notion that the balance of convenience in this matter lay with the Applicant, as a representative of the people of Burundi. However, learned Counsel for the First Respondent appeared to contest that position and attributed the insecurity and civic disorder in Burundi to some of the Applicant's members, including Mr. Janvier Bigirimana. Learned Counsel questioned the injury the Applicant specifically stood to suffer in the event that this Application was disallowed.

21. We note that Mr. Kayobera's question as to the specific injury the Applicant stood to suffer remained unanswered. Similarly, the Applicant did not rebut the First Respondent's submission that some of the Applicant's members were fanning the civic disorder in Burundi. In his reply, learned Counsel for the Applicant simply acknowledged Mr. Bigirimana as an official in the Applicant entity. In any event, we were not satisfactorily addressed on the issue of whether or not whatever injury the Applicant was likely to suffer could not be adequately compensated by damages. Consequently, we find that the Applicant has not sufficiently demonstrated the irreparable injury it stood to suffer if this Application were disallowed or that the said injury could not be compensated by damages.

22. In **American Cyanamid vs. Ethicon Ltd** (supra), the objective of interlocutory reliefs was aptly stated as follows (Lord Diplock):

> **"The object of the 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 the defendant to be protected 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 uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies**."

23. In the present Application, the Applicant sought to protect the rights of the Burundian and greater EAC region citizenry from the violation of its right to peace, security and stability, as well as good governance, democracy and the rule of law. These rights were depicted in paragraph V of the Application and canvassed in the Applicant's submissions. Indeed, they are also re-echoed in the Prayers in paragraph 52(b) of **Reference No. 2 of 2015**. On the other hand, we understood it to be the First Respondent's case that the Republic of Burundi enjoys the right to conduct its Presidential and Senatorial Elections as provided by the country's Constitution. This is reflected in

paragraphs 11, 20 and 21 of the Affidavit in Reply of Nestor Kayobera dated 16th July 2015, as well as paragraphs 12, 13 and 28 of Mr. Kayobera's submissions before this Court.

24. We have already found above that the Applicant has not established the injury it stood to suffer or whether such alleged injury could be adequately compensated by damages. We do not find any demonstration in this Application, either, that the postponement of the Presidential Election would stem the civic disorder and unrest presently being experienced in Burundi. We are alive to the very real possibility that a postponement of the said Elections could occasion similar or worse civic disorder and unrest. We were not satisfactorily addressed on that issue. In fact, a direct question from the Bench that was put to learned Counsel for the Applicant on this issue remained largely unanswered. We are of the considered view that this question is extremely critical to a determination of the balance of convenience in this matter; a postponement of the First and Second Respondents' constitutional mandate and duty to organize an Election within the time frame stipulated would only be fettered upon sufficient demonstration by the Applicant that it, or indeed the people of Burundi, stood to suffer greater injury should the Election be so held. This was not established before us.

25. Furthermore, in response to questions from the Bench, learned Counsel for the First Respondent did clarify that the Constitution of Burundi prescribed the holding of the Presidential Election not later than 1 month before the expiration of the term of the incumbent President. He clarified that Mr. Nkurunziza's term of office was due

to expire on 26th August 2015, meaning that the Presidential Election had to be conducted at least before 26th July 2015. This submission was not rebutted by learned Counsel for the Applicant. This Court has since confirmed the relevant constitutional provision in that regard to be Article 103 of the Burundi Constitution. We therefore find no reason to disallow the connotation of urgency represented by that submission.

26. Therefore, as this Court did find in **Timothy Alvin Kahoho** (supra), we find that the totality of the circumstances of this case are such that stopping the Election at this stage would occasion injury to the rights of the Burundi citizenry - that the Applicant purports to be speaking for – to the maxims of rule of law and good governance as enshrined in their National Constitution. Contrary to the assertions of learned Counsel for the Applicant, as quite clearly stated in the grounds of this Application, the Applicant herein did, as in the **Kahoho** case, take issue with the procedure leading up to the Elections in issue presently. Therefore the decision in that case is quite pertinent to the present Application.

27. In the result, weighing the balance of convenience in this matter, we take the considered view that to exercise our judicial discretion to protect the Applicant's right to security, peace and stability in the absence of satisfactory proof of the injury and inconvenience likely to be suffered by that Party in the event that the injunction were not granted, would negate the corresponding obligation to protect the Burundian people against the violation of their constitutional right to timely elections, not to mention the constitutional duty upon the

First and Second Respondents to organize the said Elections as by law provided.

28. Consequently, it is for the foregoing reasons that this Court respectfully disallowed the present Application with no order as to costs.

Dated at Arusha this 29th day of July 2015.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE

Hon. Justice Fakihi A. Jundu
JUDGE