

UGANDA / JUDGMENT

Mathias v Attorney General of Burundi (Application No.2 of 2020) [2021] EACJ 3 (7 October 2021) (First Instance Division) [2021] EACJ 3

COURT

East African Court of Justice

BEFORE

Masara PJ, Muhumuza J, Nyachae J, Nyawello J,
Wejuli J

CASE / FILE NUMBER

Application No.2 of 2020

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IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

*(Coram: Yohane Masara, PJ; Charles O. Nyaweio, Charles A. Nyachae, Richard Muhumuza, &
Richard W. Wejuii, JJ)*

> APPLICATION NO. 2 OF 2020 (Arising from Reference No. 24 of 2019)

HEIR OF NIKOBAMYE MATHIAS..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF BURUNDI..... RESPONDENT

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APPLICATION NO. 02 OF 2020 Page <sup>1</sup>

RULING OF THE COURT

A. INTRODUCTION

- 1. This is an Application by the Heir of Nikobamye represented by Mr. Fini Fany Placide and Mrs. Anita Kanyambo (hereinafter referred to as "the Applicant") for Interim Orders against the Attorney General of the Republic of Burundi (hereinafter referred to as "the Respondent") pursuant to Article 39 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty ") and Rules 21(2) and 73 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "the Rules").
- 2. The Applicant is the heir of late Nikobamye Mathias who was ordinarily resident in the Republic of Burundi, where his heir is likewise ordinarily resident. Both Mr. Fini Fany Placide and Mrs. Anita Kanyambo brought the Application in their joint representative capacities on behalf of the Applicant.
- 3. The Respondent is the Attorney General of the Republic of Burundi, who is sued in his capacity as the Principal Legal Advisor of the Government of the Republic of Burundi.
- 4. The Application arises from **Reference No. 24 of 2018** where the Applicant alleges that the Appellate Chamber of the Special Lands and Other Property has violated the Burundian law; specifically, Article 20 of the Burundian Land Code by issuing a decision whose operative part orders the *'demolition of houses of habitation, and the destruction of crops and trees.'* From the Applicant's perspective, that violation constitutes a violation of the the Treaty.

- 5. The Application was brought to this Court under a certificate of urgency seeking grant of the following:
 - a) **The Application be certified as urgent, and heard ex *parte* in the first instance;**
 - b) **Pending *inter partes* hearing and determination of the application, an order do issue prohibiting the Respondent from implementing the impugned decision or in any way taking action to revoke, cancel or otherwise dispose of the applicant's interest in the subject property; and**
 - c) **The Respondent do file an appropriate undertaking before the Court that no alteration or any modification shall be done on the subject property pending further orders of the Honourable Court.**
- 6. The Application could not be heard ex *parte* owing to the restrictions imposed by Covid-19 pandemic. As a result, the prayer that the Application be certified as urgent and heard ex *parte* was held to be overtaken by the events.

- 7. The **inter parte** Application was heard on 29th June 2021. The Applicant was represented by Mr. Janvier Nsabiman, Learned Advocate, while Mr. Vyizigiro Diomedé appeared for the Respondent.

B. APPLICANT'S CASE AND SUBMISSIONS

- 8. The Applicant's case is supported by the joint Affidavit of **Ndayizeye Victoire and Anita Kanyambo, sworn at Bujumbura**

on 23rd January 2020. The Applicant asserts that **Judgement RSTBA 0344** of the Appeal Chamber of the Special Court of Lands and Other Property, has not yet become final and ripe for execution on account of both the submission for review submitted to the Minister of Justice and the Reference brought to this Court.

- 9. In the said Affidavit, Ndayizeye Victoire and Anita Kanyambo deposed that paragraph 6 of the operative part of the Judgement gives the estate of the late Nikobamyé three months to eliminate the buildings and plants on the plot of land at their own expense, that the body of the late Nikobamyé and that of one of his sons now rest in tombs built on that property, and that destruction of those tombs will occasion irreparable injustice.
- 10. In this regard, the Applicant contends that the Impugned Decision (**Judgement RSTBA 0344**) is temporary in nature on account of both submission for review made to the Minister of Justice and Reference submitted to this Court for determination, and that the execution of such a decision will contravene the Burundian law and the Treaty. Reliance is placed on Article 7 of the Constitution of Burundi, as well on the aspect of the Burundian Constitution that prevents the execution of decisions which have not become final. Further, reliance is placed on the recent Circular of the Minister of Justice ("Circular letter on the enforcement of Judgement subject to review," **550/1440/CAB/2019, of July 11 2019**, appearing as Annex 3, page 45 of the Notice of Motion), which also prevents the execution of any decision subject to application for review before the Minister.

- 11. In summing up his submissions, the Counsel for the Applicant maintains that his client has established that a temporary decision cannot be executed, that the Reference discloses a serious triable issue with a high probability of success, and that irreparable damage will be occasioned if the impugned judgement is executed before the decision of either the Minister of Justice or before the disposal of the Reference pending in this Court. In addition, the Learned Counsel for the Applicant emphasises that if the Court does not intervene then the Applicant will suffer irreparable damage and there will be grave injustice. In light of the foregoing submissions, the counsel for the Applicant reiterates his prayer that the Court grants an interim order restraining the Respondent from executing the impugned decision pending both the decision of the Minister of Justice and the determination of the Reference.

C. RESPONDENT'S CASE AND SUBMISSIONS

- 12. The Respondent opposes the Application and the orders sought through a Reply Affidavit sworn at Bujumbura on 29th June 2021 by Mr. Barankitse Pacifique, Senior Prosecutor in the Office of the Prosecutor General to the Anti-Corruption Court. The deponent asserts that there is no basis for this Court to issue any interim order since there is no further step taken by the Special Court on Lands and Other Assets toward the execution of **Judgement RSTBA 0344** impugned by the Applicant before this Court.
- 13. Further, Mr. Barankitse Pacifique avers that the only act in the knowledge of the Respondent that is in force is the circular letter issued by the Minister of Justice on 11th July 2019, restraining

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Judges of the Republic of Burundi from executing judgements subject to review.

The deponent further buttresses his arguments by asserting that there is no irreparable damage that the Applicant will suffer **because the execution of the impugned Judgement is stayed, pending the outcome of the review of Judgement RSTBA 0344 applied for by the Applicant,**

D. COURT'S DETERMINATION

14. We have carefully examined Submissions presented by the Parties in support of their respective cases. The grant of Interim Orders by this Court is governed by Article 39 of the Treaty read together with Rule 73 of the Court's Rules of Procedure 2013. 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."**

15. Rules 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."

APPLICATION NO. 02 OF 2020

16. Principles governing the granting of Interim Orders have been set out in the landmark case of **Giella vs. Cassman Brown** as follows:

> "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."

- 17. In the case of **American Cyanamid Company vs, Ethicon Limited** , however, the House of Lords pointed out the need for courts faced with an application for an Interlocutory Injunction to be satisfied that the claim was not frivolous or vexatious - but that there was a serious question to be tried without attempting to resolve conflicts of evidence, as previously required in the determination of a *prima facie case with probability of success,* as those matters were to be dealt with at trial. [2](#page-6-1) *[1](#page-6-0)*
- 18. In this regard, in **Forum pour le Renforcement de la Société Civile & Others vs. Attorney General of the Republic of Burundi & Another** , this Court adopted the following position, stressing the demonstration of a serious triable issue rather than a *prima facie* case in applications for Interlocutory Injunctions: [3](#page-6-2)

APPLICATION NO. 02 OF 2020

¹ GIELLA V. CASSMAN BROWN & CO. LTD.[1973] E. A. 358.

² (1975) AC 396

³ EACJ Appl. No. ¹⁶ of 2016 "Therefore, 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 that the Claimant's cause of action has substance and reality."

19. It can be deduced from the above quotation that for a serious triable issue to be established, the substantive suit should, on the face of it, without recourse to the merits, disclose a cause of action. On the latter matter, in **British America Tobacco (BAT) vs. The Attorney General of the Republic of Uganda** , this Court held thus: [4](#page-7-0)

> "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 parties' recourse to the Court's interpretive and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights."

20. In the context of the EAC law, a cause of action demonstrating a serious triable issue is established by a claim that the action complained of either constitutes a violation of the national law of a

⁴ EACJ Appl. No. 13 of 2017

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APPLICATION NO. 02 OF 2020

Partner State or an infringement of the Treaty. It is grounded in the Treaty where its parameters are spelt out. In any Application, therefore, the existence of a serious triable issue must be determined by reference to the particulars spelt out under Article 30(1).

- 21. From the above quotations and analysis, the principles governing Interim Orders are:
- a) **whether, on the face of the records, there is a serious triable issue;**
- b) **whether the Applicant stands to suffer an irreparable injury which cannot be adequately compensated by an award of damages;**
- c) **where the balance of convenience lies, if the Court is still in doubt**
- 22. These principles constitute the issues that have to be resolved for the disposal of this Application. We will refer to them as "the first test", *"the second test"* and *"the third test"* in subsequent analysis.

(a) Whether, on the face of the records, there is a serious triable issue

23. In relation to this test, it is argued for the Applicant that the Application arises from **Reference No.24 of 2019**, which is premised on allegation of infringement of the Treaty by the Government of the Republic of Burundi via the violation of Article 20 of the Burundian Land Code. It is further argued that the Reference has a high probability of success. On the other hand,

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the Learned Counsel for the Respondent opposes the Application by asserting that there is no basis for the Court to issue any interim order.

24. We have carefully considered the rival arguments of the Parties. In this respect, Article 30(1) permits a person resident within the EAC to challenge before this Court "any Act, regulation, directive, decision or action of a Partner State ..." on ground of violation of the National Law or infringement of the Treaty. The Applicant, a Burundian National, makes this Application, which arises from **Reference No. 24 of 2019** premised on allegation of infringement of the Treaty via alleged violation the Burundian law. Therefore, there is a serious triable issue.

(b) Whether The Applicant Stands To Suffer An Irreparable Injury Which Cannot Be Adequately Compensated By An Award Of Damages:

25. It is submitted for the Applicant on evidence that as the execution of **Judgement RSTBA 0344** will entail demolition of buildings, elimination of crops, eradication of trees and destruction of tombs, it will occasion such harm as can never be compensated by an award of damages. Thus, it will amount to an irreparable injury. Conversely, it is the contention of the learned Counsel for the Respondent that, on account of the circular letter issued by the Minister of Justice on 11 July 2019, no further steps have been taken toward the execution of **Judgement RSTBA 0344** impugned by the Applicant before this Court. On that ground, it is asserted that there is no any irreparable damage the Applicant will suffer because the execution of the Impugned Judgement is stayed

pending the outcome of the review requested by the Applicant from the Minister of Justice.

- 26. After careful consideration of the evidence on both sides we proceed to arrive at the conclusion on this test by the following deductive reasoning:
- a) **The letter issued by the Minister of Justice on 11 July 2019 enjoins Burundian Judges from executing Judgements submitted for review by the Minister, and has led to the stay of the execution of Judgement RSTBA 0344.**
- b) **The Applicant, though admitting the nature, content, and force of the said letter, applies to this Court for Interim Orders on ground of impending irreparable damage that will ensue upon the execution of the Judgement subject of review by the Minister.**
- c) **Therefore, since Judgement RSTBA 0344 will not be executed before the outcome of the review by the Minister, no irreparable damage will ensue.**
- 27. Accordingly, the Applicant has failed to establish the existence of irreparable damage. The point is resolved in favour of the Respondent.
- 28. Our finding of "no irreparable harm" in the preceding paragraph disposes of the matter. It renders unnecessary the application of the third test. Moreover, such a finding implies that the balance of convenience lies with maintaining the **status quo**. The nature of the

APPLICATION NO. 02 OF 2020

status quo was clarified in **Garden Cottage Foods vs. Milk Marketing Board (1984) AC 130⁵** by Lord Diplock as follows:

"The *status quo* is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant *status quo* to which reference was made in **American Cyanamid** is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion."

29. As per the foregoing Case Law, the applicable *status quo ante* is the state of affairs before a respondent commenced the conduct complained of by the applicant, unless there has been unreasonable delay in filing the application for interim orders, in which case it would be the state of affairs immediately before the application. Therefore, the Applicant for interim orders ought to act quickly. See **Blackstone's Civil Practice 2005, para. 37.29, p.397.**

In light of our finding in respect of the second test, the Applicant's prayer for an order is not granted. **Reference No.24 of 2019** shall be fixed for hearing forthwith.

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APPLICATION NO. 02 OF 2020

E. CONCLUSION

30. **Application No. 2 of 2020** is disallowed with no order as to costs.

It is so ordered.

Dated, signed and Delivered at Arusha (via video Conference) this 7th Day of October 2021.

| YOHANE
MASARA
B. ||-----|-----||
PRINCIPAL
JUDGE ||||| CHARLES
NYAWELLO
DR
O. || JUDGE |||||
		CHARLES NYACHAE A.		JUDGE					MUHUMUZA RICHARD		
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