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

(*Coram: Johnston Busingye PJ, Stella Arach-Amoko DPJ, John Mkwawa J, Jean Bosco Butasi J, Benjamin Kubo J)*

APPLICATION NO. 3 OF 2010
(ARISING FROM REFERENCE NO. 7 OF 2010)

MARY ARIVIZA	**.....**	**IST APPLICANT**
OKOTCH MONDOH	**.....**	**2ND APPLICANT**
	VERSUS	
THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA	**.....**	**IST RESPONDENT**
THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY	**.....**	**2ND RESPONDENT**

DATE: 23RD FEBRUARY, 2011

RULING OF THE COURT

The Applicants in this matter, namely, MARY ARIVIZA and OKOTCH MONDOH, have filed a Reference in this Court basically praying for declaratory orders.

In essence they are praying that the conduct and process of the Referendum as well as the promulgation of the new Constitution in the Republic of Kenya be declared contrary to law, null and void and an infringement of the East African Community Treaty.

However, pending the determination of the Reference, the Applicants have applied for a temporary injunction seeking to restrain the Attorney - General of the Republic of Kenya (hereinafter to be referred to as the "1st Respondent") from receiving, tabling and making or passing any legislation to implement the new Constitution until the hearing and determination of the Reference by this Court. Further to the foregoing they are also praying that any legislation passed by the Parliament of Kenya to implement the new Constitution be stayed until the hearing and determination of the Reference.

It may be necessary at this juncture to state that the Applicants allege that the 1st Respondent has begun the process of implementing the new Constitution by fast-tracking bills through the Parliament of Kenya to the detriment of the Claimants and that the Reference shall be rendered nugatory if the injunction is not granted.

It was submitted by Mrs. Judith Wambui Madahana and Mr. Luka Sawe, the learned advocates for the Applicants, if we may put it in a nutshell, relying heavily on the affidavits sworn by the two applicants, that they have a prima facie case with a probability of success in that the 1st Respondent was responsible for setting in motion an automatic promulgation of a Constitution which is unlawful and not representative of the majority of Kenyans. It is the thrust of their argument on behalf of the Applicants and purportedly all Kenyans, that if the injunction sought is not granted, there is every possibility of enacting laws culminating into total breakdown of law and order and violation of the rule of law and the doctrine of separation of powers. It was submitted further that at the moment the Judiciary has been paralyzed, the Executive is in full control of the constitutional process and the Legislature

does what it desires to do. It is their main argument that all these erode and/or undermine the rule of law.

It is against this background that both learned counsel submitted that if the injunction is not granted Kenyans will suffer irreparable injury and that the balance of convenience tilts in favour of the Applicants.

In rebuttal learned advocates for the Respondents Messrs Kepha Onyiso and Nderi Nduma, vigorously submitted that the Applicants have not established a prima facie case with a probability of success as set out in the case of **GIELLA V CASSMAN BROWN & CO LTD [1973] EA. 358.**

They further submitted that the Applicants have not shown that they will suffer any loss, if at all, in the event the injunction, so sought, is not granted. On the contrary, it is the thirty eight (38) million or so Kenyans who stand to suffer if this Court grants the injunctive orders sought. It is their contention that the balance of convenience favours the respondents.

We have dutifully, and carefully considered the rival submissions by learned Counsel to this application, the evidence and the law on the subject and we have the following to say:

One, the granting or refusal of a temporary injunction, which is an interlocutory order, is an exercise of judicial discretion which must be exercised judiciously. **(See: SARGENT V PATEL (1949) 16 E.A.C.A 63).**

Two, the purpose of a temporary injunction is to preserve the *status quo.* **(See: NOOR MOHAMED HANMOHAMED V KASSAMALI VIRJI MADHANI (1953) 20 EACA 8 and GARDEN COTTAGE FOOD LIMITED V MILK MARKETING BOARD [1984] A.C 130.**

Three, the conditions for the grant of an interlocutory injunction are now well settled in East Africa:-

(a) an applicant must show a prima facie case with a probability of success;

(b) 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;

(c) If the court is in doubt, it will decide an application on the balance of convenience. **(See: GIELLA & CASSMAN BROWN CO. LTD (supra), E. A INDUSTRIES V TRUFOODS, [1972] E A 420, PROF. PETER ANYANG-NYONG'O AND 10 OTHERS V THE ATTORNEY GENERAL OF KENYA AND 5 OTHERS, Ref. No 1 of 2006 (EACJ)** and **EAST AFRICA LAW SOCIETY AND 4 OTHERS V THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA AND 3 OTHERS - Application No. 9 of 2007 (EACJ) arising out of Ref.No. 3 of 2007 (EACJ).**

In light of the aforestated general principles, we now turn to the facts of the present case. Having regard to what stands out clearly from the Applicants' affidavits in support of the Reference, the replying affidavits of the Respondents and the oral submissions of the learned counsel representing the parties, we find that the totality of the facts disclose bona fide serious issues to be investigated by the Court. In other words, there is an arguable case. **(See: AMERICAN CYANAMID CO V ETHICON LTD [1975] 1 ALL ER 504).**

At this stage we must of course refrain from making any determination on the merits of the application or any defence 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. Consequently, we are satisfied that the Applicants have crossed over the first hurdle.

We now come to the second condition, namely, that the Court's intervention is necessary to protect the Applicants from the kind of injury which may be

irreparable and which cannot be compensated by way of damages in the event the application is refused.

Here we must say that since the Referendum in question, a lot of water has run and continues to run under the bridge. Stopping this process by way of a temporary injunction, would occasion more injury should the Court find for the Respondents in the Reference.

In the event, however, that the Court finds for the Applicants, it is our strong view that all that will have been done, can be undone with minimum injury, if any, to either party.

In light of the foregoing, we are of the decided view that no irreparable injury will be occassioned to the Applicants if the order sought is not granted.

In the result, we are amply satisfied that the Applicants have not made out a case for the grant of the order sought. The application is accordingly dismissed. Costs to be in the cause.

It is so ordered.

DATED and DELIVERED at Arusha on this 23rd day of February, 2011.

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JOHNSTON BUSINGYE
PRINCIPAL JUDGE

.....
MARY STELLA ARACH AMOKO
DEPUTY PRINCIPAL JUDGE

.....

JOHN MKWAWA
JUDGE

.....

JEAN BOSCO BUTASI
JUDGE

.....

BENJAMIN P. KUBO
JUDGE