



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



*(Coram: Jean-Bosco Butasi, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, J,
Isaac Lenaola, J, Faustin Ntezilyayo, J)*

APPLICATION NO. 3 OF 2013
(ARISING FROM REFERENCE NO.4 OF 2013)

HENRY KYARIMPA.....APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF THE REPUBLIC OF
UGANDA.....RESPONDENT**

29TH NOVEMBER, 2013

RULING

1. The present Application arises from **Reference No.4 of 2013** where the Applicant had invoked Articles 6, 7(2), 8(1(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community (hereinafter **“the Treaty”**) in seeking orders challenging the signing of a Memorandum of Understanding between the Government of the Republic of Uganda and the then Interested Party, Sino Hydro Corporation Limited (since struck off the proceedings) for construction of the Karuma Hydro Electric Power Plant in Uganda. Of importance at this stage is the prayer in the Reference that the said Memorandum of Understanding should be cancelled and the status quo obtaining before the selection of Sino Hydro Corporation Limited (hereafter **“Sinohydro”**) be reinstated.

2. Before the Reference could be heard, the Applicant filed a Notice of Motion under the provisions of Articles 38(2) and 39 of the Treaty as well as Rules 21, 41 and 73 of this Court’s Rules of Procedure seeking the following orders:

“a) An interim order by way of a temporary injunction doth issue restraining, preventing and/or generally staying the implementation of the 600MW Karuma Hydro Power Project between the Government of Uganda and Sinohydro Corporation Limited or in any way:

 - i) **Performing any of the scheduled activities under the Memorandum of Understanding including contract negotiations and the signing of the EPC contract for the project.**

ii) Government of Uganda negotiating financing terms with China Exim Bank and obtaining disbursements.

iii) Launching the on-site construction activities of the project by Sinohydro Corporation Limited.

iv) Mobilization by Sinohydro Corporation Limited of engineers and technicians for the project to carry out further site investigations, detailed construction planning and design works.

v) Carrying out of preparatory works in annex A to the Memorandum of Understanding until the hearing and final disposal of the main Reference No.4 of 2013.

b)Cost of this application be in the cause.”

3. In the supporting Affidavit sworn on 24th June 2013 by the Applicant and from the grounds in support of the Motion as well as submissions by learned counsel for the Applicant, his case can be summarized as follows:

4. That as a citizen of the Republic of Uganda and East Africa, he has a civic duty to enjoy the observance of the rule of law, good governance, accountability and democracy by the Government of Uganda and any breaches of the Treaty would adversely affect and prejudice his well-being, trade and business in both Uganda and the East African Region. In that regard, as a procurement specialist, he is aware of the laws ,regulations and the practice of public procurement under the Public Procurement and Disposals Act,2003. That as an adviser to M/S China International Water and Electricity Corporation (hereinafter “**China International**”), a competitor to Sinohydro in the bid for the construction of the Karuma Power Plant, he was also aware of , and was involved in the tender process that led to the MOU under attack, hence his interest in it.

5. It is his further case that the bid aforesaid was actually won by China International but a report by the Inspector General of Government (IGG) led to it not being notified of its successful bid and for that reason, it went to Court in **H. C. MISC. Cause No.11 of 2013** (Uganda) and the IGG's report was quashed and the Court further directed that the contract should be awarded to the best evaluated bidder which should have been China International and not Sinohydro or any other bidder.

6. That the Attorney General of Uganda then confirmed the above position by a letter dated 11th April, 2013 to the Ministry of Energy and Mineral Development of the Republic of Uganda but without complying with the said Court order, the contract was instead awarded to Sinohydro ,unilaterally, and the Memorandum of Understanding aforesaid was then signed on 20th June, 2013, a month after the order of the High Court had been issued.

7. That, therefore, the said actions on the part of the Government of Uganda are inconsistent with, and are an infringement of Articles 6, 7(2), 8(1)(c) and 27(1) of the Treaty and unless an interlocutory injunction is granted as prayed, **“M/S China International Water and Electricity Corporation shall suffer irreparable loss, injury and damage that cannot be compensated by way of damages”**

8. In addition that he, the Applicant, stands to **“lose his fees and commission as a procurement specialist”** and there would be loss of confidence in the procurement industry in Uganda and the East African Region generally.

9. The Respondent, the Attorney General of the Republic of Uganda, in his Affidavit in Reply sworn on his behalf on 21st August, 2013, by one Christopher

Gashibarake, Commissioner for Litigation in the Respondent's office, urges the point that the Motion is devoid of merit for reasons that:

- i) when the initial tender process for the construction of the Karuma Hydroelectric Plant was found to have been permeated by allegations of corruption, the IGG intervened and later, the Cabinet of the Republic of Uganda instructed the cancellation of all bids and tenders which action was then effected by the Contracts Committee of the relevant Ministry and this was in line with unspecified provisions of the Public Procurement and Disposals Act of Uganda;
- ii) by the time **H.C. Misc. Application No.11 of 2013** was filed and orders issued, all tenders had been cancelled and the said orders were thereafter rendered **“lifeless and spent”**;
- iii) there is, in any event, an appeal before the Court of Appeal of Uganda against those orders and there are no contempt orders sought or made against the Respondent for any violation of the said Orders;
- iv) the tender awarded to Sinohydro was made within the law and in a transparent manner and all other bidders, including China International, were aware of the cancellation of the initial tender process and;
- v) that the implementation of the MOU has long been undertaken and the present Application is merely being used as a scheme to secure the payment of fees based on a self-enriching private arrangement between the Applicant and China International.
- vi) that, therefore, the Motion ought to be dismissed with costs.

10. We have taken note of the contents of an Affidavit in Rejoinder sworn on 26th September, 2013 by the Applicant together with the annexures thereto. We also note that, at the hearing of the Motion, the Applicant abandoned prayers (a) (i) and (v) and so this Ruling is limited to prayers (a) (ii), (iii), (iv) and (b), the latter being on costs.

11. In submissions, Counsel appearing for both parties agreed that in determining whether to grant or deny the prayer for an interlocutory injunction, the Court has to determine that:

- i) the Applicant has made out a prima facie case with a probability of success;
- ii) failure to grant the injunction will occasion the Applicant irreparable harm that cannot be compensated by an award of damages and;
- iii) If the Court is in doubt, then it will determine the Application on a balance of convenience – see **Giella Vs. Cassman Brown & Company Ltd[1973] E.A 358** and **American Cyanamid Co vs. Ethicon Ltd [1975] All E.R. 504 at 510.**

12. We agree and these are the principles we shall invoke in determining the Motion.

Prima Facie Case

13. The Applicant's argument on this point is that because the contract with Sinohydro was not made in compliance with the Public Procurement and Disposal Act, No.19 of 2003 and Regulations No.70 of 2003, then the Government of Uganda acted in breach of the principles set out in Articles 6, 7

and 8 of the Treaty and specifically the principles relating to good governance, transparency and accountability.

14. Further, that since there were Court Orders issued initially on 18th April, 2013 and later on 22nd April, 2013 by the Deputy Registrar of the High Court of Uganda in **H.C. Misc. Application No. 11 of 2013** and confirmed by Hon. Lady Justice Faith Mwendha on 20th May 2013, the Government of Uganda acted in contempt of the principle of the Rule of Law when it ignored those Orders and proceeded to award the Karuma Hydro Power Plant contract to Sinohydro, unilaterally. This was done, it was argued, contrary to the principle in Article 6(d) of the Treaty that all Partner States in the East African Community shall adhere to the doctrine and principles of rule of Law in their undertakings, and also a breach of Article 38(2) which enjoins them to minimize the damage of any undertaking while a matter in dispute is before this Court.

15. The Respondent took a wholly contrary position for reasons set out above and which we do not need to repeat.

16. On our part, we are aware that at this stage, we cannot delve into the merits of the whole Reference neither should we make any determinate findings as to its substance. Suffice it to say therefore that the issues raised above are not idle and as stated by Lord Denning in the **American Cyanamid Case** (Supra), if the issues raised are arguable then the first hurdle has been passed. Similarly in **Mary Arviza & Others vs. AG of Kenya & Others Application No. 3 of 2010**, this Court stated that upon reading the Reference, replying Affidavits and upon hearing Submissions from the parties, the totality of the facts disclosed bona fide serious issues to be investigated by the Court, but warned itself nonetheless that it must refrain from making a decision on the merits or demerits of the case which should await the full hearing of the Reference.

17. We shall take the same approach and will only restate the fact that the matter placed before us for consideration by the parties would lead us to conclude that the issues raised require more than a cursory glance as they are serious enough to warrant interrogation within the meaning of Article 30 of the Treaty as read with Articles 6(d), 7(2) and 38(2), thereof. In other words, the Reference is neither frivolous nor vexatious.

Irreparable Harm

18. In his submissions on this point, learned counsel for the Applicant argued that contrary to the Respondent's assertion, the Reference is not about a selfish scheme by the Applicant to enrich himself by earning fees for his consultancy work with China International. That in fact, the gist of his complaint is that the principle of the rule of Law has been trampled upon by the actions of the Government of Uganda and the harm thereby caused to the procurement industry, China International and himself can never be compensated by damages.

19. The Respondent on the other hand, was emphatic in response that the Applicant's fees are quantifiable and payable in the event that the Reference succeeds and so is the claim he has made on behalf of China International.

20. We agree with the Respondent on that point for the reason that professional fees are specific and the tender amount for the project is also specific and to state otherwise would be unreasonable. But as regards compensation in damages for breach of the principle of the rule of Law, the Respondent's argument becomes doubtful and we shall shortly explain why. The one on damage to the procurement industry is on the other hand quite far-fetched and speculative and we shall say little of it.

21. On alleged irreparable harm for breach of the principle of the rule of Law in Article 6(d) of the Treaty, we have perused the following decisions submitted by the Applicant:

- a) **Nasser Kiingi & Another vs. AG another, C. A. Const. Appl. No. 29 of 2011** (Uganda) where the Court stated that no amount of monetary compensation can be accorded to a person whose non-derogable rights under the Constitution have been violated.
- b) **Grace Bororoza & 53 Others vs. Dr. Kasirivu & 51 Others** where the holding in (a) above was repeated and the Court went further to hold that violation of non-derogable rights is “**irreversible and cannot be addressed by payment of any amount of money.**”

22. We must say that the argument above, made in the context of the Bill of Rights in a Constitution, has not been sufficiently addressed to align it with the principles in the Treaty which Partner States must adhere to. It is therefore debatable whether the argument made can be sustained in that context but taking all matters into perspective, we are satisfied that whereas some harm may afflict the Applicant if the injunction is not granted, largely, that harm can be compensated in damages.

Balance of Convenience

23. On this issue, little was said by the Applicant but we gather that for reasons that the Treaty was allegedly violated and court orders were disobeyed, the balance of convenience must tilt in his favour.

24. The Respondent on the other hand argued that the project was a God-send and that its existence will bring forth employment opportunities, social amenities, an improved road network and an enhanced standard of living for the people of Uganda. That therefore, the balance of convenience is in his favour and not in

favour of the Applicant who will not be prejudiced in any way should the orders be denied.

25. We have considered the matter before us in totality and whatever the merits or otherwise of the Applicant's case, the construction of the Karuma Hydro Power Plan has already commenced. Funds have certainly been pumped into it and the consequences of stoppage may not be bearable to the tax payer in Uganda.

26. Further, a number of parties have been named as having an interest in this matter but they are not before us. They include the principal player in the offending MOU, namely, Sinohydro as well as China International and Exim Bank China. To issue Orders that may affect them adversely without hearing them would not enhance the rule of Law and would instead violate it. In the end and with extreme reluctance, we are minded to the position that the balance of convenience must tilt in favour of the Respondent.

27. In saying so, we are aware that the grant of an interlocutory injunction is an exercise of the Court's discretion which must be exercised judiciously at all times - see **Kahoho vs. Secretary General of the EAC, EACJ Application No. 5 of 2012.**

28. In exercise of that discretion in the present case, we find that we are unable to grant the Motion as prayed but will instead dismiss it with a further order that costs shall abide the determination of the Reference.

29. However and in the wider interests of justice, we hereby order that to bring the whole controversy to a quick resolution, **Reference No. 4 of 2013** shall be fast-tracked and heard and determined in the earliest.

30. Orders accordingly.

Dated, Delivered and Signed at Arusha this 29TH day of November, 2013

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JEAN BOSCO BUTASI
PRINCIPAL JUDGE

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MARY STELLA ARACH-AMOKO
DEPUTY PRINCIPAL JUDGE

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JOHN MKWAWA
JUDGE

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ISAAC LENAOLA
JUDGE

.....
FAUSTIN NTEZILYAYO
JUDGE