



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

(Coram: Isaac Lenaola, DPJ, Faustin Ntezilyayo, J, Monica K. Mugenyi J.)



APPLICATION NO. 5 OF 2013

(Arising from Reference No. 9 of 2012)

VENANT MASENGE.....APPLICANT

VERSUS

**1. THE ATTORNEY GENERAL OF
THE REPUBLIC OF BURUNDI..... RESPONDENT**

18TH JUNE 2014

RULING OF THE COURT

1. The present Application, filed on 30th October 2013, arises from **Reference No.9 of 2012** which was filed on 10th August 2012 under Articles 3(3)(b), 6(d), 7(2), 8(4), 27(1) and 30(1) & (2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as “ **the Treaty**”) and where the Applicant seeks among other orders a declaration that the occupation and exploitation of his land property by the Respondent’s agents is unlawful and constitutes an infringement of Articles 6(d) and 7(2) of the Treaty.

2. Before the hearing of the Reference, the Applicant, Venant MASENGE, filed a Notice of Motion under Rules 1(2) and 2(2) (3) & (4) of the EACJ Rules of Procedure seeking the following orders:
 - “a) A temporary injunction restraining and prohibiting the Respondent from using the property which is in conflict or changing it in any way;**

 - b) An order of an injunction nature to stop immediately all the constructions undergoing on the land.**

 - c) The Court to make such further or other orders as may be necessary in the circumstances of the case;**

 - d) The costs of this Application be provided for.”**

3. The Applicant’s case, as it is apparent from the supporting Affidavit sworn on 18th October 2013 by himself, and from the

grounds in support of the Motion, as well as submissions by his Counsel is as follows:

4. The Applicant, a natural person and a resident of Burundi, filed a Reference on 10th August 2012 contending that he is the owner of a land property measuring 24 hectares in the Commune of Gihanga, in Bubanza Province and is the holder of a legal title to that property. He avers that following encroachment onto his land by Mr. Anthere NZOHABONAYO, a local troublemaker and Mr. Bonaventure NTIRANDEKURA, the Mayor of Gihanga Commune, together with their supporters, he referred the matter to the Minister of Home Affairs on 12th March 2012 seeking for his authority to take all the necessary orders to restore completely and peacefully his possession of land. He further states that the legal notice to which the Minister was to respond to expired in 3 months, that is on 12th June 2012 and that, despite the Applicant's letter to the said Minister, the latter has failed to take any action to protect his property rights over the land, thus violating the fundamental principles under Article 6(d) of the Treaty. The Applicant also faults the Respondent for continuing to exploit, dispose of the property and undertake new constructions on it while ignoring the fact that a Reference regarding the dispute is pending before this Court. He points out that the situation is worsening since the Governor of BUBANZA Province is parcelling out and selling the litigious property; that a Muslim Mosque is already erected on it; that an Association called AGAKURA is digging out ponds for fish farming; that a football

stadium is under construction; that a second building to shelter a Primary School is under construction and even a new foundation for a third is underway.

5. On 30th October 2013, the Applicant filed the present Application seeking injunction orders restraining and prohibiting the Government of Burundi from using his land or changing it in any way. He seeks to immediately stop all the constructions on the disputed land.
6. The Application was scheduled for hearing on 04th February 2014, and on 30th January 2014, Counsel for the Applicant, Mr. Isidore Rufyikiri, sent a request for adjournment of the hearing stating that he was unable to appear before the Court because the Government of Burundi had taken a decision to restrain his movement and forbade him from crossing the Burundian borders. Although the Respondent wanted to proceed *ex parte*, the Court adjourned the matter to allow the Applicant get another lawyer and the Respondent to file his response to the Application.
7. The Application in any event was heard on 22nd May 2014 and the Applicant was represented by Mr. Horace NCUTIYUMUHETO, while Mr. Elisha MWANSASU appeared for the Respondent.
8. In a nutshell, Counsel for the Applicant contends that, despite continuous actions undertaken by the Applicant seeking the intervention of different Burundian administrative authorities at different levels as chronologically detailed in the Applicant's

Affidavit, in order to ensure the protection of his property rights on the disputed land, his request has fallen on deaf ears. That rather, actions leading to dispossession of his land property kept escalating despite his holding of a formal title of property ownership duly issued by the Registrar of Land Titles of the Republic of Burundi.

9. It is Counsel's argument that the Court enjoys jurisdiction to make any order that may be necessary for the ends of justice, according to the provisions of Rule 1 (2) of the Court's Rules which stipulates that: **'Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court'**".
10. He further stated that the Application was made by Motion on the ground that the delay caused by proceedings in the ordinary way would or might entail irreparable injustice for the Applicant. To buttress his argument, he relied on Rule 21(2) of the Court's Rules according to which, the Court, if satisfied that the delay caused by proceedings would cause such irreparable injustice, may hear the Motion and make any ex parte order upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court deems just.
11. In opposition to the Motion, Counsel for the Respondent, first of all, contended that there is a case (i.e. **RAC6190**), with similar prayers as in the Motion before us pending in the

Administrative Court of Bujumbura, which Court has full jurisdiction over land disputes involving the Government.

12. Counsel went on to challenge the Motion and relies on Article 27(1) & (2) of the Treaty in arguing that since Partner States have not up to now concluded a protocol to operationalise the extended jurisdiction to include land matters, this Court has no jurisdiction to make an order to demolish the constructions built on the disputed land or to stop all activities taking place on that land as requested by the Applicant. For ease of reference, Article 27 of the Treaty is reproduced below.

Article 27:

“1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Court at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.”

13. The learned Counsel closed his opposing arguments to the Motion by contending that the Applicant acquired and

occupied the land in dispute illegally as shown and proved by the National Commission for Land and other Assets which, he argued, is in any event the competent authority to deal with this matter.

14. It is worth noting that both parties failed to refer to any authority in support of their opposing contentions.
15. On our part, we have carefully reviewed the arguments on the issue at hand presented by both parties. At this stage, the Court has to examine whether or not it should grant interlocutory orders sought, without delving into the merits of the main issues that have yet to be determined in the Reference.
16. It should also be recalled that the purpose of granting an interlocutory injunction is to avoid or minimise loss to an applicant/ plaintiff while the substantive case proceeds to final determination. The loss is avoided or minimised by ordering the defendant to stop a controversial activity so that the *status quo* is preserved while the substantive case proceeds to finality.
17. The considerations that the Court bears in mind when exercising its discretion to grant or not to grant interlocutory injunction order have been outlined in the cases of **Giella Vs. Cassman Brown & Co Ltd (1973) EA 358** and **American Cyanamid Co Vs. Ethicon Ltd [1975] All E.R. 504 at 510**. The three conditions that need to be satisfied were set out in these cases as hereunder:

- a) An Applicant must show a *prima facie* case with a probability of success;
- b) An injunction will not be granted unless the Applicant might otherwise suffer irreparable injury which would not be compensated by award of damages; and
- c) When the Court is in doubt, it will decide the application on the balance of convenience.

18. Since the **Giella** and the **American Cyanamid Co** cases, the requirements for granting or refusing temporary injunctions have been subject to various interpretations when their application was invoked before courts. While reviewing conditions for grant of temporary injunctions, this Court found, in **Mbidde Foundation Ltd & Rt. Hon. Margaret Zziwa Vs The Secretary General of the East African Community & The Attorney General of Uganda, EACJ Application No. 5 of 2014**, that one authority which convincingly sums up the present law on grant of interlocutory injunctions is Halisbury's Laws of England, Vol. 11 (2009), 5th Edition, para. 385. It states that: **“On an application for an interlocutory injunction the court must be satisfied that there is a serious question to be tried. The material available to court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial. The former requirement that the claimant should establish a strong prima facie case for a permanent**

injunction before the court would grant an interim injunction has been removed.”

We agree with this more progressive approach and will invoke these principles in determining the present Motion.

19. Before examining whether the Applicant’s Motion meets the abovementioned conditions, we wish to point out, as regards the question of jurisdiction raised by Counsel for the Respondent, that at this stage of the proceedings, the Court will not address this matter which is one of the issues for determination in the Reference. But suffice it to say that as long as a party moves the Court asking for the interpretation of the Treaty in order to determine whether or not, an act, regulation, directive, decision or action of a Partner State is unlawful or is an infringement of the provisions of the Treaty, the Court cannot refrain from fulfilling its mandate as provided by Article 30 (1) as read together with Articles 23 (1) and 27(1) of the Treaty.

20. In the instant Application, the Applicant seeks injunction orders restraining and prohibiting the Government of Burundi from undertaking actions which amount to encroachment of his land property. His rights to that land have been confirmed by a land title duly issued by the Registrar of Land Tiles of Burundi. This position, however, is denied strongly by Counsel for the Respondent who alleges that the Applicant has no right to

the disputed land since he acquired title to, and occupied the said land illegally.

21. We have reviewed the material submitted by both parties, and especially the 2011 Burundi Land Act, the Constitution of Burundi and the Registration Certificate of a land property Vol. ECCXXV Portfolio 134 issued on 9th August 2009 by the Registrar of Land Titles. The latter was registered in the name of Mr. Venant Masenge, the Applicant. Therefore, at a *prima facie* level, the title may serve as an indication that the Applicant may have an interest in the property. In making this finding, we have also taken note of the fact that the Respondent has taken no action to revoke the Applicant's title and to-date no legal proceedings have been undertaken to show that he unlawfully acquired the said title and/or that he unlawfully occupied the land.

22. In light of the foregoing, subject to more substantial arguments at the hearing of the Reference, it is our considered view that the Applicant's claim on the disputed land raises serious triable issues that warrant interrogation within the meaning of Article 30 of the Treaty as read together with Articles 6(d) and 7(2) thereof.

23. As for the Applicant's prayer that the interlocutory injunction order also ought to be granted on the ground that the delay caused by proceedings in the ordinary way

would or might entail irreparable injustice for him, the latter has not shown in his submissions or affidavit that if the injunction is not granted he will suffer irreparable injury that cannot be compensated by award of damages. Considering the case at issue, we are of the view that any potential injury that the Applicant may suffer if the injunction is not granted is quantifiable and damages would be an appropriate compensation. Consequently, the Court is also of the opinion that although his reference raises triable issues, the balance of convenience does not lie in favour of the Applicant and for obvious reasons.

24. Lastly, given the foregoing, and bearing in mind 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, EACJ Application No.5 of 2012**), we decline to grant the interlocutory injunction orders sought and do hereby dismiss this Application.

25. The cost thereof shall abide the outcome of the Reference.

It is so ordered

Dated, Delivered and Signed at Arusha this 18th day of June, 2014.

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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO
JUDGE

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MONICA K. MUGENYI
JUDGE