



**EAST AFRICAN COURT OF JUSTICE
(FIRST INSTANCE DIVISION AT ARUSHA)**

(Coram: I. Lenaola, DPJ; J. Mkwawa, J (Rtd); F. Ntezilyayo, J)

**APPLICATION NO. 4 OF 2014
(ARISING FROM REFERENCE NO. 2 OF 2014)**

**IN THE MATTER OF CONFERRING A JUDICIARY JURISDICTION TO THE
EXECUTIVE**

AND

**IN THE MATTER OF DENYING THE PRINCIPLE OF THE INDEPENDENCE OF THE
JUDICIARY**

AND

IN THE MATTER OF DENYING THE RIGHT TO A FAIR TRIAL

AND

**IN THE MATTER OF A BREACH OF THE FUNDAMENTAL AND OPERATIONAL
PRINCIPLES OF THE TREATY FOR THE ESTABLISHMENT OF THE EAST
AFRICAN COMMUNITY BY THE REPUBLIC OF BURUNDI
BETWEEN**

- | | |
|---------------------------------|--------------|
| 1. THE UPRONA PARTY | |
| 2. MR. GABRIEL SINARINZI | } APPLICANTS |
| 3. MR. ONESIME KABAYABAYA | |

AND

- | | |
|---|----------------------------|
| 1. ATTORNEY GENERAL OF THE REPUBLIC OF
BURUNDI | 1 ST RESPONDENT |
| 2. THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY | 2 ND RESPONDENT |

15th August 2014

RULING

Introduction

1. The Notice of Motion dated 28th February 2014 is premised on the provisions of Article 39 of the Treaty for the Establishment of the East African Community (hereinafter “**the Treaty**”) and Rule 73 (1) and (2) of the East African Court of Justice Rules of Procedure (hereinafter “**the Rules**”) It arises out of **Reference No. 2 of 2014** wherein the Applicants challenge *inter – alia* the creation of a National Commission for Lands and other Assets (hereinafter “**the Commission**”) in the Republic of Burundi vide **Act No. 1/31** which came into effect on 31st December 2013. One of the complaints made with regard thereto, is that the said Act in effect granted the Commission powers akin to those of the Judiciary which is a violation and a breach of Articles 6(d) and 7 (2) of the Treaty.

2. In the Notice of Motion aforesaid the Applicants now seek the following **ORDERS**:

“1.Pending the hearing and determination of the Reference, this Honourable Court be pleased to grant an interim Ex-Parte order to stay the enforcement of the Act No. 1/31 of 31st December 2013 in the Republic of Burundi.

2.An Order that pending hearing and determination of the matter Inter-Partes, this Honourable Court be pleased to grant an Interim Ex-Parte order that the National Commission of Lands and other assets is no more competent to entertain and determine the matters related to lands and other assets.

3.An Order that pending the hearing and determination of the matter Inter-Partes, this Honourable Court be pleased to grant an Interim Ex-Parte Order

that from now up to the final judgment the Ordinary jurisdictions of the Republic of Burundi will be competent to entertain and determine all litigious matters related to lands and other assets.

4.The costs of this Application be met by the Respondent.

5.This Honourable Court be pleased to order such further or other orders as it deems fit and just in the circumstances.”

Case and Submission for the Applicants

3. The Applicants filed Affidavits in support sworn on February 2014 by one, Prof. Charles Nditije, legal representative of **UPRONA** Party, as well as separate Affidavits by Gabriel Sinarinzi and Onesime Kabayabaya, the 2nd and 3rd Applicants, respectively, sworn on the same date. A further Affidavit was also sworn by Onesime Kabayabaya on 16th April 2014.
4. Mr. Vital Nshimirimana, learned Counsel for the Applicants, also made elaborate submissions on their behalf and in a nutshell the case for the Applicants is as set out herebelow.
5. Firstly, from the grounds on the face of the Notice of Motion under consideration and from a casual reading of **Reference No. 2 of 2014**, the main issue in contention is whether the creation of the Commission is an affront to the general principle of the need for an independent and impartial judiciary in every democracy. The argument made by the Applicants in that regard, is that the said principle was not upheld in the establishment of the Commission. The reasons made for that argument are that its

decisions are final, are immediately enforceable notwithstanding any appeal and in any event that any such appeal is to a non-existent Special court.

6. Secondly, that the Commission is lacking in independence because its members are appointed by the President of the Republic of Burundi and act under his direct supervision and report directly to him on the sensitive issue of land.
7. Thirdly, the proceedings of the Commission do not respect the right to legal representation and that advocates are barred from appearing before it. The net effect of adoption of such a procedure is that the right to a fair trial is negated, so the Applicants argue.
8. Fourthly, that although the Commission is a purely administrative organ, its creation is a violation of the doctrine of separation of powers and has allowed the Executive to intrude into space reserved for the Judiciary and thereby unlawfully substitute itself for the judiciary. In addition, Mr. Nshimirimana stated, on this aspect of the case, that the establishment of the Commission has led to a duplication of regimes as some of the land disputes pending before courts of law are also presented for determination by the Commission, thus creating confusion as to which regime supersedes the other.
9. Fifthly, that the actions of the Government of the Republic of Burundi in setting up the Commission is a breach of the fundamental and operational principles of the Treaty including the Rule of Law, Good Governance and the principles of Human Rights and therefore pending the hearing and determination of **Reference No. 2 of 2014**, interim reliefs as set out above should be granted to forestall any further alleged suffering by real and potential victims of the Commission's decisions.

10 . Lastly, in his Affidavit, Mr. Kabayabaya deponed that Prof. Nditije was entitled to swear the Affidavit in support of the Notice of Motion as he had been legally appointed by the Central Committee of **UPRONA** Party as the President and legal representative of the Party after the amendment of its Constitution on 8th August 2009. Further, that Mr. Nshimirimana had also been lawfully appointed to act for the Applicants in this Court.

Case and Submissions for the 1st Respondent

11 . The 1st Respondent, the Attorney-General of Burundi opposes the Application and filed a Replying Affidavit sworn on 1st April 2014 by Sylvestre Nyanddwi, Permanent Secretary in the Ministry of Justice of the Republic of Burundi in that regard. Mr. Nestor Kayobera, Director, Judicial Organisation of the Office of Attorney-General of Burundi ,argued its case which in a nutshell is that the Application is speculative and without merit because there are no facts upon which it is founded.

12. Regarding the specific claim that there is no mechanism for appeals from the decisions of the Commission, the 1st Respondent's answer is that whereas it is true that the Special Court to handle such appeals has not been created, all such appeals are presently being handled by competent courts and tribunals in Burundi and therefore there is no lacunae in the legal process at all.

13. The 1st Respondent has further denied the argument that advocates are not granted audience before the Commission and that there is no evidence that any litigant has been denied the right to fair representation in any such proceeding.

14. On the Applicants' submission that the Commission has invaded the space constitutionally reserved for the Judiciary, the 1st Respondent has argued that the doctrine of separation of power is alive and well in the Republic of Burundi and that its Constitution clearly demarcates powers as between the Executive and the Judiciary.

15. As to the background for the creation of the Commission, Mr. Nyandwi deponed that it was a result of the 2000 Arusha Peace and Reconciliation Agreement for Burundi and is a popular initiative supported by a majority of the people of Burundi and not one person has challenged its legality in any court in Burundi.

17. It is also the 1st Respondent's contention that none of the provisions of the Treaty have been breached or violated and the Applicants are malicious persons bent on reaping from lands unlawfully acquired since 1972 when Burundi descended into ethnic violence forcing many people to flee their lands. That therefore, this Court ought not to reward them by granting the orders sought and instead the Application should be dismissed with costs.

18. In his submissions, Mr. Kayobera made a lot out of the place of Prof. Nditije in **UPRONA** and argued that he had no mandate in law to represent that Party and that the Application is, for that reason alone, incompetent.

Case and Submissions for the 2nd Respondent

19. By Submissions filed on 5th May 2014, the 2nd Respondent, Secretary-General of the East African Community (EAC) opposes the Motion and states from the outset that although no orders are sought against him, the Application should still be dismissed as it is not tenable within the Law of the EAC. In any event, that he has already constituted a team to visit Burundi and verify the many claims regarding abuses in land ownership and generally the governance situation in Burundi. The team is yet to do so and therefore grant of interim orders before such a report is presented to him would not be a tenable proposition.

20. Dr. Anthony Kafumbe, Counsel for the 2nd Respondent further submitted that the orders sought are in the nature of injunctions and are therefore a matter of judicial discretion. He relies on the decisions in **Sergent vs Patel [1972] 16 EALA 63** and **Giella vs Cassman Brown [1973] E.A. 358** to argue that none of the orders sought should therefore be granted.

In the end, the 2nd Respondent seeks that the Application should be dismissed with costs.

Determination

21. The Notice of Motion before us is brought under the provisions of Article 39 of the Treaty and Rule 73 (1) and (2) of the Rules of Procedure of this Court which both grant the Court the jurisdiction to grant “**any interim orders or issue any directions which it**

considers necessary or desirable” on such terms as it deems fit. This mean that the Court has the unfettered discretion to grant or refuse to grant such orders and as is the law, discretion must always be exercised judiciously. In saying so, we are in agreement with the decision of Koome, J. A. in **Maguna Andu Self Selection Stores Ltd vs Albert Ouma Akeyo [2014] eKIr** that:

“...judicial discretion is always done on a reasonable basis; it must be based on facts or laws that demonstrate that the applicant is deserving of the orders...”

22. We agree and with the above background in mind and looking at the Application before us and specifically the prayers sought, the language is less than elegant and created confusion at the hearing. We say so, with respect, because it seems that the Applicants are seeking “**ex-parte**” orders at the “**inter-partes**” stage and which by their tenure and effect, also seem to be “**final**” in nature. Interim orders under both Article 39 and Rule 73 (1) and (2) are precisely that; interim pending the final decision in a reference hence the words in Article 39 that “**interim orders and other directions issued by the Court shall have the same effect as as decisions of the Court.**” Decisions are, therefore, final but interim orders are not final although they are as binding as final decisions.

23. Further, as was clear from the submissions of Dr. Kafumbe for the 2nd Respondent, Parties were unclear as to what principles of law should be applicable to the Motion. Neither Counsel for the Applicants nor Counsel for the 1st Respondent addressed that issue but Dr. Kafumbe in his submissions approached all the prayers as if they were

seeking an interlocutory injunction hence his reliance on the three principles in Giella vs Cassman Brown (supra) i.e

- (i) that an applicant must demonstrate a prima facie case with the probability of success.
- (ii) that damages may not be an adequate remedy if the injunction is not granted
- (iii) If the Court is in doubt, then it shall determine the application on a balance of convenience.

24. On our part it is clear to us that prayer (a) of the Application seeks orders of **stay** of the enforcement of **Act No. 1/31** of 31st December 2013.

Prayer (b) on the other hand, is worded in the nature of a **declaratory order** that the Commission is no longer competent to entertain and determine matters related to land and other assets. Prayer (c) seems to be seeking a **mandatory injunction** that pending the final judgment in Reference No. 2 of 2014, the ordinary jurisdictions (presumably the National Courts of Burundi) shall be compelled to entertain and determine all litigious matters related to land and other assets.

25. Our rendition of the prayers above is borne by the Court record of 18th June 2014 when we sought clarification from Mr.Nshimirimana on the issue. If that be so, therein lies the first difficulty that the Applicants must contend with. We say so, because prayer (b) as framed and argued cannot be granted as an interim order. “**Interim Order**” is defined in Black’s Law Dictionary, 9th Edition as:

“a temporary court decree that remains in effect for a specified time until a specified event.”

27. When, therefore, the Applicants pray that an “**interim ex-parte order that the National Commission for Lands and other assets is no longer competent to entertain and determine the matters related to lands and other assets**”, should be granted at the interlocutory stage of the proceedings, even with the misplaced words, “**interim ex-parte order**” in that prayer, the final effect of any issuance of the order would be a **final** declaration on the issue which would not be proper in the circumstance of this case. We say so because we are yet to hear the merits of the case as set out in **Reference No. 2 of 2014** and to issue prayer (b) at this stage, would be equal to pre-judging it without hearing the other Parties to the said Reference.

28. Turning back to prayer (a) of the Application, it is not in doubt that **Act No. 1/31** of 31st December 2013 has already come into operation and the Commission has been set up and is functional. The 1st Respondent by the Affidavit of Mr. Nyanddwi has stated that **Act No. 1/31** is actually an amendment of **Act No. 1/01** enacted on 4th January 2011 and which itself had amended **Act No. 1/17** enacted on 4th December 2009 which provides for the mandate, composition, organization and functions of the Commission. The latter averment has not been denied, neither has the submission by Dr. Kafumbe that the process of the Commission should not be interrupted so as to avert chaos, been contested. In other words, the Commission seems to have been in place from 2009 or thereabouts and certainly it is in place and working.

29. On our part and in the totality of things, at this stage, we cannot delve into the propriety or legality of **Act No 1/31**, but suffice it to say that the Commission now in question is a creature of the Legislature of Burundi within its constitutional mandate. We do not at all have such persuasive material placed before us to warrant the drastic

action of suspending the law without hearing all parties on the merits. There is also the question of jurisdiction raised by both Respondents and to swing the sword of justice one way at the interlocutory stage would be unjust and this Court declines the invitation to do so.

30. Regarding prayer (c) of the Application, we understood the Applicants to be saying that in fact some land disputes are being handled by both the National Courts of Burundi and the National Commission on Land and Other Assets. But prayer (c) is specific; that pending the judgment in **Reference No. 2 of 2014**, “**all litigious matters related to lands and other assets**” should be entertained and be determined by the ordinary courts of Burundi.

Upon considering the prayer above, we find tremendous difficulty in granting it at this stage. We say so, with respect, because the Commission is still a statutory institution under the laws of Burundi, despite displeasure expressed by the Applicants. One of the prayers in **Reference No. 2 of 2014**, is that **Act No. 1/31** should be annulled and that therefore means that all land disputes would thereafter be handled by National Courts in Burundi. Suppose we grant prayer (c) now and in the Reference we decline to annul **Act No. 1/31**. What would be the effect of our decision? Obviously, the Court, as the 1st Respondent has argued, would have perpetuated a chaotic procedural and legal situation, a position we refuse to put ourselves in. As we have stated above, the Commission is functioning and has been for some years. It is best therefore that the situation as obtaining today should continue to obtain and the Court will render itself fully and finally on both **Act No. 1/31** and its processes including the work of the

Commission, once **Reference No. 2 of 2014** is heard and determined on its merits. That, in our view, is the best course of action in the wider interests of justice.

31. Having disposed of the main issues in the Application, we do not see any reason to delve into the issue whether Prof. Ndetije is the legal representative of **UPRONA** Party and whether Mr. Nshimirimana was properly appointed to act in these proceedings.

Conclusion

32. Land is an emotive issue in the East African region and Courts generally bear that fact in mind when settling disputes tied to land, but as regards the Application before us, we have said why we see no merit in it and we shall dismiss it as prayed by the Respondents.

33. Regarding the costs, let the same abide the outcome of **Reference No. 2 of 2014**.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ARUSHA THISDAY OF2014

.....
ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

.....
***JOHN MKWAWA**
JUDGE (RETIRED)

.....
FAUSTIN NTEZILYAYO
JUDGE

*NB: Hon.Mr.Justice John Mkwawa participated in the hearing and deliberations leading to this Ruling. He retired from the Court on 26th June 2014.

