IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, J & Fakihi A. Jundu, J)

APPLICATION NO. 11 OF 2016

(Arising from Reference No. 8 of 2016)

CASTRO PIUS SHIRIMA.....APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI.....1ST RESPONDENT**
2. **THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....2ND RESPONDENT**
3. **THE ATTORNEY GENERAL OF THE REPUBLIC OF RWANDA.....3RD RESPONDENT**
4. **THE ATTORNEY GENERAL OF THE REPUBLIC OF SOUTH SUDAN.....4TH RESPONDENT**
5. **THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA.....5TH RESPONDENT**
6. **THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....6TH RESPONDENT**
7. **THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY .....7TH RESPONDENT**

6TH JULY 2017

RULING OF THE COURT

A. INTRODUCTION

1. This Application was filed on 31st October 2016 by Mr. Castro Pius Shirima (hereinafter referred to as the "**Applicant**"), a Tanzania citizen and resident in Arusha.

2. The Respondents are the Attorneys General of all the six East African Community Partner States who are sued in their capacities as the Principal Legal Advisors of their respective Governments and the Secretary General of the East African Community who is sued as the Principal Executive Officer of the Community.

3. The Application arises from **Reference No. 8 of 2016** and is premised on Article 39 of the East African Community (hereinafter referred to as the "**Treaty**") and Rules 21(1)(4) and 73 of the East African Court of Justice Rules of Procedure 2013(hereinafter referred to as the "**Rules**").

4. The Applicant has approached this Court under a certificate of urgency whereby he stated that **"the hearing of the Application was of extremely urgency due to the fact that the 2nd Respondent went on ratifying the Economic Partnership Agreement between the East African Community and the European Union on 20th September 2016 despite the 17th East African Community Extra-Ordinary Summit decision to halt the signing of the EPA for further consultation in three-month period." [sic].** He further stated that he stood to suffer irreparable economic loss and serious violation of his rights under the Treaty in case of further signatures and /or ratification to the Economic Partnership Agreement (hereinafter "EPA") between the East

African Community (hereinafter "the Community) and the European Union (hereinafter "the EU") before the determination of this Application.

5. In his Notice of Motion, the Applicant has therefore prayed for the following orders:

> ***"i. An order for stay of signing the Economic Partnership Agreement with the European Union by the first, fourth, fifth and sixth Respondents as proposed by the 17th EAC Extraordinary Summit's resolution on 8th September 2016 at Dar-es- Salaam, on the ground that:***
>
> ***a. Signing such agreement by the Second and Third Respondent has violated and/or will continue violating the letter and spirit of the East African Community Treaty if signed by the remaining Respondents, respectively.***
>
> ***b. The signing of the Economic Partnership Agreement demands an intervention of the court to resolve the legal question that food security is the backbone of East African economies yet at the same time European Union subsidizes domestic farmers; which may expose the East African farmers to unfair competition.***
>
> ***c. If not stayed, any further signature will allow ratification and regional application of the Agreement in contravention which will most likely displace East African Community products from the market thereby undermining the***

industrialization policy framework including tariff regimes.

d. There is no any compensatory remedy or damages that will reverse the impacts of application of this Agreement in the region in event that the court does not intervene pending the hearing of the main reference.

ii. An order directing the second and third Respondents herein to stay forthwith any pending procedures and/or processes over the agreement they have signed until final decisions on the main reference is delivered;

iii. An order directing the seventh Respondent to withdraw forthwith any negotiations initiated with the European Union in view of the 17th Extra-ordinary Summit's decision until final decision on the main reference is delivered;

iv. And for an order that the costs of and incidental to this application abide the result of the case." **[sic]**

6. When the Application came for hearing on 24th November 2016, it was noted that the Applicant had not served some of the Respondents with the Reference and the Application, namely the Republic of Burundi, the Republic of Rwanda and the Republic of South Sudan. The Court therefore directed the Applicant to properly serve them with the Reference and the instant Application. The Court also directed that preliminary objections filed against the Application should be argued at the hearing of the

Application. The Application was subsequently heard on 13th March 2017.

B. REPRESENTATION

7. The Applicant appeared in person at the hearing of the Application on 24th November 2016, but on 13th March 2017, Mr. Moto Matiko Mabange appeared as the Applicant's Agent. The 1st Respondent was represented by Mr. Nestor Kayobera; Ms. Jennifer Gitiri and Mr. Maurice Ogosso appeared for the 2nd Respondent; the 3rd Respondent was represented by Mr. Nicholas Ntarugera and George Karemera; Mr. Jeremiah Swaka Moses appeared for the 4th Respondent; the 5th Respondent was represented by Mr. Edson Mweyunge, Mr. Mark Mulwambo and Mr. David Kakwaya; Mr. Elisha Bafilawala, Mr. Gerald Batanda and Ms. Sylvia Cheptoris represented the 6th Respondent, while the Secretary General of the East African Community was represented by Mr. Stephen Agaba.

C. CASE & SUBMISSIONS FOR THE APPLICANT

8. The Applicant's case is as stated in his Application and his supporting Affidavit filed on 31st October 2016. His agent, Mr Mabange also made oral submissions.

9. On why he had sued the Respondents including specifically the 4th Respondent, the Applicant deponed that the 4th Respondent was a Member State of the Community with full and equal rights, obligations and privileges from 5th September 2016 and was therefore properly sued in the Reference as a respondent.

10. He also asserted that the 7th Respondent, as the Principal Executive Officer of the Community was duty-bound under the Treaty, to provide advice and oversee the implementation of various activities and/or programmes of the Community.

11. He further stated that there have been formal trade agreements between EU and the East African region, which agreements maintain non-reciprocal tariff preference and that the latter was contested at the World Trade Organization (WTO) as being discriminatory against some members.

12. He averred that out of the five EAC Member States, only Kenya is classified by the World Bank as a developing country and that the four remaining countries are in the category of least developed countries.

13. He also stated that on 23rd June 2000, the African, Caribbean and Pacific Group of States and the EU signed the Cotonou Partnership Agreement and committed to negotiate a reciprocal Economic Partnership Agreement (EPA). He added that on the part of the Community, the negotiations that started in 2002 were carried out under the bloc auspices.

14. It is the Applicant's further submission that exports from the 2nd Respondent faced tariff rates between five and twenty-two per cent and that those from the remaining Community members were exempted from tariffs under the Everything But Arms (EBA) arrangement.

15. The Applicant further contended that the EU had unilaterally set 1st October 2014 as the deadline for the conclusion of EPA negotiations and that it had threatened that after that date, exports

from East Africa would lose preferential treatment and would be subject to the Generalized Scheme of Preferences.

16. He also submitted that on 13th October 2007, the Community directed its member States to harmonize their positions on the EPA and submit harmonized market access offer to the EU, but that it was not possible to conclude the full EPA negotiations by the 1st October 2014 deadline; that indeed, negotiations were concluded shortly after the said deadline and the EPA was only initialled on 14th October 2014. He also stated that, specifically, the 2nd Respondent's exports were put back on the Preferential List on 25th December 2014.

17. It is also the Applicant's submission that the Community had committed itself to liberalising eighty-two per cent of imports from the EU over a transitional period of twenty-five years, and that the European Council did authorize the initial application and implementation of EAC-EU EPA on 20th June 2016.

18. He further pointed out that the East African Legislative Assembly (EALA) had, on several occasions declared that the EPA framework had to be subjected to National Parliaments for approval before signing of the resultant Agreement and added that EALA had also resolved that the signing of the EPA should be delayed until contentious matters between the negotiating parties to the Agreement are formally and fully resolved.

19. The Applicant also recalled that the Community had enacted an Industrialization Policy running from 2012 to 2032 and also established the East African Industrialization Strategy for the same period. He also mentioned the enactment of the East African

Community Vision 2050 as relevant to his Reference and Application.

20. He also deponed that the 17th EAC Extra-Ordinary Summit of Heads of State convened in Dar-es-Salaam on 8th September 2017, had considered, *inter alia*, the Council of Ministers' report on the EAC-EU EPA and he also pointed out that the said Summit was also attended by the 4th Respondent which, however was not a member to the Community during negotiations for the EPA.

21. The Applicant further stated that the 2nd Respondent had ratified the EPA on 20th September 2016 and deposited its instruments of ratification on 28th September 2016.

22. In addition to the Applicant's deposition, his Agent made oral submissions and contended that the signing of the EPA was not in the interest of Partner States to the Community as it posed economic risks to the East African region. He also pointed out that there was uncertainty in the relationship between the Community and the European Union following the United Kingdom's decision to leave the European Union. He then stressed the need for Partner States to stand together rather than acting individually as was the case whereby two Partner States had signed the EPA while others were raising concerns over the signing of the said Agreement.

D. CASES & SUBMISSIONS FOR THE RESPONDENTS

1ST Respondent

23. In a replying Affidavit sworn on 3rd February 2017, Mr. Nestor Kayobera, on behalf of the 1st Respondent, deponed that since

there was no urgency or merit in the Application contrary to what was alleged by the Applicant, the Court ought to dismiss the Application with costs and thereafter schedule the Reference for determination.

24. Learned Counsel further referred to Article 39 of the Treaty where it is provided that for this Court to issue interim orders, it has first of all to be satisfied that the orders sought by the Applicant are necessary or desirable, and it was his view that the orders sought by the Applicant were not.

25. Furthermore, pointing out that granting of interim orders is governed by Article 39 of the Treaty aforesaid as read together with Rule 21 of the Rules, he asserted that this Court had, in a number of applications, including **Application No. 5 of 2015, arising from Reference No. 2 of 2015** in **East African Society Organization Forum Vs The Attorney General of the Republic of Burundi & 2 Others**, set three conditions for grant of an interlocutory injunction. They are that:

> ***"i. An application must show a* prima facie *case with a probability of success;***
>
> ***ii. 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; and***
>
> ***iii. If the Court is in doubt, it will decide an application on the balance of convenience."***

26. Based on the foregoing, Learned Counsel submitted that the instant Application did not meet any of the abovementioned conditions and prayed that the Court, therefore, ought to dismiss the Application and schedule **Reference No. 8 of 2016** for determination.

27. Counsel in addition to the above contended that the Applicant's assertion that the 17th EAC Extra-Ordinary Summit had decided that the 1st, 4th, 5th and 6th Respondents should abstain from signing of the EPA with the EU is unfounded and so is his contention that the two Partner States that have signed the EPA have violated the Treaty, which contentions in any event had no legal basis.

28. It was Learned Counsel's further submission that the Applicant could not establish any injury he was likely to suffer if an interlocutory injunction was not granted by this Court and that the Applicant had also not established that he had a *prima facie* case with a probability of success against the Respondents and neither balance of convenience lies in favour of the Applicant.

29. He summed up his deposition by praying that this Court ought to dismiss the Application with costs and that **Reference No. 8 of 2016** be scheduled for determination.

2nd Respondent

30. In response to the Application, the 2nd Respondent filed a preliminary objection mainly contending that the Court lacks jurisdiction to hear and determine the matter. In that regard, he contended that since a treaty-making process is based on mutual consent of sovereign States under international law and since such

a process was mandated by the Summit and negotiated having regard to the Cotonou Partnership Agreement between the Members of the ACP States and the European Community and its Member States, the Court lacked jurisdiction to hear the matter as the negotiation, conclusion and ratification of the EPA by the 2nd Respondent is within its sovereign mandate and in fulfilment of its obligations under international law. To buttress his argument, Learned Counsel for the 2nd Respondent submitted that pursuant to Article 27 of the Treaty, the jurisdiction of this Court is limited to interpretation and application of the Treaty and does not extend to adjudicating a treaty-making process that is based on mutual consent between the Partner States and third parties under international law.

31. Learned Counsel also argued that this Court lacked jurisdiction since the Republic of Kenya's action of signing and ratification of the EPA was in fulfilment of its mandate pursuant to Article 37 of the Protocol on the Establishment of the EAC Customs Union and Article 37(1) of the Protocol on the Establishment of the EAC Common Market according to which Partner States have the mandate to ***"coordinate their trade relations to promote international trade and trade relations between the Community and third parties."***

32. Further to the above, Counsel for the 2nd Respondent submitted that this Court lacked jurisdiction since the EAC Summit of Heads of State, which is the apex decision making Organ of the Community was seized of the issue and that the 17th EAC Extra-Ordinary Summit did not resolve to halt the signing and ratification of the EPA.

33. The 2nd Respondent also filed written submissions on 8th March 2017 and started by setting out the factual background to the present dispute recalling the various stages of the EPA negotiations that led to the initialling of the Agreement by the EU and all EAC Member States in October 2014. It was also pointed out that the EAC Sectoral Council on Trade, Industry, Finance and Investment (SCTIF) during its session of 26/2/2016 had directed the EAC Secretariat to liaise with the EU in order to organize the signing ceremony for the EPA, but that the possibility of signing the Agreement in July 2016 on the side-lines of the UNCTAD XIV Conference did not materialize. The Republics of Kenya and Rwanda in any event eventually signed the Agreement on 1st September 2016, he added.

34. The 2nd Respondent also contended that if Kenya had failed to sign and ratify the EPA, it would have lost the Duty-Quota-Free market access to the EU since it would have been relegated to the category of Generalized System of Preferences which is less favourable than the EPA and Kenya's exports to the EU would as a consequence be immediately subjected to higher tariffs.

35. In his submissions, Counsel for the 2nd Respondent therefore framed three issues for determination, as follows:

> **"1. Whether the Court has jurisdiction to hear and determine the application;**
>
> **2. Whether the dispute is admissible; and**
>
> **3. Whether an order of stay should be granted to stay the signing of EPA or the implementation of the same."**

36. On the issue of jurisdiction, he reiterated his contentions contained in the aforementioned preliminary objection that this Court's jurisdiction as provided by Articles 23 and 27 of the Treaty is limited to the interpretation and application of the Treaty and that it does not extend to the interpretation of issues related to the process of treaty making as is the case in the matter at hand. In support of that submission, he referred the Court to the cases of **Democratic Party Vs. The Secretary General of the East African Community & Others**, EACJ Appeal No. 1 of 2014; **Samuel Kamau Macharia and Another Vs. Kenya Commercial Bank, eKLR; Owners of the Motor Vessel 'LilianS' Vs. Caltex Oil (K) LTD** (1989) KLR 1and **The East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community, EACJ Reference No. 9 of 2012.**

37. The 2nd Respondent further relied on Article 31 of the Vienna Convention on the Law of Treaties which sets the benchmark of how a treaty is to be interpreted and submitted that no provision of the Treaty bestows upon this Court the power to adjudicate upon issues related to any treaty-making process *per se*. In that regard, he contended that the said process was within the sovereign mandate of States and hence not amenable to the Court's jurisdiction. In the same vein, it was Counsel's submission that under Article 6 of the Vienna Convention on the Law of Treaties, each State retains the right to make treaties with other States or international organizations and thus, he asserted, treaty making is essentially the preserve of their executive arms of government and therefore, issues arising therefrom are not justiciable.

38. As for the admissibility of the dispute, the 2nd Respondent submitted that the dispute **"is not ripe for determination by the Court for it is being handled by one of the organs of the East African Community, namely the Summit."** He then referred to Article 11 of the Treaty where the functions of the Summit are set out and quoting the statement of the Communiqué issued following the 17th EAC Extra-Ordinary Heads of State Summit on 8th September 2016, which considered a report of the Council of Ministers on the EPA, he contended that the Summit had not made any determination on the matter and therefore, this Court should await that decision and should in the circumstances declare the Reference inadmissible.

39. Reverting to the issue on whether an order of stay should be granted to prevent the signing of EPA or further processes arising from its signing, the 2nd Respondent stated that the orders sought by the Applicant, being in the nature of a temporary injunction, some conditions must be satisfied before such an injunctive order is granted as set out in the landmark case of **Giella Vs Cassman Brown and Company Ltd** (1973) EA 358. These conditions are couched in the same terms as those reproduced elsewhere above in the 1st Respondent's case. It was therefore the 2nd Respondent's submission that the Application had no chances of success since the Court has no jurisdiction to hear or determine the Reference and that in any event, the latter was inadmissible. Moreover, he contended that the Applicant had not set out the nature of injury that he would suffer in the event that the orders sought were not granted and prayed that the Application should consequently be dismissed.

3rd Respondent

40. The 3rd Respondent's case is contained in a Replying Affidavit sworn by Mr. George Karemera, Senior State Attorney in the Attorney General's Chambers of the Republic of Rwanda as well as in oral submissions made during the hearing of the Application on 13th March 2017.

41. In the aforesaid Affidavit, the deponent stated that he disproved the urgency of this Application and that the same in any event lacked merit and had no legal basis as regards the order sought to stop any further signing and ratification of EPA by the remaining EAC Partner States. In the rest of the Replying Affidavit, the depositions are, in our view, mere responses to the Reference than to the instant Application.

42. At the hearing of the Application, Counsel for the 3rd Respondent however stated that he fully supported the preliminary objections raised by the 2nd Respondent as regards the issue of jurisdiction and the admissibility of the Application. He also contended that the Applicant had not given any clarification on the damages that he or the Community would suffer by the signing of the EPA.

43. Learned Counsel further contended that the Applicant did not clarify or indicate the pending procedures that were supposed to be stopped by this Court as regards the Republic of Rwanda which had already signed the EPA in accordance with its obligations as an EAC Member State. He thus prayed for the dismissal of the Application with costs.

4th Respondent

44. In a Statement of Defence lodged on 3rd December 2016 as well an answer to the Application, the 4th Respondent stated that although it had been made aware of the proposed economic partnership between the Community and the EU, it did not participate in the EAC-EU EPA negotiations at all. It further asserted that any bilateral agreements concluded by an individual EAC Partner State with any other party was not binding on other Partner States not parties to such an agreement.

45. The 4th Respondent also stated that during the negotiations for admission to the Community, the Republic of South Sudan had accepted to be bound by the treaties, agreements, memoranda of understanding that the Partner States had already concluded **"(as a bloc)"** with other Partners without re-negotiations. He further pointed out that it was also agreed during negotiations for admission to the Community that the 4th Respondent would commit itself to accede and implement the EPA after all other Partner States had signed it prior to its admission as a full member of the Community and thus, the 4th Respondent could not take part in the negotiations before its admission as a full member of the Community which was effective as of 1st October 2016.

46. The 4th Respondent also pointed out that the 2nd and 3rd Respondents had signed the EPA in Brussels on 1st September 2016 and the 2nd Respondent had ratified the same on 20th September 2016 before the admission of the 4th Respondent as a full member of the Community.

47. In light of the foregoing, the 4th Respondent stated that it had no case to answer and urged the Court to dismiss the Application against it.

5th Respondent

48. The 5th Respondent filed a Notice of preliminary objection and a counter Affidavit sworn by Mr. Aiday Alfred Kisumo, Senior State Attorney in the Attorney General's Chambers of the United Republic of Tanzania, on 18th November 2016. The preliminary objection is based on two grounds, namely, that the Applicant has no cause of action against the 5th Respondent and that the Application is frivolous and vexatious.

49. With regard to the cause of action, Counsel for the 5th Respondent referred the Court to the case of **Prof. Peter Anyang' Nyong'o & 10 Others Vs The Attorney General of Kenya & 5 Others, EACJ Reference No. 1 of 2006** as well as the case of **Auto Garage Vs. Motokov (1971) EA 514** and pointed out that in both cases, the Courts had stated that a cause of action is a set of facts or circumstances that in law would give rise to right to sue or to take out an action in Court. He contended in that context that neither the Reference nor the Application had indicated a specific cause of action against the 5th Respondent. He further stressed that the 5th Respondent had not signed the EPA neither had the 5th Respondent indicated that it intended to sign it at all. He further contended that the Applicant's allegations were hypothetical and unfounded, and the Application being an abuse of the Court process, was thus frivolous and vexatious.

50. In furtherance of his argument, Learned Counsel asserted that the Applicant had not demonstrated any circumstances that showed that the 5th Respondent would act contrary to the decision of the 17th Extra-ordinary EAC Summit of Heads of State which had directed that there would be no further signatures appended to the EPA until they had resolved the concerns of the remaining Partner States. In that regard, he submitted that the case of **The Attorney General of the United Republic of Tanzania vs. African Network for Animal Welfare,** EACJ Appeal No. 3 of 2014 and the case of **Alcon International Ltd Vs Standard Chartered Bank of Uganda & 2 Others, EACJ Appeal No. 3 of 2013**, had made it clear that if there was no live dispute for resolution, a Court of Justice would be wasting the public resources of money and time by engaging in a futile and vain exposition of the law.

51. To further counter the Application, the 5th Respondent's Counsel contended that the Applicant had not demonstrated that the interlocutory injunction orders sought met the three conditions required for a Court to grant them. On those conditions - reproduced elsewhere above, he referred the Court to the case of **Mbidde Foundation Ltd & Another Vs The Secretary General of the East African Community**, EACJ Application No. 5 of 2014 and Application No. 10 of 2014 where this Court had quoted with approval the aforementioned case of **Giella Vs Cassman Brown.**

52. Counsel for the 5th Respondent also took issue with the Applicant's Affidavit in support of the Application where he had deponed that the 4th Respondent had participated in the EAC Heads of State Summit of 3rd June 2010 while the Republic of South Sudan, the 4th Respondent, had not even attempted to be a

Partner State to the Community by that date. Recalling therefore that an affidavit is a voluntary declaration of facts written down and sworn by a deponent before an officer authorized to administer an oath such as a Notary Public and is as such a statement of truth, learned Counsel argued that if such a declaration contains a falsehood as is the case with regard to the Applicant's affidavit, the latter ceases to be an affidavit. And then, relying on the case of **Kidodo Sugar Estate & 5 Others Vs Tanga Petroleum C. Ltd,** Case No1 Civil Application No. 110 of 2009, where the Court had found that "**the application without a supporting affidavit remains with no legs to stand upon and for this reason, it must fail",** Counsel submitted that, likewise, since there was no affidavit in support of the present Application, the latter was incompetent and should therefore be dismissed with costs.

6th Respondent

53. The 6th Respondent filed a Replying Affidavit sworn by Mrs Clare Kukunda, State Attorney in the Attorney General's Chambers of the Republic of Uganda, on 8th December 2016. The thrust of her deposition is that the Applicant's affidavit was a mere narrative and did not show that **Reference No. 8 of 2016** disclosed a *prima facie* case with a probability of success and that the Applicant had not shown the irreparable injury likely to be suffered in the event that the Application before us was not granted.

54. During the hearing of the Application, Counsel for the 6th Respondent's submissions more or less recouped those from other Respondents, namely that the Applicant had not demonstrated that he had a *prima facie* case with a probability of

success and that in any event he stood to suffer no irreparable injury which could not be compensated by an award of damages. It was also learned Counsel's submission that, looking at the economic benefits that the signing of the EPA would bring to the Community, the Court ought to find that to grant an injunction against its signing would heavily inconvenience the EAC Partner States while conversely, the Applicant would not be inconvenienced at all if his Application was not granted. He therefore prayed that this Application be dismissed with costs to the Respondents.

7th Respondent

55. The 7th Respondent filed a Replying Affidavit sworn by Mr. Charles Njoroge, Deputy Secretary General of the East African Community, on 17th November 2016. He first of all stated that he disapproved of the alleged urgency of the matter, whereby the Applicant seeks certain interim orders and that the Court should instead schedule **Reference No. 8 of 2016** for determination since the Applicant's main concern with regard to the liberalization of trade between the Community and the EU would commence 7 years after the coming into force of the EPA, as provided by Article 11 and paragraph 2 of Annex II thereof.

56. He further pointed out the three conditions for the grant of an interlocutory injunction as set out by this Court in **Application No. 3 of 2010, arising from Reference No. 7 of 2010 in Mary Ariviza case against the Attorney General of the Republic of Kenya and the Secretary General of the East Africa Community** and

submitted that the Application did not meet any of the said conditions.

57. Moreover, Mr Njoroge stated that the Application and the Applicant's supporting Affidavit were based on speculation and/or misinformation on the role of the 7th Respondent in the EPA negotiations in that negotiations were spear headed by the Partner States and the role of the 7th Respondent was limited to the coordination, facilitation and management of the process in line with respective Council and Summit directives. He also stated that the 17th Extraordinary EAC Summit of Heads of State was seized of the EPA matter and was committed to addressing the concerns of some Partner States before proceeding with the signing of the EPA by Partner States that had not already signed it. In view of the foregoing, Mr Njoroge asserted that the Application did not disclose any bona fide case against the 7th Respondent and did not raise any triable issue nor did it show existence of a *prima facie* case with any likelihood of success against the 7th Respondent.

58. It was also stated, on behalf of the 7th Respondent, that the balance of convenience as far as the Community's interests were concerned, was not in the Applicant's favour; rather, if the orders prayed for were granted, such orders would disrupt the organs of the Community seized of the EPA matter and cause more injury to the Community as a whole. The 7th Respondent accordingly prayed that no single order sought should be granted and urged the Court to dismiss the Application with costs to the Respondents.

E. REJOINDER OF THE APPLICANT'S AGENT

59. In rejoinder, the Applicant's Agent did not address a number of issues raised by Respondents and opted instead to make a general statement whereby he reiterated his earlier submissions that the EPA posed serious risks to the Community and that Partner States should coordinate their efforts to address the serious issues he had raised before the signing of the EPA.

60. In response to the issue pertaining to the nature of the orders sought, Mr Mabange submitted that what was important was not the way those orders were formulated (i.e. stay orders versus injunctive orders), but their aim which, as he pointed out, is to stop the Partner States who had not signed the EPA from signing it and to restrain those who had signed it from carrying out further procedures or processes.

F. DETERMINATION

61. Given the abovementioned discussions over the nature of the orders sought by the Applicant as to whether they were stay orders or injunctive orders, we propose to start with this issue before examining the preliminary objections raised by the 2nd and 5th Respondents pertaining to issues of jurisdiction and cause of action, and thereafter, we shall address the main issue with respect to whether the orders sought should or should not be granted.

Nature of the orders sought by the Applicant

62. In the Notice of Motion and at the hearing of this Application, the Applicant and his Agent have urged the Court to grant an order for

stay of signing the EPA by the Community's Partner States who have not yet signed it, that is Burundi, South Sudan, Uganda and the United Republic of Tanzania. The Applicant has also prayed for an order directed at the 2nd and 3rd Respondents staying forthwith any pending procedures and/or processes over the said Agreement that they had signed earlier, until a final decision on **Reference No. 8 of 2016** is delivered.

63. In that regard, it should be recalled that, as far as the status of the EPA process is concerned, negotiations on the Agreement were finished in October 2014 and the same was initialled by all EAC Partner States at the time and thereafter, the signing of the EPA was considered by the Sectoral Council on Trade, Industry, Finance and Investment, which directed the Secretary General of the Community (the 7th respondent) to liaise with the EU in order to organize the signing ceremony of the EPA. It is also worth mentioning that Kenya and Rwanda have already signed the EPA, and Kenya has even gone further to ratify it.

64. In light of the aforestated situation, was the Applicant seeking a stay order or an injunctive order (more precisely a preventive injunction)? Was there anything to stay given that there was no effective EPA in place since for one to be operational, it has to be ratified by all Parties involved (i.e. EAC Partner States and the EU)?

65. At the hearing of the Application, the Applicant's Agent, when asked to clarify the nature of the orders he was seeking, stated that what the Applicant was praying for, in essence, was to be granted an order stopping the EAC Partner States who have not

signed the EPA from signing it and those who have signed it from carrying out any further procedures and processes which procedures and processes he was, however, unable to indicate. From the submissions that ensued and taking into consideration that the Application was seeking a permanent injunction in the main Reference, it clearly appeared that the Applicant was, in essence, seeking an interlocutory injunction to restrain the impending signing of the EPA by Partner States who had not yet sign it, but he fell short of clarifying which procedures/processes had to be restrained with regard to the two Partner States which had already signed the Agreement, one Partner State having even ratified it.

66. We shall therefore take it that the use of the word "stay" as used in the Application is an error and actually means that the Applicant is seeking a temporary injunction in the manner explained above, pending the hearing and determination of **Reference No. 8 of 2016.**

Preliminary objections

(i) **Whether the Court has jurisdiction to entertain this Application**

67. The 2nd Respondent has raised a preliminary objection that this Court lacked jurisdiction to hear the Reference as well as the Application and the thrust of his arguments is that a treaty-making process such as the negotiation, conclusion and ratification of the EPA by the 2nd Respondent is within its sovereign mandate and in fulfilment of its obligation under international law and therefore,

such a process is outside the ambit of the Court's jurisdiction as provided for by Article 27 of the Treaty.

68. As pointed out herein above, EAC Partner States had undertaken to negotiate the EPA as a bloc and the said negotiations were concluded in October 2014 with the initialling of the EPA. It has also been submitted that the EAC Sectoral Council on Trade, Industry, Finance and Investment had thereafter directed the 7th Respondent to liaise with the EU in order to organize the signing ceremony of the EPA by June 2016. It is further a matter of record that the 2nd and the 3rd Respondents signed the EPA on 1st September 2016, and on 8th September 2016, the 17th Extra-ordinary EAC Summit of Heads of State, after considering a report of the Council of Ministers on the EPA, requested for three months to finalize and obtain clarification on the concerns of some of the remaining Partner States before considering the signing of the EPA as a bloc.

69. The Applicant has in that context alleged that ***"signing such agreement by the second and third Respondent has violated and/or will continue to violating the letter and the spirit of the EAC Treaty if signed by the remaining Respondents respectively" [sic]*** and prayed for a restraining order as stated herein above.

70. At this juncture, it is worth recalling that under Article 27(1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty. It is also worth mentioning that Article 30(1) of the Treaty which provides that ***"Subject to the provisions of Article 27 of this Treaty, any person who is***

resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such an Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty." In that context, this Court has previously held that the interpretation of the question whether for example Articles 6(d) and 7(2) of the Treaty has been violated squarely falls within the ambit of the Court's jurisdiction. (See **Samuel Mukira Muhochi** (supra), **Plaxeda Rugumba Vs The Secretary General of the East African Community & The Attorney General of Rwanda, EACJ Reference No. 8 of 2010; Masenge Venant Vs The Attorney General of the Republic of Burundi**, **EACJ Reference No. 9 of 2012; and Peter Nyang'o Nyong'o** (supra)). Therefore, without going into the merits of the case which is a matter to be addressed at the hearing of **Reference No. 8 of 2016**, when a party approaches this Court, invokes specific provisions of the Treaty and alleges that a Partner State or an institution of the Community has violated or breached those provisions in the manner set out in Article 30(1) of the Treaty, then this Court is clothed with jurisdiction to determine such an allegation.

71. In the instant Application and in **Reference No. 8 of 2016**, the allegation made is, *inter alia,* that by individually signing the EPA, the 2nd and the 3rd Respondents have violated Article 6(a) and (f) of the Treaty and that allegation is sufficient to cloth this Court with jurisdiction to determine the Reference and the Application, the merits or demerits of either of them notwithstanding. We are, for the above reasons, satisfied that we have the jurisdiction to

determine both the Reference aforesaid and the Application before us.

(ii) **Whether the Application discloses a cause of action against the 5th Respondent**

72. The 5th Respondent has argued that the Application did not disclose any specific cause of action against him since the United Republic of Tanzania had not signed the EPA and that there was no indication that it intended to sign it.

73. As stated above, the Applicant has moved the Court seeking in essence a temporary injunction to restrain some EAC Partner States, including Tanzania, from signing the EPA, alleging that such an action violates some provisions of the Treaty. In addition, as also stated above, the 17th Extra-ordinary EAC Summit of Heads of State, seized of the matter, has decided to hold the signing of the EPA pending further consultations on the subject. It is clear from the foregoing that there is a live issue to be determined as to whether the remaining Partner States, Tanzania included, should be stopped from signing the EPA pending the determination of the Reference. In the circumstances, we are satisfied that both **Reference No. 8 of 2016** and the present Application disclose a cause of action against the 5th Respondent and all other Respondents.

(iii) **Is the Application incompetent for lack of a proper supporting Affidavit?**

74. The 5th Respondent has alleged that the Applicant's supporting Affidavit contained a "**falsehood**" as it deponed therein that the 4th Respondent had participated in the EAC Heads of State Summit of

3rd June 2010 while South Sudan by that date had not even attempted to be a party to the Community, and that for that reason, the Affidavit was incompetent and should be struck out. Having been so struck out, the Application was also rendered incompetent because it would not then be accompanied by an Affidavit contrary to the Rules.

75. In addressing the above issue, it should be recalled that the Republic of South Sudan applied to join the Community on 10th June 2011 and was admitted at the 17th EAC Heads of State Summit held on 2nd March 2016 in Arusha. Its instrument of ratification on the accession to the Treaty was deposited on 5th September 2016 (See http://www.eac.int/news-and-media/press-releases/20160905/republic-south-sudan-deposits-instruments-ratification-accession-treaty-establishment-east-african). It is, therefore, obvious that South Sudan could not have participated in an EAC Heads of State Summit before its accession to the Community. But, is that a sufficient reason to strike out the Affidavit in support of the Application? To our minds, such an action would not be justified. It is upon this Court to take whatever facts it deems relevant in determining the Application before it and ignore what is of no use in doing so. Further, as we understand it, the whole Affidavit is not the one that is said to be clothed with falsehood, but one line of it. Expunging that one line from the record would not therefore invalidate all other facts deponed to and in the event, we see no reason to strike out the entire Affidavit as prayed. The issue raised is also irrelevant to a just determination of the present Application and we shall therefore address the entire Application in its proper context.

(iv) **Does the Application meet the criteria for grant of an interlocutory injunction?**

76. As pointed out by all the Respondents, the conditions required for this Court to grant an interlocutory injunction have previously been settled following an approval of the landmark case of **Giella v. Cassman Brown & Co. Ltd [1973] E.A 360** (see Mbidde **Foundation & Another Vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2014** and **Application No. 10 of 2014; Application No. 3 of 2010, arising from Mary Ariviza Vs The Attorney General of the Republic of Kenya and the Secretary General of the East Africa Community, EACJ Reference No. 7 of 2010**. The three-part test for granting an injunction is therefore that:

(i) An Applicant must show a *prima facie* case with a probability of success;

(ii) 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.

(iii) If the Court is in doubt of the two above principles, it will decide an application on the balance of convenience.

77. As stated elsewhere above, the Applicant alleged that the signing of the EPA by the 2nd and 3rd Respondents contravened the Treaty and is urging the Court to issue an interlocutory injunction stopping other EAC Partner States from signing it. It is however admitted that the EPA needs ratification by all Parties for it to enter into force. Having heard all the parties, that issue is not frivolous and

warrants interrogation by this Court. There is therefore a triable issue within Articles 27 and 30(1) of the Treaty and in addressing the question whether this Court should or not grant the orders sought by the Applicant.

78. The Applicant has also submitted that EAC Partner States which have not signed the EPA should be prevented from signing it because he allegedly stands to suffer irreparable economic loss and serious violation of his rights under the Treaty. At the hearing of the Application, the Applicant's Agent was asked to clarify the nature of injury in issue, and he contended that the injury should be considered, not at an individual level, but at a regional level. It was his further contention that the way some Partner States had acted individually in signing the EPA was harmful to the Community and to the East African economy. But when pressed to expound on the irreparable economic loss and the violation of rights that the Applicant/Principal stood to suffer, he was unable to make the link between the impugned signing of the EPA and the alleged irreparable harm that the said signing would cause. In the circumstances, therefore, it is our considered view that the Applicant has failed to establish that he would suffer an irreparable injury that could not be compensated by an award of damages if the injunctive order sought is not granted.

79. Besides, in view of the decision of the 18th Summit of Heads of States held in Dar-es-Salaam on 20th May 2017 stating that the remaining Partner States that had not signed the EPA were not in a position to do so pending clarification of the issues they had indentified in the Agreement, it appears that there is no harm to the Applicant if the injunctive order sought is not granted and that

rather, the matter proceeds to the hearing of **Reference No. 8 of 2016** as correctly stated by some of the Respondents.

80. Given the foregoing, we don't deem it necessary to carry out the test of balance of convenience as it is clear in our minds that the injunctive order sought is not warranted for the reasons given herein above.

81. As for the order directing the 2nd and 3rd Respondents to restrain from undertaking any pending procedures and/or processes over the EPA until a final decision in the Reference aforesaid is delivered, we reiterate that the Applicant was asked to explain which procedures or processes he was referring to in respect of the two Partner States who had already signed EPA, one having even ratified it. No explanation at all was given and that fact would thus preclude us from issuing any such restraining orders.

82. The Applicant also sought an order directing the 7th Respondent to withdraw forthwith from any negotiations initiated with the EU in view of the 17th Extra-ordinary Summit decision aforesaid until a final decision on the Reference is delivered. But as pointed out elsewhere above, the EPA negotiations were concluded in October 2014 and therefore, such an order cannot be granted as the negotiation phase is now closed.

83. As for costs, given the nature of the matter and the parties involved, we deem it proper to order that costs shall abide the outcome of **Reference No. 8 of 2016**.

G. DISPOSITION

84. In light of our findings above, the following orders are issued:

(i) The order sought to restrain the 1st, 4th, 5th and 6th Respondents from signing the EAC-EU EPA is not granted;

(ii) The order sought directing the 2nd and the 3rd Respondents to restrain from any pending procedures and/or processes over the EPA they have signed is not granted.

(iii) The order sought directing the 7th Respondent to withdraw forthwith any negotiations initiated with the European Union is not granted.

(iv) Costs of the Application to abide the outcome of **Reference No. 8 of 2016**.

85. It is so ordered.

Dated, Delivered and Signed at Arusha this 6th July 2017

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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE

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FAUSTIN NTEZILYAYO
JUDGE

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FAKIHI A. JUNDU
JUDGE