



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



(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles A. Nyachae; Richard Wabwire Wejuli and Léonard Gacuko, JJ)

REFERENCE NO. 14 OF 2019

DR WAIRAGALA ISABIRYE WAKABI 1ST APPLICANT

TANZANIA HUMAN RIGHTS

DEFENDERS COALITION 2ND APPLICANT

versus

THE ATTORNEY GENERAL OF

THE UNITED REPUBLIC OF TANZANIA RESPONDENT

29TH NOVEMBER 2023

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. This Reference was filed on 24th June 2019 under Articles 6(d), 7(2), 8(1)(c), 27, 30(1) and 104 of the Treaty for the Establishment of the East African Community (“the Treaty”), Articles 7 and 54 of the Protocol on the Establishment of the East African Community Common Market (“the Protocol”) and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (“the Rules”).
2. The 1st Applicant is a natural person. He is a citizen and resident of the Republic of Uganda, a Partner State of the East African Community. The Applicant is the Executive Director of a Ugandan based organisation known as Collaboration on International ICT Policy for East and Southern Africa (hereinafter “CIPESA”).
3. The 2nd Applicant, the Tanzania Human Rights Defenders Coalition (THRDC), is a non-governmental entity registered in Tanzania in 2010 but started to operate in 2012. It describes itself as a membership organization with over 150 members across the country, representing nine thematic groups of human rights, such as pastoralists, minority groups, women human rights defenders and disabled groups. It is also interested in public interest litigation among other initiatives.
4. For the purposes of service of this Reference, the Applicants’ address of service is c/o Pan African Lawyers Union, No. 3 Jandu Road, Corridor Area, P.O. Box 6065 Arusha, Tanzania.
5. The Respondent is the Attorney General of the United Republic of Tanzania, sued on behalf of the Government of the United Republic of Tanzania in his capacity as the Chief Legal Advisor to the Government. For the purposes of this Reference, the Respondent's address for

service is: c/o Office of the Solicitor General, 20 Kivukoni Road, P.O. Box 71554, 11492 Dar es Salaam, United Republic of Tanzania.

B. REPRESENTATION

6. The Applicants were represented by Ms Praisegod Joseph and Ms Neema Jaji, learned Counsel, while the Respondent was represented by Mr Mark Mulwambo and Mr Hangi Chang'a, both learned Principal State Attorneys, assisted by Mr Charles Mtei and Ms Lucy Kimario, both learned State Attorneys.

C. BACKGROUND

7. From what is contained in the Statement of the Reference, the 1st Applicant was invited to Tanzania by the 2nd Applicant, to participate in the Annual Commemoration of the Tanzania Human Rights Defenders' Day that was scheduled to take place on the 28th April 2019 under the theme "Claiming and Protecting Online Civic Space for Promotion and Protection of Human Rights in Tanzania". The event was to be preceded by a 2-days workshop, aimed at engaging civil society organisations, online journalists and human rights activists, on how to safely use online platforms for the promotion and protection of human rights.
8. On the 25th April 2019, the 1st Applicant landed at Mwalimu Julius Kambarage Nyerere International Airport, in Dar es Salaam in the United Republic of Tanzania from Entebbe, Uganda.
9. On arrival at the Airport, the 1st Applicant was interrogated by the Tanzania Immigration Department Officers who later denied him entry into Tanzania.
10. The 1st Applicant avers that he was not accused of any crime, other than a statement from the Agents of the Respondent that his name

appeared on “some List”, without telling him where the said list came from and why his name was on the said List.

11. The Applicant was finally returned to Uganda via Jomo Kenyatta International Airport.

D. THE APPLICANTS' CASE

12. The Applicants' case is set out in the Statement of Reference and in the and in the Rejoinder to the Respondent's Response to the Reference. The Applicants also deponed Affidavits in support of the Reference, deponed by the 1st Applicant and one Onesmo Olengurumwa, the National Coordinator of the 2nd Applicant, dated 8th July 2019 but lodged in Court on 18th October 2019. The case is also contained in the affidavit of Deogratias Bwire dated 20th August 2019.

13. It is the 1st Applicant's case that he was invited by the 2nd Applicant to participate in the Annual Commemoration of the Tanzania Human Rights Defenders' Day that was scheduled to take place on the 28th April 2019 under the theme “*Claiming and Protecting Online Civic Space for Promotion and Protection of Human Rights in Tanzania*”.

14. That on arrival at Dar es Salaam Airport, he was denied entry into the Respondent's territory, detained, interrogated and deported to his home country.

15. Further, that his belongings, which had previously been withheld by Agents of the Respondent, were handed back to him when he reached at Jomo Kenyatta International Airport on the way to Entebbe. Among the withheld items was his cell phone, his passport and a copy of the Notice to Return or Convey a Prohibited Immigrant.

16. Furthermore, the 1st Applicant alleges that, the Respondent, through its Agents, did not inform him verbally or in writing, why he had been

denied entry into Tanzania as well as why he had been declared a prohibited immigrant and subsequently returned to Uganda.

17. It is also the 1st Applicant's assertion that he was denied the right to communicate with the Uganda High Commission in the Respondent State before the deportation took place.
18. The Applicant further states that for the past 4 years, he had visited the territory of the Respondent on numerous occasions and had never been accused of, or committed any criminal offence against the laws of the Respondent and/or the EAC to warrant the denial of entry into the United Republic Tanzania.
19. It is the Applicants' firm view that the actions of the Respondent's Agents offend not only the text and spirit of the EAC Treaty, especially Articles 6(d), 7(2), 8 (1)(c), but also, among others, Article 7 of the Protocol, Articles 2, 6, 7, 9, 10, 11, 12 and 28 of the African Charter on Human and Peoples' Rights and the Respondent's own Constitution and various national laws.
20. Thus, the Applicants state that the Respondent, through the acts and/or omissions of its Agents, omitted to abide by its commitment under the EAC Treaty, to the fundamental and operational principles of the EAC, specifically the principles of the rule of law, good governance and the recognition and protection of human rights of the 1st Applicant, especially his right to due process, good governance including the adherence to democracy, the rule of law, accountability, transparency as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.
21. Further, that by denying the 1st Applicant his right to consult with a lawyer and the failure to charge him or bring him before a competent

impartial court or tribunal constitutes a violation of his right to a defence, a right guaranteed under Article 7 of the African Charter. In the same line, the 1st Applicant maintains that the denial of his right to freely be allowed to enter and freely move within the Respondent State, the deprivation of his liberty through the illegal detention, is a violation of the right to free movement as guaranteed under Article 104 of the Treaty, Article 7 of the Protocol and Article 12 of the African Charter.

22. In addition, that the Respondent violated the right to freedom of movement guaranteed under Article 15(1) and 15(2)(a) of its own Constitution, and the right to a defence under Section 18(A) of the Penal Code.

23. That as the 1st Applicant does not fall under any categories of prohibited immigrant under Section 23(1) of the Respondent's Immigration Act, it was wrong for the Immigration Authorities of the Respondent to illegally declare him a Prohibited Immigrant.

24. The Statement of Reference and evidence provided is silent on the specific violations against the 2nd Applicant.

E. THE RESPONDENT'S CASE

25. The Respondent's case is laid out in his Response to the Reference and in the Affidavit sworn on 24th August 2022 by Salum O. Balum, Inspector of Immigration in the United Republic of Tanzania.

26. The Respondent does not deny that on 25th April 2019, the 1st Applicant landed at Dar es Salaam Airport from Entebbe, Republic of Uganda and was denied entry into the Respondent's territory. The Respondent contends that the 1st Applicant was interrogated for national security purposes and after the interrogation, it was discovered that the Applicant was not eligible for admission in the Country. That

he was informed verbally that he was denied entry into the country for public security reasons upon which he was told to wait for the next plane which transported him back to his Country.

27. Additionally, the Respondent denies that the Applicant was illegally detained or discriminated in any way, as his denial of entry was in accordance with the national law.

28. The Respondent refutes the 1st Applicant's allegations and contends that no Applicant's belonging was withheld and the 1st Applicant was not declared as a Prohibited Immigrant.

29. In addition, the Respondent avers that the whole process was fair and in accordance with national laws. Furthermore, the Respondent rebuts the allegations made by the 1st Applicant against the Respondent that he was denied the right to communicate with the Uganda High Commission in Tanzania. That, there was no request in this respect.

30. The Respondent further states that visiting the country numerous times does not by itself imply that the 1st Applicant could not be denied entry into the Respondent's State.

31. As to the alleged denial of legal assistance, the Respondent refutes the accusation but contends that, since the Applicant was denied entry, he could only access his lawyer when he was outside the country.

F. POINTS OF AGREEMENT

32. At the Scheduling Conference held on 19th September 2022, Counsel for the Parties pointed out that they were in agreement that on 25th April 2019, the 1st Applicant:

a. landed at Mwalimu Julius Kambarage Nyerere International Airport, Dar es Salaam, in the United Republic of Tanzania, from Entebbe, the Republic of Uganda; and

b. was denied entry into the Respondent State; and

c. was deported to Uganda.

G. ISSUES FOR DETERMINATION

33. During the Scheduling Conference above stated, the following issues for determination were agreed:

1. Whether the denial of entry into the Respondent State, the alleged detention and deportation of the 1st Applicant by the Respondent, violated Articles 6(d), 7(2), 8(1)(c) and 104 of the Treaty for the Establishment of the East African Community and Article 7 of the Protocol on the Establishment of the East African Community Common Market; and

2. Whether the Parties are entitled to the remedies sought.

34. In addition to the agreed issues, during the highlights of written submissions, Counsel for the Respondent, by way of a preliminary legal point, asked the Court to rule that the Reference was not properly before the Court since it was filed without documentary evidence, in contravention of the Rules.

35. We consider it necessary to deal with this point before delving into the other issues.

H. PRELIMINARY OBJECTION

Whether the Reference is properly before the Court

36. As stated above, Counsel of the Respondent contended that the Reference under consideration is not properly before this Court.
37. To buttress his argument, Counsel for the Respondent, Mr Mulwambo, argued that the Reference was filed in contravention of Rule 25(3) of the 2019 Rules. According to him, the Rule, as presently obtaining, states that an affidavit has to accompany the Reference. That, if one refers to the previous Rules (the 2013 Rules of the Court), when the Reference is filed in Court, it has to be accompanied with documentary evidence. That, in his view, such evidence may include an affidavit. That, the Reference which was challenging the decision that was taken by the Respondent was filed on the 24th June 2019 without being accompanied with any documentary evidence or affidavit.
38. That, whereas the Reference was filed on 24th June 2019, which was within the prescribed 2 months period, the other documentary evidence was filed on the 18th October 2019, that is a period of over 115 days beyond the prescribed period.
39. In the Respondent's view, where a Reference was supposed to be filed with documentary evidence and it was not filed with such documentary evidence, the evidence being filed three months later renders such a Reference to be of no consequence; that is, there was no Reference before the Court.
40. For the Respondent, as the necessary evidence to back up the Reference was filed later than the prescribed timeframe, the Statement of Reference filed without such evidence defeats the mandatory period of two months prescribed under Article 30(2) of the Treaty. The Statement of Reference should therefore be deemed to have been filed out of time and therefore time barred.

41. Mr Mulwambo relied *inter alia* on the case of **Attorney General of Uganda & Anor vs Omar Awadh & 6 Others, EACJ Appeal No. 2 of 2012**, where the Appellate Division of this Court stated in paragraph 48 that:

“The Court is still of the same view: that the objective of Article 30 (2) is legal certainty. It still notes that the purpose of this amended provision of the Treaty was to secure and uphold the principle of legal certainty; which requires a complainant to lodge a Reference in the East African Court of Justice within the relatively brief time of only two months. Nowhere does the Treaty provide for any ‘exception’ to the two months period.”

42. Responding to the legal point, Ms Praisegod argued that whereas it was true that when the Reference was filed on 24th June 2019 it did not contain the documentary evidence, the same is salvaged by the provisions of Rule 4 of the Rules.

43. In addition, Ms Praisegod conceded that the old Rules applied in this matter. That the old Rules stated that a Statement of Reference shall be accompanied by documentary evidence. In the case at hand, she contended, the Statement of Reference, under paragraph 30, identified the documentary evidence that the Applicants were to rely upon.

44. Counsel for the Applicants urged the Court to invoke its inherent powers under Rule 4, in the interest of justice, and hold that the Rule requiring accompaniment of documentary evidence was complied with as such evidence was mentioned in the Reference. That such evidence was not immediately in the 1st Applicant’s possession and when it was obtained, he filed the same in October 2019.

45. In his rejoinder, Mr Mulwambo reiterated the objection and maintained that what the Applicants have done in this Reference is to mention at

paragraph 30 the documents that they intend to rely on, but the wording of the Rule as it was then, is very specific in its wording.

46. According to the Respondent, the Rules applicable at the day of filing of the Reference did not say that the applicant shall state the evidence or the documents that will be relied upon, but has to be filed with the reference. In his view, the Reference has to be accompanied by documentary evidence at the time of filing, otherwise it loses the meaning ascribed to it.

47. Mr Mulwambo, therefore, urged the Court to uphold the objection and hold that the Reference was filed out of time and, hence, has to be dismissed with costs.

48. At the submissions' highlights, the Court asked Counsel for the parties their understanding of the term "documentary evidence" as used in Rule 24(3) of the 2013 Rules.

49. According to Ms Praisegod, documentary evidence is an affidavit for the purpose of the 2019 Rules; but it can be any particular documents that the applicant or the respondent will rely upon in the application, such as laws, statutes or precedents. For her, documentary evidence can include also the documentary authorities or the records of evidence such as annexures that the applicant or the respondent will rely upon.

50. The Court also sought to know if a defective Reference filed in time translates into a reference filed out of time because it had omissions or was not fully compliant with certain aspects of the law or the rules. Further, if a reference is filed without certain documents amounts to a no Reference. In the same line, the Court asked Counsel whether affidavits or document filed after the Reference has been filed but before closure of pleadings, amounts to a belated filing and can entitle the Respondent to invoke the limitation rule.

51. Responding to the Court's questions, Mr Mulwambo submitted that the relevant Rule is couched in mandatory terms. That the use of the word "shall" entails that the Rule has to be complied with. In his view, when a reference is filed in Court, it has to be accompanied by an affidavit or documentary evidence. To him, as this Reference was filed in Court without the documentary evidence, it is improperly before the Court. The Attorney General's view is that to remedy such a situation, the Applicants would have sought leave of the Court to file documents and ask the Court to consider them as filed within time.

52. On the question whether there is a difference between a reference filed outside the time that is contemplated in Article 30 of the Treaty, on the one hand, and a reference that is filed within that period but which is in violation of Rule 24(3), Counsel Mulwambo stated that the Reference that has been filed beyond the prescribed period of Article 30(2), is time barred and there is a plethora of decisions of this Court that the Court cannot extend the time period.

53. Rule 24(3) of the East African Court of Justice Rules of Procedure 2013 under which the instant Application has been instituted provides that:

"Where the *reference* seeks the annulment of an Act, regulation, directive, decision or action, the statement of reference shall be accompanied by documentary evidence of the same."

54. We have noted that the 2013 Rules of Procedure uses at several instances the word "affidavit". Undoubtedly, the Rules used the words '**documentary evidence**' instead of 'affidavit'. This, to us, means that the documents stated in the Rule are documents other than an affidavit.

Although such documents can also be annexed to an affidavit or the Statement of Reference, as it was before.

55. Having examined the records, we agree with Counsel for the Respondent that in filing this Reference, the Applicants did not comply with the mandatory requirement of Rule 24(3) of Rules of Procedure 2013. Counsel for the 1st Applicant confirms this but seems to suggest that such documents are deemed to have been filed through the cross reference made in Paragraph 30 of the Statement of Reference.

56. We are unable to agree with Ms Praisegod. We do find that, although the Reference was filed within the two months period provided by the Treaty, it violated Rule 24(3) of the Court's Rules applicable at the time the Reference was filed, for being unaccompanied by documentary evidence.

57. Documents that were filed beyond the 3 months remain to be of no effect and cannot be held to be part to a Reference filed.

58. Consequently, this Court is of the view that the Reference is improperly before the Court, as it was filed contrary to the prevailing Rules of the Court.

59. Having so determined, we see no good grounds to deal with the other issues framed for the simple reason that there is no Reference before the Court.

60. Regarding costs, Rule 127(1) of the Court's Rules of Procedure provides that "Costs in any proceedings shall follow the event unless the Court for good reasons otherwise orders."

61. In the exercise of our judicial discretion, we deem it necessary to depart from the general principle above outlined and let each party bear their own costs.

I. CONCLUSION

62. From the foregoing, the Reference is dismissed in its entirety.

63. We direct that each party bears its own costs.

64. It is so ordered.

**Dated, signed and delivered at Arusha this 29th Day of November
2023.**



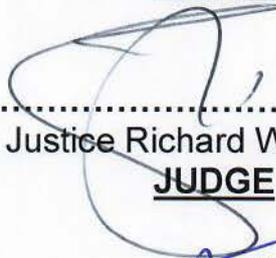
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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



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Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE



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Hon. Justice Charles A. Nyachae
JUDGE



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Hon Justice Richard Wabwire Wejuli
JUDGE



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Hon. Justice Dr Leonard Gacuko
JUDGE