

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**MISC. APPLICATION NO.21 OF 2022
[ARISING OUT OF MISC.APPLICATION NO.843 OF 2021]
[ARISING OUT OF MISC. CAUSE NO.287 OF 2021]**

***[AN APPLICATION FOR STAY OF PROCEEDINGS & RULING PENDING
DETERMINATION OF EAST AFRICAN COURT OF JUSTICE REFERENCE].***

MALE MABIRIZI K. KIWANUKA:.....:APPLICANT

VERSUS

ATTORNEY GENERAL:.....:RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING.

The applicant brought this application under Article 38(2) of the Treaty for Establishment of the East African Community, Article 123 (1) of the Uganda Constitution, Section 33 & 39 of the Judicature Act and paras 1-4 of Uganda Code of Judicial Conduct, 2003 seeking the following orders:

1. STAYING all proceedings, rulings & decisions in and under *MISC.APPLICATION No.843 of 2021 vide Attorney General v. Male H. Mabirizi K. Kiwanuka & MISCELLANEOUS APPLICATION No.846 of 2021 vide Male H. Mabirizi K. Kiwanuka v. Attorney General*, be stayed until the final determination of *EAST AFRICAN COURT OF JUSTICE REFERENCE No. 01 of 2022*.

In the alternative to 1 above

2. RESTRAINING JUDGE SSEKAANA MUSA from taking part in *MISC.APPLICATION No.843 of 2021 vide Attorney General v. Male H. Mbirizi K. Kiwanuka & MISCELLANEOUS APPLICATION No.846 of 2021 vide Male H. Mbirizi K. Kiwanuka v. Attorney General*, until the final determination of *EAST AFRICAN COURT OF JUSTICE REFERENCE No. 01 of 2022*.

The grounds for the application are briefly set out in the Notice of Motion and the affidavit in support by the applicant:

1. That the applicant has filed a Reference in the East African Court of Justice, First Instance Division, challenging the decision of Justice Ssekaana Musa refusing to recuse himself from the case.
2. The reference raises grave matters as far as Uganda's compliance with contravention of the principles and provisions enshrined in the Protocol on the Establishment of the East African Community Common Market.
3. Judge Ssekaana Musa is likely to continue participating in the proceedings leading to the termination of the same before determination of the reference, where a dispute has been referred to the EAST AFRICAN COURT OF JUSTICE, Uganda, as a Partner State is required to refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute.
4. The applicant will suffer irreparable damage if the application is not granted and the balance of convenience is in favour of granting the application.

5. It is in the interest of fulfilling Uganda's Treaty Obligations and promotion of Good Governance and rule of law that the application be granted and that the application has been brought without undue delay.

The respondent filed an affidavit in reply through *Oburu Odoi Jimmy-Principal State Attorney* contending that;

1. The applicant is filing a reference to the East African Court of Justice as a disguised appeal against a recusal decision and it amounts to an abuse of process as it seeks to circumvent the provisions of the Constitution (Recusal of Judicial Officers) (Practice Directions) 2019, which provide that *were a judicial officer refuses to recuse himself , the matter shall proceed for hearing, and any appeal arising therefrom the said decision shall be made after the suit is determined.*
2. I know that the applicant is engaging in forum shopping by filing this application to stay proceedings in the High court after opting to file a reference in the East African Court of Justice.
3. I know that this court has no jurisdiction to make interlocutory orders in respect of matters pending hearing before the East African Court of Justice, except where the court has requested the East African Court of Justice for a Preliminary ruling on a question arising in a matter before it.
4. I know that under the provisions of the Constitution (Recusal of Judicial Officers)(Practice)(Directions) 2019 a judicial officer's decision on recusal can only be challenged on appeal after the determination of the suit, and accordingly any legal challenge to such a decision which is made during the pendency of the suit proceedings cannot constitute a valid ground to stay proceedings in the suit.

5. I know that the Applicant shall not suffer any irreparable damage if the application is not granted as he has a right of appeal arising from the decision on recusal.

The applicant is self-represented although he never appeared in court while the respondent was represented by *Ms. Patricia Mutesi-Assistant Commissioner*.

Whether the court should stay all the proceedings, rulings and decisions in and under Misc. Application No. 843 of 2021?

The applicant never appeared in court but filed his submissions in this court and the respondent's counsel opted made oral submissions.

Submissions

The applicant submitted that the general principle relating to stay of proceedings was stated by the Constitutional Court in *Bassajabalaba & Another v Attorney General Constitutional Application No. 9 of 2013*. Although in the instant case the challenge is not by constitutional Petition, it by a Reference to the East African Court of Justice which is superior than this court in terms of Article 33(2) of the Treaty for Establishment of the East African Community.

He further submitted that the treaty requires a partner state to stay challenged proceedings until a reference is the reference is determined. Therefore, according to counsel the Judge's refusal to recuse from the cases translating into the same judge proceeding with cases.

The respondent counsel has submitted that the Constitution (Recusal of Judicial Officers)(Practice)(Directions) 2019 on recusal provides that were a

judicial officer refuses to recuse the matter shall proceed and any appeal shall be made after the suit has been determined. The wording of this provision is mandatory and the court has no discretion to stay proceedings to allow a litigant to challenge the recusal decision.

By filing a reference in the East African court of Justice, the applicant is trying to circumvent these provisions and it is a disguised appeal. This is a total abuse of court process and it is intended to further abuse the court process. Therefore the applicant is forum shopping.

This court has no jurisdiction to make interlocutory orders in respect of matters pending before the EACJ except where the court itself has made a request for a preliminary ruling before it.

Analysis

It appears the applicant's appreciation and comprehension of the application of the East African Treaty is skewed and it could be this faulted understanding that is leading him to the court because he thinks it is superior. The matter before the court is not about the Interpretation of the East African Treaty but rather contempt of court proceedings. By raising an issue of recusal in the trial court, such action should not mean that issues of Interpretation of the East Community Treaty automatically set in in order to bar the local courts from determining cases before it.

The **East African Court of Justice** was established under **Chapter 8 of The Treaty for Establishment of The East African Community** and particularly under **Article 23(1)** of the same treaty, the role of the court is to ensure adherence to the law in the interpretation and application of the treaty. This is further established under **Article 27(1)** which grants this court the jurisdiction over the interpretation and application of the treaty.

The provision of the treaty upon which this application is brought is **Article 38(2)** and states as follows; “*where a dispute has been referred to the Council or the court (EACJ), the partner states shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute*”, this provision has been interpreted by this court on a number of cases.

In the case of ***Timothy Alvin Kahoho vs. The Secretary General of The East African Community Application No. 5 of 2012***, the court declined to order that Article 38(2) of the treaty acts as an automatic injunction once a dispute has been referred to the court or the council.

Similarly in ***Henry Kyarimpa vs The Attorney General of Uganda [2014] EACJ 109 / Appeal No. 6 of 2014***, in which the court extensively discussed the interpretation of the provision. The court held that Article 38(2) means to “refrain from any action” simply means to apply a break to an intended action by the partner state involved in the dispute which has been referred to the court. It’s a call by the treaty to self-censorship by the partner state concerned and does not amount to an automatic injunction by the treaty against the partner states concerned.

This is a good ground for holding that a reference of a matter to the EACJ does not automatically stay proceedings in a national court; as alleged by the applicant in his application and submissions.

This court agrees with the submission of counsel for the respondent that this court has no jurisdiction to stay proceedings or make interlocutory orders in respect of matters pending before the East African Court of Justice except where the court itself has requested the East African Court of Justice for a Preliminary Ruling on a matter pending before it.

On perusal of the reference filed with the East African Court of Justice, it raises many grounds for determination but among which is the refusal of Justice Musa Ssekaana to recuse himself from the said matters.

Looking at the notice of motion and the affidavit deposed by the applicant, the gist of the matter in summary is that the applicant seeks the stay of proceedings *vide Miscellaneous Applications No.843 & 846 both of 2021*

pending the determination of an *East African Court of Justice reference* relating to the two applications and in the alternative, *an injunctive order*, restraining Justice Musa Ssekaana from taking part in the said proceedings, and the reference contains grounds challenging the refusal of Justice Musa Ssekaana to recuse himself from the handling of the said matters.

It is on this premise that it should be determined whether such *injunctive orders* can be sought under these circumstances and it will be imperative to look at the case of ***M.K. Financiers Ltd v. N. Shah & Co. Ltd High Court Miscellaneous Application No.764 of 2014***, a case in which the applicant in this present case (**Mr. Male Mabirizi**), represented M.K. Financiers Ltd as the director in that case, though it also involved numerous recusals and confusion in the court proceedings, the applicant in that case also sought a stay of proceedings vide M.A.No.452 of 2014 and wanting all other applications arising therefrom to be stayed until the final determination of Constitutional Petition No.22 of 2014 and any other appeal that may have arisen therefrom and that all proceedings in M.A. No.452 of 2014 and Civil Appeal No.13 of 2014 be stayed until the final determination of all Miscellaneous Applications arising therefrom and **Alividza J.**, in that case, rendered a ruling, dismissing the application, and in doing so, considered the decision in ***Davis Wesley Tusingwire v. Attorney General Constitutional Application No.06 of 2013***, where three justices of the Constitutional Court, in an application to stay criminal proceedings in the Anti-Corruption Division of the High Court at Kololo before and arising from the Chief Magistrate and Grade 1 Magistrate be stayed pending hearing and final determination of Constitutional Petition No.2 of 2013, held that;

“The law as to injunctive orders:

It is settled law that for an application for an injunction or order of stay of proceedings, whether interim or not, to succeed, the applicant has to show that:

- i) He/she has a prima-facie case in the constitutional petition, that the petition is neither frivolous nor vexatious and that the matters raised therein have a probability of success.
- ii) Failure by court to grant the injunction or order of stay sought will cause irreparable damage that cannot be compensated for by an award of damages.
- iii) If court is in doubt on both of the above two requirements or any of them, the court will determine the application on a balance of conveniences.

It is imperative that each ground is looked at as follows:

- i) In relation to whether there is a prima facie case and that the matters raised have a probability of success.

The justices of the East African Court of Justice, while dismissing an application for the recusal of the judges vide **Attorney General of the Republic of Kenya v. Prof. Anyang' Nyong'o & 10 others East African Court of Justice Application No.5 of 2007**, borrowed the words of the constitutional court of South Africa in **The President of the Republic & 2 others v. South African Rugby Football Union & 3 others Case CCT 16/98**, where it was held that;

“While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide the case impartially, this does not give them the right to object to their cases being heard by particular judicial officers merely because

they believe that such persons will be less likely to decide cases in their favour.....The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the constitution itself.”

The letter **dated 3rd January, 2022**, that the applicant seeks to rely on contains the reasons as to why Justice Musa Ssekaana declined to recuse himself from the said proceedings which were, that the grounds such as not greeting the applicant in court, and threatening to take the applicant to Luzira for *exhibiting questionable decorum* in court are insufficient grounds for a judge to recuse himself from a matter. The actions complained of do not provide any substantial evidence to impute bias by the Judge towards the applicant and judges, being bound by the judicial oath are duty bound to dispense justice without fear, favour or ill will and as such, means that the contentions of the applicant are baseless and do not have a probability of success.

To state that Justice Musa Ssekaana will hear the matters and most likely dismiss the same is extremely speculative to say the least and without merit. Cases are determined on merit of facts and the law applicable to the same.

The grounds raised on the face of it do not disclose any cause of action or a prima facie case with a likelihood of success and are merely speculative, and a vexatious, and malicious attempt to abuse court process and exhibit or display

legal acumen as opposed to achieving the ends of justice as the applicant claims.

- ii) **Whether the applicant will suffer irreparable damage in the event that the application is not granted.**

Paragraph 8 (4) of the Constitution (Recusal of Judicial Officers) (Practice) Directions, 2019, is to the effect that where a judicial officer declines to recuse him or herself, the reasons for declining shall be noted on the record and the matter shall proceed for hearing and under subparagraph (5) where the party is dissatisfied with the decision of the judicial officer not to recuse himself or herself, the party shall state the reason(s) and the hearing shall continue and important to note is that under **Paragraph 9 of the Constitution (Recusal of Judicial Officers) (Practice) Directions, 2019**, any appeal arising out of the failure to grant an application for recusal shall be made **after the matter has been determined**.

Justice Musa Ssekaana in the letter dated 3rd January, 2022, clearly stated the reasons for his refusal to recuse himself from the said matters and basing on these provisions of the law, the applicant will have an opportunity to appeal the decision of the judge in refusing to recuse himself from the said matter but that must be after the matter has been determined, since there is a remedy available to the applicant, the argument that he will suffer irreparable damage has no merit as such an appeal will likely repair any damage that may be occasioned to the applicant, if any.

- iii) **Whether the balance of conveniences tilts in favour of the application being granted.**

Article 28(1) of the Constitution of the Republic of Uganda, 1995, as amended, is to the effect that “in the determination of civil rights and obligations..., a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”

This implies that the said applications M.A. 843 and 846 of 2021, need to be dispensed with as soon as possible and unnecessarily staying the proceedings through injunctive orders will delay justice and as the old adage goes, ‘Justice delayed is justice denied.’ The main application (843 of 2021) out of which this application is for contempt of court which ought to be determined to establish the conduct of the respondent.

In addition to this, Judicial officers swore an oath to dispense justice without fear, favour or ill will and are bound by that oath and as such, any fears as to the impartiality of a judge in the handling of a matter that are not adequately substantiated should not be tolerated. Therefore, in the interest of speedy dispensation of justice, it would be detrimental to grant the application which seeks injunctive orders staying the proceedings and therefore, the balance of convenience does not tilt in favour of the application being granted as the applicant alleges.

The applicant has failed to prove that the said reference challenging the decision of Justice Musa Ssekaana to not recuse himself from the handling of Miscellaneous Applications No.843 & 846 both of 2021, has a likelihood of success. He has an option to appeal such a decision and as such will not suffer irreparable damage in the event that the application is not granted and the balance of convenience does not tilt in favour of the application being granted since the matters have to be dispensed with in a timely manner so as to quicken the dispensation of justice which is a constitutional mandate.

The applicant is trying to forum shop in order to avoid and circumvent the law on recusal in Uganda which action should be abhorred. This court cannot be coerced in staying proceedings in Uganda simply because the applicant has opted to make a reference to the East African Court of Justice. It is his right to go to any court of his choice but he should not use it as a bar to other proceedings in other courts which he has filed matters himself simply because he does not want the court to hear those matters.

The applicant has failed to prove any of the required grounds for the injunctive orders and in this case, stay of *MISC.APPLICATION No.843 of 2021 vide Attorney General v. Male H. Mbirizi K. Kiwanuka & MISCELLANEOUS APPLICATION No.846 of 2021 vide Male H. Mbirizi K. Kiwanuka v. Attorney General*, pending the final determination of EAST AFRICAN COURT OF JUSTICE REFERENCE No.01 of 2022.

I therefore dismiss the application with costs to the respondent.

I so order.

SSEKAANA MUSA
JUDGE
27TH JANUARY 2022