

## Nyamwasa and Others v Rwanda (interim measures) (2017) 2 AfCLR 1

Application 016/2015, *General Kayumba Nyamwasa & Others v Republic of Rwanda*

Order, 24 March 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSSE, BEN ACHOUR, BOSSA, MATUSSE and MENGUE

Recused under Article 22: MUKAMULISA

Request for interim measures not granted in a case dealing with referendum on amendment to the Constitution of Rwanda allowing the President of the Republic to seek a third term as the request had been overtaken by the holding of the referendum.

**Interim measures** (request for interim measures overtaken by events, 35)

### I. The Parties

1. The Applicants are General Kayumba Nyamwasa, Mr Kennedy Alfred Nurudin Gihana, Mr Bamporiki Abdallah Seif, Mr Frank Ntwali, Mr Safari Stanley, Dr Etienne Mutabazi and Mr Epimaque Ntamushobora (hereinafter referred to as “the Applicants”) requesting certain Interim Measures. The Applicants claim to be citizens of the Republic of Rwanda who are currently in exile in the Republic of South Africa, having fled from Rwanda.

2. The Respondent is the Republic of Rwanda. It ratified the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 22 July 1983 and the Protocol on 6 May 2003, and is party to both instruments. The Respondent deposited, on 22 January 2013 a Declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.<sup>1</sup>

### II. Subject of the Application

3. The Application is based on the exercise in Rwanda to amend the Constitution to allow the President of the Republic of Rwanda to

1 It should be noted that the Respondent withdrew its declaration on 29 February 2016. On the decision of the Court in this regard, see para 22 and 23.

seek election to serve for a third term as President. The Applicants allege that Article 101 of the Constitution of the Republic of Rwanda provides that the President shall serve for only two (2) terms.

4. The Applicants allege that the campaign for the amendment of Article 101 of the Constitution has been conducted against a climate of fear and that any challenges to the amendments of the Constitution would likely not succeed as the judiciary of Rwanda is allegedly not independent, particularly since some judicial officers are also members of the Respondent's Ruling Party.

5. The Applicants further allege that this has been against a backdrop of arbitrary arrests, detentions and trials of leading political figures such as Victoire Ingabire Umuhoya, the former President, Pasteur Bizimungu, the former Minister, Charles Ntakirutika and Bernard Ntaganda. One of the Applicants, General Kayumba Nyamwasa, states that South African Courts have found that his attempted assassination was conducted by persons linked to the Respondent. The Applicants also allege that another military officer, Lieutenant Colonel Seveline Ngabo has been held *incommunicado* in an unknown location since 20 August 2010 and that despite the East African Court of Justice finding that his detention was unlawful, he has neither been presented in Court nor charged with any offence.

6. The Applicants also claim that the filing of an application by the "Green Party" in the courts in Rwanda to challenge the amendment of Article 101 of the Constitution, is a sham since this Party is a creation of the President and the whole exercise is intended to lend legitimacy to the process of the amendment of the Constitution by allowing these constitutional challenges.

7. The Applicants have filed affidavits in support of the Application. The affidavit by Safari Stanley states that local remedies in Rwanda are neither practical nor effective since the President of the Republic of Rwanda dictates how courts should decide matters before them. They add that, since the President has a personal interest in the matter, the outcome of any action at the local level would be to allow the amendment.

8. The Applicants base their Application on Articles 13 (freedom to participate in government), 19 (equality of peoples), 21 (freedom of peoples to dispose of their wealth), 22 (the right to economic, social and cultural development) of the Charter and Article 23 (prohibiting amendments of constitutions to extend term limits for the presidency) of the African Charter on Democracy, Elections and Governance (hereinafter referred to as 'the Charter on Democracy'). The Applicants state that the Respondent is a party to the Charter and the Charter on Democracy. The Applicants also allege that the planned constitutional amendment is in contravention of Article 6(d) of the Treaty of the East

African Community which sets out the fundamental principles of the East African Community, including “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”.

### **III. Procedure**

**9.** The Application was filed on 22 July 2015. It was served on the Respondent and transmitted to the States Parties to the Protocol and the Executive Council of the African Union through the Chairperson of the African Union Commission by notices dated 4 August 2015.

**10.** On 27 October 2015, the Respondent applied for extension of time, by thirty (30) days to file its Response. By a notice dated 13 November 2015, the Respondent was notified of the Court’s decision to grant the extension of time to file the Response by 23 November 2015.

**11.** By a Notice dated 13 November 2015, the Parties were informed that there would be a Public Hearing on legal arguments on the Request for Interim Measures on 25 November 2015 in Arusha, Tanzania in the course of the Court’s 39th Ordinary Session.

**12.** On 18 November 2015, the Respondent filed the Response to the Application and it was transmitted to the Applicants by a notice of the same date.

**13.** On 18 November 2015, the Applicants requested a deferral of the hearing due to the inability of some of the Applicants to travel to Arusha for the hearing due to lack of travel documents.

**14.** Following the Applicant’s request for a deferral of the hearing, by a Notice dated 20 November 2015, the Parties were informed that the Court had decided to defer the Public Hearing.

**15.** On 12 December 2015, the Applicant’s representative raised an objection to the deferral of the Public Hearing. The Applicant stated that this meant that their Application would be overtaken by events since the referendum with respect to which they sought orders would take place in a few days’ time.

**16.** The Registry responded to the above mentioned communication from the Applicant’s representative by a letter dated 29 December 2015, by chronicling the handling of the matter by the Court and emphasizing that the deferral of the public hearing was on the Applicants’ request despite the Court having scheduled it due to the urgency of the situation.

**17.** The Applicants filed the Reply to the Response on 1 February 2016. On 5 February 2016, the Registry notified the Applicants that, since the Reply was filed out of time, they should seek the leave of Court for an extension of time to file the Reply. The Applicants sought this leave, by their notice received on 7 March 2016. The Court granted

the leave and the Reply was served on the Respondent by a notice dated 14 July 2016.

**18.** By a letter dated 1 March 2016, received at the Registry of the Court on 2 March 2016, the Respondent notified the Court of its deposition of an instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol with respect of Application No. 003/2014, *Ingabire Victore Umuhoza v Republic of Rwanda* wherein the letter stated that:

“The Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda, [including Ingabire Victoire Umuhoza v Republic of Rwanda], until review is made to the Declaration and the Court is notified in due course.”

**19.** By a letter dated 3 March 2016, the Office of Legal Counsel and Directorate of Legal Affairs of the African Union Commission notified the Court of the submission of the Respondent’s withdrawal of its Declaration made under Article 34(6) of the Protocol, which was received at the African Union Commission on 29 February 2016.

**20.** By a notice dated 10 March 2016, the Applicants were notified of the deposit by the Respondent of a declaration withdrawing its Declaration filed under Article 34(6) of the Protocol, and invited to file any comments thereon within fifteen (15) days of receipt of the notice.

**21.** The Applicants filed observations regarding the Respondent’s withdrawal of the Declaration on 16 May 2016. The Respondent did not file a Response to the Applicant’s observations.

**22.** On 3 June 2016, the Court issued a Ruling in Application No. 003/2014, *Ingabire Victoire Umuhoza v Republic of Rwanda* that the Respondent’s withdrawal of its Declaration has no effect on that Application and it would continue with the hearing of that Application.

**23.** On 3 June 2016, the Court issued an Order in the current Application that,

“the Court’s Ruling in *Ingabire Victoire Umuhoza v Republic of Rwanda*, therefore is to the effect that the withdrawal of Rwanda’s Declaration does not have the effect of suspending proceedings of cases that have been filed against Rwanda before the Court” and “unanimously, decides to continue examining this Application”.

**24.** This Order was transmitted to the Parties by a notice dated 5 July 2016.

**25.** The Court ordered that pleadings in the Application be closed with effect from 16 September 2016.

## **IV. Prayers of the Parties**

### **A. Applicant's Prayers**

**26.** In the Application, the Applicants are applying for interim measures. They pray that the Court:

- "a. Order President Kagame and the Republic of Rwanda to strictly abide by and respect the clear wording of Article 101 of the Republic of Rwanda Constitution, read with Article 13 of the ACHPR and Article 23 of the Democracy Charter
- b. Order the Senate of Rwanda not to entertain any motion purportedly instigated by the people of Rwanda to repeal Article 101 because the people exhausted this power after they banned themselves from ever revisiting Article 101
- c. Order the government of the Republic of Rwanda to comply with Article 23(5) of the African Charter on Democracy, Elections and Governance which forbids any change of the constitution to give the president third or other term
- d. Order any relief(s) as the Court may deem necessary in the circumstances."

**27.** In their Reply to the Respondent's Response, the Applicants pray the Court to:

- "a. Declare that it has jurisdiction in terms of the Protocol and the Rules of procedure to hear the Application
- b. Declare the Application duly admissible.
- c. Simultaneously order the Respondent to abandon plans to hold a referendum on 17 or 18 December 2015 to amend Article 101 of its Constitution in light of the Article 23(5) prohibition of the Charter on Democracy.
- d. Declare that even if, but without conceding that Kayumba Nyamwasa and Safari Stanley for the reasons alleged in the Response have no right to seek remedy, other Applicants have this right and the Respondent by not referring to them anywhere in the Response does admit that the case is admissible in respect to these other Applicants.
- e. Order the Respondent to produce the Gacaca and Military Court judgments severally referred to in the Response to enable Kayumba Nyamwasa and Safari Stanley to study

- them and make further representations with their rights.
- f. Order the Respondent to delete paragraph 31 of the Response threatening the Court against deciding against the Respondent and take necessary measures against the Respondent.
  - g. Award costs of this Application to the Applicants.
  - h. Make such orders and reliefs as it deems necessary.”
- 28.** In its Response to the Application, the Respondent prays the Court to:
- "a. Declare that the Application is frivolous, vexatious, tendentious, politically motivated, an abuse of the process of the Court and an attempt to compromise the integrity of the Honourable Court.
  - b. Dismiss the Application without the necessity of summoning the respondents to the hearing in accordance with Rule 38 of the Rules of procedure.
  - c. Declare that criminal convicts still eluding justice cannot have locus standi before the Honourable Court.
  - d. Declare that the Court has no jurisdiction to hear and deal with the Application on grounds that it is defective and bad in law.
  - e. Declare the Application inadmissible on grounds that it falls short of admissibility conditions established by the Charter and Rules.
  - f. Award costs to Respondents.
  - g. Make such an order as it deems fit.”

## V. On the request for interim measures

**29.** In its Response to the Request for Interim measures, the Respondent raised objections, contending that the Application does not indicate what would remain for the Court to decide after issuing interim measures. They allege further that there are no people’s lives in danger or serious massive violations of human rights as required under Article 27(2) of the Protocol, to justify a request for interim measures.

**30.** Citing the Court’s Ruling in Application No. 004/2013, *Lohe Issa Konate v Burkina Faso*, the Respondent maintains that the purpose of interim measures is to avoid irreparable damage to the victims during the course of the consideration of the application on the merits. The Respondent further states that, there is no evidence that interim measures can be separated from the merits attributable to this request and the Court cannot grant interim measures without prejudging the potential merits “(if any)” of the Application.

**31.** In their Reply to the Respondent's objection, the Applicants state that the Court has the mandate to issue interim measures pursuant to Rule 51 of the Rules and that this Application raises a matter of extreme urgency. The Applicants further state that neither is the application for interim measures based on the number of people that have died nor does the Rule require that lives must have been lost for the Court to issue interim measures. The Applicants maintain that the measures requested are to prevent the Respondent from conducting the referendum. The Applicants aver that, the Court should exercise its jurisdiction since the Supreme Court of Rwanda has determined the application filed by the Green Party, to challenge the referendum.

**32.** This Ruling is with respect to the Applicants' Request for Interim Measures for the Respondent to be ordered not to proceed with the referendum to amend Article 101 of its Constitution, in light of a prohibition in this regard in Article 23(5) of the Charter on Democracy.

**33.** The Court can indeed, pursuant to Article 27(2) of the Protocol issue the interim measures "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons." This provision is mirrored in Rule 51(1) of the Rules which provides that '[p]ursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the Parties any interim measure which it deems necessary to adopt in the interest of the Parties or of justice'.

**34.** However, interim measures are ordered to prevent irreparable harm to the rights of the party requesting them, pending determination of an application on the merits.

**35.** In view of the extreme urgency of the situation, whereby the request for interim measures was to stop the Referendum on amendment of Article 101 of the Respondent's Constitution planned for 17 or 18 December, 2015, the Court decided to hold a Public Hearing on this request on 25 November 2015. The Applicants requested a deferral of the hearing due to the inability of some of the Applicants who wished to travel to Arusha for the same. The referendum was duly held on 17 December 2015, thus defeating the purpose of any interim measures and the request was overtaken by events.

**36.** In light of the foregoing, the Court cannot order the interim measures requested since the same has been overtaken by events. The Application is therefore of no relevance and is consequently dismissed.

**37.** For these reasons,  
The Court,  
Unanimously:

i. Rules that the Court cannot grant the Interim Measures requested.

- ii. Rules that the Application be and is hereby dismissed.