



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/092

Order No.: 262 (NBI/2015)

Date: 3 September 2015

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

KILEMI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**DECISION ON THE APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for the Applicant:**

Self-represented

**Counsel for the Respondent:**

Saidou N'dow, UN-HABITAT

### **The Application and Procedural History**

1. The Applicant is the Director of Administration at the United Nations International Criminal Tribunal for Rwanda (ICTR). She serves on a fixed term appointment at the D1 level.
2. On 28 August 2015, the Applicant filed an Application for Suspension of Action “contesting the decision not to permit [her] to fully and fairly compete in the selection process” for the post of Director, Management and Operations Division, UN-HABITAT.
3. The Application was served on the Respondent on the same day. The deadline for the submission of the Respondent’s Reply was set for noon on 31 August 2015.
4. On 31 August 2015, the Respondent filed a motion for extension of that deadline on the ground that Counsel needed more time to properly obtain instructions from, and consult with, his client.
5. On the same day, the Tribunal issued Order No. 258 (NBI/2015) granting the Respondent’s Motion.
6. The Respondent filed his Reply to the Application on 1 September 2015.

### **Deliberations**

7. Applications for suspension of action are governed by art. 2.2 of the Statute of the United Nations Dispute Tribunal and arts. 13 and 14 of the Tribunal’s Rules of Procedure.
8. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an

application for suspension of action to be granted. Under both arts. 13 and 14 of the UNDT Rules, the Tribunal has five working days from the service of an application on the Respondent to consider an application for interim measures.

9. A suspension of action order is, in substance and effect, akin to an *interim* order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending a management evaluation of its impugned decision or a full determination of the case on the merits. It follows, therefore, that an order for a suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

10. This Application must be adjudicated against the stipulated cumulative test, in that the Applicant must establish that the impugned decision is *prima facie* unlawful, calls for urgent adjudication and that implementation of the impugned decision would cause him/her irreparable harm.

11. To grant an application for suspension of action, the Court must be satisfied that there is a serious question to be tried on the merits and must also consider whether damages would adequately compensate the applicant in the event that his or her application succeeds at trial.<sup>1</sup>

12. The Applicant in this case submits that she is “not contesting the appointment of a specific person to the post, but contesting the decision not to permit [her] to fully and fairly compete in the selection process.” She also concedes that not “being invited for an oral interview is not in and as of itself a violation of the staff regulations and rules of the United Nations, and its respective administrative issuances.” She however contends that “it is a mockery of the system if the process

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<sup>1</sup> See *Kasmani* UNDT/2009/017; *Onana* UNDT/2009/033; *American Cyanide Co v Ethicon Ltd* (1975) AC396.

leading to the identification of candidates to be interviewed and subsequently for the recommendation is skewed to benefit a particular candidate who does not possess the required qualifications and experience for the post.”

13. Given those submissions, it is difficult for the Tribunal to glean what exactly the Applicant is seeking to suspend.

14. The Tribunal clearly cannot suspend the decision not to interview her, given that that decision forms part of a continuum that makes up the selection exercise. As no selection decision has yet been made by the Senior Review Group, before whom the decision is currently pending, there is no *decision* on the selection exercise that the Tribunal can properly suspend. The Applicant, in any event, has made the point that she is *not* challenging a selection decision, and acknowledges that the decision not to have invited her for an oral interview cannot be challenged at this stage.

15. While the Applicant appears to be implying that extraneous factors may have led to the panel’s recommendation, and that the selected candidate does not meet the criteria set out for the vacancy, her submissions are neither cogent nor coherent enough to clearly make out a *prima facie* case with respect to those implied allegations. As no selection decision has been made, the Applicant’s allegations are at this stage little more than speculation or conjecture.

16. Within the present context of the United Nations, a suspension of action application will only succeed where the Applicant is able to establish a *prima facie* case on a claim of right, or where he/she can show that *prima facie*, the case he/she has made out is one which the opposing party can be called upon to answer and that it is just, convenient and urgent for the Tribunal to intervene and, without which intervention, the Respondent’s action or decision would irreparably alter the *status quo*.

17. On the facts of the present case, there is, in effect, no *status quo* which the Court can properly preserve.

18. Based on the evidence before it, the Tribunal finds no impropriety in the Respondent's application of ST/AI/2010/3 on the Staff Selection system in respect of this selection exercise. This Application therefore fails on the first limb of *prima facie* unlawfulness.

19. Having found that the impugned decision has not been shown to be *prima facie* unlawful, and given that the test for suspension of action applications is a cumulative one, it is unnecessary for the Tribunal to proceed to assess this Application on the ground of urgency and irreparable harm.

20. The Application for Suspension of Action is hereby **REFUSED**.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 3<sup>rd</sup> day of September 2015

Entered in the Register on this 3<sup>rd</sup> day of September 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi