



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Jean-Pelé Fomété

KAMUNYI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORAL ORDER ON THE RESPONDENT'S
APPLICATION FOR A CLOSED SESSION
PURSUANT TO ARTICLE 16(6) OF THE
RULES OF PROCEDURE OF THE
UNITED NATIONS DISPUTE TRIBUNAL**

Counsel for applicant:

Mr. James Ochieng Oduol

Counsel for respondent:

Mr. Chacha Odera

Ms. Miouly Pongnon, UNON

Introduction

1. At the commencement of today's hearing, a special hearing to take evidence of two witnesses in advance of the main hearing because those witnesses will be absent on the date of the main hearing, an application has been made by the respondent that the entire proceedings of this case should be closed.

2. The application is made pursuant to Article 16, sub-section 6 of the Rules of Procedure of the Tribunal, which reads,

The oral proceedings shall be held in public unless the judge hearing the case decides, at his or her own initiative or at the request of one of the parties, that exceptional circumstances require that the oral proceedings be closed".

3. The basis of the application presented by counsel for the respondent is that there are ongoing investigations which have not been concluded, respecting a threat to a senior member of UNON some years ago and that because those proceedings have not been finalized, it may prejudice the ongoing investigation if these proceedings before the Tribunal were open to the public.

4. When asked whether the application was in respect of the entire proceedings or only part of it counsel advised that in view of the sensitive security matters and the possible release of information on security issues, it would be in the interests of the parties to have the entire proceedings closed because it was impossible to anticipate or to tease out, what will be confidential and what will not be confidential. Counsel for the respondent urged extreme caution as this is a matter that could affect the security of everyone in the UNON complex.

5. The application was opposed by counsel for the applicant. He made the point that there was no notice of this application conveyed to the applicant before today but in spite of that he made submissions. He emphasized that Article 16 envisages open

hearings and that there should be exceptional circumstances for it to not be open. He pointed out that the investigation referred to by counsel for the respondent has in fact been concluded and he referred to two letters to support that contention.

6. Counsel for the applicant also said in reply that this case concerns five issues, which have to do with the placement of the applicant on suspension and special leave, his incarceration by the police, the decision to reprimand him and the decision to transfer him to another section of UNON, none of which, he says, have anything to do with security and that this is not a matter where the exceptional circumstances have been made out.

Ruling

7. I have spent some time in preparation for this case and in doing so I read virtually all, if not all, of the relevant documents including the correspondence which was alluded to by counsel.

8. Undoubtedly, this is a case which concerns security at UNON and the reason for this is that the applicant was a security officer, his senior supervisors were security officers and the incidents which led to the facts of this case, arose out of the performance of security duties. But there seems to me little, if anything, that has to do with delving into the darkest secrets of the United Nations Security Service and I cannot accept, with respect to the submissions of counsel for the respondent, to say that it is impossible to tease out what might be confidential and what is confidential.

9. Two main events occurred which led to the initial suspension of the applicant. One of those was a private matter that had to do with the applicant and evidence will reveal that. The second was a death threat to a senior member of staff. In my view, that second matter comprises a small part of the evidence.

10. I agree with counsel for the applicant that the overriding consideration coming out of Article 16 is that proceedings should be open. It is one of the desires of the General Assembly in instituting the Tribunal; that it should hold open, fair and transparent proceedings. That is indicated by the wording of Article 16, which says that exceptional circumstances be established if the oral proceedings are to be closed.

11. I accept that in the course of these proceedings, there may be some matters that come to light, which may require to be kept confidential. I respect the respondent's right to alert the Tribunal as soon as it becomes apparent that this is a confidential matter and the Tribunal will take immediate steps to make certain that any confidential matters of that sort are not heard in open public and that they are covered, in addition, by non-publication orders. But, as I started by saying, having read the papers, I am quite certain that those will be of very limited ambit and that they are identifiable from the papers and should be able to be anticipated by counsel.

12. So, for those reasons, I decline the respondent's application to order that this case be closed. It is open to the public. The public is entitled to hear it except for those times when the Tribunal is asked to specifically exclude the public from hearing certain portions of the evidence. I have no doubt that competent counsel will be able to anticipate those matters. After all, everything has been in writing for several years now and it should be possible to anticipate those moments.

13. So, for that reason, the application is denied subject to the right of respondent to raise it for specific matters as they come to light.

(Signed)

Judge Coral Shaw

Dated this 6th day of October 2010

Entered in the Register on this 6th day of October 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi