THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(Coram: Johnston Busingye, PJ; Mary Stella Arach-Amoko DPJ; John Mkwawa J, Jean Bosco Butasi J, Benjamin Patrick Kubo J)

REFERENCE NO.1 OF 2008

MODERN HOLDINGS (EA) LIMITED……………………….CLAIMANT

VERSUS

KENYA PORTS AUTHORITY……………………………..RESPONDENT

Date: 12th February 2009

RULING OF THE COURT

The Claimant is a company incorporated and registered in the United Republic of Tanzania, having its residence and registered offices at Sokoine Road, Arusha, Tanzania. It has perpetual succession, a common seal and power to sue and be sued in its corporate name. At the material time, it was an importer and sole distributor of Masafi products, which include high quality fruit juices and mineral water in the East Africa Region. The products were imported from a company called Masafi Mineral Water Co. (LLC) based in the United Arab Emirates.

The Respondent, Kenya Ports Authority (KPA) is a statutory corporate body, established under the provisions of section 3 of the Kenya Ports Authority Act (KPA Act), Cap. 391 Laws of Kenya. Its headquarters are at Mombasa, Kenya. Its duties are *inter alia*, to act as a warehouse provider and to store goods for persons making use of Kenyan ports. In addition, the Respondent has the statutory obligation to determine, impose and levy

rates, fares, charges, dues or fees for its services or for use, by any persons, of its facilities.

The Claimant filed the reference in this Court on the 25th September 2008, under Article 30 of the Treaty for the Establishment of the East African Community (herein referred to as “the Treaty”), Rule 20 of the East African Court of Justice Rules of Procedure, the East African Community Customs Management Act of 2004, and the East African Community Customs Management Regulations of 2006.

In the reference, the Claimant avers that it imported 21 x 40ft containers of assorted Masafi fruit juices and mineral water which landed at the Mombasa port on diverse days in December 2007 and January 2008. The Claimant further avers that the consignment could not be cleared from the port within the stipulated time due to the post election violence experienced in Kenya during the aforementioned period which disrupted the operations at the port. It avers that the Respondent was fully aware that the consignments consisted of perishable goods with limited shelf life and in order to cover for the period lost due to the disruptions of port operations, it was imperative and legitimately expected that the clearance of the Claimant’s consignments would be effected as a matter of top priority on resumption of port operations.

The Claimant contends that in recognition of this fact, and in the East African Community spirit, the Kenya Revenue Authority (KRA) in accordance with Regulation 85 of the East African Community Customs Management Regulations of 2006 recommended on the 28th April 2008 to the Minister for Finance a waiver of customs warehouse rent of 80%. It avers further that on the 8th May 2009 (he must have meant 2008), the Government of Kenya acted on the recommendation and waived 80 % of the customs warehouse rent up to 13th March 2008. The Complainant complains that unknown to it and without its consent, and/or without justification, the Respondent had warehoused its consignment at the Makupa Transit Shade Ltd. (MTS Ltd.), an entity contracted and/or which entered into some arrangement with the Respondent, but which had no contractual obligation with the Claimant.

The Claimant avers that the Respondent unlawfully and unjustifiably insisted that the Claimant must clear its consignment through MTS Ltd, with the direct consequence that the waiver granted by the Government of Kenya and its tax agencies could not be enjoyed by the Claimant. The Claimant added that the said company imposed unreasonable clearance conditions that all twenty one (21) containers be cleared within three (3)

days with a verbal waiver of 90% of the customs warehouse rent, making it logistically impossible to clear the consignments within the imposed duration apart from only six (6) out of the twenty one (21) containers. The Complainant contends that, MTS Ltd, after the expiry of the three (3) days period refused to allow the Claimant to remove the rest of the consignments, notwithstanding the arrival of nine (9) trucks from Tanzania and an additional six (6) trucks sourced locally to transport the said containers, unless and until the customs warehouse rent was paid in full, thereby overriding the waiver granted by the Kenya Government.

The Claimant contends further that the Respondent and/or its agent MTS Ltd, arrogantly and blatantly ignored and/or unreasonably refused to comply with the directive issued by the Government of Kenya. It avers that through no fault of its own and as a direct consequence of the Respondent acting in cohorts with MTS Ltd, it has suffered colossal pecuniary losses in that:

- All products in the aforesaid containers have expired and are no longer fit for human consumption ;
- It's sales and distribution agreement dated 12th October 2008 with Mineral Water Co[LLC], a high quality and reputable juice supplier ,has been terminated with no option for renewal;
- Its bank guarantee of US $ 1,000,000 was utilized by Masafi Mineral Water Co.(LLC) to liquidate outstanding invoices;
- Bankers withdrew credit facilities, and threatened to foreclose on its collateral so as to realize security;
- Its reputation as a trading entity has been gravely injured and eroded;
- It incurred expenses in hiring fifteen (15) trucks, nine (9) of which came from Tanzania to carry the consignments;
- It incurred expenses in purchasing air tickets, on road transport , hotel accommodation and meals in following up clearance of the aforesaid consignments from the custody of the Respondent;
- It incurred unnecessary demurrage charges which continue to be incurred at a rate of US $ 50 per day; and
- It lost profit due to failure to deliver the consignments, and interest on monies borrowed from banks to pay its creditors.

Consequently, the Claimant claims from the Respondent and prays for the following orders from the Court:

"(1) A declaration that the decision and the action of the Respondent in refusing to clear and release the Claimant's consignments is unlawful and an infringement of the letter and spirit of the Treaty and The East African Community Customs Management Act and Regulations.

(2) A declaration that no further customs warehouse rent is payable to the Respondent by the claimant on the 15 containers in their custody, whose contents and/or products have expired.

(3) Loss of the consignment through expiry of the product ………………………………………………………….. $ 819,554

(4) Loss of profit for January to June 2008 $ 1,395,816

(5) Special damages $ 22,500,000

(6) Interest on borrowed funds up to June 2008 $ 28,749

(7) Expenditure on following up clearance $ 75,000

SUB TOTAL $ 24,819,119

(8) Loss of profit for the remaining period of the sales and distribution agreement which is 31.12.2010, at a rate of $ 232,636 per month for 30 months from 01.07.2008 totaling $ 6,979,080

(9) General damages to be assessed by the Court together with interest thereon at rates to be determined by the Court.

(10) Interest on items (3),(4),(5),(6)&(7) herein above and/or the decretal sum from 01.07.2008 to the date of full payment at commercial rates and/or such rates as this Honourable court may deem fit to grant.

(11) Any other relief that this Honourable Court may deem fit to grant.

(12) Costs of this reference be borne by the Respondent in any event."

In its response filed on the 27th November 2008, the Respondent admitted the description of the parties, its statutory duties under the KPA Act, the objectives of the Treaty as stated in the last four recitals of the preamble as cited, the purpose of the promulgation of the East African Community Customs Management Laws, namely, to facilitate trade and business in the Partner States, the importation of the cargo by the Claimant on the dates and in the quantities stated as well as their intended destination. The Respondent, however, denied each and every allegation contained in the reference as though the same were set out verbatim and traversed seriatim. It described the reference as frivolous, vexatious and a grave abuse of the process of the Court, and urged the Court to dismiss the same *in limine.*

The response also gave notice of a preliminary objection seeking the dismissal *in limine* of the reference on the grounds that:

(i) This honourable Court lacks the jurisdiction to entertain the nature of the matter contained in the reference.

(ii) The Respondent lacks the capacity to be sued as a legal person in this honourable Court.

(iii) The applicant lacks the *locus standi* to bring the reference before the Court.

When the reference came before the Court on 20th January 2009 for scheduling conference, the Court ruled that the preliminary objection be dealt with straightaway, since it was a fundamental point of law which could, if upheld, dispose of the reference at this stage of the proceedings. The Court was alive in taking this step, to the observation made by LAW,J.A of the then E.A Court of Appeal ***in Mukisa Biscuits Manufacturing Co Ltd – vs - West End Distributors Ltd [1969] E.A 696 at 700*** where he stated that:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court,……………."

Additionally, this Court took cognizance of the fact that jurisdiction is basic to its adjudicatory function, such that if jurisdiction is challenged and made

an issue, it ought to be addressed and determined forthwith. The rationale for this was aptly summed up by Nyarangi, J.A. of the Kenya Court of Appeal (as he then was) in ***Owners of Motor Vessel "Lilian S"- vs-Caltex Oil (Kenya) Ltd [KLR] 1*** when he stated at page at page 14:

".... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest possible opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence...."

Submissions were made by Mr Geoffrey Imende and Mr Paul Muite, Counsel for the Respondent and Claimant, respectively. The Court reserved its ruling on the issue till 12th February 2009.

The bone of contention from the submissions of both learned Counsel is the jurisdiction of this Court to entertain the reference and the capacity of KPA as a Respondent. Spirited submissions were made before this Court on behalf of both parties.

The Respondent's Counsel submitted that KPA lacks the capacity to be sued in this Court as a legal person because it is not an institution of the Community. Article 30 of the Treaty provides that a complaint must be against an Act, regulation, directive, decision or action of a Partner State or an institution of the Community. The Treaty defines an institution of the Community in Article 9 (2) of the Treaty as such bodies, departments, and services as may be established by the Summit. KPA was not established by the Summit, it was established by the Republic of Kenya, a Partner State, under the provisions of section 3 of the KPA Act. It was his submission therefore that this Court has no jurisdiction to entertain and determine this reference.

Counsel for the Respondent abandoned ground (iii) of his objection.

Learned Counsel for the claimant on his part maintained that this Court has jurisdiction to entertain and determine this reference. He submitted that Article 30 of the Treaty is not specific as to who should be a respondent in a reference brought by legal or natural persons under the said Article. He argued further that in the event that the Court accepts the argument by the Respondent's Counsel that the said Article only applies to Partner States and institutions of the Community as respondents, KPA can be classified

as an institution of the Community by virtue of Article 9 (2) of the Treaty because the said sub-Article refers to "services". He pointed out that under Article 93 of the Treaty which obligates the members of the Community to co-operate in the development and promotion of port services, the word "services" is used several times and that at the time the Summit signed the Treaty, the said Article 93 was part and parcel of the Treaty, and that therefore KPA is a service of the Partner States and the Community.

Counsel for the Claimant also stated that one of the reasons why he resorted to this Court is the failure by the Republic of Kenya to establish a tax appeals tribunal to which he would have referred the matter before this Court for adjudication.

After due consideration of the submissions, it is the Court's view that the issues for determination are:

(a) Whether the Court has jurisdiction to entertain the matter complained of in the reference.

(b) Whether the Respondent has the capacity to be sued in this Court.

The Court is in agreement with Mr. Imende that in this case the two issues are intertwined and is of the view that the matter revolves around the interpretation of Article 30 read together with Article 27 of the Treaty.

The jurisdiction of the Court is conferred by the Treaty. The Treaty describes the role and jurisdiction of the Court in two distinct but clearly related provisions. In Article 23(1), the Treaty provides:

"1.The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty."

It then provides thus in Article 27(1):

"***The Court shall initially have jurisdiction over the interpretation and application of this Treaty."***

The Treaty also makes provision for reference by natural or legal persons to the Court under Article 30 on which the preliminary objection is based. It reads:

"Reference by Legal and Natural Persons

1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner state may refer for determination by the Court, the legality of any Act, regulation, directive, decision, or action of a Partner State or an institution of the Community on the ground that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

The Treaty, being an international treaty among five sovereign states, namely, Kenya, Uganda, Tanzania, Rwanda and Burundi, is subject to the international law on interpretation of treaties, the main one being **"The Vienna Convention on the Law of Treaties".**

Article 31 of The Vienna Convention on the Law of Treaties sets out the general rule of interpretation of treaties as follows:

"1. <u>A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose</u>.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation.
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended." *(Underlining is added for emphasis)*

This rule has been applied by this Court in for instance, ***Prof. Peter Anyang' Nyong'o and Others - vs – The Attorney General of The Republic of Kenya and Others, Reference No. 1 of 2006;* and in *The East African Law Society and Others - vs - The Attorney General of the Republic of Kenya and Others, Reference No.3 of 2008***.

The Court has been proactive in the interpretation and application of the Treaty. For instance in ***Katabazi and Others - vs - The Attorney General of The Republic of Uganda and The Secretary General of the East African Community, Reference No.1 of 2007***, a similar preliminary objection was raised by Counsel for the Respondents on the grounds that the reference was a human rights issue, and that the Court had no jurisdiction under Article 27 (2) of the Treaty in the absence of a protocol to operationalise the Court's extended jurisdiction. The Court had no difficulty in overruling the preliminary objection in question because that complaint did not only involve the interpretation of the Treaty, but was also basically against the Republic of Uganda, a Partner State of the Community. That case is distinguishable from the instant one in that the Respondent KPA is not a Partner State of the Community.

The Court has also declined to entertain matters where it has no jurisdiction. (*See:* ***Christopher Mtikila and Others – vs - The Attorney General of the United Republic of Tanzania, Ref No.2 of 2007***).

In ***Prof. Anyang' Nyongo and Others – vs – The Attorney General of the Republic of Kenya and Others, Ref. No.1 of 2006,*** the Court struck out the reference against three individuals for lack of capacity. The Respondents were sued as the Clerk to the National Assembly of Kenya, Leader of Government Business of the National Assembly of Kenya and the Chairman of NARC Kenya, a political party, respectively. Counsel for the applicants had argued that since a natural person has the capacity to sue in this Court a natural person must also have the capacity to be sued in the same Court under the Treaty. He had urged the Court to give Article 30 of the Treaty an interpretation that would bring natural persons who commit misfeasance that infringe provisions of the Treaty within the ambit of Article 30 to account for their actions. This is what the Court held at page 7 of the ruling dated 27th November, 2006:

"***With due respect to Counsel for the Applicants, it appears to us that enjoining the 2nd, 5th and 6th Respondents to the reference was under a misconception. A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the***

legality under the Treaty of an activity of a Partner State or of an institution of the Community. The alleged collusion and connivance, if any, is not actionable under Article 30 of the Treaty.

We think there is merit in the objections. The matters referred to this Court, whose legality it has to determine relate to the responsibility of the Republic of Kenya as a Partner State, acting by its National Assembly under Article 50 of the Treaty, to elect nine members of the EALA. Both the process of selecting the nine members whose names have been remitted to the 3rd Respondent and the Election Rules under which they were elected or selected were done by the Republic of Kenya through its National Assembly. It is for that reason that the Attorney General of Kenya was rightly made the 1st Respondent.”

Applying the above principles to the matter before us, and we find the language of Article 30 plain and clear. As we have demonstrated earlier on in this ruling, and it is not in contention by both parties:

- Article 30 makes provision for reference by any natural and legal person;
- who is resident in a Partner State;
- in respect of the legality of any Act, regulation, directive, decision, or action of a Partner State or an institution of the Community;
- on the grounds that such Act, regulation, decision or action is unlawful or is an infringement of the provisions of this Treaty.

Article 9 (2) contains the following definition of institutions of the Community:

“2. The institutions of the Community shall be such bodies, departments and services as may be established by the Summit.”

The institutions of the Community are enumerated under Article 9 (3). These are:

-The East African Development Bank, The Lake Victoria Fisheries Organization and surviving institutions of the former East African Community which are defined as follows on page 10 of the Treaty:

“***surviving institutions of the former East African Community****” means the East African Civil Aviation Academy, Soroti, the East African Development Bank, the East African School of Librarianship and the Inter-University Council for East Africa.”*

KPA is definitely not among the institutions of the Community created under Article 9 (2), or a surviving institution of the East African Community appearing on the above list. As such KPA is not one of the respondents envisaged under Article 30 of the Treaty.

KPA is an authority created under section 3 of the KPA Act as a statutory body with perpetual succession, a common seal and power to sue and be sued in its corporate name. It was created by the Republic of Kenya, a Partner State, and not by the Summit. The "Summit" means the Summit established by Article 9 of Treaty. Members of the Summit consist of Heads of State or Government of Partner States. The mere fact of rendering the nature of the services it renders at Mombasa port, namely, serving the East African Partner States and citizens, does not *ipso facto* make it an institution of the Community. In order to qualify as a service under Article 9 (2) of the Treaty, the service must be such a service created by the Summit.

Further and in respect of the submission by learned Counsel for the claimant based on Article 93 of the Treaty, the Court finds that the obligation to promote the development of efficient and profitable sea port services enumerated in the said Article is an obligation of the Partner States. In this particular case, the obligation lies squarely on the shoulders of the Republic of Kenya, and not on other implementers along the way like KPA. In sum, therefore, the reference is not properly before this Court due to lack of capacity of KPA as a respondent under Article 30 of the Treaty.

Finally an allegation was levelled against the Republic of Kenya by Counsel for the Claimant that the Claimant had to resort to this Court due to failure by the Republic of Kenya in setting up a tax appeals tribunal to deal with disputes such as the one before this Court. With due respect to learned Counsel, we are unable to make any finding on this issue because the Republic of Kenya was not a party to this reference and the statement was from the bar.

Based on the above reasons, we hold that this Court has no jurisdiction to entertain this reference. We accordingly uphold the preliminary objection raised by Counsel for the Respondent and dismiss the reference with costs to the Respondent.

Dated and delivered at Arusha this--------------day of-----------------------2009.

JOHNSTON BUSINGYE
PRINCIPAL JUDGE

MARY STELLA ARACH-AMOKO
DEPUTY PRINCIPAL JUSGE

JOHN MKWAWA
JUDGE

JEAN BOSCO BUTASI
JUDGE

BENJAMIN PATRICK KUBO
JUDGE