IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA

FIRST INSTANCE DIVISION

[Coram: Johnston Busingye, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, Jean-Bosco Butasi & Benjamin Patrick Kubo, JJ]

REFERENCE NO.7 OF 2010

BETWEEN

MARY ARIVIZA …….. 1ST CLAIMANT

OKOTCH MONDOH …….. 2ND CLAIMANT

AND

THE ATTORNEY GENERAL OF

THE REPUBLIC OF KENYA……. 1ST RESPONDENT

THE SECRETARY GENERAL OF

THE EAST AFRICAN COMMUNITY …….. 2ND RESPONDENT

DATE: 30TH OF NOVEMBER 2011

JUDGMENT OF THE COURT

Background

The Claimants averred that they were adult Kenyans duly registered as voters in Westlands Constituency in Nairobi and Nangoma Location of Busia District in Kenya, respectively. Ariviza added that she was an accredited polling agent for the Church Red Card National Referendum Committee while Mondoh added that he was an accredited observer, through the facilitation of the National Council of Churches of Kenya (NCCK), in the Referendum carried out in Kenya on 4th August, 2010.

There was a review of the old Constitution of Kenya initiated by Section 47A of the same Constitution with the aim of replacing the said Constitution. Detailed arrangements for the review were set out in the Constitution of Kenya Review Act, No. 9 of 2008 ("the Review Act") and rules made thereunder. The review process was to culminate in a Referendum whereat the people of Kenya were to vote for or against the proposed new Constitution (replacing Constitution). In apparent anticipation that disputes would arise out of the review process, specific provision was introduced into the old Constitution vide Section 60A of The Constitution of Kenya (Amendment) Act, No. 10 of 2008 which established an Interim Independent Constitutional Dispute Resolution Court (IICDRC).

The IICDRC, while it enjoyed the status of the High Court of Kenya, was not a division of the High Court of Kenya and had exclusive original

jurisdiction **"*to hear and determine all and only matters arising from the constitutional review process.*"**

Act No. 10 of 2008 which came into force on 29th December, 2008 and established the IICDRC was silent on any appeal.

The Claimants took issue with various aspects of the conduct of the entire constitutional review process, including the Referendum and the manner in which the replacing Constitution was promulgated. In the premise they, either singly or jointly, instituted three sets of proceedings as under:-

a) On 18th August, 2010 Ariviza filed High Court (Nairobi) Miscellaneous Civil Application No.273 of 2010 against the Interim Independent Electoral Commission of Kenya & Attorney-General of Kenya, being judicial review proceedings for orders of certiorari and prohibition against Gazette Notice No.9360 which had on 6th August, 2010 published the result of the Referendum held on 4th August, 2010. The applicant prayed for leave to get an order of certiorari to move to the High Court for purposes of quashing the aforesaid gazette notice of the certificate of results of the Referendum and/or publication of the text of the new Constitution in the Kenya Gazette. Ariviza also prayed that she be granted an order of prohibition to prohibit the promulgation of the Proposed Constitution of Kenya by operation of law and/or publication of the text of the new Constitution in the Kenya Gazette. She likewise prayed for an order that the leave granted do operate as a stay of the promulgation of the Constitution of Kenya.

The High Court found that Ariviza's complaint related to the management of the Referendum process after voting, that the complaint fell within the conduct of the Referendum and that it could be brought by way of petition before the IICDRC in accordance with the Review Act.

In this regard, the High Court noted on 24th August, 2010 that Ariviza had already filed an application before the IICDRC which was pending there. The High Court concluded that in view of Sections 60 and 60A of the old Constitution, it had no jurisdiction to deal with the Application and, accordingly, struck it out.

b) On 19th August, 2010 Ariviza and Mondoh filed in the IICDRC Constitutional Petition No.7 of 2010 ("the Petition") against the Interim Independent Electoral Commission, George Chege, Hellen Mutua & the Hon. Attorney General of Kenya seeking the following reliefs:-

i. A scrutiny and recount of all the ballot papers and counterfoils, registers and tally sheets for all votes cast on the polling day of 4th August, 2010.

ii. An independent audit of software used in transmitting results of and tallying the votes from the Referendum of 4th August, 2010.

iii. The Referendum Result declared by the 1st Respondent be declared null and void.

iv. The Respondent (*sic*) bears the costs of the Petition and matters incidental thereto.

v. Such further orders as the Court may deem fit and just to grant.

The Petition was based on the following grounds:

i. Flouting of the law on campaigning.

ii. Irregularities on the polling day.

iii. Tallying of votes in a manner that gave an inaccurate result.

iv. Failure to follow the law in regard to the publication of the gazette notice on the Referendum result.

Numerous incidents were cited to demonstrate alleged irregularities in the Referendum process. They included:

i. Refusing the "NO" agents to accompany the ballot boxes to the Constituency Tallying Centres and up to the National Tallying Centre at Bomas of Kenya; and refusing the "NO" Chief Agent access to the Tallying Centre at Bomas of Kenya.

ii. The television monitor showing streaming of the Referendum results being switched off at about 8.25 p.m. on 4th August, 2010 at the National Tallying Centre when the "NO" result was way ahead (about 14,000 votes) of the "YES" (about 9,000 votes).

iii. On 4th August, 2010 at about 8.35 p.m. the streaming of the results resuming but now the "YES" leading by about 19,000 votes and the "NO" having gone down to about 8,000 votes.

On 24th August, 2010 Ariviza and Mondoh filed Application No. 3 of 2010 in the IICDRC (arising from Petition No.7 of 2010) seeking, *inter alia*, the following reliefs:

i. That the Honourable Court do dispense with written request for interim relief.

ii. That the Honourable Court do suspend the whole of the Gazette Notice purportedly giving the final result of the Referendum as it was the subject before that Court.

iii. That the Honourable Court do suspend the Promulgation of the Constitution until the hearing and determination of Petition No.7 of 2010.

The Application was heard by the IICDRC which decided by a majority of three Judges that even if they granted the interim orders sought, such orders would be in vain for being based on a Petition they considered as inchoate (not fully developed), because the requisite Ksh.2 million security for costs had not been deposited and in the Judge's opinion it was too late to deposit it within the prescribed time. The court dismissed the Application. The other two Judges' dissenting opinion was that there was a valid Petition.

However, all the five Judges seemed to be on common ground that their Court had been presented with a *fait accompli* by the act of the Interim Independent Electoral Commission (IIEC) publishing on 23rd August, 2010 a notice in the Gazette confirming the Referendum result as final.

From the pleadings on record, the reason given by the IIEC for publishing the notice of final Referendum result was that the Attorney General and the IIEC had not been served with the Petition by that date and that there was no impediment for the IIEC to publish a certificate of the Referendum result as final.

c) On 13th September, 2010 Ariviza and Mondoh filed the present Reference No.7 of 2010 before this Court (EACJ).

Representation of the Parties

The Claimants were represented by Mrs J.W. Madahana and Mr Luka Sawe. The 1st Respondent was represented by Ms Wanjiku A. Mbiyu and Mr Kepha Onyiso.

The lead Counsel for the 2nd Respondent was Mr Wilbert Kaahwa but sometimes Mr Anthony Kafumbe or Mr Mathews Nderi Nduma stood in for him.

Revisiting the issue of jurisdiction

The complaints in this Reference revolve around alleged contravention by the 1st Respondent of the Referendum law in Kenya amounting to violation of the rule of law, thereby violating The Treaty for the Establishment of the East African Community ("the Treaty") to which Kenya is a party. The 2nd Respondent is accused of inaction in the face of the aforesaid Treaty violation.

Concurrently with the filing of the Reference, the Claimants also filed EACJ Application No. 3 of 2010 for a temporary injunction praying for the following substantive Orders:

(a) That the 1st Respondent be restrained and prohibited from receiving, tabling and/or passing any legislation to implement the new Constitution of Kenya until the hearing and determination of the Reference.

(b) That any new legislation passed by the Parliament of Kenya to implement the new Constitution be stayed until the hearing and determination of the Reference.

(c) That the 2nd Respondent does commence an investigation, as provided by Article 29 of the Treaty, into the violation of the law and the Treaty by the 1st Respondent.

At the commencement of the hearing of the Application, Counsel for the 1st Respondent raised a six-point preliminary objection revolving on the issue

of jurisdiction as in the 1st Respondent's view the Court had no jurisdiction to entertain even the Reference from which the Application arose. In our Ruling of 1st December, 2010 we held that the points raised in the preliminary objection could not be disposed of without ascertaining facts which were in dispute. We deferred our Ruling on the preliminary objection until after hearing all arguments from both sides. Subsequently we heard full arguments from both parties on the preliminary objection. Counsel for the 2nd Respondent supported the preliminary objection.

In our Ruling of 28th December, 2010 we agreed with the Applicants that this Court had jurisdiction to hear their Application No. 3 of 2010. We overruled the preliminary objection and proceeded to hear the Application.

After hearing the Application, we delivered our Ruling on 23rd February, 2011 in which we found from the totality of the facts disclosed by the affidavits and submissions of the parties that there were *bona fide* serious issues warranting to be investigated by this Court. We, however, restrained ourselves from making any determination on the merits of the Application and defence to it, pending substantive consideration of the facts and applicable law after full hearing of the Reference itself. We declined to issue the injunctive or conservatory orders sought and dismissed the Application.

Grounds for and Prayers in the present Reference

As already recorded, on 13th September, 2010, the Claimants filed the present Reference which they amended on 13th December, 2010 pursuant

to Rule 48(a) of the East African Court of Justice Rules of Procedure; the East African Community Treaty (1999) Articles 5(1), 6(c) &(d), 7(2)(c) [*sic*], 27(1), 29 & 30; the African Charter on Human and People's Rights Articles 1, 3, 7(1) & 9(2). The Reference was based on the following summarized grounds:

a) That the 1st Respondent, under Section 47A (of the replaced Constitution), received a draft Constitution and his mandate was only to make editorial changes. Instead he made changes (some substantial) to the draft and on 6th August, 2010 he purported to publish, under Section 34 of the Review Act, a draft Constitution with a confusingly different and misleading title.

b) That the Applicants (Ariviza & Mondoh) contend that the publication of a document with a materially different title with which the electorate was faced was stage-managed by the 1st Respondent to cause confusion amongst the voters most of whom could not ordinarily be expected to know the difference, import and legal implications of the title.

c) That on 4th August, 2010 a highly flawed Referendum was conducted by the Interim Electoral Commission (*sic*) and the result was published on 6th August, 2010 in a gazette notice and which certificate of result was in the view of the Claimants contrary to law, null and void *ab initio*.

d) That on the basis of the said gazette notice the 1st Respondent set in motion an automatic promulgation of the New Constitution, a document which was not in the public domain, within fourteen days of the said

publication under the Review Act. This was borne out by the announcing to the public that the promulgation of the Constitution would be on 27th August, 2010.

e) That on18th August, 2010 the Claimants unsuccessfully moved the High Court of Kenya (vide Miscellaneous Civil Application No.273 of 2010) for Judicial Review Orders as the issue was of great fundamental importance, for promulgation of the Constitution would under Article 264 (of the replacing Constitution) repeal the (old) Constitution resulting in the loss of the Claimants' ascertained rights and freedoms.

However, on 24th August, 2010 the High Court declined to deal with the matter citing ousting of its jurisdiction by Sections 60 – 60A of the replaced Constitution.

f) That being dissatisfied by the conduct and result of the Referendum, Ariviza and Mondoh on 19th August, 2010 lodged in the IICDRC Constitutional Petition No.7 of 2010 within the period stipulated by the Review Act, No.9 of 2008 as amended by the Statute Law (Miscellaneous Amendment) Act, No.6 of 2009.

g) That on 23rd August, 2010 the IIEC gazetted a notice of certificate final Referendum result in spite of the pending IICDRC Constitutional Petition No.7 of 2010 before that Court.

h) That on 24th August, 2010 Ariviza and Mondoh lodged IICDRC Application No.3 of 2010 seeking suspension of the above gazette notice they asserted to have been published contrary to the law.

i) That the Review Act provided for the Petitioner to serve upon the Attorney General (1st Respondent) a notice of the filing of a Petition challenging the Referendum within seven days after such filing, whereupon the Attorney General should within seven days of service of the said notice publish a notice of the filing of the Petition in the Kenya Gazette; but in express contravention of the law, the Attorney General failed to gazette the said Petition.

j) That under Section 47(1) of the Review Act no hearing of the aforesaid Petition could commence until seven days after publication of the requisite notice. The Claimants contend that non-publication of the notice effectively denied them their fundamental right to be heard in their cause, thus contravening their basic human rights.

k) That meantime the 1st Respondent in violation of the rule of law is moving Bills in the National Assembly that would give effect to the replacing Constitution whose legitimacy is in grave doubt and which is being operationalised in defiance of the rule of law and democratic principles.

l) That the Claimants contend that the 1st Respondent set up a Court (IICDRC) whose independence was not guaranteed and which though admitting jurisdiction reiterated its lack of powers to stop illegalities being

committed to ensure promulgation of the Constitution takes place despite the flouting of the law.

m) That the Claimants are aghast at the inaction by the 2nd Respondent who is mandated by the Treaty to investigate violations of the Treaty and which the Claimants contend has been done by the 1st Respondent who has flouted the rule of law, democratic principles and fundamental rights to be heard by an independent and fair court.

n) That this Honourable Court has jurisdiction to interpret and determine this very important issue that touches on the future of the Kenyan nation.

The Claimants prayed for the following orders:

a) A declaration that the publication of Gazette Notice No.10019 on 23rd August, 2010 by the 1st Respondent through the Interim Electoral Commission (*sic*) was illegal, null and void *ab initio* for being a violation of the fundamental operational principles of the Community and in particular Articles 6 (c) & (d), 7(2) and 8(1)(c) of the Treaty.

b) A declaration that the Interim Independent Constitutional Dispute Resolution Court is not an Independent or Impartial Court within the meaning of law capable of discharging the obligation by the Republic of Kenya under Articles 6(c) & (d) and 7(2) of the Treaty.

c) A declaration that the Applicants are entitled to be heard on their cause and to be heard by an Independent and Impartial Court of Justice and

the refusal of the 1st Respondent to provide for this is in itself an infringement of fundamental principles of social justice and peaceful settlement of disputes.

d) A declaration that Section 47A, amendment to Section 60 and Section 60A of the replaced Constitution are an aberration and fundamental departure from the doctrine of separation of powers which is the cornerstone of democracy and the rule of law constituting a violation of Article 7(2) of the Treaty.

e) An order that the 1st Respondent acting through the Parliament of the Republic of Kenya be restrained and or prohibited from tabling and or making and or passing legislation to implement the replacing Constitution until the hearing and determination of this case.

f) Any implementation and or operationalisation of any legislation made and or passed by the Parliament of Kenya to implement the New Constitution be stayed until the hearing and determination of this case.

g) A declaration that the promulgation of the New Constitution on 27th August, 2010 was in contravention of and a violation of the Treaty, and in particular Articles 6(c) & (d) and 7(2), and was therefore illegal, null and void.

h) A declaration that there is no document in the public domain purportedly published by the 1st Respondent that fulfils the requirements of a replacement of the Constitution of Kenya and is in itself a violation of Article 7(2) of the Treaty.

i) A declaration that the Proposed New Constitution is not the same as the Proposed Constitution of Kenya and is in itself a violation of Article 7(2) of the Treaty.

j) A declaration that the law as currently formulated on the Review of the Constitution is fatally flawed and is not a valid and or legal basis for replacement of the current Constitution being an infringement of Articles 6(c), (d) & (2) and 8(c)[*sic*] of the Treaty.

k) A declaration that the inaction by the 5th Respondent [*sic*] has aided and abetted the violation of the Treaty in particular Articles 8(c) [*sic*] and 29.

l) A declaration that the Respondents have abused office and power by subverting the rule of law and administration of justice violating the obligations under Articles 8(c) [*sic*] and 29 of the Treaty.

m) Costs of this Reference.

Respondents' Response

The Respondents denied the claims made by the Claimants and opposed the issuance of any of the orders prayed for. The position of the 1st Respondent herein was that due process was followed at all stages of the Constitutional Review Process; that gazettement of the certificate of the final Referendum result and subsequent promulgation of the Constitution

were validly done; and that the dismissal of IICDR Application No.3 of 2010 was in accordance with the law.

For his part, the 2nd Respondent denied failing to discharge his duties under Article 29 of the Treaty and contended that, to the best of his knowledge, the Constitution-making process in Kenya was smoothly conducted, supported by millions of Kenyans and that he had no notice of any occurrence that would have necessitated his investigation.

Both Respondents contended that there was no wrongdoing on their part and that the Reference should be dismissed with costs.

Agreed Issues

The issues for determination by this Court were agreed and framed by the Parties during the Scheduling Conference held on 30th January, 2011 as follows:-

Issue No.1:

Whether due process was followed in the presentation of the draft Constitution to the Referendum and if not, did this amount to a violation of the Rule of Law in Kenya and, by extension, a violation of the East African Community Treaty?

Issue No.2:

Whether there was failure of resolution of Petition No.7 of 2010 by the Interim Independent Constitutional Dispute Resolution Court which violated the provisions of peaceful resolutions of disputes.

Issue No.3:

Whether or not the publication of Gazette Notice No.10019 on 23rd August, 2010 and the subsequent promulgation of the new Constitution of Kenya on 27th August, 2010 was a breach of the Rule of Law and, therefore, a violation of the Treaty.

Issue No.4:

Whether or not the Parties are entitled to the remedies sought.

Consideration of the Issues:

We now proceed to consider the Reference under the four Issues. In so doing, we take due account of the authorities and legal literature cited by Counsel in support of their rival claims.

At the outset it is pertinent to mention that the issues as agreed revolve around one major theme, namely, the appropriateness of IICDRC's decision in Petition No.7 of 2010. But at the risk of repeating ourselves we have decided to consider them separately in order to be as comprehensive as this case demands.

Issue No.1:

Whether due process was followed in the presentation of the draft Constitution to the Referendum and if not, did this amount to a

violation of the rule of law in Kenya and, by extension, a violation of the East African Community Treaty?

This issue has two limbs:

i. Whether due process was followed in the presentation of the draft Constitution to the Referendum.

ii. If not, did that amount to a violation of the Rule of Law in Kenya and, by extension, a violation of the East African Community Treaty?

As to the first limb, the Claimants contended that due process was not followed. Counsel for the Claimants described due process as a legal principle that the Government must respect legal rights that are owed to a person according to the law; that in this case due process demanded that at least the petition before the IICDRC should have been heard and disposed of on merit before promulgation of the New Constitution could proceed and that because this was not done, the rule of law, which implies due process, was violated.

The thrust of the Claimants' case on the first limb is:-

a) That whereas the 1st Respondents' mandate was only to make editorial changes to the draft Constitution received from the National Assembly, he in fact purported to publish on 6th May, 2010 a document entitled "The Proposed Constitution of Kenya" to which he had made changes some of which were substantive.

b) That whereas the Referendum question was “Do you approve the proposed New Constitution?” not enough copies of “The Proposed New Constitution” were circulated to the voters numbering 12,656,451, it being admitted by the 1st Respondent that only 5 million copies were printed, thereby leaving out 7 million persons.

c) That the publication of a document with a materially different title with which the electorate was faced was stage-managed by the Respondent (sic) to cause confusion amongst the voters most of whom could not ordinarily be expected to know the difference, import and legal implications of the title.

d) That there were serious flaws in the proposed Constitution of Kenya which other persons had attempted to bring to the attention of the IICDRC but which the IICDRC declined to deal with, citing lack of jurisdiction despite the wide jurisdiction conferred upon it by Section 60A of the replaced Constitution.

e) That on 4th August, 2010 a highly flawed Referendum was conducted by the Interim Independent Electoral Commission and the results were published on 6th August, 2010, in a Gazette Notice and which Certificate of Results was in the Claimants’ view contrary to law, null and void.

The gist of the 1st Respondent’s case is:

a) That due process was followed in the presentation of the Draft Constitution to the Referendum as per the procedure prescribed by the Review Act.

b) That whereas the Claimants complained that the 1st Respondent, who was not authorized to effect any alteration to the draft Constitution from the National Assembly except for editorial purposes, made substantial changes to the draft Constitution, the Claimants did not specify the alleged changes.

c) That while conceding that only five million copies of "The Proposed New Constitution" were printed and distributed, the 1st Respondent averred that further generic copies of the said Constitution were reproduced and distributed to voters; and that local dailies with nationwide circulation also reproduced the Constitution word-for-word in their editions.

d) i. That whereas in the replaced Constitution reference was made to "draft Constitution", voters were clear in their minds that the draft Constitution they were voting for was the one which had been approved by Parliament and published by the 1st Respondent.

ii. That whereas the Claimants alleged there were flaws in "The Proposed Constitution of Kenya" and in the Referendum, they did not specify any of them.

On his part, the 2nd Respondent's case is:

a) That there was no iota of evidence that due process was not followed in the presentation of the Proposed Constitution of Kenya and the conduct of the Referendum.

b) That the Claimants had the opportunity to vote for or against the Proposed Constitution of Kenya; that Kenyans overwhelmingly endorsed the said Constitution; and that the Claimants cannot be heard to fault the process.

c) That this Court should take judicial notice of the unanimous acclamation and affirmation by the international observers including the 2nd Respondent and the East African Legislative Assembly and the world at large that the process was free and fair and a major step towards restoration of the rule of law in Kenya after the tragic events following the 2007 general elections.

We have carefully considered the rival stances of the parties, the law on the subject and we opine as hereunder:

In our understanding, the expression “due process” means the same thing as “due process of law”. Simply put, “due process” and “due process of law” mean following laid down laws and procedures. Further, “due process of law” is a component of the principle of “the rule of law” as generally understood in Anglo-American jurisprudence. The following literary works may serve as elaboration of the concept of due process:

The UN Secretary-General in his report of 23rd August, 2004 to the Security Council (http://dacess-dds-ny.un.org/doc/UNDOC/GEN/04/395/29/pdf Open Element) described the rule of law, *inter alia*, as follows:

> "***The 'rule of law'… refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated….It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law… legal certainty, avoidance of arbitrariness and procedural and legal transparency.***"

We adopt this amplified conceptualization of the rule of law and endorse the view that due process of law is one of its core components.

In his book "**The Due Process of Law**", first printed in 1980, Lord Denning, *inter alia*, stated (at the Preface):

> "***By 'due process'… I mean much the same as Parliament meant when it first used the phrase… in 1354…. So by 'due process of law' I mean the measures authorized by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted …; that lawful remedies are readily available; and that unnecessary delays are eliminated.***"

As recorded earlier, the Claimants alleged that due process was not followed in the presentation of the draft Constitution to the Referendum. It is trite law that he/she who alleges must prove the allegation. In the instant case the burden of proof of the subject allegation lies on the Claimants, to be discharged on a balance of probability.

The Claimants alleged that several changes were made to the Draft Constitution but did not specify the changes. They alleged, too, that the change of title from "Draft Constitution" to "Proposed Constitution of Kenya" or "Proposed New Constitution" was stage-managed by the 1st Respondent to cause confusion amongst voters. We were not furnished with any evidence by way of affidavit from any voter, including the Claimants themselves, that any Kenyan voter was confused by the change of title. The Claimants alleged serious flaws in the Draft Constitution as well as in the Referendum process. We were not furnished with specific examples. The claimants alleged that the document entitled "The Proposed New Constitution" was not circulated to the voters numbering 12,656,451 because the 1st Respondent printed only 5 million copies. In our view, although the 1st Respondent conceded to printing only 5 million copies, we are, respectfully, not in agreement that 7 million voters were left out because it was shown in evidence that generic copies were printed and a number of Kenyan dailies, like Daily Nation and The Standard, with wide circulation also reproduced the Draft Constitution word for word and even carried extensive discussions on it.

Having regard to the evidence, the rival submissions and jurisprudence above cited, we are of the view that the Claimants have not made out a

case that meets the required standard to establish that due process was not followed.

The question of their Petition No.7 of 2010 not having been heard and determined on merit before the promulgation of the New Constitution has clearly kept nagging the Claimants at all material times. Notwithstanding the Claimants' complaint on the matter, we take cognizance of the fact that the IICDRC by majority decision found, while dealing with interlocutory Application No.3 of 2010 for interim reliefs, that there was no valid Petition. Whether that decision was right or wrong, the fact of the matter is that it is a judicial decision.

The Claimants came to this Court, *inter alia*, under Article 30 of the Treaty. Sub-Article (1) thereof provides:

> **"30(1) Subject to the provisions of Article 27 of this Treaty (relating to EACJ's jurisdiction) 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 grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."**

Was the decision of the IICDRC complained of a regulation, directive or action of a Partner State or an institution of the Community within the meaning of the Article 30(1) such as to empower this Court to inquire into or review the same?

In our respectful view, the matters which this Court can, in exercise of its original jurisdiction, inquire into under Article 30(1) do not include judicial decisions. The latter can only be subjected to requisite inquiry or review in exercise of appellate or review jurisdiction. We are not clothed with that jurisdiction.

We, accordingly, answer the first limb of Issue No.1 in the affirmative and this answer also disposes of the second limb.

Issue No2:
Whether there was failure of resolution of Petition No.7 of 2010 by the Interim Independent Constitutional Dispute Resolution Court which violated the provisions of peaceful resolution of disputes.

As already recorded, on 24th August, 2010 Ariviza and Mondoh filed Application No.3 of 2010, arising from Petition No.7 of 2010, seeking interim reliefs. On 26th August, 2010 while dealing with Application No.3 of 2010, the IICDRC by majority decision found that Petition No.7 of 2010 was not a valid Petition, thereby affectively disposing of the Petition itself. In our settled view, the fact that there was a decision on Petition No.7 of 2010 is sufficient evidence that the Petition was heard and determined by the IICDRC. Whether the decision was right or wrong is immaterial.

We accordingly, answer Issue No.2 in the negative.

Issue No.3:

Whether or not the publication of Gazette Notice No.10019 on 23rd August, 2010 and the subsequent promulgation of the New Constitution of Kenya on 27th August, 2010 was a breach of the Rule of Law and, therefore, a violation of the Treaty.

This issue is against the publication/gazettment by the Interim Independent Electoral Commission (IIEC) on 23rd August, 2010 of a Certificate giving final results of the Referendum before the Claimants' Petition No. 7 of 2010 challenging the conduct and result of the Referendum had been heard and determined. The reason given for the IIEC to publish the notice as aforesaid was that the Attorney General and IIEC had not been served with the Petition by that date. It is common ground that the Petition filed on 19th August, 2010 was served on the Attorney General and IIEC on 24th August, 2010.

The basic legal requirements relating to the questioned publication are found in Sections 43 and 44 of the Review Act as amended by the Statute Law (Miscellaneous Amendment) Act, No.6 of 2009 which provide as follows:

> "43. ***(1) The Interim Independent Electoral Commission shall publish the result of the Referendum in the Gazette within two days of the holding the referendum.***

(2) If no petition is made under Section 44 challenging the conduct or result of the referendum within the time limit for making such petitions, the result of the referendum shall be final upon the expiry of that time.

(3) If a petition is made under section 44 challenging the conduct of the referendum within the time limit for making petitions, the results of the referendum shall not be final until all such petitions are finally disposed of.

(4) The Interim Independent Electoral Commission shall, consequent upon the results of the referendum becoming final, by notice in the Gazette, confirm the results as the final result of the referendum.

43A. The President shall by notice in the Gazette, promulgate the New Constitution not later than fourteen days after the publication of the final result of the referendum.

44. (1) The conduct or result of the referendum may be challenged only by petition to the Interim Independent Constitutional Dispute Resolution Court established by Section 60A of the Constitution.

(2) A petitioner shall give notice of the petition to the Attorney General and the Interim Independent Electoral

Commission within seven days after the petition is made and the Attorney General shall publish a notice of each petition of which notice has been received, in the Gazette within seven days of the expiry of the period prescribed in subsection(1).

(3) The petitioner shall within seven days after the petition is made deposit two million shillings with the Court as security against costs.

(4) If the security is not given in accordance with subsection (3), the petition shall be dismissed."

The material placed before us in this Reference reveals that the challenge posed before this Court relating to the conduct and result of the Referendum was subjected to the judicial process in Kenya, notably vide IICDRC Constitutional Petition No.7 of 2010. The Claimants herein have taken issue with IICDRC's action of disposing of the petition at inter-locutory stage while dealing with Application No.3 of 2010 which was seeking interim reliefs pending the hearing of the Petition on merit. We note from its Ruling of 26th August, 2010 that the IICDRC categorically stated that it was well within the Attorney General's and IIEC's mandate to publish the final results.

In essence what the instant Reference is asking this Court to do, in the exercise of its original jurisdiction, is to inquire into and review the decision of the IICDRC not to hear the Petition on merit. With respect, we do not

consider it to be within this Court's competence to do that. If we did so, we would in effect be sitting on appeal over the subject IICDRC's decision. We do, respectfully, decline the invitation to inquire into and review the correctness or otherwise of IICDRC's decision on Petition No.7 of 2010.

Accordingly, we answer Issue No.3 in the negative.

Issue No.4:
Whether or not the parties are entitled to the remedies sought.

This issue, though not so clearly framed, is in effect asking whether the Claimants are entitled to the remedies sought. It should be clear from our answers to Issue No.1, Issue No.2 and Issue No.3 that we find the Claimants not entitled to the remedies sought.

Accordingly, we answer Issue No.4 in the negative.

Having regard to the foregoing, we hereby dismiss the Reference.

Costs

This Court is aware that the successful party normally gets costs of the litigation unless the Court in its discretion, which should be exercised judicially, directs otherwise [see: Rule 111(1) of the Rules of this Court and ***Kiska Ltd – vs – De Angelis*** (1969) EA.6].

We note that the Claimants are ordinary individuals who tussled over different aspects of the same matter before the High Court of Kenya, before Kenya's IICDRC and before this Court. They clearly must have felt strongly that they had genuine grievances requiring judicial adjudication even at regional level. The litigation before this Court was not frivolous and it was of interest not just to the Claimants but to other East Africans as well. In such litigation, one inevitably incurs expenses. We feel that the Claimants have already paid adequately by pursuing this matter before different courts including EACJ. We believe the Claimants undertook this litigation in good faith and we are not inclined to penalize them with costs.

Consequently, we direct that the Parties shall bear their respective costs.

It is so ordered.

Dated at Arusha this …….day of …….. , 2011.

JOHNSTON BUSINGYE

PRINCIPAL JUDGE

MARY STELLA ARACH-AMOKO

DEPUTY PRINCIPAL JUDGE

JOHN MKWAWA

JUDGE

JEAN-BOSCO BUTASI

JUDGE

BENJAMIN PATRICK KUBO

JUDGE