IN THE EAST AFRICAN COURT OF JUSTICE

FIRST INSTANCE DIVISION

AT ARUSHA

(*Coram: Johnston Busingye PJ, Stella Arach-Amoko DPJ, John Mkwawa J, Jean Bosco Butasi J, Isaac Lenaola J*)

REFERENCE No. 9 of 2010

AFRICA NETWORK FOR ANIMAL WELFARE (ANAW)................. APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA

ON BEHALF OF THE UNITED REPUBLIC OF TANZANIA..RESPONDENT

DATE: 29th August, 2011

RULING OF THE COURT

1. The Applicant brought a Reference to this Court by Notice of Motion under Articles 23 (1) & (3); 27; 30; 39 of the Treaty for the Establishment of the East African Community "the Treaty" and Rules 24 (1), (2) & (4) of the East African Court of Justice Rules of Procedure, 2010, "the Rules", and "all other enabling provisions of the law". In the Reference, the Applicant contends that the action by the Respondent to upgrade, tarmac, pave, realign, construct, create or commission the "NATTA- MUGUMU- TABORA B – KLEIN'S GATE – LOLIONDO ROAD" also known as the "North Road" and otherwise as the "Superhighway" (or simply as the "highway" or "road") across the Serengeti National Park is "unlawful and infringes on" (*sic*) the provisions of the Treaty.

2. The Applicant is accordingly moving this Court to:

   (1) declare that the action by the Respondent to upgrade, tarmac, pave, realign, construct, create or commission the "NATTA- MUGUMU- TABORA B – KLEIN'S GATE – LOLIONDO ROAD" also known as the "North Road" and otherwise as the "Superhighway" (or simply as the "highway" or "road") across the Serengeti National Park is "unlawful and infringes on" (*sic*) the provisions of the Treaty; and

   (2) issue a permanent injunction restraining the Respondent from carrying out that action.

3. The Respondent opposed the Reference and prayed that it be dismissed with costs. The Respondent also raised a number of preliminary points of law and prayed that they be disposed of first as they comprised of matters which if allowed, would dispose of the whole Reference. The Court granted the prayer.

4. This ruling is in respect of the said preliminary points of law which are that:-

   i) The application is hopelessly time-barred.

   ii) The Notice of Motion is bad in law for want of proper and specific enabling provisions of the law.

   iii) The application is ambiguous, scandalous, frivolous and vexatious for being neither a Reference nor a Notice of Motion.

   iv) The affidavit in support of the Notice of Motion is fatally defective for containing:

      a. Citation of law,
      b. Hearsay evidence,
      c. Arguments,
      d. Bad verification clause, and
      e. Opinions and anticipation, contrary to the legal principles governing affidavits.

   v) This Honourable Court has no jurisdiction to determine and grant the reliefs sought by the Applicant; and

   vi) The Application is bad in law for merging two different applications in one.

5. We shall consider objections 5 and 1 on substantive law first and then consider points 2, 3, 4 and 6 on procedural law.

Objection 5: Jurisdiction to determine and grant the reliefs sought.

6. Mr Yohan Masala, Principal State Attorney, assisted by Mr Gabriel Malata, Senior State Attorney, for the Respondent, raised two objections on the jurisdiction of this Court:

i) First, he argued that the actions complained of by the Applicant namely to upgrade, tarmac, pave, realign, construct, create or commission the "NATTA-MUGUMU-TABORA B-KLEIN'S GATE-LOLIONDO ROAD" also known as "North Road" or "Superhighway" across the Serengeti National Park fall within the jurisdiction of the courts of the United Republic of Tanzania in accordance with Article 30 (3) of the Treaty. He contended that nothing can prevent a sovereign state from undertaking development of infrastructure within its boundaries and that, by extension, he argued, this Court does not have jurisdiction to grant the declaration sought.

ii) Secondly, he argued that this Court lacks jurisdiction to issue the permanent injunction sought as Article 39 of the Treaty, read together with Rule 21 of the Rules, clothes it with power to grant interim injunctions only.

7. Mr Saitabao Kanchory Mbalelo for the Applicant, on his part, argued firstly that it is not the right to develop infrastructure in the United Republic of Tanzania that is being challenged, rather it is the legality of the action of constructing and maintaining a road across the Serengeti National Park. He contended that the Court has jurisdiction under Article 30 (1) read together with Articles 27 (1) and 23 (1) of the Treaty to determine the legality of any act, regulation, directive, decision or action of a Partner State when a reference alleging that they constitute an infringement to the Treaty has been made and that therefore, he further asserted, the Court has power to grant relief.

8. Secondly, he argued that the action complained of does not fall within the ambit of Article 30 (3) of the Treaty. He explained that the actions that fall under that provision are those which have been reserved by the Treaty for determination by an institution of a Partner State and that the present matter is not one such action.

9. On whether the Court can issue the permanent injunction sought, Counsel pointed out that an injunction is an equitable remedy and therefore the Court has inherent power to grant it and secondly that it would be a grave legal and judicial absurdity for this Court to have the jurisdiction to grant

interim orders including interlocutory injunctions and then lack the jurisdiction to confirm such orders.

10. We duly examined the evidence and the submissions. At the outset we fully agree with Counsel for the Respondent that the United Republic of Tanzania has a right to develop infrastructure within its boundaries. However, we also agree with Counsel for the Applicant that it is not the existence of this right which is the subject of the present Reference but rather the legality of exercising that right by constructing or maintaining a highway across the Serengeti National Park.

11. The Treaty, under Article 30 (1) enables natural and legal persons to refer, for determination by this Court, the legality of any Act, regulation, directive, decision or action of a Partner State on the grounds that it is unlawful or is an infringement of the Treaty. This is what the present Applicant has done. To peg the application of the provision to geographical and/or sovereign boundaries would be an absurd interpretation at best.

12. We are of the opinion that the Applicant is right and consequently, we find that the Reference is properly before this Court.

13 We now examine whether the act complained of is such act as is envisaged under Article 30 (3). The sub-article provides that: ***"The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State".***

14. What the Applicant is complaining of is a specific action of a Partner State. Our considered view is that the provisions of the sub-article are very clear and must be read strictly. Unless an Act, regulation, directive, decision or action has been reserved ***under this Treaty*** to an institution of a Partner State, then, plainly it does not come within the ambit of the sub-article. The Respondent did not show us, and neither were we able to find, a provision in the Treaty, or any other law that reserves the action or actions such as the one being complained of in the present Reference for determination by an institution of the United Republic of Tanzania.

15. We have no flicker of doubt that the action being complained of in the present Reference does not come within the ambit of actions envisaged under Article 30 (3) of the Treaty.

16. The next point of consideration and determination is whether this Court has power to grant the permanent injunction sought. The Respondent relied on Article 39 of the Treaty to

show that this Court does not have such power. The Article provides as follows:

"The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. Interim orders and other directions issued by the Court shall have the same effect ad interim as decisions of the Court."

17. This Article is unambiguous, clear and is in plain language. Our reading of it is that it empowers the Court, in a case referred to it, to make interim orders or issue directions it considers necessary and desirable. It does not appear, even remotely, that the Article in its present formulation can operate to bar the Court from granting permanent injunctions. To read such an implied meaning into the Article would be highly speculative. In our considered view it is inconceivable that the intention of the framers of the Treaty could have been to bar the Court from granting permanent injunctions without expressly saying so, and yet, empower it to make final judgments.

18. Permanent injunctions are by their very nature final, similar to judgments. The online Legal Dictionary defines "*permanent injunction*" as follows:

"A permanent or perpetual injunction is one granted by the judgment that ultimately disposes of the injunction suit, ordered at the time of final judgment. This type of injunction must

be final relief. Permanent injunctions are perpetual provided the conditions that produced them remain permanent"
http://legal-dictionary.thefreedictionary.com/injunction.

19. The above definition suggests that it is in the inherent nature of final judgments by Courts to grant permanent or perpetual injunctions. In any event injunctions generally are equitable remedies which this Court, like any other, can grant, whenever it is necessary and desirable in the interest of justice so to do.

20. In the premises, we are of the decided view that Article 39 of the Treaty does not directly or by implication operate to bar or in anyway restrain this Court from granting permanent injunctions where it finds that it is the relief that must be granted.

21. In sum we find that the Reference is properly before the Court, the act complained of does not fall within the acts envisaged in Article 30 (3) of the Treaty and Article 39 does not the bar the Court from granting the reliefs sought.

We accordingly overrule the objection.

Objection 1: Limitation of time

22. Counsel for the Respondent laboriously argued that the Reference was time-barred. He contended that the Applicant was aware of the facts complained of before or at least since the 19th August 2010. In support of his argument, he referred us to an extract from the minutes of a Board meeting of the African Network for Animal Welfare, where "**Min.8/20/2010: Proposed Serengeti Court Case"** appears and contended that this numbering corresponds with calendar dates and that therefore the Applicant was aware of the facts complained of before or by 19th August 2010. He then concluded that the reference was filed after the two-month period prescribed by Article 30 (2) of the Treaty had lapsed and was consequently time-barred.

23. Counsel for the Applicant contended that Annexure JNK-1 clearly showed that the proposed Serengeti Court case had been discussed in the Applicant's Board of Directors Meeting held on 20th November 2010 and that **Min. 8/20/2010** merely refers to the number of the minute. He maintained that the Reference which was filed on 10th December 2010 was well within the period of 2 months stipulated under Article 30 (2) of the Treaty.

24. After carefully perusing the evidence on record and submissions of Counsel, we find that indeed the excerpt of the

minutes of the Applicant's Board of Directors Meeting shows that the minutes are dated 20th November 2010. Counsel for the Respondent neither challenged the authenticity of the extract nor showed us anything else to substantiate his claim. It is trite law that he who makes an allegation must prove it or else he loses it.

25. We agree with the Applicant. It looks very clear on the face of the document in question that **"Min. 8/20/2010"** refers to the number of the minute. To read into it a calendar date, without concrete evidence in support, would be to stretch our imagination too far.

26. In the premises we overrule the Objection

27. **On Objection 2,** Counsel for the Respondent argued that the Reference is bad in law for want of enabling provisions to move this Court to grant the orders sought. He submitted that filing a Reference by way of a Notice of Motion is wrong in law as, under the Court's Rules of Procedure, a Notice of Motion is filed under Rule 21 when interlocutory reliefs are being sought. He submitted further that a Notice of Motion is not and cannot be preferred in the Application for a Reference brought under Rule 24 (1), (2) and (4) of the Rules of the Court. He finally contended that under the Treaty and the Rules, a Reference is like a Plaint or main suit in national

jurisdictions and it cannot, therefore be brought by a Notice of Motion which is a replica of a Chamber Summons/Application in national jurisdictions.

28. In response, Counsel for the Applicant submitted that the Reference cites Articles 30 (1), 23 (1) and (3) and 27 of the Treaty as they are the relevant enabling provisions under which it is brought. He submitted further that the Reference also cites Rule 24 (1), (2) and (4) of the Rules of the Court as they provide the form and content of a Reference. The finally submitted that the Reference is grounded on "all other enabling provisions of law" for avoidance of doubt as to whether the Court had been properly or adequately moved.

29. We have carefully considered the rival submissions of Counsel reflected on the import of the Rules cited.
First, we are in no doubt that the Applicant intended to and in fact filed this Reference under relevant provisions of the Treaty and the Rules of Procedure of this Court, specifically Articles 30 (1), 23 (1) and (3) and 27 of the Treaty as well as Rule 24 (1), (2) and (4).

30. Secondly, although we understand the Applicant's strategy of citing "all other enabling provisions of law to avoid doubt as to whether the Court had been properly or adequately moved" we nevertheless agree with the Respondent that the sub-heading

"NOTICE OF MOTION" to the Reference was, clearly, a misapplication of the Rules. We also note that in fact save for the use of the words ***"NOTICE OF MOTION"*** the pleading is otherwise intituled ***"REFERENCE".***

31. In the premises, we find that the Applicant's use of the words ***"Notice of Motion"*** in the introduction of the Reference was a bonafide misapplication of the Rules that occasioned neither injustice nor confusion to the Respondent. We consequently decline to hold that it is a sufficient ground to invalidate the Reference.

32. Finally we note the growing practice and the real likelihood of misapplication of the rules relating to institution of references by intending litigants and we find that this is an opportune moment to restate that References in this Court must be instituted in strict compliance with the provisions of Rule 24 of the Rules of Procedure of this Court. For clarity's sake we will reproduce the Rule;

Rule 24: References

(1) A reference by a Partner State, Secretary General or any person under Articles 28, 29, 30 respectively of the Treaty shall be instituted by presenting to the Court an application.

(2) An application under sub-rule (1) shall state:

(a) the name, designation, address and where applicable residence of the applicant;

(b) the designation, name, address and where possible the residence of the respondent;

(c) the subject-matter of the reference and a summary of the points of law on which the application is based;

(d) where appropriate, the nature of any evidence offered in support;

(e) where applicable the order sought by the applicant

(3) Where the reference seeks annulment of an Act, regulation, directive, decision, or action, the <u>application</u> shall be accompanied by documentary evidence of the same

(4) Where the reference is made by a body corporate the <u>application</u> shall be accompanied by documentary evidence of its existence in law

(5) The Registrar shall serve on every respondent named in the reference and on the Secretary General a notification of the reference and a copy of the <u>application.</u> (emphasis added)

The reference to a ***"Notice of Motion"*** as the application intended under Rule 24 is a misapprehension which we are prepared to overlook at this juncture and will deal with it at the Scheduling Conference.

33. **On Objections 3 and 6,** Counsel for the Respondent argued that the application is ambiguous, scandalous, frivolous and vexatious for being neither a Reference nor a Notice of Motion and bad in law for merging two different applications in one.

In view of our findings in Objection 2 above we find the points raised in **Objections 3 and 6** adequately addressed and we see no value in belabouring the point.

34. **On Objection 4**, Counsel for the Respondent contends that the affidavit is defective in that it contains citation of law, hearsay evidence, arguments, bad verification clause, and opinions and anticipation, contrary to the legal principles governing affidavits.

    In view of our finding in Objection 2 above, we find that affidavits are an excess addition at the stage of instituting references under the provisions of Rule 24 and we hold, therefore, that the issue of whether they are or they are not defective does not arise at this stage.

35. In sum, we find and hold that:

    1. This Court has jurisdiction to handle this matter and to grant orders such as those sought by the Applicant.
    2. The Reference is not time-barred
    3. The Reference, as drawn, is properly before the Court
    4. The issue of affidavits does not arise at this stage

36. The Preliminary Objection is consequently overruled, in its entirety, with costs to the Applicant.

37. It is so Ordered.

Dated this Day……………………….of …………………….August 2011.

Johnston Busingye

Principal Judge

Mary Stella Arach-Amoko

Deputy Principal Judge

John Mkwawa

Judge

Jean- Bosco Butasi

Judge

Isaac Lenaola

Judge