



**EAST AFRICAN COURT OF JUSTICE
FIRST INSTANCE DIVISION**



Hearing: 14th November 2019 from 9:30 am
(Open Court, 2nd floor, EAC Headquarters)

Reference No.9 of 2017 Hon. Justice Malek Mathiang Malek vs Minister of Justice the Republic of South Sudan & The Secretary General of the East African Community

Reference filed on: 13th September 2017.

Articles: 6(d), 7(2), 27 (1), 29 (1), 30(1) (2) and 71(1) (d) of the Treaty for the Establishment of the East African Community.

Rule: 24 of the EACJ Rules of Procedure, 2013.

Subject matter: *Alleged wrongful dismissal.*

The Applicant, Hon. Justice Malek Mathiang Malek, was a Justice of the Court of Appeal of South Sudan. He was first appointed a Judge in 1999 and promoted to a Justice of the Court of Appeal in 2016 where he served until he was removed from office.

The 1st Respondent is the Minister of Justice of the Republic of South Sudan and the 2nd Respondent is Secretary General of the East African Community.

It is the Applicant's case that, on 12/07/2017 the President of the Republic of South Sudan in exercise of the purported powers under Article 134 (2) of the Transitional Constitution of South Sudan, 2011 (as amended) and section 61(a) of the Judiciary Act, 2008 unlawfully issued a *Republican Decree No.100/2017 for the removal of some Justices and Judges of the Judiciary of the Republic of South Sudan.*

The Applicant who was served with the Decree on 22/07/2017 claims such dismissal was undertaken without following disciplinary measures required under the Judicial Service Council Act, 2008.

Further that, the President has no powers to remove Judges. His role in disciplinary process only comes at the stage of enforcement of a penalty and confirmation of a decision by a board of discipline, Judicial Service Council and the Supreme Court's President.

He alleges that, removal of Judges by the President breaches the Constitution of South Sudan and the EAC Treaty. In addition, it amounts to abuse of power and interference with the independence of the Judiciary which has had an adverse effect on the administration of Justice.

The Applicant also alleges that, the Secretary General of the EAC, failed to undertake either in his own motion or otherwise investigations, collection of information, or verify matters greatly affecting the judiciary and judicial officers in South Sudan as provided for under the EAC Treaty. The consequence of which caused backlog of cases, congestion in prisons and grossly limiting administration of justice to the people of South Sudan. According to the Applicant, the Secretary General failed to fulfil his obligation under Article 29 (1) of the EAC Treaty.

The Applicant therefore prays for declarations that;

- a. The act of the President of South Sudan of removing the Applicant from his position as a Justice of the Court of Appeal vide *Republican Decree No.100/2017* dated 12th July 2017, is in contravention of the Constitution of the Republic of South Sudan and in breach of Article 6(d) of the Treaty Establishing the East African Community (EAC).

- b. A declaration that the President of the Republic of South Sudan has no exclusive powers of removing a Justice of the Court of Appeal from office, the Applicant inclusive.
- c. Failure of the Secretary General of the EAC to investigate, collect information and submit his findings to the Republic of South Sudan is an infringement of Article 29 (1) and 71(1) (d) of the EAC Treaty.

The 1st Respondent in his submission states that, the Applicant together with other Justices and Judges formed a “Justice and Judges Committee” to raise complaints and accusations against the Chief Justice who is not answerable to them but to the President of the Republic of South Sudan.

The Justices and Judges held a strike between 2nd May and 11th September 2017, which paralyzed the delivery of justice to the people of South Sudan for four months, in violation of Article 122(1) of the Transitional Constitution of the Republic of South Sudan, 2011.

The President of the Republic of South Sudan formed a Committee on 24th April 2017 to discuss their grievances but the Justice and Judges Committee rejected any form of dialogue and instead went on an open strike with condition that, if the President relieves the Chief Justice from office the strike will be postponed.

Further states that, the Judges and Justices Committee is not an established structure of the Judiciary and was illegally constituted to pursue illegal demands. This condition amounted to misconduct within the meaning of Article 134 (2) of the Transitional Constitutional of the Republic of South Sudan 2011 and section 50 of the Judiciary Act, 2008 which triggered their removal from office.

The 1st Respondent also argues that, the Applicant never requested for his allowances, privileges, post-service benefits and other related issues as required by the law since the issuance of the Presidential Decree. Further that, the Republic of South Sudan have not violated the EAC Treaty, but exercised her mandatory powers as is the case with any Partner State.

The 2nd Respondent among other things submits that, upon receipt of the allegations, he communicated to the 1st Respondent about the claims and requested for a comprehensive report regarding the allegations and what the 1st Respondent was doing to address the claims.

That, the 1st Respondent has not responded. Considering that he was not aware of the claims prior to the Reference, he cannot be blamed for failure to act in accordance with Article 71(1) (d) and 29 of the EAC Treaty.

The 2nd Respondent believes that in due course, the 1st Respondent will account for the reasons why the Applicant was removed from office, to the extent that, the removal was done in accordance with the laws of South Sudan, there was no breach of the EAC Treaty provisions, and further a declaration that he failed to investigate and collect information and submit findings on the Republic of South Sudan pursuant to Articles 29 & 71 of the Treaty is not necessary.

Further argues that, the Reference discloses no cause of action against him and therefore the granting of orders and reliefs sought by the Applicant against the 2nd Respondent does not arise and should be dismissed with costs.

This case summary is a document produced by the Registry to assist in understanding forthcoming matters before the Court. It does not bind the Court. For authoritative Decisions, Judgments and general information about the Court please visit <http://www.eacj.org>

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