



**THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA**

**FIRST INSTANCE DIVISION**

*[Coram: Johnston Busingye, P.J; Mary Stella Arach Amoko, DPJ and John Mkwawa, J]*

**REFERENCE NO. 2 OF 2010**

**EMMANUEL MWAKISHA MJAWASI & 748 OTHERS .....CLAIMANTS**

**VERSUS**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....RESPONDENT**

**DATE: 29<sup>TH</sup> OF SEPTEMBER 2011**

**RULING OF COURT**

***INTRODUCTION***

The Claimants filed a Reference in this Court on the 24<sup>th</sup> June 2010 against the Respondent in his representative capacity as the Principal Legal Advisor of the Government of Kenya under Articles 6(d), 7(2), 27 and 30 of the Treaty for the Establishment of the East African Community and the Rules of Procedure of the East African Court of Justice (hereinafter referred to as the “Treaty” and the “Rules”, respectively).

The Claimants totaling 749 alleged in the Reference that they are former employees of the defunct East African Community (EAC). That the Kenya Government has neglected/failed and or refused to pay to them pension and

other benefits due to them for services they had rendered to the defunct EAC. They aver that the continued refusal, neglect and/or failure by the Respondent to pay their terminal benefits is contrary to Articles 6(d) and 7(2) of the Treaty and a violation of their rights under the various human rights conventions listed therein.

The Claimants seek from the Court declarations that the Respondent's continued refusal, neglect and/or failure to pay their terminal benefits for the services they rendered to the defunct EAC constitute:

- 1. a breach of article 6(d) of the Treaty and in particular a travesty upon the recognition, promotion and protection of their rights as enshrined in the African Charter on Human and Peoples Rights of 1981.**
- 2. a breach of Article 6(d) of the Treaty in particular the principles of accountability, transparency and social justice.**
- 3. a breach of Article 7(2) of the Treaty in particular by failing, refusing and/or neglecting to maintain universally accepted standards of human rights.**

The Claimants also pray for:

- 4. an Order compelling the Respondent to pay the claimants in accordance with their individual records, their terminal benefits for the services they rendered to the defunct EAC including but not limited to ; pension, additional pension, gratuity, redundancy payment in lieu of notice, one month's salary in lieu of notice, loss of office benefits, pension emoluments, outstanding/accumulated leave, repatriation expenses, real value and 7 % compound interest until payment in full.**
- 5. Costs of the Reference.**

In his response, the Respondent contended that the Claimants were not entitled to the alleged payment and also raised the points of law the subject of this Ruling. The objections were that:

*(i) The Court lacks the jurisdiction to hear and determine the Reference.*

*(ii) The matter is Res judicata.*

*(iii) The Reference is inadmissible in this Court since local remedies have not been exhausted.*

*(iv) The East African Community Treaty of 2000 cannot be applied retrospectively.*

*(v) The Claimants' statements are mere allegations without any proof of how the Treaty or the various conventions listed therein have been infringed by the Respondents or that the respondent is a signatory to them.*

*(vi) The Objectives of the Treaty under Article 5 do not provide for the redress of previous injustices, if any, to entitle the Claimants to rely on Articles 6 and 7 of the Treaty.*

It is necessary to point out from the outset that Counsel for the Respondent raised the last three objections in his written submissions. They were not among the objections he had raised at the scheduling conference. Nevertheless, we have considered them in our ruling since it is trite law that a point of law can be raised at any stage of the proceedings. The rationale is that it would save courts time and resources if the objection can dispose of the case at the earliest. The record also indicates that Counsel for the Respondents abandoned the point raised against the capacity of the Claimants to institute these proceedings at the scheduling conference and did not canvass it in his written submissions.

#### ***SUBMISSIONS BY RESPONDENT'S COUNSEL***

Counsel for the Respondent submitted, firstly, that since the Reference contains allegations of violations of the Claimants' human rights and is an appeal against the decision of the Kenya High Court dismissing a similar complaint by the Claimants in HCCS No. 1879 of 1997, in the absence of the protocol for the extended jurisdiction of the Court, this Court lacks the jurisdiction to hear and determine the same.

Secondly, Counsel submitted that the matter is barred by the doctrine of *res judicata*, having been determined by the Kenya High Court in HCCS No. 1879 of 1997 between the same parties.

Thirdly, Counsel submitted that the matter is inadmissible in this Court since the Claimants have not exhausted the local remedies available in the Republic of Kenya.

Fourthly, it was Counsel's contention that the Treaty has no provision for retrospective application. The matters complained of occurred well before the Treaty entered into force in 2000. The Reference is therefore wrongly brought before this Court which cannot entertain it since the Court itself is a creature of the Treaty.

Fifthly, Counsel attacked the Reference for being vague without any proof.

Lastly, Counsel contended that Article 5 of the Treaty is about the Objectives of the Treaty, it cannot be used by the Claimants to bring a reference under Article 6(d) and 7(2) for previous injustices, if any.

Consequently, he prayed that the Reference be struck out with costs.

#### ***RESPONSE BY CLAIMANTS' COUNSEL***

Counsel for the Claimants opposed the objections strongly asserting that this Court has the jurisdiction to hear and determine the Reference. He contended, firstly, that the Reference is not about human rights violations or an appeal against the decision of the Kenya High Court as alleged. He argued that the Reference concerns the breach of Articles 6(d) and 7 (2) of the Treaty by the Kenya Government and the fact that it contains allegations of violation of human rights under the conventions cited therein cannot prevent this Court from handling the Reference. In support of this stance he cited the decision of this Court in ***Reference No.1 of 2007, James Katabazi and 21 Others vs The Attorney General of the Republic Of Uganda.***

Secondly, he disagreed that the matter was barred by the doctrine of *res judicata* since the issues before this Court are not similar or directly and substantially in issue before the Kenya High Court and Counsel for the claimants had not even shown that they were the same litigants in both suits.

Thirdly, Counsel contended that there is no requirement for exhaustion of local remedies under the Treaty and consequently, this Court should not entertain that objection.

Counsel made no response to the last three objections on the ground that they did not form part of the objections Counsel for the Respondent had raised and were agreed upon during the scheduling conference. He instead went ahead to submit on the capacity of the Claimants, a point which as we stated earlier in this ruling and is borne out by the record of proceedings, the Respondent's counsel had abandoned at the scheduling conference. For that reason we have not considered it in this Ruling as well.

### ***DETERMINATION OF THE POINTS OF OBJECTION BY THE COURT***

After carefully considering the written submissions of both sides and the law, our findings and conclusions are as follows:

#### ***1. Jurisdiction***

The jurisdiction of this Court is stated in Article 27 read together with Article 23 of the Treaty in the following words:

- (i) The Court shall initially have jurisdiction over the interpretation and application of this Treaty.
- (ii) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

Article 23 provides that:

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

It is not in dispute that the steps in Article 27(2) have not yet been taken. It follows therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*. The Court has no appellate jurisdiction as well.

However, in this Reference, this Court is neither being asked to adjudicate on a dispute concerning violation of human rights *per se* nor to exercise an appellate jurisdiction over the decision by the Kenya High Court. The Court is being asked to determine whether the alleged failure by the Kenya Government to pay the Claimants their terminal benefits constitutes a violation of Articles 6(d) and 7(2) of the Treaty. The fact that the Reference also contains allegations of violations of human rights under the conventions listed therein cannot prevent this Court from exercising its mandate under Article 27(1) of the Treaty. We have considered this objection and come to the same conclusion in a number of references including **James Katabazi & 21 Others -vs. - The Secretary General of the EAC and the AG of the Republic of Uganda** (*supra*). We still hold the same view.

This point of objection is accordingly overruled.

## **2. Res Judicata**

The doctrine is defined in the Civil Procedure Acts of Kenya, Uganda and Tanzania as follows:

**No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised, and has been heard and finally determined by such Court.**

The doctrine has been applied in this Court in a number of references including **James Katabazi & 21 others** (*supra*) where the Court stated that for the doctrine to apply:

- (i) the matter must be '**directly and substantially**' in issue in the two suits,
- (ii) the parties must be the same or parties under whom any of them claim, litigating under the same title; and
- (iii) The matter must have been finally decided in the previous suit.

In the present Reference, the issue which this Court is being called upon by the Claimants to determine is basically, whether the alleged failure, neglect and/or

refusal to pay the claimants their terminal benefits for the services they rendered to the defunct EAC violate the principles of accountability, transparency, social justice, and also fall below the universally accepted standards of human rights and are therefore an infringement of Articles 6(d) and 7(2) of the Treaty. In deciding this issue, the Court will be required to interpret the provisions of the Articles cited.

On the other hand, the issues framed by the Court in **the HCCS No.1879 of 1997** were:

**“Firstly, when was pension payable?**

**Secondly, had the Government complied with the Mediation Agreement?**

**Thirdly, should the declarations and orders sought be granted?**

**Fourthly, in any event is the suit time barred?**

**Fifthly, who should pay the costs? ”.**

In that case, as can be discerned from the judgment, the Kenya High Court interpreted and applied the provisions of the Mediation Agreement as well as the relevant Kenyan laws.

From the foregoing, it is clear that the issues before this Court are not similar or substantially the same ones which were litigated before the Kenya High Court. We therefore agree with the Claimants’ Counsel that the doctrine of *res judicata* does not apply to this Reference.

### **3. Exhaustion of local remedies**

The rule is to the effect that a state should be given an opportunity to address an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question. The exemption is where the domestic remedy is unavailable or may result into undue delay. It has been incorporated into several human rights conventions including the African Charter on Human and People’s Rights (See Article 50). It is a question of admissibility and not of substance. There is, however, no express provision in the Treaty requiring

the exhaustion of local remedies before filing a Reference in this Court. Under Article 27(1) of the Treaty, matters requiring interpretation and application of the Treaty such as the instant Reference are admissible in this Court.

This Court dealt with this issue in **Reference No. 1 of 2006, Professor Peter Anyang Nyong'o & Ors vs The Attorney General Of Kenya and Others** and the Court stated as follows at pages 20 to 21 of the judgment:

Under Article 33(2), the Treaty obliquely envisages the interpretation of the Treaty provisions by national courts. **However, reading the pertinent provisions with Article 34 leaves no doubt about the supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty.**

For clarity, the provisions of the two Articles were reproduced. Article 33 provides that:

***"1. Except where jurisdiction is conferred on the Court by the Treaty, disputes in which the Community is a party shall not on that ground alone be excluded from the jurisdiction of the national courts of the Partner States.***

***2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of the national courts on a similar matter.***

Article 34 provides that:

***"Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question".***

The Court said that the purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.



The Court further pointed out in Reference that:

**“Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor is there a provision directly conferring on the national court’s jurisdiction to interpret the Treaty. Article 30 on the other hand, confers on a litigant resident in a partner state the right of direct access to the Court for determination of the issues set out therein. We, therefore, do not agree with the notion that before bringing a Reference under Article 30, a litigant has to “exhaust the local remedy”. In our view there is no local remedy to exhaust.”** (Underlining added for emphasis).

We share the same view and accordingly, overrule this objection as well.

#### ***4. The Retrospective Application of the Treaty.***

The Vienna Convention on the Law of Treaties provides in Article 28 that:

**“Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry in force of the treaty with respect to that party”.**

According to the above provisions, a treaty cannot be applied retrospectively unless a different intention appears from the treaty, or is otherwise established. In the absence of a contrary intention therefore, a treaty cannot apply to acts or facts which took place or situations which ceased to exist before the date of its entry into force.

From the pleadings on record, it is clear that the Claimants became aware of the acts/omissions of the Respondent complained of by 1998, when they filed the suit in the Kenya High Court. That was well before the Treaty entered into force in

2000. There is no contrary intention from the reading of the Treaty that it was to apply retrospectively and none has been established by the Claimants.

This point of objection is accordingly upheld.

**5. *The Claim is a Mere Allegation.***

This criticism has no basis in our view. The pleadings are clear. The Claimants allege that the respondent has breached specific Articles of the Treaty. The Claimants set out details in the supporting affidavits and annexures. That is all that is required of a Claimant under Rule 37 which provides that:

**“.....every pleading shall contain a concise statement of material facts upon which the party’s claim or defence is based not the evidence by which those facts are to be proved”.**

This point of objection is accordingly overruled.

**6. *The Objectives of the Treaty***

The import of this point of objection is similar to objection No. 4 and the answer is the same.

This objection is upheld.

**CONCLUSION**

In conclusion, we rule that although the Court has jurisdiction to hear the Reference and that it is not barred by the doctrine of *res judicata* or the rule of exhaustion of local remedies, nonetheless, it cannot entertain the Reference on account of the non retrospective application of the Treaty.

The Reference is accordingly struck out with costs to the Respondent.

IT IS SO ORDERED

Dated at Arusha this ..... Day of September 2011.

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Johnston Busingye

**Principal Judge**

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Mary Stella Arach-Amoko

**Deputy Principal Judge**

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John Mkwawa

**Judge**