



OVERVIEW OF THE EAST AFRICAN COURT OF JUSTICE

BY

JUSTICE HAROLD R. NSEKELA

PRESIDENT, EAST AFRICAN COURT OF JUSTICE

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I am indeed honoured and privileged to briefly address this distinguished gathering and give an overview of the East African Court of Justice (the Court). Historically, the Court can trace its roots to the Court of Appeal for Eastern Africa which was established in 1909. The territorial jurisdiction then covered Aden, Kenya, Seychelles, Somalia, Tanganyika, Uganda and Zanzibar. In the course of time, only four countries remained, namely; Kenya, Tanganyika, Uganda and Zanzibar, and the Court was renamed the Court of Appeal for East Africa. With the collapse in 1977 of the East African Community the said Court ceased to exist.

My presentation is essentially a descriptive essay of the salient features of the Court. The Court was created by the Treaty for the Establishment of the East African Community (the Treaty) and was inaugurated on the 30th November, 2001. It is a judicial body serving the five Partner States. To that extent, it is an international court. The defunct East African Court of Appeal was a Court of Appeal to which appeals both civil and criminal matters except constitutional matters and in the case of Tanzania the offence of treason, lay from the national High Courts of the original three Partner States, Kenya,

Uganda and Tanzania. This Court is of limited jurisdiction which is hardly comparable to the then Court of Appeal for East Africa. Originally, the Court had six Judges, two from each Partner State, and the Registrar. The Court commenced its operations as a single chamber and the judges serve on ad hoc basis. The judgment of the Court was final and binding and not subject to appeal. However the Treaty was subsequently amended and established; the First Instance Division and the Appellate Division. This is provided for in Article 23(3) and (3) of the Treaty which provides:-

- “2. The Court shall consist of a First Instance Division and an Appellate Division.*
- 3. The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty.”*

The number of judges manning the Court was understandably increased. Currently, there are ten (10) judges of the Court, five (5) from each Division. The maximum number is expected to be fifteen (15), ten (10) being judges of the First Instance Division. In terms of Article 24(2) the Judges have a maximum of a seven year non - renewable term. Read together with Article 140(4), the Judges only come to Arusha or elsewhere only when there is business to transact - hearing of disputes or attend to administrative matters.

It is only the Registrar and the other Court staff who are on a full-time basis. The Registrar is responsible for the day to day administration of the Court. To complete the organization of the Court, let me make reference to Article 24 of the Treaty as amended. It provides as under-

- “4. *The Summit shall designate two of the Judges of the Appellate Division as the President and the Vice President respectively, who shall be responsible for the performance of such functions as are set out in this Treaty:*
5. *The Summit shall designate two of the Judges of the First Instance Division as the Principal Judge and Deputy Principal Judge respectively, who shall be responsible for the performance of such functions as may be set out in this Treaty;*
6. *The President shall:*
 - (a) *Be the Head of the Court and shall be responsible for the administration and supervision of the Court;*
 - (b) *Direct work of the Appellate Division, represent it, regulate the disposition of the matters brought before the Court and preside over its sessions.*

7. *The Principal Judge shall direct work of the First Instance Division, represent it, regulate the disposition of the matters brought before the Court and preside over its sessions”*

Thus the Court is headed by the President assisted by the Vice President. The President is the administrative Head of the Court as well as the head of the Appellate Division. The Principal Judge directs the work of the First Instance Division under Article 23(3). In terms of Article 45(5), the Registrar is in charge of the day to day administration of the business of the Court and carry out other duties as stipulated under the Treaty and rules of the Court.

The mode of operation of the Court goes hand in hand with the tenure of judges. The current arrangement where the Judges work on a non-renewable seven years term does not help the Court or the Community and has to be revisited. The Court is slowly becoming a training ground for Judges to undergo intensive capacity building with a view to preparing them for effective discharge of their mandate, but before they can deliver, their terms come to an end. Two alumni of the Court are now with the African Court of Human and Peoples Rights.

The Treaty in Article 27,28,29,30,31 and 32 prescribes the jurisdiction of the Court as follows:-

- (i) *Initial jurisdiction over the interpretation and application of the Treaty; plus other original, appellate human rights and other jurisdiction as may subsequently be determined by Council of Ministers, by Protocol to be concluded by the Partner states.*
- (ii) *References by the Partner States or the Secretary General, over the failure by a Partner State or Community /Institution to fulfill a Treaty obligation; or for infringement of the Treaty; or illegality of an Act, regulation, decision or action;*
- (iii) *Reference by legal or Natural persons (resident in Partner State) over the legality of any Act, regulation, directive decision or action of a Partner State or Community Institution - except for Acts, regulations, etc that are "reserved" to an institution of a Partner State;*
- (iv) *Disputes concerning East African Employees.*
- (v) *Arbitration by the Court in matters arising from an arbitration clause contained in a contract agreement which confers jurisdiction on the Court - including disputes between Partner State submitted to the Court under special agreement.*

Briefly, let me examine some of these Articles.

Article 27 of the Treaty as amended now provides as follows:-

“(1) The Court shall initially have jurisdiction over the interpretation and application of this Treaty:-

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner State.

(2) *The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at the suitable subsequent date. To this end, and the Partner State shall conclude a protocol to operationalise the extended jurisdiction.*

Under the proviso to Article 27(1) the Court jurisdiction to interpret the Treat shall not include the application of any such interpretation to the jurisdiction conferred by the Treaty on organs of the Partner States. This Article should be read together with Article 33 which reads-

“(1) *Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not*

on that ground alone, be excluded from the jurisdiction of the national court of the Partner States.

(2) Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matters”.

The Court seems to have concurrent jurisdiction with national Courts on the interpretation of the Treaty, but decisions of the Court take precedence over decisions of the national courts. This Court in Reference No. 3 of 2007, **The East African Law Society and 4 Others and The Attorney General of Kenya and 3 Others**, made the following pertinent observation-

“By the provisions under Articles 23,33(2) and 34, the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainly. The new

(a) proviso to Article 27; and

(b) paragraph (3) of Article 30,

Have the effect of compromising that principle and/or of contradicting the main provision. It should be appreciated that the question of what “the Treaty reserves for an institution of a Partner State” is a provision of the Treaty and a matter that ought to be

determined harmoniously and with certainty. If left as amended the provisions are likely to lead to conflicting interpretations of the Treaty by national courts of the Partner States”.

And in Civil Reference No. 1 of 2006 between **Prof. Peter Anyang’ Nyongo and 10 others and the Attorney General of Kenya and 2 others and Abdirahim Haitha Abdi** and 11 others, the Court had this to say-

“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. 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 any other provision directly conferring on the national Court jurisdiction to interpret the Treaty:

It is important that this uncertainty in the Treaty provisions should be made clearer by amending the Treaty as appropriate. I have already made reference to the proviso to Article 27(1). The initial function of the Treaty.

Therefore the Treaty, Protocols and any Community law are the core generators of the work of the Court, and the Court can entertain any dispute arising out of these instruments. However, we are witnessing or continuing number of Protocols contradicting the position of the Treaty. Other parallel dispute resolution mechanisms (national courts and quasi judicial bodies) are being established. For instance, Article 41(2) of the EAC Customs Union Protocol that deals with dispute settlement establishes committees to handle disputes arising out of the Protocol and gives these committees finality in determining the disputes. The Court is left out and therefore denied a role in all this process except if a party challenges the decision of the Committee on grounds of fraud, lack of jurisdiction or other illegality. Again, under Article 54(2) of the Common Market Protocol, jurisdiction to entertain Common Market related disputes has mainly been given to national Courts. At the same time under Article 33(2) of the Treaty recognizes that the Courts decisions on the interpretation of the Treaty and Community law as being superior to the national court decision on the same matter. This Partner State tendency of ousting the jurisdiction of their own joint Court is not conducive to the integration agenda. It has the effect of undermining the Court itself and causing confusion in the development of the uniform regional jurisprudence.

I now come to Articles 23 and 35A of the Treaty as amended. They provide as follows:-

“23(1) The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.

(2) The Court shall consist of a First Instance Division and an Appellate Division.

(3) The First Instance Division shall have jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty.

35A. An appeal from the judgment or any other of the First Instance Division of the Court shall lie to the Appellate Division on-

(a) points of law

(b) grounds of lack of jurisdiction; or

(c) Procedural irregularity”

The Treaty as amended simply provides that appeals from judgments and orders of the First Instance Division shall lie to the Appellate Division. Fair enough! However there are two areas in the Treaty where such a mechanism may not be appropriate. First, Article 34 of the Treaty provides for a referral of certain disputed questions from the national courts to the East African Court of Justice.

A national court or tribunal before which a question arises as to the interpretation or application of the Treaty, is required to request the EACJ to give a preliminary ruling on the matter, in order to enable the national court or tribunal before which the question has arisen to give its judgment on the parent matter. Where should such a referral go to, First Instance Division or Appellate Division? Second, Article 36, confers jurisdiction on the Court to give advisory opinions on questions of law arising from the Treaties. Again, bearing in mind the seriousness of such issues, should advisory opinions be rendered by Court of First Instance, subject to appeal to the Appellate Division or from the Appellate division, whose decisions are final? There is no guidance in the Treaty on these two issues. The Court has taken the initiative and invoked its rule making powers under Article 42 of the Treaty by amending the East African Court of Justice Rules of Procedure. Rules 75 and 76 provide as follows-

“75(1) A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division and shall contain an exact statement of the question upon which an opinion is required and shall be accompanied by all relevant documents likely to be of assistance to the Division;

76(1) A request by a national Court or tribunal of a Partner State concerning the interpretation or application of the provisions of the Treaty or validity of any regulations directives, decisions or actions

of the Community pursuant to Article 34 of the Treaty shall be lodged in the Appellate Division by way of a case stated.”

This may be a stop-gap measure. Proper jurisdictional boundaries need to be made in the Treaty itself.

In the decade ahead of us, Partner States should see the need for utilizing the Court's facility as an arbitral tribunal. The Court on its part is ready and prepared to handle any arbitration matter. Judges have been trained and familiarized themselves with international commercial arbitration principles and practices. The Court has already reviewed its rules of arbitration to measure up to international standards, but ten years down the road, no dispute has been referred to the Court for arbitration. The founding judges of the Court have all retired without handling an arbitral matter and training is under way for the new crop of judges.

From the foregoing and other issues that will be raised in the course of this workshop, the next decade promises to be quite challenging. If the political will to make this Regional Court an architect of legal and judicial integration, a court in which local and foreign investors will place their confidence, a Court which, in collaboration with national courts and tribunals, a regional jurisprudence will emerge, I am sure policy organs of the Community will endeavor to address these issues and many more.

Thank you for your attention.