IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Fakihi A. Jundu, J Audace Ngiye, & Charles Nyachae, JJ)

REFERENCE NO.8 OF 2017

PONTRILAS INVESTMENTS LIMITED..... APPLICANT

VERSUS

CENTRAL BANK OF KENYA ..... 1ST RESPONDENT

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA .....2ND RESPONDENT

4TH JULY, 2019

RULING ON OF THE COURT

A. INTRODUCTION

1. The instant Reference, **No.8 of 2017**, was filed by Pontrilas Investments Limited ('the Applicant') on 31st August, 2017. The thrust of the Reference is the Applicant's contention that the Respondents breached their obligations under the Treaty for the Establishment of the East African Community, ('the Treaty') and in particular Articles 6, 7(2) and 8(1)(c) thereof, as well as the Protocol for the Establishment of the East African Monetary Union ('the Protocol') as regards supervision of Imperial Bank of Kenya Limited and actions related thereto.

2. The First Respondent is the Central Bank of Kenya, and the Second Respondent is the Attorney General of the Republic of Kenya. The said Respondents filed Responses to the Reference, on 30th January, 2018 and 18th January 2018 respectively.

3. By a Notice of Preliminary Objection, also filed on 30th January, 2018, the First Respondent prayed that the Court do dismiss the Reference as against it, with costs, on the following grounds:

    a. **That this Court lacks jurisdiction over the First Respondent;**
    b. **That this Court lacks jurisdiction to determine and grant the reliefs sought;**
    c. **That the Reference is time barred;**
    d. **That the Reference is bad in law and has been filed contrary to the provisions of the Treaty;**

e. **That the Applicant lacks *locus standi* to file the subject Reference;**
f. **That the Reference is based on an illegality;**
g. **That the Reference is an abuse of Court process;**
h. **That the** Reference **is therefore incompetent, fatally defective and does not lie and the same ought to be struck out or dismissed with costs.**

4. At the Scheduling Conference held on 13th June, 2018, the Court directed that the above Preliminary Objection be heard and determined first, and for purposes of the Preliminary objection, the Parties do file written submissions limited to one question namely: **'Whether the First Respondent had been properly sued, was properly before the Court, and the Court thus has jurisdiction over it.'** Effectively, the several objections set out in the Notice of Preliminary Objection thus collapsed into one objection.

5. At the hearing of the Preliminary Objection, the Applicant was represented by Prof. Edward Fredrick Ssempebwa and Mr. Ladislaus Rwakafuuzi, while Mr. James Ochieng Oduol appeared for the First Respondent, and Mr. Charles Mutinda and Ms. Lauren Kitubi for the Second Respondent.

B. **FIRST RESPONDENT'S SUBMISSIONS**

6. The First Respondent relied on its written submissions and in particular, submitted that the question of Jurisdiction is paramount and must be determined at the earliest opportunity. It referred us to the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited (1989) eKLR**, which had been cited with approval

by this Court in **Modern Holdings (EA) Limited vs. Kenya Ports Authority, EACJ Ref. No.1 of 2008.**

7. More recently the Supreme Court of Kenya in the matter of **The Interim Independent Electoral Commission (2011) eKLR** quoted with approval, the words of Nyarangi, JA in the said case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited (Supra)**, thus:

> **I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.**

8. Nyarangi, JA further stated:

> **By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter, or Commission under which the Court is constituted and may be ended or restricted by like means. If no restrictions or limit is imposed, the Jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters which the particular court has cognizance or as to the areas over which the Jurisdiction shall extend, or may partake of both these characteristics.**

9. The Supreme Court of Kenya in the **Interim Independent Electoral Commission** (supra) thus concluded that **'jurisdiction flows from the law, and the recipient court is to apply the same, with any limitation embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, when the wording of the legislation is clear and there is no ambiguity.'**

10. Mr. Ochieng Oduol did also make reference to the decision of the Appellate Division of this Court in **Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No.1 of 2011** where, borrowing from the jurisprudence of the European Court of Justice, it was held:

> **It is a well-established principle of law that the European Court of Justice can only act within the limits of the powers conferred upon it by the existing treaties or any inter conventions. Its jurisdiction must therefore be from specific provisions and does not extend beyond the defined area.**

11. Applying the authorities cited above to the Treaty, and particularly Articles 23 and 30 which deal with the Court's jurisdiction, the First Respondent submitted that whereas in the instant Reference the Applicant is a legal person resident in a Partner State, as envisaged by Article 30(1) of the Treaty, the First Respondent was neither a Partner State nor an Institution of the Community as required by the said Article 30(1).

12. The First Respondent further argued that in so far as the Applicant had in its pleadings acknowledged that the First Respondent was a statutory body established under the laws of the Republic of Kenya, and not under the Treaty or Protocol, the First Respondent was not an entity within the ambit of the provisions of Article 30(1) of the Treaty, that could be competently sued as a Respondent before this Court as it was neither a Partner State nor an Institution of the Community. It relied upon the decision of this Court, in **Modern Holdings (EA) Limited vs. Kenya Ports Authority** (supra) to contend that it too was neither listed among the institutions of the Community under Article 9(3) nor was it created by the Summit under Article 9(2) of the Treaty.

13. In **Modern Holdings**, the Court concluded that:

> **KPA is definitely not among the institutions of the Community created under Article 9(2), or a surviving institution of the East African Community appearing on the above list. As such, KPA is not one of the Respondents envisaged under Article 30 of the Treaty. KPA is a statutory authority created under Section 3 of the KPA Act --- it was created by the Republic of Kenya, a Partner State, and not by the Summit.**

14. It was the contention of the First Respondent, that the principles and obligations under Articles 6, 7(2) and 8(1)(c) of the Treaty, and of the Protocol squarely lay with the Republic of Kenya as a State, and the First Respondent was therefore not a proper and competent respondent under Article 30 of the Treaty.

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15. As regards the doctrine of Emanation of a State (which as is discussed later in this ruling, is a principal plank of the Applicant's opposition to the instant Application), the First Respondent urged that, the doctrine could not be invoked to maintain a claim against the First Respondent before this Court, as that party was not subject to the Court's jurisdiction under Article 30(1) of the Treaty.

16. The First Respondent consequently sought that the Preliminary Objection be upheld and the Reference as against it be struck out with costs.

C. **APPLICANT'S SUBMISSIONS**

17. In turn, the Applicant's submissions in opposing the Preliminary Objection fell into two distinct categories. Firstly, the Applicant urged the Court to take a broad and liberal interpretation of the Treaty and hold that by virtue of its functions and role in the Community through the Monetary Union Protocol, the First Respondent should be deemed to be an institution of the Community, in terms of Article 9(2) of the Treaty. This first hub of the Applicant's submission rests largely on the envisaged role to be played by the First Respondent, as well as the Central Banks of other Partner States, to enable the Partner States to fulfill their obligations under the Treaty, and specifically, the Monetary Union Protocol. Evaluating the First Respondent's statutory role alongside the Treaty and Protocol obligations of the Second Respondent and other Partner States, it was the Applicant's contention that to the extent that the national Central Banks are pivotal to the realization of a functional Monetary Union, the First Respondent as one such Central Bank should be deemed to be an institution of the Community.

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18. In response to the First Respondent's argument that it is not expressly named in Article 9(3) as an institution of the Community, the Applicant contended that, the Treaty provision was not exhaustive but rather, the institutions of the Community could be deduced from the functions they perform. In a nutshell, it was the Applicant's submission on this limb that in so far as the Central Banks of the Partner States had been placed in a pivotal role with regard to the establishment and operation of the Monetary Union, they were now regional institutions clothed with international/ regional corporate personality.

19. The Applicant addressed the doctrine of emanation of the state under the second limb of its submissions. Whereas under the first limb, the Court had been invited to interpret the Treaty broadly and thus find that the Central Bank of Kenya is an institution of the Community, under the second limb the Applicant advanced the alternative argument that the Court should find the Central Bank of Kenya to be an emanation of the Kenyan State. The Applicant referred us to the case of **Foster vs. British Gas PLC c. 2188/89 (1990) ECR 1-3313,** where the European Court of Justice defined emanation of the state as **'a body whatever its legal form which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals.'**

20. Acknowledging that emanation of the State is not a concept provided for by the Treaty for the Establishment of the East African Community, we understood the Applicant to argue that it was a

necessary development of Community Law that was intended to be integrative and should accordingly be given effect by this Court.

The Applicant urged the Court to over-rule the Preliminary Objection and proceed to hear the matter on its merits.

D. SECOND RESPONDENT'S SUBMISSIONS

21. The Second Respondent filed written submissions on several of the original points of objection listed in the First Respondent's Notice of Preliminary Objection dated 23rd January, 2018. In his oral highlights at the hearing of the 'consolidated' Preliminary Objection, Counsel for the Second Respondent focused on the issue of jurisdiction, as directed by the Court at the Scheduling Conference.

22. It was the Second Respondent's contention that the First Respondent was not an institution of the Community in terms of the Treaty and therefore the Court had no jurisdiction over it; and further, the First Respondent being a creation of the Laws of Kenya, only the national courts of Kenya had jurisdiction over it. In essence, the Second Respondent supported the First Respondent's Objection and urged the Court to strike the latter off the Reference.

E. THE COURTS DETERMINATION

23. Having carefully considered to the Parties' submissions, it is the considered view of the Court that prior to a substantive consideration of the said submissions at this stage, it is imperative that the Court confirms that what is before it, is indeed a preliminary point of law that would be properly determined as a Preliminary Objection.

24. Whereas the matter under consideration was raised and argued by all the Parties as a Preliminary Objection, the Court is alive to the importance of proper procedure in the judicial process.

25. In **Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, (supra)**, the Appellate Division of this Court held:

> **The improper raising of points by way of Preliminary Objections does nothing but unnecessarily increase costs and, on occasion confuse the issues. The Court must therefore, insist on the adoption of the proper procedure for entertaining applications for Preliminary Objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will instead, treat as preliminary objections, only those points that are pure law; which are unstained by facts or evidence, especially disputed points of facts or evidence or such like.**

26. This position was underscored in **The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa, Appeal No.7 of 2015** where the Court cited with approval the following exposition in **Mukisa Biscuit Manufacturing, Company Limited vs. West End Distributors Limited (1969) EA 696** (per Newbold, P):

> **A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact**

has to be ascertained or what is sought is the exercise of judicial discretion.

27. The question of what would constitute a proper preliminary objection was further addressed in **Attorney General of Tanzania vs. African Network for Animal Welfare (ANAW) EACJ Appeal No.3 of 2011,** where the Appellate Division of this Court held that a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and assessment of testimony it **'should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigations on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined, and a finding of fact then made by the Court.'**

28. In the instant case, the First Respondent argued that as matter of both fact and law, it is not an institution of the Community in terms of Article 9 of the Treaty and therefore cannot be a Respondent sued in this Court, such as is envisaged in Article 30 of the Treaty. Article 9(2) and (3) provides as follows:

> **2. The institutions of the Community shall be such bodies, departments and services as may be established by the Summit.**
>
> **3. Upon the entry into force of this Treaty, the East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established**

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by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such.

29. In their respective submissions, much was made by both Respondents of the fact that the First Respondent is an entity created by Article 231 of the Constitution of Kenya, 2010 as well as the Central Bank of Kenya Act, and is therefore not and cannot be an institution of the Community.

30. We take the view that, as a matter of law, institutions of the Community would firstly be such institutions as are designated as such in Article 9(3) of the Treaty. Article 9(2), on the other hand, envisages that the Summit will from time to time as it deems fit or necessary establish various bodies, departments and services as institutions of the Community. This clearly is an ongoing process. At any given time, therefore, including at the time of filing or hearing the instant Application, it cannot be discerned, by reading the said Article whether or not a particular entity is an institution of the Community having been so established by the Summit in terms of Article 9(2). Whether or not an entity has been so established, can only be demonstrated by adducing appropriate evidence either in support or negation of that contention.

31. It is clear to us that Articles 9(2) and 9(3) are separate and distinct legal bases under the Treaty for determining whether or not a particular entity is an institution of the Community, in terms of Article

1 thereof, which provides '**institutions of the Community" means the institutions of the Community established by Article 9 of this Treaty.'** An entity will thus be determined to be an institution of the community by one or the other of these bases. In the case of Article 9(2), such determination by the Court is a question of fact that would require proof of the Summit having established the entity as an institution of the community.

32. In the instant Application, the First Respondent placed great reliance on this Court's decision in **Modern Holdings (E.A) Limited vs Kenya Ports Authority** (supra). In that matter, the issue under consideration was identical to that in question presently; namely the determination of an institution of the Community for purposes of Article 30 of the Treaty thus giving rise to a consideration of Article 9. The Court held:

> **Mere fact of rendering the nature of services it renders at Mombasa Port, namely serving the East African Partner States does not ipso facto make it an institution of the Community. In order to qualify as a service under Article 9(2) of the Treaty, the services must be such a service created by the Summit.**

33. We hold that to be the correct position in law. However, we hasten to add that a determination as to whether the services rendered by an entity are indeed created by the Summit would be a question of fact that is subject to proof as such.

34. Whereas in Modern Holdings (supra) this Court correctly found that in terms of Article 9(2) of the Treaty, a service can only be an institution of the Community if so established by the Summit, it is our

view that the question of whether or not a service has been so established is a question of fact that must be proved by evidence.

35. In the interest of clarity of the law and guided by the said decisions of the Appellate Division of this Court in **Attorney General of The The Republic of Kenya vs. Independent Medical Legal Unit** (supra), **The Secretary General of the East African Community vs. Rt. Ho. Margaret Zziwa** (supra) and **Attorney General of Tanzania vs. African Network of Animal Welfare (**ANAW) supra, we reiterate that whether or not an entity is an institution of the Community under Article 9(2), is a question of both law and fact, the latter requiring evidential proof. When therefore a party bases an application on a contention that it is or is not an institution of the Community, in terms of the said Article 9(2), this requires evidential proof, and cannot rightly be the subject of a preliminary objection.

36. Against the jurisprudential background referred to above, it becomes abundantly clear that the question as to whether or not the First Respondent is an institution of the Community would require proof of affirmation or rebuttal under the precincts of Article 9(2) of the Treaty. In the same vein, the issue as to whether or not the services provided by the First Respondent are services created by the Summit and therefore services provided by an institution of the Community under Article 9(2) is a question of evidence that cannot be conclusively disposed of as a preliminary point of law.

37. We have considered the Applicant's argument relating to emanation of the state, as well as the First Respondent's response on the same. It is our considered view, that, having concluded as we have that the question before us, is question of both law and fact, and therefore

not a proper preliminary point of law, it would be inappropriate at this stage to make a determination on the doctrine of emanation of the State. This seems to us to be an issue to be canvassed and determined at the substantive hearing of the Reference, if the First Respondent chooses to challenge the court's jurisdiction over it, at the said hearing.

38. We do therefore overrule the present Preliminary Objection; we order that **Reference No.8 of 2017** be heard on its merits, and urge the Parties (should they be so inclined) to address the issue of the First Respondent's *locus standi* therein as a question of law and fact.

39. We make no order as to costs.

Dated, signed and delivered at Arusha this 4th day of July, 2019.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Dr. Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE

Hon. Justice Fakihi A. Jundu
JUDGE

Hon. Justice Audace Ngiye
JUDGE

Hon. Justice Charles Nyachae
JUDGE