THE ROLE OF THE EAST AFRICAN COURT OF JUSTICE IN THE EAST AFRICAN INTERGRATION PROCESS

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Introduction

East African countries have for centuries had historical and commercial ties. These ties were anchored in close tribal traditions and social relationships across the region. Many cultures in the region also had similar notions of justice (customary law) that governed tribal and inter-tribal relationships even before the colonial period brought in the court system as we know it today. The fate of the East African peoples was therefore historically not only intertwined geographically, socially, economically but legally as well. This allowed for order within society for the overall wellbeing of its peoples.

It was therefore not surprising that even during the scramble and the eventual partition of Africa (Berlin Conference of 1884) colonial powers sought to leverage on this already existing commonality among the different communities in order to curve out their empires. In East Africa Great Britain went further to galvanise its gains by the construction of the Kenya-Uganda

Railway to provide a gate way from the coast to the hinterland between 1897 and 1901. On the economic front, the British in 1900 established the Customs Collection Centre in the region and introduced the East African Currency Board in 1905. This in effect substituted the local economy for a foreign and more global one. It then became necessary to protect these gains with a justice system that the colonial governments could understand leading to the creation of among other domestic courts, the Court of Appeal for Eastern Africa (EACA) in 1909. EACA became the single Court of Appeal of all the East African Territories for decisions emanating from their High Courts; thereby creating uniform jurisprudence within the region. Other institutions were created during this time which we shall not delve into in this paper. Suffice it to note that it did not take long for the need for an umbrella organisation to coordinate all these regional organisations to emerge. So from 1961 to 1966 the East African Common Services Organisation Agreement came into force. This was replaced by the Treaty for East African Co-operation of 1967 creating what became known as the **East African Community** which collapsed in 1977. It is important to note that the East African Community was now a willing creation of the post-independence East African Countries as we know them today (Uganda, Kenya and Tanzania). The continuation of the colonial model for East African integration by the post-independence countries in the region was a clear indication of the desire to continue a sense of regional cooperation that pre-dated the colonial times while at the same time capturing the global perspective as well. However, the collapse of the East African Community 1977 also led to the collapse of some of the regional institutions including the East African Court of Appeal. What followed was a long period of soul searching that led to the revival of the East African Community on the 30th November, 1999

with the signing of the Treaty for The Establishment of the East African Community (EAC Treaty); which came into force on the 7th July 2000. Article 5 (1) states **the objectives** of the EAC and provides:

> *"... 1. The objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit..."*

This Article can be said to articulate the integration agenda under the new Treaty which is widening and deepening co-operation among Partner States.

The Legal basis for the new integration agenda under the EAC Treaty.

The EAC Treaty provides a clear legal basis for the new integration agenda. One of the recitals to the EAC Treaty for example provides:

> *"... AND WHEREAS the said countries, with a view to strengthening their cooperation are resolved to adhere themselves to the **fundamental and operational principles** that shall govern the achievement of the objectives set out herein and to the principles of international law governing relationships between sovereign states..."*

This recital articulates very important principles to the current integration agenda of East Africa namely adherence to governance based on the provisions of the EAC Treaty and the principles of international law. Clearly aware of the weakness of the 1967 Treaty the Partner States ceded sovereignty and accepted adherence to the new EAC Treaty and its fundamental and operational principles in accordance with international law.

Furthermore, Article 3(3) provides that foreign States wishing to join the EAC have to meet certain criteria which inter alia is provided as follows:

> *"... shall include that foreign country's:*
>
> *(a) acceptance of the Community as set out in this Treaty;*
>
> *(b) adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice..."*

The EAC Treaty under Article 6 then states what the **fundamental principles** of the EAC are and for purposes of this paper I will highlight just two principles.

The first principle is found in Article 6 (c) which is the peaceful settlement of disputes.

The second is found in Article 6 (d) which provides:

> *"... (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights..."*

This stated fundamental principle is then tied in with what is termed as **"operational principles"** to be found in Article 7of the EAC Treaty. The Operational principle found in Article 7 (2) in particular provides:

> *"... 2. The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of*

law, social justice and the maintenance of universally accepted standards of human rights…"

The EAC Treaty therefore in its fundamental and operational principles emphasises the important legal tenants of **democracy, rule of law, accountability, social justice, equality and human rights**. These legal tenants need to be active and enforceable if an orderly and legally effective EAC integration is to be achieved. This is where the EACJ comes in.

The new East African Court of Justice

The current Treaty under Chapter 8 created the East African Court of Justice (EACJ) which was inaugurated on the 30th November, 2001. The EACJ however was a different flavour from the defunct EACA as it did not exercise appellate jurisdiction from the EAC High Courts but rather exercised jurisdiction over the EAC Treaty, very much in the same way as the European Court of Justice in the European Union.

In conformity with the need to enforce the fundamental and operational principles of the EAC Treaty as earlier discussed, Articles 23 & 27 (1) of the EAC Treaty provides that role of EACJ is to ensure **the adherence to law, in the interpretation and application of and compliance** with the said Treaty. So the key words here as to the role of the EACJ are 3 namely: **"interpretation"**, **"application"** and **"compliance"** with the Treaty. It follows therefore that where there is a dispute and or breach of the EAC Treaty in terms of these three key areas, then the jurisdiction of the EACJ crystallises to reinstate compliance with the EAC Treaty; thus ensuring that the overall integration agenda of the Partner States remains on track. This can be regarded as the core mandate of the EACJ.

Article 27 (2) of the EAC Treaty further provides for the enhanced jurisdiction of the Court beyond this core mandate (i.e. other original, appellate, human rights and other jurisdiction) as will be determined by the Council at a suitable subsequent date. In this regard, the Partner States are to conclude a protocol to operationalise the extended jurisdiction. To date no such protocol of enhanced jurisdiction has been signed.

Decisions of the EACJ on the interpretation and application of the EAC Treaty under Article 33 (2) shall have precedence over decisions of national courts on a similar matter. This is different from what used to happen at the EACA which had precedence in domestic matters. The EACJ on the other hand has precedence on Treaty matters and therefore provides uniformity in the interpretation and application of the EAC Treaty. A case at the EACJ is initiated by a Reference. There is no legal requirement like in many other regional and international courts that a party must first exhaust (The principle of subsidiarity) local remedies (in their home jurisdiction) before filing a reference at the EACJ (**Rugumba V Attorney General of Rwanda).**

The EACJ has two chambers. The trial Chamber is called the First Instance Division and from its decisions may be an appeal to the Appellate Chamber. Each Partner State has one Judge assigned to a chamber. At First the EACJ operated with only one chamber. The Appellate Chamber however, was created by Partner States following the injunction made by the EACJ against the Republic of Kenya in **Prof. Ayang' Nyong'o v AG Kenya & EAC Secretary General, 2006.** This decision created a lot of controversy since it was against a Partner State and so Partner States decided that a new appeal structure be added to the EACJ; to remedy possible mistake that the First Instance Court may make.

Under Article 35 (A) of the EAC Treaty the appeals of decisions of the First Instance Division can be made to the Appellate Division in three areas namely:

a) On points of law
b) On jurisdiction and
c) To review procedural irregularities.

Salient aspects of the Court's work.

Who may file a Reference?

A Reference to the EACJ for a decision may be made by any of the following parties:

a) By Partner States (Article 28)
b) By Secretary General (Article 29)
c) By legal and natural persons resident in Partner States (Article 30)
d) By the Community and its employees (Article 31)

It is important to observe that the EAC Treaty is one of few regional treaties that gives legal standing of natural persons before it. This means that person's resident in Partner States may also file a reference before the EACJ. This creates a very wide catchment area of stakeholders to the court to drive accountability from all corners and not just governments.

Article 36 Advisory Opinion.

The Summit, the Council or a Partner State may under Article 36 of the EAC Treaty request the EACJ to give an advisory opinion regarding a question of law arising from this Treaty which affects the Community, and the Partner State, the Secretary General or any other Partner. In one such opinion **(The**

Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion Application 1 of 2008) the EACJ advised Ministers on the principle of variable geometry [Art. 79 (e)] that allowed for different Partner State progression in co-operation in order to achieve integration.

Article 34 Preliminary Rulings.

Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions 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.

One such situation arose where the High Court of Uganda (HCCS 298 of 2012) sought interpretation form the EACJ (EACJ case stated case No 1 of 2014 **AG V Tom Kyahurwenda)** whether Articles: 6, 7, 8, 27, 33 and 123 of the Treaty were justiciable in the National Courts. The EACJ reaffirmed Article 34 of the Treaty that the EACJ exclusive jurisdiction to interpret the Treaty.

Article 32 Arbitration.

The EACJ can, if the parties so request under Article 32 to act as an arbitral tribunal. In this regard, special Rules of Arbitration (The East African Court of Justice Rules of Arbitration 2011) have been made. In this regard some private parties have nominated the EACJ as an arbitral tribunal to resolve their

disputes. The EACJ can also be nominated as an appointing authority in an arbitration clause.

Some significant opinions and jurisprudence of the EACJ.

1. **<u>Rule of law and good governance.</u>**

   The EACJ has been instrumental in resolving disputes which sought of delegates should be elected to the East African Legislative Assembly (EALA) from Partner States based on the provisions of the EAC Treaty. Examples of these cases are:

   i. Prof Ayang' Nyong'o V AG Kenya & SG EAC 2006 (Kenya)
   ii. AG of Tanzania V Calist Komu App 2 of 2015 (Tanzania)
   iii. Wani Santino Jada V AG South Sudan Ref 8 of 2017 (Republic of South Sudan).

   This ensured balanced representation of all shades of political opinion and not just the ruling parties from Partner States to participate in EALA.

2. **<u>Good Governance.</u>**

   There are instances where the EACJ has to pronounce itself on issues relating to good governance and or the support of Constitutions and institutions in Partner States. Such examples include:

   i. Alleged failure by Governments to comply with court orders (James Karoso V Attorney General of Kenya).
   ii. Alleged failure to appoint judges in Uganda (Simon Peter Ochieng V Attorney General of Uganda)

iii. Breach of Constitutional provisions on term limits (EASCOF V Attorney General of Burundi)

3. **Human Rights**

Though the EACJ does not have direct jurisdiction on human rights issues it has still used the Treaty's fundamental and operational principles to deal with human rights violations. Some examples in this regard are:

i. Allegations of invasion of courts by armed forces (James Katabaazi V Attorney General of Uganda)
ii. Alleged violations of press freedoms (Burundi Journalist Union V Attorney General of Burundi)
iii. Alleged violation of freedom of movement and illegal deportation (Sam Mohochi V Attorney General of Uganda).

4. **Business and commerce**

This is another area where though the EACJ does not have direct jurisdiction in the area of business and trade, it was still able to use the fundamental and operational principles of the Treaty to pronounce itself on business related cases such as:

i. Alleged political interference in the award of construction tender (Henry Kyarimpa V Attorney General of Uganda)
ii. Alleged excessive application of excise duty on cigarettes (BAT {u} V Attorney General of Uganda)

5. **Environmental protection.**

   One of the most spoken after decisions of the EACJ was the injunction given against the United Republic of Tanzania when it tried to upgrade the road in the Serengeti National Park to asphalt (Attorney General of Tanzania V African Network on Animal Welfare). This was seen as positive judicial intervention to protect the environment so as to make tourism more sustainable.

6. **Property rights.**

   The EACJ has also had the opportunity to pronounce itself on the protection of property rights in Partner States (Manariyo Desire V Attorney General of Burundi)

These cases all show how the EACJ has been able to defend and better articulate the EAC Treaty so that the benefits it accords to the peoples of East Africa are protected for a smoother integration. The court has also readily opened its doors to those who have legal standing with it and need to seek redress across borders thus ensuring uniform application of the principles of the EAC of peaceful resolution of disputes and the observance of the rule of law, good governance, human rights and equality to mention but a few.

Challenges

The EACJ is still an adhoc court which does not sit throughout the year and still has no permanent court house of its own.

Administratively the EACJ is still fighting for its own character away from the EAC secretariat by awaiting the passing of the Administration of Justice Bill which is due to be debated in EALA.

On the legal front there has arisen debate that the two-month time limit to file a Reference (Article 30 [2]) is too Short for some types of cases and persons. There is even criticism that the EACJ may clash with national courts over its concurrent jurisdiction when it comes to the interpretation of Treaty provision and may try to act as an appellate court to national courts. However, this fear so far has been unfounded as the EACJ has stuck to its mandate under Article 27 of the Treaty.

Conclusion

Law and its adjudication has always been a pillar of East African unity and integration from the pre-colonial to the present time. This is because an environment of self –help, disorder, lack of accountability, violation of human rights and the absence of human rights is not good for integration.

In this regard the EACJ has tried to act as an impartial umpire in this regard just like our old societies would have expected of our chiefs and Kings. It is still early days for the court and Partner States should urgently see to its complete institutionalisation for it to be more effective.

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