

TWENTY YEARS OF THE EACJ (2021)

THE COURT TWENTY YEARS HENCE (2041)

CELEBRATING THE LIFE OF THE EACJ

By

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[Salutations/Protocol]

We assemble in this idyllic setting of beautiful Bujumbura, to celebrate 20 years of this Court's life. Inevitably, we look back at the last 20 years: mostly with nostalgia.

However, this also is the opportunity to cast a look at the future of the Court: perhaps with a tinge of trepidation and foreboding, for none knows what the future holds. But look we must.

Nonetheless, before we look either way: back or front, let me ask us to stand up for a minute's silence to remember and honour all those who laid the judicial foundations of this Court, but who have since succumbed to the pull of Divine gravity. which bids all of us to depart this mortal life at our respective appointed time...

- The 1st President of the Court Hon. Justice Moiyo ole Keiua, from Kenya.
- The 2nd President of the Court: Hon. Justice Joseph Nyamihana Mulenga, from Uganda.
- The 3rd President of the Court: Hon. Justice Harold Nsekel, from Tanzania.
- And our equally illustrious member of the Court: Hon Chief Justice of Tanzania, Augustine Ramadhan.

These Patriarchs have gone: but they left behind an illustrious legacy of Integration.

May their souls now rest in the Peace, Bliss and Serenity of the Celestial!

Prof. Sempebwa has guided us on an eloquent tour de force of the Court's last 20 years. He has posited a bright, accurate and altogether agreeable rendering of the chronicles, lamentations and revelations of the Court's existence and substance of the last 20 years.

Let's then commence our own construction on that professorial and professional construct.

I INTRODUCTION:

At the genesis of the EACJ, the Three Sovereign States of Kenya, Uganda and Tanzania, got together to negotiate a new EAC Treaty (given the defunct one of 1967). In that new Treaty, was a chapter providing for the judicial face of the New Community: personified in the institution of the EACJ as an Organ of the EA Community.

We recall that in former times, there had existed the East African Court of Appeal (EACA): a formidable institution whose jurisprudence is still well and alive, even today.

Faced with that history, the framers of the New Treaty, therefore, had to contend with either re-enacting an Appellate Court (on the lines of the old EACA), or designing a brand new Court measured, cut and tailored on the Trade, Commerce & Economics foundations of the New Treaty. The old EACA had been buttressed by the quasi-sovereign, near total cooperation of the pre and post-colonial arrangements of the Three States of Kenya, Uganda and Tanzania- namely: one Currency Board (forerunner to the Central Bank);

One currency; One Tax regime; one Railway System; One Postal Office; One Airline Service; One Ports Authority; One University; virtually one Judiciary (at least at the apex end of the EACA).

The New Treaty had to work with a totally different reality of Three independent Sovereign States: independent in all areas, dependent only in their constant search for Trade and commerce. The new Court had to reflect that reality of complete autonomous sovereigns. Therefore, no Appellate Court.

However, the framers of the New Treaty were equally alive to the paradigm of a hoped-for political Federation in the future. They, therefore, included in the New Treaty, the hopes for an Appellate Court for EA at an appropriate time in the future.

Finalization of the provisions of the New Treaty, covering the hope for that Appellate jurisdiction were left to discussion, debate and resolution by the Three Attorneys General of Kenya, Uganda and Tanzania, working in close collaboration with the Judiciaries of Kenya Uganda and Tanzania. I was privileged to be the Judge appointed by my fellow Judges of Uganda to represent Uganda at those Treaty negotiations. When the Judges representing Kenya, Ugandan and Tanzania met in Plenary to consider the New Treaty, they too elected me to be the one

Judge to represent all Three Judiciaries at the final meeting of the Attorneys General.

The three Attorneys General and myself, then met in Arusha: AG Amos Wako of Kenya, AG ... of Tanzania, and AG Bart Katureebe (now CJ Emeritus of Uganda), and myself as representative of the Three EA Judiciaries.

Kenya, in particular, was adamant and extreme in its stand of barring EACJ appellate jurisdiction. Kenya would not countenance the possibility of appealing her own Court's judgements on Constitutional disputes and Human Rights matters to the EACJ. The rest had to live with an inchoate provision: enabling appellate jurisdiction only when the States would deem themselves ready to endorse the move in the future.

The sovereign sentiment was so strong in those early days, that when the Court boldly ruled against Kenya's irregular purported election of her EALA members (in the original Anyang Nyongo case), Kenya reacted forcibly and dramatically. It led the crusade to amend the young Treaty quite drastically, and in a record seven to ten days. The Treaty Amendment effectively removed that bastion of judicial independence (namely, the normal security of a Judge's tenure). Henceforth, EACJ Judges could be recalled, removed for questioning on their conduct back home in

their State of origin. And this, the Kenyan authorities soon tried to execute forthwith in the case of their two Judges at the time: the President of the Court, Ole Keiua and the second Kenyan Judge at the EACJ: Justice Benjamin Kubo.

That the Court withstood all these shocks and storms, is grand testimony to the backbone and the resilience of our founding colleagues of this Court. Thanks to the indomitable pioneer Judges, the nascent Court, whose wings had been clipped in its infancy, soon grew new feathers to keep flying and soaring like the eagle – cruising across the vast skies of the EA judicial landscape.

That's a snapshot look at the past 20 years.

How about a glance at the next 20 years?

I prophesy implementation of the Court's appellate jurisdiction in that time – by design (i.e. deliberate enactment of the needed Protocol).

If not by design, then “appellate jurisdiction” shall slowly but surely creep in, by default: through the Court's own bold and incremental interpretation of the Treaty, to bring under its wings the area of Human Rights via the many Economic rights contained in the Protocols on Free Movement of People, goods and capital; plus the right of establishment for East African residents/nationals.

II REGIONAL REGISTRIES/ REGIONAL PRESENCE (THE FACE OF THE COURT)

The establishment of fully functional Regional Registries all across the length and breadth of the EA Partner States, is a harbinger of the things to come. In their original design, those Registries were intended to serve more or less as the resident post offices, where the Court's users would access the Court without much ado. Filing and processing of documents, would be done by the Parties and their lawyers at close range, without need to travel all the way to and from Arusha.

Let's pause there for just a moment; to consider a development that has a critical relationship to the filing, hearing and deciding of cases: and that is the repercussions and ramifications of the current COVID pandemic. The impact of the pandemic has been phenomenal, monumental, truly transformational. The technology flowing from the devastating pandemic, has mandated the drastic lessening, if not jettisoning, of the age-long phenomenon of physical judicial hearings of cases and delivery of judgements in open court.

We've entered the age of virtual hearings. The trend into virtual/digital court work will no doubt increase and intensify with time: both in quantity and quality – leaving even less need for Regional filing etc.

Nonetheless, there'll still be room for at least Two progressive steps to be taken.

In this regard, the Regional Registries could be upgraded from mere postal stations, to quasi Regional “courts”, at least in the sense of becoming the venues where Judges of the EACJ physically sit to hear and determine a matter.

First and foremost, subject to the volume of its future work, the Court would start a strategy of Circuits. With this, the Court would be able to sit in rotation, in each of the Partner States at the established Regional Registries, to hear cases and/or to deliver its Judgements. The parties and the ordinary people of the States of these Registries, need to see first-hand and to feel, to hear and to experience up close, in real terms, the existence of the EACJ.

The Court owes the people, All the people of East Africa, a responsibility of widening and deepening the Integration Agenda. For the last 20 years, the Court has done so largely from the cosy and closeted conclave of its glittering seat in Arusha. In the next 20 years, the Court must step up and move out to the periphery of the East African territory! To show itself, face to face with the people of East Africa. In this “people-centred Community”, the people matter!

This is a proposition that's utterly doable. During my time at the Court, we once moved from Arusha to Nairobi, to deliver a judgement in one of the many Anyang

Nyong'o litany of Cases and Applications versus the Republic of Kenya. In those days, we had not yet set up the Regional Registry in Kenya. We, therefore, pitched tent at the Kilimani Commercial Courts in Nairobi. The Press came, the Lawyerly luminaries of who's who in Kenya turned up. The Parties and their legal representatives were present. Above all, ordinary members of the general public showed up to experience first-hand this novelty in their own backyard. And we of the Court, be-gowned and be-wigged, sat in formidable array to deliver our Judgment.

It was an experiment never to be forgotten, an experience that tickled the mind, a spectacle that touched the heart of all the spectators. I can only hope and pray that the experiment has been repeated and replicated by the Court in appropriate cases; and in the right places.

That's the substantive part. But there's also the ceremonial portion: the opening of the Court's Year and the Court's Sessions. These offer a rare, but extremely significant opportunity to showcase the Court. The Opening ceremonies at the Regional Registries, done in rotation, would give the Court the rare but desirable visibility in each one of the Partner States.

III LEGAL TRAINING :

An important area of the legal profession in the Partner States, and even more significant at the East African Regional level, is the Training of Lawyers. The Partner States train their lawyers at two levels: the Academic level (at the Universities); and the practical level (in the professional Law schools, such as the Law Development Centres (LDCs) in Uganda, the Kenyan Law school in Nairobi, and their equivalents in Tanzania, Rwanda and Burundi) ... am not personally knowledgeable about the situation in the sixth Partner State (Sudan).

Given the great plethora of Universities, Law schools and various curricula, we should explore the prospects of an East African LDC (i.e. practical school for professional formation) to teach, among others, the practical aspects of Advocacy, Ethics, Decorum, and Professional Conduct.

At the domestic level, the Judiciaries of the Partner States have a pivotal role to play in the affairs of these practical advocacy schools. Equally, at the EAC Regional level, the EACJ should play the lead role in the EAC LDC.

First, the EACJ has a direct interest in the matter, in as much as there's a fast growing body of Community Law. Experts in the substance and procedure of the corpus of that Law are needed from the various Bars of the Partner States. The

present Treaty requirement: that qualifies any lawyer with a practicing certificate in the domestic courts to practise before the EACJ; worked not so well in the first 20 years of the Court. In the next 20 years of the Court's future life, more experience and more competence, in EA Community Law and Comparative Legal Systems will most definitely be required of practitioners before the EACJ – as the complexity of the various Protocols under the Treaty and the 'collision' between Continental vs Common Law, begin to manifest themselves in the work of the Court.

Second, Uniformity and the quality of training of tomorrow's lawyers can only be assured by a common effort all across the EA jurisdictions : fronted by the EACJ itself, working very closely with the Partner State Judiciaries and, especially so, with the EA Law Society.

The present dearth of versatile, well skilled practitioners of Community Law at the EACJ and elsewhere in the domestic courts of the Partner States, is self-evident. Equally, the dismal failure to date of the Treaty provision calling for case-stated (i.e. References by the Partner States' domestic courts to the EACJ for interpretation of the Treaty), is largely a challenge of conceptualization on the

part of these courts and of the lawyers practising there. The fog enveloping that phenomenon requires lifting – namely, education by the EACJ.

Any positive excursions into this arena of the kind now suggested, can only redound to the widening and deepening of the EAC Integration Project.

IV EACJ/ JUDICIAL SERVICE COMMISSION (JSC)

The last 20 years of the Court have been characterized by a Staff of more or less *ad hoc* Judges – sent to Arusha on a non-permanent basis. Only the President and the Principal Judge of the Court are currently permanent in Arusha.

The Treaty, in its provisions, envisages a Permanent Court sometime in the future... and rightly so. That future is likely to come within the next 20 years of the life of this Court -- given the current growth pattern in the Court's volume of work. A Permanent Court will call for and justify a more spirited mechanism for the independence of the Judges of that Court; and for a more professional and transparent mechanism for their appointments. Therefore, we need to explore and prepare for instituting an EA Judicial Service Commission of sorts, or a mechanism akin to that.

Such a body or mechanism would have attributes of professionalism in its composition and work methods; plus, independence in its assessment and

recommendations of candidates for appointment by the summit. The EA JSC would in addition have a mandate to educate the public, etc. concerning the law of the Court (i.e. the Treaty, the Protocols, EAC legislation and the Court's own case law). This is a recognized role for which the JSCs, of the Partner States (notably Uganda) are mandated to carry out.

Equally, as with the domestic JSCs, the EA JSC would carry out the responsibility to discipline the Judicial staff of the EACJ.

V EACJ/EA ELECTORAL COMMISSION :

This 20th Anniversary is ideal for an exploration of the possibility and feasibility for the EACJ to play a role in an EA Electoral Commission for the election of EALA member. The string of electoral cases triggered by the Anyang Nyongo cases are highly instructive on this point. Similarly, the widespread electoral practice in SADAC countries is to deploy senior Judges of the Judiciary to chair the Electoral Commissions of those countries. Perhaps, Judges of the EACJ could either constitute or appoint an EA Electoral Commission, or the Partner State Electoral Commissions ... or perhaps the Court or its members could play another role altogether.

VI THE COVID PANDEMIC :

I know that the topic of IT and the consequences of COVID are a substantive subject to be tackled later in this Conference by two distinguished gurus: my Lord Geoffrey Kiriabwire, Vice-President of the Court, and my Lord Aaron Ringera, Emeritus Justice of Appeal of that Court.

Nonetheless, permit me just a word or two in passing to underline the importance of COVID and Technology in our Court.

COVID has brought, in its trail, a transformational change all across the board of human enterprise – not just in EA, but throughout the entire Planet. The abnormal is the new normal. The normal has largely been jettisoned out of the window.

The Teaching of the law, has been turned upside down. The Learning of the law, equally so. The marking of law examinations, not any less so. The practice of the law, no longer a face-to-face encounter : in the courts, in arbitrations, as indeed in any other judicial fora. Online is the flagship of everything. Zoom and virtual are the key to all.

The Digital Revolution is here – and is here to stay and to abound in both quantity and quality. Its incumbent upon the Court to find itself a fitting niche in this

avalanche of a Revolution, the tempest of whose winds are felt everywhere: in the filing of documents, the hearing of evidence, arguments, submissions of pleading; and in the compiling and submissions of pleadings and bundles; and in observing the body language of witnesses.

In the digital Age, all these are thrown back to the drawing board.

In all these, and more, the EACJ has its work cut out for the present and for the next succeeding 20 years.

But more of that Revolution, we entrust to the next panel of surgeons at this Conference, that will be dissecting the IT enigma more specifically.

VII STRATEGIC PLANNING AND PREPARATION :

Let me end the way I started. This Anniversary, we focus on the 20 Years the Court has lived. But it's also the Opportunity to cast our sights on what the future promises. What will, and what should the Court in the Year 2041 look like? The answer to that calls for both prophesy and preparation, as well as planning : highly strategic planning.

In the Holy Bible, there are at least two stories of this kind of Preparation and Planning. Of the Ten virgins called to the wedding Feast of the Century, five wise

ones were prepared for the task at hand. Five foolish ones were utterly unprepared. They were instantly thrown out of action.

The second story : is of Joseph the Dreamer boy, before mighty Pharaoh of the world class Egyptian Empire. Faced with the prospect of unprecedented regional hunger. Joseph designed a home grown, Divinely ordained, 14-year food plan. That plan won him the sovereign's accolades of Prime Ministership of Egypt, second only to the Pharaoh himself.

In all the various propositions I've offered in this discourse – namely: EACJ's Appellate jurisdiction, Circuits and Regional Registries, Legal Training, EACJ/JSC and the Electoral postulate, COVID's Digital Revolution of dispersing judicial work, the EACJ will need a Strategic Master Plan of Action.

Let there be a consultative Think Tank of sorts, a Strategic Review Commission or Task Force of sorts to study, reflect, and meditate upon all these and more critical Challenges of the Future. The Task Force would re-play, re-adjust and re-configure the Joseph model of strategic planning for the next 20 years of the Court's life.

The Court must not let the future overtake it with its pants down.

1. The Court of the last 20 years has been tried and found fit. It delivers.
2. The Court has found appropriate interpretation of the Treaty, to lay the beginnings of some elements of Human Rights jurisdiction for itself.
3. A solid body of legislation, case law and policy has arisen over the last 20 years impacting the domestic law of the Partner States. This gives rise to the possibility of quickening the day when the Treaty provisions on the Court's appellate jurisdiction will either be implemented by the Partner States; or, to some extent, be interpreted into existence by the Court itself- particularly so, given the array of economic rights that come with, among others, the freedom of persons, goods, financial capital let alone intellectual capital, to cross borders.

To recognize the illustrious gains made by the Court over the last 20 years, it behoves us all, all East Africans, to put an indelible imprint on the history of this exceptional period.

And so, here, I make a plea:

Let's find a way to appreciate in practical terms the stellar Leadership of the EACJ in these Past 20 years.

At my old school : King's College Budo, we've erected busts and sculptures of the various Headmasters of that school over the last 100 years of its existence.

Likewise, at the High Court of Uganda, this last month or so, we recognized the historic services rendered by one of Uganda's most eminent and most iconic Chief Justices, CJ Bendikito Kiwanuka, a judicial martyr who, 50 years ago, lost his mortal life to a killer dictator: Idi Amin.

We unveiled his statue at the High Court premises. In Ghana, the Judiciary decided, some years ago to erect statues of the three Justices who were killed in their line of duty by a firing squad by the bloodthirsty makers of a wicked military coup. Their statues stand at the Judiciary Headquarters in Accra.

My suggestion is this. This 20th Anniversary is as good a time as any to explore the feasibility of honoring the pioneer leadership of our beloved EACJ: The Patriarchs of the Court, Judge President Moiyo Ole Keiua, Judge President Joseph Mulenga, and Judge President Harold Nsekela – all departed. Their busts, or statues or other recognition, could be commissioned and erected to stand either at the Court's premises in Arusha, or at the respective Regional Registries of their Partner State of origin. Let the States, pass policies and

resolutions recognising these judicial Patriarchs, preferably at the Regional Registries.

This plea stands on its own merit, to recognize the respective feats attained by these illustrious Judges. But the prayer of that plea would also end in physical, tangible things that at once make manifest to the general public the reality, existence, presence, and visibility of the EACJ in its quest to widen and deepen the EAC's Integration Agenda.

And now, as is our usual style and custom, precedent dictates that we craft a fitting poetic summary to capture the inspiration of this historic moment.

So here we go ... [See the Poem overleaf entitled : **Happy Birthday EACJ**, that commemorates the Court's 20 Years' existence].

Happy Birthday EACJ

1. Oh ye Court majestic, Court mystic :

Spread wide your motherly wings

over your brood of six fledgling chicks

To them you impart judicial refuge,

To them you assure judicial recourse.

2. Conceived against the Colonial backdrop

of a benign imperial reign,

You grew into midlife : against the torment

of death by strangulation

wrought by an angry, discordant

political wind of Three sovereigns.

3. To Death, you descended

Near-Extinction, you tested

But soon, a mere Three decades soon

dry bones of your Past arose

You resurrected glorious :

into the vibrant body that you now wear

A star-studded Future Awaits :

decked in an Abundance of Blessings

4. May you live long: Justice and Truth to dispense.

From the high Cooperation of your Colonial Past

May you live immortal to spread deep and wide

the Integration of Today

May you live to blow the candles of the Jubilee!

may, of the Century!!

Happy Birthday EACJ

DEDICATION : In Celebration of Twenty Years of the Existence of the East African

Court of Justice, this verse of poetry is proffered!

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