

27/01/2010

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**ROLE OF THE EAST AFRICAN COURT OF JUSTICE
IN THE REALIZATION
OF CUSTOMS UNION AND COMMON MARKET**

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**A Paper for Presentation During the Inter-Parliamentary Relations Seminar
(Nanyuki - V -) to be held at Burundi National Assembly, Bujumbura,
Burundi, 27th – 31st January, 2010**

Introduction

It is a huge pleasure for me to have been given today the opportunity to address you on the topic **“The Role of the East African Court of Justice in the Realization of the Customs Union and Common Market”**. I wish to express my sincere gratitude to the Hon. Speaker of the East African Legislative Assembly in this regard for the invitation.

As you are aware, the East African Court of Justice (EACJ) was established under Article 9 of the Treaty for the establishment of the East African Community (the Treaty) and formally inaugurated on 30th November 2001. Almost Nine (9) years have now lapsed since the first EACJ Judges were appointed. The EACJ spent a number of years trying to get its feet on the ground thereby experiencing what may be considered as teething problems. It developed its Rules of Procedure, the Rules of Arbitration and heard cases that were presented to it among other things.

In the process of the regional integration on which the East Africa Community has embarked, one would expect the EACJ to play an instrumental role not only through peaceful settlement of disputes, but more importantly by contributing to the harmonization of the laws of Partner States through development of jurisprudence in the region.

The East African Community celebrated last year (2009) its tenth anniversary which was mainly marked by two major achievements of the Community: the adoption and signature of the East African Common Market Protocol and the end of the transitional phase for the Customs Union (1 January 2005- 31 December 2009). These are two important phases of the EAC integration which are expected to be the fundamental basis for the next two phases namely the Monetary Union and the Political Federation.

This leads me to the question which this paper attempts to answer, namely, **“What is the role of the East African Court of Justice in the realization of the Customs Union and the Common Market?”**.

It is my argument in this paper that the existence of the EACJ constitutes another forum within the Community for advancing the EAC integration agenda. I am at the same time demonstrating how the parallel dispute resolution mechanisms established under the Customs Union and Common Market Protocols are a challenge to the work of the Court and consequently undermine the EAC integration process.

A way forward and conclusion shall close the presentation.

2. The East African Court of Justice as an opportunity for the EAC integration

It is a reality that when people interact they are likely to get into differences and disagreement. That is human nature. Courts of law are purposely created to address this natural eventuality of human relationship. Similarly, the more East Africa gets integrated the more disputes of a trans-boundary nature are likely to happen. The visionary founders of the East African Community foresaw this situation and decided to create the East African Court of Justice to address such situations.

It is against the foregoing background that I consider the EACJ as constituting a unique opportunity for the EAC integration in that it is the main judicial organ of the Community, accessible, independent and that renders expeditious justice.

3. East African Court of Justice as Main Judicial Organ of the Community

As mentioned above, the Court was created by the EAC Treaty and its main mandate as enshrined in Article 23 (1) is to “ensure the adherence

to law in the interpretation and application of and compliance with [the] Treaty”.

The Treaty in this context means the Treaty for the Establishment of the East African Community and any annexes and protocol thereto¹. It should be understood that any annexes and protocol to the Treaty and any Community law are the ones that potentially generate work for the Court and that the Court can competently entertain any dispute arising out of those instruments. It is this finding that prompts me to argue in this paper that any attempt to take away the jurisdiction of the Court by any instrument other than the Treaty through establishment of other parallel dispute resolution mechanisms (quasi judicial bodies) is in itself illegal and objectionable.

4. Accessibility

The Court is accessible by a range of stakeholders from State level to that of a simple individual. The following have expressly given access to the Court by the Treaty:

- Partner states: when a Partner State considers that another Partner State or Community organ has failed to fulfill Treaty obligation, or that there is need for determination by the Court on legality of any Act, regulation, directive, decision or action on ground of being *ultra vires* the Treaty ²
- Secretary General: where he considers that a Partner state failed to fulfill obligation or breached the Treaty³,
- National court: where national courts refers to EACJ for preliminary ruling question of Treaty interpretation or determination of legality of a Community law or action⁴ ,

¹ See Article 1 of the Treaty for the Establishment of the east African Community (The Treaty)

²See Article 28 Ibid.

³ See Article 29 Ibid.

⁴ See Article 34 Ibid.

- Legal/ natural persons residents of East Africa: on legality of any Partner State/Community Act, regulation, directive, decision or action as *ultra vires* of Treaty⁵

Apart from this statutory access provided for under the Treaty, the Court is in the process of establishing sub-registries within the Partner States.

The establishment of sub registries is not provided under the Treaty, but it is a practical arrangement initiated by the Court in a bid to bring accessibility and justice nearer to the people. In exercise of its powers under Article 42 (1) of the Treaty the Court formulated Rule 6 of its Rules of Procedure to make the establishment of sub-registries possible as an attempt to bring justice nearer to the people. This arrangement has proven to be very efficient with the Caribbean Court of Justice where Supreme Court registries of the member states are *ipso facto* its sub-registries.

The EACJ was directed by the Council when this idea was tabled before it, to do a comprehensive study on the subject and present the proposal after consulting widely. After obtaining the Council approval the Court will have to work out with national judiciaries, on the modalities of putting in place the sub-registries in Partner States. We think this will immensely contribute to the improvement of the regional judicial mechanism in at least bringing justice nearer to the people, among others.

5. Independence

A judicial body can only be efficient if it enjoys confidence of its users. This confidence heavily depends on the independence of the Court as an institution and that of its individual members. Worth is to mention that the Court is composed of Judges from the five Partner States. They are -

⁵ See Article 30 Ibid.

appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfill the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognized competence, in their respective Partner States.⁶

Since its inauguration on 30th November 2001 to date, the EACJ has had on its bench Judges that fulfill those conditions: judges of the highest courts in the Partner States and/or jurists of recognized competence. This is quite a statutory guarantee of independence and impartiality of the Court.

The Court has so far proved to be an independent and impartial body. Indeed, the Court has experienced and survived what can be termed as apparent intimidation while discharging its noble duty as the Temple of Justice. This can be ably demonstrated by what transpired soon after delivery of one ruling on a matter that was before the Court. In their joint Communiqué of the 8th Summit, being a reaction to the Court's ruling and temporary injunction in *Anyang' Nyong'o case* the EAC Heads of State directed, among other things:

“ that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty.”⁷

and that

“a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard.”⁸

Within a short time the Treaty was then amended accordingly. It appears from the foregoing interventions that the Judges by deciding the case the

⁶ Article 24 (1) of the Treaty.

⁷ Joint Communiqué of the 8th Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12.

⁸ Ibid.

way they did committed an act that would have lead for their suspension or removal but since such act was not covered by the Treaty, an amendment to the Treaty had to be effected to so that should there be a repeat of such act by the Judges, punitive measures can be taken. Indeed by so doing security of tenure for EACJ Judges was seriously put at risk. However, this unfortunate reaction of the Summit did not deter the Judges from acting impartially and independently as it transpired in the subsequent decisions of the Court. Arguably this makes the EACJ an exemplary model of the Court that stands to propel the integration process as provided for in the EAC Treaty. Indeed Judges are committed to do justice without fear or favour as required by their judicial oath.

Cases which did not stand the competence test of the Court and were referred to national courts are also inspirational as to how some people believe more in the justice of the regional Court than that of their national courts. In this regard I would simply refer you to the cases *Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community*⁹, and *Mordern Holdings v Kenya Ports Authority*¹⁰.

6. Challenges:

6.1 Working on an *ad hoc* basis

The fact that the Court works on an *ad hoc* basis is an element that undermines its efficiency. None of the ten (10) judges composing the Court resides at the seat of the Court, including the President. It has proven difficult to compose the panel of Judges to seat on a particular case due to their commitments within their respective home countries. It is also a sad reality that the judicial work of the Court is mainly organized by the Registrar instead of the Court's President.

⁹ Reference No 2 of 2007

¹⁰ Reference No 1 of 2008

While we wait for the Council to determine the period when the Court will become fully operational, the Court strongly feels that time has now come for at least the President of the Court and the Principal Judge, to start with, to be permanently resident in Arusha.

Put briefly, while acknowledging that the present work load of the EACJ does not require all the Judges to reside permanently at the seat of the Court, it is highly recommended that the President and Principal Judge should be allowed to work on full-time basis in order for them to organize the administrative and judicial works of the Court.

For the President to perform his administrative and supervisory functions as envisaged by Article 24 (7) (a) read together with Article 45 (4) of the Treaty for the Establishment of the East African Community, it is necessary that he be resident in Arusha. An *ad hoc* President can hardly perform the administrative mandate of heading and leading the Court effectively and efficiently, giving it the guidance it deserves especially during these formative stages; and also attending high-level meetings with the Secretariat and sister organs. The current position where the Registrar is attempting to fill the void is inappropriate. Under the Treaty the headship of the Court is duly vested in the President of the Court. The Registrar is the Accounting Officer. He cannot give policy direction for the Court. The President cannot effectively discharge his functions under the Treaty by remote control.

Likewise, for the Principal Judge to direct the work of the First Instance Division, represent the Division and regulate the matters brought before the Court as provided for in Article 24 (8) of the Treaty, it is necessary for the Principal Judge to be present and resident where the seat of the Court is located.

This argument is buttressed by the fact that the Court workload has increased and also on the anticipation that it will increase more with the implementation of various Protocols of the Community

The African Court on Human and People's Right which is also based in Arusha has its President and Registrar resident in Arusha working on full time basis. The nature of the operations of this court is similar to that of the East African Court of Justice. The Judges of the African Court on Human and People's Rights also serve on *ad hoc* basis but for effective operations of the court the President of the Court resides in Arusha and works on full time basis.

Time has come for the President of the East African Court of Justice, an Organ of the Community, to concentrate, focus and direct his energies and planning towards the efficiency, growth and progress of the Court as a Regional Court, so that it can play its rightful role as envisaged in the Treaty and as expected by the citizens of EAC. An absentee leadership, for ten years, has clearly been a handicap to strategic growth and progress of the Court. We know that other major programs of the Community (customs union, common market, political federation, etc) have gained momentum and are in high gear. If the Court lags behind in preparedness to guide application and interpretation of protocols governing these programs, it will be bad for us all.

6.2 Slowness of the process of adoption of the Protocol extending the Court's jurisdiction to appellate and human rights

The decision of extending the jurisdiction of the Court to include appellate and human rights jurisdiction was taken in November 2004, but a Protocol that is meant to be the legal framework for this extension is yet to be concluded. This denies the Court opportunity to play a very

important role in addressing the violations of human rights in East Africa at regional level. It should be noted that a regional jurisprudence in human rights is required as the Court will be called upon to decide on common market related matters such as free movement of people, right of establishment etc which have human rights elements.

People of East Africa particularly the business community and law societies have been agitating for appellate jurisdiction of this court so that it becomes the apex court in the region. Albeit for different reasons, the East African Magistrates and Judges Association (EAMJA) has also joined EALS the Bar Association to demand for the East Africa Court of Appeal. These clear demands can be found in the speech by President of the East African Magistrates and Judges Association during the association's Annual General meeting held in Dar Es Salaam in January 2004 when he said:

'We in the EAMJA believe that in order to fulfill the objective of the Community, especially those under Article 126 (c) of the Treaty which include, *inter alia* "... the harmonization of legal learning and the standardization of judgments of courts within the Community," the formation of the East African Court of Appeal is a necessary and overdue step. We need a court of the highest resort in East Africa whose decisions bind all our national courts. The world trend now is to use international norms and standards to interpret national laws ... And further delay in establishing the East African Court of Appeal will just leave us behind while other regions forge ahead'.¹¹

6.3 Parallel EAC Dispute Resolution Mechanisms (Establishment of Quasi Judicial Bodies)

Much as the EACJ is the main judicial organ of the Community that has been tasked with the resolution of disputes arising out of the Treaty and other Community laws, the EAC continues to establish other quasi-

judicial bodies or mechanisms with the same mandate as the EACJ. The Customs Union and Common Market Protocols are an example where such parallel mechanisms have been established with potentialities of making EAC redundant.

a) Customs Union Protocol

The dispute resolution mechanism put in place by the EAC Customs Union Protocol is in Annex IX of the same.¹²

The mechanism consists of a possibility for an amicable settlement through good offices, conciliation and mediation to be arranged by the parties themselves¹³ as well as proceedings before the East African Committee on Trade Remedies established under Article 24 of the Protocol (Committee). It is provided under the Customs Union Protocol that the Committee shall handle all matters pertaining to:

- (a) rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules, specified in Annex III to the Protocol;
- (b) anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to this Protocol;
- (c) subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol;
- (d) safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol;
- (e) dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to this Protocol; and

¹² Article 41 (2) of the Customs Union Protocol.

¹³ Regulation 5 (1) and Regulation 6, Annex IX to the Customs Union Protocol.

- (f) any other matter referred to the Committee by the Council.¹⁴

As if the foregoing was not enough the Protocol goes on to tie the note against the East African Court of Justice by stating that the decision of the Committee on these matters shall be final.¹⁵

It is important to note that the EACJ is left out and therefore denied a role in all this process under the Customs Union Protocol except if any party challenges the decision of the Committee on grounds of **fraud, lack of jurisdiction or other illegality**,¹⁶ in which case such party may refer the matter to Court for review in accordance with Article 28(2) of the Treaty and any other enabling provision of the Treaty.¹⁷

Interesting enough, the review provided for under this provision can only be requested by Partner States as Article 28 of the Treaty referred to provides **only** for references by Partner States not by any other person.

From the aforesaid one would wonder whether the EACJ was established to play any significant role in the integration process of the East African Community. If the Court's main mandate is to ensure the adherence to law within the Community, would one conclude that the Customs Union Protocol is not part of the EAC law? I would not agree with that. The EAC Customs Union is part of the Community law whose application, interpretation and compliance therewith would have naturally come to the Court. The establishment of the above mentioned Committee with exclusive jurisdiction on matters arising out of Customs Union and the ousting of the jurisdiction of the East African Court of Justice is in my view, contradictory and illegal.

¹⁴ Article 24 (1) of the Customs Union Protocol.

¹⁵ Regulation 6 (7) of Annex IX of the Customs Union Protocol.

¹⁶ Emphasis added.

¹⁷ Regulation 6 (7), *Ibid.*

We may not be surprised why up to now, five years since Customs Union Protocol became operational, EACJ has received no single case on Customs Union. There was an attempt by one person whom for lack of a better word I prefer to call him “a risk undertaker” who filed a reference in the East African Court of Justice to test the waters¹⁸. However, the case did not even take off as the Court dismissed it on the preliminary objection ground which was raised by the Respondent that the Court had no jurisdiction.

Apparently the dismissal of this case by the Court for lack of jurisdiction was a big blow especially to the Business Community which had been urging for enhancement of the jurisdiction of the East African Court of Justice. The Court was taken to have shot itself on the foot by joining the Partner States in taking away the jurisdiction which according to the Treaty is supposed to be that of EACJ. Perhaps the Court should have played a more proactive role and hear the matter by ruling that it had jurisdiction, but we should appreciate the fact that it is not for the Court to confer to itself the jurisdiction that has been categorically taken away. As far as implementation of Customs Union Protocol is concerned we should not expect the miracle on the part of the Court unless the question of jurisdiction is addressed in the Protocol with necessary amendments, much as the judges may be proactive.

It may be of interest also to investigate whether the East African Committee on Trade Remedies that is being referred to under Article 24 of the Protocol have been formed. To the best of my knowledge no such Committee has been formed to date. This means, the people of East Africa have nowhere to present their disputes that arise out of Customs Union. Consequently the chances of EACJ receiving appeals under its limited jurisdiction are also not there unless the Committees are formed to generate work for the Court.

¹⁸ See *Mordern Holdings v. Kenya Ports Authority*, Reference No 1 of 2008.

b) Common Market Protocol

The Common Market Protocol does not establish a new dispute resolution body. However the mechanism it has put in place does not give to the EACJ the powers that would have naturally come to it. Jurisdiction to entertain Common Market related disputes has mainly been given to national courts as it flows from Article 54 (2):

“In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

- a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall enjoy the right of recourse, even where this infringement has been committed by persons exercising their official duties; and
- b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is making the appeal”.

It is clear from the foregoing provision that an individual, whose rights accruing from the Common Market Protocol may be violated, shall take the matter to his/her national courts and shall have no immediate recourse to the EACJ. Unless a national court seized with a Community law related matter feels a need for interpretation and refers it to the EACJ in accordance with Article 34 of the Treaty, the EACJ shall never entertain a Common Market-related matter. The role of the EACJ in the realization of Common Market solely depends on the extent of its Judges in being proactive and on the discretion of the national courts judges to refer the matters for interpretation by the EACJ.

This introduces us to the fundamental question of the relationship of EACJ and national courts. Indeed among the stakeholders of the EACJ, are national courts. As I said earlier, one aspect of the EACJ’s jurisdiction is to hear and determine cases referred to it for preliminary ruling by the national courts.

When faced with a case requiring the application or the interpretation of the Treaty or any other East African Community law, the national courts are required to refer the matter to the EACJ for preliminary ruling. This is a Treaty requirement. However, the obligation to refer a matter to the EACJ for preliminary ruling is not automatic whenever a question of interpretation or application of the Treaty or a question concerning the validity of the regulations, directives, decisions or actions of the Community arises. The preliminary ruling should be **necessary** in the opinion of the national court judge to enable the national court give its judgment.

This of course leaves to the national court a very wide discretion to ascertain whether a decision on a question of Community law is necessary to enable it give its judgment. It means therefore that the EACJ finding on any reference from the national courts aims at assisting the national courts in making a decision on a matter that may be right before it. The interaction of the EACJ and the national courts through references for preliminary rulings is essential in making community law effective and development of uniform jurisprudence in the region. We hope that national courts will always remember that according to the Treaty “decisions of EACJ on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter.”¹⁹

It is important to note that much as the reference mechanism is crucial to the application of the Community law at the national level, to date this mechanism has not yet been used. This could be an indication that the East African Community law is not known within the region, even by the Judicial Community. If this mechanism is utilized, there is no doubt that the legal integration in the region would be faster. The utilization of this

¹⁹ See Article 33 (2) of the Treaty

mechanism would also create more awareness on the rights flowing from the Treaty and the Partner States' obligations pertaining to these rights.

From the foregoing discussion, it can be confirmed that although Article 54(1) of the Common Market Protocol refers any dispute amongst Partner States arising from the Protocol to “the procedure for the settlement of disputes stipulated in the Treaty”, the likelihood of Partner states taking each other to Court is very little if at all. The individuals and body corporate would have been the ones to make the EACJ play a significant role in the realization of the Common Market. It should always be understood that the Court was not established for the sole and exclusive use of the Partner States and EAC Institutions. The main reason why it was put in place was indeed to assist the Community achieve its objectives through respect of the principles of rule of law, democracy, good governance and human rights which are very well enshrined in the Treaty.

7. Conclusion

The above discussion shows how the EACJ can potentially play its role of ensuring adherence to the rule of law but it is not given sufficient jurisdiction in this regard and in some instances the little jurisdiction it has is being taken away. Arguably, EACJ has been systematically reduced to a toothless dog that cannot bite. The Court of Justice of the European Communities which, since its inception, has been playing a crucial role in the European integration process has, from January 2000 to November 2009, determined more than four hundred (400) cases related to Customs Union and Common Market.²⁰ This is what a fully

²⁰ The cases finalized by the Court of First Instance are not included. See data existing at http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/List_of_cases_6th_VAT_directive_a2_fr.pdf and http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/court_cases_direct_taxation_en.pdf both websites accessed on 20 January 2010.

fledged Community Court is capable of achieving and the EACJ has the potential of doing the same. All it needs is support from the EAC Policy Organs.

It should be understood that the existence of parallel dispute resolution mechanisms with the EACJ is not an asset to the EAC integration process for the following reasons among others:

Firstly, there will be different interpretations of the Community Law that will create a vicious circle of endless litigation. Secondly the process of harmonization of the national laws will take too long thereby delaying the whole integration process. Thirdly the co-existence of the EACJ and the Committee is not cost effective at all. The Committee shall be comprised of three (3) members per Partner State,²¹ making a total of fifteen members. It will also need a secretariat just as the Court needs to have Registry staff. Lastly the procedure before the Committee will be extremely costly to the parties as they shall bear the remuneration and travel expenses of the members of the Panel and those of experts,²² on the rate fixed by the Council of Ministers from time to time.²³ The number of Panel members is fixed by the Committee.²⁴

I have not made an exhaustive discussion on the topic but due to time constraints I have just raised issues to engage you in the discussion of this important topical issue that touches the role of the East African Court of justice in the realization of the Customs Union and Common Market.

Thank you for your attention.

²¹ Article 24 (2) of the Customs Union Protocol.

²² Regulation 19 (2) of Annex IX, *Ibid.*

²³ Regulation 19 (1) of Annex IX, *Ibid.*

²⁴ Regulation 8(5) of Annex IX, *Ibid.*