



**IN THE EAST AFRICAN COURT OF JUSTICE AT
ARUSHA**



FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Audace Ngiye & Charles Nyachae, JJ)

REFERENCE NO. 9 OF 2016

RASHID SALIM ADIY

& 39,999 OTHERS APPLICANTS

VERSUS

- 1. ATTORNEY GENERAL OF THE
REVOLUTIONARY GOVERNMENT OF ZANZIBAR**
- 2. CHIEF SECRETARY OF
THE REVOLUTIONARY COUNCIL OF ZANZIBAR**
- 3. ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA RESPONDENTS**

29TH SEPTEMBER 2020



RULING OF THE COURT

A. INTRODUCTION

1. Mr. Rashid Salim Adiy and 39,999 other persons ('the Applicants') filed Reference Number 9 of 2016, Rashid Salim Adiy & 39,999 Others vs. The Attorney General of the Revolutionary Government of Zanzibar & 2 Others claiming *inter alia* that the purported unification of the Republic of Tanganyika and the Peoples Republic of Zanzibar to form the United Republic of Tanzania is a nullity.
2. Mr. Rashid Salim Adiy ("the First Applicant") is a natural person, and describes himself as a resident of Zanzibar, and a citizen of the United Republic of Tanzania; while the 39,999 persons on whose behalf he brought the Reference are similarly described as residents of Zanzibar and citizens of the United Republic of Tanzania.
3. The Applicants sought the following reliefs (reproduced verbatim):
 - i. *A declaration that the purported Article of Union allegedly signed on the 22nd April, 1964 between the Republic of Tanganyika and the Peoples Republic of Zanzibar is non-existent.*
 - ii. *A declaration that the purported Article of Union allegedly signed on the 22nd April 1964 between the Republic of Tanganyika and the Peoples Republic of Zanzibar is a nullity ab initio.*
 - iii. *A declaration that the purported Article of Union allegedly signed on the 22nd April 1964 between the Republic of*



Tanganyika and the Peoples Republic of Zanzibar was not ratified on the 25th April, 1964, as alleged, or at all.

- iv. A declaration that the purported Republic of Tanzania to signify a union between the Republic of Tanganyika and the Peoples Republic of Zanzibar is a nullity.*
 - v. A declaration that the Revolutionary Government of Zanzibar is an autonomous and sovereign state on its own.*
 - vi. An order directed at the Revolutionary Council of the Revolutionary Government of Zanzibar in conjunction with the cabinet of ministers to enact laws reestablishing the autonomy and sovereignty of the Revolutionary Government of Zanzibar.*
 - vii. Such other declarations and orders to meet the ends of justice.*
4. The Reference is opposed by the Attorney General of the Revolutionary Government of Zanzibar ('the First Respondent'); the Chief Secretary of the Revolutionary Council of Zanzibar ('the Second Respondent') and the Attorney General of the United Republic of Tanzania ('the Third Respondent'), who are collectively referred to herein as 'the Respondents'. They are holders of the respective self-defining offices described above, and are respectively sued as such.
5. The Respondents did file Responses to the Reference, as well as a Notice of Preliminary Objection that was jointly filed pursuant to Rules 41(1) and (2) of the East African Court of Justice Rules of Procedure, 2013. The Notice of Preliminary Objections raised the following preliminary points of law:



- i. The Court lacks jurisdiction to entertain a Reference that is questioning the sovereignty of the United Republic of Tanzania, which is a founding member of the East African Community;
 - ii. The Reference is time-barred under Article 30(2) of the Treaty for the Establishment of the East African Community ('the Treaty').
6. At the hearing, the Applicants were represented by their agent, Mr. Rashid Mukabana Mutola, while the Respondents were represented by:
 - i. Mr. Gabriel Malata – Deputy Solicitor General;
 - ii. Mr. Vincent Tango – Principal State Attorney;
 - iii. Mr. Ali Hassan – Principal State Attorney;
 - iv. Mr. Juma Msafiri – Principal State Attorney;
 - v. Mr. Mbarouk Uthman – Senior State Attorney, and
 - vi. Mr. Stanley Kalokola – State Attorney

B. RESPONDENTS' SUBMISSIONS

7. It was argued by the Respondents that the subject matter of the Reference does not fall under any of the jurisdictional powers granted to this Court by Article 27 of the Treaty; neither is it one that calls for Treaty interpretation and/ or application in terms of Article 27(1) thereof. It was the contention that, were the Court to assume jurisdiction on the issues raised in the Reference, it would be assuming jurisdiction to hear a challenge that goes to the very existence of the Community itself, as well as its organs, including the Court. In the Respondents' view, this is not contemplated by either the letter or the spirit of Article 27(1) of the Treaty.



8. The Respondents opined that the Union between the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar occurred on 26th April 1964, therefore any challenge thereto would by virtue of Article 30(2) of the Treaty be clearly time-barred. In this regard, the Respondents referred the Court to the cases of **Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu, EACJ Appeal No. 2 of 2015**; **Attorney General of the Republic of Uganda vs. Omar Awadh & 6 Others, EACJ Appeal No. 2 of 2012**, and **Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011**.
9. It was the Respondents' contention that the Reference must fail at this preliminary stage on account of the principle of non-retrospective application of Treaties. This principle, the Respondents argued, is one of general application in international law, as well as one that has been specifically endorsed by this Court. They thus referred us to the cases of **Alcon International Limited vs. Standard Chartered Bank of Uganda & 2 Others, EACJ Appeal No. 3 of 2013** and **Emmanuel Mwakisha Mjawasi & Others vs. Attorney General of the Republic of Kenya, EACJ Reference No. 2 of 2010**.
10. The Respondents therefore asked the Court to dismiss the Reference with costs.

C. **APPLICANTS' SUBMISSIONS**

11. The Applicants apparently did not consider it necessary to respond to the specific issues raised by the Respondent in support of the Preliminary Objections. Rather, they argued that the Court having been seized of the matter, had jurisdiction to hear and determine the same. In their view, the Respondents having filed an earlier Notice of



Objection on substantially the same issues, which had not been determined, they could not be heard on the present objections. They premised their argument on the principle that litigation must come to an end. The Applicants therefore prayed that the Preliminary Objections be dismissed and the Reference be heard on its merits.

D. COURT'S DETERMINATION

12. Having carefully listened to the Parties, we wish at the onset to make an observation. The Reference in which these objections arise, and the Notice of Preliminary Objection itself, was filed pursuant to the East African Court of Justice Rules, 2013. The Court's Rules have since been revised, the applicable Rules now being the East African Court of Justice Rules, 2019. In terms of Rule 136 of the latter Rules, we shall apply the 2019 Rules, **'without prejudice to the validity of anything previously done provided that if and so far as is impracticable to apply the (2019) Rules, the practice and procedure heretofore shall be followed.'**
13. In his submissions, the Applicants' Agent went to great lengths to urge the Court to dismiss the Respondent's Preliminary Objection on the ground that a similar Preliminary Objection had earlier been raised by the Respondents, and which had neither been prosecuted nor determined by the Court. He therefore argued that the instant Objection was an abuse of court process. In response, Counsel for the Respondents submitted that it is established law that an objection on a point of law can be raised at any stage.
14. We are persuaded that the Respondent's submission represents the correct position of the jurisprudence of this Court. In **Emmanuel**



Mwakisha Mjawasi & Others vs. Attorney General of the Republic of Kenya (supra), this Court observed:

It is trite law that a point of law can be raised at any stage of the proceedings. The rationale is that it would save courts time and resources if the objection can dispose of the case at the earliest.

15. We do not find it necessary to say anything further on this issue. On that premise, we now proceed with the determination of the points of law subject of the Preliminary Objections.

Objection (i): The Court lacks jurisdiction to entertain a Reference that is questioning the sovereignty of the United Republic of Tanzania, which is a founding member of the East African Community.

16. The jurisdiction of this Court, is stated in Article 27(1) of the Treaty as follows:

The court shall initially have jurisdiction over the interpretation and application of this Treaty.

17. Further, Article 30(1), which provides for References to the Court by Legal and Natural Persons provides:

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is



unlawful or is an infringement of the provisions of this Treaty.

18. Read together, Articles 27(1) and 30(1) provide that his Court has jurisdiction to *interpret* and *apply* the Treaty, in the case of a Reference by a Legal or Natural Person that is resident in a Partner State, where the impugned act is an Act, regulation, directive, decision, or action of a *Partner State* or an institution of the Community, on the grounds that such impugned act is unlawful or is an infringement of the provisions of the Treaty.

19. In **The Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu** (supra), jurisdiction was categorized into 3 broad bands: *ratione personae*, *ratione materiae* and *ratione temporis*. Lack of *ratione personae* would arise where one of the parties is devoid of the requisite capacity or *locus standi* to appear before a court; while a court's *ratione materiae* is questioned on the basis of the invoked subject matter, the court having no *ratione materiae* to try a matter where a treaty or convention does not grant it jurisdiction over designated actions. In the case of the EAC Treaty, the Court's *ratione materiae* is outlined in Articles 30, 31 and 32 thereof. *Ratione temporis*, on the other hand, refers to time prescribed for the institution of cases in a court. In the instant case, it would appear that the Respondents challenge the Court's jurisdiction on account of 3 types of jurisdiction.

20. In terms of the *ratione personae*, Article 1 of the Treaty defines Partner States to include **'the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania, and any other country granted membership to the community under Article 3 of**



this Treaty. The Court takes judicial notice of the fact that three (3) additional Partner States have since been admitted under Article 3 of the Treaty, namely, the Republics of Burundi, Rwanda and South Sudan. More importantly, judicial notice is taken of the fact that the Partner State referred to as **'The United Republic of Tanzania'** in Article 1 of the Treaty includes the Peoples' Revolutionary Republic of Zanzibar. Indeed, it is this inclusion that is the subject matter of this Reference.

21. The First Respondent is the Attorney General of the Revolutionary Government of Zanzibar, while the Second Respondent is the Chief Secretary of the Revolutionary Council of Zanzibar. Even from a cursory reading of Article 30(1) of the Treaty, it is manifestly plain that a Reference to this Court can only be in respect of the **'Act, regulation, directive, decision or action of a Partner State or an institution of the Community.'** It is clear that Zanzibar is neither a Partner State nor an institution of the Community. It follows therefore that neither Zanzibar nor any of its officials have *locus standi* before this Court. Of the three Respondents, only the United Republic of Tanzania, a Partner State that is represented herein by its Attorney General, has *ratione personae* or *locus standi* before the Court. We therefore strike out the First and Second Respondents from the Reference.

22. Turning to the *ratione materiae*, the question then becomes what is the Act, regulation, directive, decision or action by the Third Respondent State, the legality of which has been challenged under Article 30(1) of the Treaty? The acts complained of in the Reference were undertaken by two entities, the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar. None of these entities



is a Partner State of the East African Community in terms of Article 30(1). No evidence was adduced by the Applicants as would suggest that the Third Respondent State was responsible for any of the acts that they have challenged. Indeed the Claimant's Agent was not able to answer the specific question from the bench: what is the complaint against the United Republic of Tanzania in terms of Article 30(1) of the Treaty?

23. Consequently, whereas the Third Respondent State does have *ratione personae* in this matter, it clearly lacks *ratione materiae*. The matters complained of in the Reference gave birth to the United Republic of Tanzania but that Partner State cannot be responsible for actions and decisions that pre-date its existence. The cause of action in the Reference cannot be imputed to it.

24. In any event, the impugned acts of the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar are stated to have been effected in 1964, many years prior to the existence of the Treaty. The Respondents were emphatic in their submissions that under both general international law, as well as the jurisprudence of this Court, acts that ensued prior to the coming into force of the Treaty are not within the purview of the Court to interrogate. This is the principle of non-retroactive application of a treaty. We do agree.

25. Article 28 of the Vienna Convention on The Law of Treaties provides:

Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or in any



situation which ceased to exist before the date of the entry in force of the treaty with respect to that party.

26. This principle was applied by the World Trade Organisation (WTO) Appellate body, in Brazil – Measures Affecting Deseccated Coconut, Brazil vs. Philippines, Appellate Body Report, WT/DS22/AB/R, Report No AB-1996-4, Doc No 97-0695, ITL 137 (WTO 1997), DSR 1997:I, 167, 21st February 1997, where it was held:

It is an accepted principle of customary international law, reflected in Article 28 of the Vienna Convention that rights and obligations under a new treaty do not apply retroactively.

27. The WTO Appellate Body further held:

Absent a contrary intention, a treaty cannot apply to acts or facts which took place or situations which ceased to exist, before the date of its entry into force.

28. The reasoning in that case is echoed in Emmanuel Mwakisha Mjawasi & Others vs. Attorney General of the Republic of Kenya (supra). It was held:

A Treaty cannot be applied retrospectively unless a different intention appears from the Treaty or is otherwise established. In the absence of the contrary intention, a Treaty cannot apply to acts or facts which took place or situations which ceased to exist before the date of its entry into force. ... There is no contrary



intention from the reading of the Treaty that it is to apply retrospectively.

29. That decision was cited with approval in Alcon International Limited vs. Standard Chartered Bank of Uganda & 2 Others (supra). It was held:

Where then, one may ask, did the court derive its jurisdiction since the Treaty which normally confers the jurisdiction on the court, did not apply? Non retroactivity is a strong objection: where it is upheld, it disposes of the case there and then. As non retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the court?

30. Indeed in the Emmanuel Mwakisha Mjawasi case, the Court concluded:

The objection of the non retroactivity of the Treaty is a fundamental issue, one that goes to the root of the case. The Court cannot avoid the question. It must determine it at the outset before dealing with any other issue. True, it is not possible to deal with the objection of non retrospectivity without considering the cause of action of the particular case. However, such consideration helps only to situate the objection in a certain period and it does not transform the principle of non retroactivity into a matter of facts. ... the objection of non retroactivity is interconnected with the question of jurisdiction. The Court must consider the question even where the parties fail to raise it.



31. Needless to state, the forgoing decisions of the Appellate Division have binding authority on us. Consequently, unless the principle on non-retrospective application of the Treaty is rebutted by demonstrating a contrary intention; as a matter of law, the Court would lack the juridical basis to determine a dispute in respect of events that took place before the coming into force of the Treaty. We find that we have no jurisdiction over this Reference, and must decline the invitation to decide otherwise.

32. In the Alcon International Limited case, the Appellate Division cited with approval this Court's observation in Attorney General of the United Republic of Tanzania vs. African Network of Animal Welfare, EACJ Reference No. 9 of 2010 as follows:

Jurisdiction is a most, if not the most, fundamental issue that a Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; from which springs the flow of the judicial process. Without jurisdiction, a Court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case.

33. Consequently, having held that we lack the jurisdiction to entertain this Reference, that should have been the end of the matter and we would dismiss the Reference on that basis. However, we do consider it appropriate that we make a determination on the second point of law objection raised by the Respondents. That then brings us to the issue of *ratione temporis* or time limitation.



Objection (ii): The Reference is time-barred under Article 30(2) of the Treaty.

34. Article 30(2) of the Treaty provides as follows:

The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.

35. That Treaty provision has two (2) limbs to it: first, that a Reference should be filed within 2 months of the act giving rise to a cause of action and, secondly, where the date of an action is not known, within 2 months of a litigant's knowledge of the act giving rise to a cause of action.

36. For purposes of computation of time, in **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit** (supra), the Court held that time would start to run 'two months after the action or decision was first taken or made.' This position was affirmed in **The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others**, where it was held that 'the starting date of an act complained of under Article 30(2) is not the day the act ends, but the day it is first effected.'

37. The actions that the Applicants in this case sought to impugn are stated to have transpired in April 1964. Whereas the Applicants contest the existence of the Articles of Union that executed the Union between the Republic of Tanganyika and the Peoples' Republic of Zanzibar, the import of paragraphs 5, 6 and 7 of the Reference is that



the Articles of Union were recognized by the United Nations in May 1964 and the United Republic of Tanzania was formally recognized by the United Nations in November 1964. It will suffice to note that the said recognition did not at the time draw any objection from either the Republic of Tanganyika or the Peoples' Republic of Zanzibar.

38. Given that the Reference was filed in this Court on 2nd November 2016, it clearly falls outside the ambit of the two-month limitation period contemplated in the first limb of Article 30(2). The challenge to the existential basis of the United Republic of Tanzania is therefore time-barred.

39. As regards the second limb of Article 30(2), it hinges on proof by a party that wishes to rely on it that it only got to know of the act(s) complained after the event but within the two-month limitation period prescribed by Article 30(2) of the Treaty. The onus of proof would therefore be upon the Applicants herein to demonstrate when exactly the acts they now seek to challenge came to their knowledge. Having failed to discharge that burden, the second limb to Article 30(2) of the Treaty would not be available to them.

40. This Court has had occasion to pronounce itself on the interpretation and application of Article 30(2) of the Treaty. In **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit** (supra), the Appellate Division of this Court ruled out the possibility of the extension of the time set in Article 30(2), or the notion of continuing violations. It was held:

In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognise any continuous breach



or violation of the Treaty outside the two months; nor is there any power to extend that time limit. ... Again no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty.

41. This position was reiterated in the Omar Awadh case in the following terms:

Moreover, the principle of legal certainty requires strict application of the time limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend or to condone to waive or modify the prescribed time limit for any reason, including for continued violation.

42. We therefore find that the matters in contention in the instant Reference are time-barred, the time of reckoning in respect thereof having commenced in May 1964. In so far as the Court neither has the mandate to extend the time limitation under Article 30(2) of the Treaty, nor the liberty to treat the alleged Treaty breaches herein as continued violations; the Court clearly has no jurisdiction *ratione temporis* to entertain this Reference.

E. CONCLUSION

43. For the reasons stated earlier in this ruling, we find and hold that this Court does not have jurisdiction to hear and determine the subject matter of the Reference. Further and in any event, it is also our finding that at the time of filing the Reference, the same was time



barred. Accordingly, we hereby uphold both points of law as raised by the Respondents.

44. On the question of costs, Rule 127(1) of the Court's Rules of Procedure provides that '**costs in any proceedings shall follow the event unless the Court for good reasons otherwise orders.**' In the instant case, misguided as the Reference was in the circumstances, we are mindful that it was brought in the public interest. We accordingly exercise our discretion under the said Rule 127(1) to order that each party shall bear its own costs.

It is so ordered.

Delivered by Video Conference this 29th Day of September, 2020.



Monica K. Mugenyi

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Audace Ngiye

Hon. Justice Audace Ngiye
JUDGE

Charles Nyachae

Hon. Justice Charles Nyachae
JUDGE

