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

(Coram: Jean-Bosco Butasi, PJ, Mary Stella Arach-Amoko, DPJ, Isaac Lenaola, J)

REFERENCE NO.3 OF 2011

EAST AFRICA LAW SOCIETY …… APPLICANT

VERSUS

THE ATTORNEY GENERAL OF UGANDA SUED ON BEHALF OF THE REPUBLIC OF UGANDA …….. 1ST RESPONDENT

THE ATTORNEY GENERAL OF KENYA SUED ON BEHALF OF THE REPUBLIC OF KENYA …….. 2ND RESPONDENT

THE SECRETARY GENERAL EAST AFRICAN COMMUNITY …….. 3RD RESPONDENT

DATE: 4TH SEPTEMBER, 2013

RULING

This Reference was scheduled for hearing on 3rd September, 2013 by way of highlighting of submissions filed by the Parties but an issue was raised by the Respondents which required resolution *in limine*; whether the Reference is moot and should be struck off in view of the decision of the Appellate Division of this Court on 15th April, 2013 in **Appeal No.2 of 2012, Attorney General of the Republic of Uganda vs Omar Awadh and Others.**

In that Appeal, the Appellate Division determined that **Reference No.4 of 2011** lodged by Omar Awadh and Others was time barred under Article 30(2) of the Treaty for the Establishment of the East African Community and subsequently, the Applicants withdrew the said Reference on 3rd September, 2013.

SUBMISSIONS BY THE RESPONDENTS

The Respondents made the straight forward argument that the present Reference and **Reference No.4 of 2011** all arise from the same set of facts and once the latter was withdrawn on account of time bar, then the present one ought to be similarly withdrawn and in the alternative, be struck off.

The facts are that in both References, the Applicants were allegedly arrested in the Republic of Kenya and renditioned to the Republic of Uganda where they were charged with various criminal offences related to the terrorism bomb attacks that

took place on 11th July, 2010 at Kyadondo Rugby Grounds and the Ethiopian Restaurant (Kabalagala) in Kampala, Uganda where 82 lives were lost.

Further, that the Applicant, the East Africa Law Society, by its pleadings and nature of membership was aware of the attacks and the subsequent arrests of Omar Awadh and the other suspects of the bomb attacks. That, therefore, since the Reference was filed on 31st May,2011 it was time-barred under Article 30(2) of the Treaty as it was filed close to one year after the action complained of took place and should be struck off as a consequence and in line with the decision in **Appeal No.2 of 2012.**

SUBMISSIONS BY THE APPLICANT

Mr. Onsongo, learned Counsel for the Applicant denied that the Reference was time-barred and urged the point that they only came to know of the alleged arrest and rendition of Omar Awadh and others sometime in May 2011 and promptly filed the instant Reference.

That, in any event, **Reference No.4 of 2011** was premised on a completely different cause of action and has no connection whatsoever with **Reference No.3 of 2011** and that neither the decision in **Appeal No.2 of 2012** nor the withdrawal of **Reference No.4 of 2011** should affect the determination of **Reference No.3 of 2011**.

Counsel also urged this Court to adopt a progressive, non-technical and accommodating interpretation of Article 30(2) of the Treaty and proceed to determine the Reference on its merits.

DETERMINATION

We have considered the rival submissions tendered, and we have carefully read the Judgment of the Appellate Division in **Appeal No.2 of 2012** as well as the pleadings and written submissions of the Applicant and the 2nd and 3rd Respondents in this matter.

Out of abundant caution, we have also perused the record in **Reference No.11 of 2011, Mbugua Mureithi Wa Nyambura vs Attorney General of Uganda** and the Ruling of this Court in **Application No.7 of 2012, Attorney General of Uganda vs East Africa Law Society.**

We shall make references to them later in this Ruling.

In any event, our opinion on the issue before us is as follows:

Article 30 (2) of the Treaty provides that:

> ***"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 absence thereof , of the day in which it came to the knowledge of the complainants, as the case may be".***

Mr. Onsongo in submissions categorically stated that the Applicant is relying on the second limb in making its case and if that be so, then the date when the actions complained of came to the knowledge of the Applicant is crucial.

When pressed to give a precise date in that regard, learned Counsel maintained that it was sometime in May, 2011 just prior to the filing of the Reference.

With respect, the above argument is not borne out by matters on record in this and other matters. We say so, because, in the Reference itself, the Applicant at paragraphs 4, 5, 6, 7, 8, 9 and 10 sets out with clarity the chronology of events starting from the terrorist bomb attacks and the arrest and renditioning of the Kenyan suspects, to their arraignment in Court in the Republic of Uganda.

At paragraph 11 of the Reference, the Applicant then stated as follows:

> ***"The above mentioned violations of human rights were widely reported in both the print and electronic media all over the World and in East Africa in particular that they became so notorious that every person including the 3rd respondent had notice or must have had notice of them".*** [Emphasis added]

At paragraph 12 it is stated as follows:

> ***"Further to paragraph 11 above, the Applicant, the Law Society of Kenya and the Uganda Law Society duly notified the Respondents that the human rights violation as stated above against the Kenyan Citizens were in contravention of the Constitution of Kenya read together with the Treaty for Establishment of East African Community and other Regional and International Human Rights Conventions to no avail. The Respondents were thus, put on notice that their continued actions and inactions would invite legal intervention".*** [Emphasis added].

Further, one of the annextures in furtherance of the above position is "annexture 8" to the Reference which is a Press Release by the Uganda Law Society relating to the arrest of one Mbugua Mureithi, Advocate on 15th September, 2010 on his way to Kampala "for a Court hearing of terrorism cases relating to his client(s), some of whom are Kenyan Nationals".

The Press Release indicated that it was being issued by the "**Uganda Law Society together with its counterparts of Kenya and East Africa Law Society";** the latter being the present Applicant.

When pressed to indicate the date of the Press Release, Mr. Onsongo pleaded ignorance of it but in **Reference No.11 of 2011**, Mr. Mbugua Mureithi, Advocate pleaded that he was actually arrested on **15th September, 2010** when he visited Uganda for the third time since the alleged renditioning of his clients to Uganda. On that day, he was apparently on his way to Court where the rendition cases were being mentioned.

It follows, therefore, that reading paragraph 11 above together with paragraph 13 of the Reference where the Applicant indicated that its evidence shall include "print media reports" and "the media joint statements of the Uganda law Society, the Law Society of Kenya and the **East Africa Law Society**", together with the uncontroverted assertion by Mr. Mureithi, the subject of the Press Release, it is not difficult to conclude that on or around the 15th September, 2010, the Applicant had knowledge of the matters complained of or at least knew of them in the month of September, 2010.

But, suppose in fact that while the matter was of such notoriety as pleaded, at paragraph 11 of the Reference, the Applicant in its corporate nature had no knowledge of the actions complained while "every person including the 3rd Respondent had notice or must have had notice of them"? In that case, a contradiction is apparent because in its submissions filed on 27.4.2012, the Applicant argued that the particulars of the cause of action indicate that it is of a **"continuing nature"** and that there cannot be a limitation of time on the 3rd Respondent's failure to investigate the Applicant's complaints.

If the above be its position, which is obviously mistaken, then we can only resolve the contradiction by holding firmly that all evidence before us points to the fact that the Applicant knew or ought to have known of the actions complained of by September, 2010.

Besides, it is now a very trite principle of law that Parties are bound by their pleadings and any evidence led by the Parties which does not support the averments in the pleadings or which is at variance with the averments in the pleadings must be disregarded by the Court. (**See Jani Properties vs Dar-es-Salaam City Council [1966] E.A. 281).**

It is also well settled that, submissions, no matter how eloquent, can never form part of evidence in any litigation.

Having found as above, we must then juxtapose the above finding with the Judgment in **Appeal No.2 of 2012** and **Application No.7 of 2012**. In the latter, this Court granted a stay of the present Reference pending the hearing and determination of the Appeal aforesaid.

In doing so, we stated inter alia as follows:

> "***We share the Respondent's view that this Application should have been raised at the Scheduling Conference and that would also have saved time. In the interest of justice, however, this Court must consider the other factors to grant or to dismiss the Application.***
>
> ***The first is the possibility of conflicting decisions. It is our considered view that a stay may be granted where there are multiple proceedings pending in both Divisions of the Court and the decision of the Appellate Division might affect the outcome of the other proceedings. In the instant Application, we think that due to the nexus between both References as shown above, the outcome of Appeal No.2 of 2012 might have an impact on Reference No.3 of 2011. At this stage we cannot say that such impact will be substantial or not, but it suffices that we foresee an impact. We believe that a common sense justification to a stay such as sought here, is to aim to avoiding conflicting decisions and the possibility of rendering some of them nugatory. Consequently, we find it prudent to await for the outcome of Appeal No.2 of 2012".***

The impact that we foresaw above is now the subject of this Ruling and **Appeal No.2 of 2012** was eventually determined and the Appellate Division inter-alia rendered itself as follows:

> ***"The Appellate Division of this Court has carefully considered the rival submissions of the Parties in support of their respective positions. First and foremost, we find (supported by the Parties' own affirmation), that the acts complained of (such as the arrest, rendition and detention of the Respondents) happened between 22nd July and 17th September 2010; and that those acts were well known by the Applicants/Respondents, right from the inception of the various acts.***
>
> ***In the above regard, it is plainly evident that both parties have no dispute concerning the fact that the Applicants promptly filed their legal challenges on behalf of their relatives (the Respondents) in the domestic Courts namely, the High Court of Kenya and of Uganda, seeking their release. Later on, they lodged their Reference in this Court, in June 2011. This was more than one year after the expiry of the two-month time limit prescribed by the Treaty".***

The above holding is binding on this Court and particularly so because the Respondents in the Appeal are the subject of the present Reference and their Advocate was one, Mbugua Mureithi, who is also mentioned in the Press Release issued by among others, the present Applicant, soon after his arrest on the 15th September, 2010. We must state here that it is absolutely inconceivable for the Applicant and the Uganda Law Society to demand in the Press Release certain actions

regarding Mr. Mureithi months after his arrest and to also demand certain actions regarding his clients in May 2011 as Mr. Onsongo would like us to believe.

We also deliberately google-searched the Press Release aforesaid and although not necessarily an authoritative source of information, we obtained the following information:

i) at http://www.frontline defender.org/node/13353, the Press Release was first posted on 17th September, 2010.

ii) at http://www.fidh.org/arrest - and - arbitrary – detention of 8514, the Press Release was first posted on 22nd September, 2010.

It is also obvious to us, therefore, that having been Party to the Press Release, we reiterate our finding that the East Africa Law Society was aware of the actions complained of in September, 2010.

Having established that the Applicant knew of the alleged renditioning of Omar Owadh and Others way before May, 2011 and having established the nexus of facts between **References Nos.3 and 4 of 2011**, it only follows that the Reference was filed outside the two-months period envisaged by Article 30(2) of the Treaty and to proceed to hear and determine **Reference No.3 of 2011** would be superfluous and clearly an act in defiance of the Judgment in **Appeal No.2 of 2011**. This Court declines the invitation to follow that path.

Accordingly, we agree with the position taken by the Respondents and the Reference herein is hereby struck off.

As to costs, since **Reference No.4 of 2011** together with all resultant Applications were settled with no orders as to costs, let each Party also bear its costs in the present Reference.

It is so ordered.

Dated, Delivered and Signed at Arusha this 4th day of September, 2013

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JEAN BOSCO BUTASI
PRINCIPAL JUDGE

…….
MARY STELLA ARACH-AMOKO
DEPUTY PRINCIPAL JUDGE

…….
ISAAC LENAOLA
JUDGE