



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

**(Coram: Hon. Mr. Justice Johnston Busingye, PJ, Hon. Mr. Justice John
Mkwawa, J, Hon. Mr. Justice Benjamin Patrick Kubo, J)**

REFERENCE NO. 6 of 2010

ALCON INTERNATIONAL LIMITED CLAIMANT

VERSUS

STANDARD CHARTERED BANK OF UGANDA 1st RESPONDENT

ATTORNEY GENERAL OF UGANDA

ON BEHALF OF THE REPUBLIC OF UGANDA2nd RESPONDENT

REGISTRAR OF THE HIGH COURT OF UGANDA 3rd RESPONDENT

RULING OF THE COURT

The Claimant named above has brought a Reference to this Court against the Respondents, also named above, under Articles 27 (2) and 151 of the Treaty for the Establishment of the East African Community (the Treaty) and also under Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market (the Protocol), praying for orders:

1. **THAT** this Honourable Court be pleased to interpret and apply Articles 27(2) and 151 of the Treaty for the Establishment of the East African Community together with Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market on the enhanced Jurisdiction of this Honourable Court as a Competent Judicial Authority with regard to the enforcement of and enhancement of trade and resolution and settlement of disputes for the protection of cross – border investments. (sic)

2. **THAT** this Honourable Court be pleased to declare that the signing of the Protocol on the Establishment of the East African Community Common Market and the coming into force of the said Protocol on 1st July 2010 enhanced the Jurisdiction of this Honourable Court as envisaged under Article 27 (2) of the Treaty as a competent judicial authority for the determination of cross – border trade disputes between persons emanating from partner states.

3. **THAT** this Honourable Court be pleased to declare that where a Public Official of a partner state fails to honour his obligation/duty, statutory or legal, to a person from a different partner state, then under the Spirit and letter of the Treaty and the Protocol, this Court has the jurisdiction to enforce that obligation or duty expeditiously.

4. **THAT** this Honourable Court be pleased to direct the Respondents jointly and/or severally to pay to the Claimant the Decretal sum of USD 8,858,469.97 together with interest and costs in full under the Bank Guarantee dated 29th October 2003.

5. **THAT** this Honourable Court direct the Respondents jointly and or severally to pay to the Claimant General Damages assessed by this Court.

6. **THAT** this Honourable Court direct the Respondents jointly and or severally to pay interest on the sums of money due on such rates and from such dates as this Honourable Court should direct.
7. **THAT** this Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.
8. **THAT** the costs of this Reference be borne by the Respondents in any event.

The background to the instant Reference may, in the interest of brevity, be stated as follows:-

In 1994 and by a contract dated 21st July 1994 together with a co-finance agreement, Alcon International Limited agreed to construct the building now known as the Workers House in Kampala, Uganda on behalf of National Social Security Fund (NSSF) Uganda. It is common ground that NSSF did terminate the aforementioned contract and that the dispute was referred to arbitration. It is further common ground that Alcon International Limited obtained an arbitral award for the sum of USD 8,858,469.97 together with interest and costs. NSSF challenged the award in the Commercial Division of the High Court of Uganda. The latter affirmed the award. Things did not stop there, as subsequently the matter landed in the Court of Appeal of Uganda and at present the matter is before the Supreme Court of Uganda Vide Civil Appeal No. 15 of 2009 where NSSF is seeking that the arbitral award be set aside. One issue which sprang up midway and seemed to overwhelm the rest of the issues in the case is: **which Alcon International Limited is the proper beneficiary of the USD 8,858,469.97 award. It continues to bedevil the case to this day.**

It behoves us to mention right at the outset that the pleadings and submissions that have been filed by the parties now before us amply establish that the Claimants Reference in this Court is a product of a protracted litigation both outside and inside the courts in Uganda

At the Scheduling Conference held on 25th February 2011 the first Respondent raised a couple of preliminary points of law and prayed that the Court disposes of them before proceeding to hear the main Reference.

The points raised were:

- a) Whether the Reference is properly before the Court as against the 1st and 3rd Respondents.
- b) Whether the Reference is time-barred.
- c) Whether the Claimant has rights under the Protocol on the Establishment of the East African Community Common Market in respect of acts which arose prior to the coming in force of the Protocol.

The law on preliminary objection is well settled and we need not belabour the same. Suffice it to say that the Court decided to dispose of the Preliminary Objections first.

Canvassing the grounds of the preliminary objections, Mr. Tumusingize, learned counsel for the First Respondent, raised a number of points in *limine*. In a nutshell, he submitted as follows:-

Firstly, that under Article 30 of the Treaty References must be brought only as against a Partner State or an Institution of the East African Community. In support of his stance he referred us to the decisions of this Court in **Reference No. 1 of 2006 Prof. Peter Anyang' Nyongo and 10 Others versus The Attorney General of the Republic of Kenya and 5 Others** and **Reference No. 1 of 2008 Modern Holdings (E.A) Limited versus Kenya Ports Authority**. It was his argument that as the First Respondent is neither a Partner State nor an Institution of the Community, but is merely a private limited liability company

incorporated and registered in Uganda, it can not be joined/impleaded to a Reference under the aforesaid Article 30 of the Treaty. He thus urged this Court to find and hold that the Reference against the First Respondent is misconceived and bad in law.

Secondly, the learned counsel argued that the settlement of disputes under the Protocol is by competent institutions in the Partner States. It was his submission that the East African Court of Justice does not fall under the purview of the bodies envisaged in Article 54 (2) (b) of the Protocol.

Thirdly, the learned counsel contended that to-date there has been no protocol to operationalise the extended jurisdiction of the East African Court of Justice to go to provide for original, appellate, human rights and other jurisdictions pursuant to Article 27 (2) of the Treaty. He further argued that even if this jurisdiction had been extended, the Reference would still be bad as against a party that is neither a Partner State nor an institution of the Community.

Fourthly, he submitted to the effect that, to-date, there are on-going proceedings relating to the complaint in the Reference in the Supreme Court of the Republic of Uganda between *Alcon International Limited* and the National Social Security Fund of Uganda (*Supreme Court Civil Appeal No. 15 of 2009*).

It was also his argument that the absurdity of having proceedings in two different courts at the same time should be clear to anyone. The learned counsel wondered what would happen to these proceedings and what would be the fate of this Reference in the event that this Court and the Supreme Court of Uganda make conflicting decisions.

In conclusion he argued that as the local remedies for settlement of this dispute have not been exhausted, this Reference is wrongly before this Court.

He thus urged us to find and hold that the Reference is wrongly before this Court as against the First Respondent and consequently uphold the objection raised and condemn the Claimant to costs.

Ms. Patricia Mutesi, Principal State Attorney representing the Second and Third Respondents fully associates herself with the arguments advanced by the learned counsel for the First Respondent.

She urged the Court, not unlike Mr. Tumusingize for the First Respondent, to find and hold that the claim is improperly before this Court as against 2nd and 3rd Respondents and should be answered in the negative.

Mr. Fred Athuak, Learned Counsel for the Claimant, submitted in response to the three (3) Respondents' Submissions. In essence, he submitted as follows:-

Firstly, that it is important to note at the outset that from the manner in which the preliminary issues are framed by the parties, that this Reference is properly before this Court as against the Second Respondent, namely the Attorney General of the Republic of Uganda.

Secondly, the learned counsel, if we may put it in a narrow compass, categorically contended that the Claimant is neither a Party to the proceedings before the Supreme Court in Uganda in Civil Appeal No. 15 of 2009 nor did he agree to the purported consent in that Appeal.

Thirdly, it was also submitted on behalf of the Claimant that by promulgation of the Protocol the jurisdiction of this Court was greatly enhanced as envisaged by Article 27 (2) of the Treaty and that Article 54 of the Protocol read together with Article 27 (2) of the Treaty gave new meaning to original jurisdiction of this Court. The learned counsel did conclude by saying that consequent to the foregoing the most celebrated case of *Anyang' Nyongo*

(supra) was overtaken by events especially with regard to Article 30 of the Treaty.

We have carefully considered the rival submissions of the learned counsel in support of their respective stances.

First and foremost, we find it necessary to associate ourselves with the submission of the learned counsel for the First Respondent that there is overwhelming evidence from the material now before us that there have been and still are several cases in the Courts of Uganda in which the instant Claimant is directly interested.

It is also evident from the material submitted to us for consideration and determination for example that the Claimant was the respondent in the Court of Appeal in Uganda Civil Appeal No. 2 of 2004, namely, *National Social Security Fund and W. H. Sentoogo t/a Sentoogo and Partners versus Alcon International Limited*. It is also on record that *National Social Security Fund* being aggrieved by that decision appealed to the Supreme Court of Uganda in Civil Appeal No. 15 of 2009.

It is on the basis of the foregoing that we are unable to agree that the Claimant, namely, *ALCON INTERNATIONAL LIMITED* is not a party to the proceedings in Uganda's courts, while at the same time seeking to enforce a decision from the same courts in the Reference before us. This is amply evident in prayer No. 4 at page 10 of the Reference filed by *ALCON INTERNATIONAL LIMITED* which reads:

"THAT this Honourable Court be pleased to direct the Respondents jointly and/or severally to pay Decretal sum of USD 8,858,469.97 together with interest and costs in full under the Bank Guarantee dated 29th October 2003."

In spite of the passion with which the Claimant laboured to convince us otherwise, we find ourselves in a position of absolute inability to resist the Respondents' submission that currently there are judicial proceedings going on in courts in Uganda of which the Claimant is aware and that at the moment they are at an advanced stage of litigation; and that it would be absurd to have parallel proceedings in two different courts, namely, one before us and another in the courts in Uganda. Indeed, a clash of decisions would not only cause confusion between this Court and the courts in Uganda, it would also result in an execution stalemate. We find it improper for the Claimant to have abandoned litigating before the courts in Uganda and instead sought sanctuary in this Court.

In our considered view, this amounts to **forum shopping** and we take this early opportunity to say loudly and clearly that this Court finds it unprofessional and strongly disapproves of it.

In the result and for the foregoing reasons, we find and hold that the Reference is improperly before this Court as against the 1st, 2nd and 3rd Respondents. Consequently, Issue No. 1 is answered in the negative.

In view of the position we have taken in disposing of this ground, we do not find it necessary to go into the other grounds raised by the parties or tackle the remaining objections, as this finding alone sufficiently and conclusively dispose of this Reference.

Consequently, the Reference is struck out with costs.

It is so ordered.

Before we pen off, we wish to express our appreciation to the learned counsel for the parties for their industry, good research and insightful presentations which were of immense assistance to us.

Dated at Arusha this day of2011.

**JOHNSTON BUSINGYE
PRINCIPAL JUDGE**

**JOHN MKWAWA
JUDGE**

**BENJAMIN PATRICK KUBO
JUDGE**