



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



(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ;  
Charles A. Nyachae; Richard Muhumuza & Richard Wabwire  
Wejuli, JJ)

**REFERENCE NO. 5 OF 2019**

**CHRISTOPHER AYIEKO ..... 1<sup>ST</sup> APPLICANT**

**EMILY OSIEMO ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF THE  
REPUBLIC OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**THE SECRETARY GENERAL OF THE  
EAST AFRICAN COMMUNITY ..... 2<sup>ND</sup> RESPONDENT**

**2<sup>ND</sup> DECEMBER 2022**

## JUDGEMENT OF THE COURT

### A. INTRODUCTION

1. This Reference was filed on 5<sup>th</sup> March 2020 under Articles 5, 6, 7, 8, 27(1), 30, 38, 75(7), 76(2), 76(4), 104, 130 and 151 of the Treaty for the Establishment of the East African Community ('the Treaty'), Article 37 of the Protocol on the Establishment of East African Customs Union ("the Customs Union Protocol"), Article 5(3) and 37 of Protocol on the Establishment of East African Common Market("the Common Markets Protocol"), Rules 4, 25(1), (2) and (3) of the East African Court of Justice Rules, 2019 (the Rules) and the Vienna Convention on the Law of Treaties, 1969 ("VCLT").
2. The 1<sup>st</sup> Applicant is a citizen of the Republic of Kenya and an Advocate of the High Court of Kenya. He is a natural person and resident of the Republic of Kenya within the context of Article 30 of the Treaty.
3. The 2<sup>nd</sup> Applicant is a citizen of the Republic of Kenya and an Advocate of the High Court of Kenya. She is also a natural person, resident within the Republic of Kenya in the context of Article 30 of the Treaty.
4. The Applicants' address of service for purposes of this Reference is c/o Lumumba & Ayieko Advocates, Bishops Garden Towers, Mezzanine Floor, 1<sup>st</sup> Ngong Avenue, Off Bishop Road, P.O Box 10391 -00100, and Nairobi Kenya.
5. The 1<sup>st</sup> Respondent is the Attorney General of the Republic of Kenya. He was sued on behalf of the Government of the Republic of Kenya in the capacity of the principal legal advisor of the Government. His address of service for purposes of this Reference is; The office of the

Attorney General and Department of Justice, Sheria House,  
Harambee Avenue, P.O Box 40112-00100, Nairobi, Kenya.

6. The 1<sup>st</sup> Respondent filed his Response in contest to the Reference on the 21<sup>st</sup> November 2020 and the 2<sup>nd</sup> Respondent filed his on 22<sup>nd</sup> April 2020.
7. Scheduling Conference Notes were filed by the Parties on 26<sup>th</sup> November 2021.

## **B. REPRESENTATION**

8. The Applicants were represented by Mr Elisha Ongoya, Mr Edmund Shikoli and Mr Fleming Lumumba, learned Counsel. The 1<sup>st</sup> Respondent was represented by Mr Thande Kuria, Principal State Counsel and Ms Jacqueline Kiramana, State Counsel while the 2<sup>nd</sup> Respondent was represented by Dr Anthony Kafumbe, Counsel to the Community.
9. The parties filed written submissions which they highlighted on 13<sup>th</sup> June 2022.

## **C. THE APPLICANT'S CASE**

10. The dispute emanates from a transaction between the Government of the Republic of Kenya and the United States of America Government.
11. It is alleged that on or about 6<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent without regard for the provisions of the Treaty, the Customs Union Protocol and the Common Markets Protocol entered into, negotiated and or expressed intent to negotiate a bilateral Free Trade Agreement with the Government of the United States of America, in total violation of the Treaty and the said Protocols.



12. The Applicant's case is set out in the Statement of Reference and in the Affidavit in support thereof deposed by Christopher Ayieko dated 5<sup>th</sup> March 2020.
13. It is the Applicant's case that the 1<sup>st</sup> Respondent, without regard to the spirit and provisions of the Treaty, negotiated and or expressed intention to negotiate a bilateral Free Trade Agreement with the United States of America without due regard to fundamental and operational principles of the Community set out under Articles 6(d), 6(f), 7, 8(1)(c), 8(3), 8(4) and 151 of the Treaty and Article 37 of the Common Market Protocol.
14. That the 1<sup>st</sup> Respondent adopted a phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America, which allows American wheat to access Kenya without due regard to the provisions of the Treaty; and further, that the 1<sup>st</sup> Respondent failed to send the proposed agreement to the Secretary General of the East African Community pursuant to Article 37 of the Customs Union Protocol.
15. That the 2<sup>nd</sup> Respondent failed to warn or stop the 1<sup>st</sup> Respondent from entering into the alleged illegal Free Trade Agreement and adopting the Phytosanitary Protocol, which violates and or defeats the letter and spirit of the Treaty and that the 2<sup>nd</sup> Respondent has failed or neglected to take action since the said violation took place.
16. The Applicant further avers that as a consequence of the Respondents' actions and omissions:

**a) the 1<sup>st</sup> Respondent has jeopardized the adoption of a common East Africa Community negotiation position**

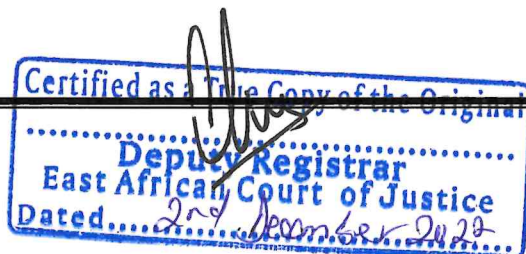


between the Community and the United States of America;

- b) Other East African Community Partner States have not been notified or considered the 1<sup>st</sup> Respondent's Free Trade Agreement, the adopted phytosanitary Protocol and the Memorandum of Understanding;
- c) The 1<sup>st</sup> Respondent's actions and or omissions ignore the Treaty requirement to supply information or exchange information with other Partner States thus violating the letter and spirit of the Treaty;
- d) The 1<sup>st</sup> Respondent's actions and or omissions overlook the precedence of East African Community law, Institutions and Organs over national ones, thus going contrary to the letter and spirit of Article 8(4) of the Treaty; and
- e) The actions of the 2<sup>nd</sup> Respondent violate Article 37 (3) of the Protocol for the Establishment of the East African Common Market for failing to ensure that the Council puts in place a mechanism for the coordination of trade relations with third parties.

17. Premised on the foregoing, the Applicant seeks the following declarations and orders:

- a) That the 1<sup>st</sup> Respondent through the acts and or omissions of entering into, negotiating and or intending to negotiate a Free Trade Agreement with the United States of America, violated its commitment to



the fundamental and operational principles of the EAC, specifically the principles of good governance and the rule of law, transparency and cooperation for mutual benefit as guaranteed under Articles 6(d), 6(f), and 7(2) of the Treaty;

- b) That the 1<sup>st</sup> Respondent through the acts and or omissions of adopting a phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America violated its commitments to the fundamental and operational principles of the EAC, specifically the principles of good governance and the rule of law, transparency and cooperation for the mutual benefit as guaranteed under the Treaty;
- c) That the 1<sup>st</sup> Respondent's actions and or omissions of entering into, negotiating and or intending to negotiate a Free Trade Agreement with the United States of America violated Article 37 of Protocol on the Establishment of East African Common Market and Article 37 of the Protocol on the Establishment of East African Customs Union;
- d) That the 1<sup>st</sup> Respondent through the acts and or omissions of adopting a phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America violated Article 37 of Protocol on the Establishment of East African

**Common Market and Article 37 of the Protocol on the Establishment of East African Customs Union;**

- e) That the proposed free trade area agreement entered into, negotiated and or intended to be negotiated between the 1<sup>st</sup> Respondent and the United States of America be and is hereby declared illegal, null and void;
- f) That the adopted phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America be and is hereby declared illegal, null and void;
- g) That the inaction of the 2<sup>nd</sup> Respondent to advise the 1<sup>st</sup> Respondent is an infringement of the fundamental principles and the doctrines of good governance, the rule of law and transparency; and
- h) That the costs of the Reference be borne by the Respondents.

**D. THE 1<sup>st</sup> RESPONDENT'S CASE**

18. The 1<sup>st</sup> Respondent's case is stated in the Response to the Statement of Reference. He contends that no cause of action has arisen between the Applicants and the 1<sup>st</sup> Respondent (Republic of Kenya) to warrant the jurisdiction of this Court to be invoked.

19. That the 1<sup>st</sup> Respondent has not violated the provisions of the Treaty. That whereas this Court has the jurisdiction to determine matters of infraction of the Treaty and that the Respondent intends to



explore negotiation of a bilateral Free Trade Agreement with the United States of America, the process is at an exploratory stage, as no draft agreements have been developed or agreed as a basis for negotiations and that therefore this Reference has been filed prematurely. That the impugned export Certification Protocol does not in any way violate the Treaty nor contradict the EAC Common External Tariff nor violate any EAC law. That the Republic of Kenya has not engaged in any activities that would jeopardize realization of the objectives of the Treaty.

20. The 1<sup>st</sup> Respondent further contends that the said Protocol is not a Trade Agreement within the meaning of Article 37(4) of the Customs Union Protocol and that the Republic of Kenya was therefore under no obligation to send the impugned Protocol to the Secretary General of the EAC or notify the EAC Council. That what is supposed to be notified to the Partner States is a proposed Agreement.

#### **E. THE 2<sup>ND</sup> RESPONDENT'S CASE**

21. The 2<sup>nd</sup> Respondent's case is stated in his Response to the Reference. He contends that he only got to know of the allegations that the 1<sup>st</sup> Respondent had any intent of or entered into agreement with the United States of America relating to importation of goods on 26<sup>th</sup> February 2020 upon which he wrote to the 1<sup>st</sup> Respondent drawing his attention to media releases alluding to the intent of the United States of America and the Government of Kenya to negotiate a trade agreement. That he pointed out the implications of the proposed negotiations in the context of the provisions of the Customs Union Protocol, Community laws and the 2002 Summit directive concerning the EAC pursuit of collective engagement with third parties on trade negotiations and sought clarification from the 1<sup>st</sup>

Respondent. That premised on the foregoing, the 2<sup>nd</sup> Respondent has not failed to take any action nor has he breached any provisions of the Treaty or Community laws.

#### **F. ISSUES FOR DETERMINATION**

22. At the Scheduling Conference held on 26<sup>th</sup> November 2021, the following issues for determination were agreed upon; namely:

- a) Whether the instant Reference is admissible, in view of the fact that the jurisdiction of this Court has been prematurely invoked;**
- b) Whether the 1<sup>st</sup> Respondent's intention to enter into and or negotiate a Free Trade Agreement with the United States of America without involving the other EAC Partner States violated Articles 5, 6(d), 6(f), 7(2), 8(1)(c), (3) & (4) and 151 of the Treaty, Article 37 of the Protocol on the Establishment of the East African Common Market and Article 37 of the Protocol on the Establishment of East African Customs Union;**
- c) What constitutes a proposed Agreement to be notified to the EAC Partner States through the Secretary General of the EAC pursuant to Article 37(4) (b) of the Protocol on the Establishment of the East African Customs Union?**
- d) Whether the 1<sup>st</sup> Respondent's actions and or omissions of adopting a Phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America without involving the other EAC Partner States violated Articles 5, 6(d), 6(f), 7(2), 8(3), (4) and 155 of the**

Treaty, Article 37 of the Protocol on the Establishment for the East African Common Market and Article 37 of the Protocol on the Establishment of East African Customs Union;

- e) Whether the Phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain between the 1<sup>st</sup> Respondent and the United States of America is a trade agreement within the meaning of Article 37(4) of the Protocol on the Establishment of East African Customs Union and whether it contradicts the provisions of the EAC law, if any or at all;
- f) Whether the EAC Sanitary and Phytosanitary (SPS) Protocol adopted by the EAC Council in the year 2012 is fully operational and if not, how are the EAC Partner States to implement the SPS measures?
- g) Whether the 2<sup>nd</sup> Respondent has abdicated his obligation under the Treaty and under Article 37 of the Protocol on the Establishment of the EAC Common Market; and
- h) Whether the Applicants are entitled to the remedies sought.

#### **G. COURT'S DETERMINATION OF THE ISSUES**

**ISSUE No.1: Whether the instant Reference is admissible, in view of the fact that the jurisdiction of this Court has been prematurely invoked**

23. It is the 1<sup>st</sup> Respondent's contention that although the Government of Kenya is exploring bilateral ties with the USA, this was wholly being



undertaken within a framework of “negotiation principles and objectives” which have not culminated into any proposed or draft agreement for further consideration by the 1<sup>st</sup> Respondent and the USA and that he is therefore not in contravention of Articles 37 of the Customs Union Protocol and of the Common Market Protocol. That consequently, the Reference is not demonstrative of any unlawful actions, decisions or directives undertaken by the 1<sup>st</sup> Respondent to warrant invoking the jurisdiction of this Court to determine whether there was any contravention of the Treaty or EAC laws. That the Reference is prematurely before the Court and that there is no cause of action demonstrated against the Respondents.

24. Counsel for the Applicants submitted that the 1<sup>st</sup> Respondent’s contention that this Honorable Court’s jurisdiction has been prematurely invoked is baseless because the Respondent does not dispute that it is negotiating a bilateral trade agreement with the USA and that the process commenced on 6<sup>th</sup> February 2020. That it is also a point of agreement that the 1<sup>st</sup> Respondent has adopted the impugned phytosanitary Protocol on Wheat with the USA.

25. On the other hand, Counsel for the Applicant further submitted that the 2<sup>nd</sup> Respondent was prompted to write a letter dated 26<sup>th</sup> February 2020 to the 1<sup>st</sup> Respondent seeking clarification in relation to the conduct of the 1<sup>st</sup> Respondent although no response has to date been forthcoming from the 1<sup>st</sup> Respondent.

26. That the 2<sup>nd</sup> Respondent confirms the actions of the 1<sup>st</sup> Respondent and does not dispute the two points of agreement namely;

- i. **that the 1<sup>st</sup> Respondent is negotiating a Free Trade Agreement with the United States of America and secondly; and**

- ii. that the 1<sup>st</sup> Respondent has adopted a phytosanitary Protocol on the Certification of Wheat Grain and or negotiated a Memorandum of Understanding on Certification of Wheat Grain with the United States of America.

27. Premised on the foregoing, the Applicant vehemently submitted that the Reference was therefore not prematurely brought before the Court because the alleged actions and inactions on the part of both Respondents contravened the Treaty, the Customs Union Protocol and the Common Market Protocol. He further submitted that this Court has the mandate to interrogate a Partner State's actions or omissions with a view to ascertaining whether they were in violation of the Treaty.

28. Consequently, the Applicants pray that the Court finds that it has jurisdiction to hear and determine this Reference.

29. It is long established that jurisdiction is a most, if not the most fundamental issue that the Court faces in any trial. That without jurisdiction, a Court cannot even take the proverbial first Chinese step in its judicial journey to hear and dispose of the case. - see **Manariyo Desire vs Attorney General of Burundi [2015-2017] EACJLR 992.**

30. Once the Court establishes that it lacks jurisdiction over a matter, it should instantly cease any action in the direction of resolving the matter, otherwise any purported remedies or judgment rendered does not adjudicate anything, will not bind the parties and cannot therefore be the foundation of any right. It will simply amount to naught.

31. It is therefore imperative for us to determine the question as to whether the Court has jurisdiction over this matter.
32. In doing so, we shall address the question as to whether the matter is prematurely before this Court, as is submitted by the Respondents and contested by the Applicant.
33. Whereas Article 27 of the Treaty bestows upon the Court the mandate to interpret and apply the Treaty, Article 30 mandates any person resident in the Community to bring, 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 grounds of illegality or infringement of the Treaty by such act, regulation, directive, decision or action.
34. The Court derives its mandate to entertain and determine questions of infractions of the Treaty from the foregoing provisions.
35. The contention in the instance is whether or not the Treaty and its Protocols have been violated.
36. Once this allegation is made, then a cause of action arises and it is the Court's obligation to determine the veracity of such allegations of infraction of the Treaty and whether or not indeed the Respondents have infringed the Treaty as alleged.
37. The Court being the guardian of the Treaty, is duty bound to intervene and for purposes of determining whether or not the Court has jurisdiction, it is not imperative to establish the veracity or illegality of such allegations at this stage. At this preliminary stage, all that is required is for the Court to establish the legal nexus between the Applicant's allegations and the existence of positive provisions in the



Treaty and elsewhere that impose on the Partner States an obligation to do or refrain from doing or engaging in certain acts or to observe a certain standard or behavior.

38. Article 37(4) (b) of the Customs Union Protocol provides that;

**“Where a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of the Article, with a foreign country, the Partner State shall send proposed agreement or amendment by registered mail to the Secretary General, who shall communicate the proposed agreement by registered mail to the other Partner States within period of thirty days, for their consideration.”**

39. It is common ground that the 1<sup>st</sup> Respondent is negotiating a Free Trade Agreement with the United States of America, secondly, that the 1<sup>st</sup> Respondent has adopted a phytosanitary Protocol on the Certification of Wheat Grain and or negotiated a Memorandum of Understanding on Certification of Wheat Grain with the United States of America and thirdly that the 2<sup>nd</sup> Respondent has hitherto not communicated the fact of existence of these developments to any of the other Partner States.

40. Without a doubt the nexus is established between the actions and inactions of the Respondents and the provisions of the Treaty and of the Treaty laws. From this perspective, it is our finding that the instant Reference is aptly brought before this Court and that the Court has the requisite jurisdiction to entertain and determine the Reference.

41. The issue as to whether the instant Reference is admissible is therefore answered in the affirmative. The jurisdiction of this Court has been appropriately invoked.

**ISSUE No.2: Whether the 1<sup>st</sup> Respondent's Intention to Enter Into and or Negotiate a Free Trade Agreement with the United States of America without involving the Other EAC Partner States Violates Articles 5, 6(D), 6(f), 7(2), 8(1)(C), (3) & (4) And 151 of the Treaty, Article 37 of The Protocol on the Establishment of the East African Common Market and Article 37 of the Protocol on the Establishment of the East African Customs Union.**

**ISSUE No.3: What Constitutes a Proposed Agreement to be Notified to the EAC Partner States through the Secretary General of The EAC Pursuant to Article 37(4) (B) of the Protocol on The Establishment of the East African Customs Union?**

42. The Applicant argued Issues 2 and 3 jointly and we shall adopt the same approach in determining the two issues.

43. Counsel for the Applicant submitted that premised on the uncontested fact that the 1<sup>st</sup> Respondent is negotiating a bilateral trade agreement with the United States of America in the process that commenced on 6<sup>th</sup> February 2020 when the 1<sup>st</sup> Respondent communicated its intention, the 1<sup>st</sup> Respondent has violated Article 37 of the Customs Union Protocol and Article 37 of the Common Market Protocol. Counsel invited the Court to read the foregoing Articles together with Article 8 of the Treaty. He emphasized the



importance of the choice of the words “intend” and “proposed agreement”, used in the construction of the said Articles of the EAC laws and urged Court to interpret the said provisions in good faith and to accord ordinary meaning to their objects and purpose.

44. Counsel for the Applicant drew the Courts attention to the objectives of the Customs Union, which are spelt out under Article 3 of the Customs Union Protocol and submitted that the said objectives, when considered together with a reading of Articles 37 of the Customs Union Protocol and the Common Market Protocol, the Protocol did not intend to have a concluded agreement sent to the Secretary General and to the other Partner States but that instead, Article 37 intended that all the other Partner States be involved right from the time a Partner State expresses its intention to negotiate a bilateral agreement with a third party. That Article 37 of the Protocol does not make reference to a “concluded agreement” but rather to a **“proposed agreement”**.

45. Counsel further submitted that the Negotiation Objectives, being a part of the proposed agreement between the USA and the 1<sup>st</sup> Respondent, it ought to have been brought to the attention of and circulated to the Partner States, through and by the 2<sup>nd</sup> Respondent, in order to elicit their input. That the failure by the 1<sup>st</sup> Respondent to notify the 2<sup>nd</sup> Respondent despite the 2<sup>nd</sup> Respondent’s letter of 26<sup>th</sup> February 2020 violates Article 37 of the Customs Union Protocol.

46. Regarding the intended Free Trade Agreement, Counsel submitted that it was in conflict with the objectives of the Customs Union, to the extent that it seeks to open up the EAC goods market to a third party without soliciting for and taking into consideration the input of the other Partner States before concluding the Agreement.



47. It is the Applicant's case as submitted, that the Customs Union Protocol does not require a concluded agreement but that the Minutes of Negotiations, the Scope of the intended Bilateral Agreement and other relevant documentation suffice to meet the requirements of Article 37 of the Protocol.

48. As to whether the 1<sup>st</sup> Respondent's negotiations or intention to enter into the said agreement without consideration of the other Partner States' input amounted to a violation of the Treaty and the Protocols, Counsel submitted that indeed it was a violation. That, Article 37 of the Protocol should be performed in good faith. That a breach of Article 37 of the Customs Union Protocol in turn violates Article 37 of the Common Market Protocol which requires Partner States to adopt common negotiating positions, promote participation and further, that it in turn defeats objectives of the Community under Article 5 and breaches the fundamental and operational principles under Articles 6(d) and 7(2) of the Treaty.

49. In reply, Counsel for the 1<sup>st</sup> Respondent contended that under Article 37(4)(a) of the Customs Union Protocol, a Partner State may separately conclude or amend a trade agreement with a foreign country and that the Republic of Kenya was at liberty to exercise that right as a sovereign State to negotiate and enter into agreement with other foreign sovereign states on condition that the terms and conditions arrived at do not contravene the Treaty. He further asserted that the obligation to notify or provide information to the Partner States arises when a draft agreement has been developed. That hitherto, no draft or trade agreement has been developed for consideration and that the negotiations between the USA and Kenya were based on a framework of Negotiation Principles and Objectives.

That, such negotiations are therefore neither a draft agreement nor an actual trade agreement as contemplated under Article 37(a) & (b) of the Customs Union Protocol.

50. The 2<sup>nd</sup> Respondent elected not to address those issues, which in his opinion is not the subject of focus premised on the reasons that he may not have inside information on intentions and what could have gone on in respect of the proposed Trade Agreement between the USA and the 1<sup>st</sup> Respondent and what the current status may be.

#### **H. DETERMINATION BY COURT**

51. It is imperative that, for good order, we first address Issue 3 which seeks to answer the question as to what constitutes a proposed Agreement that would warrant notification to the other Partner States pursuant to Article 37(4)(b) of the Customs Union Protocol.

52. Article 37(4)(b) of the said Protocol provides that;

**“Where a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of the Article, with a foreign country, the Partner State shall send its proposed agreement or amendment by registered mail to the Secretary General, who shall communicate the proposed agreement by registered mail to the other Partner States within a period of thirty days, for their consideration”**

53. Article 31 (1) of the **Vienna Convention on the Law of Treaties (VCLT) (1969)** provides that a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose.



54. Plainly put, the Treaty and, for that matter the words that constitute the construction of the Treaty must not be embellished with meaning beyond that which is ordinary, unless the parties intended that a special meaning is given to a term of the Treaty.

55. Article 37 of the Customs Union Protocol alludes to **intention** to conclude or amend an agreement but also requires **communication of the proposed agreement**. These are the principal operational words that give life to the Article. The usage and context of the word denotes the intended and not the actual agreement itself.

56. The operational words that are subject to the test are “intend” and “proposed agreement”. “Intend” is variously defined and is synonymous with “purpose”, “plan”, “have it in mind”, “be determined” etc. While on the other hand, “proposed” as stated by the Applicant citing the Cambridge Dictionary means “suggested as a possible plan or action for people to consider”. Relatedly, Black’s Law Dictionary defines “proposal” as “something offered for consideration”.

57. In the opening stage of his submissions, Counsel for the Applicant labored at length to amplify the significance of the word “intent” which is used in Media Releases from the Office of the United States Representative, in which it was captioned that “*President Trump announces intent...*” These media releases are referred to in the 2<sup>nd</sup> Respondent’s letter to the 1<sup>st</sup> Respondent.

58. The ordinary meaning of the provision would be that where a Partner State has a plan in mind, it shall suggest the possible agreement to the other Partner States for consideration. Once intention is established then the 1<sup>st</sup> Respondent or the party harboring



such intent should forthwith submit the proposed agreement to the other Partner States through the 2<sup>nd</sup> Respondent.

59. The uncontroverted common grounds between the parties, namely, that the 1<sup>st</sup> Respondent is negotiating a Free Trade Agreement with the United States of America, secondly, that the 1<sup>st</sup> Respondent has adopted a phytosanitary Protocol on the Certification of Wheat Grain and or negotiated a Memorandum of Understanding on Certification of Wheat Grain with the United States of America all evince the 1<sup>st</sup> Respondent's ascertainable intent. Furthermore, in a Statement released by the Cabinet Secretary of the Ministry of Industrialization at the launch of the negotiations, marked CA-4, it is stated that the Presidents had on 6<sup>th</sup> February announced their **intention** to negotiate a Free Trade Agreement between the two countries.

60. The next course of action required under Article 37 of the Customs Union Protocol, once intent has been ascertained is that the Partner State should then transmit its proposal to the other Partner States within 30 days for their consideration. Noteworthy, Article 37 of the Customs Union Protocol does not envisage a completed agreement but a proposal of the agreement.

61. Premised on Article 31(2) of the VCLT on interpretation of international treaties, reference to the context of a Treaty includes the preamble, annexes and any known instruments or agreements between the parties which relates to the conclusion of the Treaty. It is indeed our understanding, that the term "proposed agreement" as used in Article 37(4) of the Customs Union Protocol implies and includes all negotiation documents including the Negotiation principles and Objectives and indication of the provisions to be addressed in the negotiations. These, in our view, constitute a

proposed Agreement that would warrant notification to the other Partner States pursuant to Article 37(4)(b) of the Customs Union Protocol.

62. Having so concluded, we shall now proceed to draw our conclusion as to whether the 1<sup>st</sup> Respondent's intention to enter into and or negotiate a Free Trade Agreement with the United States of America without involving the other EAC Partner States violates Articles 5, 6(d), 6(f), 7(2), 8(1)(c), (3) & (4) and 151 of the Treaty, Article 37 of the Protocol on The Establishment of The East African Common Market and Article 37 of the Protocol on the Establishment of The East African Customs Union.

63. A Treaty is binding on the parties who must all perform their respective obligations in good faith (*pacta sunt servanda*). 'Good faith, inter alia, requires that a party to a Treaty shall refrain from any acts calculated to prevent the due execution of the Treaty or otherwise to frustrate its objects.

64. On 8<sup>th</sup> July 2020, the Republic of Kenya launched negotiations with the USA without the benefit of considerations from the other Partner States as required by Article 37(4)(c) & (d) of the Customs Union Protocol. It is common ground that to date, the 2<sup>nd</sup> Respondent has not communicated the fact of existence of these developments to any of the other Partner States.

65. By omitting to engage the other Partner States through the Secretary General as stipulated by Article 37, the 1<sup>st</sup> Respondent's actions potentially serve to jeopardize coordination of Partner State economic policies through the institutions of the Community. The Respondent's actions and inactions undermine those aspects of the



aspirations of the Community stipulated in Articles 37 of the Customs Union Protocol and the Common Market Protocol as well. They also undermine the precedence of the Community organs, institutions and laws on implementation of the Treaty, contrary to Article 8 of the Treaty.

66. A breach of Article 37 of the Customs Union Protocol in turn violates Article 37 of the Common Market Protocol which requires Partner States to adopt common negotiating positions and promote participation. The breach, in turn, defeats objectives of the Community stated under Article 5 of the Treaty and also breaches the fundamental and operational principles of the Community stated under Articles 6(d) and 7(2) of the Treaty.

67. The 1<sup>st</sup> Respondent's contention that the Republic of Kenya is at liberty as a sovereign State to enter agreement with other sovereign States so long as the terms of agreement do not contravene the Treaty, whereas it may be factually correct, it is a contextually and legally misconceived argument in the circumstances. That provision of the Protocol. Article 37(4)(a) which the Respondent relies upon, is qualified by Article 37(4)(b) of the Protocol which requires that the other Partner States are notified and given opportunity to make input to the process.

68. We are inclined to agree with the Applicants that the import of Article 37(4) of the Customs Union Protocol is that whereas a Partner State may separately conclude or amend a trade agreement with a foreign country, as the 1<sup>st</sup> Respondent intends to do, that Partner State cannot entirely act individually. That is the essence of Article 37(4)(b), (c) and (d) of the Customs Union Protocol.



69. Premised on the forgoing and without delving any further, it is our finding that by omitting to cause the participation of the other Partner States in the process through solicitation of their respective input as prescribed by Article 37(4)(b) of the Customs Union Protocol and by the 2<sup>nd</sup> Respondent refraining from escalating the matter to the Council of Ministers, the 1<sup>st</sup> Respondent resoundingly violated Articles 5, 6(d), 6(f), 7(2), 8(1)(c), (3) & (4) and 151 of the Treaty, Article 37 of the Common Market Protocol and Article 37 of the Customs Union Protocol. Issues 2 and 3 are answered in the affirmative.

**ISSUE No. 4:** Whether the 1<sup>st</sup> Respondent's actions and or omissions of adopting a Phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America without involving the other EAC Partner States violated Articles 5, 6(d), 6(f), 7(2), 8(3) and 151 of the Treaty, Article 37 of the Protocol for the Establishment for the East African Common Market and Article 37 of the Protocol on the Establishment of East African Customs Union.

**ISSUE No.5:** Whether the Phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain between the 1<sup>st</sup> Respondent and the United States of America is a trade agreement within the meaning of Article 37(4) of the Protocol on the Establishment of East African Customs Union and whether it

contradicts the provisions of the EAC law, if any or at all.

**ISSUE No.6: Whether the EAC Sanitary and Phytosanitary (SPS) Protocol adopted by the EAC Council in the year 2012 is fully operational and if not, how are the EAC Partner States to implement the SPS measures?**

70. In his submissions and during the highlights thereof, Counsel for Applicant addressed Issues 4, 5 and 6 together.

71. He submitted that the impugned Phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain concluded between the 1<sup>st</sup> Respondent and the USA is a Treaty within the meaning of Article 2 of the Vienna Convention on the Law of Treaties.

72. That the impugned Protocol is also a trade agreement within the meaning of Article 37 of the Customs Union Protocol based on the reasons that it allows goods, specifically wheat, from a third party to be imported into the Community and that it involves a Partner State of the Community and a third party.

73. Regarding the question as to whether the Community has a law on Sanitary and Phytosanitary (SPS) measures and whether the law is in operation, the Applicants submitted that the EAC has a law on SPS which includes Articles 105 and 110 of the Treaty, the Customs Union Protocol and the EAC SPS Protocol which the 1<sup>st</sup> Respondent ratified in 2016. That, the Respondent's contention that there is no such law is false. He stated that Articles 105 and 110 of the Treaty regulate SPS and require Partner States to adopt common measures among other requirements. That the 1<sup>st</sup> Respondent signed the EAC Sanitary



and Phytosanitary (SPS) Protocol in 2013 and ratified it in 2016 and that he is therefore bound by the international treaties' principle of *pacta sunt servanda*.

74. To brace his case, Counsel cited the decision by this Court in **African Network for Animal Welfare (ANAW) vs Attorney General of the United Republic of Tanzania, EACJ Reference No. 9 of 2010**, where it was held that failure to ratify or enact a Protocol does not oust the obligations placed on a Partner State by clear and unambiguous provisions in the body of the Treaty.

75. In reply, the 1<sup>st</sup> Respondent contends that the MOU is not a trade agreement within the meaning of Article 37(4) of the Customs Union Protocol but that it is a Sanitary and Phytosanitary measure whose Certification with the USA, the 1<sup>st</sup> Respondent is not obligated to notify the EAC Council about. That it neither adjusts nor contradicts the EAC Common External Tariffs in any way.

76. On the EAC Sanitary and Phytosanitary (SPS) Protocol adopted by the EAC Council in 2012, Counsel for the 1<sup>st</sup> Respondent submitted that since its enactment, the Protocol has not been operationalized due to failure by some Partner States to have it ratified and that by their own admission, the Applicants also acknowledge that the EAC Sanitary and Phytosanitary (SPS) Protocol is not yet operational. That the Treaty provisions, Article 108 of the Treaty and Article 38 of the Customs Union Protocol do not provide a clear and unambiguous framework for SPS measures, which then necessitated development of the EAC SPS Protocol. Counsel further submitted that as a result of the delayed ratification of the EAC SPS Protocol by some of the Partner States, Partner States have had to resort to World Trade



Organization (WTO) Agreement on application of SPS measures as well as their respective domestic laws.

77. In our view, the lethargy to operationalize the EAC SPS Protocol is a factor of the other Partner States and not the 1<sup>st</sup> Respondent. Whereas the 1<sup>st</sup> Respondent ratified the Protocol, the other Partner States have not yet done so. This however does not absolve the 1<sup>st</sup> Respondent from compliance with the relevant provisions of the Treaty (Articles 105,108 and 110) and the Protocols by which he is bound – (see: **African Network for Animal Welfare (ANAW) vs Attorney General of the United Republic of Tanzania** (supra).

78. Rationally, it is plausible to take the view that the enactment of the EAC SPS Protocol could have been informed by the inadequacy of the Treaty and Customs Union provisions relating to SPS. However, to date, the EAC Sanitary and Phytosanitary (SPS) Protocol adopted by the EAC Council in the year 2012 has remained in limbo and is not fully operational.

79. How the EAC Partner States are to implement the SPS measures is a question that has not been canvassed by the Parties and we therefore find it to be outside the remit of this Court to address it in the circumstances. Nonetheless, it behooves the defaulting Partner States to ratify the Protocol in order to give it functionality. Partner States should pay attention to the matter and attend to it with the urgency it deserves in furtherance of the aspirations of the Treaty.

80. The delayed operationalization of the Protocol could be a recipe for recurrent litigation.

81. As to whether the 1<sup>st</sup> Respondent's adoption or negotiation of a SPS Protocol with USA violates the Treaty, we reiterate the international

law position that a treaty is binding on the parties who must all perform their respective obligations in good faith (*pacta sunt servanda*). That a treaty must be applied in good faith in accordance with its terms. 'Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.

82. Undertakings, with the USA, that would undermine some of the objectives and aspirations of the Community such as the planned reduction and elimination of tariffs, which is a preserve of the Common Market and the Customs Union Protocols would out rightly frustrate the objects of the Treaty and of the said Protocols.

83. Having signed and ratified the EAC SPS Protocol, the Customs Union Protocol and the Common Market Protocol which basically address the same scope of issues as the Phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America, the 1<sup>st</sup> Respondent is estopped from acting in a manner inconsistent with the objectives of the Treaty and the said EAC Protocols. *Pacta sunt servanda* frowns upon departure from what has been agreed or that which will undermine what has been agreed.

84. The 1<sup>st</sup> Respondent's adoption of a Phytosanitary Protocol on the Certification of Wheat Grain and or Memorandum of Understanding on the Certification of Wheat Grain with the United States of America without involving the other Partner States undermines the objectives of the Treaty and are inconsistent with the EAC SPS Protocol. The conduct without involving the other EAC Partner States specifically violates Articles 5, 6(d), 6(f), 7(2), 8(3) & (4) of the Treaty, Article 37



of the Common Market Protocol and Article 37 of the Customs Union Protocol.

85. Regarding the issues as to whether the impugned Memorandum of Understanding on the Certification of Wheat Grain is a trade agreement, we are of the view that a trade agreement is an agreement between countries where they agree on certain obligations that affect trade in goods and services and usually the main goal of trade agreements is to reduce barriers to exports and protect respective party interests.

86. Whether the impugned Memorandum is also a trade agreement within the meaning of Article 37 of the Customs Union Protocol is determined by subjecting it to the test of the definition of a treaty under the Vienna Convention on the law of Treaties.

87. Article 2 of the Convention defines a Treaty to mean an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

88. The impugned Memorandum of Understanding was exhibited as an attachment at page 50 to the Applicant's Rejoinder to the Response. During the highlights to their submissions, Counsel for the Parties confirmed to this Court that the fact of existence of the duly executed Memorandum of Understanding was an agreed fact despite the fact that the exhibit on Court's record is not a signed version.

89. Upon scrutiny of the document, we find that it is on all fours with the definition proffered by the Vienna Convention on the Law of Treaties. The MOU is a written and duly executed document between the



Republic of Kenya and the USA in which their grounds of agreement are stated. It provides for a commencement date and a defined duration period.

90. We therefore find the MOU properly characterized as a trade agreement within the meaning of Article 37 of the Customs Union Protocol.

**ISSUE No. 7: Whether the 2<sup>nd</sup> Respondent has abdicated his obligation under the Treaty and under Article 37 of the Protocol on the Establishment of the EAC Common Market.**

91. Counsel for the Applicants submitted that the 2<sup>nd</sup> Respondent has abdicated his obligations under the Treaty. That by his own admission, the 2<sup>nd</sup> Respondent learnt about the intended bilateral agreement and wrote to the 1<sup>st</sup> Respondent on 26<sup>th</sup> February 2020 seeking clarification but has to date not received any reply.

92. The Applicants contended that the 2<sup>nd</sup> Respondent took such an important matter lightly when he casually wrote a letter seeking clarification but has since done nothing to resolve the matter. The Applicant also faulted the 2<sup>nd</sup> Respondent for not invoking his mandate under Articles 29 and 71 of the Treaty when by his own admission, he was aware of the issue.

93. The Applicants' Counsel further asserts that the 2<sup>nd</sup> Respondent has failed to put in place mechanisms for coordination of trade relations with third parties as envisaged under Article 37(3) of the Customs Union Protocol.

94. Counsel cited the cases of East African Law Society vs The Secretary General of the East African Community, EACJ Reference No. 7 of 2014 and that of James Katabazi & 21 Others vs the Secretary General of the East African Community & Another, EACJ Reference No. 1 of 2007, where the Secretary General was found to have abdicated his obligations under the Treaty, to support his submissions against the 2<sup>nd</sup> Respondent.

95. In reply, Counsel for the 2<sup>nd</sup> Respondent prayed that the Reference be dismissed against him. That there was no evidence that he abdicated his obligations under the Treaty and Article 37 of the Common Market Protocol. Further that there was no cause of action against him.

96. Our attention is drawn to the provisions of the Treaty and Protocols upon which the alleged abdication from obligations is founded. For brevity we highlight only the specific parts here:

a) **Article 37 of the Common Market Protocol provides for coordination of trade relations between Partner States. Article 37(5) provides that the provisions of Article 37 of the Customs Union Protocol shall apply for purposes of trade arrangements. Article 37 of the Customs Union Protocol provides for trade arrangements with countries and organizations outside the Customs Union. In the specific context of this matter, however, Article 37(4)(b) requires the 2<sup>nd</sup> Respondent to communicate the proposed agreement to the other Partner States.**

b) **Article 29 of the Treaty mandates the Secretary General to submit his findings to a Partner State where he**

**considers that such a Partner State has failed to fulfil its obligations under the Treaty or has infringed a provision of the Treaty and require such a State to its observations or findings. The Secretary General has the option of escalating the matter to the Council and when it gets necessary refer the matter to Court. While Article 71(1) (d) of the Treaty mandates the 2<sup>nd</sup> Respondent to undertake investigations, collect information, verify matters relating to any matter affecting the Community.**

97. Whereas the Secretary General, in his submissions, contended that the Reference does not raise a cause of action against him and that he should therefore be discharged, we are of the view that in the context of the instant matter, this argument is misconceived. In the face of allegations of failure or refusal to act where articles of the Treaty and the Protocols arrogated specific functions to the Respondent, the contention that there is no cause of action against him collapses.

98. On his own testimony, the 2<sup>nd</sup> Respondent stated that upon learning about the impending transaction between the 1<sup>st</sup> Respondent and the government of the United States of America, he wrote a letter to the 1<sup>st</sup> Respondent on 26<sup>th</sup> February 2020 to caution the 1<sup>st</sup> Respondent about the transaction. No reply has been forthcoming since then.

99. Whereas the 1<sup>st</sup> Respondent contended that he had promptly acted upon the allegations which form the basis of the Reference when they arose, after he wrote to the 1<sup>st</sup> Respondent to ascertain the facts regarding the transaction and there was no response to his inquiry several years after, and even after the Reference was filed against him, he made no effort to follow up on the letter. If he did so, then



evidence that he did so was not adduced in Court. He also refrained from exercising his mandate under Article 71(1) (d) of the Treaty to carry out investigations or verify matters at his own initiative. He also did not exercise his mandate under Article 29 of the Treaty.

100. The submission that Article 29 can only be invoked when he has been made aware of a violation of the Treaty is, with respect, misconceived. When read together with Article 71(1)(d), the Secretary General may proactively conduct investigations and collect information or verify matters on his own initiative. This therefore negates the argument that Article 29 can only be invoked when a violation has been brought to his attention.

101. Given the gravity of the matter, one would have expected to see more initiative on the part of the Respondent to have it resolved. The Respondent should have sought to have his letter replied to or in the alternative, should have invoked his mandate under Article 71 and 29 of the Treaty to conduct an independent investigation about the matter.

102. The fact that he wrote a letter for which there was no reply several months later and there is nothing on record to indicate that he ever followed up or exercised his mandate under the Treaty and the Protocols to cause the 1<sup>st</sup> Respondent to act is not manifest of diligence in execution of his mandate.

103. This state of affairs can only be attributed to either a failure or neglect to carry out his mandate under the Customs Union and the Common Market Protocols and the Treaty. We can only conclude, as we hereby do in agreement with the Applicant, that the 2<sup>nd</sup> Respondent abdicated from his obligations.

**ISSUE No. 8: Whether the Applicants are entitled to the remedies sought**

104. Counsel for the Applicants prayed that having demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the Treaty provisions through their impugned actions and omissions, the orders sought in the Reference be granted to the Applicants.

105. The 1<sup>st</sup> Respondent contended that the remedies sought be denied because a cause of action had not arisen at the time of filing the Reference, that the Reference was prematurely brought before Court. On the 2<sup>nd</sup> Respondent part, he contended that there being no cause of action against him and that there is already a trade negotiation framework 2016 the Reference be dismissed with costs.

106. Having determined all the issues raised as we did above and considered the submissions by Counsel for the parties, save for remedy in respect of the alleged inaction of the 2<sup>nd</sup> Respondent to render advice on setting up a mechanism for coordination of trade relations with third parties, we are inclined to agree with the Applicants on the remedies.

107. We also take direction from Rule 127 of the Rules which provides that, except for good reasons, costs in any proceedings shall follow the event.

**I. FINAL ORDERS**

108. In the result, we declare and order as follows;

- a) the 1<sup>st</sup> Respondent through the acts and or omissions of entering into, negotiating and or intending to negotiate a Free Trade Agreement with the United States of America, violated

its commitment to the fundamental and operational principles of the Community, specifically the principles of rule of law, transparency and cooperation for mutual benefit as guaranteed under Articles 6(d), 6(f) and 7(2) of the Treaty;


- b) the 1<sup>st</sup> Respondent through the acts and or omissions of adopting a Memorandum of Understanding on the Certification of Wheat Grain with the United States of America violated its commitments to the fundamental and operational principles of the Community, specifically the principles of the rule of law, transparency and cooperation for mutual benefit as guaranteed under the Treaty;
- c) the 1<sup>st</sup> Respondent's actions and or omissions of negotiating and or intending to negotiate a Free Trade Agreement with the United States of America violated Article 37 of the Common Market Protocol and Article 37 of the Customs Union Protocol;
- d) the 1<sup>st</sup> Respondent through the acts and or omissions of adopting a Memorandum of Understanding on the Certification of Wheat Grain with the United States of America violated Article 37 Common Market Protocol and Article 37 of the Customs Union Protocol;
- e) the proposed Free Trade Area Agreement negotiated and or intended to be negotiated between the 1<sup>st</sup> Respondent and the United States of America without the involvement of the other Partner States be and is hereby declared illegal, null and void;



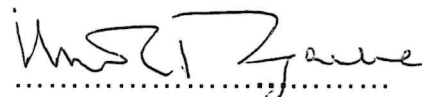



- f) the adopted Memorandum of Understanding on the Certification of Wheat Grain with the United States of America be and is hereby declared illegal, null and void;
- g) the inaction of the 2<sup>nd</sup> Respondent to advise the 1<sup>st</sup> Respondent is an infringement of the Treaty provisions on fundamental principles and the doctrines of good governance, the rule of law and transparency; and
- h) Costs of the Reference shall be borne by the Respondents in equal proportion.


Dated, signed and delivered at Kampala this 2<sup>nd</sup> Day of December 2022.

  
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Hon. Yohane B. Masara  
**PRINCIPAL JUDGE**

  
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Hon. Dr Charles O. Nyawello  
**DEPUTY PRINCIPAL JUDGE**

  
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Hon. Charles A. Nyachae  
**JUDGE**

  
.....  
Hon. Richard Muhumuza  
**JUDGE**

  
.....  
Hon. Richard Wabwire Wejuli  
**JUDGE**