



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



*(Coram: Yohane B. Masara, PJ; Charles A. Nyachae, Richard Muhumuza,  
Richard Wabwire Wejuli, & Léonard Gacuko, JJ)*

**APPLICATION NO. 13 OF 2022  
(Arising from Reference No. 52 of 2021)**

**HUMPHREY MAKORI NYAGOE.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF THE  
REPUBLIC OF KENYA..... RESPONDENT**

**21<sup>ST</sup> NOVEMBER 2023**

## **RULING OF THE COURT**

### **A. INTRODUCTION**

1. This Application is brought under Article 39 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rules 4 and 84 of the East African Court of Justice Rules of Procedure 2019 (“the Rules”).
2. The Application arises from **Reference No.52 of 2021** and seeks interim orders compelling the Deputy Registrar of the Employment and Labour Relations Court at Nairobi to tax the Applicant’s Bill of costs filed in Nairobi **ELRC No.82 of 2019** and immediately thereafter allow and issue execution proceedings against the Kenya Airports Authority and the Respondent herein.
3. The Applicant is a natural person resident within the Republic of Kenya. His address for service is c/o O.P Ngoge and Associates Advocates, Coffee Plaza, 4<sup>th</sup> Floor, P.O. Box 3430 – 00200 Nairobi, Off Haille Sellasie Avenue in Nairobi.
4. The Respondent is the Attorney General of the Republic of Kenya, sued in a representative capacity, as the Principal Legal Adviser of the Government of the Republic of Kenya. His address for service is: c/o Office of the Attorney General and Department of Justice, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100, Nairobi.

### **B. REPRESENTATION**

5. At the hearing, the Applicant was represented by Mr Peter Ngoge Advocate. The Respondent was represented by Mr Christopher Mulili and Ms Christine Oyugi, both State Counsel.

**C. THE APPLICANT'S GROUNDS FOR THE APPLICATION AND SUBMISSIONS**

6. The Applicant's case is contained in the Notice of Motion filed on 25<sup>th</sup> May 2022 and the supporting Affidavit by the Applicant also filed on 25<sup>th</sup> May 2022. A further affidavit sworn by Advocate Peter O. Ngoge, was filed on 27<sup>th</sup> February 2023. Counsel for the Applicant made oral submissions at the hearing.
7. In essence, the Applicant contends that the Respondent Partner State, through its agent, the Deputy Registrar of the Employment and Labour Relations Court in Nairobi, has deliberately and maliciously refused to set down the taxation of the Bill of Costs in **ELRC No. 82 of 2019** for hearing, with the consequence that the Plaintiff has suffered and continues to suffer prejudice, in that he cannot access the costs due to him pursuant to the Judgment in **ELRC No. 82 of 2019**.
8. The gravamen of the Applicant's claim is that this alleged action or omission of the said Deputy Registrar is a violation both of the Constitution of Kenya, as well as of Articles 6(d) and 7(2) of the Treaty.
9. The Applicant alleges that Nairobi **ELRC Petition No. 82 of 2019** between the Applicant and Kenya Airports Authority was concluded in favour of the Applicant. The matter however, is the subject of an Appeal to the Court of Appeal of Kenya, by the Respondent. On his part, the Applicant has filed **Reference No. 52 of 2021** in this Court, alleging violation of the Treaty, in the conduct and decision by the said domestic Court in the said **ELRC No. 82 of 2019**.

10. The Applicant alleges that following the Judgment in the said **Petition No. 82 of 2019**, and the costs awarded to the Applicant therein, the Deputy Registrar of the Employment and Labour Relations Court in Nairobi, has refused and, in any event, has failed to list the subject Bill of Costs for taxation. The Applicant further alleges that this failure is deliberate and constitutes a violation of the Treaty, particularly, Articles 6(d) and 7(2) of the Treaty.

11. The substantive order that the Applicant therefore seeks in his Notice of Motion is:

**“That interim orders be issued forthwith compelling the Deputy Registrar of the Employment and Labour Relations in Nairobi to tax the Applicant’s Bill of Costs as filed in Nairobi ELRC No. 82 of 2019 and immediately thereafter to allow and issue execution proceedings against the Kenya Airports Authority and the Respondent herein.”**

#### **D. RESPONDENT’S REPLY AND SUBMISSIONS**

12. The Respondent’s grounds of opposition are contained in a Replying Affidavit deponed by Ms Christine Oyugi and filed in Court on 16<sup>th</sup> March 2023; as well as in the Respondent’s Counsel’s submissions at the hearing.

13. The Respondent contended that **“the subject matter of the Application does not fall within any of the categories listed and/or envisioned under Articles 27 and 30 of the Treaty hence, this Court lacks jurisdiction to hear and determine the matter.”**

14. The Respondent further contended that the instant Application is premature and contrary to Articles 6 and 7 of the Treaty regarding the

rule of law and good governance as the Applicant has not exhausted the Judicial procedures available in the Respondent State.

15. In the Affidavit of Ms Oyugi, the Respondent states that the Applicant does not, in the Application, demonstrate that the Deputy Registrar of the Employment and Labour Relations Court has indeed refused to set the subject Bill of Costs for taxation.
16. The Respondent further contends that there is no cause of action against the Respondent as the Applicant was an employee of the Kenya Airports Authority which is an autonomous institution which should be sued in its own name.
17. The Respondent also contends that the Further Affidavit sworn on 27<sup>th</sup> February 2023, having been deponed by the Applicant's Counsel, is incompetent and should be struck out.
18. The Respondent invited the Court to strike out the instant Application with costs, as being frivolous and an abuse of the Court process.

#### **E. THE COURT'S DETERMINATION**

19. It is an established Judicial procedure that where the issue of jurisdiction is raised, the Court is bound to determine this issue before any other. This is for the obvious good reason that a Court can only consider and determine matters of merit and substance if it has jurisdiction. In the absence of jurisdiction, the Court must down its tools forthwith.
20. We, therefore, will first consider the jurisdictional issue. In this regard, we note that the Respondent has effectively raised two jurisdictional issues. Firstly, that the subject matter of the Application is not within what the Treaty envisions in Articles 27 and 30. Secondly, that the Applicant cannot come to this Court, as he has not

exhausted local Judicial procedures. The Court understands the latter to be referring to the customary international law doctrine of exhaustion of local remedies.

21. We shall deal with the two jurisdictional issues seriatim.

22. The Court derives its jurisdiction from Articles 27(1) and 30(1) of the Treaty.

Article 27(1) provides:

**The Court shall initially have jurisdiction over the interpretation and application of this Treaty:**

***“Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”***

Article 30(1) 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.”**

23. In **Alcon International Ltd vs The Standard Chartered Bank of Uganda, EACJ Appeal No. 2 of 2011**, the Appellate Division of this Court cited with approval, the decision of the Court of Appeal of

Kenya, in the Owners of the Motor Vessel “Lilian” vs Caltex Oil (Kenya) Limited [1989] KLR wherein Nyarangi, JA, stated:

**“Jurisdiction is everything. Without it, a Court has not power to make one step. Where a court has no Jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”**

24. Read together, the clear net effect of Articles 27 and 30 of the Treaty is that a resident of a Partner State correctly invokes the jurisdiction of the Court where that person, being a legal or a natural person, claims that the Partner State, by some act, regulation, directive, decision or action on its part has infringed the Treaty, and the Court is called upon to interpret and/or apply the Treaty.
25. In the instant Application, both in the Affidavit supporting the Notice of Motion, and in submissions, the Applicant categorically contended that the Respondent, through the actions or omissions of its agent, the Deputy Registrar of the Employment and Labour Relations Court, violated Articles 6(d) and 7(2) of the Treaty.
26. In these circumstances, the Court must take up jurisdiction before considering the matter on its merit.
27. We are unable to agree with the Respondent that the Applicant does not fall within the categories envisioned under Articles 27 and 30 and that this Court has no jurisdiction. The Applicant alleges an action or omission by the Respondent State, which he claims is a violation of specific Articles of the Treaty. That in our view places the matter squarely within the said Articles.

28. In Steven Denis vs the Attorney General of Burundi and Others, EACJ Reference No. 3 of 2015, this Court stated:

“... we must begin by reiterating that this Court’s jurisdiction is well set out in Articles 23, 27 (1) and 30 (1) of the Treaty. In sum those Articles provide that the Court shall have jurisdiction to interpret and apply the Treaty and to determine whether any Act, regulation, directive, decision or action of a Partner State or an institution of the Community is unlawful or is as an infringement of the process of the Treaty.”

29. Further, in Eric Makala vs the Attorney General of Rwanda, EACJ Reference No. 1 of 2017 this Court stated:

“Thus, to succeed on a claim of lack of jurisdiction in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdiction, *ratione personae (locus standi)*, *ratione materiae* and *ratione temporis*. Simply stated, these 3 jurisdictional elements respectively translate into jurisdiction on account of the person concerned, matter involved and time element.”

30. In the instant Application, the Respondent challenged the Court’s jurisdiction on account of the matter involved (*ratione materiae*).

31. Applying the Applicants claim against the said Articles of the Treaty, we find no difficulty in concluding that the Court has jurisdiction *ratione materiae* on the subject matter of the Application.

32. We now turn to consider the issue raised by the Respondent that the Applicant has come to this Court before exhausting the remedies available in the Partner State.



33. The Jurisprudence of this Court on the doctrine of exhaustion of local remedies has been clear and unequivocal such that we need not spend time on it.

34. In ABBA Limited vs the Attorney General of the Republic of Rwanda, EACJ Reference No. 18 of 2018) this Court stated:

**“Whereas the obligation to exhaust local remedies is a tenet of customary international law, it is not a prerequisite for filing any matter or seeking remedies in this Court under the Treaty. (See Attorney General of the Republic of Rwanda vs Plaxeda Rugumba, Appeal No. 1 of 2012). The Treaty provides no requirement for exhaustion of local remedies as a precondition for accessing it. The fact that a matter has been filed in this Court after a party has exhausted local remedies does not per se warrant audience to such a party nor accord jurisdiction to this Court over such a matter.”**

35. This, with respect, is settled law as far as the East African Community jurisprudence is concerned. There is no requirement that a party exhausts remedies in the Partner State before approaching this Court.

36. As stated earlier in this Ruling, one of the Respondent’s grounds of opposition to the Application, as stated in the Respondent’s Replying Affidavit, is that, **“there is no cause of action against the Respondent and most of the reliefs sought are in the realm of the Respondent to satisfy. The Claimant/Applicant was an employee of the Kenya Airports Authority which is an autonomous institution capable of being sued in its own name.**

**The Claimant/Applicant should therefore pursue his claims with his former employer.”**

37. With respect, the Respondent’s argument is not a sound one and cannot be sustained. It focuses on the litigation in the Partner State’s domestic Court, wherein, in any event, in **Nairobi ELRC No. 82 of 2019**, the Applicant herein has indeed sued Kenya Airports Authority. However, in **Reference No.52 of 2021** in this Court, from which the instant Application arises, the impugned action/omission is that of the Deputy Registrar of the said domestic Court, who is indisputably an agent of the Respondent State.

38. For the reasons set out in the preceding paragraphs of this Ruling, we hold that, this Court has jurisdiction to hear and determine this Application.

39. Having decided as above on the jurisdictional issues, we take jurisdiction and proceed to determine the substance of the Application.

40. Both in the Respondent’s Replying Affidavit and in submissions at the hearing, the Respondent contended that the Further Affidavit filed in Court on 27<sup>th</sup> February 2023 is incompetent by reason of having been sworn by the Applicants’ Advocate on record.

41. The said Affidavit seeks to introduce substantive evidence in support of the Applicant’s case.

42. This Court has on many occasions expressed its disapproval of the practice of Advocates with personal conduct of a case, deponing affidavits in the same case.

43. In **Hon. Fred Mukasa Mbidde vs the Attorney General of the Republic of Burundi and the Secretary General of the East**

African Community, EACJ Application No. 6 of 2018, the Court said:

“First and foremost, the question as to whether an advocate that has personal conduct of a case can swear an affidavit in such a matter, as happened in the present Application, is as debatable as it is controversial. This practice has been held to violate the tenets of advocates’ professional conduct and would render an affidavit fatally defective. In R vs Secretary of State for India, (1942) 2 All ER 546, a junior counsel of one party was called as a witness to prove certain aspects of Indian Law and thereafter purported to continue acting as counsel in the case. Whereas no objection was raised by opposite Counsel, it was held that ‘this was irregular and contrary to practice’; and

A barrister may be briefed as counsel in a case, or he may be a witness in a case. He should not act as both Counsel and witness in the same case. This position was cited with approval in Yunus Ismail t/a Bombo City Stores vs Alex Kamukama & Others t/a Bazari, Supreme Court Civil Appeal No. 7 of 1987, (UG) and Francis Babumba and Others vs Bunju High Court Civil Suit No. 679 of 1990, (UG). We are respectfully persuaded by the foregoing position, particularly so in a case such as the present one where the sole advocate for the First Second (sic) Respondent purported to concurrently double as the sole witness for the same Party.”

44. However, in a recent Ruling in Dr Mpozayo Christophe vs The Attorney General of Rwanda, EACJ Application No. 9 of 2022 the

Appellate Division of this Court stated a more flexible position as follows:

**“As regards affidavits sworn by Counsel, the general principle is that Counsel is required to refrain from deposing to an affidavit in contentious matters, particularly where he risks being subjected to cross-examination. However, Counsel is not precluded from swearing an affidavit on formal and non-contentious matters which are within his personal knowledge. In the Kamlesh Mansukhlal Damji Pattni vs Nasir Ibrahim Ali & 2 Others [2005] eKLR, the Court of Appeal of Kenya held as follows:**

**“Mr. Muite is of course in his concession that Advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of order XVIII R2, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information. On both counts we do not find Muite’s remaining affidavit offensive. As we stated earlier, he is**

**possessed of the facts stated therein and secondly, he has explained, and we believe him in the circumstances of this case, that his clients were not readily available.”**

45. Relying on the said authorities of the Court, the said Further Affidavit of Advocate Ngoge cannot be sustained and must be struck off. The Further Affidavit introduces contentious issues and documents such as the Report of the Judges and Magistrates Vetting Board. The Affidavit in our view, is typical of one that would call for cross examination, thereby placing an Advocate in personal conduct in the invidious position of being both counsel and witness. It does not in our view, fall into the category of exception recognised in the **Dr Mpozayo** case.

46. Nor indeed was there any suggestion that the Applicant was not available to depone to the matters in the Further Affidavit. We strike out the Further Affidavit of Advocate Ngoge.

47. At the hearing, the Court *suo moto* raised the issue of Counsel Christine Oyugi (for the Respondent) also having deponed the Respondent's Replying Affidavit. However, the Court was satisfied that Ms Oyugi, while clearly assisting Counsel Mr Mulili, did not have personal conduct of the matter.

48. Turning to the substance of the Application, the jurisprudence of this Court is well established as regards the issuance of interim orders under Article 39 of the Treaty. Article 39 provides as follows:

**“The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. Interim orders and other**

**directions issued by the Court shall have the same effect *ad interim* as decisions of the Court.”**

49. The Court has on several occasions held that to grant such orders under Article 39, it will apply the trifold test first enunciated in **Giella vs Cassman Brown [1973] EA 258**. In **Francis Ngaruko vs the Attorney General of the Republic of Burundi, EACJ Reference No.3 of 2019**, the Court set out the test and stated as follows:

**“This Court has had occasion to consider numerous interlocutory applications for interim orders. It has upheld a trifold test for the grant of interim orders laid out in Giella vs Cassman Brown [1973] EA 258, albeit with deference to the demonstration of a serious triable issue rather than a *prima facie* case as the first principle that should be satisfied in an application for the grant of interim orders. See: FORC & Others vs. Attorney General of the Republic of Burundi (supra) and BAT vs the Attorney General of Uganda (supra). Consequently, we categorically state that applications for interim orders should be subjected to the following trifold test. First, the Court needs to be satisfied that there is a serious question to be tried on the merits of the Applicant’s Reference, that the Applicant has a cause of action that depicts substance and reality. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”**

50. The Court went further to state:

**“As has been severally held, within the context of EAC Community Law, a cause of action demonstrating the prevalence of a serious triable issue has been held to exist where the Reference raises a legitimate legal question under the Court’s legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the National Law of a Partner State or infringes any provision of the Treaty.”**

51. While the Applicant and his Counsel did categorically claim that the Respondent State had violated both its Constitution and the Treaty (and on this basis as stated above, in this Ruling, we find that the Court has jurisdiction to determine the matter), there was a distinct dearth of evidence to support the contention in the consideration of the merits of the claim. This has a direct negative effect on the merits of the Application.

52. Both in the Notice of Motion and in the Supporting Affidavit, the Applicant states and contends that the Deputy Registrar of the Employment and Labour Relations Court deliberately REFUSED to list the Bill of Costs in **Nairobi ELCRC No. 82 of 2019**, for taxation on 10<sup>th</sup> May 2022. Beyond this bare assertion, he did not offer evidence of such refusal or any basis concluding the non-listing of the matter to be deliberate and/or malicious.

53. He goes further to state in the Notice of Motion, without proffering any evidence, **“that the Applicant is highly apprehensive that the deliberate unexplained refusal to list his Bill of Costs on the 10<sup>th</sup> May, 2022 as was scheduled was a punishment being inflicted**

**against the Applicant herein for having lodged Reference No. 52 of 2021 against the Respondent herein before this Honourable Court ...”** Again, a bare assertion unsupported by any evidence.

54. At the hearing of the Application, there were conflicting submissions from the bar, from the two sides as regards the status of the Bill of Costs and taxation thereof. Suffice to say that even in those submissions, and against questions from the bench, the Applicant’s Counsel, was not able to demonstrate his claims as regards the conduct of the Deputy Registrar. The Court is mindful that the Applicant has evidential responsibility to prove his claims.

55. In the result, the Court was left with no option but to conclude that the taxation of the subject Bill of Costs was merely delayed in the normal course of the judicial process. The Court notes that there is nothing on the record to indicate that at any point, the Applicant engaged the domestic Court to either understand the cause of delay or to spur progress on the matter.

56. Again, in the Supporting Affidavit, the Applicant merely states, **“that I am apprehensive that the Registrar of the Employment and Labour Relations Court must have been instructed by the Respondent herein not to list the matter for taxation on the 10<sup>th</sup> of May, 2022 but instead to have the same removed from the day’s cause list in order to punish me for having lodged the said Reference No.52 of 2021 considering that no reason has been given by the Respondent herein as to why the said Bill of Costs could not be taxed on the 10<sup>th</sup> May, 2022 and as to why he has failed to honour, obey and satisfy the said Judgment ...”**

57. The Applicant does not offer any basis for his apprehension. On inquiry from the Court at the hearing, Counsel for the Applicant was



unable to say who told him that the Bill of Costs had not been listed because of his filing of Reference No. 52 of 2021 in this Court. He could only offer, “**from the office of the Registrar.**”

58. In the result, the Applicant did not demonstrate the basis for claiming that the Deputy Registrar of the Employment and Labour Relations Court had refused to set the subject Bill of Costs for taxation. Much less did he demonstrate that, if there was a failure or delay on the part of the Court, to have the Bill of Costs taxed, this was deliberate and malicious, calculated to cause damage to the Applicant, as punishment for having lodged a Reference with this Court.

59. The Applicant does not lay a reasonable basis for his serious claims against the said Deputy Registrar. Thus, in our considered opinion, the Applicant does not even begin to demonstrate, whether by evidence or in submissions, that the Respondent Partner State has violated either its own Constitution, or the Treaty.

60. The Applicant alleges violation of both the Treaty and the Constitution of Kenya, but fails to lay even the most basic foundation that would make his allegations a serious triable issue.

61. We hold therefore, that the Applicant fails the first of the trifold test.

62. Having so held, we do not find it necessary to consider applying the remaining two of the trifold test.

63. In the event, there can be no basis for this Court to grant the orders sought in the Application.

#### F. CONCLUSION

64. We therefore decline to grant the orders sought and we dismiss the Application.

G. **COSTS**


65. Rule 127 (1) of the Rules provides as follows:

**“Costs in any proceedings shall follow the event, unless the Court shall for good reasons otherwise order.”**

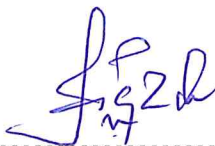
66. In the circumstance of this matter, we order that costs shall abide the outcome of the Reference.

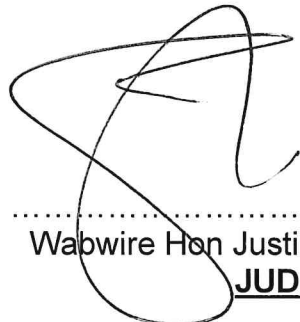
67. It is so ordered.


Dated, signed and delivered at Arusha this 21<sup>st</sup> Day of November  
2023.

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

  
.....  
Hon. Justice Charles A. Nyachae  
**JUDGE**

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

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

  
.....  
Hon. Justice Dr Léonard Gacuko  
**JUDGE**