



**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, Gacuko Leonard, JJ)

REFERENCES NOS. 38 AND 39 OF 2021

LUPAIN GROUP INC..... APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF SOUTH SUDAN..... RESPONDENT**

28TH NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. LUPAIN GROUP INC (“the Applicant”) filed **Reference No. 38 of 2021** and **Reference No. 39 of 2021** (hereinafter referred to as “the References”) against the Attorney General of the Republic of South Sudan (“the Respondent”) on 24th September 2021. The References were preferred under Articles 6(d), 7(2), 8, 23(1), 27(1), and 30(1) & (2) of the Treaty for the Establishment of the East African Community (“the Treaty”).
2. **Reference No. 38 of 2021** impugned the decision by the Respondent State not to honor Bank Guarantee No. 004/2020, while **Reference No. 39 of 2021** challenged the decision of the Respondent State to refrain from making payment to the Applicant upon the presentation of Bank Guarantee No. 005/2020.
3. The Applicant is a legal person, duly incorporated under the laws of the Republic of South Sudan and the Republic of Uganda and have its principal address of business in Juba, South Sudan and Kampala, Uganda. His address of service for the purposes of these References is c/o Ochieng’ Opiyo and Company Advocates, Flamingo Towers, 2nd Floor, Mara Road, P.O Box 42088-00100, Nairobi, Kenya.
4. The Respondent is the Attorney General of the Republic of South Sudan (the Minister of Justice and Constitutional Affairs of the Republic of South Sudan), who is the Chief Legal Advisor to the Government of the Republic of South Sudan, a Partner State of the East African Community. His address of service for the purposes of the References is the

Ministry of Justice and Constitutional Affairs, Airport Avenue, Juba, South Sudan.

B. REPRESENTATION

5. Mr Ochieng Opiyo and Mr Amol Hannington, learned Advocates, appeared on behalf of the Applicant. The Respondent was represented by Mr Biong Pieng Kuol, Director for Civil Litigation and Legal Opinion in the Ministry of Justice and Constitutional Affairs, South Sudan.

C. BACKGROUND

6. In brief, the background to the References relates to the payment obligations by the Respondent, which emanates from Bank Guarantees issued by the Bank of the Republic of South Sudan, that is: Bank Guarantee No.004/2020 and No.005/2020, in the sum of United States dollars: Thirty-five Million, Five Hundred Twenty-Two Thousand, Six Hundred Seventy-One (USD 35,522,671.00) and United States Dollar Fifty-Six Million, Seven Hundred Twelve Thousand, Six Hundred Eighty-Nine. (USD 56,712,689.00) respectively.

7. The underlying contracts to these Bank Guarantees were in respect of supply of various commodities to the Government of South Sudan.

8. It is noteworthy that these contracts contained clauses stating that the agreements are governed by English Law, and English is designated as the language for communication and deliberations; that disputes are to be initially resolved through amicable consultation and mediation between the parties; that if such efforts prove unsuccessful, either party may escalate the matter to arbitration in accordance with the rules of the London Court of International Arbitration and that the

arbitration tribunal formed under these regulations, will issue a final and binding decision.

9. Also, of particular interest, is that these Bank Guarantees stated that they would be governed by the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees 758 (ICC URDG 758) which, by virtue of being invoked by the Respondent as the governing law for the Bank Guarantees, were incorporated into the laws that the Respondent must uphold.
10. Upon the maturity of the said Bank Guarantees on 29th April 2021, the Applicant presented them for payment but the same were not honored by the Bank of South Sudan. It is this alleged failure of the Respondent to honor the Bank Guarantees that led the Applicant to file the present References in a bid to draw Court's attention to violations of the rule of law and the Treaty.
11. In the meantime, on the same day of filing the References, two Applications, namely, **Application No. 16 of 2021** arising from **Reference No. 38 of 2021** and **Application No. 17 of 2021** arising from **Reference No. 39 of 2021** were lodged in this Court by the Applicant, seeking *inter alia*, that pending the hearing of the References, orders be issued directing the Respondent to release to the Applicant the entire value of the Bank Guarantees to be deposited to a bank account specified by the Applicant.
12. During the hearing of **Application No. 16 of 2021** on 9th June 2022, the Court deemed it appropriate to direct Counsel for the parties to first submit on this **Court's Jurisdiction to hear and determine the References**. Another issue the parties were asked to address the Court on was **whether the two References were to be**

consolidated. Both Applications were accordingly stayed. It was also decided that one Ruling be delivered regarding Court's jurisdiction for both References.

13. Parties submitted on both issues and later made highlights thereof during the hearing on 15th September 2022.

ISSUE NO. 1: Whether the Court has Jurisdiction to entertain the References

14. In their written submissions, Counsel for the Respondent submitted that this Court has no jurisdiction to entertain the References, since the References are basically premised on failure of honoring the Bank Guarantees and not on the interpretation of or application of the Treaty as stipulated in Article 27 thereof. That, instead the said Bank Guarantees are governed by the International Chamber of Commerce (ICC) on the Uniform Rules for Demand Guarantees 758 (ICCURDG 758) and not by provisions of the Treaty as the Applicant might have wrongly understood.

15. The Respondent further raised the issue of the arbitration clause present in the underlying contracts. He stated that the argument by the Applicant that the Bank Guarantees do not have arbitration clauses, and are independent of the underlying contracts is not true because the Bank Guarantees were only issued to ensure performance of the contract for which they should have been honored if the Applicant performed its contractual obligations that were guaranteed by the said Bank Guarantees. That, therefore, the Bank Guarantees were collaterals or security ensuring performance of the contracts; and any dispute emanating from the Bank Guarantees would be preferred to follow the arbitration route.

16. On his part, Counsel for the Applicant submitted that this Court has jurisdiction to entertain and determine the References in question because the Respondent's failure to honor the express terms of the Bank Guarantee constitutes a violation of Article 6(d) of the Treaty on rule of law, accountability and good governance, and various provisions of the laws of the Republic of South Sudan.
17. Further, that the contention by the Respondent that the Applicant did not perform its obligation as per the contract between the Applicant and the Respondent cannot stand because there was an acknowledgement of debt by the Respondent. That such acknowledgement prevents the Respondent from claiming that the contract had not been performed. That the Respondent proceeded to issue two Bank Guarantees after acknowledgement of the debt.
18. Counsel for the Applicant maintained that a bank guarantee exists as a separate contract from the underlying contractual obligations and that a determination of whether or not a bank guarantee is enforceable by the party in whose favor it was granted, should not concern itself with the legality or illegality of the underlying contract. He submitted that his position is captured by the International Chamber of Commerce (ICC) rules for Demand Guarantees 758 (ICC URDG 758) specifically in Article 5 thereof, which speaks of the independent nature of a bank guarantee from the underlying contract.
19. To buttress his argument on Court having jurisdiction to determine the References, Counsel for the Applicant referred to the case of **Heir of Nikobamye Mathias vs the Attorney General of Burundi, EACJ Application No. 2 of 2020**, in which it was stated that "a Reference whose gravamen is the violation of the Treaty or the laws of a

Partner State is one that has merits and therefore confers jurisdiction on the Honorable Court”.

20. Counsel further stated that beyond being a commercial matter by virtue of the Bank Guarantees being debt instruments, the violations by the Respondent fall within the jurisdiction of the Court. Further, that the cause of action falls within what was defined by the Honorable Court in **Heir of Nikobamye Mathias Case** (supra) citing with approval the principle in **British American Tobacco (BAT) vs The Attorney General of the Republic of Uganda, EACJ Application No. 13 of 2017**, that:

“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”.

G. COURTS' DETERMINATION

21. Jurisdiction of this Court is well articulated in Articles 27 and 30 of the Treaty. Article 27 provides that:

“The Court shall initially have jurisdiction over the interpretation of 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 State.”

22. On the other hand, Article 30(2) delineates the period in which a person may come to this Court for relief. Article 30 reads:

“(1) 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.

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

23. This Court has, on many occasions, held that it is trite law that issues of jurisdiction, when raised, must be examined and determined forthwith because jurisdiction is the bedrock on which our litigation system is based.

24. In **Mary Ariviza & Another vs The Attorney General of Kenya & Another, EACJ Application No. 3 of 2010**, Court concurred with the rationale on jurisdiction in **Owners of Motor Vessel “Lilian” vs Caltex Oil (Kenya) Ltd [1989] KLR 1**, that “...jurisdiction is everything. Without it a court has no power to make another step...”

25. Further, in **Eric Kabalisa vs The Attorney General of Rwanda, EACJ Reference No.1 of 2017**, this Court clarified that:

“... 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 jurisdictions: *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 the time element.”

26. In the present case, parties addressed the Court on two jurisdictional elements, i.e *ratione materiae* and *ratione temporis*.

27. Counsel for the Applicant was consistent that the Respondent's failure to honor the express terms of the subject Bank Guarantees constitutes a violation of Articles 6(d), 7(2) and 8 of the Treaty, primarily by failing to uphold the Treaty principles of rule of law, transparency and accountability, and good governance, as well as failure to recognize, and uphold equal protection of the law, and Articles 14, 28, and 37(2)(c) of the Constitution of the Republic of South Sudan.

28. In considering the jurisdictional challenge raised by the Respondent, it is crucial to examine the language employed in the Bank Guarantees No. 004/2020 and No. 005/2020. A thorough look of them show that each of them appears and is worded in part, as below:

“...THIS SBLC/ BANK GUARANTEE SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF ENGLAND.

THIS SBLC/BANK GUARANTEE IS AN OPERATIVE INSTRUMENT; THIS SBL BANK GUARANTEE IS

TRANSFERABLE, ASSIGNABLE AND DIVISIBLE WITHOUT PRESENTATION TO US.

THIS SBLC BANK GUARANTEE IS GOVERNED BY THE UNIFORM CUSTOM PRACTICE FOR SBLC/ BANK GUARANTEE AS SET FORTH BY THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) PARIS, (FRANCE) PUBLICATION 58 OR ITS LATEST VERSION AND UNIFORM RULES FOR DEMAND GUARANTEES.”

29. These provisions explicitly state that the Bank Guarantees shall be governed and construed in accordance with the laws of England. Additionally, they reference international standards, such as the Uniform Customs and Practice for Bank Guarantees by the International Chamber of Commerce (ICC) Paris, and Uniform Rules for Demand Guarantees.
30. In our view, the language employed here manifests a clear intention to subject the Bank Guarantees to a specific legal framework, notably the laws of England and internationally recognized ICC rules. The explicit choice by the parties of the governing law within the Bank Guarantees indicates an alternative legal framework outside the Court's scope.
31. Moreover, the Respondent submitted that the Bank Guarantees were collaterals or security to ensure performance of the contracts. This position was not controverted by the Applicant, and it is noteworthy that the underlying contracts from which the Bank Guarantees emanate incorporate arbitration clauses as a dispute resolution mechanism. This further emphasizes the parties' intent to

resolve potential disputes through alternative means rather than invoking the jurisdiction of the Court.

32. In light of these considerations, the Court finds that the Bank Guarantees, as represented by No. 004/2020 and No. 005/2020, expressly designate the laws of England as the governing law and incorporate international standards, thereby delineating a legal framework distinct from the Court's jurisdiction.

33. Consequently, the Court agrees with the Respondent's argument that it lacks jurisdiction (*ratione materiae*) to entertain both References as the parties envisaged an alternative dispute resolution mechanism stipulated in the underlying contracts, namely arbitration.

34. This determination that the Court lacks jurisdiction *ratione materiae* would ordinarily suffice to dispose of the References. However, cognizant of the comprehensive nature of the parties' submissions and recognizing the inherent importance of clarity and thoroughness in legal proceedings, the Court will proceed to address the second element of jurisdiction – *ratione temporis*.

35. On the jurisdictional aspect of time limitation (*ratione temporis*) Counsel for the Respondent contended that the References were filed out of time stipulated in Article 30(2) of the Treaty. According to him, the Applicant became aware of the action complained of on 29th April 2021 when the Bank Guarantees were presented to and got rejected by the Bank of South Sudan, or on 12th June 2021 when the Ministry of Finance and Planning clearly wrote to the Bank of South Sudan that it was not aware of the outstanding demand payment of the amount stated in the Bank Guarantees.

36. Counsel for the Respondent, therefore, holds that 29th April 2021 should have been the date of occurrence of the decision complained of, or when it came to the knowledge of the Applicant. He submitted that the Applicant should have filed the References in Court by 29th June, 2021 in order to comply with Article 30 (2) of the Treaty. That by filing the References on 24th September 2021, after five months from the date on which the decision or action complained against arose, rendered the References time-barred.
37. On his part, Counsel for the Applicant contended that the References were properly filed within the period prescribed by the Treaty because the violations complained of arose on the 28th of July 2021 when the Applicant had the last communication exchange with the Respondent.
38. Further, that the original violation was not constituted by the Respondent's failure to honor the Bank Guarantees when presented, but that the parties continued with communications which could have resolved the matter either way. That as a result, the Applicant had its cause of action open until when the negotiations/communications crystallized on 28th July 2021 when it was clear that the Respondent had no intention of honoring the Bank Guarantees.
39. We have carefully considered the rival submissions of the parties in support of their respective positions and we will now proceed to determine whether Court has jurisdiction in terms of Article 30(2) of the Treaty.
40. In the above regard, we find it prudent to first highlight the important dates surrounding the events leading up to the dishonoring of the

Bank Guarantees that are the subject matter of the References, and the period when the References were filed.

41. On 20th February 2020, the Ministry of Finance and Planning, having reached an agreement with Lupain Group Inc., requested the Bank of South Sudan to issue a letter of Guarantee to KCB and Gulf Africa Bank Kenya Limited; and further authorized the Bank of South Sudan to debit their accounts against any claim in favor of Lupain Group Inc.
42. On 29th April 2020, the Bank of South Sudan issued “the Bank Guarantees to KCB-Nairobi in favour of Lupain Group Inc. after having received a letter of set-off from the Ministry of Finance on 13th March 2020.
43. On 29th April 2021, the Bank Guarantees matured and on the same date, the Applicant presented the demand letter for payment under the Bank Guarantees to the Respondent who rejected them (in the Applicant’s words).
44. Documents on the record of the Court show a letter dated 26th May 2021, in which one Nikhil Desai, Director of JMiles & Co, acting as the International Legal Counsel for Lupain Group Inc. gave an ultimatum to the Governor of the Bank of South Sudan informing him that the Bank risks legal action. At paragraph 7, legal Counsel wrote:

“In the circumstances, we have been instructed to advise you that unless you make payment of the Guaranteed amounts to Lupain’s bank account as stated in the Bank Guarantees within 7days of the date of this letter, we have instructions to forthwith institute legal proceedings directly against the Bank (as the primary obligor) in England and Wales/or South Sudan

and/or the East African Court of Justice, at your risk as to costs.”

45. On 12th June 2021, the Ministry of Finance and Planning replied to the Bank of South Sudan that it was not aware of any demand for payment of the stated amount under the Bank Guarantees and went on to ask the Bank of South Sudan to forward their “opinion” to the Applicant.
46. On 28th July 2021, the Bank of South Sudan indeed wrote to the Applicant informing them about the Ministry of Finance position regarding the demand letter for the payment of the Bank Guarantees. The Bank of South Sudan stated that the Ministry of Finance and Planning bluntly denied the existence of any demand for payment of the stated amount under the Bank Guarantees.
47. It is the above chronological order of dates that led to the instant dispute regarding the jurisdiction of this Court.
48. Under Article 30(2) of the Treaty, the Court is limited to hearing References **“filed within two months from the date of action or decision complained of, or the date the Claimant became aware of it.”**
49. In the Case of **Attorney General of Kenya vs Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011**, it was held that a reference should be filed within two months of the crystallization of the cause of action or knowledge of its existence by the complainant. Furthermore, it was stated that time limit is critical in ensuring the legal certainty among the diverse membership of the Community and therefore strict application is required.

50. In the instant case, what is disputed is the time when the decision that is complained against or action complained of arose or came to the knowledge of the Applicant. Regarding “the starting date” of the two-month period, the Appellate division of this Court stated that it is “is not the day the act complained of ends, but the day it is first effected.” (see Attorney General of Uganda & Another vs Omar Awadh & 6 Others, EACJ Appeal No. 2 of 2012.)

51. The Court went on to state thus:

“It is clear that both the content and intent of Article 30(2) provide a legal framework for determining the starting date of an act complained of, or alternatively the date on which the complainant first acquired the requisite knowledge — all with the objective of ascertaining the commencement and expiry of “the time limit of two months”. In that spirit, the Article does not contemplate the concept of “continuing” breach or violation, in as much as the acts complained of, or the time when a claimant had knowledge of the breach or infringement, have a definitive starting date and expiry date within the two - month period”.

52. Similarly, in Attorney General of Kenya vs Independent Medical Legal Unit (supra), it was held that a claimant cannot avoid the time limitation by alleging a continuing breach or violation of the Treaty.

53. In his pleadings and submissions, Counsel for the Applicant stated that the Applicant did not raise the issue on 29th April 2021 when the Bank Guarantees were presented and rejected because of the expected further negotiations and communication, until 28th July 2021

when it was clear that the Respondent had no intention of honoring the Bank Guarantees.

54. With respect, we find Counsel for the Applicant to be disingenuous in this regard. Throughout his submissions, pleadings, and submissions in rejoinder on the jurisdiction of this Court, Counsel consistently referred to the Respondent's failure to honor the Bank Guarantees as a rejection. It logically follows therefore that if the Applicant understood the dishonoring of the Bank Guarantees as rejection, it is right to say that, that is when the cause of action arose.
55. It is our considered view that if the Applicant chose to wait until the most recent communication with the Respondent, which occurred on 28th July 2021, to submit the References, there is no evidence that this "latest communication" signifies a final communication or a rejection notice.
56. Consequently, the Applicant's decision to file the References on 24th September 2021, cannot be justified on the basis that it received the rejection letter on July 28, 2021. It could be inferred that the ongoing correspondence and the anticipation of the Applicant for the fulfillment of the Bank Guarantees in question are still in progress.
57. Accordingly, we agree with the Respondent that the Applicant ought to have filed the References within two months from the time when the presentation of the Bank Guarantees was dishonored, that is to say, from 29th April 2021.
58. In light of the above, this Court finds that the actual date of reckoning started on the day the Bank Guarantees were dishonored which is 29th April 2021 and not 28th July 2021, and that filing in Court of the

present References was done out of time within the meaning of Article 30 (2) of the Treaty.

H. CONCLUSION

59. For the reasons set out above, we find that this Court lacks Jurisdiction to entertain the References.

60. Having held as we have, we find it no longer necessary to delve into the second issue of consolidation of the matters as the finding on jurisdiction alone sufficiently and conclusively disposes of the References.


61. Consequently, **References Nos. 38 and 39 of 2021** as well as **Applicatons Nos. 16 and 17 of 2021**, arising from the said References, are hereby dismissed.

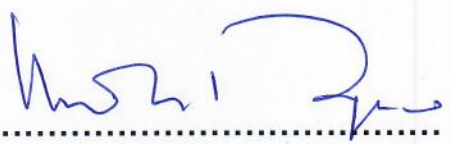
62. Regarding costs, Rule 127 of the Rules of the Court provides that **“Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order”**.


63. In exercise of our discretion, taking into account the nature of the matter before us, we find it equitable to order that each party bears its own costs.

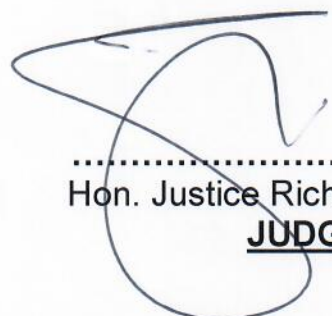
64. It is so ordered.


Dated, signed and delivered at Arusha this 28th Day of November,
2023


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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE


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Hon. Justice Charles Nyachae
JUDGE


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Hon. Justice Richard Muhumuza
JUDGE


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Hon. Justice Richard W. Wejuli
JUDGE


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Hon. Justice Dr Léonard Gacuko
JUDGE