



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



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

REFERENCE NO. 39 OF 2021

**CENTRE FOR FOOD AND ADEQUATE
LIVING RIGHTS (CEFROHT)1ST APPLICANT**

**AFRICA INSTITUTE FOR ENERGY
GOVERNANCE (AFIEGO)2ND APPLICANT**

NATURAL JUSTICE KENYA 3RD APPLICANT

CENTER FOR STRATEGIC LITIGATION 4TH APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA 1ST RESPONDENT**

**THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA2ND RESPONDENT**

**SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY3RD RESPONDENT**

29th NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. The Applicants filed this Reference on 6th November 2020, challenging the actions and omissions of the Respondents regarding execution of the Inter-Governmental Agreement (IGA) to transport crude oil from Hoima District in Uganda to Tanga District in the United Republic of Tanzania, for being in contravention of various provisions of the Treaty for the Establishment of East African Community (“the Treaty”) and the Protocol for Sustainable Development of the Lake Victoria Basin (“the Protocol”).
2. The Applicants contend that the 1st Respondent embarked on the East African Crude Oil Pipeline (“EACOP”) Project without the Certificate of Approval from the National Environmental Management Authority (NEMA) and an approval on the Environmental and Social Impact Assessment of the Project. That the EACOP Project is therefore proceeding in breach of human rights obligations, and disregard of environmental considerations such as preservation of forest reserves, water bodies, wetlands, international conservation sites, bird and animal wildlife and that it will have a significant impact on food security in the region.
3. In their Response to the Reference, the Respondents contend, among others, that the Reference is time barred. Further, that the development of the East African Crude Oil Pipeline is done in accordance with the Treaty and the Protocol.
4. On 28th December 2020, the 2nd Respondent filed a Notice of Preliminary objection and so did the 1st Respondent on 3rd November 2022.

B. THE PARTIES

5. The 1st Applicant, **Centre for Food and Adequate Living Rights (CEFROHT) Ltd**, is a Uganda-registered not-for-profit civil society organization promoting the right to adequate living, right to food and trade justice.
6. The 2nd Applicant, **Africa Institute for Energy Governance (AFIEGO) Ltd**, is a not-for-profit company limited by guarantee incorporated in Uganda to promote environmental and human rights in Uganda and the East African region.
7. The 3rd Applicant, **Natural Justice Kenya**, is a not-for-profit civic society organization promoting and monitoring environmental compliance and promotion of human rights of indigenous people and local communities in Kenya and East Africa.
8. The 4th Applicant, **Centre for Strategic Litigation**, is a body corporate registered under the Companies Act No.15 of 2013 of the laws of Zanzibar in the United Republic of Tanzania.
9. For the purposes of this Reference, the address of service for all the Applicants shall be: *c/o M/s Semuyaba, Iga & Co. Advocates, Plot 65 Buganda Road, P.O. Box 12387, Kampala and Dalumba Advocates, Plot 652 Jorina House, Gayaza P.O. Box 16414, Wandegeya, Uganda.*
10. The 1st Respondent is the **Attorney General of the Republic of Uganda**, sued in his representative capacity as the principal legal advisor of the Government of Uganda whose address of service is: *The Attorney General of the Republic of Uganda, Ministry of Justice and Constitutional Affairs, Bauman House, Plot 5, Parliament Avenue, P.O Box 7183, Kampala, Uganda.*

11. The 2nd Respondent is the **Attorney General of the United Republic of Tanzania**, sued in his representative capacity as the principal legal advisor of the Government of United Republic of Tanzania whose address of services is: *Attorney General of the United Republic of Tanzania, 20 Kivukoni Front, P.O Box 9050, 11492 Dar-es-Salaam, Tanzania.*
12. The 3rd Respondent is the **Secretary General of the East African Community**, its principal officer sued on behalf of the community, whose address of service for the purposes of this Reference is: **The Secretary General, EAC Headquarters, Afrika Mashariki Road, EAC Close, P.O. Box 1096, Arusha, Tanzania.**

C. REPRESENTATION

13. The representation in Court, for the respective parties, was as follows:
- a) The 1st and 2nd Applicants were represented by Mr Justin Semuyaba and Mr David Kabanda; the 3rd Applicant by Mr Onyango Odel and Mr Mark Odagga and the 4th Applicant by Mr Jeremiah Mutobesya and Mr Anthony Oduol, all of whom are Learned Advocates;
 - b) Counsel for the 1st Respondent were: Mr Martin Mwambutsya, Director, Civil Litigation; Mr George Kalemera, Commissioner, Civil Litigation; Mr. Richard Adrole, Asst Commissioner, Civil Litigation; Ms Charity Nabaasa, Senior State Attorney and Mr Mugisha Twinomugisha, State Attorney;
 - c) The 2nd Respondent was represented by Mr Mark Mulwambo, Principal State Attorney; Ms Irene Tesuli, Principal State Attorney; Mr. Hangi Chang'a, Principal State Attorney; Ms Vivian Method, Senior State Attorney and Mr Stanley Kalokola, State Attorney; and

d) Dr Anthony Kafumbe - Counsel to the Community, represented the 3rd Respondent.

D. PRELIMINARY OBJECTIONS

14. When the parties appeared in for the Scheduling Conference, on 11th November 2022, it was agreed that the preliminary points of law should be addressed, namely:

- 1. Whether the Reference raises matters for the interpretation of the Treaty in line with Articles 23(1) and 27 of the Treaty for the Establishment of the East African Community;**
- 2. Whether the Reference has been brought within time as required under Article 30(2) of the Treaty for the Establishment of the East African Community; and**
- 3. Whether the pleadings are properly verified in accordance to (*sic*) Rule 46 of the East African Court of Justice Rules of the Court, 2019.**

15. The 1st Respondent raised Issues 1 and 2 and the 2nd Respondent raised Issue 3.

16. The jurisdiction of the Court over the matter having been raised as one of the preliminary issues for determination, will be addressed first. We shall then, contingent upon the outcome of this issue, address Issue 1 and close with Issue 3.

ISSUE No. 2: whether the Reference has been brought in time as required under Article 30 (2) of the Treaty for the Establishment of the East African Community

17. Mr Mwambusya, Counsel for the 1st Respondent, submitted that the Reference is time barred in as far as the challenge to the Inter-Governmental Agreement (IGA) is concerned, that evidence by both parties, illustrates that the IGA was signed on 25th May 2017.
18. That the Reference is also premature in respect of the challenge to the Host Government Agreement (HGA) as evidence of both parties illustrates that the same had not been signed by the time the Applicants filed the instant Reference on 6th November 2020. That the HGA was in fact signed on the 11th April 2021.
19. Mr Mwambusya submitted that while the Applicants contend that the Reference was filed within two months of the actions and omissions of the 1st Respondent which, according to the Applicants, last occurred on 11th September 2020 with the signing of the IGA, it is stated in the Project Update-Brief from EACOP dated 2nd December 2020, which is attached to the Applicant's Reply to the 1st and 3rd Respondents' Response to the Statement of Reference, that the 1st and 2nd Respondents are required to execute the Host Government Agreement in order to implement the Inter-Governmental Agreement for the EACOP project, signed between themselves on 25th May 2017.
20. Counsel referred to **Annexure C, of the Affidavit of Nkasiima Janet** in support of the Reference, filed on 2nd November 2020, which reiterates the same position.
21. He drew the Court's attention to **Article 30(2) of the Treaty**, which limits the lodgement of References to two months after an impugned

action was taken. He also invited this Court to take into account the decisions in **Attorney General of the Republic Uganda and Another vs Omar Awadh and Six Others, EACJ Appeal No. 2 of 2012**, and **The Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, EACJ Appeal No. 1 of 2021**, where, in both matters, the Court reiterated the limitation period and upheld the position that the Treaty does not grant the Court any authority to extend, condone, waive or alter the prescribed timeframe for filing.

22. The 1st Respondent's submission, in summary, was that the issues relating to the signing and implementation of the IGA cannot be adjudicated on for reasons that they were brought to Court outside the time period prescribed by the Treaty.

23. While the Applicants contend that the signing and implementation of the HGA between the 1st Respondent and Total Company to construct the EACOP Project was executed on 10th September 2020, the 1st Respondent states that at the time of filing the Reference, which was on 6th November 2020, the HGA had not been executed by the 1st Respondent. That it was only done on the 11th April 2021. That, this is stated in the Brief on the EACOP project dated 2nd December 2020, attached to the Applicants' Reply to the 1st and 3rd Respondents Response to the Statement of Reference. He submitted that the foregoing clearly demonstrates that the HGA had not been signed by the parties and that therefore, the Reference filed on 6th November 2020 is premature in as far as it seeks to challenge the HGA which had not yet been executed.

24. The 1st Respondent sought to brace his submissions with the Supreme Court of India decision in the case of **Vithalbhai PVT Limited**

exercising its discretion. He invited the Court to adopt the finding in that case for its persuasive value, that: *“the Court shall not exercise its discretion in favour of decreeing for the occurrence of a premature event.”*

25. The 1st Respondent reiterated that the Reference is time barred under Article 30(2) of the Treaty and prayed that the Court should dismiss it, with costs to the Respondents, since all the averments by the Applicants are premised on the signing of the IGA and for having been prematurely filed on 6th November 2020, before the HGA was signed.

26. On behalf of the 2nd Respondent, Mr Kalokola submitted as follows regarding the position of the law on raising and determination of preliminary objections and on the issue of limitation of time and want of jurisdiction under Article 30(2) of the Treaty:

27. He associated himself with the submissions of the 1st Respondent and addressed the Court on the challenge by the Applicants to the nature of preliminary objections raised.

28. That while the Applicants contended that the nature of the objections call for ascertainment of facts, the position in law is that the impugned facts pleaded could be invoked in the determination of points of law. That this is because some points of law touch on law and facts. He cited the decision of the Appellate Division of this Court in the case of the **Attorney General of the Republic of Kenya vs Independent Medical Unit** (supra), in which the Court was of the view that determination of a point of jurisdiction will call for analysis of both law and facts presented before the Court. He invited the Court to reflect on the facts pleaded in the Statement of Reference together with those facts pleaded in the Response, as presented by the Respondents, when determining the points of law raised.

29. In reply, Mr Semuyaba, Counsel for the Applicants, submitted that when the Court needs to evaluate evidence or when there is a contestation of facts between the parties, then any objection brought based on facts and evidence stops being a preliminary point of law because it will require the Court to evaluate what each party is alleging in order to come to a conclusion.
30. He drew the Court's attention to the fact that for a preliminary objection to succeed, the Court has to follow the principles that are well laid out in the case of **Mukisa Biscuits' Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A 696**. That, Court must avoid treating as preliminary objections, those points that are only disguised as such and will instead, treat as preliminary objections, only those points that are pure law, which are unstained by facts or evidence, especially disputed points of fact or evidence. He contended that all the Respondents in the instant case are raising their objections based on facts that require evidence to be adduced.
31. That, the dates upon which the Respondents dwell are in respect of the IGA yet the Applicant sued based on the HGA. He submitted that by that fact alone, the mere fact that the Applicant is saying, he sued based on the HGA and the Respondents are saying the matter is on the IGA Agreement, amounts to a disagreement which would not be resolved by a preliminary point of law.
32. He contended that the 1st Respondent's Media Centre communicated the signing of the HGA as being 11th September 2020 and that this is when the Applicant learnt of it as evinced in the Applicant's Reply to 1st and 3rd Respondents' Response to Reference and paragraph 5 of Nkasiima Janet's Affidavit filed on 9th April 2021. That the dates that can guide the Court on which date this Reference is based, can be

clearly found in the Statement of Reference. That the dates that the Respondents are trying to tell the Court to look at are not in respect of the instant Reference. He invited the Court to look at the Reference, that because the case that was brought to this Court is the case of the HGA and not the IGA case and that it can be seen very well when the HGA Agreement was signed.

33. Counsel Semuyaba further submitted that the basis of the Reference is largely on the HGA and the events of the HGA took place in 2020. That the Reference was filed on the 6th of November 2020 and that then, the case was still within time in accordance with Article 30 of the Treaty. That, the Reference was not filed prematurely as the 1st Respondent's media brief stated that the HGA was signed on 11th September 2020.

34. That the Reference was filed in compliance with Article 30(2) of the Treaty and is therefore not time barred and further that the disputations are matters of fact that cannot be subject of a preliminary objection.

35. He prayed that the preliminary objection should be dismissed.

36. In further reply, Mr Odagga, Counsel for the 3rd Applicant, submitted that the Respondents had all misdirected themselves in relation to what constitutes a preliminary objection. That they had severally invited the Court to refer to matters of fact from the pleadings, contrary to the long-established line of authority that preliminary objections fall squarely within the four walls of the pleadings submitted by the party on the other side. He cited the case of **Mukisa Biscuits** (*supra*).

37. Mr Odagga contested the Respondent's submission that the effect of the decision in **Attorney General of Kenya vs Independent Medical Legal Unit** (*supra*) is that this Court can consider matters in both fact

and law as preliminary objections. He contended that in that particular case the two preliminary objections raised involved a point of jurisdiction and an issue of limitations which were purely points of law. In that case, the Appellate Division held that:

“It is evident that the Court and all Counsel proceeded to treat these challenges as matters of preliminary objection. There was absolutely no challenge, let alone discussion, of the validity or otherwise, or whether the matters properly constitute points of preliminary objection. None of the Counsel, or indeed the Court itself, raised any such concern and objection. None was argued, canvassed or in any way adverted to. Instead, all concerned proceeded to address twin issues of jurisdiction and limitation as preliminary points of law.”

38. That this case, **Attorney General of Kenya vs Independent Medical Legal Unit** (*supra*), is on all fours with the present situation. He invited the Court not to allow itself to refer to anything outside the pleadings that were adduced by the Applicants. He further cited the case of **Mukisa Biscuit** (*supra*), in which it was stated that a preliminary objection arises as an argument on the assumption that the facts as pleaded by the other side are correct.

39. Mr Odagga contended that the representations by Counsel for the Respondents were simply submissions from the Bar that the HGA was signed and executed in 2021, and that the Inter-Governmental Agreement was signed in 2017. That, in his opinion, since these are matters that are disputed, the Court would invariably have to exercise its discretion, which it cannot. He contended that the manner in which the preliminary issues had been raised amounts to an abuse of Court

process and prayed that the Court treats it as such and dismisses the preliminary issues. He sought to rely on the case of **Attorney General of Kenya vs Independent Medical Legal Unit** (*supra*) in which it was held that where there is a misapplication of this nature, it is an abuse of Court process.

40. Mr Adrole, on behalf of the 1st Respondent, addressed the Court in rejoinder. He invited the Court to look at the Applicants' Rejoinder to the 1st and 3rd Respondents' Response to the Reference in which the Applicants attached an EACOP Project Update Brief dated 2nd December 2020 which, he says, states the date on which the IGA was executed. That it is not in dispute because the Applicants attached it and it is not contested by the 1st Respondent. That the Applicants in doing so reaffirm to the Court that that date is actually the date the IGA was executed, which resonates with the authority in **Mukisa Biscuits** (*supra*).
41. That further, in the Affidavit of Nkasiima Janet, deponed in support of the Reference, filed on 6th November 2020, it has a Brief from EACOP which points to the date the IGA and the HGAs were to be executed. That it is therefore not in doubt that those facts have been ascertained. That the Court should therefore not allow the Applicants to run away from these facts which have been ascertained.
42. Mr Adrole invited the Court to look at the pleadings, and drew the Court's attention to Paragraph 18 of the Reference where the IGA is under challenge. It states, "**...immediately after, on the 11th September 2020, the 1st Respondent signed an Inter-Government Agreement with the 2nd Respondent detailing the mode of cooperation in the development and operation of the EACOP.**"

That the Applicants cannot be allowed to depart from that position that is clearly stated in their pleadings.

43. He further invited the Court to find that Article 30 of the Treaty is a legal bar which does not allow the Court the flexibility to enlarge the time and cannot condone late filing. That it is a legal bar that favours the Respondent and which has to be adhered to by the Court.

44. He invited the Court to find that it does not have jurisdiction to determine the Reference as the same is barred by limitation and that the dates he mentioned are imperative when coming to the conclusion.

45. Mr Mulwambo, on behalf of the 2nd Respondent, addressed the Court in rejoinder to the submissions by the Applicant's Counsel. He drew the Court's attention to Paragraphs 18, 22 and 38(a) & (b) of the Reference wherein the Applicant specifically pleaded both the Inter-Governmental Agreement and Host Government Agreement to illustrate that the Applicants had knowledge since 2017 when the two countries had entered into an Inter-Governmental Agreement. He prayed that the matter be dismissed with costs.

E. COURT'S DETERMINATION

46. In their submissions, the Applicant and the 1st and 2nd Respondents all sought to rely on the case of **Mukisa Biscuits** (*supra*), which is the *locus classicus* on preliminary objections in this jurisdiction. In its own jurisprudence, this Court, in **Secretary General EAC vs Margaret Zziwa, EACJ Appeal No. 7 of 2015** has embraced the fundamentals of **Mukisa Biscuits** (*supra*) regarding preliminary objections. In **Margaret Zziwa** (*supra*), a preliminary objection consists of:

“... a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a

preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the Court or a plea of limitation...”

47. Premised on the foregoing position of this Court, which is still good law, the preliminary objections as raised for determination fall within the purview for consideration as such by this Court, as they are purely questions of jurisdiction, limitation and express matters of pleading as stipulated under the Rules.
48. However, according to the case of **Mukisa Biscuits** (*supra*), once there is a contest over any fact warranting evidence to be adduced to prove the assertion, then it is a matter of fact and not a point of law and should be heard on the evidence and merits. The objection will not succeed as a preliminary point of law, on that account.
49. With the foregoing rider in mind, this Court has addressed itself to the specific paragraphs of the Reference, namely; Paragraphs 18, 22 and 38 (a) & (b). We have also perused the Affidavit of Nkasiima Janet and its attendant attachments as requested by Counsel for the Applicant and the 1st and 2nd Respondents.
50. In consonance with the submissions and invitation to the Court made by Mr Odagga, Counsel for the 2nd Applicant, the pleadings and the respective attachments on file alone have informed the findings of our inquiry into whether or not the preliminary point of law raised can be sustained or otherwise.
51. Paragraph 18 of the Reference states that the Respondents signed the Inter-governmental Agreement on 11th September 2020.
52. Paragraph 22 states that prior to signing of the Host Government and the Intergovernmental Agreements, the alleged infractions or omissions transpired.

53. Paragraph 38(a) and (b) spell out the subject matter of the Reference. It is captioned: **“In the premises the subject matter of the reference is:”** and this is stated to be:

“(a) the signing of the HGA by the 1st Respondent and the IGA between the 1st and 2nd Respondents to build a pipeline that goes through protected areas; and

(b) the signing of the HGA by the 1st Respondent and the IGA by the 1st and 2nd Respondents without a certificate of approval and environmental impact assessment.”

54. The import of Paragraphs 18, 22 and 38 of the Reference is that both the IGA and the HGA are the basis of the challenge to the legality or otherwise of the Respondents’ actions and omissions presented in the Reference before this Court. This was indeed confirmed in the Court by Counsel Semuyaba when he was asked by the Court to read out the provisions of Paragraph 38 of the Reference, during the highlight of his submissions in Court.

55. In the circumstances, the dates of signing of the IGA and of the HGA are both material dates in considering when time starts reckoning for purposes of determining whether or not the Reference was lodged within the limits of time stipulated under Article 30(2) of the Treaty.

56. It is stated in the Brief from EACOP dated 2nd December 2020, which is attached to the Applicant’s Reply to the 1st and 3rd Respondents’ Response to the Statement of Reference, that the 1st and 2nd Respondents are required to execute the Host Government Agreements in order to implement the Inter-Governmental Agreement for the EACOP Project signed between themselves on 25th May 2017. Annexure C, of the Affidavit of Nkasiima Janet in support of the

Reference filed on 2nd November 2020, reiterates the same position. This confirms two things namely, that the IGA was signed in 2017 and secondly that the HGA was yet to be signed. The parties being bound by their respective Pleadings, common ground on this pivotal issue is established.

57. While the Applicants contend that the Reference was filed within two months of the signing of the HGA and that the Reference is exclusively premised on the HGA, these two positions are dispelled by the pleadings on record. The Applicants' own pleadings evince that the IGAs was signed in 2017, that the HGA was yet to be signed and Paragraph 38 of the Reference illustrates the indisputable nexus between the IGA and HGA.

58. Article 30(2) of the Treaty entreats all References filed in respect of infractions of the Treaty to be lodged within two months of the occurrence or omission of the infraction or of the day in which it came to the knowledge of the complainant. It states that:

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

59. As already stated, the Applicants had knowledge since 2017 when the 1st and 2nd Respondents entered into the Inter-Governmental Agreement. This forms the basis for computation of time. Time starts reckoning from the date the Applicants acquired knowledge, which, in the instance, is 2017.

60. Consequently, when the Applicants filed their Reference on 6th November 2020, this was well over two months after execution of the IGA. The Reference was therefore time barred and as is the long established jurisprudence of this Court and the delineation of its mandate by the Treaty, the Court does not have authority to extend, condone, waive or alter the prescribed timeframe for filing a Reference or claim- see **Attorney General of the Republic of Uganda & Another vs Omar Awadh & 6 Others** (*supra*).

61. This Court has a wealth of authorities on Article 30(2) of the Treaty which prescribes the timeframe within which an aggrieved resident of the Community can bring a Reference for determination before this Court. The Applicants, with the support of their Counsel, who are seasoned users of this Court, should have interrogated these authorities before bringing the Reference to this Court.

62. 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 the moment it holds that it is without jurisdiction. (See **Alcon International Ltd vs Standard Chartered Bank of Uganda, EACJ Appeals No. 2 of 2011**).

63. On the question of costs, Rule 127(1) of this Court's Rules provides that costs shall follow the event unless the Court, for good reason, decides otherwise. We find no reasons to deviate from the general rule.

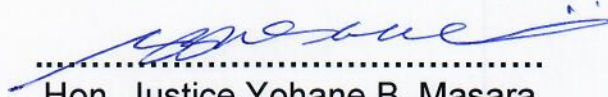
F. CONCLUSION

64. From the foregoing, the Reference is time barred and cannot be adjudicated upon for having been filed outside the time period prescribed by the Treaty. The Court therefore lacks jurisdiction *ratione temporis* to entertain the Reference.

65. The Reference is accordingly dismissed with costs awarded against the Applicants, jointly and severally.

66. It is so ordered.

Dated, signed and delivered at Arusha this 29th day of November 2023.



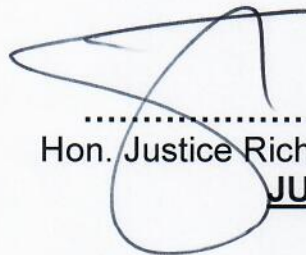
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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



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Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE



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Hon. Justice Richard Muhumuza
JUDGE



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Hon. Justice Richard Wabwire Wejuli
JUDGE



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Hon. Justice Dr Léonard Gacuko
JUDGE