



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



*(Coram: Yohane B. Masara, PJ; Richard Wabwire Wejuli, DPJ; Richard Muhumuza, Gacuko Leonard & Kayembe Ignace Rene Kasanda; JJ)*

**REFERENCE NO. 21 OF 2019**

**YU SUNG CONSTRUCTION LTD ..... APPLICANT**

**VERSUS**

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

**26<sup>TH</sup> NOVEMBER 2025**

## RULING OF THE COURT

### A. INTRODUCTION AND BACKGROUND

1. The Applicant filed **Reference No. 21 of 2019** seeking to recover US \$46,403,228.26 allegedly owed to it pursuant to the Respondent's failure to pay them for performance of a construction contract.
2. Sometime in 2008, the Respondent was granted a contract to build a military training complex known as Dr John Garang Memorial Military Academy and Natinga Warehouses in the Republic of South Sudan.
3. Along the way, the parties disagreed. While the Applicant claimed for outstanding sums of money, the Respondent alleged non-performance of the contract. The disagreement culminated into **Reference No. 21 of 2019**.
4. In the Reference, the Respondent did not file a Response at all. However, on the 31/8/2021, Mr Biong, appearing for the Respondent made an oral Application to file a Response out of time and was granted leave to do so.
5. Instead, on the 26/11/2021, the parties filed a Consent ostensibly signed on behalf of the Respondent by the said Mr Biong and extracted a Decree. The Consent was recorded and endorsed by the Court.
6. In a turn of events, the Respondent filed **Application No.1 of 2021** in which he sought to have the Consent decree reviewed and set aside on grounds that it was fraudulently entered without authority of the Respondent. The Application succeeded and the Consent decree was set aside in its entirety.

7. The Applicants appealed against the Ruling in **Application No .1 of 2021** whereupon the Appellate Court directed that the Reference be heard on its merits, *vide EACJ Appeal No. 11 of 2022*.

## **B. PARTIES**

8. The Applicant is a limited liability company incorporated under the Companies Act of Kenya. It's address for service is: *c/o M/s Semuyaba, Iga & Co. Advocates, Plot 65 Buganda Road, P.O. Box 12387, Kampala, Uganda.*

9. The Respondent is the Attorney General of the Republic of South Sudan, sued in his official capacity as the principal legal advisor to the Government of South Sudan. His address for service is: *Office of the Attorney General & Ministry of Justice, State Law Office, Juba, Republic of South Sudan.*

## **C. REPRESENTATION**

10. At the hearing, the Applicant was represented by Mr Justin Semuyaba of M/s Semuyaba, Iga & Co. Advocates, with Ms Cynthia Ogema holding brief for Prof. Patrick Lumumba of M/s Lumumba & Lumumba Advocates appearing via video link.

11. The Respondent was represented by Mr Elijah Mwangi Njeru of M/s Macharia, Mwangi & Njeru Advocates.

## **D. SCHEDULING CONFERENCE**

12. The Reference was set down for hearing on 19<sup>th</sup> November 2024. This Ruling arises from the hearing conducted on that day, wherein this Court reserved its decision on two preliminary issues; namely:

- i. **Whether the Court has jurisdiction to entertain the Reference; and**
- ii. **Whether the Reference was filed within the two-month limitation period prescribed under Article 30(2) of the Treaty for the Establishment of the East African Community.**

13. As recorded in the Court's proceedings of 19<sup>th</sup> November 2024, the Applicant formally withdrew **Application No. 42 of 2022**, which sought a stay of proceedings pending appeal, on grounds that it had been rendered moot by the Appellate Division's judgment in **EACJ Appeal No. 11 of 2022** directing that the Reference be heard on its merits. The Respondent raised no objection thereto and the Court duly marked the Application withdrawn.

14. The Applicant maintained **Application No. 14 of 2024** to summon witnesses. The Respondent did not object to its retention but reserved its right to oppose it pending resolution of the preliminary issues. The Court retained the Application, expressly noting that its fate is contingent upon the determination of the jurisdiction issue.

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

15. It is a foundational tenet of the jurisprudence of this Court, that questions of jurisdiction are not mere procedural niceties but the very bedrock upon which the edifice of its judicial authority is erected.

16. Jurisdiction is a most fundamental issue that a Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed. See **Rashid S. Adiy & Others vs Attorney General of Zanzibar, EACJ Reference No. 9 of 2016.**

17. Once raised, whether by a party or *suo motu* by the Court, the issue of jurisdiction assumes precedence over all other aspects of the proceedings and must be resolved *in limine* before any further steps are taken, including adjudication on the merits. This principle ensures the efficient administration of justice, averts the wastage of judicial resources on *ultra vires* proceedings, and upholds the rule of law by confining the Court to its jurisdictional limits as delineated in the Treaty.
18. The *locus classicus* adopted for this position in the East African Court of Justice's jurisprudential tradition is the Court of Appeal of Kenya decision in Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1 in which Nyarangi, JA, articulated the imperative with unyielding clarity, thus:

***"Jurisdiction is everything. Without it, a Court has no power to make one more step in the proceedings of a cause... A court without jurisdiction is a fish out of water, it cannot even flounder... A question of jurisdiction ought to be raised at the earliest opportunity and a Court should not allow a matter to proceed unless it is satisfied that it has the necessary jurisdiction."***

19. This *dictum* has been consistently embraced by this Court as reflective of the Treaty's architecture, specifically Articles 23, 27 and 30, which vest jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* in distinct, non-derogable bounds.
20. Subsequent East African Court of Justice authorities have steadfastly upheld and elaborated this position, framing jurisdictional challenges as threshold Issues No. 1, with merits deferred and only addressed upon affirmative resolution of jurisdiction, a position adopted in Audace

**Ngendakumana vs Attorney General of Burundi, EACJ Reference No. 11 of 2014**, where Court stated that:

***"We deem it necessary to consider jurisdiction first because the determination of all other framed issues depends first on whether this Court has jurisdiction."***

21. In **Plaxeda Rugumba vs Attorney General of Rwanda, EACJ Reference No. 8 of 2010**, (upheld on appeal), the Court *suo motu* interrogated its human rights jurisdiction under Article 27(2) of the Treaty before merits, underscoring that "*jurisdiction... can be raised at any stage either by the parties or suo motu by the Court.*" It is upon such precedence that this Court is emboldened to have raised the issue of arbitration, *suo motu*, in the instant case.

22. The landmark ruling on raising jurisdiction as a preliminary objection is the East African Court of Appeal (EACA) decision in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**, where Justice Law, JA (as he then was), stated that:

***"A preliminary objection consists of a point of law which has been pleaded, or which arises by necessary implication out of pleadings, and which if argued as a preliminary point may dispose of the suit... Examples of such points are an objection to the jurisdiction of the Court..."***

23. In the instant Reference, both of the framed issues raised on the 19<sup>th</sup> November 2024: the first one regarding substantive jurisdiction under Article 27 of the Treaty and the second one on temporal jurisdiction under Article 30(2), are quintessentially jurisdictional, implicating the

Court's competence *ratione materiae* and *ratione temporis* to adjudicate alleged infringements of the Treaty. Per the foregoing jurisprudence, we are duty-bound to address them upfront before venturing into the substantive merits of the Applicant's claim.

24. To that end, we shall first interrogate jurisdiction through the prism of the dispute resolution clause in the underlying contracts, the breach of which forms the gravamen of the Reference. The clause provides for amicable settlement failure upon which then the disputants are obligated to proceed to arbitration.

25. Only if this threshold is surmounted shall we proceed to the merits of the Reference.

26. As previously noted, the viability of **Application No. 14 of 2024** stands or falls with this determination.

27. We now turn to the merits of the question of jurisdiction.

28. Since both issues have the potential to dispose of the entire Reference, we propose to address jurisdiction jointly.

**Issue 1: Whether the Court has jurisdiction to entertain the Reference**

29. In the impugned transaction, the Applicant, Yu Sung Construction Ltd, derives its interest from Bethlehem Engineering & Construction Company Ltd. As Counsel for the Applicant expressly submitted, "***Yu Sung is Bethlehem Construction.***"

30. This position is substantiated by a letter dated 17<sup>th</sup> October 2007 from the SPLA General Headquarters (attached to the Reference), signed by Brigadier General Martin T. Kenyi, Director for Procurement, stating

that the SPLA Procurement Department agreed to transfer all construction activities to M/s Yu Sung Construction Co. Ltd. It is further corroborated by the Collective Report compiled by a Select Committee comprising officials of the Applicant and the Respondent, dated 16 July 2011, also attached to the Reference, which states:

***“the contract was awarded to Bethlehem Engineering Construction Co. Ltd, code-named Yu Sung Limited.”***

31. Clause 16 of the subject Contract for the Military College, entered between the Government of Southern Sudan and Bethlehem Engineering & Construction Company Ltd, provides:

***“All disputes arising out of or in connection with this agreement shall first be resolved amicably by the parties. Failure to reach an amicable solution, the dispute shall be referred to arbitration by the Ministry of Legal Affairs and Constitutional Development of the Government of South Sudan.”***

32. Counsel for the Applicant confirmed that the parties pursued the first limb, amicable resolution through a series of negotiation meetings, as expressly contemplated by the clause. He asserted that this process culminated in a binding compromise and that no dispute subsists, rendering arbitration unnecessary and the matter ripe only for enforcement.

33. However, this assertion stands in irreconcilable contradiction with the Applicant’s own conduct in instituting and vigorously prosecuting **Reference No. 21 of 2019**, which remains actively contested on the Court’s record. The filing of the Reference, the extraction of a consent

decree which was set-aside, the subsequent appeal to the Appellate Division, and the present insistence on oral evidence via **Application No. 14 of 2024**, all presuppose the existence of a live, unresolved dispute.

34. The Court cannot countenance a submission that simultaneously proclaims finality of settlement while pursuing judicial remedies, *vide* **Reference No. 21 of 2021**, premised on breach. Such a position is inherently self-defeating and undermines the integrity of the dispute resolution mechanism contractually agreed upon.

35. This Court consistently emphasizes the primacy of party autonomy in dispute resolution, viewing an arbitration agreement as a binding choice of forum that ousts its jurisdiction, unless the agreement expressly incorporates the East African Court of Justice as arbiter.

36. Failure to exhaust the arbitration process does not merely result in a stay of proceedings, instead, it leads to outright dismissal for lack of subject-matter jurisdiction (*jurisdiction ratione materiae*). This strict approach aligns with the Court's role as a supranational body promoting regional integration and reflects a policy of respecting contractual stipulations to prevent forum-shopping.

37. The rationale is twofold: first, the Court's mandate is treaty-centric, meaning purely contractual claims unrelated to Treaty interpretation fall outside its purview; second, arbitration agreements embody the parties' consent, which the Court upholds.

38. The Court has addressed this issue in a consistent body of case law, with appeals reinforcing the principles.

39. The seminal case directly on point is **Godfrey Kazinduka & 3 Others vs The Secretary General of the East African Community, EACJ Reference No. 8 of 2019**. In this matter, the Applicants entered into fixed-term consultancy contracts with the EAC Secretariat for policy advisory services.
40. The contracts included an express arbitration clause stipulating that any disputes would be resolved by arbitration under the UNCITRAL Arbitration Rules, seated in Arusha, Tanzania, but without designating the East African Court of Justice as the arbitral authority. When the Secretariat failed to pay outstanding dues, the Applicants filed a Reference claiming breach of contract and seeking payment, damages, and interest. They framed the claim as arising under Articles 7 and 8 of the Treaty. They did not initiate arbitration. The Applicants contended that the dispute implicated Treaty obligations and that exhaustion of arbitration was unnecessary as a local remedy.
41. The Respondent in **Kazinduka** (*supra*) argued lack of jurisdiction, asserting that the arbitration clause mandated UNCITRAL arbitration, not East African Court of Justice proceedings, and that the claims were purely contractual, not Treaty-derived. That parties must honour the arbitration agreement before approaching the Court.
42. The East African Court of Justice 's arbitral role is activated only if parties "confer jurisdiction" via the dispute resolution clause. In **Kazinduka**, the Court noted that the arbitration clause was "clear and unambiguous" in creating an exclusive forum for resolution.
43. The Court further held that exhaustion of arbitration is mandatory where agreed, bypassing it violates party autonomy. It relied on **Democratic Party and Aother vs The Secretary General of the East**

**African Community and Another, EACJ Reference No. 6 of 2011,** for the principle that agreed dispute resolution mechanisms must be exhausted before judicial intervention, analogizing to arbitration. In agreement with the Respondent, the Court dismissed the Reference (***Kazinduka-supra***), with costs to the Respondent, for lack of jurisdiction.

44. This precedent clarifies that "exhaustion" in arbitration contexts is jurisdictional, not merely procedural. Parties cannot "upgrade" a contractual dispute to a Treaty Reference to circumvent arbitration. The decision was not appealed, thereby solidifying its authority.

45. Subsequent cases have affirmed these principles: In **East African Law Society vs Secretary General of the East African Community, EACJ Reference No. 1 of 2020,** when dismissing a challenge to EAC procurement rules, the Court invoked ***& 3 Others (supra)*** to note that where underlying agreements contain arbitration provisions, References alleging Treaty breaches must demonstrate whether arbitration was exhausted or inapplicable. The ruling warned against using the East African Court of Justice as a "backdoor" for commercial claims.

46. The position taken in **Godfrey Kazinduka (supra)** and the **East African Law Society (supra)** cases had previously been applied by this Court. In **Plaxeda Rugumba vs Secretary General of the East African Community, EACJ Reference No. 8 of 2011,** the Court emphasized contractual arbitration, stating that:

***"Agreed alternative dispute resolution mechanisms, including arbitration, must be exhausted to avoid undermining the Court's limited mandate."***

47. By treating non-conferring arbitration clauses as ousting its jurisdiction, the Court aligns with Treaty objectives, including harmonized trade as anticipated by Article 5 of the Treaty. Critically, unlike the exhaustion of local remedies, arbitration exhaustion is non-waivable due to its consensual nature; disputants ignoring it do so at their peril, as the Court honours it strictly to deter "treaty-laundering" of commercial claims.

48. This body of law is coherent, precedent-driven, and promotes efficient dispute resolution.

## **F. CONCLUSION**

49. In light of the foregoing, this Court finds that the parties expressly agreed, in Clause 16 of the underlying Contract, to a mandatory two-tier dispute resolution mechanism: first, amicable resolution, and failing that, arbitration.

50. The Applicant's submission that the 2019 negotiations constituted a final, binding compromise is irreconcilably contradicted by its own institution and continued prosecution of the present Reference, which presupposes a live dispute.

51. The agreed arbitral forum has not been invoked, let alone exhausted. To entertain the Reference would therefore sanction forum-shopping and undermine the sanctity of party autonomy, principles this Court is duty-bound to uphold.

52. The East African Court of Justice's competence under Articles 27 and 30 of the Treaty is not engaged where parties have contractually designated an alternative arbitral forum.

53. Consistent with the Court's established jurisprudence, the existence of a valid, unexhausted arbitration clause ousts this Court's jurisdiction *ratione materiae*.

54. Notably, exhaustion of arbitration is not a procedural hurdle but a substantive precondition tied to the existence of jurisdiction. In the instant case, the arbitration clause does not name the East African Court Justice. The Court therefore lacks competence *ab initio*; the matter must be resolved via the designated arbitral route.

55. Where jurisdiction falters, the Court is "*precluded to rule on the merits*" – See: **Manariyo Désiré vs Attorney General of Burundi, Appeal No. 1 of 2016 [2017] EACJLR 23** and **Attorney General of the United Republic of Tanzania vs Anthony Komu, Appeal No. 3 of 2014] [2015] EACJLR 89** in which the Justices held that:

***"Where the Court... finds a manifest lack of jurisdiction, considerations of sound administration of justice dictate that the case is inadmissible".***

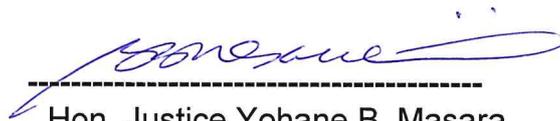
56. Accordingly, **Issue 1** is resolved in the negative: **this Court lacks jurisdiction** to entertain **Reference No. 21 of 2019**. There is no justification to proceed to the second limb of jurisdiction concerning limitation under Article 30(2) nor delve into the merits of the Reference, as the jurisdictional defect is dispositive.

57. Resultantly, **Application No. 14 of 2024** to summon witnesses, being wholly dependent on the subsistence of the Reference collapses.

**IT IS HEREBY ORDERED THAT:**

- a) **Reference No. 21 of 2019** be and is hereby **dismissed in its entirety**.
- b) The Applicant shall bear the **costs** of the Reference and all incidental and antecedent Applications.

**Dated, signed and delivered at Arusha this 26<sup>th</sup> day of November 2025.**



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



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



Hon. Justice Richard Muhumuza  
**JUDGE**



Hon. Justice Dr Leonard Gacuko  
**JUDGE**



Hon. Kayembe Ignace Rene Kasanda  
**JUDGE**