

**IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA**

*(Coram: Moijo M. ole Keiwua P, Joseph Mulenga VP, Augustino S.
L. Ramadhani J, Kasanga Mulwa J, Joseph S. Warioba J)*

REFERENCE NO. 1 OF 2006

PROF. PETER ANYANG' NYONG'O AND 10 OTHERS
..... **APPLICANTS**

VERSUS

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA
AND 5 OTHERS** **RESPONDENTS**

DATE: 27TH DAY OF NOVEMBER, 2006

RULING OF THE COURT.

The Applicants named above have brought a reference to this Court under Article 30 of the Treaty for the Establishment of the East African Community (“the Treaty”). In the reference they contend *inter alia* that the process by which the representatives of the Republic of Kenya to the East African Legislative Assembly (EALA) were nominated was incurably and fatally flawed in substance, law and procedure and contravenes Article 50 of the Treaty in so far as no election was held, and aver that the Clerk to the National Assembly of Kenya, 2nd Respondent, forwarded to the Clerk to the EALA, 3rd Respondent, an illegal list of names of Kenya’s representatives. They pray that this Court be pleased –

1. to interpret and apply the Treaty to the process of nomination and election of Kenya’s representatives to the EALA;
2. to declare that the Rules of Election applied by the Kenya National Assembly constitute a breach of Article 50 of the Treaty and is (sic) therefore void;

3. to declare that the process of election, selection and/or nomination of members to the EALA by the Republic of Kenya is null and void;
4. to declare that the 5th and 6th Respondents have no mandate to determine persons to represent the Republic of Kenya at the EALA;
5. to restrain and prohibit the 3rd and 4th Respondents from assembling, convening, recognizing, administering oath of office or otherwise presiding over or participating in election of the Speaker or issuing any notification in recognition of the following persons: Messrs Clerkson Otieno Karan, Safina Kwekwe Sungu, Gervase Akhaabi, Christopher Nakuleu, Sarah Godana, Abdi Rahman Haji, Reuben Oyondi, Catherine Ngima Kimura and Augustine Chemonges Lotodo as nominated representatives of the Republic of Kenya to the EALA;
6. to direct the Republic of Kenya through the 1st and 2nd Respondent [to] repeat its nomination and election process in compliance with Article 50 of the Treaty within reasonable time as the Court may direct;
7. to extend time within which the Republic of Kenya will transmit names of duly elected members to the 3rd and 4th Respondents for purposes of being sworn in as members of the EALA;
8. to make such further or other orders as may be necessary in the circumstances.

The reference was filed on 9th November 2006 along with an *ex parte* application by Notice of Motion for interim orders *inter alia* that pending the hearing and determination of the motion and of the reference this Court be pleased –

“to restrain and prohibit the 3rd and 4th Respondents from assembling, convening, recognizing, administering oath of office or otherwise howsoever presiding over or participating in election of the Speaker or issuing any notification in recognition of any names of persons as duly nominated representatives of the Republic of Kenya to the EALA.”

When the Notice of Motion came up for hearing *ex parte* on 17th November 2006, we considered that notwithstanding its urgency, its import warranted giving the Respondents opportunity to be heard. Accordingly we ordered that the Respondents be served so that the motion is heard *inter partes* on 24th November 2006. The Respondents were duly served and on the fixed day, the 1st Respondent appeared in person and the rest by counsel.

Prior to the hearing the 1st, 2nd, 5th and 6th Respondents gave notice that they would raise as a preliminary objection, this Court’s lack of jurisdiction to hear and determine the reference and to grant the restraining orders prayed for. In addition the 2nd, 5th and 6th Respondents objected to their being joined as parties to the suit. In view of the urgency of the application for the interim order, the primacy of the objection to the court’s jurisdiction and the need to determine early who are the rightful parties to a suit, and because of constraint of time, the Court directed at the commencement of the hearing that the three issues be argued together so that the decision on them may be given in one ruling.

Jurisdiction

The contention that this Court lacks jurisdiction to determine the reference was premised on an argument, articulated variously by the respective counsel for the Respondents, that in substance the reference was brought to challenge the election of Kenya’s nine representatives to

the EALA. It was stressed that “the Treaty for the Establishment of the East Africa Community Election of Members of the Assembly) Rules 2001” (the Election Rules) under which the nine representatives were elected were the same under which the outgoing representatives were elected, and that Applicants had fully participated in the election process under the same rules without protesting their illegality. It was only after the Applicants’ candidates failed to be elected that the reference was brought under the guise of seeking interpretation of the Treaty when the real purpose was to challenge the outcome of the election.

In his submissions, the learned Attorney General stressed that the initial jurisdiction vested in this Court under clause (1) of Article 27 of the Treaty is very restricted, and that the Court should not assume jurisdiction that is not yet vested in it or jurisdiction that is vested elsewhere. He maintained that jurisdiction over the interpretation and application of the Treaty does not extend to determining questions arising from elections of members of the EALA. He pointed out that in Article 52(1) the Treaty expressly reserves the jurisdiction to determine such questions to the appropriate institutions of the Partner States.

Mr. Wekesa, learned counsel for the 6th Respondent, sought to crystallize the argument. He submitted that under the Court’s jurisdiction vested by Article 27(1) of the Treaty, the Court was competent to consider and determine whether the Election Rules under which the National Assembly of Kenya proceeded in electing the nine representatives infringed Article 50 of the Treaty, but it was not competent to determine if elections carried out under those rules were lawful because by virtue of Article 52(1) that was the preserve of the pertinent national institution, namely the High Court of Kenya. Learned counsel invited the Court to decline to entertain the feigned reference for interpretation, which in his view was tantamount to abuse of court process.

It is common ground that by virtue of Article 27(1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty. Under Article 30, of the Treaty, the Court is empowered to exercise that jurisdiction by determining the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it on the ground that it is unlawful or it infringes provisions of the Treaty. Article 27(1) provides –

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty.”

And Article 30 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 the this Treaty.”

It cannot be gainsaid that in the reference the Court is called upon to determine if the process by which the Kenya’s representatives to the EALA were nominated and the Election Rules under which it was undertaken are unlawful or an infringement of Article 50 of the Treaty on Election of Members of the Assembly. The Article provides in clause (1) –

“The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.”

The Applicants maintain that what transpired was not an election, and the Election Rules used did not conform to the procedure as envisaged under the said provision. On the face of it therefore, in order to

determine the reference the Court has to decide what the expression “each Partner State shall elect” means and whether what transpired fits or does not fit within that meaning. We are satisfied that this is an issue that falls within the jurisdiction of this Court.

Wrongly joined parties

The objections to being joined raised by the 2nd, 5th and 6th Respondents were virtually on the same ground, namely that by virtue of the provisions of Article 30 of the Treaty they were wrongly enjoined to the reference and the motion. They maintained that under that Article, only an Act, regulation, directive decision or action of a Partner State or an institution of the Community may be referred to this Court. Although they were joined in their respective official capacities, they did not come within the ambit of Article 30 of the Treaty. The 2nd Respondent was sued as Clerk to the National Assembly of Kenya. The 5th Respondent, who is the Vice President of Kenya, was sued as Leader of Government Business in the National Assembly. The 6th Respondent was sued as Chairman of NARC-Kenya, a political party. The reason for joining the three Respondents is disclosed in paragraph 33 of the reference where the Applicants aver that the three “*colluded and connived in the violation of law as they usurped the authority of the Party Leader of the Ruling Party NARC and collectively robbed Kenyans of the opportunity to decide by democratic means their representatives to the EALA.*”

Mr Mutala Kilonzo, learned counsel for the Applicants, strenuously argued that since the natural person has the capacity to sue in this Court the natural person must have the capacity to be sued in the same Court under the Treaty. He urged the Court to give to Article 30 an interpretation that would bring natural persons who commit misfeasance

that infringe on provisions of the Treaty within the ambit of Article 30, to account for their actions.

With due respect to counsel for the Applicants, it appears to us that enjoining the 2nd, 5th and 6th Respondents to the reference was under a misconception. A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the Community. The alleged collusion and connivance, if any, is not actionable under Article 30 of the Treaty.

We think there is merit in the objections. The matters referred to this Court, whose legality it has to determine relate to the responsibility of the Republic of Kenya as a Partner State, acting by its National Assembly under Article 50 of the Treaty, to elect nine members of the EALA. Both the process of selecting the nine members whose names have been remitted to the 3rd Respondent and the Election Rules under which they were elected or selected were done by the Republic of Kenya through its National Assembly. It is for that reason that the Attorney General of Kenya was rightly made the 1st Respondent.

We are satisfied that the 2nd, 5th and 6th Respondents were wrongly joined to the reference and we order that they be struck off with costs.

Interim injunction

The clear purpose of the application for the grant of an interim injunction is to prevent the nine persons elected by the National Assembly of Kenya taking office as Members of the EALA until this Court determines whether or not the process of their election was unlawful or an

infringement of the Treaty. The Applicants contend that if the injunction is not granted there would be an irreparable damage because after taking office as Members of the EALA there is no legal means for removing them even if this Court subsequently determines under the reference that the process of electing them was not lawful.

It is not in dispute that in absence of any restraining order, the said nine persons will be sworn-in along with the Members elected by the National Assemblies of Tanzania and Uganda. The 3rd and 4th Respondents have confirmed in their respective affidavits that the commencement of the second EALA will be effected on 29th November 2006 and that all the elected Members will be facilitated to take the oath of office on that day.

The contentious issue is what would happen if they assumed office and subsequently this Court determined in the reference that the process of their election and the Election Rules used therein were an infringement of Article 50 of the Treaty. The learned Attorney General and both Mr. Macharia and Mr. Nyaoga the learned counsel for the 2nd and 5th Respondents respectively, contended that the Applicants armed with a declaration of this Court that the process and the rules were unlawful or an infringement of the Treaty would be able by virtue of the provisions of Article 52 to move the High Court of Kenya to annul the elections. However, the learned counsel for the 6th Respondent appeared to canvass a different view more akin to that of counsel for the Applicants. He submitted that such a declaration would have no consequence on the election that has already been carried out under the Election Rules that were competently and lawfully made under Article 50 of the Treaty by the National Assembly of Kenya. He opined that the declaration would be applied to the making of future procedure for the election of Members of the EALA.

We are constrained to state at the outset that the enormity of this application cannot be over emphasised. The subject matter of the restraining order prayed for is the EALA, a very important organ of the Community. The implications of declining to grant the order and of granting it are grave. In an affidavit in support of the application, Fidellis Mueke Ngulli deponed that if the order is not granted not only the Applicants will suffer irreparably but also *“the legitimacy of [the] EALA [will be] greatly imperiled by the unelected and irregularly wounded (sic) members from Kenya”*. On the other hand, in their respective affidavits opposing the application, both the 3rd and 4th Respondents deponed that *“the EALA in particular, and the East African Community in general stands to suffer great hardship if an injunction against the swearing in of the Members of the EALA is issued.”* –

It is trite law within the jurisdictions of the three Partner States in the East African Community, that an applicant who seeks an interim injunction must show a prima case with a probability of success. Secondly, a court will not normally grant an interim order unless it is shown that if the order is not made the applicant is likely to suffer irreparable damage or injury.

We have read the pleadings and documentary annexures so far filed in Court in the reference and in the motion. We also benefited tremendously from the very able submissions by all learned counsel who addressed us. We are satisfied that the applicants have shown that they have a prima facie case with a probability of success. This of course is subject to what pleadings the Respondents will bring in response to the reference. For obvious reasons, at this stage we would wish to refrain from discussing the merits of the case in any detail. The finding that there is a prima facie case with a probability of success is to say no more than that if the

Respondents do not put up any probable defence or response the Applicants would succeed.

We also think that the second criterion for the grant of an interim injunction is satisfied. It is apparent that in the present state of the law, the hearing and determination of the reference after the affected persons have taken office might not assist to prevent the alleged illegality being perpetuated. We are satisfied that not only the Applicants but also the EALA and the Community itself stand to suffer irreparable damage if it turns out that one third of the Members of the EALA were not legally elected. The fact that the out going Kenyan Members were elected in a similar manner in 2001, should not be a source of solace but rather should be a reason to determine soon if the process is illegal and ought to be rectified.

Accordingly, we hereby grant an interim injunction restraining the 3rd and 4th Respondents from recognizing the following persons as duly elected Members of the EALA or permitting them to participate in any function of the EALA until the final determination of the reference, namely -.

1. Clerkson Otieno Karan,
2. Safina Kwekwe Sungu,
3. Gervase Akhaabi,
4. Christopher Nakuleu,
5. Sarah Godana,
6. Abdi Rahman Haji,
7. Reuben Oyondi,
8. Catherine Ngima Kimura, and
9. Augustine Chemonges Lotodo

In this ruling we have given our full decisions on the three issues raised in this application. We shall, however, give our detailed reasons for the same later.

The costs of the application shall be in the cause.

Dated and delivered this -----day of November 2006

**MOIJO. M . OLE KEIWUA
PRESIDENT**

**JOSEPH. N. MULENGA
VICE PRESIDENT**

**AUGUSTINO. S . L . RAMADHANI
JUDGE**

**KASANGA MULWA
JUDGE**

**JOSEPH. S . WARIOBA
JUDGE**