



THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

(Coram: BUSINGYE Johnston PJ, Stella Arach Amoko DPJ,
Mkwawa John J, Butasi Jean Bosco J, Kubo Benjamin J)

APPLICATION N° 3 OF 2010

[Arising out of Reference NO. 7 of 2010]

BETWEEN

MARY ARIVIZA.....1st CLAIMANT
OKOTCH MONDOH.....2nd CLAIMANT

AND

ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA.....1st RESPONDENT
THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY.....2nd RESPONDENT

DATE: 1st DAY OF DECEMBER, 2010

RULING OF THE COURT

This is a ruling in respect of a preliminary objection raised in the above application when it came before us for hearing on the 28th, October, 2010.

The brief background is as follows:

Mary Ariviza and Okotch Mondoh the 1st and 2nd Claimants in this Application have filed a reference in this Court under Articles 5(1), 6 (c) and (d), 7(2), 8(1) (c), 27 (1), and 29 of the Treaty for the Establishment of the East African Community ("the Treaty"), Articles 1, 3, 7(1) and 9(2) of the African Charter on Human and Peoples Rights.

Their claim, briefly, is that the conduct and process of the Referendum as well as the promulgation of the new Constitution in the Republic of Kenya were contrary to law, infringed the Treaty for the East African Community and should be declared null and void.

The reference is pending before this Court.

At the time of filing the Reference, the claimants also filed the instant application for a temporary injunction praying for the following substantive Orders:

- 1) That the 1st Respondent be restrained and prohibited from receiving, tabling and or passing any legislation to implement the new constitution until the hearing and determination of this case.

- 2) That any new legislation passed by Parliament to implement the new Constitution be stayed until the hearing and determination of this case.
- 3) That the 2nd Respondent does commence an investigation, as provided by Article 29 of the Treaty for the Establishment of the East African Community, into the violation of the law and the Treaty by the 1st Respondent.

The main ground for the Application is that the 1st Respondent has begun the process of implementing the illegal Constitution by fast-tracking bills through the National Parliament to the detriment of the Claimants and, that, the Reference shall be rendered nugatory if the injunction is not granted.

In response to the application, Ms Wanjiku A. Mbiyu and Kepha Onyiso, learned Counsel for the 1st Respondent filed a notice of preliminary objection containing six grounds. At the commencement of the hearing they abandoned one and maintained the following five:

1. That this Court has no jurisdiction to hear and determine the reference because neither the Treaty nor any Protocol grants it jurisdiction.
2. That under Article 2(3) of the Kenyan Constitution, jurisdiction to hear and determine issues arising from the constitution making process was vested in the Interim Independent Constitutional Dispute Resolution Court (the "IICDRC") and hence this Court's jurisdiction is ousted.
3. That under Article 60 A of the replaced Constitution, the jurisdiction to hear and determine issues arising from the Constitution - making process was vested in the IICDRC and hence this Court lacks the requisite Jurisdiction.

4. That since the Constitution making process is within the sovereign power of Kenyans and this Court is not one of the organs through which such sovereignty can be exercised, it lacks jurisdiction to hear and determine this matter.
5. That the Court lacks jurisdiction to stop Parliament undertaking its legislative function.

Ms Wanjiku canvassed the preliminary objections. On the first one, she contended that the Court does not have jurisdiction to hear and determine the Reference as well as the Application as neither the Treaty nor any Protocol grants it such jurisdiction. She argued that Article 27 (1) gives this court jurisdiction to interpret and apply the Treaty but that the Reference as well as the present Application seeking for interim orders do not, in her view, come under the purview of Article 27(1). Equally, she contended that Article 27 (2) is not applicable in view of the fact that the jurisdiction of the Court envisaged therein is yet to be determined by a decision of the Council of Ministers of the East African Community.

On the second objection she submitted that Article 2 of the Constitution of Kenya provides that the validity of the constitution cannot be challenged in any forum including this Court.

On the third objection Ms Wanjiku contended that Section 60 (A) of the replaced Constitution of Kenya vested jurisdiction to hear and adjudicate issues pertaining to the referendum in the Interim Independent Constitutional Dispute Resolution Court (IICDRC) which was in existence and therefore this matter could not be a subject of determination by this Court.

She did not canvass the fourth ground.

On the fifth objection she contended that this Court does not have jurisdiction to stop the legislative process of implementing the Constitution in Kenya because the Constitution, as the Supreme Law, is very clear on the process of its implementation. Therefore, she argued, this Court lacks

jurisdiction to issue any injunctive or conservatory orders staying that process.

She prayed the Court to uphold the preliminary objection and dismiss the application with costs to the Respondents.

The 2nd Respondent was represented by Mr. Wilbert Kaahwa, Counsel to the Community. He associated himself with the submissions made on behalf of the 1st Respondent on the preliminary objection. He however made some additions.

First, he told the Court that under the Vienna Convention on the Law of Treaties, 1969, the Treaty for the East African Community is the "*grund-norm*" for the integration process and does not oust the sovereignty of the Partner States. He contended that this Court has no jurisdiction to entertain the Application and the intertwined Reference before it.

He referred the Court to the word "initially" used in Article 27 of the Treaty and contended that the extent of jurisdiction of the Court goes only as far as applying and interpreting the Treaty and not further.

Mr. Kaahwa argued that the present application is based on the claimant's dissatisfaction with the constitution making process and with the constitutional implementation in Kenya. He told Court that the replaced Constitution established the IICDRC and vested in it exclusive jurisdiction to deal with such disputes, that it had in fact done so, a fact the applicant is aware of. He therefore contended that the proper forum to pursue dissatisfaction with the Constitution making process in Kenya was the IICDRC not this Court.

Regarding disputes on the implementation of the Constitution, Mr. Kaahwa argued that the new Constitution provides, in its chapter 10, judicial organs with authority to address complaints that may arise during the legislative process in Kenya.

He finally told the Court that Constitutional matters also fall in the Executive and Legislative domain of States and that there are issues of public interest and political necessity that the court ought to take into account when addressing such matters.

The claimants were represented by Mrs. J.W.Madahana and Mr.Luka Sawe. Mrs. Madahana made the reply. We observe at this point that she did not respond to the matters raised in the preliminary objections in the order they were raised or in any ascertainable order. Be that as it may, the foregoing is what we were able to discern from her lengthy submissions.

First, she contended that the preliminary objection is misconceived because issues raised in preliminary objections should be, purely, legal yet, for example, the issue of whether there is a pending petition in Kenya's Constitutional Court similar in content to the present application is not an agreed fact.

Secondly she argued that it was also not agreed that there was a court established and still able to determine this case in Kenya as, from the legal point, it is no longer a Court.

She argued further that although the Respondents had relied on Article 27 of the Treaty to challenge the jurisdiction of this court, she was referring the Court to Article 6 (c) on peaceful settlement of disputes and (d) which sets out the fundamental principles of the Community including adherence to principles of democracy, rule of Law, accountability, transparency, social justice, and other values of Community.

She contended that here was a situation where there has been no adherence to the law and, citing a decision of the Constitutional Court of Uganda, in the case of **Paul K. Semogerere and 2 others Vs The Attorney General of Uganda, Constitutional Appeal N°1 of 2002**, urged the Court to find that it can do something, in other words, to find that it has jurisdiction and dismiss the preliminary objections.

Asked to identify for the Court specific acts that she was complaining of as violations of the Treaty, Mrs. Madahana told Court that non- gazzettelement of the notice of petition created a situation where the claimants felt that they were not satisfied with the way the referendum was conducted and the way the dispute arising there from was resolved. In her view this constituted a violation of Article 6 (c) and (d) of the Treaty which relate to peaceful settlement of disputes, adherence to democratic principles, rule of law and other values.

Additionally she argued that the gazzettelement of the results of the referendum before their petition was heard and determined constitutes a specific act that, in her view, violates the Treaty.

On the issue of sovereignty she argued that accession to the Treaty means ceding part of sovereignty and accepting obligations to be met so that citizens can enjoy rights conferred by the Treaty. In support of this argument she relied on a decision of this court in **Reference No 1 of 2006, Prof Peter Anyang Nyong'o and 10 others Vs The Attorney General of Kenya and 2 others.**

Mrs. Madahana referred the Court to its own judgment in **Reference N°1 of 2007, James Katabazi and 21 others Vs the Attorney General of Uganda and the Secretary General of the East African Community,** and said that Article 27 does not restrict the Court's jurisdiction and the Court cannot stand idly by when a fundamental principle that underpins civilization is trampled upon.

In reply Ms. Wanjiku repeated her conviction that the preliminary objections were valid and that this Court had no jurisdiction.

Likewise, Mr. Kaahwa reiterated his prayer adding that the requirement under Article 30 is a specific Act, regulation, directive, decision or action which is unlawful or an infringement of the Treaty, and not a generalized one as the claimants' application shows.

The preliminary issues raised and canvassed are all objections to the jurisdiction of this Court. What is sought, in effect, is a dismissal, *in limine*, of the application, and, by implication, the Reference out of which the application arose, for want of jurisdiction.

It is trite law that issues of jurisdiction, whenever raised, must be examined and determined forthwith because jurisdiction is the bedrock on which our litigation system is based.

In Modern Holdings Vs Kenya Ports Authority (Reference N°1 of 2008) this court took cognizance of ".....*the fact that jurisdiction is basic to its adjudicatory function, such that if it is challenged and made an issue, it ought to be addressed and determined forthwith....*"

The rationale for this, with which we concur, was aptly put by *Nyarangi J.A* in **Owners of Motor Vessel "Lillian" Vs Caltex oil (Kenya) Ltd [1989] KLR 1**, at p.14 where he stated that a question of jurisdiction ought to be raised at the earliest possible opportunity and the Court is obliged to decide on it right away. He went on to state that "*.....jurisdiction is everything. Without it a Court has no power to make one more step.....*"

In order to determine whether or not we have jurisdiction to hear this application or the reference, our task must be to examine the law, issues raised in the preliminary objections, the arguments of counsel, as well as authorities on the subject.

This Court is created by the Treaty and its jurisdiction is established by the same.

Article 23(1) of Treaty provides that the role of The Court shall be to ensure the adherence to law in the interpretation, application of and compliance with the Treaty.

Article 27 (1) provides that the Court shall initially have jurisdiction over the interpretation and application of the Treaty provided that the power to interpret shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Under Article 30 (1) the Court can determine the legality of an Act, regulation, directive, decision or action of a Partner State or an institution of the Community, referred to it by any person who is resident in a Partner State, on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty.

The Claimants' case is that the conduct and process of the Referendum as well as the promulgation of the new Constitution in the Republic of Kenya was contrary to law, an infringement of the Treaty and should be declared null and void.

They claim that the 1st Respondent is responsible for the said conduct and process, and the 2nd Respondent is responsible for inaction in the face of Treaty violations.

The Respondents' response is a denial in toto of the alleged violations and a contention that this court has no jurisdiction to entertain the reference.

Two Residents of the East African Community, alleging that a Partner State has committed acts that violate provisions of the Treaty for the Establishment of the East African Community, have come to the East African Court of Justice, a judicial body established by the Treaty and entrusted with the role of ensuring adherence to law in the interpretation, application of and compliance with the Treaty. Have those East African residents come to the wrong court? Have they brought the wrong action? Ought they to be heard?

The Respondents urged us to shut the door in the face of the Claimants and tell them we cannot hear them because we do not have jurisdiction. The Claimants, on the other hand, urged us to find that we have jurisdiction and hear both sides.

We agree with the Claimants. Whether or not there is merit in their claim is a matter to be considered and determined by this Court after hearing the Application and the Reference. Whether or not they have a right to bring this claim to this court and whether this court has jurisdiction to hear it are, in our view, settled matters.

We are fortified in this view by the decision of this Court in the case of **Professor Anyang' Nyong'o and Others Vs The Attorney General of Kenya and Others, Reference No 1 of 2006, at p.10**, where this Court stated as follows:

“The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions. In Article 23, the Treaty provides-

“The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty”.

It then provides thus in Article 27(1)-

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

The Treaty, being an international treaty among three sovereign states, is subject to international law on interpretation of treaties, the main one being the ***“Vienna Convention on the Law of Treaties.”*** The three Partner States acceded to the Convention on different dates; (Uganda on 24th June 1988, Kenya on 9th November 1988 and Tanzania on 7th April 1993). The articles of the Convention that are of particular relevance to this Reference are Articles 26 that embodies the principle of *pacta sunt servanda*, Article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and Article 31, which sets out the general rule of interpretation of treaties”.

In light of the foregoing we have no difficulty in finding and holding that the preliminary objection lacks merit. We accordingly overrule it and direct that the Application be heard on merit.

Costs shall be in the cause.

BUSINGYE JOHNSTON

THE PRINCIPAL JUDGE

MARY STELLA ARACH AMOKO

THE DEPUTY PRINCIPAL JUDGE

JOHN MKWAWA

JUDGE

JEAN BOSCO BUTASI

JUDGE

BENJAMIN PARTICK KUBO

JUDGE