



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



(Coram:Johnston Busingye, P.J, John Mkwawa, J, Jean Bosco Butasi, J.)

**APPLICATION NO.4 OF 2011
(Arising from Reference NO. 04 of 2011)**

OMAR AWADH OMAR AND 6 OTHERS APPLICANTS

VERSUS

**THE ATTORNEY-GENERAL
REPUBLIC KENYA.....1st RESPONDENT**

**THE ATTORNEY- GENERAL
REPUBLIC OF UGANDA 2nd RESPONDENT**

**THE SECRETARY-GENERAL
EAST AFRICAN COMMUNITY3rd RESPONDENT**

DATE: 1ST DECEMBER, 2011

RULING OF THE COURT

INTRODUCTION

The Applicants filed an Application before this Court by Notice of Motion under Rules 1(2), 4, 21 and 118 of the EACJ Rules and Article 30 (2) of the Treaty for the Establishment of the East African Community, (“the Treaty”). The Applicants are seeking for orders and interim orders that:

- a) This motion and any other pleadings/Applications by the Applicants touching on and/or arising from Reference No.4 of 2011 before this Court or connected therewith be lodged without payment of fees and fee in connection with the said Reference be waived and/or refunded as the case may be.
- b) Due to the nature and urgency of the Application, and to avoid irreparable injustice this Honourable Court be pleased to prohibit, restrain and injunct the Government of Uganda (the Second Respondent herein) and all institutions and/or persons and/or authorities hereunder, as the case may be, from proceeding with prosecution and/or trial of the Applicants pending the hearing and the determination of Reference No. 4 of 2011 before this Honourable Court.
- c) The time lag for institution of this Reference as prescribed by Article 30 (2) of the Treaty be condoned by extension of time and the Reference be deemed to be within time.
- d) The Costs incidental to this Application abide to result of Reference No.4 of 2011 lodged with this Honourable Court.

The Application is supported by the affidavits of Rabia Mohamed Omar, the wife of the 1st Applicant herein. In opposition to the Application is the response of Ms. Patricia Mutesi, Counsel for the 2nd Respondent.

BACKGROUND

According to the affidavit evidence and written submissions on the record it is discernible that the Applicants were arrested from the Republic of Kenya, taken to and detained in the Republic of Uganda where they have been arraigned on charges of terrorism allegedly committed in Uganda.

They maintain that their arrest, transfer to and detention in Uganda infringes the Treaty. It is against this background that they are before this Court seeking urgent intervention.

At the hearing Counsel for the Applicants dropped prayers (c) and (d), and maintained prayers (a) and (b) related to fees and injunction respectively.

Before the hearing of the Application could proceed Ms Patricia Mutesi, Counsel for the 2nd Respondent raised a preliminary objection, on limitation of time. The Court then allowed all parties to file their respective submissions on the objection.

This Ruling is in respect of that preliminary objection.

SUBMISSIONS

2nd Respondent's Submissions

Ms Patricia Mutesi, Counsel for the 2nd Respondent relied on the affidavits of Ms Robina Rwakoojo, the Acting Director of Civil Litigation in the Attorney General's Chambers, Kampala, Ms Joan Kagezi, Senior Principal State Attorney in the Directorate of Public Prosecutions, Kampala and that of Wilson Magomu, Seniors Superintendent in the Uganda Prisons Service, and told the Court that the acts complained of in the Reference happened between 22nd July and 17th September 2010. She pointed out evidence on the record that shows that the Applicants were at all times from the 22nd July 2010 aware of the acts they are now complaining of. She then showed the Court evidence that the Reference was filed on the 9th June 2011. She contended that the Reference on which this Application is based is itself out of time, that the Court

has no jurisdiction to extend the time and therefore the Court cannot proceed to grant interim or any orders on such an Application.

Citing Article 30 (1) and (2) of the Treaty Counsel for the 2nd Respondent submitted that the Reference should have been filed within two months from the date the acts complained of happened or from the date the Applicants became aware of them. The present Reference, she argued, meets neither of those Treaty requirements. She contended that the present Application which arises from the Reference is time barred.

She argued that Article 30 (2) of the Treaty reflects the principle that a cause of action arises when a state of facts occurs which gives a potential claimant a right to succeed against a potential defendant. She further argued that the Article also recognizes that where applicable, time to file a Reference does not begin to run until a claimant becomes aware of the alleged unlawful act or infringement complained of. However, after a person becomes aware of the said action, the stipulated time of two months begins to run and the time limit is thus imposed. She further contended that Article 30 (2) of the EAC Treaty does not legally recognize any “continuing” breach of violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant.

Counsel contended that although the Applicants had sought to rely on Rules 1(2) and 4 of the East African Court of Justice Rules of Procedure, (“the Rules”), those Rules do not grant the Court any jurisdiction outside the Treaty but are themselves subject to the provisions of the Treaty. In support of her stance she cited Article 9 of the Treaty which provides, inter alia, that Organs of the Community shall perform their functions within the limits of the powers conferred by/or under the Treaty.

1st Respondent’s Submissions

Mr. Edwin Okello, Counsel for the 1st Respondent, associated himself with the 2nd Respondent’s submissions and added that the proceedings provided for in the Article 30 (2) must be instituted within two months of enactment, publication, directive, decision or action complained of.

He further added that there is no provision within the Treaty that provides for extension of time. He further contended that the cause of action arose between 22nd July, 2010 and 17th September, 2010 and that; therefore, the Reference should have been filed by 17th November, 2010 at the latest.

3rd Respondent's Submissions

Mr. Agaba Stephen, Counsel for the 3rd Respondent, also associated himself with the 1st and 2nd Respondents' submissions. Citing Article 31 (1) of the Vienna Convention of the Law of Treaties he submitted that if the Court interprets Article 30 (2) of the Treaty strictly and gives it its ordinary meaning, the present Reference will be found to have been filed after the two month period provided under the above provision.

Counsel distinguished the case of **Independent Medical Legal Unit Vs the Attorney General of Kenya and 4 Others Ref. No.3. of 2010** where this Court held that "*failures in a whole continuous chain of events cannot be limited by mathematical computation of time*" from the present case. Firstly, he submitted that the Applicants did not show that they were abducted from Kenya and surrendered to Uganda illegally and that, therefore, the action complained of cannot be said to be still ongoing, when it did not even happen. Secondly, he argued, that the Applicants had not shown that the Republic of Uganda had failed to provide any remedy before coming to this Court.

Applicants' Response

Mr. Muturi Kigano, Counsel for the Applicants, in reply, submitted that it was not contested that the Applicants and Counsel were aware of the infringements complained of from July 2010. However, his contention is that the Republic of Kenya and the Republic of Uganda continue to violate the Treaty by continuing to detain or falsely imprison his clients to-date. Citing this Court's holding in ***Independent Medical Legal Unit vs The Attorney General of Kenya and 4 Others, Ref No 3 of 2010***, he submitted that the Treaty violations complained of were a chain of continuous acts and that, in a situation such as the Applicants are in, time cannot begin to run until the violations end.

DETERMINATION OF THE APPLICATION

We have carefully considered the evidence, the submissions as well as the applicable law on the subject. The following are our findings and conclusions:

Article 30 (2) of the Treaty provides 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 absence thereof , of the day in which it came to the knowledge of the complainants, as the case may be”.

This Court is alive to the strict limitations imposed by this provision. We also agree with the Respondents that proceedings can only be brought within two months of the unlawful act or infringement complained of, or of the day the complainant became aware of it.

The facts of the instant Reference, however, present us with the kind of unlawful acts, or treaty infringements which, if proved would, in our view, obviously be continuous and not capable of mathematical computation of time.

This can be discerned from Paragraphs 5 and 6 of the Reference which state that:

“5. On diverse dates between 22nd July 2010 and 17 September 2010 the Applicants were captured and abducted from various locations in the Republic of Kenya by officers from the Kenyan and Ugandan Police respectively in collaboration with officers/officials acting on behalf of the United States of America, Federal Bureau of Investigation (FBI) and were, after being illegally detained in various police stations in Kenya (without charge) for periods between 3 and 6 days, spirited across the border to Uganda in what is notoriously referred to as “rendition”.

“6. Upon rendition as aforesaid to date the Applicants have been shuffled between various locations, forests, police stations, military barracks/camps and prisons under the directions of the 2nd

Respondent.All the applicants are currently being detained at Luzira Prison, Kampala, Uganda.”

It can be further discerned from paragraphs 6 and 7 of the supporting affidavit of Rabia Mohamed Omar which, at paragraph 6 says, in part, that several Kenyan Muslims, inclusive of her husband, have been captured by and/or abducted by the Kenya Police and/or officers acting thereunder in cahoots and/or collaboration with officials from the Republic of Uganda and the United States Government and transported/ transferred and surrendered to Uganda. None of the victims have been subjected, before rendition to Uganda, to due legal process and/or recourse to due extradition process; and at paragraph 7 it states that:

“My said husband is in custody of the notorious Rapid Response Unit (para military) at Kireka, Kampala following violent capture, abduction and surrender as aforesaid. He has not been tried or convicted. He was abducted on the 17th September 2010 on Kimathi Street.....”

From the above cited parts of the Reference and affidavit evidence, it is clear that the acts complained of as unlawful include unlawful detention, detention incommunicado, denial of bail, vicious torture, continuous interrogation.

“Black’s Law Dictionary, 9th Edition, at p.514, defines “Detention” as “The act or fact of holding a person in custody; confinement or compulsory delay.”

The Online Encyclopedia, **Wikipedia**, defines “Detention” as ***“any form of imprisonment where a person’s freedom of liberty is removed.....”***

Loukès G. Loukaidès, in **“The European Convention on Human Rights: Collected Essays”**, at p.26, states, *inter alia*, that ***“ ...detention appears to be a typical case of a continuing violation initiated by an instantaneous act...”***

The common thread running through the above literature, with which we are respectfully in agreement, shows that detention is not a single happening,

rather it is a situation in which one's right of liberty stands removed. It is a constant state of affairs, that is to say, a continuing deprivation of a person's liberty.

We were invited by Counsel for the 3rd Respondent to interpret Article 30 (2) of the Treaty in accordance with the provisions of Article 31 (1) of the Vienna Convention on the Law of Treaties. The Article provides that:

“..a Treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the Treaty in their context and in the light of its object and purpose.”

We have given careful thought and consideration to the import of Article 30 (2) of the Treaty. We are of the decided view that its object and purpose could not have been to deny the people in East Africa the right to challenge continuing Treaty infringements of which they are victims just because it is over two months since such infringements started.

In ***Independent Medical Legal Unit vs The Attorney General of Kenya and 4 Others (supra)*** this Court held, in sum, that where matters complained of are failures in a whole continuous chain of events from when the alleged violations started until a claimant decides that a Respondent has failed to provide any remedy for the alleged violations, then such action or omission of a Partner State cannot be limited by mathematical computation of time. Counsel for the 3rd Respondent attempted to distinguish this case from the present Application. We are respectfully unable to find the distinction he laboured to establish. The issues whether or not the Applicants were abducted and surrendered to Uganda illegally and whether or not the Republic of Uganda failed to provide a remedy are matters for the merits of the case.

In our considered view, the violations complained of do not constitute an act, rather, it is our finding that they constitute a continuous chain of acts the occurrence of which the Applicants could not and cannot, until now, append a specific hour, day and month. For instance, while an unlawful arrest can be time specific an unlawful detention continues to be an unlawful act on each succeeding day until it is stopped.

CONCLUSION

In view of the foregoing, we have no hesitation in concluding that the alleged Treaty violations complained of in the present Reference are continuous to-date and cannot be subjected to mathematical computation of time.

Accordingly, we find and hold that Reference No 4 of 2011 is properly before this Court. Consequently, the present objection is hereby disallowed.

Costs shall be in the cause.

It is so ordered.

Dated at Arusha This 1st Day of December, 2011

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JOHNSTON BUSINGYE
PRINCIPAL JUDGE

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JOHN MKWAWA
JUDGE

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JEAN BOSCO BUTASI
JUDGE