IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION

AT ARUSHA

APPEAL NO. 1. OF 2011

(Coram: H. R. Nsekela P; P. K. Tunoi VP; E. R. Kayitesi, L. Nzosaba and J. M. Ogoola, JJA)

BETWEEN

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ..... APPELLANT

AND

INDEPENDENT MEDICAL LEGAL UNIT ..... RESPONDENT

Appeal from the Ruling of the First Instance Division at Arusha by J. Busingye, PJ; M. S. Arach Amoko, DPJ; J. J. Mkwawa, J. B. Butasi and B. P. Kubo, JJ, dated 29th June, 2011, in Reference No. 3. of 2010)

JUDGMENT OF THE COURT

FACTUAL BACKGROUND

The Appellant filed this appeal in the Appellate Division of this Court, challenging the Ruling of the First Instance Division dated 29th June, 2011 concerning Reference No. 1 of 2011 by INDEPENDENT MEDICAL LEGAL UNIT (``IMLU``), a Non-Governmental organization operating in Kenya. That Reference had its origins in the alleged executions and actions of torture, cruelty, inhuman and degrading treatment of over 3,000 Kenyan residents that took place in the Mount Elgon District of Kenya, between 2006 and 2008. Consequent upon the tragic situation, the Government of the Republic of Kenya was accused of failure to investigate those atrocities and of not taking any administrative, judicial or other measure to prevent or punish the perpetrators.

The Respondent in the First Instance Division canvassed the following five Preliminary Objections:

(1) The Jurisdiction of the Court;

(2) Non-compliance with Rule 24 of the EACJ Rules;

(3) Misjoinder of the 2nd, 3rd, and 4th Respondents;

(4) Cause of action against the 5th Respondent; and

(5) Limitation.

The First Instance Division held that the Court had jurisdiction to entertain the Reference; and decided that the Reference was not barred by limitation of time.

On 29th September 2011, the Appellant lodged an appeal against part of the above decision of the First Instance Division, citing nine grounds of appeal. The Appellate Division of the Court is seized of this appeal under Articles 23(3) and 35A of the Treaty establishing the East African Community (the ``Treaty``), and Rule 77of the EACJ Court Rules of Procedure.

APPEAL ON POINTS OF LAW: JURISDICTION AND LIMITATION.

The Court agreed with the parties to consolidate the nine grounds of appeal cited in the submissions of the Appellant into two points of law, namely:

(i) The learned Judges erred in law and in fact in arriving at the decision that the Court has jurisdiction to hear the Reference;

(ii) The learned Judges erred in law and in fact in arriving at their decision that the Reference is not time barred.

PRELIMINARY OBJECTIONS

Before considering the above substantive two grounds of appeal, the Court wishes to address, at the outset, one issue of paramount judicial importance affecting the Court's practice and proceedings, namely, the treatment to be accorded to applications for

preliminary objections. In the present Reference, the Attorney General of the Republic of Kenya as Respondent in the Reference before the Court below, raised two preliminary objections, challenging the jurisdiction of this Court to entertain this matter; as well as the time limitation on the Respondent/Applicant to institute this matter before the First Instance Division.

The Court below, in as far as can be ascertained, dealt with the two issues as a matter of course. In its scheduling conference of 2nd December 2010, as indeed in its Ruling of 29th June 2011, the Court below reiterated the fact that:

> *"This Ruling is in respect of preliminary objections raised by the Respondents to the Reference when it came for scheduling."*

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 of whether these matters properly constitute points of preliminary objection. None of the Counsel (nor indeed the Court itself), raised any such concern or objection and none was argued, canvassed or in any way adverted to. Instead, all concerned proceeded to address the twin issues of jurisdiction and limitation – as preliminary points of law. They all did this on the mutual assumption that, indeed, these were valid points of preliminary objection. All gave no heed at

all to the proper procedure for entertaining such preliminary objections.

This Court wishes to set the record straight, concerning the appropriate practice and procedure to adopt when faced with an application for a Preliminary Objection. The procedure was firmly established by the East African Court of Appeal in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**.

The purported preliminary objection in the **Mukisa case** was an application for summary dismissal of the suit for want of prosecution. The trial court overruled the application after hearing the Appellant`s counsel, but without calling upon the opposite counsel to reply; and without reading its reasons in open court. The Court then gave judgment in the substantive suit.

Upon appeal of that judgment, the issue of the original preliminary objections was raised afresh. The Appellant`s counsel contended that the matter (of summary dismissal of the suit for non-prosecution), had been raised under the guise of a preliminary objection – when it was not. It should have been raised in the form of an application by way of motion – accompanied by affidavits, and a reply by the plaintiff giving reasons for the delay in prosecuting the suit. The Court (LAW, JA) emphasized that the proper form should have been

a motion, and not a preliminary objection – which it was not. He underlined the essence of a preliminary objection as being:

> *"A point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point, may dispose of the suit".*

The President of the Court (SIR CHARLES NEWBOLD) – mindful of the paucity of "facts in that case, and the inevitable dispute as to what were the facts" – gave a succinct elaboration of this point, thus:

> *"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised raised if and fact has to be ascertained or if what is sought is the exercise of judicial disrection . The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop".*

It is abundantly clear from the above, therefore, that the adoption of a wrong procedure, disadvantages both the Applicant and the Respondent, as well as the judicial process itself. This is uniquely so where, as in this present Reference, the Parties disagreed virtually on every fact that gave rise to the background to the suit.

It is equally clear that the improper raising of points by way of preliminary objections ``*does nothing but unnecessarily increase costs and, on occasion, confuse the issues".* The Court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. In that way, it will 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 or such like.

JURISDICTION

The Appellant`s learned Counsel, Mr Ombwayo, raised the issue of the jurisdiction of this Court, submitting that ``*The learned Judges erred in law and in fact in arriving at the decision that the Court has jurisdiction to hear the Reference*``. He explained that the Reference in the Court below dealt with human rights violations carried out by the Respondent in contravention of the fundamental principles of the Treaty and similar provisions of other international conventions: notably Articles 4, 5(1), (5)(3)(f), and 6(d) of the Treaty.

Further, Mr Ombwayo asserted Article 27(2) presupposes that the Court has no jurisdiction to entertain a Reference based on a breach by a Partner State of the rights of her people, unless and until the EAC Council of Ministers will have determine so; and a Protocol operationalizing such extended jurisdiction will have been signed.

Mr Ombwayo forcefully submitted that the Reference does not merely refer to violations of human rights, but is indeed based on violations of human rights; because even the order sought by the Claimants in the Reference called for the enforcement of the human rights of the above victims..

In response to Mr Ombwayo`s submissions, learned counsel for the Respondent, Ms Kilonzo, averred that the State failed to investigate the allegations of human rights violations in the Mount Elgon District.

The Government`s failure to investigate those human rights violations, to prosecute and punish the perpetrators, and to afford relief to the victims, constituted a breach of the Treaty principles of the Rule of Law, Good Governance, promotion and protection of Human and People's rights, as expressly stipulated in Articles 5, 6 and 7 of the Treaty; and contravenes several International Conventions, International Law, as well as the Constitution and Laws of the Republic of Kenya.

As regards, the jurisdiction of the Court, Mr Deya (Amicus Curiae), stated that Article 27 of the Treaty implies that there is already jurisdiction for the Court. The Court has a wide mandate in that its duties include delivery of justice in the matter, to ensure that there is interpretation of the Treaty, and also to ensure that there is compliance with the Treaty. Taking into account the fact that the

alleged acts of omission and commission constituted mass atrocities and violations of criminal and civil laws, the Court should address all these from the point of view of the responsibility of the State towards its citizens. From that standpoint, this Court has jurisdiction to entertain the Reference.

Having regard to the above submissions of all three Counsel, we take the lower Court`s Ruling as our starting point for consideration of this ground of appeal on jurisdiction. That Court appears to have adopted, as its own decision, the sentiments expressed in the case of **James Katabazi & 21 Others v EAC Secretary General & Attorney General of Uganda (Reference No. 1 of 2007: Judgment of 1st November 2001** –

namely, that**:**

> ``*While the court will not assume jurisdiction to adjudicate Human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article27(1) merely because the reference includes allegations of human rights violations*``.

On that basis, the Court then pronounced its own substantive decision in virtually identical terms thus:

> ``*Similary, in this reference, the Court will not abdicate duty to interpret the Treaty merely because Human Rights violations are mentioned in the Reference*``.

It is from the above decision that the aggrieved Party came to us on appeal. The issue of jurisdiction, brought before this Appellate Division, is indeed a point of law stipulated by Article 35A of the Treaty. However, it appears that the Ruling of the First Instance Division relied only on **Katabazi case**. It is, therefore, quite clear that the First Instance Division abstained from categorically and effectually analyzing the allegations pleaded and discussed by both parties, to demonstrate how those facts were related to the Court`s decision on jurisdiction.

The significance and genius of the **Katabazi case** is not so much in the Court`s famous refusal "not to abdicate" its jurisdiction. Rather, it was the Court`s ability to find and supply, through interpretation of the Treaty, the source and basis for the Court`s jurisdiction in the circumstances of the case then before the Court. To this end, the Court in the **Katabazi case** proceeded to probe, to examine and to asses at great length and in great depth the source that allowed the Court to claim and exercise jurisdiction in the matter. They found and supplied the cause of action flowing from the Treaty (that was different and distinct from violation of the human rights) on which to peg the Court`s jurisdiction. Similary, in the instant Reference, the Court below ought to have gone beyond `` non abdication of power``. It should have delved into the cause of action and other considerations that provide the legal linkage and basis for this Court`s jurisdiction in the instant Reference, which is separate and

distinct from human rights violations. Sadly, they did not do so. Against such a linkage or nexus, **Katabazi case** has no mystic properties of a magic wand that cures all.

In these circumstances, we are of the view that the decision taken by the First Instance Division *that it would not abdicate its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of Human rights violations*``, was sound, because the EACJ is the Institution mandated to determine whether a Partner State has or has not breached, infringed, violated or, otherwise offended the provisions of the Treaty. However, we consider that the issue of jurisdiction as canvassed before the Court below, was a mixed question of both fact and law. Therefore, to come up with a decision on jurisdiction, the First Instance Division ought to have analyzed the allegations of lack of jurisdiction in the light of both the law and the facts as presented before that Court. Yet, it did not categorically and emphatically do so.

The Court`s reasoning and analysis of these issues was submerged and drowned in the lone reference to the **Katabazi case**, without the Court giving its own reasoning for its own decision. In doing so, the Court failed to observe the express requirement of Rule 68(5) of this Court`s Rules of Procedure, namely to provide the reasons for its judgment. That Rules provides in relevant parts, as follows:

"(5) *The judgment of the Court shall contain"`:*

...

(f) the points for determination,

(g) the decision arrived at,

(h) the reasons for such decision``.

Moreover, it also deprived both Parties to the Reference as well as us, the Appellate Division, of knowing the reasons for its judgment on this particular issue.

As adverted to above, Counsel Deya contended before us that the Court should have addressed the question of jurisdiction from the point of view of the responsibility of the State towards its citizens. We agree. The respective Partner States' responsibilities to their citizens and residents have, through those States voluntary entry into the EAC Treaty, been scripted, transformed and fossilised into the several objectives, principles and obligations now stipulated in, among others, Articles 5, 6 and 7 of the Treaty, the breach of which by any Partner State, gives rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Article 27(1), constitutes the cause of action in a Reference, such as the instant Reference. It is not the violations of human rights under the Constitution and other Laws of Kenya or of the international community, that is the cause of action in the Reference at hand. The Court below could have explored all these and more to establish the legal foundation for this Court's jurisdiction in this Reference. It did

not do so; and neither did it supply other substantive reasons for its peremptory holding.

In the premises, this Appellate Division could have opted to remit the matter back to the First Instance Division for a proper determination of the question of jurisdiction, especially in as much as that Division did proceed to adjudicate the second issue before it, namely: the time limitation imposed on the Applicant to bring its complaint to the Court within two months of the Government`s action. Upon reflection, however, we decline to do so. This is because the issue of limitation of time is equally before us in this appeal, as a ground of appeal. That ground, like the ground of jurisdiction of this Court, is properly before us, pursuant to Articles 23(3) and 35A of the Treaty.

LIMITATION

The main issue for determination before the Court below was whether or not the Reference was time barred. The Appellant averred that the acts complained of took place within a specified period of time which could be determined. However, the Respondent contended that the matters aforesaid are matters of a criminal nature which in effect concerned the Rule of Law and Good Governance, and do not actually have any statutory time limits, but had remained in limbo and unresolved. The Court below after considering both oral and written submissions canvassed before it by Learned Counsel for the parties, held as follows:

> "*Upon careful consideration of this point of objection, it is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations. We find that such action or mission of a Partner State cannot be limited by mathematical computation of time."*

Mr Ombwayo, contended before us that Article 30(2) of the Treaty was unambiguous and categorical that the Reference ought to have been instituted within the time specified therein. Moreover, he argued, it was easy to ascertain and subject the time within which the Reference could be lodged to mathematical computation of time on the basis of the reports of the tragic events in the Mount Elgon District since those reports were recorded and widely publicized.

Ms Kilonzo adopted her submissions in the Court below and added that there is no limitation of time in failing to file a reference on lack of investigation by the State because the obligation to investigate is of a continuing nature. She gave an example of persons accused of rape or murder who cannot challenge the statute of limitation against the crimes charged. Similarly, she contended, that the State cannot avail itself of such argument.

Ms Kilonzo also referred us to the case of **Moiwana Community v Surnam (Inter-American Court of Human Rights: Judgment of June 15, 2005).** This was a case on human rights with facts similar to the matter now before us. In that case the State of SURINAM in 1986 attacked a village called MOIWANA and massacred 40 men, women and children. Those violations occurred in 1986, when SURINAM had not yet become a signatory to the American Convention on Human Rights. In fact, it became a signatory on the Convention in 1987, one year after the State agents had attacked the village. The case was brought before the Court of Human Rights in 2005, 20 years after the fact; and the State submitted that the Court lacked jurisdiction to hear the application because the events in question took place before SURINAM became a signatory to the Convention.

It is worthy of note that in the **Moiwana case**, the Court distinguished between two violations; (i) those of a continuing nature; and (ii) those which had clearly occurred in the past.

Article 30 of the Treaty provides as follows:

> *" (1)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 this Treaty."

(2) *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 in which it came to the knowledge of the complainant, as the case may be..."*

It is clear that the Treaty limits References over such matters like these to two months after the action or decision was first taken or made, or when the Claimant first became aware of it. In our view, the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the Article above. Equally so, the Court below could not rule otherwise on the face of the explicit limitation in Article 9(4)to the effect that the Court must act within the limits of its powers under the Treaty.

To borrow from European Community jurisprudence, it is also a well established principle of law that the European Court of Justice can only act within the limits of the powers conferred upon it by the existing Treaties or any later conventions. Its jurisdiction must therefore be from specific provisions and does not extend beyond the defined area – See ***Halsbury`s Laws of England, 4th Edn., Volume 51.*** It follows, therefore, in our view, that this Court is limited by Article 30(2) to hear References only filed within two months from the date

of action or decision complained of, or the date the Claimant became aware of it.

In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit – see **Case 24/69 Nebec v EC Commission [1975] ECR 145 at 151, ECJ.** Again, no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty. The reason for this short time limit is critical – it is to ensure **legal certainty** among the diverse membership of the Community: see **Case 209/83 Ferriera Valsabbia Spa v EC Commission OJ C2009, 9.8.84 p.6, para 14, ECJ** quoted in **Halsbury's Laws** (*supra)* **Para 2.43.**

It must be made clear at the outset that the main complaint against the Appellant and the Government of Kenya is that it failed to investigate the alleged atrocities. It is obvious that the Government could not investigate unless it had knowledge of those violations. Various publications, reports and documents show beyond doubt that the Government had knowledge of those atrocities and the Respondent knew that the Government had the said knowledge through the following reports exhibited in the Court below:

i) The People Daily of 27 November, 2009 where IMLU had urged the Government of Kenya to make public the report of May 2008.

ii) Kenya National Commission on Human Rights subsequently released a report entitled ``*"The Mountain of Terror" - 2008*.

iii) The Report by Human Rights Watch released In July 2008 entitled "*All the Men Have Gone*``.

iv) The United Nations on May 26th, 2009 published a *"Report of the Special Rapporteur Phillip Alston on extrajudicial, summary or arbitrary executions*``.

v) The wide media and electronic coverage (July – August 2008) publicised the executions, torture and other atrocities committed against Kenyans resident in Mount Elgon by the four Respondents.

After consideration of the various reports, narrated herein above and whose copies were made public and availed to the Respondent, the Court finds that, firstly IMLU came to the knowledge of the acts complained of, at the earliest, in 2006; and, at the latest, in February, 2009; which was at least one-and-half years before the Reference was brought. Secondly, the reason advanced that there was no way to compute time is irrelevant, since all those reports were dated and widely circulated to the Public.

For the above reasons, we conclude that IMLU filed the Reference out of the prescribed time and consequently, the Reference is time - barred for not complying with the amended provision of Article 30(2).

CONCLUSION

In the result:

1. This appeal is hereby allowed.
2. The Reference lodged in the First Instance Division on 12th July 2010, is hereby ordered struck out for having been filed outside the time limit prescribed under Article 30(2) of the EAC Treaty.
3. Each party shall bear its own costs of the appeal.

It is so ordered.

Dated and delivered at Arusha this 15th **day of March 2012**

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Harold R. Nsekela

PRESIDENT

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Philip K. Tunoi

VICE PRESIDENT

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Emily R. Kayitesi

JUSTICE OF APPEAL

.....

Laurent Nzosaba

JUSTICE OF APPEAL

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James M. Ogoola

JUSTICE OF APPEAL