



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



APPEAL NO.4 OF 2011

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

BETWEEN

EMMANUEL MWAKISHA MJAWASI AND 748 OTHERS.....APPELLANTS

AND

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA..... RESPONDENT

**[Appeal from the Ruling of the First Instance Division of the East African Court
of Justice at Arusha by J. Busingye, PJ; M. S. Arach-Amoko, DPJ; and J. J.
Mkwawa, J. dated 29th September, 2011 in Reference No.2 of 2010]**

I

JUDGMENT OF THE COURT (27 April 2012)

Introduction

This is an appeal by EMMANUEL MWAKISHA MJAWASI and 748 others (“the Appellants”), represented by Mr. Mutembei of Gichuru & Co., Advocates, against the Ruling of the First Instance Division of the Court in Reference No.2 of 2010.

The Respondent is the REPUBLIC OF KENYA, represented by the Honourable Attorney General of the REPUBLIC OF KENYA.

I. Background to the Case

The Appellants are Kenyan citizens and former employees of the defunct East African Community (EAC) that collapsed in 1977.

Subsequent to the dissolution of the defunct EAC in 1977, the Partner States executed a Mediation Agreement on 14 May, 1984, for the division of the assets and liabilities of the defunct Community. Under that Mediation Agreement, each Partner State undertook the responsibility to pay out of its share of the defunct Community’s assets, the pensions and other terminal benefits of its respective nationals who had been employed by the EAC and its institutions prior to the division date of the assets. The division dates were different for each of the existing institutions as

indicated in article 1 (i) of the Mediation Agreement. However, the latest such division date was 30 June 1977.

Article 10.05 of the Mediation Agreement provided as follows:

“Each State shall:

(a) Pay its nationals employed by Corporations or GFS and retired from active services by the division date the pensions and other benefits due to them on account of such employment.

(b) Make provision for the pension rights and entitlement to other benefit accrued as of the division date in favour of its nationals in active service with such Corporations or GFS at that date.”

Interestingly, the Kenyan Government devised a somewhat novel way of dealing with the situation which arose as the consequence of the Mediation Agreement. In this regard, the ex-employees who were still in active service on the division date were given the option to take their EAC pension directly; or to join the Kenyan Public Service, including its Parastatals and State corporations. Through this latter option, many ex-employees of the defunct EAC were absorbed into the employ of the Kenyan Public Service. Conversely, those who took the option to retire were paid at once all their benefits, including additional pensions on the basis that their offices had been abolished in the EAC.

It was the Appellants' case before us and in the Court below that even

though they were absorbed into the Kenyan Public Service and other State agencies and were eventually paid their terminal dues by those organizations, they have not, however, been paid their corresponding dues for the services they rendered to the East African Community; yet they lost their employment at the EAC pursuant to the abolition of their offices.

The Appellants, therefore, averred that they are entitled to be paid by the Kenyan Government their EAC terminal benefits in accordance with their individual records for the services they rendered to the defunct East African Community before the division date -- including their pensions, additional pensions, provident fund, severance allowances, gratuity, redundancy, payment in lieu of notice, repatriation expenses, loss of office, benefits outstanding, accumulated leave, salary in lieu of notice, real value and compound interest until full payment.

It is common knowledge that the Appellants instituted two suits in the High Court of Kenya, which were later consolidated. The Appellants later petitioned the Kenya National Assembly, but also, in vain. It is on the basis of this background that the Appellants filed the Reference No.2 of 2010, before the First Instance Division of the East African Court of Justice (EACJ).

II. The Reference

It is to be recalled that in their Reference in the Court below, the Applicants (now Appellants) had prayed for declarations that the Respondent's refusal, neglect and/or failure to pay the Applicants their EAC terminal

benefits constitutes a breach of Article 6(d) and Article 7(2) of the EAC Treaty.

They also prayed for an order to compel the Respondent to pay their EAC terminal benefits including, but not limited to, one month's salary in lieu of notice, loss of office benefits, pension emoluments, outstanding/accumulated leave, repatriation expenses, real value and 7% compound interest until payment in full.

III. Respondent's Response

The Respondent opposed the Reference in the Court below. He raised the following objections which were agreed as issues by both parties during the Scheduling Conference, namely:

- (1) The Court lacks the jurisdiction to hear and determine the Reference;
- (2) The matter is *res judicata*;
- (3) The Reference is inadmissible in this Court since local remedies have not been exhausted.

Subsequently, however, the Respondent unilaterally added the following issues in the Respondent's written submissions after the hearing:

- (1) The East African Community Treaty of 2000 cannot be applied retroactively;
- (2) The Claimants' statements are mere allegations without any proof of how the Treaty or the various Conventions listed therein have been infringed by the Respondent or that the Respondent is a signatory to them;
- (3) The objectives of the Treaty under its Article 5 do not provide for the redress of previous injustices, if any, to entitle the Claimants to rely on Articles 6 and 7 of the EAC Treaty.

IV. Ruling of the First Instance Division

The First Instance Division considered all the above six preliminary objections, including those which had not been agreed upon by the Parties at the Scheduling Conference, and concluded with the decision that:

- (1) The Court has jurisdiction to hear the Reference;
- (2) The Reference is not barred by the doctrine of *res judicata* nor by the rule of exhaustion of local remedies;
- (3) The Court cannot entertain the Reference on account of no retrospective application of the Treaty;

(4)The Reference is accordingly struck out with costs to the Respondent.

V. The Grounds of Appeal

Aggrieved by the above decision of the First Instance Division, the Appellants lodged an appeal to this Appellate Division based on 8 grounds; but at its Scheduling Conference held on 16 March, 2012, this Appellate Division agreed with the Parties to reduce the grounds of appeal from eight to only three, namely:

- (1) Whether the learned Judges of the First Instance Division erred in law in finding that the East African Community did not have retroactive application in respect of the present case;
- (2) Whether the learned Judges of the First Instance Division erred in law when they made findings of fact with finality at the preliminary stage without a full trial;
- (3) Whether there was procedural irregularity in entertaining and determining the issue of retroactivity with finality without affording the Appellants notice for and an opportunity to present their submissions.

Ground 1: Whether the EAC Treaty has retroactive application for the instant case?

On this point, the Court below made the following finding:

“it is clear that the Claimants became aware of the acts/omissions of the Respondent complained of by 1998, when they filed the suit in the Kenya High Court. That was well before the Treaty entered into force in 2000. There is no contrary intention from the reading of the Treaty that it was to apply retrospectively and none has been established by the Claimants.”

That finding was contested by the Appellants with the argument that their case was within the scope of the EAC Treaty, since the time of their cause of action was not in the year 1998 as the Court below found. Counsel for the Appellants contended that the issue of non retroactivity of the EAC Treaty was not relevant to the circumstances of this case. He added that the Court below did not give the reasons why it chose the year 1998 as its reference point, in lieu of the years 2004 or 2009. He affirmed that the issue of non-payment of terminal benefits by the Respondent to the ex-employees for services they rendered to the defunct Community, was raised in Kenya's National Assembly on 5 August, 2009, and that the Respondent admitted to holding monies for payment to the Appellants and that non-payment was due to the fact that the beneficiaries could not be found or traced. Learned Counsel concluded that the admission of debt by Kenya, constituted an acknowledgement of the Applicants' debt and reactivated

their cause of action in this matter.

The Respondent contended the opposite position. He averred that the EAC Treaty 2000 was not applicable to the instant case by virtue of the principle of non retroactivity. He recalled the collapse of the former EAC (as it is briefly narrated in the background of this case). He stated that the employment of the Appellants ceased to exist on the division date of each institution and that no contrary intention by the founders of the new Community, has been shown by the Appellants. He concluded that, in the absence of any such contrary intention for its continuance, the current Treaty cannot operate retrospectively. Moreover, since this Court is a creation of the EAC Treaty of 2000, it cannot be seen to interpret and apply the EAC Treaty of 2000 to acts or facts that took place in 1977.

The principle of non retroactivity is a well known doctrine. It is generally applied in the jurisprudence of Public International Law. It constitutes a limit on the scope of a Treaty *ratione temporis* [see” O. DORR and K SCHMALENHACK (eds)], Vienna Convention on the Law of Treaties, Springes – Verlag Berlin Heidelberg 2012; A. BUYSE: “A Lifeline in Time-Non-retroactivity and Continuing Violations *under the ECHR*” In *Nordic Journal of International Law*, 75: 63-88, 2006, Pr Dr J. WOUTERS, Dr D. COPPENS, D. GERAETS: “The Influence of General Principles of International Law” <http://www.kuleuven.be> .

When a treaty is not retroactive, the consequence is that it cannot apply to any act or fact which took place or any situation which ceased to exist before the date of its entry into force.

Retroactivity of a treaty may derive either explicitly from the provisions of the treaty itself, or it may implicitly be deduced from its interpretation.

Upon closely and carefully reading the EAC Treaty, we did not find any provisions explicitly stating that the Treaty may be applied retroactively. We, then, turned to its interpretation in a bid to determine whether the framers of the Treaty had any intention to make the EAC Treaty retroactive.

The performance of this Court's duty in this regard, is guided by the Vienna Convention on the Law of Treaties. Article 2 (1) (a) of that Convention defines the instruments/treaties to which the Convention applies. The Article states as follows:

“For the purposes of the present Convention:

(a) ‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”

On the specific issue of non retroactivity, Article 28 of the Vienna Convention provides as follows:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or, any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

That Article helps in establishing the intention of the parties where this intention is not explicitly expressed in a particular Treaty. Such is the case with the EAC Treaty in the instant case.

This Court, therefore, needed to interpret the Treaty in order to establish whether the EAC founders manifested any intention to make their Treaty retroactive. Moreover, further guidance in this lies in Article 31 of the Vienna Convention which provides, *inter alia*, as follows:

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(1) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(2) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty...”

Consistent with the above guidelines, this Court interpreted the provisions of the EAC Treaty: it placed them against the objectives and purposes of the Treaty. We find that the intention of the framers of the new EAC Treaty of 2000 was to turn the page of the past and to build a new project for the future.

The context of the creation of the new EAC Community confirms that finding. The Preamble to the EAC Treaty leaves no doubt about the objective of putting a definite end to the defunct Community. The fourth paragraph of the Preamble clearly states that:

*“AND WHEREAS in 1977 the Treaty for East African Co-operation establishing the East African Community was **officially dissolved**,...” [emphasis added]*

The fifth paragraph of the same Preamble likewise underscores the fact of that “**dissolution**”, thus:

*“AND WHEREAS upon the **dissolution** of the East African Community the said countries signed ... the Community Mediation Agreement 1984 for the **division** of the assets and liabilities of the **former** East African Community.” [emphasis added]*

From the preambular paragraphs quoted above, it is patently clear that far from manifesting any intention to resurrect the old Community or its Treaty, the framers of the new Treaty made their intention abundantly obvious: namely, to officially dissolve the defunct Community and then, to divide and share out the assets and liabilities of the defunct Community among the three Partner States of the old Community. Accordingly, this Court agrees with the finding of the Court below that the EAC Treaty 2000 cannot be applied retrospectively. This particular point is put beyond any shadow of a doubt by Article 15.00 of the Mediation Agreement 1984, which stipulates that:

*“The Treaty for East African Co-operation, dated
6th June, 1967, is hereby abrogated.”*

The above finding leads the Court to examine yet another question: Was the application of non retroactivity **relevant** to the instant case?

The conditions specified by O. DORR and K. SCHMALENHACK (*supra*) for fulfilling the test of “relevant application” of the principle of non retroactivity, are as follows:

1. *Existence of a Treaty to which the Respondent is a party.* In the instant case, there exists the EAC Treaty.
2. *The absence of any intention of the parties to apply their Treaty retroactively.* In the instant case such absence has been amply demonstrated in the above Court analysis concerning the EAC Treaty.
3. *An act or fact which took place, or a situation which ceased to exist, before the entry into force of the Treaty concerned.* In the instant case, we have the alleged refusal by the Republic of Kenya to pay the terminal benefits of the former employees of the defunct Community in execution of the Mediation Agreement signed in 1984 **after** the dissolution of the Community in 1977.
4. *The entry into force of the Treaty is posterior to the act; fact or situation which constitutes the cause of action against the Respondent.* In the

present case, the EAC Treaty entered into force for Kenya on 7 July 2000, after the Appellants' claim which was already before the Kenyan High Court at Nairobi.

5. *The Claimant asks the Court for the application of the Treaty to the Party in respect of the act/fact which took place or situation which ceased to exist before the coming into force of the Treaty.* In the instant case, the Appellants prayed this Court to apply the EAC Treaty to their case.

From all the above, this Court finds that the instant case meets the necessary conditions for the principle of non retroactivity to be applied. In this regard, the Court considers the situation of the ex-employees of the defunct Community to have ceased to exist at the Community level from 14 May, 1984. That date was obviously way before the entry into force of the EAC Treaty in July 2000. We, therefore, agree with the Court below that the principle of non retroactivity is relevant to the instant case.

Consequently, the first ground of this appeal fails.

Ground 2: Whether the First Instance Division made findings of fact with finality at the preliminary stage without a full trial?

Learned Counsel for the Appellants contended that the question of non retroactivity was an issue of fact. From this stand point, he contended that the Court below could not, therefore, determine this point at the preliminary stage, without full trial.

The Respondent postulated a totally opposite understanding of the issue of non retroactivity of a Treaty. He averred that non retroactivity is a pure point of law, intertwined with jurisdiction, which the Court can even consider on its own motion.

We are of the view that the Court below applied the correct law. The objection of non retroactivity of a Treaty is a fundamental issue, one that goes to the root of the case. The court cannot avoid that question. It must determine it at the outset, before dealing with any other issues. True, it is not possible to deal with the objection of non retroactivity without considering the cause of action of the particular case. However, such consideration helps only to situate the objection in a certain period, and it does not transform the principle of non retroactivity into a matter of facts. We agree with the Respondent that objection of non retroactivity is interconnected with the question of jurisdiction. The Court must consider the question even where the Parties themselves fail to raise it. Indeed, it is incomprehensible that the Respondent omitted to bring it up at the Scheduling Conference in the Court below. Nonetheless, it is recognized, in our jurisprudence that for the attainment of substantive justice, a point of

law can and should be raised at any time during the course of the proceedings, preferably at the earliest available opportunity.

For these reasons, the second ground of appeal also fails.

Ground 3: Whether there was procedural irregularity for the Court below to entertain and determine the issue of retroactivity without the Appellants' submissions?

Under this ground the Appellants raised three distinct sub issues, which could be summarized as:

- (i) smuggling into the case the issue of non retroactivity, when the Parties had not agreed any such issue during the Scheduling Conference;
- (ii) denying the Appellants sufficient notice to respond to, and a fair opportunity to be heard on, the smuggled issue of non retroactivity (all in contravention of natural justice);
- (iii) raising non retroactivity as a preliminary point of objection, when it was not a point of pure law.

Counsel for the Appellants contended that the issue of non retroactivity of the EAC Treaty was not among those which were agreed upon by the Parties during the Scheduling Conference.

He averred that the point was introduced only subsequently in the

Respondent's written submissions after the hearing; but that, nonetheless, the Court proceeded to consider and determine that point with finality, without affording the Appellants effective notice to respond, or an opportunity to present their submissions thereon. He prayed this Court to find that all this amounted to a procedural irregularity; and to reinstate the case in order to enable the Appellants to present their submissions.

He averred that in determining the point and making a finding on it without full trial, the Court below contravened the well established principle of natural justice.

On the third sub issue, Counsel contended that non retroactivity is an issue of fact, not of law, which should not have been entertained by the Court below by way of a preliminary objection.

This Court considers that, even if it was not agreed upon during the hearing, the issue of non retroactivity was totally unavoidable. It fundamentally determines the applicability of the new Treaty to the Reference. Without prior determination of this point, the Court could not proceed even one step further. Nonetheless, the Court below should have afforded the Appellants the opportunity for effective notice to make their submissions on that point. The failure to do so constituted an irregularity. Nevertheless, the injustice occasioned has now been duly cured, in as much as the Appellants have been given the opportunity to submit on the point in this appeal.

Given our finding that non retroactivity is a fundamental point of law, we need not delve into or tarry long on the Appellants' sub issue of whether non retroactivity is a point of fact, which the Court below should not have entertained by way of a preliminary point of objection. It is evident from our analysis of the issue elsewhere in this judgment, that retroactivity is eminently a point of pure law, which this Court is not only entitled to raise on its own motion, but also to entertain as a point of objection that is capable of disposing of the entire case.

Therefore, the third and last ground of this appeal also fails.

VI. Effects of non Retroactivity to the Question of Jurisdiction

While recognizing the jurisdiction of this Court over the interpretation and application of the EAC Treaty, as provided for by Article 27(1), the Respondent argued that the instant Reference does not deal with the interpretation nor the application of the Treaty.

The Court below, considering the submissions of the parties, held that it had jurisdiction on the basis of Articles 27(1) and 23 of the Treaty, but that the EAC Treaty was not applicable to this Reference on account of the non retroactive application of the Treaty to that particular Reference.

Where then, one may ask, did the Court derive its jurisdiction, since the Treaty which normally confers the jurisdiction on the Court did not apply? Non retroactivity is a strong objection. When it is upheld, it disposes of the case there and then. As non retroactivity renders the Treaty inapplicable

forthwith, what else can confer jurisdiction on the Court? Non retroactivity leads the Court to the lack of jurisdiction.

This is the first time that this Court has been confronted with the issue of non retroactivity. The jurisprudence of other International Courts would help to illustrate the effects of non retroactivity; particularly so, concerning the consequential, but all-critical question of jurisdiction. In this connection, three cases come to mind:

(1) The Ambatielos case (jurisdiction), judgement of July 1st 1952; I.C.J. reports 1952, p.28;

(2) Mavrommatis Palestine Concessions (Greece v U. K.), 1924, P.C.I.J., (SER. B) No.3 (Aug.30) Publications of the Permanent Court of International Justice Series A – No.2; collection of judgements A.W. Sijthoff'n Publishing Company, Leyden, p. 194; and

(3) W. T.O., Brazil – Measures Affecting Desiccated Coconut, AB 1996 – 4, Report of the Appellate Body, page 15.

In all the three cases quoted above, the consequences of a finding of non retroactivity of a treaty, invariably led to a finding of lack of jurisdiction; and that was the end of the proceedings.

This Court has repeatedly underlined the effect of lack of jurisdiction. Without it, *“a Court cannot take even the proverbial first Chinese step in its*

judicial journey to hear and dispose of the case” – (see Appeal No.3 of 2011: Attorney General of the United Republic of the Tanzania vs. African Network for Animal Welfare, EACJ, Appellate Division, Judgment of 15 March, 2012, p.7).

Having in mind the effect of non retroactivity of a Treaty, the point should have been determined before any other issues in order to avoid the ambiguity contained in the final conclusion of the Ruling of the Court below, which held as follows:

“In conclusion, we rule that although the Court has the jurisdiction to hear the Reference and that it is not barred by the doctrine of res judicata or the rule of exhaustion of local remedies, nonetheless, it cannot entertain the Reference on account of the non retrospective application of the Treaty”.

For the above reasons, this Court finds that the EAC Treaty is non retroactive. It is not applicable to the present Reference. Consequently, the East African Court of Justice is not clothed with the jurisdiction to entertain it.

Before departing from this matter altogether, this Court is constrained to make the following observations. The framers of the new EAC Treaty of 2000 saw it fit--indeed desirable -- to interpose in the new Treaty the fact of the Mediation Agreement of 1984, which the three former Partner States of Kenya, Uganda and Tanzania had agreed a formula for dividing and sharing the assets and liabilities of the defunct Community, including the

settling of terminal benefits and pensions of the former employees of the defunct Community. The interposition of all these factors into the new Treaty was, thus, a deliberate and express action on the part of the Partner States. In our view, beyond mere recording of history, the interposition was done for a reason and a purpose - namely, to “revisit” or to “keep alive” the nexus between the Old and the New order of the East African integration (paragraph 2 of the Preamble); cooperation, former and future (paragraph 6 of the Preamble); and upgrading into a Treaty the Region’s Tripartite efforts of 1997-2000 (paragraph 9 of the Preamble); as well as breathing a fresh breath of oxygen into the important issue of the sharing and the management of the assets and liabilities -- including the welfare of the former employees of the defunct Community (paragraph 5 and 6 of the Preamble). The interposition of these factors was, thus, a clear statement by the new Community expressing its profound interest in the continued management of the assets and liabilities of its predecessor Community, and the welfare of the former employees of that defunct Community.

By analogy to municipal law, the Mediation Agreement on the sharing of assets and liabilities was the equivalent of drawing a Will and appointing Administrators/Executors to oversee and administer the Estate of the defunct Community. Conversely, the Mediation Agreement was the equivalent of the creation of a Trust and appointment of Trustees to oversee and manage the residue of the affairs of the defunct Community (see in particular Article 10 and Annex “F” of the Mediation Agreement). In either case, the Administrators/Executors or Trustees owe a duty of care to manage the Estate or Trust for the benefit of the beneficiaries (in this case the former Community employees), in accordance with the well known and

generally accepted norms and standards that govern Administrators, Executors and Trustees. In the event of any “audit” queries concerning the exercise of their duty, the Administrators, Executors or Trustees of the Estate or Trust must be held responsible and accountable.

From all this, Kenya’s former Community employees (who are the Applicants/Appellants before this Court), appear to have a genuine and legitimate basis for their grievance of injustice against the Kenyan State concerning the issue of their Community pensions.

Nonetheless, notwithstanding our being a court of justice, the jurisdiction for interrogating the merits (or demerits) of Appellants’ grievance lies not in this Court, on account of the non retrospective application of the new EAC Treaty of 2000. That jurisdiction properly lies with the national Courts and allied for a, in as much as the Mediation Agreement of 1984 effectively and definitively moved the management of the assets and liabilities of the defunct Community from the remit of the East African Community, to the realm of the various National States.

Conclusion

In the result, this Court dismisses all the grounds of the Appeal. Each Party shall bear their own costs of this appeal, and of the Reference in the Court below.

It is so ordered.

**DATED, AT ARUSHA
THIS 27TH DAY OF APRIL, 2012**

.....
**Harold R. Nsekela
PRESIDENT**

.....
**Phillip K. Tunoi
VICE PRESIDENT**

.....
**Emily R. Kayitesi
Justice of Appeal**

.....
**Laurent Nzosaba
Justice of Appeal**

.....
**James Ogoola,
Justice of Appeal**