



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



*(Coram: Jean-Bosco Butasi, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, J,
Isaac Lenaola, J, Faustin Ntezilyayo, J)*

REFERENCE NO.2 OF 2012

DEMOCRATIC PARTY..... APPLICANT

VERSUS

**THE SECRETARY GENERAL,
EAST AFRICAN COMMUNITY..... 1ST RESPONDENT**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF
UGANDA..... 2ND RESPONDENT**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF
KENYA..... 3RD RESPONDENT**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF
RWANDA..... 4TH RESPONDENT**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF
BURUNDI..... 5TH RESPONDENT**

29TH NOVEMBER, 2013

JUDGMENT

Introduction

1. The Applicant herein is the Democratic Party, a political organization in the Republic of Uganda registered under the Political Parties' and Organizations Act, 2005. It has sued the 2nd, 3rd, 4th and 5th Respondents in their capacities as principal legal advisers to their respective governments and vicariously liable for their actions while the 1st Respondent has been sued in his capacity as the officer mandated by the Treaty for the Establishment of the East African Community (**“the Treaty”**) to supervise the implementation of the said Treaty.
2. The Reference principally challenges the alleged failure by the 2nd, 3rd, 4th and 5th Respondents to make individual country declarations in acceptance of the competence of the African Court on Human and People's Rights in line with Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (hereinafter referred to as **“the Protocol”** and **“the African Court”** ,respectively). It is urged that the alleged failure to do so is an infringement of Articles 5, 6, 7(2), 8(1)(c), 126 and 130 of the Treaty and Articles 1, 2, 7, 13, 26, 62, 65 and 66 of the African Charter on Human and People's Rights (**“the African Charter”**) and the Protocol aforesaid. It is further urged that the said actions were a violation of the Vienna Convention on the Law of Treaties, 1969.
3. In that regard, the following declaratory orders are sought by the Applicant:

“a) That the acts of the 2nd, 3rd, 4th and 5th Respondents of failure or refusal and/or delay to make respective declarations to accept the competence of the African Court in line with Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and Peoples Rights and all other International Human Rights Conventions is an infringement of Articles 5, 6, 7(c), 126 and 130 of the Treaty for the Establishment of the East African Community and Articles 1, 2, 7, 13, 26, 62 and 66 of the African Charter on Human and People’s Rights the Vienna Convention on the Law of Treaties, 1969;

b) The demand made by the Applicant to the 1st, 2nd, 3rd, 4th and 5th Respondents to make their declarations to accept the jurisdiction of the African Court, despite the fact that they ratified the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and Peoples Rights and all International Human rights Conventions, has not been considered and the Applicant as an individual legal personality and other individuals in East Africa are aggrieved as they cannot have access to the Court because of the restrictions imposed by Articles 5(3) and 34(6) of the Protocol on the Establishment of the African Court requiring that the Court shall not receive any petition involving any State Party to the African Union which has not made any declaration under Articles 5(3) and 34(6) of the Protocol.

c) That failure/refusal and inaction of the 2nd, 3rd, 4th and 5th Respondents to deposit the said declarations is in itself an infringement of the fundamental principles contravention of the doctrines and principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally

accepted standards of human rights which are enshrined in those Articles of the Treaty of the Community in particular regard to peaceful settlement of disputes(sic).

d) The failure/refusal and inaction of the 2nd, 3rd, 4th and 5th Respondents to deposit the said declarations is in itself an infringement of Articles 5, 6, 7(2), 8(1)(c), 126 and 130 of Treaty for the Establishment of the East African Community which is founded on the African Charter on Human and People’s Rights and all other International Human Rights Conventions, International Law as well as their various National Constitutions.

e)That in the East African Community the following Partner States having signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights as follows:

	Country	Date of Signature	Date of Ratification	Date of Deposit
1	Burundi	09/06/1998	20/04/2003	12/05/2003
2	Kenya	07/07/2003	04/02/2004	18/02/2005
3	Rwanda	09/06/1998	05/05/2003	06/05/2003
4	Tanzania	09/06/1998	07/02/2006	10/02/2006
5	Uganda	01/02/2001	16/02/2001	06/06/2001

Are bound by the African Charter on Human and People’s Rights, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights and all other International Human Rights Conventions, International law as well as their various National Constitutions and

there is no justification for them to withhold the deposit of declarations to enable individuals and NGOs have access to the African Court and under Article 8(1)(c), 126 and 130 of the Treaty for The Establishment of the East African Community they are obliged to harmonize their laws to universally accepted standards of Human rights and abstain from any measures that are likely to jeopardize the achievement and objectives of the Treaty and the African Charter on Human and Peoples' Rights and all other International Human Rights Conventions, International Law as well as their various National Constitutions and laws.

f) The rule of law in East Africa requires that public affairs are conducted in accordance with the Treaty for Establishment of the East African Community Treaty and the acts of the 2nd, 3rd, 4th and 5th Respondents are a blatant violation of the rule of law and are unlawful and an infringement of the Treaty and the East African Community Integration.

g)The United Republic of Tanzania, another Partner State of the East African Community having signed, ratified, acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights went ahead and entered(sic) a declaration in conformity with Article 34(6) along with other African State parties as follows:

i) Burkina Faso: The court shall be competent to receive cases from individuals and NGOs with observer status within the African Commission on Human and Peoples' Rights. (signed on 14/07/1998 and deposited on 28/07/1998);

- ii) Malawi: Accepts the competence of the Court to receive cases under Article 5(3) of the Protocol. (signed: 09/09/2008 and deposited: 09/10/2008);**
- iii) Mali: Accepts competence of the Court to receive cases in accordance with Article 5(3) of the Protocol. (signed: 05/02/2010 and deposited: 19/02/2010);**
- iv) Tanzania: The Court may entitle Non-governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it in accordance with Article 34(6) of the Protocol. However, without prejudice to Article 5(3) of the aforesaid Protocol, such entitlement is only to be granted to such NGOs and individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania. (signed: 09/03/2010 and deposited: 29/03/2010);**

The 2nd, 3rd, 4th and 5th Respondents as other Partner States of the East African Community have no reason whatsoever to withhold their deposits of declaration.

h) The 1st Respondent being the Chief Executive Officer of the East African Community is mandated to play supervisory roles over all the Partner States of the East African community to ensure that they comply with the Treaty.

i) The Secretary General of the East African Community has failed to supervise the 2nd, 3rd, 4th and 5th Respondents to ensure that they deposit their respective declarations in order to make them conform to the Treaty for the Establishment of the East African Community, the

African Charter on Human and Peoples’ Rights, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights and all other International Human Rights Conventions, International Law as well as their various National Constitutions and Laws.

j) The 2nd, 3rd 4th and 5th Respondents as Attorney Generals of Uganda, Kenya, Rwanda and Burundi are vicariously liable for the actions of their respective Governments.

k) This Court is seized with jurisdiction to handle this matter by virtue of Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 21 of the East African Court of Justice Rules of Procedure as there are serious questions for determination by Court the legality of any Act, regulation, directive, decision or action of a Partner State or Institution of the Community on grounds that such an Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty(sic).

l) Costs of this Reference be provided for.”

Factual Background

4. The facts of the Reference are undisputed and they are as follows:

The Republics of Uganda, Kenya, Rwanda and Burundi are all signatories to the African Charter and the Protocol. Article 34(6) of the Protocol provides as follows:

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court

shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.

5. Further, Article 5 of the said Protocol provides as follows:

“1.The following are entitled to submit cases to Court:

- a) **The Commission,**
- b) **The State Party which has lodged a complaint to the Commission,**
- c) **The State Party against which the complaints has been lodged to the Commission,**
- d) **The State Party whose citizen is a victim of human rights violation**
- e) **African Inter-governmental Organizations.**

2. When a State Party has an interest in a case, it needs to submit a request to the Court to be permitted to join.

3. The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol.”

6. During the pendency of the proceedings, Rwanda complied with the provisions of Article 34(6) aforesaid and in a declaration dated 22nd January, 2013 under the said Article, it declared that:

“The African Court on Human and Peoples’ Rights may receive petitions involving the Republic of Rwanda, filed by Non-Governmental Organizations (NGOs) with observer status before the African Commission on Human and Peoples Rights and individuals, subject to the reservation that all local remedies will have been exhausted before the competent organs and jurisdictions of the Republic of Rwanda”.

7. When the above declaration was brought to the attention of the Applicant, the Reference as against Rwanda was withdrawn on 22nd August, 2013 and the only issue to address in that regard at the end of this judgment is costs, for or against the Republic of Rwanda.

8. With regard to the 2nd, 3rd and 5th Respondents, it is not contested that they have not filed any declaration pursuant to Article 34(6) aforesaid and that is the gist of the Applicant's Reference.

Case of the Applicant

9. The Applicant's case is contained in an Affidavit sworn on 19th January, 2012 by one Emmanuel Nsubuga, Secretary General of the Applicant political party and in submissions filed on 18th April, 2013 as well as a composite response to the Respondent's submissions, filed on 9th August, 2013. In summary, its case is as follows:

Firstly, that under Article 5(1) of the Protocol, only the African Commission on Human and People's Rights, State Parties and African Inter-governmental Organizations have automatic access to the African Court on Human and People's Rights and that the State parties at their discretion can grant NGOs and individuals access to the Court by making declarations similar to the one made by Rwanda on 22nd January, 2013 and by the United Republic of Tanzania on 29th March, 2010. By not doing so, the 2nd, 3rd and 5th Respondents have created a **“disturbing situation”** which has seriously affected **“the entire system of judicial protection of human rights at the regional and continental level”**.

Secondly, that the Applicant has made demands to the Respondents, including the 1st Respondent, to remedy the above situation but no action has been taken and the result is that there is no external mechanism for

protecting individuals from any excesses of the State with regard to human rights and there is, therefore, a great need to grant NGOs and individuals locus standi to institute cases directly against erring States.

Thirdly, that the failure/refusal, delay and inaction of the 2nd, 3rd and 5th Respondents to deposit the declarations aforesaid is an infringement of the fundamental principles of **“good governance, including adherence to the principles of democracy, rule of law, social justice and the maintenance of universally accepted standards of human rights”** which are enshrined in Articles 5, 6, 7(2), 8(1)(c), 126 and 130 of the Treaty which is itself founded on the African Charter.

Fourthly, that the State parties to the Treaty are members of the United Nations and subscribe to the principles contained in the Universal Declaration of Human Rights, 1948, and have also ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Human, Social and Cultural Rights (ICHSCR) and have institutionalized annual meetings of Human Rights Organizations to enable an exchange of views and sharing of progress on implementation of human rights programmes at national level in accordance with the above international instruments.

That this has been done in addition to inter-alia the development of an EAC Plan of Action on Human Rights and the draft Protocol on Good Governance.

Lastly, that by not depositing the declarations under Article 34(6) of the Protocol, the 2nd, 3rd and 5th Respondents' inaction has the inconsistent effect of limiting the right to freedom, liberty, fair hearing, freedom of association and have discriminated against the Applicant and its

members, as well as other citizens of East Africa who would wish to challenge human rights violations in the African Court.

10. That the complaints made in the Reference are therefore well founded and the Applicant is deserving of the declaratory orders set out elsewhere above.

Case for the 1st Respondent

11. The 1st Respondent filed a response to the Reference on 8th March, 2012 and submissions on 6th August, 2013 and his case is as follows:

- i) that no cause of action is disclosed against him on a plain reading of Article 34(6) of the Protocol which neither sets a time limit for the making of declarations nor does it render the making of such declarations mandatory.
- ii) that no provision of the Treaty obliges the 1st Respondent to compel a State Party to make a declaration in terms of Article 34(6) of the Protocol and the Reference is therefore misguided.

Further and in any event, this Court has no jurisdiction to determine the Reference as it is being called upon to interpret provisions of the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court and neither Articles 6, 7(2), 8(1)(c), 13, 27(1) and 30 of the Treaty confer such jurisdiction. That the right forum to address the Applicant's complaint is the African Court through the African Commission on Human and People's Rights and not this Court.

12. Regarding the 1st Respondent's obligations under the Treaty, it is his case that he has no supervisory powers over the Partner States as to their obligations under the African Charter and the Protocol and, therefore, there has been no

infringement of the Treaty to warrant a cause of action against him. In any event that he, out of abundant caution, indeed sought a clarification from the 2nd, 3rd and 5th Respondents as to the reasons why they had taken no action pursuant to Article 34(6) aforesaid but his letter dated 5th March, 2012 has elicited no response and so he has left the matter for the Court's determination.

13. It is his concluding argument that for the above reasons, the Reference as filed has no merit and should be dismissed.

Case for the 2nd Respondent

14. The 2nd Respondent filed a Response to the Reference on 23rd March, 2012 and urged the point that the delay in depositing a declaration under Article 34(6) does not in any way constitute a violation of any provision of the Treaty. In any case that since there is no time limit set to do so, no legal obligation is specifically conferred on any party to the Protocol in that regard and the Reference as crafted is vague, argumentative, scandalous, embarrassing and discloses no cause of action against the 2nd Respondent.

15. Further, that this Court has no jurisdiction to interpret any provision of the African Charter and its Protocols and should be dismissed with costs.

Case for the 3rd Respondent

16. The 3rd Respondent's case as contained in its response to the Reference dated 16th March, 2012 and a replying Affidavit sworn on 28th February, 2013 by Prof. Githu Muigai, the Attorney General of the Republic of Kenya, is that the Applicant has no locus standi to institute any proceeding in this Court or even in the African Court because it is neither an NGO with observer status before the African Commission on Human and People's Rights nor is it an individual with legal capacity within the context of the African Charter. This means that even if the Republic of Kenya had complied with Article 34(6) of

the Protocol, the Applicant would still not have been able to institute any cases directly to the Court, a fact that would render his Reference moot.

17. Further, that under Article 11(3) of the Treaty, it is the Summit that should review the state of good governance within the Community and Kenya has in any event adhered to the principles of good governance, rule of law, social justice and maintenance of universally accepted standards of human rights and has taken constitutional steps to bind all State organs, State offices and Public offices and all other persons to the same standards. In that regard, reference has been made to Articles 2(5), 2(6) and 10 of the Constitution of the Republic of Kenya which provide for the place of general rules of International Law and Treaties in the Laws of Kenya as well as national principles of governance including good governance and human rights, respectively. Reference has also been made to decisions of the High Court of Kenya where the government has been held liable for past violations of human rights and the point made is that Kenya has a robust judicial system that is capable of granting justice for alleged violations of human rights and there is no urgent need for recourse to any other court system including the African Court.

18. On jurisdiction, the 3rd Respondent has urged this Court to decline the invitation to assume jurisdiction in matters involving the African Charter and the Protocol and to hold that Kenya's discretion to deposit a declaration under Article 34(6) of the Protocol is not subject to this Court's jurisdiction.

19. Lastly, that since the Reference does not seek the annulment of any Act, regulation, directive, decision or action within the meaning of Article 30 of the Treaty as read with Rule 24 of this Court's Rules of Procedure, it should be struck out with costs as against the 3rd Respondent.

Case for the 5th Respondent

20. By its Response to the Reference filed on 26th March, 2012, the 5th Respondent has urged that this Court should “**declare itself incompetent to hear and determine this Reference**” and should instead dismiss it with costs as against the 5th Respondent for reasons inter-alia:

That in matters of good governance affecting the East African Community, only the Summit can review the state of affairs in that regard under Article 11(3) of the Treaty and like Kenya, the Republic of Burundi has taken all measures in its Constitution and the Treaty as regards adherence to “**the principles of good Governance, rule of law, social justice as well as recognition, provision and Protection of human and peoples’ rights in accordance with the provisions of the African Charter**”.

Further, that this Court has no jurisdiction to determine the Reference which is filed contrary to the provisions of Article 30(1) of the Treaty.

Lastly, that this Court has no jurisdiction to “**review the provisions of the Protocol to the African Charter ... on the Establishment of an African Court on Human and Peoples’ Rights.**”

Scheduling Conference

21. On 1st February, 2013, parties attended a Scheduling Conference convened by the Court and the following points were found to be subject to no dispute:

- a) that the 2nd, 3rd, 4th and 5th Respondents all signed, ratified and acceded to the Charter, the Protocol and the Treaty.
- b) that there are triable issues based on the provisions of Articles 6, 7, 27 and 30 of the Treaty for The Establishment of the East African Community.

c) that the 4th Respondent only deposited a declaration under Article 34(6) of the Protocol after the commencement of these proceedings.

22. The following were distilled as points of disagreement and which now require this Court's determination:

- 1) whether the Court has jurisdiction to entertain this Reference.**
- 2) whether the issues as presented were justiciable.**
- 3) whether the Application discloses a cause of action against the 1st and 4th Respondents.**
- 4) whether the Applicant has locus standi to present the Reference.**
- 5) Whether the delay by the 2nd to 5th Respondents to deposit their respective declarations is a violation of Articles 5, 6, 7, 8(1)(c), 126 and 130 of the Treaty; Articles 1(2), 7, 13, 26, 62, 65 and 66 of the African Charter on Human and People's Rights (the Charter) and Articles 1, 3, 5, and 34 of the Protocol on the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the Protocol).**
- 6) Whether the 1st Respondent has a duty under the Treaty, the Charter or the Protocol to compel and/or supervise the 2nd, 3rd and 5th Respondents to deposit declarations under Article 34(6) of the Protocol.**
- 7) Whether the parties are entitled to the remedies sought.**

DETERMINATION OF THE ISSUES

Applicable Rules and Principles of Interpretation

23. The Treaty, as has been stated previously by this Court, is an International Treaty and subject to International Law of Treaties and specifically Article 31(1) of the Vienna Convention on the Law of Treaties which has set out the general rule in the interpretation of treaties as, that:

- a) a treaty shall be interpreted in good faith and
- b) in accordance with the ordinary meaning to the terms of the Treaty in their context, and
- c) in the light of the object and purpose of the Treaty.

24. We shall apply the above principles in determining the issues framed above and in addition, we shall be guided by, and remain faithful to the jurisdiction conferred on this Court by the Treaty.

Issue No.1: Whether this Court has Jurisdiction to entertain the Reference

25. The objection made by the Respondents jointly and severally on this issue is that because the Applicant's complaint is principally premised on the question whether the Respondents' delay in depositing declarations pursuant to Article 34(6) of the Protocol, then this Court has no jurisdiction over the dispute and that the proper forum to resolve it is the African Court on Human and Peoples' Rights through the African Commission.

If that be so, then the issue of jurisdiction is one that this Court has on more than a dozen occasions addressed - see for example *Mtikila & Others vs Attorney General of the United Republic of Tanzania Ref. No.2 of 2007*. But what is the meaning that we shall attribute to “**jurisdiction**” in the context of the issue at hand? We agree with counsel for the 2nd Respondent that the

definition given in the **Dictionary of Words and Phrases Legally Defined** is appropriate in the present circumstances where it is defined as:

“The authority which a Court has to define matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are inspired by statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means”.

26. The jurisdiction conferred on this Court following the above definition is to be found in Article 23(1) of the Treaty which provides as follows:

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

27. A closely related but distinct provision is Article 27(1) of the Treaty which states that:

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty: provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States”.

28. The Treaty, and of importance in the present Reference, also provides in Article 30 that:

“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;

3. The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”

29. The Respondents have urged the point that since the Court’s jurisdiction is limited to **“the interpretation and application of the Treaty”**, no jurisdiction is conferred on it to interpret other Treaties or international instruments such as the Charter and the Protocol. That may well be true but, with respect, the Respondents have completely misunderstood what jurisdiction is in the present context.

30. Jurisdiction is quite different from the specific merits of any case and their arguments on this point will best be addressed when dealing with issue No.5: *whether the delay in depositing declarations is an infringement of the Treaty.*

31. As it is, it should be noted that one of the issues of agreement as set out by the parties is that there are triable issues based on Articles 6, 7, 27 and 30 of the Treaty. That is correctly so because once a party has invoked certain relevant provisions of the Treaty and alleges infringement thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 determine whether the claim has merit or not. But where clearly the Court has no jurisdiction because the issue is not one that it can legitimately make a determination on, then it must down its tools and decline to take one more step-

(see *Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd 1989 [KLR]1*).

32. Indeed, this Court has in the past ruled that it has no jurisdiction in a number of cases including:

a) *Modern Holdings Ltd (EA)Ltd vs. Kenya Ports Authority, Ref. No.1 of 2008* where the court stated that it had no jurisdiction because the Respondent could not be properly sued since it was not a surviving institution of the former East African Community to be sued within the contemplation of the Treaty.

b) *Mtikila vs. Attorney General of the United Republic of Tanzania (supra)* where the court held that it had no jurisdiction to entertain an application filed to seek an annulment of elections held by the National Assembly of Tanzania.

33. None of the above situations can properly be invoked in the instant case. This is because the Applicant has specifically alleged that the Respondents' actions or indeed alleged inactions are an infringement of Articles 5, 6, 7(2), 8(1)(c), 23, 27(1), 30, 33, 126, 130 and 131 of the Treaty and this Court can properly interrogate that complaint within its Treaty – given mandate and whether indeed the complaint is meritorious is not a matter of jurisdiction per se.

34. Turning back to the issue whether this Court can purport to interpret the provisions of other Treaties, the issue is simple and portends no difficulty at all because jurisdiction is conferred by '**a statute, charter or commission under which a court is constituted**'. In the case of this Court, the Treaty confers jurisdiction and we have explained above in what instances and specifically under Article 30. The same Article denies jurisdiction in other instances but where violation of it is alleged, the Court cannot shy away from its jurisdiction

to interrogate those allegations. We are of course aware that this Court in the case of **Rugumba vs Attorney General of Rwanda, Reference No.8 of 2010** invoked the African Charter on Human and People's Rights to find in favour of the Applicant but it must be understood that the said finding was made in the context of specific violations of Article 6(d) of the Treaty and not the Charter per se.

We shall therefore hold and find that we have the requisite jurisdiction to determine the issues raised in the Reference, but subject to what we shall say later about the Court's jurisdiction as regards interpretation of other international instruments and specifically the African Charter and the Protocol.

Issue No.2: Whether the Issues raised in the Reference are Justiciable

35. On this issue, the Respondents made the point that the issues raised are not justiciable in that it is not the province of this Court to compel a Partner State to perform a purely Executive function.

36. The Applicant on the other hand went into great detail to show why the issues raised are all about access to justice and that the defence of sovereignty is not available to the Respondents since they ceded part of their sovereignty when they acceded to the African Charter and the Treaty. That once this was done, then by denying NGOs and individuals access to the African Court, the Respondents were acting in violation of the Treaty and the issues placed before the Court are, therefore, justiciable.

37. **“Justiciable”** has been defined to mean **“of a case or dispute properly before a Court of Justice; capable of being disposed of judicially in a justiciable controversy”** – **Black's Law Dictionary, 9th Edition** **“Justiciability”** has been defined in the same dictionary as **“the quality or state of being appropriate or suitable for adjudication by a Court”**.

38. Of interest in the Black's Law Dictionary at page 943 is the following statement:

“Concepts of justiciability have been developed to identify appropriate occasions for judicial action The central concept often is elaborated into more specific categories of justiciability - advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions and administrative questions.”

39. The 2nd Respondent in submissions has specifically made the argument that the issues raised involve political questions which the Court should refuse to take cognizance of or decide, on account of their purely political character, or because their determination would involve an encroachment upon the Executive or Legislative domains.

40. All the arguments made by the Respondents on this point would otherwise have had merit but for the fact that in the Scheduling Conference, parties agreed that **“the Reference raises triable issues based on the provisions of Articles 6, 7, 27(1) and 30 of the Treaty....”** We hold the same view and in discussing the issue of jurisdiction, we alluded to the fact that once there are triable issues, then the Court, barring a specific exclusion as to jurisdiction must proceed and seize the question for determination on their merits.

41. **“Triable”** has been defined to mean **“subject or liable to judiciable examination and trial”** – Black's Law Dictionary (supra).

In that regard, Article 6(d) of the Treaty provides as follows:

“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

“Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

42. Article 7(2) then provides that:

“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

43. We have elsewhere above reproduced Articles 27 and 30 of the Treaty and read in the context of the present Reference (and we must reiterate the point), the question before the Court is whether the actions or inactions of the Respondents violate Articles 6(d) and 7(2) inter-alia. We have held that this Court has jurisdiction to determine that question and it is also obvious to us that the issue is both triable and justiciable and we decline the invitation to treat it as a purely political question.

44. In the event we find that the issues placed before us are justiciable and we shall in addressing the remaining issues, reach a fair determination of the one fundamental issue in controversy.

Issue No3: Whether the Application discloses a Cause of Action against the 1st and 4th Respondents

45. The “**Application**” should be taken to mean the present Reference and elsewhere above, we noted that the Applicant withdrew all complaints against the 4th Respondent subject to the issue of costs and so the question as framed, must be answered with regard to the 1st Respondent only.

46. The 1st Respondent has urged that he has no role in the matter at hand and that he has no supervisory role over the Partner States as regards their commitments outside the Treaty.

47. The Applicant's position is to the contrary and to us, the issue again portends no difficulty at all. The Treaty in Article 67 creates the office of the Secretary General of the East African Community and sets out his duties in Article 67(3) which includes being **“the head of the Secretariat.”** Article 71 sets out the functions of the Secretariat which are not important to restate but Article 29 grants the Secretary General the mandate to submit his or her findings to a Partner State if he considers **“that a Partner State has failed to fulfill an obligation under [the] Treaty or has infringed a provision of [the] Treaty”** and if the response is not satisfactory, he may refer it to this Court for resolution or to the Council and if no resolution is made either way, thence to this Court for a final decision thereof.

48. In his Response to the Reference, the 1st Respondent indicated that once he got wind of the Applicant's complaint, he wrote to all the Respondents seeking a clarification on the matter and once the Reference was filed, he left the matter in the hands of the Court.

49. The Applicant, however, considers that the 1st Respondent should have done more but we disagree. The principal issue before us is *whether delay in depositing declarations under Article 34(6) of the Protocol was in violation of the Treaty*. In our view, the 1st Respondent did what he would in his circumstances and once the matter was placed before this Court, he had nothing more to do. He has no specific role under the African Charter and Protocol and to expect him to do more than he did would be unreasonable. Like the 4th Respondent, he has already acted as required by law and the cause of action even if it existed, no longer subsists as against him and he is improperly before

this Court as ultimately no specific order of value and substance can be made against him.

50. A “**cause of action**” has been defined to be “**a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles a person to obtain a remedy in Court from another person**” – **Black’s Law Dictionary** (supra). Spry V-P in **Auto Garage vs. Motokov No.3(1971) EA 514** stated that where any essential ingredient forming a cause of action is missing, then “**no cause of action has been established.**” We agree and in the context of the present Reference, neither the facts nor the eventual remedy to be granted or denied would create a cause of action against the 1st Respondent and we so find.

Issue No.4: Whether the Applicant has Locus Standi to present the Reference

51. The argument made by the Respondent on this issue that the Applicant’s Reference is supported by an Affidavit sworn by one Mathias Nsubuga, who, contrary to the deposition made in that Affidavit was not the Secretary General of the Democratic Party of Uganda and his purported election to that position had been overturned by the High Court of Uganda in the Case of **Ochieng S. C. Peter & 5 Others vs. President General Democratic Party Misc. Cause No. 217/2008.** However, in the course of these proceedings, it emerged that the issue had been resolved and indeed Mr. Nsubuga was lawfully in office as Secretary General of the Applicant Political Party.

52. There was no other serious issue raised on locus standi and so the issue requires no more than a resolution in the negative as it is moot.

Issue No.5: whether the delay by the 2nd and 5th Respondents to Deposit their Respective Declarations is a Violation of Articles 5, 6, 7, 8(1)(c), 126,

and 130 of the Treaty; Articles 1(2), 7, 13, 26, 62, 65, and 66 of the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the Protocol)

53. This issue forms the substratum of the Reference and the Respondents have urged the point that whether or not this Court has jurisdiction to determine the issue, there is no time frame for them to deposit their declarations under Article 34(6) of the Protocol and the issue of delay or inaction does not thereby arise.

54. The Applicant has however framed the issue as a wider matter of access to justice and that the delay aforesaid is a violation of the principles governing the achievement of the objectives of the East African Community. Of interest is the reliance placed on the decision of the African Court in *Michelo Yogogambaye vs. Senegal File No.001/2008* to show that unless the declarations are deposited, then like Yogogambaye, the right of access to the African Court would continue to be curtailed. In that case, the African Court held that since the Republic of Senegal had not deposited a declaration under Article 34(6) of the Protocol, then the Court could not entertain a case of alleged human rights violation by any NGO or individual from Senegal.

55. The starting point of the determination of this issue must be a resolution of the question whether this Court can properly delve into obligations created on the Respondents by other international instruments. We have elsewhere above said something about the issue and in that regard, the answer must be an emphatic **NO**.

56. This Court can only “interpret” and “apply” the Treaty under Article 27 and in doing so, adherence to law in the interpretation and application of and compliance with “the Treaty” shall be its guiding principle under Article 23. Further, in doing so, it can only inquire into “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 an Act, regulation, directive, decision or action is unlawful or is an infringement of the principles of [the Treaty]” within the meaning given by Article 30 thereof.

57. But that is not the end of the matter because we heard the Applicant to be saying that failure to deposit the declarations aforesaid is a violation of Articles 6(d), 7(2), 126 and 130 of the Treaty. Article 126 provides for the scope of co-operation in legal and judicial affairs while Article 130 provides for relations with other regional, international organizations and development partners. Article 130(2) specifically states that:

“2.The Partner States reiterate their desire for a wider unity of Africa and regard the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community.”

Article 130(1) also provides that:

“1.The Partner States shall honour their commitments in respect of other multinational and international organizations of which they are members.”

58. Reading the above Articles together, it is obvious to us that where a Partner States **“fails to honor commitments made”** to other international organizations, then with appropriate facts placed before the Court, a decision to ensure compliance therefore may be made in favour of a party that fits the description in Article 30 of the Treaty and which has a genuine complaint in that regard. In fact in Article 130(4), the Organization of African Unity, the United Nations and its agencies and other international organizations, bilateral and multi-lateral development partners interested in the objectives of the Community are specifically named in that regard and Partner States are

implored to **“accord special importance to co-operation with those agencies”** and we have no doubt that in appropriate circumstances, a case may be made if Partner States acted to the contrary.

59. In stating the above, the only rider is that this Court cannot purport to operate outside the framework of the Treaty and usurp the powers of other organs created for the enforcement of obligations created by other instruments including the African Charter and Protocol.

60. The second aspect of this issue to address is the aspect of **“delay”** in depositing the declarations.

61. Delay presumes that the Partner States have an obligation to a time frame for doing so, but the language of Article 34(6) of the Protocol to the contrary is merely that the State Partners shall do so **“at the time of the ratification of the Protocol or any time thereafter.”**

62. There is no certainty in the above expression and in fact there is no obligation to **“expeditiously”** deposit the declarations or to do so by a certain date or to do so because the United Republic of Tanzania has done so but the entire process is left to the sole discretion of the State Party. Delay cannot in such circumstances be attributed to a party in a vacuum and that is all there is to say.

63. Lastly, therefore, has the delay caused a violation of the Treaty? Of course not and it is obvious why. The facts cannot point to a violation where the sole discretion is left to the Partner State. Even if this Court could properly invoke Articles 6(d), 7(2), 126 and 130 as it has, the facts do not point to a violation and if there is a violation of the African Charter and Protocol, this is not the forum to challenge such violation in the circumstances of this case.

64. In fact, to our minds, the Applicant made a mountain out of an anthill. We say so, with tremendous respect, because whereas we see the difficulty created by Article 34(6) of the Protocol and whereas we note the importance attributed to the issue at hand, the simple issue of the alleged delay and timeframe to deposit the declarations did not require more than this simple answer; there is no connection between the issue and the Treaty.

This issue must be answered in the negative and we have shown why.

Issue No.6: Whether the 1st Respondent has a duty under the Treaty, the Charter or the Protocol to compel Control or supervise the 2nd, 3rd 4th and 5th Respondents to deposit Declarations under Article 34(6) of the Protocol

65. We are of the view that our answer to Issue No. 3 sufficiently disposes of this issue and we need say no more.

Issue No.7: Whether the Parties are entitled to the Remedies Sought

66. We have said enough to show that the Reference is misguided on the main issue for determination. We are aware that other African Countries in their own wisdom have already deposited the declarations under Article 34(6). They include the United Republic of Tanzania, Burkina Faso, Malawi, Mali and the Republic of Rwanda. They did so in their own time – 1998, 2008, 2010 and 2013, respectively. Neither the 1st Respondent nor this Court can compel the 2nd, 3rd, and 5th Respondents to do so and the reasons are obvious.

67. Lastly, there is the issue of costs. The Applicant has not succeeded but even in the case of the Republic of Rwanda which only deposited the declarations after being served with this Reference, we do not deem it fit to penalize the Applicant with costs as it was pursuing a purely public interest matter.

68. Let each Party, therefore, bear its own costs.

Conclusion

69. We would wish to thank the advocates for the Parties for their incisive and illuminating submissions and authorities cited. That we did not cite or quote all of them does not mean that they were of no help.

70. In any event, the Reference is hereby dismissed with the further order that each Party shall bear its own costs.

71. Orders accordingly.

Dated, Delivered and Signed at Arusha this 29th day of November, 2013

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JEAN BOSCO BUTASI
PRINCIPAL JUDGE

.....
MARY STELLA ARACH-AMOKO

.....
JOHN MKWAWA
JUDGE

.....
ISAAC LENAOLA
JUDGE

.....
FAUSTIN NTEZILYAYO
JUDGE