



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



*(Coram: Jean Bosco Butasi, PJ; John Mkwawa, J; Faustin Ntezilyayo J.)*

**REFERENCE NO.11 OF 2011**

**MBUGUA MUREITHI WA NYAMBURA..... APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF THE  
REPUBLIC OF UGANDA.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF THE  
REPUBLIC OF KENYA.....2<sup>ND</sup> RESPONDENT**

**AND**

**AVOCATS SANS FRONTIÈRES.....AMICUS CURIAE**

**24<sup>TH</sup> FEBRUARY, 2014**

## **JUDGMENT**

### **INTRODUCTION**

The Applicant is a citizen of the Republic of Kenya, an Advocate of the High Court of Kenya and a Human Rights lawyer and defender.

His address of service for purposes of this Reference is care of MUREITHI OLEWE & ASSOCIATES ADVOCATES, 4<sup>TH</sup> Floor, JOSEM TRUST HOUSE (housing Barclays Bank), MASABA ROAD, OFF BUNYALI ROAD, LOWERHILL, P.O. BOX 52969,(00200), NAIROBI, KENYA.

The 1<sup>st</sup> Respondent is the Attorney General of the Republic of Uganda, the Chief Legal Advisor to the Government of Uganda and is sued on behalf of the Government of Uganda.

The 1<sup>st</sup> Respondent's address of service for the purposes of the Reference is care of the Ministry of Justice and Constitutional Affairs Headquarters, plot No.1, Parliament Avenue, Queen`s Chambers, P.O. Box 7183 Kampala, Uganda.

The 2<sup>nd</sup> Respondent is the Attorney General of the Republic of Kenya and is sued on behalf of the Government of Kenya.

The 2<sup>nd</sup> Respondent's address of service for the purposes of this Reference is care of the Attorney General`s Chambers, State Law Office, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100, Nairobi, Kenya.

It is also worth noting that on 3<sup>rd</sup> May, 2013, *Avocats Sans Frontières* by its Notice of motion sought orders for leave to intervene as Amicus Curiae in this Reference in compliance with Article 40 of the Treaty for the Establishment of the East African Community and Rule 36 of the Court's Rules of Procedure, 2013 (herein referred to as "the Treaty" and "the Rules" respectively). The Application was granted on 28<sup>th</sup> August, 2013.

## **REPRESENTATION**

The Applicant was represented by Mr. Selemani Kinyunyuu.

Mr. Denis Bireije, Mr. Phillip Mwaka, Mr. Richard Adrole and Mr. E. Bafirawala appeared for the 1<sup>st</sup> Respondent.

Ms. Stella Munyi represented the 2<sup>nd</sup> Respondent while Mr. Nicholas Opiyo and Mr. Antony Mulekyo appeared for *Avocats Sans Frontières*.

## **BACKGROUND**

The Applicant is a Human Rights lawyer and defender.

Sometime in July, 2010, six Kenyan citizens were arrested and detained incommunicado in Kenya before being rendered from Kenya and handed over to Ugandan Authorities for trial as terrorist bombings in Kampala on 11<sup>th</sup> July 2010.

Following their arrest, the Muslim Human Rights Forum (hereinafter referred to as “MHRF”), a Kenyan Human Rights Non-Governmental Organization and their families instructed the Applicant to pursue the issue of a fair trial and assist the suspects in the Courts of Uganda.

On 15<sup>th</sup> September, 2010, the Applicant flew to Kampala, Uganda in order to attend their case at the NAKAWA Chief Magistrate’s Court scheduled on 16<sup>th</sup> September, 2010 and to petition for temporary admission to the Roll of Ugandan Advocates to enable him to defend the suspects in Court.

Upon his arrival at the Entebbe Airport on the same date, the Applicant alleges that he was hurled into a trap by members of the Uganda’s Rapid Response Unit (hereafter referred to as “the RRU”) through an officer who kept calling one Al-Amin Kimathi. The latter had travelled with the Applicant from Nairobi. That officer pretended to be waiting for them at Niagara Hotel with a letter from one of the Applicant’s clients.

When they reached the Niagara Hotel, they were arrested at gunpoint, manacled on the legs and subjected to endless high speed driving into the outskirts of Kampala throughout the night, while being taunted as terrorists and threatened with being charged with terrorism and murder offences. The Applicant was locked up incommunicado with his clients in the cells at RRU Kireka from 16<sup>th</sup> to 17<sup>th</sup> September, 2010, and his belongings were seized.

He was thereafter transferred to Entebbe International Airport Police Station where he continued to be detained incommunicado without any contact from his family until 18<sup>th</sup> September, 2010.

On the morning of 18<sup>th</sup> September, 2010, the Applicant was escorted by Ugandan security officers to an Aircraft of Uganda Airlines destined for Nairobi, Kenya. His passport, mobile phone and other personal belongings were handed back to him in that aircraft. No reasons were given to him about that mistreatment.

This instant Reference challenges the aforesaid acts of ill-treatment to the Applicant by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

### **THE APPLICANT'S CASE**

The Applicant's case is contained in his Reference filed on 30<sup>th</sup> December, 2011 under Articles 27, 30 and 38 of the Treaty and Rules 1(2) and 24, his affidavit sworn on 20<sup>th</sup> March, 2013 and filed on 21<sup>st</sup> March, 2013 as well as in his written submissions.

In summary, his case is as follows:

The Applicant alleged that he was arrested upon his arrival at Kampala on 15<sup>th</sup> September, 2010, where he was detained incommunicado and interrogated by the agents of the 1<sup>st</sup> Respondent in complicity with the agents of the 2<sup>nd</sup> Respondent from 15<sup>th</sup> to 18<sup>th</sup> September, 2010.

On 18<sup>th</sup> September, 2010, the Applicant was deported to Kenya without having been given reasons for his arrest, detention, interrogation and deportation.

It is the Applicant's contention that, the above acts of the Respondents were in violation of Articles 6(d), 7(2) and 104(1) of the Treaty, Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the East African Common Market Protocol and Articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 of the African Charter on Human and Peoples' Rights and Principles 16, 17, 18 and 21 of the UN Basic Principles on the Role of Lawyers.

On the basis of the foregoing, the Applicant sought the following orders:

- i. that the arrest of the Applicant by security agents of Uganda in complicity with the Kenyan security agents without warrants and the search and confiscation of his belongings without warrants were unlawful and unjustifiable and constituted a violation of Articles 6(d) and 7(2) of the Treaty by the Respondents;
- ii. that the violent arrest of the Applicant without warrants at gunpoint, hooding him, manacling him in the legs, subjecting him to endless high speeding into outskirts of Kampala throughout the night while taunting him of being a terrorist and threatening him with execution and depriving him of sleep and rest by Ugandan security agents in complicity with Kenyan security agents were unlawful and unjustifiable and contravened Articles 6(d) and 7(2) of the Treaty;
- iii. that the incommunicado and unlawful detention for four days and confiscation of his belongings without warrants by Ugandan Security agents in complicity with Kenyan security agents, infringed Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
- iv. that the interrogation of the Applicant jointly by the security agents of Uganda and the security agents of Kenya relating to the Applicant's

- instructions as an Advocate of his clients was unlawful and unjustifiable and was in violation of Uganda's and Kenya's obligations under Articles 6(d) and 7(2) of the Treaty and Principles 16, 17, 18 and 21 of the UN Basic Principles on the Role of Lawyers;
- v. that the deportation and/or forcible removal of the Applicant from Uganda without due and legal process was unlawful, unjustifiable and in violation of Articles 6(d), 7(2) and 104(1) of the Treaty and Article 7 of the Protocol for the Establishment of the East African Common Market;
  - vi. that the refusal to the Applicant by the Respondents to give any information or reasons related to his mistreatment was unlawful and contravened Articles 6(d) and 7(2) of the Treaty;
  - vii. that the violent arrest of the Applicant without warrants followed by mistreatment and his detention incommunicado by the Respondents were a violation of the fundamental rights enshrined in Article 5 of the African Charter on Human and Peoples' Rights;
  - viii. that the arrest, search, confiscation of the Applicant's belongings without warrants, his incommunicado detention without charge, interrogation related to his professional engagement and deportation from Uganda without formal process were in contravention with Articles 2, 4, 5, 6, 7, 8, 10(1) and 12(1) and (4) of the African Charter on Human and Peoples' Rights;
  - ix. that the denial of the Applicant jointly by Government of Uganda and Government of Kenya of any information or reasons concerning his aforesaid mistreatment constituted an infringement of the Applicant's fundamental rights of access to information guaranteed by Article 9(1) of the African Charter on Human and Peoples' Rights;
  - x. that the Applicant is entitled to a remedy of reparation in general, exemplary and/or punitive damages from the Respondents jointly

and/or severally consequent upon the violation of his fundamental rights and freedoms;

- xi. that an order for such general, exemplary and/or punitive damages as this Honourable Court may assess or as may be assessed by the competent National Courts of the Respondents as may be directed by this Court;
- xii. costs of this Reference;
- xiii. that such other Orders, remedy or directions as the Court may deem fit to grant.

### **CASE FOR THE 1<sup>ST</sup> RESPONDENT**

The 1<sup>st</sup> Respondent's case rests on a response to the Reference filed on 14<sup>th</sup> March, 2012 which was supported by an Affidavit sworn by OKELLO CHARLES on 13<sup>th</sup> March, 2012 and filed on 14<sup>th</sup> March, 2012 and an additional Affidavit sworn by AGUNA Joel on 20<sup>th</sup> March, 2012 and filed on 22<sup>nd</sup> March, 2012 and the 1<sup>st</sup> Respondent's Case is contained in the written submissions dated 14<sup>th</sup> November, 2013.

In a nutshell, the 1<sup>st</sup> Respondent's case can be summarized as follows:

- i. that the Applicant arrived in Uganda, through Entebbe International Airport, on the night of 15<sup>th</sup> September, 2010;
- ii. that the Applicant was arrested on the same night of the 15<sup>th</sup> September, 2010 on suspicion of being involved in terrorism, being a facilitator of terrorism by way of being a conduit for funds directed towards terrorist operations and murder over 70 Ugandans on 11<sup>th</sup> July, 2010, based on intelligence information obtained by Uganda's security forces;
- iii. that the Applicant was, at the time of his arrest, informed of the preferred charges against him and was then driven to Kampala for interrogation;

- iv. that whilst in Kampala, the Applicant was detained on the 16<sup>th</sup> September, 2010, interrogated and recorded a statement with the Uganda Police;
- v. that on 17<sup>th</sup> September, 2010 the Applicant was transferred to Entebbe International Airport Police Station;
- vi. that the Applicant voluntarily returned to Kenya in the morning of 18<sup>th</sup> September, 2010 and his passport was only stamped with an exit stamp;
- vii. that the 1<sup>st</sup> Respondent denies that the Applicant was deported and further denies that its servants, agents marked or in any way mutilated the Applicant's passport;
- viii. that the 1<sup>st</sup> Respondent denies in toto the allegations of violation of the stipulated Treaties and instruments and contends that its servants, agents executed their duties professionally, in accordance with Uganda's Laws and in compliance with the stipulated Treaties and instruments;
- ix. that the 1<sup>st</sup> Respondent contends that the Applicant is not entitled to the remedies sought.

### **CASE FOR THE 2<sup>ND</sup> RESPONDENT**

The 2<sup>nd</sup> Respondent's case is contained in his response to the Reference filed on 27<sup>th</sup> February, 2012. In a nutshell, the 2<sup>nd</sup> Respondent denies vehemently the allegations of the Applicant.

In summary, the 2<sup>nd</sup> Respondent's case is expressed as follows:

- i. that he was not aware of the arrest, interrogation, detention and the alleged deportation of the Applicant;
- ii. that he denies any implication and responsibility for the sub judice matter;



- iii. that the 2<sup>nd</sup> Respondent contended that Uganda is a sovereign State and took action with the Government of the Republic of Uganda since he was informed of the Applicant's case.

### **AVOCATS SANS FRONTIÈRES' POSITION**

The amicus curiae's position is summarized in its written submissions. In brief, it is explained as follows:

- i. that it is the obligation of each State to respect and protect the Principles of lawyer's independence in the East African Community;
- ii. that the lawyers' independence is a fundamental standard of human rights;
- iii. that the lawyers' independence is most essential in protecting and upholding the rule of law;
- iv. that the lawyers' independence is universally accepted standard of human rights recognized in the Treaty.

### **SCHEDULING CONFERENCE**

Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 29<sup>th</sup> January, 2013 where the Parties pointed out the points of agreement:

*That the issues raised in this Reference are triable on the basis of Articles 6, 7, 27 and 30 of the Treaty for the Establishment of the East African Community.*

The following were stressed as points of disagreement and therefore issues for determination by this Court:

- a) *whether the East African Court of Justice has jurisdiction to entertain this Reference;*
- b) *whether the Reference is time-barred;*

- c) *whether the arrest, interrogation and detention of the Applicant was a violation of Articles 6(d), 7(2) and 104(1) of the Treaty for the Establishment of the East African Community, Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the Protocol for the Establishment of the Common Market and Articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 of the African (Banjul) Charter on Human and Peoples' Rights and the United Nations Basic Principles on the Role of Lawyers have been violated;*
- d) *whether or not the Applicant was deported and if so, whether the deportation was in violation of Articles 6(d), 7(2) and 104(1) of the Treaty for the Establishment of the East African Community, Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the Protocol for the Establishment of the Common Market and Articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 of the African (Banjul) Charter on Human and Peoples' Rights and the United Nations Basic Principles on the role of Lawyers have been violated;*
- e) *whether the Parties are entitled to the remedies sought.*

## **DETERMINATION OF THE ISSUES**

### **Applicable Rules and Principles of Interpretation**

On many occasions, this Court has stated that the Treaty for the Establishment of the East African Community is an International Treaty subject to International Law of Treaties and in particular, Article 31(1) of the Vienna Convention on the Law of Treaties which has set up the general Rule of Interpretation of Treaties as follows:

***“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.”***

In the determination of the issues framed in this Reference, we shall be guided by the above Principles and by the relevant Articles of the Treaty related to the jurisdiction of the Court.

**Issue No.1: Whether the East African Court of Justice has Jurisdiction to entertain this Reference**

The Reference is premised on Articles 27 and 30(1) of the Treaty.

The Applicant is a citizen and resident of the Republic of Kenya, one of the Partner States of the East African Community and in that capacity, Counsel for the Applicant said that he has the right to bring a reference before this Court. It is the Applicant's submission that under Article 30(1) of the Treaty in determining "the legality" of any matter in question, the Court is empowered to pronounce itself on the "lawfulness" of the matter and on whether the actions complained of constitute an infringement for the provisions of the Treaty.

Through his prayers, the Applicant contended that the actions complained of breached Uganda's and Kenya's obligations under Articles 6(d), 7(2) and 104(1) of the Treaty as well as Article 7 of the Protocol for the Establishment of the East African Common Market.

The Applicant thus, sought the interpretation of the aforesaid Articles of the Treaty and therefore relied on the cases of the **Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No.1 of 2011; the Attorney General of the United Republic of Tanzania vs. the African Network of Animal Welfare (ANAW), EACJ Appeal no.3 of 2011; James Katabazi & 27 Others vs. EAC Secretary General and the Attorney General of the Republic of Uganda, EACJ Reference No.1 of 2007; Samuel Mukira Mohochi vs. Attorney General of the Republic of Uganda, EACJ Reference No.5 of 2011; the East African Law Society vs. the Secretary General of the East African Community, EACJ Reference**

**No.1 of 2011 and the Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba, EACJ Appeal No.1 of 2012.**

On the basis of the above reasons, Counsel for the Applicant urged the Court to answer Issue No.1 in the affirmative.

Counsel for the 1<sup>st</sup> Respondent on their part stated that this Court does not have jurisdiction to entertain this Reference.

Counsel for the 1<sup>st</sup> Respondent argued that the Court derives its jurisdiction from the Treaty and pointed out specifically Articles 23 and 27 of the Treaty. Article 23 of the Treaty provides that:

- (1) “The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty;***
- (2) The Court shall consist of First Instance Division and an Appellate Division;***
- (3) The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty.”***

Article 27(1) and (2) of the Treaty gives more clarifications as regards the jurisdiction of the Court as follows:

- (1) “The Court shall initially have jurisdiction over the interpretation and application of this Treaty;***
- (2) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Counsel at a suitable subsequent date. To this end, the Partner States shall conclude a Protocol to operationalize the extended jurisdiction.”***

Counsel for the 1<sup>st</sup> Respondent averred that the issues referred to this Court are related to Human Rights Matters. Therefore, it follows that, until the Protocol to operationalize the extended jurisdiction is concluded, this Court is not vested with jurisdiction to handle the Reference.

Counsel for the 1<sup>st</sup> Respondent further asserted that even if he agrees with the Applicant that the Court has jurisdiction to determine the matters set out in Article 30(1) of the Treaty, the Court is not empowered to entertain Human Rights matters as raised by the Applicant.

Counsel for the 1<sup>st</sup> Respondent concluded his submissions by urging the Court to dismiss the Reference on basis of that issue itself.

Counsel for the 2<sup>nd</sup> Respondent did not file written submissions. However, at the hearing date of this Reference, she associated herself with the Counsel for the 1<sup>st</sup> Respondent on Issue No.1.

Counsel for *Avocats Sans Frontières* did not address the Court on the issue of jurisdiction. They considered that, being an issue argued between Parties, they did not have to interfere. Rather, they addressed the Court on the issue of the independence of the Advocates to practice in their respective Partner States.

Counsel for *Avocats Sans Frontières* contended that the Court, being the guardian of the Treaty is bestowed with jurisdiction to interpret and apply it.

### **FINDINGS OF THE COURT ON ISSUE NO.1**

We have read the Applicant's submissions and counter submissions filed by the Respondents. At this juncture, we have to recall that Article 27 of the Treaty reproduced elsewhere above shows the jurisdiction of the Court. It is not in dispute that this Court has jurisdiction over interpretation and application of the Treaty.

The contention by the Respondents that the Applicant is invoking the Human Rights jurisdiction is a speculation that cannot stand. We agree with the Respondents that as long as the Protocol to operationalize the extended jurisdiction is not concluded, this Court is not vested with jurisdiction to entertain Human Rights matters. However, as to whether the functionality of Article 30(1) of the Treaty is subject to the provisions of Article 27(2), we are unable to back that misinterpretation. A reference under Article 30 of the Treaty is to be construed as an action to challenge the legality under the Treaty of an activity of a Partner State and/or an institution of the Community.

A clear reading of the points of disagreement arrived at during the Scheduling Conference shows that the Applicant sought this Court to determine whether or not his arrest, interrogation and detention was an infringement of Articles 6(d), 7(2) and 104(1) of the Treaty as well as Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the Protocol for the Establishment of the Common Market. The wording of the issues (c) and (d) agreed upon at the Scheduling Conference and the prayers sought relate to the interpretation which is the preserve domain of the Court's jurisdiction under Article 33(2) of the Treaty.

It is not in dispute that the Court has jurisdiction to interpret each Article of the Treaty. The inclusion of allegations of human rights violation in a reference will never distract this Court from exercising its interpretative jurisdiction. This has consistently been the finding of the Court in **Katabazi case** (supra), **Rugumba case** (supra), **Omar Awadh case** (supra) and **Prof. Anyang Nyong'o vs. the Attorney General of the Republic of Kenya, EACJ Reference No.1 of 2006**.

Furthermore, this instant Reference is similar to **Mohochi** case (supra), in which the Applicant challenged the violation of Articles 6(d), 7(2) and 104(1)

of the Treaty as well as the infringement of Article 7 of the Protocol for the Establishment of the Common Market.

This Court in the aforesaid case found and held that the cause of action in the above case was based on the alleged infringement of a Partner State's Treaty obligations which lies outside the territory of Human Rights. The Court held that the Reference fell under its jurisdiction. Moreover, during the Scheduling Conference, both Parties agreed that there are triable issues based on the provisions of Articles 6, 7, 27, and 30 of the Treaty. In view of the foregoing, we find and hold that this Court has jurisdiction to entertain the Reference.

### **Issue No.2: Whether the Reference is Time-barred**

On whether the Reference is time-barred, the Applicant submitted that:

Firstly, both the Respondents have not pleaded the limitation of time in their respective responses to the Reference;

Secondly, having contested all allegations of fact and any breach or violation of the Treaty, there is no longer a substratum on which the Respondents could base the plea of time limitation, especially as a threshold issue. The Respondents are unable to state the moment when the time started to run, hence, they cannot admit any alleged violation;

Thirdly, the Respondents have the onus to show what among the reliefs sought by the Applicant is time-barred;

Fourthly, before being furnished with full information related to the violations complained of, the Applicant cannot be held to time limitation due to lack of full material to focus on his cause of action;

Finally, the Applicant relied on **Rugumba case** (supra) and contended that until he had been furnished with all the information to the

questions posed by the Appellate Division of this Court as to “when, where, why and by whom he had been detained”, he would not have filed any reference to this Court.

The 1<sup>st</sup> Respondent, on his part argued, that it is obvious that the Applicant was arrested at Entebbe International Airport upon his arrival on 15<sup>th</sup> September, 2010, by the Ugandan security officers and was, thereafter interrogated. He added that on 17<sup>th</sup> September, 2010, the Applicant was transferred to Entebbe International Airport from where he subsequently left Uganda on 18<sup>th</sup> September, 2010.

The 1<sup>st</sup> Respondent averred that it is not in dispute that the Applicant filed this Reference on 30<sup>th</sup> December, 2011. The 1<sup>st</sup> Respondent asserted that the Applicant came to know the alleged violation of his rights on 15<sup>th</sup> September, 2010, the date of his arrest or on 18<sup>th</sup> September, 2010 when he left Uganda for Kenya.

He further submitted that the time frame provided for under Article 30(2) of the Treaty to challenge any Act or action complained of is two months and that period must be strictly interpreted. He cited the **Omar Awadh case** (supra) and **East African Law Society vs. the Attorney General of the Republic of Uganda, the Attorney General of the Republic of Kenya and the Secretary General of the East African Community, EACJ Reference No.3 of 2011** in support of his submissions.

The 1<sup>st</sup> Respondent averred that on the contrary, the arguments of the Applicant that he had never raised the issue of time limitation in his pleadings are untenable. He stated that he pleaded that the Reference was barred in law under paragraph 5 of his response to the Reference and even at the Scheduling Conference, both Parties framed an issue relating to time limitation. He asserted in addition, that even if he would have forgotten to raise that issue before, the Court could not close its eyes to such illegality.



He contended that it is the Court's duty to interpret and apply the provisions of the Treaty and to inform itself of the relevance of provisions that may affect its decisions.

In conclusion, he submitted that, the Reference was filed out of time and prayed that this Court be pleased to dismiss it with costs.

As said previously, Ms. Munyi, Counsel for the 2<sup>nd</sup> Respondent did not file written submissions. Nevertheless, during the last hearing of the Reference on 18<sup>th</sup> November, 2013, she associated herself with the submissions of the 1<sup>st</sup> Respondent on the issue of time limitation. She further referred the Court to the list of Authorities, in particular the decision of the Appellate Division in **Omar Awadh case** (supra) where the Court held that the Treaty does not contain any provision which allows any disregard about the time limit of two months prescribed in Article 30(2).

Counsel for the 2<sup>nd</sup> Respondent, therefore, urged the Court to hold the same by dismissing the Reference with costs to the 2<sup>nd</sup> Respondent.

## **FINDINGS OF THE COURT ON ISSUE NO.2**

For ease of Reference, we shall reproduce the content of Article 30(1) and (2) and analyze especially sub Article 2:

- (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, 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.”***

The general Rule of interpretation set out by the Vienna Convention on the Law of Treaties reproduced elsewhere above is applicable to the interpretation of this Article. It is our understanding from the plain reading of Article 30(2) that a reference challenging any unlawfulness or infringement provided for under Article 30(1) must be instituted within a period of two months of their occurrence or in the absence thereof, when the complainant came to know the Act or action complained of. That is the clear and ordinary meaning to be given to the Article 30(2).

It is undeniable that the Applicant was arrested upon his arrival at Entebbe International Airport on 15<sup>th</sup> September, 2010 by the Ugandan Rapid Response Unit (RRU) and was escorted by Ugandan security officers into an Aircraft of Uganda Airlines destined for Nairobi, Kenya on 18<sup>th</sup> September, 2010. It is also common ground that this Reference was filed before this Court on 30<sup>th</sup> December, 2011.

The Applicant took exactly one year, three months and twelve days to file the Reference instead of two months prescribed by the Treaty. Is there any hardship that can explain such unusual non-compliance with the Article 30(2) of the Treaty? To that question, the Applicant contended that he wanted to be told before he initiated any reference when, where, why, and by whom he had been detained.

At this juncture, we hasten to say that this reasoning is not helpful at all. Why do we say so? It is well set out in the Reference brought by the Applicant that he was arrested and detained on 15<sup>th</sup> September, 2010,(when), upon his arrival at Kampala, (where). The Applicant further pointed out that he was threatened with being charged with the same

terrorism and murder offences that his clients were facing if he did not give false statement about the incrimination against the suspects, (why). It is also evident from the complaint that he was arrested, interrogated and detained by the Uganda's Rapid Response Unit, (who).

It is our considered view that the Applicant can no longer rely on **Rugumba** case (supra,) since he was released on 18<sup>th</sup> September, 2010. The Court was not told what prevented the Applicant to file his Reference between 18<sup>th</sup> September, 2010 and 18<sup>th</sup> December, 2010 that to say, two months as prescribed by the Treaty.

We further find and hold that the Applicant cannot argue that he was not furnished with full material to crystallize his cause of action. Indeed, it has been established by this Court that an alleged infringement of the provisions of the Treaty would give rise through interpretation of the Treaty under Article 27(1) to a cause of action [See **Mohochi** case (supra) and **Independent Medical Legal Unit** case (supra)].

A cause of action is defined by the Black's Law Dictionary as **“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.”**

The Applicant has complained of the violation or infringement of the aforesaid Articles of the Treaty by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It is that infringement which constitutes a cause of action. Therefore, since he was enjoying his rights which were allegedly violated by the Respondents, the requirements to support or sustain a cause of action were enough to enable him to file a reference.

Coming back to time limitation as enshrined in Article 30(2) of the Treaty, we need to say that the word **“Limitation”** is defined by the Black's Law

Dictionary as “**a statutory period after which a law suit or prosecution cannot be brought in Court.**”

The Dictionary of Words and Phrases Legally Defined further clarifies that “**For most actions, periods of limitation are prescribed by statute with the consequence that an action begun after the period of limitation has expired is not maintained.**”

In addition, “**A limitation period is a time limit, during which an action may be brought, thereafter a potential plaintiff is barred and may no longer bring his action. Statutes of limitation are in their nature strict and inflexible enactment**” (See **Law Africa, Civil Procedure & Practice in Uganda, M. Ssekaana & S. N. Ssekaana**).

Recently, the Appellate Division of this Court found and held that:

*“It is clear that the Treaty limits Reference 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”- [See **Independent Medical Legal Unit** case (supra)].*

Moreover, the Court above found and held that “*The principle of legal certainty requires strict application of the time limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend, to condone, to waive or to modify the prescribed time limit for any reason*”- [**See Omar Owadh** case (supra)].

Consequently, the Court is bound by the Law (Treaty) and for the above reasons we have to take cognizance of the fact of the limitation. Therefore,

we hold that the Reference is time-barred. Moreover, as we have answered issue No.2 in the affirmative, we refrain from entertaining issues nos.3 and 4 for the simple reason that the Reference is no longer alive.

Accordingly, this Reference is hereby dismissed.

As to costs, due to peculiar circumstances of this case, we deem it just for each Party to bear its own costs.

It is so ordered.

**Dated, Delivered and Signed at Arusha this 24<sup>th</sup> day of February, 2014**

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**JEAN BOSCO BUTASI  
PRINCIPAL JUDGE**

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**JOHN MKWAWA  
JUDGE**

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**FAUSTIN NTEZILYAYO  
JUDGE**