# IN THE EAST AFRICAN COURT OF JUSTICE
# AT ARUSHA

***(Coram: Moijo M. ole Keiwua P, Joseph N. Mulenga J, Kasanga Mulwa J, Mary Stella Arach-Amoko J. and Harold R. Nsekela J)***

**APPLICATION NO 9 OF 2007**

*(Arising out of Reference No.3 of 2007)*

**BETWEEN**

**1 EAST AFRICAN LAW SOCIETY……………………………………………1ST APPLICANT**
**2 THE LAW SOCIETY OF KENYA…………………………………………2ND APPLICANT**
**3 THE TANGANYIKA LAW SOCIETY……………………………………3RD APPLICANT**
**4 THE UGANDA LAW SOCIETY……………………………………………4TH APPLICANT**
**5 THE ZANZIBAR LAW SOCIETY…………………………………………5TH APPLICANT**

**AND**

**1 THE ATTORNEY GENERAL OF THE REPUBLIC. …………………1ST RESPONDENT**
**OF KENYA**
**2 THE ATTORNEY GENERAL OF THE UNITED REPUBLIC**
**OF TANZANIA………………………………………………………………2ND RESPONDENT**
**3 THE ATTORNEY GENERAL OF THE REPUBLIC**
**OF UGANDA…………………………………………………………………3RD RESPONDENT**
**4 THE SECRETARY GENERAL OF THE EAST AFRICAN**
**COMMUNITY………………………………………………………………4TH RESPONDENT**

**DATE: 11TH DAY OF JULY 2007**

## RULING OF THE COURT

The above mentioned applicants have brought Reference No.3 of 2007 under Articles 1, 4, 5, 6, 7, 8, 9, 11, 27, 30, 38 and 150 of the Treaty for the Establishment of the East African Community (the Treaty); and Rules 1(2) and 20 of the East African Court of Justice Rules of Procedure. The Reference is supported by an affidavit sworn by Tom Odhiambo Ojienda, President of the East African Law Society (1st Applicant). The essence of the Reference is to the effect that the amendments of the Treaty and ratification thereof by the three Partner States, namely the Republic of Kenya (1st Respondent); the United Republic of Tanzania (2nd Respondent) and the Republic of Uganda (3rd

Respondent) are illegal, unconstitutional and of no legal effect since they were made in contravention of Articles 150 and 38 of the Treaty. The applicants are therefore seeking from the Court the following prayers:-

"1. Declaration that the process of amendment of the Treaty infringes Articles 5, 6, 7, 8, 9, 11, 38 and 150 of the Treaty, as well as peremptory norms of international law;

2. Declaration that amendment of the Treaty shall incorporate public consultation and participation, in the same manner that was employed in negotiating the Treaty and the various Protocols under it, especially the Protocol on the Establishment of the East African Community Customs Union;

3. Declaration that the entire process of amendment of the Treaty to date is unlawful and of no legal effect;

4. Declaration that the purported ratification processes for the said Treaty Amendments employed by the Republic of Kenya, Republic of Uganda and the United Republic of Tanzania are illegal, unconstitutional and of no legal effect;

5. Order that the Partner States cannot amend the Treaty without commencing a fresh process, as provided for under Article 150 of the Treaty;

6. Order that the cost of and incidental to this Treaty Reference Application be met by the Respondents;

7. That this Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances."

The Reference was filed on 18th May 2007 together with this application which was *ex parte* by Notice of Motion for interim orders, *inter alia*, that –

> "Pending the hearing and final determination of the instant Reference, this Honourable Court be pleased to restrain and prohibit the 1st, 2nd, 3rd , and 4th Respondents from formulating, publishing, enacting, ratifying, or otherwise howsoever purporting to implement the proposed amendments to the Treaty for the Establishment of the East African Community that were commenced pursuant to the Official Communiqué of the Summit of Heads of State of the East African Community that was issued on or about 30th November 2006."

In order to strike a balance between the need to hear the application expeditiously with the need to hear all the parties in view of the gravity of the issues raised in the application, the Court on its own motion directed that the application be heard *inter partes* and abridged the time for filing replies.

At the hearing of the application, Prof. Ssepembwa outlined the principles that normally guide courts when called upon to decide whether or not to grant the injunctive order sought. He submitted that the applicant should first establish a prima facie case with a probability of success. On this point, he contended that the Reference raises more than a prima facie case. The issue involved was the correct interpretation of Article 150 of the Treaty on the procedure to be followed when amending the Treaty. He added that even the respondents in their replying affidavits sworn by Ms Njeri Mwangi, for the 1st respondent; Mr. Martin Mwambutsya for the 3rd respondent and Amb. Julius Baker Onen, for the 4th Respondent, had raised the same issue, but the parties are poles apart as regards the exact interpretation of Article 150 of the Treaty. The second issue in contention is the applicants' claim that the Respondents were in breach of Article 38 of the Treaty. The Applicants allege that the respondents proceeded on the amendment of the Treaty despite the fact that the matter was still pending in Court. In his view the first principle that there was a serious case before the Court had been established, but given the nature of the application before the Court, he did not go into the merits of the case at this juncture.

As regards the second principle, Prof. Ssempebwa submitted that the Reference was essentially a public interest litigation which seeks to ensure the observance of the Treaty in the interest of the citizens of East Africa. He submitted that if the amendments are implemented, they will cause irreparable injury particularly to the East African Court of Justice. Prof. Ssempebwa pointed out that under the amendments, the current decisions of the Court will be deemed to be decisions of the First Instance Division of the Court and therefore subject to appeal to the Appellate Division of the Court. Such a course of action will be extremely unfair and could cause irreparable harm and interfere with the smooth operation of organs and institutions of the East African Community. He also submitted that the amendment to Article 30 of the Treaty would curtail the jurisdiction of the Court thereby rendering it almost impotent, as he put it. There was also the question of the limitation period of two months now proposed in the amendments. The cumulative effect of all these amendments is that they would cause irreparable harm to the smooth operation of the Court to the prejudice of the people of East Africa.

Learned Counsel for the Respondents strongly resisted the application for an interim injunctive order. From their respective replying affidavits and the oral submissions of Ms Kimani; Mr. Mwaimu; Mr. Oluka and Mr. Kaahwa, three issues stand out, namely; (i) that the applicants have not disclosed any cause of action against any of the Respondents; (ii) that the applicants have not established the conditions essential to move the Court to grant the order sought and (iii) that the application has been overtaken by events since the challenged amendments have already come into force.

It is the contention of the respondents that the applicants have not shown what rights or interest were violated or infringed upon. The two affidavits in support

of the Notice of Motion were couched in generalities without disclosing the nature of the specific injury that was personal to them and which has been infringed under the Treaty. What the respondents are saying in effect is that the applicants have no *locus standi* to institute the Reference before the Court. They have not shown what legal right has been violated and that the respondents are liable for that violation. On the other hand, Prof. Ssempebwa submitted that the respondents in purporting to amend the Treaty contravened Article 150, thus depriving the rights of East Africans to participate in the process. Consequently the applicants had the obligation to access the Court to stop this breach of Article 150 of the Treaty, among others.

Our starting point in this regard is the traditional view on *locus standi.* In the landmark Indian case of *S.P. Gupta* v *Union of India* AIR 1982 SC 149. Bhagwati, J. in the course of his judgment stated as follows at page 185:-

> "The traditional rule in regard to *locus standi* is that judicial redress is available only to a person who has suffered a legal injury of violation of his legal right or legally protected interest by the impugned action of the state or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born."

The learned judge continued at page 190 as follows:-

> "If no one can maintain an action for redress of such public or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed to it. The Courts cannot countenance such a

> situation where observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened."

According to the traditional view of *locus standi* as well explained above, only an aggrieved person, that is, one who has a more particular or peculiar interest of his own beyond that of the general public, can access the Court to have his rights vindicated. (see also: *Ex-parte Sidebotham* (1880) 14 Ch D 458). Despite this apparent rigidity in the rule, Courts have somewhat relaxed the rule. For instance, in the case of *Inland Revenue Commissioners* v *National Federation of Self-Employed and Small Businesses Ltd* (1982) AC 617, Lord Diplock had this to say at page 644 E:-

> "It would in my view be a grave lacuna in our system of public law if a pressure group like the federation or even a single spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped."

From India again, in the case of *Janata Dal* v *H.S. Chowdhary* AIR 1993 SC 892, the Court stated at paragraph 62:-

> "….. the strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right of *locus standi* to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury but who is not a mere busybody or a meddlesome interloper; since the dominant object of PIL is to ensure observance of the provisions of the Constitution or the law which can be best achieved to advance the cause of the Community ….. or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery

> in; motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict."

Similar sentiments were echoed by Lugakingira, J. in the High Court of Tanzania in the case of _Rev. Christopher Mtikila v The Attorney General_ [1995] TLR 31 at page 45 where he stated: -

> "I hasten to emphasize, however, that standing will be granted on the basis of public interest litigation where the petition is _bona fide_ and evidently for the public good and where the Court can provide an effective remedy."

In our recent decision in Reference No.1 of 2006, _Prof. Peter Anyang' Nyongo and 10 Others vs The Attorney General of Kenya and 5 Others_ (unreported), we had occasion to explain what is a common law cause of action, and cited the case of _Auto Garage_ v. _Motokov_ (No.3) (1971) EA 514. We also stated that various Articles in the Treaty including Article 30 create special causes of action which different parties may refer to this Court for adjudication. The applicants herein are Bar Associations in their respective Partner States and have a duty to promote adherence to the rule of law. We are therefore satisfied that the applicants are genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the Respondents. We therefore hold that the applicants have _locus standi_ to make this application.

This takes us to the second issue. The conditions for the grant of an interlocutory injunction were stated in the oft-cited case of _Giella v Cassman Brown & Co. Ltd_ (1973) E.A. 358. Spry, V.P. stated as follows at page 360E: -

> "The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.

> Thirdly, if the Court is in doubt it will decide the case on the balance of convenience." (followed in _Kenya Commercial Finance Co.Ltd_ v _Afraha Education Society_ (2001) IEA 86 at page 89d).

From the applicants affidavits in support of the Notice of Motion, the replying affidavits of the Respondents and the oral submission of the learned Counsel representing the parties, it is evident that the interpretation of Article 150 of the Treaty will be a subject-matter of contest during the hearing of the Reference. We are satisfied that the totality of the facts in the affidavits discloses *bona fide* serious issues to be tried by the Court. At this stage we must refrain from making any determination on the merits of the application or any defence to it. Despite this limitation, however, we are satisfied that the applicants have made out a serious question to be tried which if not controverted, might entitle the applicants to succeed in respect of a number of their prayers. The applicants have therefore crossed over the first hurdle.

The second pre-condition is that the Courts' intervention is necessary to protect the applicants from the kind of injury which may be irreparable and which cannot be compensated by way of damages in the event the application is refused. Prof. Ssempebwa submitted that this was public interest litigation and therefore it was not possible to show personal loss or injury to the applicants. The aim of the Reference is to ensure the observance of the provisions of the Treaty. We have read the affidavits of Mr. Tom Odhiambo Ojienda, Mr. Alute Simon Mughwai and the replying affidavits. It is evident that the impugned amendments to the Treaty have now been implemented save perhaps the appointment to Judges of the reconstituted Court of Justice. What has been done so far, even if it were unlawful, cannot be undone in these interlocutory proceedings. Whatever remains to be done by way of operationalization can be rectified if the amendments are in the end declared illegal by this Court.

In the result and for the foregoing reasons, we dismiss the application for injunction. Costs to be in the cause.

Dated and delivered this ….. day of July 2007:

**MOIJO M. OLE KEIWUA**
**PRESIDENT**

**JOSEPH N. MULENGA**
**VICE PRESIDENT**

**KASANGA MULWA**
**JUDGE**

**MARY STELLA ARACH-AMOKO**
**JUDGE**

**HAROLD R. NSEKELA**
**JUDGE**