

25 April 2007

Reference No. 2 of 2007

**EAST AFRICAN COURT OF JUSTICE**

**CHRISTOPHER MTIKILA**

**v.**

**THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA, AND  
THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY**

**RULING**

BEFORE: PRESIDENT: Moijo. M. Ole Keiwua  
JUDGES: Augustino. S. L. Ramadhani Kasanga Mulwa, Mary Stella Arach-Amoko; Harold R. Nsekela

Citation: The East African Law Society v. The Attorney General of the Republic of Kenya, Ref. No. 2, Ruling (EACJ, Apr. 25, 2007)

Represented APPLICANT: Mr. Audax Kahendaguza Vedasto;

By: RESPONDENT 1: Mr. Matthew Mwaimu, Mr. Joseph Ndunguru, and Mr. Paul Ngwembe;

RESPONDENT 2: Mr. Wilbert Kaahwa;

INTERVENERS: Mr. Mabere Marando

Editor's INTERVENERS: Dr. George Francis Nangale, Sylvia Kate Kamba, Dr. Waalid Note: Aman Kabourou, Janet Deo Mmari, Abdullah A. H. Mwinyi, Dr. Gharib Said Bilal, Dr. John Didas Masaburi, Septuu Mohamed Nassor and Fortunatus Lwanyantika Masha

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[1] Christopher Mtikila, the Applicant in this reference, has come to this Court under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty) and is seeking the enforcement of and, therefore, the compliance by the two Respondents of Articles 48 (1) (a) and 50 (1) of the Treaty. The Respondents are: the Attorney General of the United Republic of Tanzania (1st Respondent), and the Secretary General of the East African Community (2nd Respondent).

[2] The Applicant's case is that one of the organs of the East African Community (the Community) established under Article 9 of the Treaty is the East African Legislative Assembly (the Legislative Assembly) which comprises twenty-seven elected Members and five ex officio Members according to Article 48 (1) of the Treaty. Article 50 (1) of the Treaty provides that each Partner State elects nine members to the Legislative Assembly.

[3] Sometime in 2001 the National Assembly of the United Republic of Tanzania

(hereinafter referred to as the National Assembly) elected nine persons to the Legislative Assembly two of whom were Dr. Harrison Mwakyembe and Mrs. Beatrice Shelukindo. In 2005 these two ran for and were elected Members of Parliament of the National Assembly and, pursuant to Article 51 (3) (c), they were required to vacate their seats in the Legislative Assembly. They did that.

[4] The National Assembly held by-elections, as it were, in March 2006, and elected Dr. Norman Sigalla and Mrs. Hulda Stanley Kibacha, to fill the two Tanzanian vacancies in the Legislative Assembly. However, in October, 2006, the National Assembly held a General Election, so to speak, and elected nine persons whose names have been submitted to take up the Tanzanian seats in the second Legislative Assembly since the re-birth of the Community. Dr. Sigalla and Mrs. Kibacha were unsuccessful contenders in that election.

[5] The Applicant argues that Article 51 (1) of the Treaty prescribes the tenure of every Member of the Legislative Assembly to be five years. So, he contends that the tenure of Dr. Sigalla and Mrs. Kibacha has not ended and, therefore, in October, 2006, the National Assembly ought to have elected only seven new Members to the Legislative Assembly. Since nine persons were elected, the Applicant argues, the total number of Members of the Legislative Assembly from Tanzania is eleven and that is contrary to Article 50 (1).

[6] The Applicant has two prayers, to wit:

“(a) An order that the elections of a total of 9 persons to be members of the Assembly conducted by the National Assembly of Tanzania in October, 2006, as averred in paragraph 4 (e) hereinabove while the tenure of the 2 members elected as per paragraph 4 (c) above had not ended, was, and is, a nullity and without validity; (b) An order prohibiting the East African Community Assembly to administer oaths/affirmations of the 9 persons elected by the National Assembly of Tanzania in October, 2006, as averred in paragraph 4 (e) above.”

[7] Paragraphs 2 and 3 of 1st Respondent’s response to the reference aver:

“(2) That the Reference is misconceived and bad in law for it offends the express provisions of Article 52 of the Treaty of the East African Community.

(3) That the Petitioner does not enjoy any Locus standi in this reference.”

[8] The 2nd Respondent has also submitted that the Applicant has no locus standi, that is, the Applicant does not have a legal right to come to Court. Paragraph 12 of the 2nd Respondent’s response contends:

[9] FURTHERMORE THAT the Applicant has no locus standi in the matter of elections of Tanzania’s

[10] Members to the East African Legislative Assembly; to that extent Applicant’s pleadings disclose no unlawful act on the part of the East African Community and no infringement of the Treaty within the meaning of Article 30 of the Treaty.

[11] The nine persons elected in October, 2006, applied for and were granted leave to appear as Interveners in opposition to the application. In their notice of motion filed under Article 40 of the Treaty and Rules 17 and 35 of the East African Court of Justice Rules of Procedure (the Rules), the interveners contend in paragraphs (viii) and (ix) as follows:

“(viii) As this case is averring that Dr. Norman Sigalla and Mrs. Hulda Stanley Kibacha are persons who are still members of the East African Legislative Assembly, that the elections in the National Assembly of Tanzania be repeated so that only 7 people should be elected instead of nine, thus averring that two of the elected people were not properly elected, this matter should be determined by way of an election petition filed in the Tanzania courts pursuant to the provisions of Article 52 (1) of the Treaty for the Establishment of the East African Community, and Rules 15 and 16 of the East African Legislative Assembly Election Rules, 2001 made by the National Assembly of Tanzania in May, 2001.  
(ix) This matter is a purely private matter involving two individual former Members of the 1st East African Legislative Assembly. There is no public interest involved. Hence the Applicant, Christopher Mtikila, has no locus standi to appear in this matter as it does not involve him or the public.”

[12] At the scheduling conference the parties had three points of agreement and three of disagreement. The three points of agreement were:

“(1) The Applicant is a citizen of East Africa.  
(2) That in March 2006, Hulda Kibacha and Dr. Norman Sigalla were elected into the East African Legislative Assembly by the National Assembly of the United Republic of Tanzania.  
(3) That in November 2006, the National Assembly of the United Republic of Tanzania elected nine (9) Members to the East African Legislative Assembly.”

[13] The three points of disagreement were:

“(1) Whether this Court has jurisdiction to entertain this reference.  
(2) Whether the Applicant has locus standi in this reference.  
(3) Whether swearing in of the Nine (9) Members elect will result into Tanzania having eleven (11) Members in the East African Legislative Assembly contrary to the provisions of the Treaty.”

[14] The first two points of disagreements are really preliminary objections. It was, therefore, agreed that the issues of jurisdiction of this Court over the matter in dispute, and the locus standi of the Applicant be determined first.

[15] The Applicant was represented by Mr. Audax Kahendaguza Vedasto, learned advocate while 1st Respondent had three learned Principal State Attorneys, to wit, Mr. Matthew Mwaimu, Mr. Joseph Ndunguru, and Mr. Paul Ngwembe. Mr. Wilbert Kaahwa, learned Counsel to the Community, appeared for the 2nd Respondent. The interveners were advocated for by Mr. Mabere Marando, learned counsel.

[16] Mr. Mwaimu's contention that prayer 5 (a) of the Applicant of necessity calls upon this Court to probe whether or not the nine persons elected in October, 2006, are Members of the Legislative Assembly but, he submitted that, that determination is the preserve of the High Court of Tanzania under Article 52 (1) of the Treaty. He referred us to our judgment in Reference No. 1 of 2006, Prof. Peter Anyang'nyong'o and Ten Others v. A. G. of Kenya And Two Others and four Intervenors. Mr. Mwaimu also submitted that a person will have locus standi under Article 30 only where the Court has jurisdiction in terms of Article 27, that is, where the matter before the Court is one of the interpretation and the application of

the Treaty. In this application, the learned Principal State Attorney contended, there is no issue of interpretation at all. He asked the matter to be dismissed with costs.

[17] Mr. Kaahwa was very brief on locus standi. He contended that the Applicant has not shown in his pleadings sufficient connection to the electoral process in the National Assembly. The learned Counsel continued that the Applicant would have locus standi under Article 30 if he alleged an infringement of the Treaty outside the electoral process which is vested in an institution of a Partner State. In other words Mr. Kaahwa was submitting that the Applicant should have invoked the provisions of Article 52 of the Treaty. He, too, prayed that the reference should be dismissed with costs.

[18] Mr. Marando drew our attention to what he called salient features in this application which were not pleaded and his two learned friends did not address. He pointed out that there are two lacunae in the Treaty. That is, the Treaty does not provide for two matters: One, the life span of the Legislative Assembly itself. The learned advocate said that the Treaty provides for the tenure of the individual Members of the Legislative Assembly only. Two, the Treaty does not provide for the process of filling up of any of the vacancies enumerated in Article 51 (3).

[19] Mr. Marando further submitted that prayer 5 (a) of the Applicant requires a declaration that the election of the nine Members in October, 2006, was a nullity and without validity. This, he said, is what is referred to in East African jurisprudence as avoiding an election and that is the business of the High Court of Tanzania and not of this Court. He pointed out that the lacunae do not entitle the Applicant to the prayers he seeks in the reference.

[20] Mr. Vedasto stated that this Court has jurisdiction as both Respondents, as well as the Interveners, have not disputed that the Applicant has locus standi under Article 30. He emphasized that the application is of public interest. Mr. Vedasto contended that whether or not Dr. Sigalla and Mrs. Kibacha contested the elections and took the dues which all the Members were given after the dissolution of the Legislative Assembly is immaterial to the operation of the Treaty.

[21] Mr. Vedasto went on to say that the case of the Applicant is not to question the validity of the election of any person but is to point out that there are eleven Members in the Legislative Assembly from Tanzania instead of nine. He also referred us to the judgment of this Court in Prof. Anyang'nyong'o where it was said that even in situations where Article 52 of the Treaty is involved this Court still retains jurisdiction if there are other issues which do not fall under Article 52.

[22] In reply Mr. Mwaimu had nothing to add to what he had submitted earlier on. Mr. Kaahwa, on the other hand, conceded the existence of the lacunae disclosed by Mr. Marando but added that the application is not with regard to the lacunae but with regard to the membership of the Legislative Assembly which is the subject matter of Article 52 of the Treaty.

[23] We are of the decided view that the first issue of whether or not this Court has jurisdiction will determine the matter and the question of locus standi need not detain us.

[24] For the avoidance of doubt we have to point out that in this application it is accepted that there were elections in the National Assembly in 2001, in March and in October, 2006.

So, what is before us is totally different from what was before this Court in Prof. Anyang'nyong'o where the contention was that there was no election at all as prescribed under Article 50 (1) of the Treaty.

[25] Admittedly, in Anyang'nyong'o this Court said that it still retains jurisdiction even where Article 52 of the Treaty is applicable if there are other matters which do not fall under that Article. But the Court went on to say at page 20 of the type written judgment that:

“In paragraph 29 and 30 of the reference, however, the claimants have referred to the Court two other issues, which we consider to be the core and material pleadings for purposes of the reference. It is those pleadings that disclose the special causes of action, which evoke this Court's jurisdiction under the Treaty. And it is only those pleadings that will be subject of adjudication in this reference.”

[26] Those two paragraphs provide as follows:

“(29) It is the contention of the claimants that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravenes Article 50 of the East African Community Treaty in so far as no election was held nor debate allowed in Parliament on the matter.

(30) The claimants also contend that any such rules that may have been invoked by the Kenyan National Assembly which do not allow election directly by citizens or residents of Kenya or their elected representative is null and void for being contrary to the letter and spirit of the Treaty.”

[27] No such complaints have been made in this application which would invoke this Court's jurisdiction. As for Mr. Marando's submission we agree with Mr. Kaahwa that the application is not with regard to the lacuna but with regard to the membership of the Legislative Assembly. The Applicant's complaint is that: The tenure of Dr. Sigalla and Mrs. Kibacha is five years and that they are still Members of the Legislative Assembly until sometime in March, 2011, and, so, last October the National Assembly should only have elected seven Members. Since nine Members were elected, then there are eleven Members from Tanzania. Hence the Applicant in his prayer 5 (a) wants us to declare those elections null and void.

[28] The Applicant is saying that of the nine persons elected in October, 2006, two of them are not Members of the Legislative Assembly. It is glaringly clear to us that what the Applicant is saying can be appropriately encapsulated in the words forming the heading of Article 52 of the Treaty: “Questions as to Membership of the Assembly”. This is true of at least two persons out of the nine who were elected in November, 2006. Obviously, this is the province of the High Court of Tanzania and not of this Court.

[29] As Mr. Marando properly pointed out, Rule 15 of the East African Legislative Assembly Election Rules (the Tanzania Election Rules), which the Applicant produced in his list of authorities, provides:

“Pursuant to the provisions of Article 52 (1) of the Treaty, the election of the candidate as a Member of the East African Legislative Assembly may be declared void only on an election petition.”

[30] Rule 16 goes further to articulate that:

“The procedure, jurisdiction and the grounds for declaring void the election of such member, shall be the same as provided by law for election petitions in respect of members of the national parliament.”

[31] As we have pointed out earlier, the Applicant is striving to have Dr. Sigalla and Mrs. Kibacha to be recognized as Members of the Legislative Assembly and to drop two out of the nine persons whose names have been submitted to the Legislative Assembly. In practical terms it means that Dr. Sigalla and Mrs. Kibacha are to substitute two persons on the list of Members from Tanzania which has been submitted to 2nd Respondent.

[32] We are at one with Mr. Mwaimu when he referred us to page 20 of the judgment of this Court in Prof. Anyang’nyong’o where it was said:

“We agree that if the only subject matter of the reference were those circumstances surrounding the substitution of the 3rd interveners for the said four claimants, this Court would have no jurisdiction over the reference.”

[33] In that reference four claimants averred that they had been properly nominated by their political parties within NARC but that the Chief Whip unilaterally and pompously sent in his list of names which excluded the four names. The Court said that if it was only called upon to substitute names, that is, act as if there was an election petition, the Court would not have jurisdiction. That would have been properly the domain of the Kenyan Courts. That is also the case with regard to this reference: the declaration that two persons were improperly elected and that they are not Members of the Legislative Assembly is the domain of the High Court of Tanzania and not this Court.

[34] We, therefore, hold that this Court has no jurisdiction to entertain this application which seeks to annul the elections held by the National Assembly in October, 2006. We allow the preliminary objection raised and dismiss the reference with costs for one advocate for each Respondent.

Dated at Arusha this day of 2007

MOIJO. M. OLE KEIWUA  
PRESIDENT

AUGUSTINO. S. L. RAMADHANI  
JUDGE

KASANGA MULWA  
JUDGE

MARY STELLA ARACH-AMOKO  
JUDGE

HAROLD R. NSEKELA  
JUDGE

