

22 June 2007

Application No 8 of 2007; Reference No. 3 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: Moiyo. 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, Application No 8, Ref. No. 3, Ruling (EACJ, June. 22, 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 Note: INTERVENERS: Dr. George Francis Nangale, Sylvia Kate Kamba, Dr. Waalid 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] This is an application for review of the ruling delivered by this court on 25th April, 2007 and brought by Christopher Mtikila who had previously come to this Court under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty) and sought the enforcement and the compliance of Articles 48 (1) (a) and 50 (1) of the Treaty by the two Respondents. The Respondents were: 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] The Respondents raised a preliminary objection and after a fullhearing of that this Court held that it had

“... 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.”

[8] The application for the review was premised on five grounds.

[9] The applicant, as before, had the services of Mr. Audax Vedasto, learned advocate, while the 1st Respondent was represented by two learned Principal State Attorneys, to wit, Mr. Matthew Mwaimu and Mr. Joseph Ndunguru. The learned Counsel to the Community, Mr. Wilbert Kaahwa, appeared for the 2nd Respondent.

[10] Mr. Vedasto proposed to argue together grounds one, two and four. However, for reasons which are not necessary to disclose here, he withdrew these three grounds and, as the learned counsel for the two respondents did not object, this Court granted that

application with costs to the respondents.

[11] The application for review has been made under Article 35 (3) which provides as follows:

“An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made, or on account of some mistake, fraud or error on the face of the record or because an injustice has been done.”

[12] This provision prescribes five grounds for review:

- i. The discovery of some new fact which would have a decisive influence on the judgment;
- ii. Mistake;
- iii. Fraud;
- iv. Error on the face of the record; and
- v. Because an injustice has been done.

[13] We must point out, however, that the fifth ground, that of in justice, is rather novel. Ordinarily the injustice which is considered is that which results from any of the four preceding grounds of review. But here it would appear that injustice stands out on its own and not as an accompaniment or a consequence of one of the four grounds for review. This provides a wider scope for review than is normally the case.

[14] Kenya also has a slightly wider scope in review as seen in the Court of Appeal decision in *Orero v. Seko*, [1984] KLR 238:

“Under the Civil Procedure Rules order XLIV rule 1(1), there are three grounds upon which a review may be sought and these are:

- a) where there is new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.
- b) Where there is a mistake or error apparent on the face of the record, and
- c) for any other sufficient reason.”

[15] This was reiterated in *Gharib v. Naaman* [1999] 2 EALR 88. Thus in the case of Kenya there is a third ground of “any other sufficient reason”. This is broad enough to cover the ground of injustice.

[16] Mr. Vedasto’s ground five of the review alleges injustice caused by the ruling of the Court:

[17] “The Court directed in the Ruling that the Applicant’s complaint, whose ground is that the election of the members of the Assembly by the Tanzanian National Assembly was done in infringement of the provisions of the Treaty by electing 11 instead of 9 authorized members, be petitioned in the High Court of Tanzania under the procedures and jurisdiction and on the grounds for declaring void election of a Member of the National Assembly of Tanzania, while under such procedures, jurisdiction and grounds in Tanzania infringement of

the provisions of the Treaty or even of any law if the alleged infringement does not affect the result of the respective election is not among the justiciable grounds in such a petition.”

[18] Briefly Mr. Vedasto contended that the applicant’s complaint cannot find a purchase under the law and practice of election petition in Tanzania as provided in section 108 (2) of the Elections Act:

“(2) The election of a candidate as a Member of Parliament shall be declared void only on an election petition if the following grounds (sic) is proved to the satisfaction of the High Court and no other ground, namely –

(a) that, during the election campaign, statements were made by the candidate, or on his behalf and with his knowledge and consent or approval, with intent to exploit tribal, racial or religious issues or differences pertinent to the election or relating to any of the candidates, or, where the candidates are not of the same sex, with intent to exploit such difference;

(b) non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election; or

(c) that the candidate was at the time of his election, a person not qualified for election as a Member of Parliament.”

[19] Mr. Vedasto submitted that the applicant’s complaint that the National Assembly ought to have elected seven persons only instead of nine to go to the Assembly and that the National Assembly has breached the provisions of the Treaty is not one of the three grounds for avoiding an election. Therefore, he contended, when the applicant was told to go to the High Court to seek redress he was subjected to an injustice because he cannot do that.

[20] In reply Mr. Ndunguru was very brief:

“It is our submission that the argument raised by the applicant amounts to a ground of appeal rather than a ground of review. Furthermore, it is our submission that the issue whether or not the High Court in entertaining the applicant’s complaint, (sic) is within the domain of the High Court itself, not this Court. The applicant has failed to show the injustice occasioned to him and, therefore, we are arguing that the arguments raised by the applicant’s advocate do not amount to grounds of review as envisaged under Article 35(3) of the Treaty.”

[21] Mr. Kaahwa observed that Mr. Vedasto’s submissions were mere assertions that injustice has been committed but no proof was advanced by the applicant.

[22] On the face of it, section 108(2) of the Elections Act appears to support the submission that the applicant cannot have recourse to the High Court of Tanzania because there is no enabling legal provision to do so. If that is so, it is our considered opinion that that is injustice to the applicant. There is no forum for the applicant to seek redress of his grievances. The respondents, would appear, therefore, not to be right in their contentions that there is no injustice.

[23] However, we agree with the submissions of Mr. Ndunguru that the determination of whether or not the High Court of Tanzania has jurisdiction to deal with the complaints has to be made by the High Court of Tanzania itself and not by this Court. It might as well be that there is an issue of conflict of laws and the High Court of Tanzania is the proper forum to resolve any such conflict.

[24] Rule 15 of the East African Legislative Assembly Election Rules (the Tanzania Election Rules), which the Applicant produced in his list of authorities in the reference, 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.”

[25] Then Rule 16 goes further 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.”

[26] Now, if Rules 15 and 16 cannot be resorted to because of section 108(2) of the Elections Act, then there is a conflict of laws. We cannot also agree with Mr. Vedasto that we were duty bound to ensure that the High Court of Tanzania had jurisdiction over the matter before we declared that this Court had no jurisdiction over the application.

[27] Apart from what we have pointed out above, at the hearing the Court posed a question to Mr. Kaahwa who, unlike the other two parties, is not directly involved.

[28] Mr. Kaahwa responded:

“My Lords, in the first instance, without anticipating what would happen at the national level, I think the applicant would have recourse at the national level within the existing law; the National (sic) Election Act and even the East African Legislative Assembly Election Rules of Tanzania. He would have recourse to justice and he would succeed. But regarding what Your Lordship is pointing out, in the event that there is a lacuna found, then it is the Partner State and the Community to address that lacuna.”

[29] We agree with Mr. Kaahwa that in case of a conflict of laws it is for Tanzania, and indeed, for the first respondent to see to it that the legal climate is harmonized. The High Court of Tanzania has a role in that.

[30] Resolving a conflict of law is not a matter for review. We say so because at the conclusion of a successful review the Court will rectify its decision accordingly. In the present case that would mean to reverse our decision and deal with the application. But we cannot clothe ourselves with jurisdiction to deal with the matter when we are convinced that we do not have such jurisdiction. As Mr. Kaahwa rightly framed it:

“There is no way any litigant will force an honourable court to assume jurisdiction where it does not have.”

[31] That is so irrespective of whether or not there is injustice to the applicant. We do not think that ground three had any substance. We completely failed to understand what Mr. Vedasto wanted us to do. He averred in ground three as follows:

“In his submission through his advocate in affirming jurisdiction of this Court, the Applicant submitted that the core and material pleading in the Reference in which it is

contended that the elections conducted by the Tanzanian Legislative Assembly were 11 members, hence an infringement of the Treaty which requires a Partner State elect only 9 members, like a complaint in Professor Anyang'nyong'o case (Reference No. 1 of 2006) where the Complainants had contended that Kenya got its members without conducting an election, hence an infringement of the Treaty which requires a Partner State to get its members by election, but the Court in its Ruling distinguished these two cases by citing and referring to the relevant paragraphs of Professor Anyang'nyong'o case, of which, paragraph 29 reads:

'29. 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 Treaty for the Establishment of the East African Community in so far as no election was held nor debate allowed in Parliament in the matter.' without citing, referring to, showing the difference or even saying anything on the corresponding provisions in the Reference before it (Reference no. 2 of 2007), of which paragraph 4 (g), reads: '4(g) The National Assembly of Tanzania has elected a total of 11 members of the Assembly, in infringement of Article 50(1) of the Treaty which requires each Partner State to elect only 9 members of the Assembly.'

[32] Briefly Mr. Vedasto argued that this Court did not point out the difference between the Anyang'nyong'o Case and the Reference forming the subject matter of this application for review. A number of passages from the ruling were pointed out to him which clearly underscored the difference between the two cases but still Mr. Vedasto stuck to his guns that there were no differences pointed out. However, to be fair to him at one point he admitted the possibility of himself being at fault when he said:

"Of course, it may be my weakness that I failed to see the difference, that is why I wanted the difference to be shown, but I thought that to be just, fair and whatever, the difference between the two cases ought to have been shown."

[33] We are of the well settled view that the sentence we have quoted above encapsulates the problem with ground three, that is, the weakness of Mr. Vedasto which has caused him to fail to see the distinction which the Court very elaborately made between the two cases on a number of occasions. We, therefore, dismiss this ground with costs, too.

[34] It may not be out of place to observe that the application has been overtaken by events. Only nine persons, and not eleven, were sworn as members of the second Assembly from Tanzania.

[35] Therefore, for the above reasons, the application is dismissed with costs.

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