



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



(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; & Fakihi A. Jundu, J)

REFERENCE NO.12 OF 2014

JAMES ALFRED KOROSO APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA 1ST RESPONDENT**

AND

**THE PRINCIPAL SECRETARY, MINISTRY OF STATE
FOR PROVINCIAL ADMINISTRATION AND INTERNAL
SECURITY OF THE REPUBLIC OF KENYA 2ND RESPONDENT**

24TH MARCH, 2016

next.

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference has been filed by the Applicant in this Court on 21st July, 2014 under Rule 24(1) and (2)(a), (b), (c), (d) and (e) of this Court's Rules of Procedure (hereafter "**the Rules**").
2. The Applicant is a natural person, a Tanzanian citizen and a resident of Moshi in the United Republic of Tanzania. His address for service for the purpose of this Reference is care of Mr. Selemani Likavage Kinyunyu, Advocate and Mr. Rashid Salim Rashid, Advocate, both of KNR Legal, Tanzania, Plot No.7, Block B, Sokoine Road (Corner of Jacaranda Street above Blue Financial Services), P.O. Box 249, Arusha, Tanzania.
3. The 1st Respondent is the Attorney General of the Republic of Kenya and he is sued in his capacity as the principal legal advisor of the said Government. His address for service of this Reference is care of the Attorney General's Chambers, Sheria House, Harambee Avenue, P.O. Box 30112-00100, Nairobi, Kenya.
4. The 2nd Respondent is the Principal Secretary, Ministry of State for Provincial Administration and Internal Security of the Government of the Republic of Kenya. His address for service for the purpose of this Reference is Harambee House, P.O. Box, 30510, Nairobi, Kenya.

B. REPRESENTATION

5. Mr. Rashid Salim Rashid, Learned Counsel represented the Applicant. On the other hand, the Respondents were represented

leedy.

by Mr. Charles Mutinda, Mr. Emmanuel Bitta and Ms. Wambui Ng'ang'a, Learned Counsel.

C. THE APPLICANT'S CASE

6. The Applicant's Statement of Reference is supported by his own evidence and that of his two witnesses who adduced evidence before this Court.
7. It is his case that having been lured into Kenya by the Kenyan police in 1993, he was tortured, beaten physically and sexually assaulted in various Kenyan police stations. He had allegedly been arrested from Kenya-Tanzania border and thereafter charged with the offence of robbery with violence in **Criminal Case No.73 of 1993** at Kiambu Resident Magistrate's Court in Kenya. The said Court, however, found that the Applicant had no case to answer and acquitted him.
8. Upon his acquittal and release from incarceration, the Applicant filed **Civil Case No.2966 of 1996** at the High Court of Kenya against the 1st Respondent for false imprisonment and malicious prosecution, violation of constitutional rights, general and exemplary damages. During the entire hearing of the said suit, the 1st Respondent failed to bring his witnesses to defend him despite repeated adjournments to allow him to do so and Judgment was eventually entered in favour of the Applicant on 22nd February, 2008.
9. A Decree and a Certificate of Order thereon were issued by the said Court against the 1st Respondent on 17th April, 2008 and 8th December 2011 respectively, the latter ordering the 1st Respondent to pay the Applicant the sum of **Ksh.31,576,584/=** being the decretal sum plus interest thereon. Further, on 18th November, 2011, the said

see

Court issued a Certificate of Taxation in favour of the Applicant in the sum of **Ksh.362,007/=** against the 1st Respondent.

10. Despite the Applicant's repeated demands for payment by the 1st Respondent, the latter has refused or failed to do so in respect of the mentioned Decree and Certificate of Order prompting the Applicant to file a **Judicial Review Application No.44 of 2012** against the Respondents in the High Court of Kenya on 20th February, 2012. On 19th March, 2013, the said Court entered Judgment in favour of the Applicant and issued orders of mandamus compelling the 1st Respondent to pay to the Applicant **Ksh.21,000,000/=** plus interest thereon. Further, the Applicant obtained a Decree and Certificate of Order in the sum of **Ksh.28,475,737/=** in his favour against the Respondents from the said Court on 25th March, 2013.

11. Again, despite the Applicant's repeated demands for payment, the Respondents have refused and failed to pay him todate. Further, various Notices to Show Cause were issued by the said Court against the Respondents to wit on 7th May, 2013, 16th May, 2013, 8th August, 2013, 22nd October, 2013, 22nd January, 2014, 12th February, 2014, 24th February, 2014, 12th March, 2014, 8th April, 2014, 5th June, 2014, 3rd July, 2014 and 9th July, 2014 to no avail. The said Court had also issued Warrants of Arrest on 12th February, 2014 and 9th July, 2014 against the 2nd Respondent to no avail. The Applicant on 20th June, 2014 then wrote to the Hon. Chief Justice of Kenya complaining about non-compliance of the Court Orders by the Respondents. The said letter has not been acted upon todate.

12. The Applicant contends that, in his effort to seek for payment, he had also filed at the High Court of Tanzania, an Application of

Handwritten signature

Enforcement of Foreign Judgment, which is Application No.251 of 2013. However, the same was withdrawn on 15h February, 2014 following a decision of a Kenyan High Court Judge that payment would be made immediately, which was not done. He further contends that the Respondents are acting with bias and segregation towards him in refusing to pay him the decretal sum aforesaid and have threatened his liberty and safety as per his report to the police of Tanzania at Dar-es-Salaam.

13. The Applicant also alleges that the matter has caused suffering to him, his immediate family, clan, business partners, friends and religious institutions all of whom depended on him and will continue to cause him irreparable losses and damages thereto. In addition, the Applicant further alleges that, his second spouse, one Lightness Mary died, his first spouse's business went astray, his livelihood has been permanently derailed and that his properties are earmarked for auction for failure to repay a bank facility.

14. The Applicant furthermore contends that the acts and conduct of the Respondents are an infringement and violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (the "**Treaty**") in particular the principles of good governance, rule of law, accountability, transparency and social justice.

15. Based on all the aforesaid matters, the Applicant prays for Judgment and Decree as follows:

- a) A declaration be issued that the Respondents have violated the Treaty for the Establishment of the East African Community;

Handwritten signature

- b) The Respondents be ordered to pay liquidated damages in the sum of US\$86,465,402,256/=;
- c) The Respondents be ordered to pay the Applicant US\$5,000,000/= as general damages;
- d) The Respondents be ordered to pay the Applicant the decretal sum in **Civil Suit No.2966 of 1996, Ksh.28,475,737.11/=**;
- e) The Respondents be ordered to pay interest at commercial rate on the decretal sum from the date of Judgment to the date of satisfaction thereof;
- f) The Respondents be ordered to pay costs; and
- g) Any other relief deemed just and equitable.

D. THE RESPONDENTS' CASE

16. In their Reply, supporting Affidavits and evidence of their sole witness before this Court, the Respondents have vigorously contested and opposed the Reference. Notably, they maintain that the Court has no jurisdiction to entertain and determine the Reference and that the same in any event is time barred under Article 30(2) of the Treaty.
17. The above position notwithstanding, the Respondents admit that the Judgment, Decree and Certificate of Order were in favour of the Applicant in **Civil Case No.2966 of 1996** by the High Court of Kenya at Nairobi for false imprisonment, malicious prosecution, general and exemplary damages and violation of constitutional rights. Being aggrieved thereby, the Respondents issued a notice of appeal on 4th March 2008 to the Court of Appeal of Kenya and filed **Civil Appeal No.163 of 2014** on 1st July, 2014 thereto.

Handwritten signature

18. The Respondents further admit that the Applicant had filed **Judicial Review Application No.44 of 2012** in the High Court of Kenya at Nairobi and the said Court in its Judgment issued an Order compelling the Respondent to pay the Applicant the decretal amount in **Civil Case No. 2966 of 1996** within 30 days. In addition to the said Judgment, the said Court also issued a Decree and Certificate of Order thereto. The Respondents are aggrieved by all these decisions and are pursuing the appeal process. The Respondents also applied to the Court of Appeal of Kenya for stay of execution of all Orders issued by the High Court of Kenya in **Civil Case No.2966 of 1996** which order was granted on 22nd July, 2014. The Respondents contend therefore that they have at all times complied with the Notices to Show Cause and Warrants of Arrest issued by the High Court of Kenya in respect of **Civil Case No.2966 of 1996**.
19. The Respondents in that context deny any violation of the provisions of the Treaty in particular Articles 6(d) and 7(2) thereof and in pursuing an appeal at the Court of Appeal of Kenya, they contend that the same is in furtherance of good governance and the rule of law under the Treaty. Further, the Respondents deny allegations of bias and segregation raised by the Applicant as a reason for not being paid to date.
20. The Respondents strongly contend that the damages and losses claimed by the Applicant in the Reference are too remote in this matter. In any event, they contend that the acts and resultant decretal amount complained of by the Applicant arose from events in 1993 to 1996 before the coming into force of the Treaty hence; this Court has no jurisdiction to determine this Reference based on the principle of non-retroactivity. The Respondents contend further that

Handwritten signature

the Applicant' Reference was filed in bad faith as it has not disclosed some basic material facts which is an abuse of Court process and against the principles of good governance and rule of law. Such matters include the appeal process and stay of execution order pursued by the Respondents.

21. Based on the aforesaid contentions, the Respondents pray for the dismissal of the Reference with costs.

E. SCHEDULING CONFERENCE

22. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 5th February, 2015 where all the Parties were present and agreed that:

1. There is Judgment and Decree in favour of the Applicant in Civil Case No.2966 of 1996;
2. The Applicant has not been paid the decretal sum todate;

23. There were also issues of disagreements as follows:

- a) It is admitted that the High Court of Kenya issued a Certificate of Order in Civil Case No.2966 of 1996, but the amount is disputed; and
- b) The judicial Review Judgment and the Certificate of Order were issued but their validity is disputed by the Respondents;

24. On the other hand, the following points were framed for determination by the Court:

1. Whether the Court has jurisdiction to entertain the Reference;
2. Whether the Reference is time-barred;

next;

3. Whether the actions of the Respondents are in violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
4. Whether the issues in this Reference are similar to the issues in Nairobi HCCC No.2966 of 1996; and
5. Whether the Applicant is entitled to the reliefs sought.

F. DETERMINATION OF ISSUES BY THE COURT

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

25. The Applicant and the Respondents have each submitted on the above named issue as reflected below:

THE APPLICANT'S SUBMISSIONS

26. The Applicant in his submission vigorously contends that this Court has jurisdiction to entertain the Reference.
27. Firstly, he contends that the Applicant as a natural person, a citizen of Tanzania and a resident of Moshi in the United Republic of Tanzania has a right of access to this Court under Article 30(1) of the Treaty. He avers that in this Reference, he is also challenging the Respondents' acts and both are officials of the Republic of Kenya, a Partner State in the East African Community.
28. Secondly, the Applicant contends that he is seeking interpretation of Articles 6(d) and 7(2) of the Treaty which allegedly have been breached by the Respondents. He argues that the Court under Article 27 of the Treaty has jurisdiction over interpretation and application of the Articles of the Treaty and that the Court under

my

Article 23 of the Treaty is required to ensure adherence to law in the interpretation of and compliance with the provisions of the Treaty. He further argues that the orders he is seeking from this Court are intended to ensure that the Respondents comply with the provisions of the Treaty.

29. Thirdly, the Applicant contends that this Court has previously dealt with interpretation and application of Articles 6 (d) and 7(2) of the Treaty in Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No.1 of 2011 and stated as follows:

“The respective Partner States’ responsibilities to their citizens and residents have through those States voluntary entered into the EAC Treaty, been scripted, transformed and fossilized into the several objectives, principles and obligations now stipulated in, among others, Articles 5, 6 and 7 of the Treaty, the breach of which by any Partner State gives rise to infringement of the Treaty. It is that alleged infringement which through interpretation of the Treaty under Article 27 (1) constitutes the cause of action in a reference.”

30. The Applicant has also cited Samuel Mukira Muhochi vs. the Attorney General of the Republic of Uganda; EACJ Reference No.5 of 2011 which decision was to the effect that all the fundamental principles of the EAC under Article 6 are “*foundation, core, indispensable and enforceable,*”

THE RESPONDENTS’ SUBMISSIONS

31. The Respondents in their submission vigorously contend that the Court has no jurisdiction to entertain the Reference. Firstly, they

ueefy.

contend that the acts complained of by the Applicant occurred in 1993 – 1996 hence, (citing: **Emmanuel Mwakisha Mjawasi and 28 Others vs. the Attorney General of the Republic of Kenya, EACJ Appeal No.4 of 2011**) were acts committed before the Treaty came into force in July, 2000. In this regard, they contend that, the Applicant's complaints are not covered by the Treaty due to the principle of non-retroactivity referred to by the Court in the above cited case. They further contend that, the Applicant in the Reference only seeks for the interpretation of the Treaty as to whether failure to pay the decretal amount in **Civil Case No.2966 of 1996** and the alleged failure by the Respondents to comply with the Notices to Show Cause and Warrants of Arrests are violation of Articles 6(d) and 7(2) of the Treaty.

32. Secondly, the Respondents contend that the claims which the Applicant is pursuing under this Reference are in the nature of torts, hence the preserve of the jurisdiction of the National Courts in Kenya and not this Court. They contend further that, the matter of the Applicant in **Civil Case No.2966 of 1996** are now subject of a pending **Civil Appeal No.163 of 2014** in the Court of Appeal of Kenya which in terms of Article 30(3) of the Treaty is an institution reserved with jurisdiction in the Republic of Kenya to deal with such matters and not this Court. They further argue that a reference under Article 30 of the Treaty only seeks to challenge the legality of an action of a Partner State or an institution thereof by a Partner State under the Treaty and not an action brought by a person injured by or through the misfeasance of another (citing: **Independent Medical Legal Unit vs. Attorney General and 4 Others** (supra).

Healy

33. Thirdly, the Respondents contend that the Applicant has not exhausted local remedies in pursuance of his Civil Case No.2966 of 1996 and allege that they have filed an appeal at the Court of Appeal of Kenya against the decision of the High Court of Kenya in Civil Case No.2966 of 1996. Therefore, it is their stand that the matter is still within the jurisdiction of the local judicial mechanism of the Court of Appeal of Kenya established under Article 164 of the Constitution of Kenya and which has power to deal with appeals arising from the High Court of Kenya.

DECISION OF THE COURT ON ISSUE NO.1

34. We have carefully considered the submissions and arguments of the Parties on Issue No.1 mentioned above and our determination is as here under.

35. Firstly, the Applicant has contended, and we fully agree with him that this Court has jurisdiction under Articles 23, 27 and 30 of the Treaty to entertain and determine this Reference in particular the interpretation and application of Articles 6(d) and 7(2) (See: The Independent Medical Legal Unit case (supra) and Samuel Mukira Muhochi case (supra). We are of the firm view that, the Applicant's accessibility to this Court is mandated under Article 30(1) of the Treaty. For avoidance of any doubt, the said Article provides as follows:

“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,

Lucy

directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.”

36. We observe that, the Applicant has alleged that Articles 6(d) and 7(2) have been violated or infringed by the Respondents. In numerous decisions of this Court including **Samuel Mukira Muhochi** (supra) cited by the Applicant, the Court has held that once there is an allegation of infringement of the provisions of the Treaty, the Court has jurisdiction to interpret and apply the provisions alleged to be infringed under the powers conferred on it by Articles 23(1) and 27(1) of the Treaty.

37. Secondly, we have carefully considered the Respondent's argument that the complaints of the Applicant arose during 1993 – 1996 hence, the same are not covered by the Treaty in view of , and by the principle of non-retroactivity and that therefore this Court lacks jurisdiction to entertain the Reference (See: **Emmanuel Mwakisha Mjawasi** Case (supra), However, our close reading of the Reference shows that the complaints of the Applicants are based on non-compliance by the Respondent of a Judgment , Decree and Certificate of Order by the High Court of Kenya issued on 22nd February, 2008, 17th April, 2008 and 8th December, 2011 respectively by which time or dates the Treaty had long been brought into force i.e. since 7th July 2000.They are further based on the Judgment issued on 19th March 2013, Decree and Certificate of Order issued on 25th March 2013 in **Judicial Review Application No.44 of 2012** issued on 19th March, 2013 and Decree and Certificate of Order on 25th March, 2013 as well as the various Court Orders by way of Notices to Show Cause and Warrants of Arrest to the 2nd Respondents from 2013 to 2014. This assertion distinguishes this

Keely

Reference from that of **Emmanuel Mwakisha Mjawasi** (supra) as the complaints of the Applicant therein were on matters that arose in 1977 before the Treaty had been passed. We therefore, disagree with the arguments of the Respondents as regards application of the principle of non-retroactivity.

38. Thirdly, we have also carefully considered the Respondents' argument that the Applicant has not exhausted local remedies and that the matter is subject of an appeal (**Civil No.163 of 2014**) before the Court of Appeal of Kenya. In paragraph 20 of the Reference, the Applicant avers that "*he has reasonably exhausted all available local remedies on his claims.*" In our considered view, this issue of exhaustion of local remedies should not detain us because the Court has in its previous decisions stated that exhaustion of local remedies is not a pre-condition for accessing this Court (See: **Prof. Peter Anyang Nyong'o and 10 Others vs. the Attorney General of the Republic of Kenya and 5 Others, EACJ Ref. No.1 of 2006**). Therefore, the argument by the Respondents that the matter is before the Court of Appeal of Kenya does not bar in our considered view, the Applicant from accessing this Court under Article 30(1) of the Treaty.

39. In conclusion on Issue No.1, we hold that this Court as per the provisions of Articles 23(1), 27(1) read together with Article 30(1) of the Treaty and as per numerous previous decisions of this Court, has jurisdiction to entertain and determine this Reference given the Applicant's allegation that there is violation or infringement of Articles 6(d) and 7(2) of the Treaty.

Issue No.2: Whether the Reference is Time-Barred

40. The Applicant and the Respondents have each submitted on the above named issue as reflected hereunder:

THE APPLICANT'S SUBMISSIONS

41. The Applicant contends that the gist of this Reference is repeated failure of the Respondents to pay him what is due to him notwithstanding the issuance of Judgment, Decree, Certificate of Order, various Notices to Show Cause and the Warrants of Arrests in respect of **Civil Case No.2966 of 1996** and **Judicial Review Application No. 44 of 2012**. To mention but a few, the Applicant states that the Respondents did not comply with a Notice to Show Cause issued on 3rd July, 2014 and the Warrant of Arrest dated 9th July, 2014. The Applicant also submits that on 21st July, 2014, he filed this Reference before this Court and therefore, he argues that the Reference was filed well within the time limit of two months stipulated under Article 30(2) of the Treaty.

THE RESPONDENTS' SUBMISSIONS

42. The Respondents in their Submissions strongly contend that the Reference is time barred and should not be entertained by this Court.

43. They contend that the Applicant in the Reference claims that the Respondents did not comply with the Judgment of the High Court of Kenya in **Judicial Review Application No.44 of 2012** which had ordered them to pay him the decretal sum within 30 days from the date of the delivery of that Judgment that is 19th March, 2013. They argue in that regard that the said 30 days lapsed on 19th April 2013,

keep

and that if the Applicant wanted to file this Reference, the time of two months under Article 30(2) of the Treaty lapsed on 18th June, 2013. They contend that the Reference was filed on 21st July, 2014 and was therefore instituted out of time.

DECISION OF THE COURT ON ISSUE NO. 2

44. We have considered the Applicant's contention that the Reference was filed well in time as per the requirements of Article 30(2) of the Treaty. We have also carefully considered the Respondents' submissions that the Reference is time barred under Article 30(2) of the Treaty because it is based on claims of the Applicant which occurred in 1993-1996 before the Treaty came into force and orders of the High Court of Kenya issued prior to 2014. Is the argument of the Respondents tenable?
45. It is very clear in our minds that the Applicant in his Submissions has ably demonstrated that the Respondents have refused or failed to comply with the various orders of the High Court of Kenya to pay him his decretal amount in respect of **Civil Case No.2966 of 1996** over a period of six years from the date of delivery of the Judgment in 2008 to the date of obtaining an order of stay of execution in 2014.
46. In that context, whereas we are in agreement that Article 30(2) limits the time within which a party can approach this Court to two months from the date of the action complained of (or from the date the Applicant came to know of an alleged violation), not all actions placed before us are time barred. Some of the actions of the Respondents are obviously time-barred but we have seen a number of actions in which they defied clear Court orders.

Handwritten signature

47. One such defied order is that of the Notice to Show Cause of 3rd July 2014 and the Warrant of Arrest dated 9th July, 2014. We are of the firm view that the filing of the Reference by the Applicant on 21st July, 2014, in that context, was well within the time limit of two months stipulated under Article 30(2) of the Treaty counted from the date the Respondents defied the Warrant of Arrest. While therefore the initial claim by the Applicant before the High Court of Kenya may relate to events between 1993 and 1996, the issues in context are the aforesaid orders issued between 2008 and 2014. It is also our view that whereas any orders issued prior to 21st May, 2014 are out of time but as we have shown above, some orders were issued as late as 9th July 2014 and certainly defiance of such orders fall within the time limit in challenging them before this Court.

48. To conclude Issue No.2, we hold that the Reference was filed by the Applicant partly within the time limit as required under Article 30(2) of the Treaty and we shall make necessary orders after addressing Issue No.3 below.

Issue No.3: Whether the actions of the Respondents are in violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community

49. All the Parties in their written and oral Submissions before this Court have extensively dealt with the above mentioned issue as briefly reproduced hereunder:

THE APPLICANT'S SUBMISSIONS

50. In the Reference, written Submissions and oral evidence, the Applicant explains how he obtained Judgment, Decree and Certificate of Order in **Civil Case No.2966 of 1996** on 22nd February,

Healy

2008, 17th April, 2008 and 8th December, 2011, respectively. He also explains the various actions he took in seeking execution of the said Decree including filing **Judicial Review Application No.44 of 2012** at the High Court of Kenya which issued Judgment on 19th March 2013, Decree and Certificate of Order on 25th March/3/2013.

Thereafter, he explains in detail the various judicial actions in terms of Court Orders, that were taken against the Respondents including issuance of Notices to Show cause (7th May 2013, 16th May 2013, 8th August 2013, 22nd October 2013, 22nd January 2014, 2nd February 2014, 12th March 2014, 8th April 2014, 5th June 2014, 3rd July 2014 and 9th July 2014) and issuance of Warrants of Arrest (12th February 2014 and 9th July 2014) to no avail.

51. The Applicant contends that there has been non-compliance of the various Court Orders of the said Court from 2008 to 2014 by the Respondents towards the execution of the aforesaid Decrees including the 2nd Respondent presenting an Affidavit instead of appearing in Court in response to the Warrant of Arrest.
52. Even when it comes to the process of appeal by the Respondents, the Applicant contends that the Respondents did nothing substantial for a period of six years from 22nd February, 2008, the date of delivery of Judgment in **Civil Case No.2966 of 1996** until 22nd July, 2014 when they obtained an order for stay of execution after the Applicant had filed the Reference on 21st July, 2014.
53. The Applicant contends further that, the aforesaid action of non-compliance with the various Court orders issued by the High Court of Kenya is a violation of Articles 6(d) and 7(2) of the Treaty regarding principles of good governance, rule of law, accountability,

Healy

transparency and social justice as stated in James Katabazi and 21 Others vs. Secretary General of the EAC and Others, EACJ Ref. No.1 of 2007. He contends that this Court has on numerous decisions stated that the said principles are binding on the Partner States and their citizens (citing: Henry Kyarimpa vs The Attorney General of the Republic of Uganda, EACJ Ref. No.1 of 2013) and that what the Respondents have been doing in non-compliance with the various court orders is an abuse of the process of law. He contends further that this Court has previously stated that, due process of law is a cornerstone of the rule of law and its non-respect is a violation of Articles 6(d) and 7(2) of the Treaty (citing: East African Law Society vs. The Attorney General of Burundi and the Secretary General of the East African Community, EACJ Ref. No.1 of 2014),

54. The Applicant emphatically argues therefore that the aforesaid acts of the Respondents were an abuse of due process, lacked transparency and accountability and in disregard of rule of law and good governance principles which this Court has emphasized in a number of decisions (see Samuel Mukira Muhochi (supra).

THE RESPONDENTS' SUBMISSIONS

55. The Respondents in their Submission vigorously deny violating Articles 6(d) and 7(2) of the Treaty. They contend that all the acts they have done or undertaken in Civil Case No.2966 of 1996 had been in furtherance of and in the upholding Articles 6(d) and 7(2) of the Treaty as far as the principles of good governance, rule of law transparency and accountability are concerned (citing: James Katabazi (supra) and Godfrey Magezi vs. Attorney General of the

Heedy

Republic of Uganda, EACJ Re. No.5 of 2013. Having been aggrieved by the decision in the said case, the Respondents contend that, they filed a Notice of Appeal and requested for copies of typed proceedings on 4th March, 2008 which were supplied only on 14th May, 2014 hence, the Appeal (Civil Appeal No.163 of 2014) was filed on 1st July, 2014. They contend further that although the Applicant has been complaining about the acts of the Respondents, he has not applied to the High Court of Kenya to strike out the Notice of Appeal filed by them.

56. The Respondents also contend that in pursuance of the principles of good governance and rule of law, they defended the Judicial Review Application No.44 of 2012 filed by the Applicant and have since filed a Notice of Appeal against its Judgment. On the same grounds, the Respondents argue that they filed an application for stay of execution in Civil Case No.2966 of 1996 which was granted on 22nd July 2014. Again, the Respondents vigorously contend that they attended and complied with the Notices to Show Cause as well as the Warrants of Arrests issued by the High Court of Kenya. They contend further that with all the aforesaid lawful acts they have taken, seeking to challenge the decision of the said Court, the Applicant's contention that the Respondents are violating Articles 6(d) and 7(2) of the Treaty is baseless.

57. The Respondents instead accuse the Applicant of applying double standards by invoking the principles of good governance and rule of law only if decisions are made in his favour and not otherwise. They also accuse him of not disclosing pertinent matters in his Reference that had been acted upon by the Respondents in particular the appeal process against the decision of the High Court of Kenya in

Leeds
/

Civil Case No.2966 of 1996 as well as the Application for Stay of Execution in Judicial review Application No. 44 of 2012. They argue that such conduct of the Applicant amounts to abuse of court process and is contrary to principles of good governance and rule of law.

58. They further argue that the Applicant, apart from the issue of non-compliance of payment of the decretal sum, has also raised issues of being segregated, his life and that of his subjects being threatened and that the Respondents have acted with bias in not listing his decretal amount as a debt for payment by the Government of Kenya and that in their opinion, these issues have not been proved hence, it does not follow that the Respondents have violated Articles 6(d) and 7(2) as alleged by the Applicant.

DECISION OF THE COURT ON ISSUE NO.3

59. We have carefully considered the rival arguments and submissions of the Parties on the above named issue, that is, whether the actions of the Respondents violate Articles 6(d) and 7(2) of the Treaty. Our decision thereto is as hereunder:

60. Firstly, from the pleadings, evidence, arguments and submissions of the Parties before this Court, we fully agree that, Judgment, Decree and Certificate of Order were issued in favour of the Applicant in Civil Case No.2966 of 1996 by the High Court of Kenya on 22nd February 2008, 17th April 2008 and 8th December 2011, respectively.

61. Secondly, we also fully agree that since that time, the Applicant has embarked on various judicial actions with a view to be paid his decretal amounts to no avail. This includes the filing of Judicial Review Application No.44 of 2012 whereby Judgment, Decree and

uey,

Certificate of Order were issued in favour of the Applicant on 19th March 2013 and 25th March 2013, respectively, culminating into various Notices to Show Cause and Warrants of Arrests against the 2nd Respondent.

62. Thirdly, as per our findings on Issue No. 2, there are some actions imputed to the Respondents which are time barred and therefore, in our considered opinion, cannot be entertained. In this regard, the only action which the Court can inquire into is the one pertaining to the non-compliance with the Warrant of Arrest dated 9th July 2014. The latter arose from the defiance of the 2nd Respondent to a Notice to Show Cause dated 3rd July 2014. It is our considered view that such actions and conduct of the Respondents, undoubtedly, were not in pursuance of the principles of good governance and rule of law stated in Articles 6(d) and 7(2) of the Treaty. We so hold.

Issue No.4: Whether the Issues in this Reference are similar to the Issues in Nairobi HCCC No.2966 of 1996

63. The Applicant and the Respondents have each submitted on the above named issue as reflected hereunder:

THE APPLICANT'S SUBMISSIONS

64. The Applicant contends that the issues in this Reference are quite different from the issues in **Civil Case No.2966 of 1996** of the High Court of Kenya. He asserts that such difference is vivid if comparison is made from what is stated in the Judgment of the said case and the Scheduling Conference notes of this Reference dated 5th February, 2015. He contends that in **Civil Case No.2966 of 1996**, he was seeking a remedy for false imprisonment and malicious prosecution inflicted to him by the agents of the Kenya Government

Lecky

while the issues framed in the Reference seek to show that the Respondents have violated Articles 6(d) and 7(2) of the Treaty. He asserts that none of the issues framed in **Civil Case No.2966** has been framed as an issue in the Reference.

65. The Applicant further contends that the Parties in the two cases are different. In **Civil Case No.2966 of 1996** the Respondent is the Attorney General of Kenya while in the current Reference, the Respondent is the Republic of Kenya as a Partner State represented by the Attorney General as its Chief Legal Advisor. He also asserts that the cause of action in the two cases is different. In **Civil Case No.2966 of 1996**, the cause of action was based on false imprisonment, malicious prosecution and violation of the Applicant's constitutional rights while in the current Reference, it is violation of Articles 6(d) and 7(2) of the Treaty. He also contends that, there is no requirement of exhaustion of local remedies before filing any Reference before this Court (citing: **Prof. Peter Anyang Nyong'** (supra).

THE RESPONDENTS' SUBMISSIONS

66. The Respondents in their submission vigorously contend that the issues in **Civil Case No.2966 of 1996** and the present Reference are the same. They mention claims of false imprisonment and unlawful arrest, malicious prosecution, assault and battery, special damages, loss of income from business and legal expenses, collapse of the business of the Applicant and his wife, his children leaving school and some of them turning to drugs, and how the Applicant and his wife went astray, are all issues in this Reference.

Handwritten signature

DECISION OF THE COURT ON ISSUE NO.4

67. We have carefully considered the rival submissions of the Parties on Issue No.4. In short, the Applicant has vigorously argued that the issues in the present Reference are different from the issues in **Civil Case No.2966 of 1996**. On the other hand, the Respondents in their Submissions have strongly argued that the issues are the same in the two cases.

68. In our considered view, it is a cardinal principle of law and practice that usually issues in civil cases emerge or are framed from what is contained in the pleadings filed by the Parties in court. We shall examine the issues framed in **Civil Case** No.2966 of 1996 and the issues framed in the present Reference in that context.

69. On pages 7-8 of the Judgment of **Civil Case No.2966 of 1996**, the learned Trial Judge stated as follows:

“Counsel for the Parties themselves enumerated the issues for resolution by this Court as follows:

- i) Was the Plaintiff arrested and incarcerated by the police officers from the Criminal Investigation Department on 17th December, 1993?*
- ii) Upon his arrest, was the Plaintiff detained in custody, if at all?*
- iii) Was the arrest and detention lawful or unlawful?*
- iv) Was the Plaintiff subjected to inhuman and degrading treatment during the arrest and incarceration?*
- v) Was the Plaintiff charged and arraigned in Kiambu Magistrates' Court Criminal Case No.73 of 1993 with the offence of robbery with violence, or at all?*

- vi) Was the Plaintiff acquitted of the said charge?*
- vii) In what capacity did the said police officers arrest the Plaintiff and under whose authority?*
- viii) Did the Plaintiff suffer injuries as alleged, or at all?*
- ix) Did the Plaintiff suffer loss and damage as alleged, or at all?*
- x) Is the Plaintiff entitled to the reliefs sought?"*

70. On the other hand, issues for determination by this Court are normally framed during the Scheduling Conference. The Scheduling Conference notes of 5th February, 2015 for this Reference shows that such issues were as follows:

- i) Whether the Court has jurisdiction to entertain the Reference;
- ii) Whether the Reference is time-barred;
- iii) Whether the actions of the Respondents are a violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
- iv) Whether the issues in this Reference are similar to the issues in Nairobi HCCC2966 of 1996; and
- v) Whether the Applicant is entitled to the reliefs sought."

71. Indeed, comparison of the issues in the two cases as above demonstrated clearly shows that issues in these two cases are different. Again, the cause of action in **Civil Case No.2966 of 1996** was on false imprisonment, malicious prosecution, battery and assault, loss of business and damages *inter alia*, while in the present Reference, the Applicant's cause of action is centered on violation of Articles 6(d) and 7(2) of the Treaty. It is obvious from the foregoing

that the issues for determination in the two cases are completely different although based on the same set of facts. We so hold.

Issue No.5: Whether the Applicant is Entitled to the Reliefs Sought.

72. The Parties have each submitted on Issue No.5 as reflected in the following paragraphs hereunder:

THE APPLICANT'S SUBMISSIONS

73. The Applicant in his submission prays for the following reliefs as sought in the Reference:

- a) A declaration be issued that the Respondents have violated the Treaty for the Establishment of the East African Community;
- b) The Respondents be ordered to pay liquidated damages in the sum of US\$86,465,402,256/=;
- c) The Respondents be ordered to pay the Applicant US\$5,000,000/= as general damages;
- d) The Respondents be ordered to pay the Applicant the decretal sum in Civil Suit No.2966 of 1996, Ksh.28,475,737.11/=;
- e) The Respondents be ordered to pay interest at commercial rate on the decretal sum from the date of Judgment to the date of satisfaction on this;
- f) The Respondents be ordered to pay costs; and
- g) Any other relief deemed just and equitable.

74. The Applicant submits that there are sufficient authorities to support grant of prayers (a), and (f) above (citing: **East African Law Society vs. the Attorney General of the Republic of Burundi, EACJ Ref. No.1 of 2014**) where such declaration and costs were sought and the Court granted them to the Applicant therein (citing Rule 111(1) of

Meeky

the Court's Rules of Procedure as well as James Katabazi's Case (supra).

75. As regards Prayers (b), (c), and (d), the Applicant contends that the Court is conferred with authority to award such damages under Article 44 of the Treaty which allows the Court to impose pecuniary obligation on the execution of a Judgment of the Court against a person in a Partner State. The Applicant has also submitted on the justification or legal basis for grant of each prayer and citing relevant authorities where necessary.

THE RESPONDENTS' SUBMISSIONS

76. The Respondents in their submissions have vigorously argued that the Applicant is not entitled to any of the reliefs sought in the Reference. As to prayer (a), the Respondents contend that the relief (declaration) is not available to the Applicant because all along the Respondents have acted in accordance with the principles of good governance and rule of law and hence, they have not violated Articles 6(d) and 7(2) of the Treaty. They contend conversely that it is the Applicant who has violated the principles of good governance and rule of law. The Respondents, on prayers (b), (c) and (d) maintain that the reliefs sought therein are not available to the Applicant for various reasons including that the Court under Articles 23(1), 27(1) and 30(1) of the Treaty is not conferred with the power to grant such reliefs, and is conferred with power for interpretation and application of the provisions of the Treaty only.

DECISION OF THE COURT ON ISSUE NO.5

77. We have carefully considered the rival submissions of the Parties on Issue No.5 and our determination and decision is as follows:

78. Firstly, as far as prayer (a) is concerned, that is a declaration that the Respondents have violated Articles 6(d) and 7(2) of the Treaty, we revert to our findings and holding in Issue No.3 above. We held in the said Issue and we hold the same here that non-compliance with the Warrant of Arrest issued by the High Court of Kenya on 9th July 2014, following the defiance of the 2nd Respondent to a Notice to Show Cause dated 3rd July 2014 and before orders of stay of execution were issued by the Kenyan Court of Appeal on 22nd July 2014, amounts to a violation of the principles of good governance and rule of law enshrined in Articles 6(d) and 7(2) of the Treaty. Having said so, however, in the totality of the Reference before us, the conduct of the Respondents since the Applicant obtained his Judgment on 22nd February 2008 is most unfortunate. The Judgment was rendered by a competent Court in Kenya and there is an expectation that in a country governed under the rule of law, all court orders, however painful and whatever the views of the Respondents, ought to be respected and complied with unless overturned by an appeal or otherwise reviewed. The Respondents in that regard filed a Notice of Appeal on 4th March 2008 and finally an appeal was filed on 1st July 2014, six years later. In our considered view, no justifiable reason has been given for that delay and yet the Applicant has constantly and persistently pursued the fruits of his Judgment. Had our hands not been tied by the limitation provision in Article 30(2) of the Treaty, we would have certainly held the Respondents to account for their actions within their obligations under the Treaty. It matters not, however, because we are unable to do so and our final orders will be made herebelow only within our mandate under the Treaty.

next

79. Secondly, as regards prayers (b), (c), (d) and (e), we agree fully with the Respondents that the Court, under Articles 23, 27 and 30 is not conferred with powers to grant such orders. It only deals with interpretation and application of the provisions of the Treaty and ensuring its compliance thereon. That is why in **Independent Medical Legal Unit Case** (supra), this Court stated as follows:

“A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action brought to challenge the legality, under the Treaty, of an activity of a Partner State or of institutions of the Community. The alleged collusion and connivance of the Treaty, if any, is not actionable under Article 30.”

80. Thirdly, the Applicant referred us to Article 44 of the Treaty and alleged that the Court is empowered to impose pecuniary obligation in execution of a Judgment of the Court and argued that the said Article is an authority that the Court can grant a money award to an applicant hence, the Court has jurisdiction to grant prayers (b), (c), (d) and (e). In our considered view, “a judgment of the Court” mentioned in Article 44 takes the import of the provisions of Articles 23, 27 and 30 of the Treaty, that is, that it is limited to interpretation and application of the provisions of the Treaty and their compliance thereof. We take it that imposition of “pecuniary obligation” in Article 44 refers to matters in pursuance of an interpretation and application of the provisions of the Treaty and nothing else. Pecuniary obligations include costs and have nothing to do with the awards and orders mentioned by the Applicant in prayers (b), (c), (d) and (e). We so hold.

81. Fourthly, in prayer (d), the Applicant prays to this Court to order the Respondent to pay the decretal amount granted in **Civil Case No.2966 of 1996** by the High Court of Kenya. Likewise, in prayer (e), the Applicant prays to this Court to order the Respondents to pay interest at commercial rate on the decretal sum from the date of Judgment to the date of satisfaction. The Respondents have vigorously opposed the two reliefs in their Submissions. In our considered view, the two sought reliefs fall under the jurisdiction of the National Courts in Kenya. Indeed, the record shows that the Respondents have obtained an order of stay of execution at the Court of Appeal of Kenya, and that they are pursuing an Appeal before the said Court against the decision of the High Court in **Civil Case No. 2966 of 1996**. In that context, this Court cannot grant prayers (d) and (e) sought by the Applicant.

82. Lastly, in prayer (f), the Applicant prays for costs. He has referred us to Rule 111(1) of this Court's Rules of Procedure which provide that "costs shall follow the event" and that there is an occasion the Court had ordered certain Respondents to pay costs (citing: **James Katabazi's Case** (supra). The Respondents strongly oppose the said prayer. They argue that, it is the Applicant who should pay costs because the Reference lacks merit and that it is him who has violated the principles of good governance and rule of law.

83. In our considered view, it is true as argued by the Applicant, that usually "costs follow the event" as stated in Rule 111(1) of the Court's Rules. Indeed, it is also well known that the grant of costs is a discretionary exercise by a court. After due consideration of the matter, we think and resolve that the Applicant is only entitled to a ¼ of the costs. We so hold.

Heck,

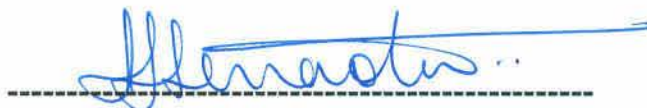
G. CONCLUSION

84. In conclusion, the final orders to be made are as follows:

- i) Prayer (a) of the Reference is granted in the following terms only: A declaration be and is hereby issued that by failing to effect the Warrant of Arrest issued by the High Court of Kenya on 9th July 2014, and before orders of stay of execution were issued by the Kenyan Court of Appeal On 22nd July 2014, the Respondents violated Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.*
- ii) Prayers (b), (c), (d) and (e) of the Reference are denied and are therefore dismissed.*
- iii) The Applicant shall have $\frac{1}{4}$ of the costs of the Reference.*

It is so ordered.

Dated, delivered and signed at Arusha on this 24th Day of March, 2016.



**Isaac Lenaola
DEPUTY PRINCIPAL JUDGE**



**Faustin Ntezilyayo
JUDGE**



**Fakihi A. Jundu
JUDGE**