IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ & Faustin Ntezilyayo J)

REFERENCE NO.3 OF 2015

STEVEN DENISS ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF BURUNDI..... 1ST RESPONDENT

THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA..... 2ND RESPONDENT

THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA..... 3RD RESPONDENT

THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA..... 4TH RESPONDENT

THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA..... 5TH RESPONDENT

THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY..... 6TH RESPONDENT

31st March, 2017

JUDGMENT

Introduction

1. The present Reference is principally premised on Articles 6(d) and 7(1)(a) of the Treaty for the Establishment of the East African Community (hereinafter the "**Treaty**"). Articles 4(3), 5, 8, 30, 67, 71, 127 and 150 of the Treaty have also been cited as have Rules 1(2) and 24 of this Court's Rules of Procedure.

2. The Applicant is a citizen of the United Republic of Tanzania whose address is c/o the East African Law Society, P.O. Box 6240, Arusha, Tanzania.

3. The 1st to 5th Respondents are the Attorneys General of the Republics of Burundi, Kenya, Rwanda, United Republic of Tanzania and Uganda, respectively, who appeared through their designated representatives in the present proceedings.

4. The 6th Respondent is the Secretary General of the East African Community (hereinafter "**EAC**") and is sued as the Principal Executive Officer of the EAC as well as in his capacity as Head of the EAC Secretariat, the Secretary of its Summit and the custodian of the Legal Instruments of the said Community.

5. The Reference arises from allegations that the Applicant was shot, his property lost and he was then forcefully expelled to Rwanda from the Kagera Region of Tanzania by agents of the Government of Tanzania but was unable to challenge those actions because of the limitation imposed on him by Article 30(2) of the Treaty.

Applicant's Case

6. According to the Applicant, although he was certain that the above alleged actions amounted to a breach of and violation of the Treaty, when he sought legal advice from the East African Law Society, by letter dated 7th May, 2014 on possible remedies, he was informed that by fact of the express and mandatory provisions of Article 30(2) of the Treaty, his claim was time-barred. He was further informed that the process by which Article 30(2) of the Treaty was introduced was unlawful and that the 6th Respondent had failed in his duty to advise Partner States to rectify the anomaly.

7. It is also the Applicant's case that the existence of Article 30(2) is a hindrance to citizens' access to justice; leaves victims of Treaty violations without redress and relief at the altar of convenience and technicalities; fosters lack of confidence by stakeholders and creates uncertainty. That it also limits this Court's ability to interpret the Treaty which is not in tandem with international and regional instruments of similar nature and it is unjust, discriminatory and does not provide aggrieved parties ample time to obtain legal assistance, conduct research and collect relevant evidence including securing of relevant witnesses. That therefore the said provision is in sum contrary to the inclusivity and equity fundamentals of the Treaty.

8. The Applicant for the above reasons prays for a declaration that the sixty days' limitation period for filing references before this Court imposed by Article 30(2) of the Treaty is contrary to the fundamental and operational principles of the EAC as set out in Articles 6(d) and 7(1)(a) of the Treaty and that the said provision should consequently be declared null and void.

9. In the alternative, he prays for an order that the Treaty ought to be amended enlarging the limitation period to not less than six months and also clothe this Court with the discretion to extend or enlarge the said period. Costs are also sought by the Applicant.

1st Respondent's Case

10. In a concise response, the 1st Respondent states that the Reference is misguided; that the introduction of Article 30(2) to the Treaty was lawful and that the Applicant must bear the consequences thereof and in any event, that the 60 days' limitation period is sufficient for any party to access this Court and also ensures certainty in proceedings before the Court.

11. Lastly, that this Court has no Jurisdiction whatsoever to grant the Orders sought as to do so would in itself be in violation of Articles 9(4), 27(1), 150 and 151 of the Treaty. That therefore the Reference ought to be dismissed with costs.

2nd Respondent's Case

12. In his response, the 2nd Respondent urges that the Reference is inadmissible, unsubstantiated and flagrantly wrong and is motivated by bad faith. That this court in any event has no Jurisdiction to grant any of the Orders sought because under Articles 150 and 151 of the Treaty, the Court has no role in the enactment of amendments to the Treaty and it must only act within the powers conferred by Article 27 of the Treaty; and that the Court cannot breathe life into a cause of action that is already time-barred. He, therefore, prays that the Reference be dismissed with costs.

3rd Respondent's Case

13. In opposing the Reference, the 3rd Respondent states that the issue of the amendment of the Treaty in general was determined by this Court in the case of the **East African Law Society & 5 Others vs. Attorney General of Kenya & 3 Others, Reference No.3 of 2007** and therefore the present Reference is barred by the principle of *res Judicata.*

14. Secondly, it states that this Court has no Jurisdiction to order any amendment to the Treaty as the right to sign, ratify or amend any treaty is a sovereign right enjoyed by States. That therefore the Applicant has the right to seek such an amendment through his State and not directly by an act of this Court.

15. Thirdly, that this Court, in previous decisions such as **Independent Medical Legal Unit (IMLU) vs. AG of Kenya & Others, Appeal No.1 of 2011** has been categorical that nowhere does the Treaty grant it power to extend, waive or modify the prescribed time limit for initiating proceedings before it. That therefore, the overall framework of Article 30(2) was designed to balance the interests of an individual complainant against the collective interests of all the other citizens of the EAC.

16. In conclusion, the 3rd Respondent urges this Court to dismiss the Reference with costs.

4th Respondent's Case

17. The Attorney General of the United Republic of Tanzania began by raising a Preliminary Objection to the Reference on the following grounds:

i) that it offends the provisions of Article 6(a) of the Treaty on the sovereign equality of Partner States;

ii) that it is time-barred;

iii) that the Applicant has not exhausted the alternative remedies available in the National Courts of the United Republic of Tanzania; and

iv) that this Court lacks the Jurisdiction to entertain the Reference by dint of Articles 27 and 30(2) of the Treaty.

18. In the alternative, it is the 6th Respondent's case that while it admits that in an operation dubbed "*Kimbunga*", the Government of the United Republic of Tanzania evicted and deported all illegal immigrants from the Kagera Region to their home countries, in doing so, it did not breach or violate any part of the Treaty.

19. Further, that the mandate of passing, signing and amending the Treaty was validly exercised by Partner States and that it was prepared to call oral evidence and rely on the Constitution of Tanzania, Statutes and Case Law to show that the Reference is one fit for dismissal with costs.

5th Respondent's Case

20. On his part, the 5th Respondent's answer to the Reference is that it does not disclose any cause of action in terms of Article 30(2) of the Treaty and is therefore frivolous, vexatious, and scandalous and an abuse of the Court process.

21. The Attorney General of Uganda also contends that the issue of the legality of amendments to the Treaty including the introduction of

Article 30(2) was substantially determined within **Reference No.3 of 2007** aforesaid and cannot be reopened in the present proceedings.

22. Further, that Article 30(2) creates legal certainty among the diverse members of the EAC; grants proportionate access to justice by citizens and Partner States; creates confidence among stakeholders and is in tandem with other international and regional instruments of like purpose.

23. In addition, the 5th Respondent contends that the 60 days' limitation period is neither restrictive, unjust nor discriminatory as alleged by the Applicant and is also not a hindrance to access to this Court by natural and legal persons. That therefore the Reference is devoid of merit and should be dismissed with costs.

6th Respondent's Case

24. The Secretary General of the EAC urges the point that the Applicant is solely to blame for his inability to meet the expectations of Article 30(2) of the Treaty. That he therefore sat on his rights and since there was nothing illegal in the enactment of Article 30(2), there was no reason for the 6th Respondent to request the Partner States to do anything regarding it.

25. In addition to the above, it is the 6th Respondent's case that no known violations of the Treaty have ever gone unattended hence the increasing litigation before this Court in that context. That there is also no disproportionate access to justice against individual citizens and in favour of Partner States and there is no lack of confidence in the Treaty by stakeholders as alleged.

26. On this Court's interpretative mandate under the Treaty, the 6th Respondent contends that the said mandate is in tandem with international legal instruments including the African Charter on Human and People's Rights contrary to the Applicant's assertion to the contrary.

27. Lastly, the 6th Respondent pleads that because there is no cause of action established against him and since he has not acted irresponsibly or failed to take action on any matter complained of in the Reference, the same ought to be dismissed with costs.

Scheduling Conference

28. On 9th March, 2016, all Parties attended a Scheduling Conference in the Court and settled on the following as issues falling for determination:

i) Whether the Court is vested with the Jurisdiction to entertain the Reference;

ii) Whether the dispute is admissible;

iii) Whether the process of introducing Article 30(2) of the Treaty was illegal and as such, the 6th Respondent should require the Partner States to rectify it;

iv) Whether Article 30(2) denies access to Justice, or renders disproportionate access to justice against individuals in favour of Partner States;

v) Whether Article 30(2) of the Treaty clogs the jurisdiction of this Honourable Court;

vi) Whether the 6th Respondent has failed in his responsibility to ensure the achievement of any of the objectives of the Treaty including those implicit in Articles 6, 8(1), 27, 29, 71(1)(c), 129 and 150 of the Treaty; and

vii) Whether the Applicant is entitled to the remedies sought.

Court's Determination

29. It must be noted from the onset that looking at the Reference, Responses to it and Submissions on record, it is not the Applicant's alleged shooting, loss of property and eviction from Kagera Region of Tanzania that is at the centre of the present proceeding. What is in issue instead is his inability to challenge those actions in this Court by dint of the provisions of Article 30(2) of the Treaty which provides as follows:

> ***"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."***

30. The challenge to the above Article would also be seen to be limited to the sixty days' limitation period imposed for instituting Court proceedings and not the latter provision on time starting to run from the date the matter complained of came to the knowledge of the complainant. It is therefore in that context that we shall address all the issues set for determination and in doing so, we shall address Issues Nos.(i) and (ii) together as they are inter-related and Parties largely addressed them as such.

Issue No.(i): Whether the Court is vested with the Jurisdiction to entertain the Reference and **Issue No.(ii): Whether the Dispute is Admissible**

Submissions by Parties

31. On the above issues, it was submitted by the Respondents that this Court has no Jurisdiction to determine the Reference on two grounds:

    i) that Article 30(2) was properly and lawfully enacted by Partner States and therefore no person can, by entreaties to this Court, question its legality; and

    ii) that the issue of amendment of the Treaty to introduce *inter alia* Article 30(2), was the subject of conclusive determination by this Court in among other cases, **Reference No.3 of 2007, EALS & Others vs. AG of Kenya & Others** and so this Court's hands are tied by the principle of *res judicata.*

32. They also submitted that since the Court has no Jurisdiction to entertain the Reference, then for the same reasons, the Reference is inadmissible.

33. In response to the above contentions, the Applicant submitted that this Court has Jurisdiction to test the validity of Article 30(2) of the Treaty as against the objectives, principles, intendment and spirit of the Treaty as it has done in previous decisions such as in **Reference No.1 of 2007, Katabazi & Others vs. Secretary General of the East African Community.** That in doing so, it would only be exercising its

interpretative mandate and no other Judicial body has that responsibility.

34. On the invocation of the principle of *res judicata*, the Applicant has dismissed the Respondents' submissions in that regard by arguing that in the **East African Law Society** (supra) case, the issue before the Court was the validity of the process of amending the Treaty as a whole and not the substance of the resultant amendments such as is the case presently. That therefore the Reference is properly before the Court and is also admissible.

Determination on Issue No.(i)

35. On our part, having considered the oral Submissions on the two issues above and noting the caveat we placed above regarding the real issue in controversy, we must begin by reiterating that this Court's Jurisdiction is well set out in Articles 23, 27(1) and 30(1) of the Treaty. In sum, those Articles provide that the Court shall have the Jurisdiction to *"interprete"* and *"apply"* the Treaty and to determine whether "*any Act, regulation, directive, decision or action of a Partner State or an institution of the Community is unlawful or is an infringement of the Provisions of the Treaty."* In undertaking that duty, the Court is enjoined to adhere to the Law at all times.

36. In that context, in a recent decision of the Appellate Division of this Court viz-a-viz **Appeal No.2 of 2015, the Attorney General of the United Republic of Tanzania & Anthony Calist Komu,** the Learned Judges stated as follows:

> ***"To succeed on a claim for lack of Jurisdiction of this Court, a party must demonstrate that there is absence of any of the three Jurisdictions – ratione personae/locus standi, ratione***

material, and ratione temporis – See <u>Alcon International Ltd and the Standard Chartered Bank & Others, Appeal No.3 of 2013 para.58</u> (unreported)."

37. Taking all the above matters into consideration and the issue at the heart of this Reference, can it be said that this Court has no Jurisdiction to determine the Reference?

38. There is no doubt that this Court can properly interrogate the legality of an amendment to the Treaty as it did in the **<u>East African Law Society Case</u>**. There is also no doubt that this Court can determine the questions whether any action of a Partner State or an Institution of the Community is a violation of the Treaty. Having so said, however, this Court cannot, as is the alternative prayer by the Applicant, by judicial fiat, order that an amendment ought to be effected in enlarging the time limit under Article 30(2) nor can it order that it should be vested with jurisdiction to enlarge time under that Article. We say so because as was stated in the **<u>Anthony Calist Komu,</u>** whatever the concerns of the Court may be regarding an amendment to the Treaty, it can only interpret and apply such a provision and address jurisdictional objections based *inter alia* on the *ratione temporis* or *personae* inapplicability. Amendments to the Treaty are therefore matters outside the Jurisdiction of this Court. *See Article 150 of the Treaty.*

39. Be that as it may, Article 30(1) of the Treaty grants *locus standi* to 'any person who is resident in a Partner State' to refer a matter to the Court for adjudication. In the instant case, the Applicant claims to be a citizen of the United Republic of Tanzania who is apparently resident in the Republic of Rwanda. We are therefore satisfied that he does meet the jurisdictional test of *ratione personae*.

40. Article 30(1) does also designate the *ratione materiae* or subject matter that would constitute a cause of action in this Court to include 'the legality of any Act or regulation'. In the present Reference, the Applicant *inter alia* challenges the legality of Article 30(2) of the Treaty if read with the principles and objectives outlined in Articles 6(d) and 7(2) thereof. It seems to us therefore that the thrust of the Applicant's case is that the amendment of the Treaty yielded an Article 30(2) that apparently conflicts with the express provisions of previously existing provisions thereof, to wit, Articles 6(d) and 7(i)(a) of the Treaty.

41. Against that backdrop, we take the view that the Applicant's case clearly raises a matter for Treaty interpretation, the purpose of which would be to interrogate the alleged inconsistencies and/or contradictions therein. It thus invokes the Court's interpretative mandate as summed up in Article 27(1) of the Treaty and duly satisfies the jurisdictional ingredient of *ratione materiae*. It does also therefore raise a cause of action, contrary to the assertions of the Fifth and Sixth Respondents.

42. Finally, contrary to the Second and Fourth Respondents' submissions, quite clearly the present Reference has been lodged within the limitation period prescribed under Article 30(2) given that the Treaty provision it challenges is still in the Treaty. The Reference therefore meets the jurisdictional ingredient of *ratione temporis*.

43. Having met all the above jurisdictional ingredients outlined in **Anthony Calist Komu** (supra), we are satisfied that this Court does have jurisdiction to entertain this matter.

44. On the question of applicability of the principle of *res judicata*, as we understand it, the doctrine is meant to ensure that parties and courts

are not burdened with multiple resolutions of the same dispute, between the same parties on the same subject matter, before the same Court and which issue has previously been conclusively determined. Case Law on the subject would therefore show that *res judicata* is recognized as a binding rule, which precludes the re-litigation of a settled dispute.

45. In that regard, in the **International Court of Justice's Application for Revision of the Judgment of 11th July 1996: In the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Yugoslavia)**, the Court, in its decision of 26th February 2007, stated *inter alia* that, in its view, *"two purposes underlie the principle of res judicata: first, the stability of legal relations that requires that litigation come to an end; and secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again."*

46. The Court then went further to state that *res judicata* should always be *"determined in each case having regard to the context in which Judgment was given"* including whether it was determined upon the upholding of a preliminary objection or on its merits.

47. Further, In Black's Law Dictionary[1], *res judicata* is defined as being:

> ***"An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been – but was not – raised in the first suit. The three essential ingredients are (1) an earlier decision on the***

[1] 8th Edition, 2004, pp. 1336, 1337

issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties." *(Our emphasis)*

48. The Oxford Dictionary of Law[2] further clarifies the gist of *res judicata* as:

"The principle that when a matter has been finally adjudicated upon by a court of competent jurisdiction it may not be re-opened or challenged by the original parties or their successors in interest. It is also known as action estoppel. It does not preclude an appeal or a challenge to the jurisdiction of the court. Its justification is the need for finality in litigation."

49. In that context, we note that the question of the legality of the contents of Article 30(2) was never in issue in **Ref. No. 3 of 2007.** This is most succinctly evident at pages 16 and 35 of the judgment in respect thereof as at page 16 the Court clarified the matter in contention between the parties therein as follows:

"The alleged infringement is the totality of the process of the Treaty amendment, which amendment was, and can only be made by the parties to the Treaty, namely the Partner States, acting together through the organs of the Community." (Our emphasis)

50. In the same vein, at page 35 it observed:

"The reference was not for determination whether the amendments were made in bad faith, but rather whether the

[2] Oxford University Press, 7th Edition, 2009, p.476

amendment process did not comply with specific provisions of the Treaty, and therefore infringed them." (Our emphasis)

51. Indeed, whereas the Court in **Ref. No. 3 of 2007** went ahead to make specific findings on the validity of the amendment process, nowhere in that judgment is any finding made as to the legality of the specific legal provisions introduced pursuant to the said amendment process. As we understand it, an amendment process can be unassailable and in full compliance with designated due process but yield substantive amendments that appear to derogate from the substance of pre-existing Treaty provisions. It is with one such substantive provision that the present Reference takes issue. That legal question was not settled by **Ref. No. 3 of 2007**.

52. Per chance, even if the question of legality were remotely opined to have been implicit in Issue No. 5 of that Reference (alongside the other amendments that were introduced to the Treaty), that issue was not resolved by the Court. The Court in fact addressed that issue as follows at p. 41:

"The last two framed issues were also not part of the subject matter of the reference for the Court's determination under Article 30, and we allude to them briefly only because we allowed argument on them."

53. It then concluded thus at p.42:

"We reiterate that the last framed issue, namely "Whether the amendments will strengthen the Community", is also not part of the reference on the legality of the impugned amendments. .... Be that as it may, it was not seriously canvassed that the impugned amendments were unlawful or infringed the Treaty

because they did not strengthen the Community or vice versa. Besides, with all due respect to learned counsel, neither party was able to show definitively to what measure and in what way the amendments strengthened or weakened the Community. In essence their submissions were in the nature of speculation. In the circumstances, we make no findings on this issue."

54. In the above context, is this Reference therefore barred by the principle of *res judicata*?

55. First and foremost, it is quite apparent that the question of the amendment process that the Applicant sought to discount was in fact framed as the third issue for determination herein, albeit with the additional question as to the Sixth Respondent's duty to ensure its rectification by the Partner States, if the process was indeed found to have been flouted. Admittedly, as we have demonstrated above, the amendment process leading to the introduction of Article 30(2) to the Treaty was indeed conclusively determined by this Court on its merits in **Ref. No. 3 of 2007**. That issue is *res judicata* and cannot, therefore, be re-litigated before this Court.

56. The secondary question under Issue No.(iii) in this Reference pertains to the alleged duty upon the Sixth Respondent to cause the rectification of any procedural anomalies in the amendment process. We take the view that the Court in **Ref. No. 3 of 2007** having found the said process to have duly complied with the relevant Treaty provisions, the secondary issue inherent in Issue No.(iii) hereof is superfluous and the purported duty upon the Sixth Respondent is redundant. In any event, the Applicant could have raised the question of the Sixth Respondent's duty to rectify the alleged procedural anomaly under **Ref. No. 3 of 2007**

so as to render finality to all attendant issues in that matter, but it seemingly omitted to do so. Given the exposition of *res judicata* in Black's Law Dictionary (supra), such an eventuality would also run afoul of the defence of *res judicata*.

57. However, the same cannot be said of Issues Nos.(iv) and (v) as framed for determination in the present Reference. Issue No.(iv) questions the extent to which Article 30(2) denies access to justice, or renders disproportionate access to justice against individuals in favour of Partner States; while Issue No.(v) specifically imputes the denial of speedy justice by the alleged clogging of the jurisdiction of this Court by Article the same legal provision. In our considered view, the Applicant does raise the issue of the legality of Article 30(2) viz the objectives and principles enshrined in Articles 6(d) and 7(i)(a). The question of the legality of Article 30(2) in that regard was never in issue in **Ref. No. 3 of 2007.**

58. In our collective mind, to the extent that the Reference *inter alia* seeks to invalidate Article 30(2) on the premise that its contents are an impediment to access to Justice or makes disproportionate access to Justice, that issue, we reiterate was never before the Court in that case and was therefore never conclusively determined. It is therefore our finding that the principle of *res judicata,* as understood in law cannot be properly applied to the challenge of the substance of Article 30(2) which matter is in issue presently.

59. On the question of admissibility, and as was correctly pointed out by the Applicant in submissions, this issue, although crafted as one to be determined separately, was actually misplaced and parties made submissions on it as part of Issue No.(i). In any event, admissibility is

a matter of evidence and has been defined to be *"the quality or state of being allowed to be entered into evidence in a hearing, trial or other official proceeding."* - See **Black's Law Dictionary**. Admissibility of a dispute in a general sense would however also refer to many things including Jurisdiction and existence of a cause of action and in the context of the present Reference our findings on Issue No.(i) are sufficient to dispose of Issue No.(ii).

60. One other issue was peripherally raised by the 2nd and 4th Respondents: that this Court has no Jurisdiction to determine the Reference because it is time-barred under the impugned Article 30(2). Beyond pleading the issue, little more was said of the matter and we shall not delve into it for lack of sufficient material on the point. Suffice to note, however, that whereas the expulsion of the Applicant from the United Republic of Tanzania would be time-barred under Article 30(2) of the Treaty, a challenge to the legality of the said Treaty provision cannot be said to be time-barred as well.

61. In conclusion, it is our finding therefore that this Court does have Jurisdiction to adjudicate the present Reference in so far as the legality of Article 30(2) is concerned, and would accordingly answer Issue No.(i) in the affirmative. On the question of *res judicata* that was argued together with the issue of jurisdiction, we find that the Reference is not barred by the principle of *res judicata*. We do therefore answer Issue No.(ii) in the negative.

Issue No.(iii): *Whether the process of introducing Article 30(2) of the Treaty was illegal and as such, the 6th Respondent should require the Partner States to rectify it*

62. Having found as we have in the preceding issues that the validity of the amendment process was conclusively addressed in **Ref. No. 3 of 2007**, we do find the principle of *res judicata* specifically applicable to Issue No.(iii) and therefore decline to re-adjudicate that issue in this judgment. In the premises, it would also be a superfluous venture to determine whether the 6th Respondent had any role in instigating the amendment of any part of the Treaty. Nonetheless, we do revert to the role of the 6th Respondent viz-a-viz the legality of Article 30(2) in our determination of Issue No.(vi).

Issue No.(iv): **Whether Article 30(2) denies access to justice, or renders disproportionate access to justice against individuals in favour of Partner States**

Submissions by Parties

63. The Submission by the Applicant on this point was that because Article 30(2) is cast in stone, with no flexibility, it becomes debilitating and a genuine cause of action cannot be addressed and is also an assault to integration and attainment of the objectives of the Treaty.

64. In addition, it was the Applicant's Submission that the 60 days' limitation period is too short and is not in tandem with the latitude given to parties approaching, say, the African Court on Human and Peoples Rights or the ECOWAS Court of Justice.

65. On the allegation that the above period is disproportionate, the Applicant submitted that whereas references by Partner States under Article 28 of the Treaty have no limitation, Article 30(2) targets individuals unfairly and is thus oppressive.

66. The Respondents, in answer to the above contentions, submitted uniformly that the limitation imposed by Article 30 (2) is reasonable and was so imposed to create legal certainty, good administration and procedural economy. Further, that this Court has previously addressed the issue in cases such as:

- ***AG of Uganda & Anor vs. Omar Awadh & 6 Others, Appeal No.2 of 2012;***
- ***The Secretary General of the EAC vs. Angella Amudo, Application No.15 of 2012; and***
- ***IMLU vs AG of Kenya & 4 Others, Appeal No.1 of 2011.***

67. The 6th Respondent however made another Submission on this issue; that no injustice has been occasioned to the Applicant by fact of his inability to file his complaint within time because the issue of the alleged deportation of illegal immigrants from the Kagera Region of Tanzania was receiving this Court's attention in **Reference No.7 of 2014, East African Law Society vs. Secretary General of the EAC.**

Determination of the Court on Issue No.4

68. Our understanding of this issue as garnered from the Applicant's submissions, as well as his pleadings is trifold. First, paragraph 14(b) and (c) of the Reference seem to suggest a challenge to the disproportionate or discriminatory treatment of individual persons accessing the Court viz-a-viz Partner States and the Office of the Secretary General. Second, the 60-day limitation period is challenged in paragraph 16 of the Reference for impeding the course of justice owing to its purportedly limited time-span. Thirdly, on the foregoing premise, the said limitation period is alleged to contravene Articles 6(d)

and 7(i)(a) as well as 7(2) of the Treaty. Indeed, in Submissions the Applicant expounds on his contention that the inflexibility of Article 30(2) – presumably given the absence of latitude for extension of time – is debilitating to Community citizens seeking to access the Court, and does also take issue with the length of the limitation period, as well as the disproportionality of its application.

69. The present issue thus raises the question of an alleged incompatibility between two (2) provisions of the same legal instrument, in this case the Treaty; it as well challenges the merits of the impugned Article 30(2) for impeding the course of justice (and implicitly, access to justice) owing to its allegedly restrictive limitation period. We reproduce the Treaty provisions in issue for ease of reference.

Article 6(d)

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality ....

Article 7(1)(a)

"(1) the principles that shall govern the practical achievement of the objectives of the Community shall include:

(a) people-centered and market-driven co-operation."

Article 7(2)

The Partner States shall undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

Article 30(2)

The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.

70. In its report, Koskenniemi, Martti, **'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'**, Report of the Study Group of the International Law Commission (ILC), 2006, the ILC acknowledges the possibility of conflicting provisions either of the same Treaty or across different treaties, legal instruments and legal regimes, and postulates the approach to be adopted by dispute-resolution bodies faced with such scenarios. *See* ***Beagle Channel Arbitration (Argentina vs. Chile) ILR vol. 52 (1979) p.141*** *where a conflict of provisions within a single treaty arose.*

71. Paragraph 43 of the said Report reads:

"When normative conflicts come to be settled by third parties the pull of harmonization remains strong though perhaps not as compelling as between the parties themselves. Because already the ascertainment of the presence of a conflict requires

interpretation, it may often be possible to deal with potential conflicts by simply ignoring them, especially if none of the parties have raised the question. But when a party raises a point about conflict and about the precedence of one obligation over another, then a stand must be taken. Of course in such case, it is still possible to reach the conclusion that although the two norms seemed to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no overlap or conflict will remain. This may sometimes call for the application of the kinds of conflict-solution rules which the bulk of this Report will deal with. *(ie* interpretative maxims and conflict-solution techniques such as the *lex specialis, lex posterior* or *lex superior).* **But it may also take place through an attempt to reach a resolution that integrates the conflicting obligations in some optimal way in the general context of international law."** *(Our emphasis)*

72. Consequently, this Court would be required to either render such construction of Articles 6(d), 7(1)(a),7(2) and 30(2) of the Treaty as would negate any conflict between them or defer to renown rules of international law to resolve the alleged inconsistency between the said Articles. The harmonisation of purportedly conflicting legal provisions would require an understanding thereof through interpretation.

73. The import of Article 30(2) was expounded as follows in **AG of Uganda & Anor vs. Omar Awadh & 6 Others** (supra), where the Appellate Division rendered itself thus:

"The solution that was designed to balance the interest of the individual complainant against the collective interests of the

other Community citizens, is the overall framework of Article 30 in which the collective interest of legal certainty is secured under Article 30(2), but without compromising the individual complainant's right to judicial redress [if promptly lodged within two months under Article 30(2)], including the grace period afforded the complainant to acquire knowledge of the particular act). That grace period can be as long as it takes for the complainant to be possessed of the requisite knowledge. Only after the complainant has the knowledge, will the period of the two months' limitation begin to balance the competing interests. We find nothing arbitrary, capricious, or unreasonable concerning this comprehensive solution of Article 30 especially in a treaty which governs not Human Rights matters, but Trade and Social Interests within and between the Partner States." *(Our emphasis)*

74. The above decision suggests that whereas Articles 6(d) and 7(2) do promote the fundamental principle of rule of law, a limitation period that prescribes the time frame within which litigants may access justice is neither arbitrary nor capricious or unreasonable. We are bound by that position and respectfully agree with it.

75. We specifically find no conflict between Articles 6(d) and 7(2) viz-a-viz Article 30(2) and of the Treaty because a harmonized construction of the said Articles would suggest that whereas Articles 6(d) and 7(2) prescribe the fundamental principles that should be adhered to in the realization of the treaty's objectives, a case that is premised on the principles enshrined therein should be promptly instituted within the time period prescribed in Article 30(2) of the Treaty. Thus Article 30(2) does not negate the said principles but rather regulates the procedural

framework – specifically, the time frame – within which the said principles may be litigated.

76. Similarly, the allegation that Article 30(2) is not in tandem with other International Legal Instruments is not entirely sustainable. First and foremost, we find that it is almost identical to the provisions of Article 230 of the Treaty Establishing the European Community. In the same vein, Article 35 of the European Convention on Human Rights prescribes a 6-month limitation period from the date of a final domestic court's decision within which a case may be filed.

77. Secondly, even in legal regimes where no limitation period is prescribed, other procedural provisions are incorporated to guide litigation. Thus:

    i) The Caribbean Court of Justice has no limitation period at all, but Article 222 of the Treaty for Chagnaramas Establishing the Caribbean Community, and invoking the *ratione personae* principle, subjects private entities to the hurdle of *"special leave of the Court"* before they can be allowed access to the Court;

    ii) The Protocol on the Establishment of the African Court on Human and Peoples' rights has no time limit but subjects complaints to exhaustion of local remedies with exceptions where there is undue or prolonged delay;

    iii) The COMESA Treaty has no time limit but subjects individuals in Article 26 to exhaustion of local remedies;

    iv) The Protocol on the ECOWAS Court has no time limit but in Article 9 it provides for competence of the Court where attempts to settle a dispute amicably have failed.

78. It therefore follows from the above that, contrary to the Applicant's assertions, the limitation period in Article 30(2) is neither strange nor outlandish, but does operate harmoniously with the principles in Articles 6(d) 7(i)(a) and 7(2) to provide a procedural framework for the promotion of the principles enshrined therein. We so hold.

79. Having so held, however, what should be said of the specific claim that Article 30(2) hinders access to Justice or promotes disproportionate access to justice?

80. The *Canadian Forum of Civil Justice* website posits the following most persuasive definition of the notion of access to justice:

> ***"While not easily defined, access to justice refers broadly to the access that citizens have to dispute resolution tools of justice including but not limited to courts. Effective access to justice does not only refer to reductions in costs, access to lawyers and access to courts; but rather, it is a broad term that refers more generally to the efficaciousness of a justice system in meeting the dispute resolution needs of its citizens."(Our emphasis)***

81. Further, in **Farrow, Trevor C. W., 'What is access to justice?', Osgoode Hall Law Journal 51.3 (2014), 957 at 973, 974** it was stated thus:

> ***"The notion that not all people experience justice equally, or put differently, not all inaccessibility is created equally, was a very common, forceful and troubling opinion expressed by many respondents. For justice to be effective, the citizenry needs to have confidence and trust in it. ..... As questioned by the Chief Justice McLachlin, 'Public confidence in the system***

of justice is essential. How can there be confidence in a system that shuts people out, that does not give them access?' .... The system's tendency to alienate those for whom it was created needs to be taken very seriously and, ultimately, eliminated."

82. In the same vein, disproportionate access to justice or the outright inaccessibility of justice is encompassed in '***the wider social context of our court system and the systemic barriers faced by different members of the community***.'[3] Similarly, a more comprehensive understanding of the notion of access to justice would go beyond the legal system to encompass '***efforts to assess and respond to ways in which law impedes or promotes economic or social justice .... In short, access to justice may involve steps to diminish substantive injustice in society at large***.'[4]

83. In the above context, there is no doubt that there is no time limitation within which the Partner States or the Secretary General of the EAC may access the Court, as is the case with natural persons under Article 30(2). (*See Articles 28 and 29).* We cannot also close our eyes to the connotations of unequal or disproportionate access to justice that is *prima facie* inherent therein.

84. In addition to the above, in **Koskenniemi, Martti, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'** (supra), the ILC posits that the harmonisation of purportedly conflicting treaty provisions may be achieved by '**a resolution that integrates the conflicting obligations in some optimal way in the general context of international law**'.

---

[3] See Alberta Civil Liberties Research Centre website

[4] See 'Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity: Final Report, Law Commission of Ontario, February 2013.

In paragraph 427 of the same report, Article 31 of the Vienna Convention on the Law of Treaties is acknowledged as customary international law. Article 31(1) thereof is therefore extremely pertinent to this Court's resolution of the disproportionate access to justice implicit herein. It reads:

> ***"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*** *(Our emphasis)*

85. In this case, the overriding purpose of the Treaty can be deduced from its long title, namely, the establishment of the East African Community. However, the objectives of the Community so established by the Treaty are set out in detail in Article 5 thereof. The principles governing the achievement of the said objectives are then laid out in Articles 6 and 7 of the Treaty. This Court is a pivotal organ in the attainment of the Treaty objectives and is thus required to exercise its mandate under Article 23(1) with due cognisance of the fundamental principles enshrined in Articles 6 and 7. It cannot in our view have been envisaged by the framers of the Treaty that access to justice would include unequal or disproportionate access thereto.

86. Whatever our concerns, nevertheless, we would not go so far as to declare Article 30(2) a violation of Articles 6(d) and 7(1)(a) and 7(2) of the Treaty. As we have held earlier herein, Article 30(2) simply clarifies the procedural context within which the substantive provisions of Articles 6(d) and 7(2) should be applied. No evidence was adduced before this Court as sufficiently establishes the rationale for the

contradictions it poses viz-a-viz Articles 28 and 29, or the irrationality of the said considerations.

87. In the premises, this is a matter that, we propose, should receive the attention of the relevant organs of the EAC. We say so because a *people-centred* and market driven co-operation as espoused in Article 7(1)(a), as well as the rule of law as articulated in Article 6(d) and 7(2) of the Treaty must of necessity include the notion of equal access to justice by all parties. Indeed, it seems to us that the time limitation in Article 30(2) is intended to facilitate the expeditious realization of the Community's objectives as detailed in Article 5(2) of the Treaty by forestalling open-ended avenues for litigation that could derail the integration process. In the same vein and for the same reasons, the spirit and letter of the Treaty would be well served if such an expedient approach were equally applied to the Partner States and the Secretary General of the EAC.

Issue No.(v): **Whether Article 30(2) of the Treaty clogs the jurisdiction of this Honourable Court**

88. It would appear that the Parties inexplicably merged their submissions on this issue with the preceding issue. We do not appreciate that approach as we interpret the two (2) issues to pertain to different matters. Whereas we have exhaustively rendered our decision on Issue No.(iv), we are hard-pressed to appreciate how our findings therein relate to the clogging of this Court's jurisdiction. In the absence of elaborate submissions from the Parties on this issue, however, we decline to speculate on what informed its framing as an issue for determination. We therefore make no finding on it.

Issue No.(vi): ***Whether*** **the 6th Respondent has failed in his responsibility to ensure the achievement of any of the objectives of the Treaty including that implicit in Article 6, 8(1), 27, 29, 71(1)(c), 129 and 150 of the Treaty *Submissions by Parties***

89. While the above issue as framed would seem to be all-encompassing in terms of alleged failures by the 6th Respondent, in his Submissions, the Applicant narrowed down his complaints to Article 71 of the Treaty on the functions of the Secretariat generally and specifically on its duty to conduct investigations, collect information or verify of matters that affect EAC.

90. In addition, two decisions of this Court were cited as evidence that the 6th Respondent has failed in the above obligations. These are **East African Law Society vs. Secretary General of EAC Reference No.7 of 2015** and the **East African Centre for Trade, Policy and Law Reference No.9 of 2011.**

91. In response, the position by the 6th Respondent is that he has not failed in the discharge of his mandate under the Treaty and specifically in the context of the present Reference. Further, that in **Reference No.7 of 2015** aforesaid, he demonstrated to Court that he had ably discharged his mandate with regard to the expulsion of illegal immigrants, such as the Applicant, from the Kagera Region and the decision of the Court is being implemented including addressing the challenges that the 6th Respondent had with regard to that matter.

Determination on Issue No.6

92. With tremendous respect to the Applicant, this issue should have been addressed in the context of the issue at hand and we note that in the Reference, no specific complaint was made that the 6th Respondent

had failed to discharge his mandate in any manner relevant to the Applicant's chief complaint. The nearest plea on that issue is the blanket statement at paragraph 15 of the Reference that *"the Respondents who are charged with the responsibility of ensuring achievement of the objectives of the Treaty have failed in their responsibility under Articles 4(3), 5, 6, 7, 8, 27, 29, 30, 67, 71, 127 and 150."* No specific complaint was made with regard to any Respondent and not a single statement was made in the Supporting Affidavit of the Applicant sworn on 24th June, 2015 as to how the 6th Respondent specifically failed in his mandate under Article 71 of the Treaty.

93. Further evidence or even a complaint against a respondent can never be introduced in Submissions as the Applicant has done. It must first be properly pleaded then proved at the hearing hence the statement by the Appellate Division of this Court in **Timothy Alvin Kahoho vs. Secretary General of EAC Appeal No.2 of 2013** that an applicant need *to "provide all the meat, necessary to cover the mere skeletal bones of his various allegations"* and also needs to *"prove each and every particular of his allegation."*

94. Even if however, the Applicant had met the above test, it is not enough to import decided cases of this Court such as the two cited above (**References Nos. 9 of 2011 and 7 of 2015**) to show failure by the 6th Respondent in the context of the present Reference. Those References were determined on their merits and cannot be generally used as evidence of failure in other circumstances.

95. We reiterate therefore that the generalized invocation of Article 71 of the Treaty and imputation of failure by the 6th Respondent in his

mandate is a misguided approach to litigation and so Issue No.(vi) must be answered in negative.

Issue No.(vii): Whether the Applicant is entitled to the Remedies Sought

96. In the Reference, the Applicant prayed for the following declarations and Orders:

    a) That the 60 days' limitation introduced by Article 30(2) is discriminatory, restrictive and hinders access to this honorable Court contrary to fundamental and operation principles of the Treaty as set out in Articles 6(d) and 7(1)(a). That Article 30(2) should therefore be declared as null and void;
    b) Alternatively, the Claimant prays for an order that:

        i. An amendment be effected enlarging the time of emulation to not less than six months; and

        ii. The court be vested with jurisdiction to enlarge time as may be necessary in the circumstance.

97. Having held as we have under paragraph 75 above that Article 30(2) does not negate the said principles but rather regulates the time frame within which the said principles may be litigated, we decline to grant a Declaration that the 60 days' limitation period is restrictive or hinders access to this court contrary to the principles set out in Articles 6(d) and 7(1)(a) of the Treaty. We similarly decline to grant a Declaration that Article 30(2) is null and void.

98. Similarly, having held as we have under paragraphs 86 and 87 above, it is proposed herein that the Summit and Council of Ministers do consider amending the Treaty to harmonize the applicability of a limitation period for all parties that access the Court.

99. Regarding the alternative prayers for Orders to effect an amendment to Article 30(2) of the Treaty for the 2-month limitation period be increased to 6 months, or to clothe this Court with the discretion to enlarge the said limitation period; we have firmly held that this Court has no Jurisdiction to make orders, the effect of which would be to amend the Treaty. The two Prayers in that regard must therefore fail.

100. On costs, under Rule 111, costs follow the event unless the Court for good reason orders otherwise. In the present Reference, while it is true that the Applicant has not succeeded in this Reference, it is also true that the issues raised by him transcended his personal situation and this decision has settled matters that are perennially raised by Parties appearing before this Court specifically on the limitation of time to access this Court. In the circumstances, we deem it fit to order that each Party ought to bear its own costs.

101. Regarding Prayer (v) on any other Order that this Court may deem fit, we can only suggest that the relevant organs of the EAC should relook at Article 30(2) and in their wisdom and within their mandates remove any apparent disparities on the time limit within which to access this Court.

Disposition

102. In the result, the Reference is hereby dismissed and each Party shall bear its own costs.

103. We so Order.

Dated, Delivered and signed at Arusha this 31st day of March 2017.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Isaac Lenaola
DEPUTY PRINCIPAL JUDGE

Hon. Justice Faustin Ntezilyayo
JUDGE