



**IN THE EAST AFRICAN COURT OF JUSTICE AT
ARUSHA**



FIRST INSTANCE DIVISION

(Single Judge Coram: Monica K. Mugenyi, PJ)

APPLICATION NO. 18 OF 2020

CHESTER HOUSE LIMITED APPLICANT

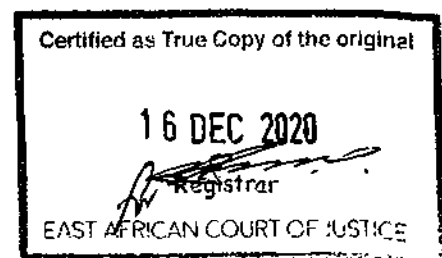
VERSUS

- 1. THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA**
- 2. THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY**
- 3. LAKE VICTORIA BASIN COMMISSION RESPONDENTS**

AND

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF KENYA INTERESTED PARTY**

16TH DECEMBER 2020



RULING

A. Introduction

1. This Application is brought under Article 30(2) of the Treaty for the Establishment of the East African Community ('the Treaty') and Rules 4, 5 and 69(2)(a) of the East African Court of Justice Rules of Procedure, 2019 ('the Court's Rules'). It seeks the extension of time within which a Reference may be filed in this Court under the cited Treaty provision or, in the alternative, that a draft Reference appended to the Application be deemed to have been duly filed within time.
2. Chester House Limited ('the Applicant') is a limited liability company incorporated under the laws of the Republic of Kenya and operational in that Partner State. It carries out business under the name of Impala Eco Lodge ('the lodge'), a resort situated at the shores of Lake Victoria in Kisumu, Kenya. Between February and May 2020, severe and extensive flooding was experienced at the lake shore as a result of which the lodge suffered excessive damage that rendered its operations impossible, leading to its closure.
3. Whereas the Applicant initially attributed the flooding to an 'act of God', a news article in *The East African Newspaper* of 30th May - 4th June appeared to lay responsibility therefor on the negligent conduct of the Government of the Republic of Uganda ('the First Respondent State'), the Secretary General of the East African Community ('the Second Respondent') and the Lake Victoria Basin Commission ('the Third Respondent').
4. The impugned action in that regard is the release of water by Eskom Uganda Limited (ESKOM) from Lake Victoria to the River Nile to

reduce the rising lake levels. That action is alleged to have contravened an *Agreed Curve* (in a Support Agreement between ESKOM and the First Respondent State) and a *New Water Release and Abstraction Policy* developed by the Third Respondent at the prompting of the Second Respondent. The Application is supported by the affidavit of Jared Benson Kangwana (a Director in the Applicant Company) dated 7th July 2020.

5. It is opposed by the Attorney General of the Republic of Uganda ('the First Respondent') and the Second Respondent, each of whom lodged affidavits in reply that respectively contest the validity of the reasons advanced in support of the Application and the Court's mandate to extend time fixed by the Treaty. An affidavit in reply was also lodged on behalf of the Attorney General of the Republic of Kenya (cited as an 'the Interested Party'), which essentially contests the Application and the Applicant's claim as against the Respondents.
6. At the hearing, the Applicant was represented by Mr. Kennedy Nyaundi, while Ms. Imelda Adong and Ms. Jacqueline Amsugut appeared for the First Respondent. The Second and Third Respondents were jointly represented by Mr. Michel Ndayikengurukiye.

B. Applicant's Submissions

7. It is the contention that the Applicant Company's Directors, including Mr. Kangwana, were unable to travel to Kisumu as soon as the flooding and related destruction to the lodge occurred owing to COVID-related travel restrictions.

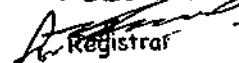
8. Meanwhile, on 31st May 2020 Mr. Kangwana's attention was drawn to a newspaper article that reported a suit against the First Respondent with regard to the floods experienced in Kisumu. However, the Applicant encountered difficulties in verifying the that information on account of a dearth of readily available information as a result of the COVID-19 lockdown measures that kept public offices closed. The delay in the filing of this Application is thus attributed to the foregoing circumstances.
9. The Applicant thus contends that having only got to know of the parties responsible for its loss on 31st May 2020, the Court should grant an extension of time within which its Reference against the said parties may be lodged. In the alternative, the Court is urged to adjudge the circumstances of this case to fall within the provisions of Article 30(2) of the Treaty, so that the Reference lodged in the Court on 10th July 2020 be deemed to have been filed within time in terms of the date the cause of action came to the knowledge of the complainant.
10. The Applicant made elaborate submissions on the Court's interpretative mandate under the Treaty, as well as its past interpretation of Article 30(2), not least being its decisions in **The Attorney General of Kenya vs. The Independent Medical Legal Unit**,¹ **Omar Awadh Omar & 6 Others vs. The Attorney General of Kenya & Another**² and **Anthony Calist Komu vs. The Attorney General of the United Republic of Tanzania**.³ The Court's inherent powers under Rule 1(2) of the Rules of Procedure was also invoked in support of the application.

¹ EACJ Appeal No. 1 of 2011.

² EACJ Reference No. 4 of 2011.

³ EACJ Reference No. 7 of 2012.

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C. First Respondent's Submissions

11. It is the First Respondent's case that the Applicant has not demonstrated sufficient reasons for the extension of time, as required by Rule 5 of the Court's Rules of Procedure. It is opined that the Applicant learnt of the floods and their effect on its lodge between February and March 2020, therefore it cannot purport to have gained knowledge by latter newspaper reports that, in any case, amount to inadmissible (hearsay) evidence. It is further argued that the decision in Omar Awadh Omar & 6 Others vs. The Attorney General of Kenya & Another (supra) cited by the Applicant was reversed on appeal vide The Attorney General of the Republic of Uganda & Another vs. Omar Awadh Omar & 6 Others,⁴ the Court declaring purportedly continuing violations to be time-barred.

12. The Second Respondent urges that genuine grievances lodged in a timely manner may be adjudicated in the public interest; not so, the present matter where the Applicant supposedly became aware of its grievance against the Respondents upon learning of a related suit. It is the contention that this would not constitute sufficient reason for the grant of the remedy sought.

D. Second Respondent's Submissions

13. On its part, though conceding the difficulty of travel within the region owing to the COVID-19 pandemic, the Second Respondent nonetheless disavows the pandemic as an excuse for the Applicant's failure to lodge its Reference within time. Citing the decision in The Attorney General of Kenya vs. The Independent Medical Legal

⁴ EACJ Appeal No. 2 of 2012.

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Unit (supra), it is argued that whereas the Court may extend time lines for actions encapsulated in its Rules of Procedure, it cannot extend time limits prescribed by the Treaty.

E. Third Respondent and Interested Party

14. The Third Respondent neither filed an affidavit in reply in this matter nor written submissions, seemingly relying on the Second Respondent's submissions made on its behalf. The Interested Party, on the other hand, did file an affidavit in reply but no written submissions.

F. Submissions in Reply

15. No submissions in reply were filed by the Applicant.

G. Court's Determination

16. As quite correctly observed by the Parties, Article 30(2) of the Treaty does prescribe a two-month limitation period within which a Reference may be instituted in this Court. It reads:

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.

17. It is indeed true that the time of reckoning for that purpose would be computed from the starting date of an act complained of and not the day the act ends. See **The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others** (supra) and **The Attorney General of the Republic of Kenya vs. Independent**

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Medical Legal Unit (*supra*). Similarly correct is the proposition that Article 30(2) makes provision for time to be computed either from the date of commencement of an impugned action or from the date when such action 'came to the knowledge of the complainant.'

18. Be that as it may, this Application essentially raises the question of the Court's jurisdiction to grant the orders sought. Undoubtedly, the Court does not have powers to extend time prescribed by the Treaty. In the absence of a Treaty provision that explicitly empowers the Court to extend time lines prescribed therein, to do so would be tantamount to acting *ultra vires* its mandate. Such an action is succinctly forestalled by the provisions of Article 9(4) of the Treaty, which enjoin East African Community (EAC) organs (the Court inclusive⁵) to perform their function '**within the limits of the powers conferred upon them by or under this Treaty.**' Thus although the Court's inherent powers under Rule 4 of the Court's procedural rules is recognized, the Rule itself is couched in terms as would restrict its application to anything in the Rules (and not the Treaty) that obviates the ends of justice or foments an abuse of court process.

19. As quite rightly argued by learned Counsel for the Second Respondent, Rule 5 of the Court's Rules does indeed empower the Court to extend the time prescribed by the Rules or otherwise fixed by the Court. That mandate, however, would not extend to the extension of time set in the Treaty. This issue was aptly and conclusively settled in **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit** (*supra*) as follows:

⁵ See Article 9(1)(e) of the Treaty.

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It is clear that the Treaty limits References over such matters like these to two months after the action or decision was first taken or made, or when the Claimant first became aware of it. In our view, the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the Article above. Equally so, the Court below could not rule otherwise on the face of the explicit limitation in Article 9(4) to the effect that the Court must act within the limits of its powers under the Treaty.

20. I would therefore respectfully decline to grant an extension of the time set by the Treaty for the lodging of the Applicant's Reference.

21. Turning to the Court's mandate herein, it will suffice to observe that its Treaty interpretation function is exercised within the precincts of Article 42(1) of the Treaty and Rule 69(1) and (2) of the Court's Rules. They are reproduced below for ease of reference.

Article 42(1)

The Court shall make rules of the Court which shall, subject to the provisions of this Treaty, regulate the detailed conduct of the business of the Court.

Rule 69(1) and (2)

(1) The quorum of the Court shall be three (3) or five (5) judges, one of whom shall be the Principal Judge or Deputy Principal Judge:—

.....

(2) The following interlocutory matters may be dealt with and determined by a single judge:—

- a. applications for extension of time prescribed by these Rules or by the Court.
- b. applications for an order for substituted service.
- c. applications for examining a serving officer.

- d. applications for leave to amend pleadings; and
- e. applications for leave to lodge one or more supplementary affidavits under rules 52(6) and 54(2).

22. The net effect of Rule 69(1) is that, sitting in exercise of its interpretative mandate as spelt out in Articles 23 and 27(1) of the Treaty, the Court must sit in quorums of 3- or 5-judge benches. It may only constitute itself into a single-judge bench for purposes of the applications outlined in Rule 69(2). Under Rule 69(2)(a) the jurisdiction of a single judge bench is limited to the extension of time prescribed by the Rules, and not an intrinsic consideration of a Reference's time limitation credentials. The presumption under Rule 69(2)(a) is that the time for undertaking an action prescribed by the Rules or the Court has indisputably lapsed and an extension of time therefor is sought.

23. That Rule does not address matters such as the one before the Court presently, where there is contestation as to whether or not the Reference is admissible under the second limb of Article 30(2) of the Treaty - when the complainant learnt of the Treaty violation. Learned Counsel for the Applicant dwelt quite extensively on his client having coming into knowledge of its rights as against the Respondents on 31st May 2020, which assertion should bring the Reference within the permissible time under the second limb of Article 30(2) of the Treaty.

24. Without delving into the merits of that argument, such a determination would go to the propriety of the Reference albeit on a point of law in respect of Article 30(2) of the Treaty. It would thus evoke the Court's Treaty interpretative function, and be interrogated as such. In so far as Rule 69(2) unequivocally demarcates the matters that may accrue to a single-judge bench to the exclusion of Treaty interpretation, it clearly negates the mandate of a single judge bench to determine a

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point of law in respect of Article 30(2) of the Treaty. Accordingly, a single-judge bench such as the present one would exceed the parameters of its jurisdiction if it purported to interrogate the draft Reference's compliance with the second limb of Article 30(2) of the Treaty. That is the preserve of a 3- or 5-judge bench.

25. Under the Court's legal regime, therefore, the procedural option available to a litigant that finds itself in the position of the Applicant would have been to file its Reference in the Court, and have the question of time limitation framed as an issue for determination by the appropriate Court bench. However, given that the Reference in issue presently is a draft pleading that was not formally lodged in this Court, it would appear that this option is no longer available to the Applicant.

26. The Applicant *inter alia* sought the following reliefs (paraphrased):

- i. An Order that this Court be pleased to grant leave to extend the time limited for the filing of a Reference against the Respondents, a draft of which is annexed hereto.
- ii. In the ALTERNATIVE, the Court do find and hold that the circumstances attending this matter are within Article 30(2) of the Treaty as the Applicant learnt of the First Respondent's liability through a newspaper report on 31st May 2020.
- iii. An Order that the Draft Reference annexed herewith be admitted and deemed to be properly on record, and to have been so filed within the stipulated time consequent only to payment of the requisite court fees.
- iv. An Order that the costs of and incidental to this Application do abide the Reference to be filed hereto.

27. Having declined to extend the time fixed by the Treaty for the filing of a Reference, this Court is unable to either admit the draft Reference

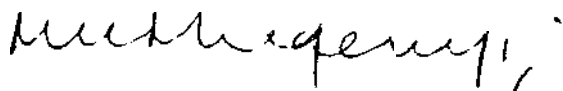
27. Having declined to extend the time fixed by the Treaty for the filing of a Reference, this Court is unable to either admit the draft Reference on the record or otherwise deem it to have been duly lodged. Furthermore, for the reasons outlined hereinabove, the Court as presently constituted is not vested with jurisdiction to adjudge the draft Reference as having been duly filed under Article 30(2) of the Treaty. I would therefore respectfully decline to do so.

28. Rule 127(1) of the Court's Rules provides that costs shall follow the event unless the Court for good reason decides otherwise. It was underscored in the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another**.⁶ We would abide that general rule.

H. Conclusion

29. In the result, the Application is dismissed with costs to the Respondents. It is so ordered.

Dated this 16th Day of December, 2020.*



Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

**Delivered by His Worship, the Registrar of the Court, following the retirement of Lady Justice Monica Mugenyi.*

⁶ EACJ Appeal No. 2 of 2019

