IN THE EAST AFRICAN COURT OF JUSTICE AT

ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Audace Ngiye & Charles Nyachae, JJ)

REFERENCE NO. 1 OF 2019

EAST AFRICA LAW SOCIETY ..... APPLICANT

VERSUS

1. **THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA**
2. **THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY..... RESPONDENTS**

25TH NOVEMBER 2020

JUDGMENT OF THE COURT

A. Introduction

1. This Reference was brought under Articles 6(d); 7(1)(a); 7(2); 8(1)(a) and (c); 23(1); 24(1); 25(1) and 2; 27(1); 30(1) and 2; 67(3); 69(1) and (2); and 71 (b)(d)(e) (1) and (4) of the Treaty.

2. The Applicant is a Civil Society Organisation structured as an umbrella regional association of respective national law societies in East Africa, and which has observers status conferred by the East African Community (EAC).

3. The 1st Respondent, is the legal advisor to the Government of the United Republic of Tanzania and is sued in a representative capacity, on behalf of the said United Republic of Tanzania, which is a Partner State of the EAC.

4. The Second Respondent is an officer of the community, appointed under Article 67 of the Treaty for the Establishment of the East African Community (The Treaty) and is sued in a representative capacity, on behalf of the EAC.

5. At the hearing, the Applicant was represented by Advocates Messrs. Hannington Amol, Achilleus Romward, and David Sigano. The First Respondent was represented by Mr. Abubakar Mrisha, Senior State Attorney, and the Second Respondent was represented by Dr. Anthony Kafumbe, Counsel to the Community (CTC).

B. **Factual Background**

6. On 1st February, 2019, the EAC Heads of State appointed the Honourable Lady Justice Sauda Mjasiri, a national of the United Republic of Tanzania, a judge of the Appellate Division of the East African Court of Justice (EACJ). This was done upon her nomination by the United Republic of Tanzania pursuant to Article 24 of the Treaty.

7. Hon. Lady Justice Sauda Mjasiri had previously served as a Justice of the Court of Appeal of the said Partner State. At the time of her appointment to the EACJ she had formally retired from the national judiciary of that Partner State upon attaining the retirement age stipulated in Article 120 of the Constitution of the United Republic of Tanzania.

8. Article 120 prescribes 65 years as the age of retirement for Justices of the Court of Appeal of Tanzania, while Article 25 of the Treaty provides for a seven-year term for the judges of the EACJ or a retirement age of 70 years, whichever eventuality comes earlier.

9. Following the learned judge's appointment, the Applicant filed the present application, claiming that it was done in violation of the Treaty.

C. **Applicant's Case**

10. The Applicant's case is set out in the Reference, the written Submissions and highlights at the hearing hereof. The Applicant contends that in making the nomination of Justice Mjasiri for

appointment to the Court, the First Respondent State failed to meet the requirements of Article 24 of the Treaty for such nomination, hence flouting the fundamental and operational principles of the Treaty that are set out in Articles 6(d) and 7(2) respectively.

11. The Applicant submitted that the process adopted by the First Respondent State in making the nomination was opaque and fell short of the principles of transparency and accountability enshrined in Article 6(d) of the Treaty. Furthermore, the First Respondent's failure to design a public nomination process that would enable EAC citizens to know and vet the prospective nominees allegedly contravened the principles of transparency, accountability and good governance, which it is obligated to under Article 6(d) of the Treaty. The said Respondent is thus opined to have denied other qualified citizens of the United Republic of Tanzania from competing for the job.

12. It is further argued that in denying EAC citizens, stakeholders and the general public any involvement in the nomination process, the First Respondent violated the obligation upon it under Article 7(1)(a) of the Treaty to allegedly promote a people-centered customs and political union.

13. With regard to the Second Respondent, it is the Applicant's contention that the said office is mandated under Article 71 of the Treaty to undertake research, verification and investigation on any matter affecting the Community, but it abdicated this duty by not initiating any such action with regard to the learned judge's nomination.

14. It was further argued that given the Second Respondent's failure to initiate and institute a nomination process for judges that is transparent, accountable, fair and people-centered, Partner States have fallen back to opaque and undesirable systems that contravene the Treaty.

15. The Applicant urged that while having no objection to the learned judge's professional capabilities, the process of her appointment was objectionable when viewed against the requirements of the Treaty in its entirety. The Court was invited to find that the process fatally negated the legality and legitimacy of the Judge's appointment.

16. Accordingly, the Applicant sought the following orders (reproduced verbatim).

i. **A declaration that the decision of the First Respondent nominating Hon. Justice Mjasiri to the East African Court of Justice contravened Article 24 of the Treaty;**

ii. **A declaration that the impugned decision contravened Article 6(d) of the Treaty for want of transparency, fairness, equal opportunities and accountability.**

iii. **A declaration that the impugned decision contravenes Article 7 (1) of the Treaty for lack of public participation.**

iv. **A declaration that based on the foregoing Hon. Justice Mjasiri is not properly nominated and/or appointed to the office of Judge of the East African Court of Justice.**

v. **A declaration that the Second Respondent acted in breach of the Treaty by failing to properly advise the Summit or the Community, and by failing to investigate and verify the qualifications of Her Ladyship as well as the process leading to her nomination.**

vi. **An order that the First Respondent should design transparent, fair, accountable and people-centered nomination process and then carry out the nomination process de novo having regard to the principles enumerated in Articles 6(d) and 7(1) and the qualifications set out in Article 24, within a time frame to be set by the Court.**

vii. **An order directed at the Second Respondent to institute the process of putting in place guidelines towards a transparent, accountable, fair and people-centered process of nominating judges to the Court.**

viii. **Costs to be borne by the Respondent.**

ix. **Any other order that the Honourable Court considers expedient in the circumstances.**

D. **First Respondent's Case**

17. The First Respondent's case is set out in the Response to the Reference, the written submissions filed herein, as well as the highlights of the same at the hearing of this Reference. It was submitted that Justice Mjasiri was and is a suitable and qualified person to hold the office of Judge of the Court, and her nomination by the First Respondent State and appointment by the Summit were in full compliance with Article 24 of the Treaty. It was argued that having qualified as a judge in the Respondent State, the learned judge did have the competencies required for appointment to the EACJ.

18. It was further argued that the Treaty made provision for appointment of judges on the premise that they were jurists of recognized competence. Thus, Lady Justice Mjasiri was rightly appointed to the EACJ on account of her competence, experience and professionalism. Her curriculum vitae was availed in proof thereof.

19. The First Respondent urged that the Treaty has no specific procedure to be followed by a Partner State in nomination of a Judge for appointment under Article 24, and that therefore each state, in exercise of its sovereignty, determines such process of nomination. The Partner states and the framers of the Treaty, in their wisdom, left the process of nomination to be determined and exercised by each State as a matter of national sovereignty.

20. The First Respondent prays for the following remedies (reproduced verbatim):

i. **That the Court be pleased to declare that the nomination and appointment of Justice Sauda Mjasiri was transparent, fair, and according to the provisions of Article 24(1) of the Treaty.**

ii. **That, the provisions of Article 6(d) and 7(1) of the Treaty have not been breached.**

iii. **That the Second Respondent has not failed to exercise its functions under Article 71 of the Treaty.**

iv. **That the Treaty does not require the Partner State to set up guidelines during nomination of a candidate but rather they must adhere to the provisions of Article 24(1) of the Treaty.**

v. **Costs to be borne by the Applicant.**

vi. **Any other relief that the Honourable Court may deem fit and just to grant.**

E. **Second Respondent's Case**

21. The Second Respondent's case is set out in the Response to the Reference, the written submissions filed, as well as the highlights thereof at the hearing. The Second Respondent denies that the nomination and appointment of Justice Mjasiri were opaque or

shrouded in secrecy, and urges that the process was in compliance with Article 24 of the Treaty, and indeed, the Treaty in its entirety.

22. The Second Respondent further urges that the said office did request a nomination to the Court from the First Respondent State vide a letter dated 13th September 2018, in which the requirements of Article 24(1) were duly illuminated. Upon receipt of the Respondent State's nomination and accompanying CV, it was observed by the Second Respondent that the nominee was indeed a jurist of recognised competence, given her extensive judicial and legal experience.

23. It was contended that the fact that the learned judge had attained the retirement age in the First Respondent State does not negate her qualification for appointment by virtue of being a jurist. It was also argued that Article 24(1) does not make it mandatory for the public to vet a nominee to the EACJ, therefore the omission to do so in the present case would not amount to a Treaty violation, neither was learned Counsel aware of any public outcry in respect of the appointment as alleged by the Applicant.

24. It was urged that the provisions of Article 24(1) having been met, there was no need for research or investigation by the Second Respondent. In any event, it was urged, the obligation to present a suitable nominee lay with the Partner States not that office, therefore the role of the said office in the nomination and appointment process was in accordance with the Treaty.

25. The Second Respondent prayed for the following orders, (reproduced verbatim):

i. **Dismiss the statement of Reference against the Second Respondent with costs.**

ii. **Declare that the Second Respondent did not breach any provisions of the Treaty in not advising the Community against the appointment of Justice Mjasiri and had no basis to investigate the qualifications and nomination of Justice Mjasiri, a jurist of recognized competence, for appointment of a judge.**

iii. **Declare that the Second Respondent has no basis to institute any investigations and or guidelines towards nominating judges to the Court.**

iv. **Make such further orders as it deems necessary.**

F. **Scheduling Conference**

26. At a Scheduling Conference held on 29th January 2020, the following issues were framed for determination:

i. Whether the process and the decision of nominating Hon. Justice Mjasiri, contravened Articles 6(d), 7(1) and 24(1) of the Treaty;

ii. Whether pursuant to Article 71 of the Treaty, the Second Respondent was obliged to investigate and verify the qualifications and suitability of Hon. Mjasiri's appointment to the Court, and advise accordingly;

iii. Whether the Respondents are under obligation to institute the process of putting in place, guidelines towards transparent, accountable, fair and people-centered process of nominating judges to the Court; and

iv. Whether the parties are entitled to the remedies sought.

G. Court's Determination

Issue No. 1: Whether the process and the decision of nominating Hon. Justice Mjasiri contravened Articles 6(d), 7(1) and 24(1) of the Treaty.

27. It is common ground between the Parties that Article 24 is the operative provision of the Treaty that deals with the appointment of judges. The relevant part of Article 24 provides as follows:-

> **Judges of the Court shall be appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfill the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognized competence, in their respective Partner States.**

28. Aside from the provision that appointment of a person to be a judge of the Court shall be done by the Summit upon nomination by a Partner State, Article 24 deals with the qualifications of a person who can be so nominated and appointed. The first relief that the Applicant seeks in their Reference is a declaration that the decision of the First Respondent in nominating Hon. Justice Mjasiri to the Court contravened Article 24. The Applicant bases this prayer, on an interpretation of Article 24 that breaks the qualifications into three:

i. **proven integrity, impartiality and independence; and**

ii. **fulfill the conditions required in their own country for the holding of such judicial office; or**

iii. **who are jurists of recognized competence**

29. The Applicant then argued, firstly, that the Hon. Justice Mjasiri could not meet the requirements to hold high judicial office in the United Republic of Tanzania, having attained the Constitutional age limit of 65 years. This, the Applicant refers to as the first limb of Article 24. The Applicant then acknowledges a second limb of Article 24, being a jurist of recognized competence. However, the Applicant imports into this second limb, the qualification to hold high judicial office in the subject Partner State. It thus tied qualification as a jurist of recognized competence to qualification to hold high judicial office, contending that the age factor disqualified the judge in both limbs.

30. The Second Respondent on the other hand, while conceding that the judge would not qualify under the first limb of Article 24 (persons who fulfill the conditions required in their own countries for the holding of such high judicial office), maintains that she did qualify for nomination by virtual of being a jurist of recognized competence. The First Respondent, on the other hand, dwelt on the actual nomination process to which we revert shortly.

31. Having carefully considered the opposing arguments on the interpretation of Article 24, as presented by the parties, we find the Applicant's argument disingenuous. From a plain reading of Article 24, we see two distinct and alternative routes for appointment to the

Court: EITHER the candidate fulfils the conditions required in their own country for the holding of such high judicial office OR the candidate is a jurist of recognized competence in that Partner State. In either case, the candidate should be of proven integrity, impartiality and independence. It would therefore be erroneous to seek to equate the qualifications of one pathway to another. In our considered view, they are to be interpreted exclusively of each other so as to provide the desired alternative effect.

32. Counsel for the Applicant repeatedly stated that the Applicant recognized that Justice Mjasiri is a jurist of recognized competence within the First Respondent State and elsewhere. It was not in contest at any point that the judge is a person of proven integrity, impartiality and independence. We are left in no doubt, therefore, that as regards the provisions of Article 24, Justice Mjasiri was at all times a person qualified to be nominated for appointment to the office of a Judge of this Court.

33. That being so, we turn to consider whether that situation is in any way on the facts of the case as are before us, negated by the provisions of either Article 6 or 7 of the Treaty? As stated hereinabove, these Articles are of general application as regards the fundamental and operational principles respectively. It was the Applicant's contention that in the process adopted to nominate the judge pursuant to Article 24, the Respondent State did not demonstrate accountability, transparency and good governance as contemplated in Article 6, nor public participation as contemplated in Article 7. This, urged the Applicant, was fatal to the process.

34. The First Respondent submitted that for the purposes of Article 24, the recommendation is exclusively the domain of a Partner State, and correspondingly, the appointment is in the domain only of the Summit. Beyond the qualifications stated in Article 24, the Treaty does not provide the procedure to be adopted in nomination, and that is left to each individual Partner State.

35. On its part, the Second Respondent argued that Article 24(1) does not make it mandatory for the public to vet a nominee to the Court, therefore the omission to do so in the present case would not amount to a Treaty violation, neither was the said office aware of any public outcry in respect of the appointment as alleged by the Applicant. It was urged that the provisions of Article 24(1) having been met, there was no need for research or investigation by the Second Respondent.

36. We have carefully considered the alternative arguments of the Parties on how Articles 6 and 7 should be treated. We are persuaded that it is not by accident that there is not, in Article 24 or indeed in any other part of the Treaty, a specific process to be adopted by the Partner States uniformly on the nomination of judges to the Court. We are further persuaded that the Partner States deliberately left such nomination process to their respective discretion as such Partner States. In their wisdom, the Partner States allowed themselves leeway in the Treaty to adopt different nomination processes for purposes of Article 24. That would not necessarily amount to an illegality.

37. In making this conclusion, we are fortified by renown rules of Treaty interpretation. Article 31(1) of the *Vienna Convention on the*

Law of Treaties, 1969 ('the Vienna Convention') underscores the need for treaties to 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 light of a treaty's object and purpose.**'

38. This provision advocates four interpretation principles: good faith, ordinary meaning of terms, context and the treaty's purpose. We have in our determination of the learned judge's qualification for nomination applied a plain or ordinary meaning of Article 24(1). In terms of the nomination process, we draw apposite context from the Preamble, as well as a comparative consideration of related Treaty provisions.

39. For purposes of achieving the Treaty's objectives, paragraph 10 of the Preamble lays as much emphasis on the Treaty's fundamental and operational principles as it does to '**principles of international law governing relationships between sovereign states**.' The principle of sovereignty in international law is thus a factor that is to be taken into account in deducing the intention of the Treaty's framers with regard to the nomination process of the Court's judges. In recognition of the different approaches that may very well prevail in the Partner States, the nomination process as we have held above was left to their discretion. It would defeat the Vienna Convention's emphasis on a 'good faith' interpretation of treaties to denote offence and undesirability to a domestic process, where the Treaty is silent on it.

40. In any case, a comparative consideration of Article 50 of the Treaty, where the Partner States set out a uniform procedure for the

election of members of the East African Legislative Assembly (EALA), is instructive. In that Treaty provision, the Partner States clearly cede their sovereignty to the extent of the process set out in that Article. Had it been the intention of the Treaty framers that candidates nominated for appointment as judges should be similarly subjected to a more public process, they would have stated so.

41. In the event, we deduce no Treaty violation in the nomination of Hon. Justice Mjasiri by the First Respondent State. For as long as the Summit appoints to the Court a nominee that abides the qualifications in Article 24 of the Treaty, there would be no Treaty violation. We would therefore answer *Issue No. 1* in the negative.

Issue No. 2: **Whether pursuant to Article 71 of the Treaty, the Second Respondent was obliged to investigate and verify the qualifications and suitability of Hon. Mjasiri's appointment to the Court and advise the Community accordingly.**

42. It was the Applicant's submission that the letter by the Second Respondent to the First Respondent, included 'direction' to the said First Respondent to 'consult' and then nominate a person to fill a vacancy that had arisen. The Applicant thus urged that the First Respondent had an obligation to ensure that the direction on consultation was carried out. The Second Respondent, on the other hand, submitted that what was required of him was to ensure that the person nominated by the First Respondent State met the qualifications set out in Article 24. Having established that, the

Second Respondent had no other responsibility beyond submitting the name to the Summit for consideration.

43. Having found as we did in the preceding *Issue*, that the nomination process envisaged under Article 24 is one that the Treaty leaves to the practice in each Partner State, we are bound to agree that the Second Respondent needed only to satisfy himself that the proposed nominee met the requirements in Article 24.

44. In Submissions, Counsel for the Applicant went to considerable length to highlight the processes adopted by various other international or regional Courts. However, and with respect to Counsel, these examples are hardly of assistance to the Court in the instant matter as they arise from specifically set out procedures. As observed earlier in this judgment, in the case of the Treaty no such procedure is set out.

45. Therefore, in answer to *Issue No. 2*, we find that the obligation of the Second Respondent was to ensure that the person nominated met the qualifications of Article 24, which the Second Respondent did.

Issue No. 3: **Whether the Respondents are under obligation to institute the process of putting in place guidelines towards transparent, accountable, fair and people-centered process of nominating judges of the Court.**

46. We do appreciate that EAC Partner States are obligated to adhere to the fundamental and operational principles outlined in Articles 6 and 7 of the Treaty, so as to foster the achievement of the Community's objectives. These objectives are to be found in Articles 2(2) and 5(2) of the Treaty, as well as the more specific provisions of the Protocols for the Establishment of the East African Community Customs Union and Common Market. Articles 2(2) and 5(2) *inter alia* provide for the establishment of the EAC Customs Union and Common Market. The reference to people-centered cooperation in Article 7(1)(a) of the Treaty must be construed in that context, and not necessarily as an obligation upon the Partner States to involve the public in each and every one of their internal domestic processes.

47. Indeed, in so far as paragraph 4 of the Preamble clarifies the reasons that failed the 'original' East African Community in 1977, including non-participation of the private sector and civil society in its co-operation activities; it provides useful background to the provisions of Article 7(1)(a) of the Treaty. The question is what exactly is the role of civil society in that regard?

48. The case of **Katabaazi & 21 Others vs. Secretary General of EAC & Another, EACJ Ref. No. 1 of 2007** laid down the principle that, provided that there was compliance with the legal regime of a

Partner State, it is not the role of the Court to superintend them in exercise of their Executive or other functions.

49. Furthermore, in **Simon Peter Ochieng & Another vs. The Attorney General of Uganda, EACJ Reference No. 11 of 2013**, it was recognized that the Executive Branch of Partner States is at liberty to formulate rules or regulations in relation to their internal functioning. The principle of legal certainty, as espoused in **Halsbury's Laws of England, 4th Edition, Vol. 1**, was cited with approval in that case as follows:

> ***The Principle of Legality.*** **The exercise of governmental authority directly affecting individual interests must rest on legitimate foundations. For example, powers exercised by the Crown, its ministers and central government departments must be derived, directly or indirectly, from statute, common law or royal** (constitutional) **prerogative; and the ambit of those powers is determinable by the courts save insofar as their jurisdiction has been excluded by unambiguous statutory language. The Executive does not enjoy a general or inherent rule-making or regulatory power, except in relation to the internal functioning of the central administrative hierarchy ... Moreover, in the absence of express statutory authority, public duties cannot normally be waived or dispensed with by administrative action for the benefit of members of the public**. (Our emphasis)

50. The foregoing legal precedent advances the pertinent point that in the absence of express statutory provision, public duties cannot be waived on account of public administrative action or disdain. In a nutshell, save where expressly stated by law to the contrary, public duties (such as the nomination of judges) must be executed undeterred where no contrary Treaty or statutory provision exist. Accordingly, it seems to us that the role of civil society envisaged in either paragraph 4 of the Preamble or Article 7(1)(a) would not necessarily include the 'vetting' of judges nominated to the Court. That is a function that has been expressly reserved for Partner States by the Treaty.

51. Consequently, we reiterate our finding above that the process of nominating persons to be appointed as Judges, beyond the qualifications set out in Article 24, are reserved to the sovereignty of the individual Partner States. They are collectively at liberty to put in place a uniform process should they be so inclined. However, for present purposes, we do not deduce the absence of such a uniform nomination process for all Partner States to necessarily amount to a Treaty violation, nor do we adjudge it to impede the institutional independence of the Court. As was aptly advanced in the Court's Advisory Opinion in **The Attorney General of the Republic of Uganda vs. Tom Kyahurwenda, EACJ Case Stated No. 1 of 2014**, judges shed their national identity upon appointment to the Court and are henceforth accountable only but to the law.

52. Accordingly, we find no obligation upon the First Respondent State to initiate a new process for the nomination of judges to the Court, that being a collective decision for all the Partner States. In the absence of incisive evidence to the contrary, we do not necessarily attribute lack of transparency, accountability or indeed judicial inefficiency to a non-public nomination process. We therefore answer *Issue No. 3* in the negative.

Issue No. 4: **Whether the Parties are entitled to the remedies sought**

53. The remedies sought by the Applicant are set out earlier in this judgment. We do not consider it necessary to reproduce them here. Having found as we have above in *Issues 1, 2 and 3*, we must deny the Applicant all the remedies sought. We hereby do so.

54. On the question of costs, Rule 127(1) of the Court's Rules of Procedure states that costs shall follow the event unless the Court for good reason decides otherwise. This rule was emphatically reinforced in the case of **The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community & Another, EACJ Appeal No. 2 of 2019**. We find no reason to depart from this Rule. We award costs to the Respondents as against the Applicant.

H. Conclusion

55. In the final result, the Reference is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered by Video Conference this 25th Day of November, 2020.

Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE

Hon. Justice Audace Ngiye
JUDGE

Hon. Justice Charles A. Nyachae
JUDGE

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25 NOV 2020

Registrar

EAST AFRICAN COURT OF JUSTICE