



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



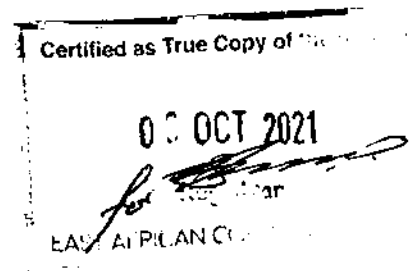
(Coram: Monica K. Mugenyi, PJ; Audace Ngiye & Charles Nyachae, JJ)

REFERENCE NO. 4 OF 2018

KIIR CHOL DENG ACUIL APPLICANT

VERSUS

- 1. ATTORNEY GENERAL OF THE
REPUBLIC OF SOUTH SUDAN 1st RESPONDENT**
- 2. THE SECRETARY GENERAL OF THE
EAST AFRICAN COMMUNITY 2nd RESPONDENT**



8th OCTOBER 2021

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Amended Reference was brought under Articles 6(d), 7(2), 27, 29(1), 30(1), (2), 38, 67(3) (d) and 71(1) (d) of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 24(1), (2) and (3) of the East African Court of Justice Rules of Procedure, 2013 (the Rules) as well as the Vienna Convention on the law of Treaties, 1969. Mr. Kiir Chol Deng Acuil ('the Applicant') is a citizen of the Republic of South Sudan resident in Juba, South Sudan and a practicing advocate in the Republic of South Sudan whose practicing certificate expired in April 2017 but could not be renewed given the alleged absence of a functioning or legitimate Bar Association and Bar Council in the Respondent's State.
2. The Reference is supported by an affidavit deposed by Mr. Kiir Chol Deng Acuil dated 6th April 2018 that highlights the failure by the Respondent State to establish a functional Bar Association and Bar Council in accordance with Section 6 of the Advocate Act, 2013. That *lacuna* is alleged to be a violation of the principles of good governance and rule of law as enshrined in Articles 6(d) and 7(2) of the Treaty.
3. The Attorney General of the Republic of South Sudan ('the First Respondent'), a self-defining office, has been sued in its representative capacity as the Principal Legal Advisor to the Government of the Republic of South Sudan. The Respondent State filed a Response to the Reference that denies any breach of the Treaty in the terms proposed by the Applicant and questions the

... Copy of the original

justiciability of the matter before this Court. The Response to the Reference is not supported by any affidavit.

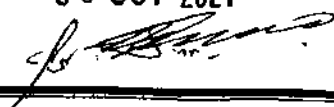
4. The Secretary General of the East African Community ('the Second Respondent') had been sued in the official capacity allegedly for his continued silence and inaction with regard to the violation of the principles of good governance and rule of law in the Republic of South Sudan, in violation of Articles 29 and 71(1)(d) of the Treaty but the case against the said office was subsequently withdrawn by the Applicant.
5. At the hearing, the Applicant was represented by William Ernest, George Mnzava and Vincent Stewart, while Mr. Bieng Piek Kol appeared for the Respondent.

B. FACTUAL BACKGROUND

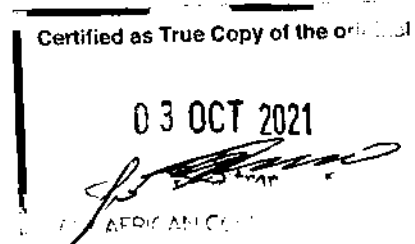
6. Mr. Kiir Chol Deng Acuil is a practicing advocate in the Republic of South Sudan who was unable to renew his Practicing Certificate upon its expiry in April 2017 owing to the absence of functional Bar Association and Bar Council.
7. The Bar Association is established under section 43 of the Advocates Act, 2013 as an independent body that regulates the legal profession in the Respondent State and particularly oversees the enrollment of advocates in accordance with section 7(1) of the Advocates Act, 2013. The Transitional Constitution of the Republic of South Sudan 2011 provides that the legal profession is an independent body established to protect the rights and interest of the people.

Certified as True Copy of the o

03 OCT 2021



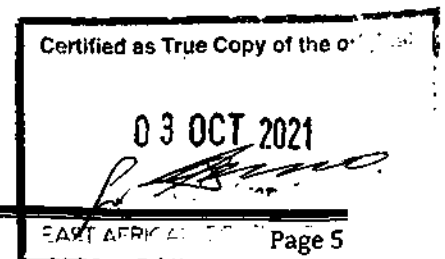
8. The election for the Executive Committee of the South Sudan Bar Association that was due in 2014 was contested in the Court of Appeal of Greater Equatorial Circuit at Juba and later in the Supreme Court of South Sudan, whereupon the parties were ordered to conduct the elections in accordance with Rule 6(1) of the South Sudan Bar Association Election Rules and Regulations, as amended in 2014. The Applicant had offered his candidature for the seat of Vice President of South Sudan Bar Association.
9. As a result of civil unrest and economic crisis then prevailing in the Respondent State, the High Electoral Committee of South Sudan Bar Association was unable to conduct the elections as ordered by the Supreme Court; hence, in order to avoid a vacuum in the profession, the candidates to the said elections allegedly reached a Compromise Agreement amongst themselves to form a transitional Bar Association on 9th December 2016, pursuant to which the Applicant was declared the Vice President of the South Sudan Bar Association.
10. Rather than assign their representative members to the Bar Council under the Transitional Bar Association established under the Compromise Agreement, the Respondent assigned their representative members to the Bar Council that has no legal existence, thus leaving the legal profession in the Respondent State under two parallel Bar Associations, one established by Compromise Agreement and another established and recognized by the Respondent.



mm

C. APPLICANT'S CASE

11. It is the Applicant's contention that the acts of the Respondent of establishing a parallel Bar Association with its Bar Council were intended to deny the Applicant the right to perform the function of Vice President in the transitional Bar. The Applicant contends that the Respondent State intentionally ignored the Bar Association established by Advocates through their Compromise Agreement in deference to the Bar Association established by the Respondent through her agents.
12. Consequently, the rule of law and efficiency in the legal profession were placed in jeopardy contrary to the Respondent's duty under sections 23 and 25(2)(a) of the Ministry of Legal Affairs and Constitutional Development Act, 2008. Further, the acts of the Respondent undermine the independence of the Bar Association in so far as the absence of the Respondent's Representatives on the transitional Bar Council denied the Applicant the opportunity to renew his Practicing Certificate.
13. In the Applicant's view, the acts or omissions by the Respondent constitute a breach of Articles 6(d) and 7(2) of the Treaty that enjoin Partner States to adhere to the principles of good governance, accountability, democracy, rule of law and transparency. It was also the Applicant's allegation that in an attempt to address the alleged misconduct by the Respondent against the purported Bar Association, the Applicant had filed a Constitutional Petition before the Supreme Court but the same has not yet been heard to date hence the filing of the instant Reference.



muH

14. The Applicant seeks the following Declarations and Orders (reproduced verbatim):

- i. **A declaration that the acts or omissions by the Respondent through its agent namely Sudan People's Liberation Movement Party in establishing a parallel Bar Association and its Bar Council is inconsistent with and in contravention of Article 136 of the Transitional Constitution, 2011 and therefore unconstitutional and be declared null and void;**
- ii. **A declaration that the acts of the Respondent in assigning their representatives members to the parallel Bar Association instead of the Transitional Bar Association established by Compromise Agreement to share power was inconsistent with and in contravention of Articles 136, 135(4), 124(1), (4), (6), (7) and 122(1) of the Transitional Constitution, 2011; and was therefore null and void;**
- iii. **A declaration that the acts of the parallel Bar Association and its bar Council as established by the Respondent through its agent namely Sudan People's Liberation Movement to operate and issue practicing licenses to the advocates is inconsistent with and in contravention of Articles 136 of the Transitional Constitution, 2011, and therefore null and void;**
- iv. **A declaration that the South Sudan Bar Association as established in accordance with the Compromise Agreement amongst the candidates in the election of**

Certified as True Copy of the original

03 OCT 2021

unt.

2014 is the legitimate body for South Sudan Bar association;

- v. A declaration that the action of the Respondent through His Excellency, the President of the Republic of South Sudan and the Chairman of the Sudan People's Liberation Movement Party (SPLM) to allow the current Acting SPLM Secretary General to continue occupying the seat of the Secretary General is a violation of Article 28(3) of the SPLM Constitution, Section 16(16) (c) of the Political Parties Act, 2012 and Article 25(3) (c) of the National Constitution (The Transitional Constitution, 2011);
- vi. A declaration that the Respondent withdraws the four representatives assigned to the parallel bar Association (two appointed by the Minister of Justice and two appointed by the Judiciary) and assign the said representatives to the legitimate Bar Association established by the Compromise Agreement;
- vii. A declaration that the acts or omissions of the Respondent in establishing the parallel Bar Association with its Bar Council intended to deny the applicant the right to participate in the Transitional Bar Association as Vice President are inconsistent and in contravention of Article 9 and 26 of the Transitional Constitution, 2011;
- viii. A declaration that section 6(2) (b) and (c) of the Advocates Act, 2013 is inconsistent and in contravention with Article 136 of the Transitional Constitution of the Republic of South Sudan, 2011. Alternatively, the Respondent be directed to withdraw and assign the four representatives who are currently in the parallel Bar

Certified as True Copy of the

Association to the Transitional Bar Association established by the Compromise Agreement;

- ix. An order directing the Respondent, through His Excellency the President of the Republic of South Sudan and the Chairman of the Sudan People's Liberation Movement Party (SPLM) to remove the current Acting SPLM Secretary General from office and conduct elections according to the law;**
- x. An order restraining permanently the Respondent and/or their agents from issuing practicing licenses to advocates or to carry any activities relating to the Bar Association or affairs of the advocates;**
- xi. An order that the costs of this Reference be met by the Respondent; and**
- xii. That this Honorable Court be pleased to make other reliefs as may deem fit.**

D. RESPONDENT'S CASE

15. On its part, the Respondent raised two preliminary points of law in addition to its response to the substance of the Reference. It is the contention of the Respondent that the Court lacks jurisdiction over the matters before it, the acts being challenged having taken place before South Sudan was granted membership of the Community in April, 2016 vide Article 3(2) of the Treaty. It is also argued that the Reference is time barred and does not disclose any cause of action against the Respondent.

16. With regard to the substantive dispute, it is the Respondent's case that it is unaware of the Bar Association ~~established through the~~

Certified as True Copy of the Original

alleged Compromise Agreement, urging that he assigned representatives to the Bar Council established by Members of the Bar Association themselves in fulfilment of the requirement of Section 6(2) of the Advocates' Act, 2013 and as requested by the then President of the Bar Association, Dr. William Kon Bior.

17. The Respondent denied (and this was not contested by the Applicant) that the Former Minister of Justice, Hon. John Luk, dissolved the Bar Association in February, 2015 contending that what had been dissolved was the Advocates' Admission Committee that had been formed by the same Minister under the Repealed Advocates' Act, 2003 to issue Practising Licences pending the enactment of the Advocates, 2013.

18. The Respondent avers that it has not violated any provision of the Treaty and thus the Applicant is not entitled to any of the reliefs sought.

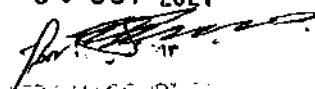
E. ISSUES FOR DETERMINATION

19. Pursuant to a Scheduling Conference held on 17th June 2019, the following issues were framed for determination:

- i. **Whether the Court has jurisdiction to entertain this Reference;**
- ii. **Whether the Reference is time barred;**
- iii. **Whether a parallel Bar was established by the Respondent and if so whether that action contravenes Articles 6(d) and 7(2) of the Treaty;**

Certified as True Copy of the orig.

03 OCT 2021



- iv. **Whether the Applicant's right to renew his Practicing Certificate and be elected as Vice President of the Bar Association was infringed upon and therefore contravening Articles 6(d) and 7(2) of the Treaty; and**
- v. **Whether the parties are entitled to the remedies sought.**

F COURT'S DETERMINATION

20. We are constrained to clarify from the onset that although the present Reference was filed under the East African Court of Justice Rules of Procedure of 2013, the said rules have since been revised, the applicable Rules presently being the East African Court of Justice Rules of 2019 ('the Rules'). The Rules shall therefore be applied without prejudice to the validity of anything previously done under the 2013 Rules and provided, as enjoined by Rule 136, that if and so far as it is impracticable to apply the 2019 Rules 'the practice and procedure heretofore shall be allowed.'

21. Secondly, we propose to determine issues 1 and 2 together given the correlation of time limitation with the question of jurisdiction as we expound below:

ISSUES 1 & 2: Whether the Court has jurisdiction to entertain the Reference; and
Whether the Reference is time barred.

22. The jurisdiction of this Court, is stated in Article 27(1) of the Treaty, as follows:

"The Court Shall Initially Have Jurisdiction Over The Interpretation And Application Of This Treaty."

Handwritten signature

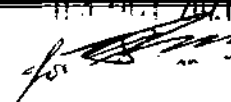
23. Further, Article 30(1) provides for References to the Court by legal and natural persons as follows:

“Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.”

24. Read together, Articles 27(1) and 30(1) provide that his Court has jurisdiction to *interpret* and *apply* the Treaty in the case of a Reference by a legal or natural person that is resident in a Partner State, where the impugned act is an Act, regulation, directive, decision, or action of a *Partner State* or an institution of the Community, on the grounds that such impugned act is unlawful or is an infringement of the provisions of the Treaty.

25. The case of **The Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu, EACJ Appeal No. 2 of 2015** delineated three types of jurisdiction: *ratione personae*, *ratione materiae* and *ratione temporis*. Lack of *ratione personae* would arise where one of the parties is devoid of the requisite capacity or *locus standi* to appear before a court. On the other hand, court's *ratione materiae* may be questioned on the basis of the invoked subject matter, an international court having no *ratione materiae* to try a matter where the treaty or convention under which it derives its mandate does not grant it jurisdiction over designated actions. In the

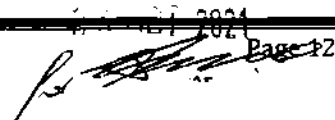
Certified as True Copy of !!



case of the Treaty for the Establishment of the East African Community, such *ratione materiae* is outlined in Articles 30, 31 and 32 thereof. *Ratione temporis*, on its part, refers to time-frame prescribed for the institution of cases in a court.

26. In the instant case, it would appear that the Respondent challenges the Court's jurisdiction on account of the *ratione materiae* and *ratione temporis*. The Applicant's *locus standi* to institute the present proceedings was not challenged. In fact, the Respondent in submissions admitted that the Applicant is a citizen and a resident of the Republic of South Sudan which is one of the Partner States to the East African Community.

27. In terms of the *ratione materiae*, it is the Respondent contention that the decision or action in issue presently took place before South Sudan had joined the Community so as to be bound by the Treaty. South Sudan was granted membership of the Community in April 2016 in accordance with article 3(2) of the Treaty. The said article states that **"the Partner States may, upon such terms and in such manner as they may determine, together negotiate with any foreign country the granting of membership to, or association of that country with, the community or its participation in any of the activities of the Community"**. It is also the Respondent's view that the obligations imposed by the Treaty apply to Partner States after obtaining the membership of the Community therefore South Sudan's obligations of the Treaty began in April, 2016 when it was admitted as member of the Community and not retrospectively as the Reference indicated. And this was not contested by the Applicant. It is manifestly plain that South Sudan was neither a Partner State nor an Institution of the Community in

 *mark*

2014. Consequently, whereas the Respondent State does have *ratione personae*, it clearly lacks *ratione materiae*.

28. In any event, the impugned acts of the Republic of South Sudan are stated to have occurred in 2014, two years prior to its membership. The Respondent was emphatic in his submissions that under both international law as well as the jurisprudence of this Court acts that ensued prior to the applicability of the Treaty to a party are not within the purview of the Court to interrogate. This is the principle of non-retroactive application of a Treaty. We do agree.

29. This was the position advanced in **Emmanuel Mwakisha Mjawasi & Others vs. Attorney General of the Republic of Kenya, EACJ Reference No. 2 of 2010**. It was held:

“A Treaty cannot be applied retrospectively unless a different intention appears from the Treaty or is otherwise established. In the absence of the contrary intention, a Treaty cannot apply to acts or facts which took place or situations which ceased to exist before the date of its entry into force. ... There is no contrary intention from the reading of the Treaty that it is to apply retrospectively.”

30. That decision was cited with approval in **Alcon International Limited vs. Standard Chartered Bank of Uganda & 2 Others, EACJ Appeal No.3 of 2013**. It was held:

“Where then, one may ask, did the court drive its jurisdiction since the Treaty which normally confers the jurisdiction on the court, did not apply? Non retroactivity is a strong objection: where it is upheld, it disposes of the

Certified as True Copy of the original

[Handwritten signatures and marks]

case there and then. As non-retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the court?”

31. Indeed, in Emmanuel Mwakisha Mjawasi case, this Court concluded:

“The objection of the non-retroactivity of the Treaty is a fundamental issue, one that goes to the root of the case. The Court cannot avoid the question. It must determine it at the outset before dealing with any other issue. True, it is not possible to deal with the objection of non-retrospectivity without considering the cause of action of the particular case. However, such consideration helps only to situate the objection in a certain period and it does not transform the principle of non-retroactivity into a matter of facts. ... the objection of non-retroactivity is interconnected with the question of jurisdiction. The Court must consider the question even where the parties fail to raise it.”

32. Therefore, unless the principle of non-retrospective application of the Treaty is rebutted by demonstrating a contrary intention; as a matter of law, the Court would lack the juridical basis to determine a dispute in respect of events that took place before the coming into force of the Treaty. We find that we have no jurisdiction over this Reference, and must decline the invitation to decide otherwise.

33. In the Alcon International Limited case, the Appellate Division cited with approval this Court's observation in Attorney General of

the United Republic of Tanzania vs. African Network of Animal Welfare, EACJ Reference No. 9 of 2010 as follows:

“Jurisdiction is a most, if not the most, fundamental issue that a Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; from which springs the flow of the judicial process. Without jurisdiction, a Court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case.”

34. Consequently, having held that we lack the jurisdiction to entertain this Reference, that should have been the end of the matter and we would dismiss the Reference on that basis. However, we do consider it appropriate to make a determination on the second point of law raised by the Respondent. That is the issue of *ratione temporis* or time limitation.

35. It is the Respondent’s contention that the Reference is time-barred, having been filed on 8th February 2018, more than two months after the actions complained of therein arose. Given the express provisions of Articles 30(2) of the Treaty, the Respondent further argued that the Reference could only raise matters that had occurred on or after 8th December, 2017. It was the conclusion, therefore, that in so far as the Court is not vested with jurisdiction to extend time set by the Treaty, the Reference should be struck out.

36. The Court is in agreement with the Respondent and is of the view that the matter revolves around the interpretation of Article 30(2) of the Treaty. It provides as follows:

Certified as True Copy of the

03 OCT 2021



new

“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 complaint, as the case may be.”

37. The provision has two (2) limbs to it: first, that a Reference should be filed within 2 months of the act giving rise to a cause of action and, secondly, where the date of an action is not known, within 2 months of a litigant's knowledge of the act giving rise to a cause of action.

38. For purposes of computation of time, in **The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011**, the Court had held that time would start to run ‘two months after the action or decision was first taken or made.’ This position was affirmed in **The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others, EACJ Appeal No. 2 of 2012** where it was held that ‘the starting date of an act complained of under Article 30(2) is not the day the act ends, but the day it is first effected.’

39. The actions that the Applicant in this case sought to impugn are stated to have occurred sometime in 2014. Therefore, given that the Reference was filed in this Court on 8th February 2018, it clearly falls outside the ambit of the two-month limitation period contemplated in the first limb of Article 30(2). As regards the second limb of Article 30(2), it hinges on proof by a party that wishes to rely on it that it only got to know of the act(s) complained of after the event but within the two-month limitation period prescribed by Article 30(2) of the

Certified as True Copy of

[Handwritten signature and initials]

Treaty. That scenario does not arise in the facts before this Court; therefore, it is only the first limb to that provision that is in issue presently.

40. The Applicant on his part further suggested that the violation claimed herein is an ongoing violation. It was ongoing at the time he instituted this Reference and is still ongoing. This Court has had occasion to extensively address the issue of time limitation in numerous decided cases. In The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit (supra), the Appellate Division of this Court ruled out the possibility of the extension of the time set in Article 30(2), or the notion of continuing violations. It was held:

“In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognise any continuous breach or violation of the Treaty outside the two months; nor is there any power to extend that time limit. ... Again no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty.”

41. This position was reiterated in the Omar Awadh case (supra) in the following terms:

“Moreover, the principle of legal certainty requires strict application of the time limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend, to condone, to waive, or to modify

the prescribed time limit for any reason (including for “continued violations”)”.

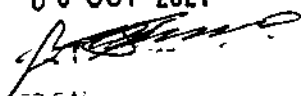
42. The Applicant also argued that the circumstances of this case are distinguishable from other cases on which the Court applied the strict interpretation of Article 30(2) because, unlike the instant Reference, in those cases the Respondent States were already members of the East African Community, making it possible for the applicants therein to access the Court. In his view, since the Respondent became a member to the EAC it is bound by the Treaty particularly Article 6(d) and 7(2).

43. In our considered view, the Respondent’s argument is aptly addressed by the principle of non-retroactivity of the Treaty as spelt out by the Court above. From the pleadings on record, it is clear that the Treaty violations in contention before us occurred sometime in 2014. There is no contrary intention from the reading of the Treaty that it was to apply retrospectively and none has been established before us by the Applicant. In any event, the Reference was filed on 8th February, almost two years after South Sudan joined the Community. Therefore, this reasoning is not helpful at all.

44. Consequently, we find that the matters in contention in the instant Reference are time barred, the time of reckoning in respect thereof having commenced in 2014. In so far as the Court neither has the mandate to extend the time limitation under Article 30(2) of the Treaty, nor the liberty to treat the alleged Treaty breaches herein as continued violations; the Court clearly has no jurisdiction *ratione temporis* to entertain this Reference.

Certified as True

03 OCT 2021



EAST AFRICAN

CONCLUSION

45. For the reasons stated in this judgment, we find and hold that this Court does not have jurisdiction to hear and determine the Reference. Further and in any event, it is also our finding that the Reference is time barred.

46. The upshot of the foregoing discourse is that we do hereby dismiss this Reference with costs to the Respondent.

47. It is so ordered.

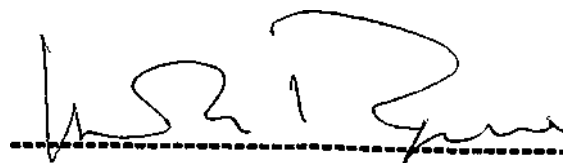
Dated and delivered by Video Conference this 8th Day of September, 2021.



Hon. Lady Justice Monica K. Mugenyi
PRINCIPAL JUDGE



Hon. Justice Audace Ngiye
JUDGE



Hon. Justice Charles Nyachae
JUDGE

****Hon. Lady Justice Monica K. Mugenyi signed this Judgement under Article 25 (3) for the Establishment of the East African Community having since retired from the Court.***

Certified as: C