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

**FIRST INSTANCE DIVISION**

(Coram: Yohane B. Masara, PJ; Audace Ngiye, DPJ;
Charles Nyachae; Richard Muhumuza and Richard W. Wejuli, JJ)

# REFERENCE NO. 8 OF 2019

**KAZINDUKA GODFREY.....1ST APPLICANT**

**ANATOLE BAVUGIRUHOZE.....2ND APPLICANT**

**EDOUARD CISHAHAYO.....3RD APPLICANT**

**VERSUS**

**THE SECRETARY GENERAL
OF THE EAST AFRICAN COMMUNITY.....RESPONDENT**

**24th JUNE 2022**

## JUDGMENT OF THE COURT

### A. INTRODUCTION

1. The Applicants, **GODFREY KAZINDUKA**, **ANATOLE BAVUGIRUHOZE** and **EDOUARD CISHAHAYO,** are former employees of the Financial Sector Development and Regionalisation Project (FSDRP 1), a World Bank Project at the East African Community Secretariat

2. The Respondent is sued in a representative capacity as the Principal Executive Officer of the East African Community ("the EAC").

3. The Applicants filed this Reference on 25th May 2019, under Article 30 of the Treaty for the Establishment of the East African Community ("the Treaty").

4. The Applicants seek for Judgment against the Respondent and for orders that the Respondent pay them US 63,000 in unpaid salaries for the months of March, April and May 2017, specific damages, general damages for the embarrassment the Respondent has caused to them, costs of the claim and any other order the Court may be pleased and deem just to make.

### B. REPRESENTATION

5. The Applicants were represented by Mr Robert Roghat and Mr Michael Lugaiya, Learned Counsel, while the Respondent was represented by Dr Anthony Kafumbe, Counsel to the Community and Florence Ochago, Senior Legal Officer.

## C. THE APPLICANTS' CASE

6. The Applicants' case is contained in the Statement of Reference filed in this Court on 28th May 2019, the Applicants Rejoinder to the Respondent's Response to the Reference and the Applicants' affidavits filed on 9th November 2021.

7. The Applicants were employed by the Respondent in the Financial Sector Development and Regionalisation Project (FSDRP I) - a World Bank funded project. Godfrey Kazinduka and Anatole Bavugiruhoze were employed on the 15th March 2011 and Edouard Cishahayo on the 22nd April 2013. Godfrey Kazinduka was employed as a Resource Mobilisation Specialist, Anatole Bavugiruhoze as a Procurement Specialist and Edouard Cishahayo as Financial Statistics Specialist. The Project was to end on 30th September 2016.

8. It is the Applicants case that a three-year work plan was approved by the Steering Committee to support a request of a three-year Additional Financing (AF) of the FSDRP phase I. The three-year work plan, alongside with other supporting documents (Financing Agreement and Project Paper) were subsequently submitted by the EAC Secretariat to the World Bank for approval and that it indicated that all FSDRP staff who were recruited under the initial phase would continue to work under the Additional Financing for the three years. That the World Bank approved the Additional Financing on 29th September 2016 and also granted a two months' extension in order to allow the project a smooth transition and to wait for the signing of the Financing Agreement by the parties.

9. The Applicants contend that on 19th October 2016, the Deputy Secretary General (Planning and Infrastructure) told them through email that the World Bank had decided not to renew their respective contracts upon expiry on 30th September 2016. The Applicants formally wrote a memo to the Secretary General to inquire about the status of their contracts. That the Secretary General convened a meeting on 1st November 2016, which concluded that the Applicants should continue their work under the same terms and await the outcome of the funding agreement. The Secretary General sent a formal reply to the Applicants and instructed them to continue working under their respective dockets.

10. The Applicants state that since they were not given letters of termination and were not paid their salaries they wrote a Memo to the Secretary General giving him up to 30th April 2019 to pay them for the period they worked from March to end of May 2017.

11. On 29th March 2019, the Deputy Secretary General (Planning & Infrastructure) responded by a letter signed on behalf of the Secretary General requiring the Applicants to hand over to the Secretariat the furniture, car number plates and IT equipment in their possession.

12. That as prescribed under Article 71 (h) and (i) of the Treaty, the Respondent is responsible for the general administration and financial management of the Community and for the mobilisation of funds from development partners and other sources for the implementation of projects of the Community but has failed to execute his responsibility.

13. For the reasons above the Applicants seek from this Court the following orders against the Respondent:

    a) **That the Respondent be ordered to pay the Applicants a total of USD 63,000 in unpaid salaries from March to May 2017;**

    b) **General damages assessed in the sole discretion of the Court;**

    c) **Specific damages of USD 196,000 be paid to each Applicant;**

    d) **Costs of the Claim; and**

    e) **Any other order that the Court may be pleased and deem just to make.**

## D. THE RESPONDENT'S CASE

14. The Respondent's case is contained in the Response to the Statement of Reference, and in the Affidavit in support of the Response to the Reference dated 24th July 2019.

15. The Respondent contends that this Court is not clothed with jurisdiction to entertain the Reference since the parties to it had agreed on arbitration in case of any dispute. That the Applicants were not employed by the Respondent but by the World Bank as Consultants on time bound project contracts. As such, they were not appointed as regular staff of the Respondent and that this information was contained in the contracts they signed. That it is the reason why the World Bank paid the Applicants a

consultancy fee of USD 7000 per month, which is well outside the pay structure of the Community.

16. The Respondent further contends that the respective contracts did not have clauses for renewal and that any renewal was at the discretion of the World Bank which paid the Consultants depending on satisfactory performance and budget availability.

17. The Respondent further states that the Reference does not disclose any cause of action against him and as such, at the very least, this Reference, if at all merited, ought to have been against the World Bank.

18. In the circumstances, the Respondent prays that the Court dismisses with costs all claims in the Statement of Reference against the Respondent and make such other orders as it deems necessary.

## E. ISSUES FOR DETERMINATION

19. At the Scheduling Conference held on 8th November 2021, the following issues were framed for determination by the Court:

    a) **Whether the Court has jurisdiction to entertain this matter;**
    b) **Whether the Reference discloses a Cause of Action against the Respondent;**
    c) **Whether the Reference is time barred; and**
    d) **Whether the Applicants are entitled to the remedies claimed in the Reference.**

20. The Parties filed written submissions and opted not to make oral highlights thereof.

## F. DETERMINATION OF ISSUES

### ISSUE NO.1: Whether the Court has jurisdiction to entertain this Matter.

21. It is the Respondent' case that this Court lacks jurisdiction to determine the Reference on the grounds that the Parties thereof agreed on arbitration which is binding upon them. He explains that when a dispute involves a contract with a written arbitration clause, the dispute is resolved through arbitration.

22. On the other hand, the Applicants submitted that this Court has jurisdiction to determine the matter in accordance with Article 30 of the Treaty read together with the EAC Staff Rules and Regulations.

23. However, they aver that 3 out of the 4 issues framed for determination should have been raised as preliminary objections on points of law by giving Notice as required by Rule 39 of the East African Court of Justice Rules of Procedure 2019 ("The Rules").

24. We find it apt to first resolve the issue of the appropriate timing for raising preliminary objections.

25. This Court, in **Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, Appeal No.1 of 2011** stated that a preliminary objection is "a **point of law which has been pleaded, or which arises in the course of pleadings and which, if argued as a preliminary point, may dispose of the suit."**

26. The Applicants do not dispute that the three issues are preliminary objections. Their contest is the procedure of raising the preliminary objections and when to do so.

27. Relevant to this point, is what was stated in **Venant Masenge vs The Attorney General of the Republic of Burundi, Reference. No. 9 of 2012** and adopted in **Union Trade Center (UTC) Ltd. vs The Attorney General of Rwanda, Reference. No. 10 of 2013**, that "A Preliminary Objection should be pleaded in a Reference and all documentation in support thereof must be annexed to the Reference."

28. In **Emmanuel Mwakisha Mjawasi & 748 Others vs The Attorney General of the Republic of Kenya, Reference No. 2 of 2010,** and in **Emmanuel Mwakisha Mjawasi & 748 Others vs Attorney General of the Republic of Kenya, Appeal No. 4 of 2011,** the Court further asserted that a preliminary objection, even though not raised at the Scheduling Conference, the Court has discretion to consider it if it deems it compelling, "**...since it is trite law that a point of law can be raised at any stage of the proceedings...**"

29. It is on record that the issue of jurisdiction was raised both in the Response to the Statement of Reference, at the Scheduling Conference and in the written submissions. The Respondent therefore satisfied the procedural requirements of the Rules.

30. Premised on the foregoing, we find no reason to deviate from the long-established precedent and will proceed to determine the first issue concerning the jurisdiction of this Court as a preliminary point of law.

31. It has been noted on several occasions by this Court that without jurisdiction, it cannot proceed at all. The determination of doubts about jurisdiction must precede the determination of the merits. In **Mary Ariviza & Another vs The Attorney General of the Republic of Kenya & Another, Application No.3 of 2020,** this Court concurred with the rationale on jurisdiction in **Owners of Motor Vessel "Lilian" vs Caltex Oil (Kenya) Ltd [1989] KLR 1, at p.14,** that **"..jurisdiction is everything. Without it a court has no power to make another step...."**

32. In the case of **Eric Kabalisa vs The Attorney General of the Republic of Rwanda, EACJ Reference No.1 of 2017**, this Court clarified that:

> **"--- to succeed on a claim of lack of jurisdiction, in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdictions: *ratione personae/locus standi, ratione materiae and ratione temporis*. Simply stated, these 3 jurisdictional elements respectively translate into jurisdiction on account of the person concerned, matter involved and the time element."**

33. In the instant Reference, the Respondent raised 2 of the jurisdictional elements, i.e *ratione materiae and ratione temporis*. However, as the order of preference of issues by the parties at the Scheduling Conference and the usual logical sequence of things dictate, we cannot jump to discuss whether the Reference is time-barred without first establishing whether this Court has the jurisdiction *ratione materiae* to entertain and determine the Reference.

34. In the case of **Alcon International Ltd. vs Standard Chartered Bank of Uganda & 2 Others, Appeal No. 3 of 2013,** the Appellate Division of this Court adopted the definition of *ratione materiae* as "**the power of the Court to entertain and decide on the subject matter of the complaint before it".**

35. In the present Reference, the Respondent argued that the Reference's subject matter is of an arbitration nature and not one to be litigated. The Respondent further stated that the rightful venue to consider this case is through arbitration as indicated in the Applicants' letters of appointment, and not in this Court.

36. To lend support to his submission, the Respondent annexed the said letters of appointments which in part, read as follows:

> "**Any dispute arising from or in connection with this Contract shall be amicably settled between you and the EAC. Where an amicable settlement of a dispute or conciliation procedure within fixed deadline cannot be reached, the dispute will be referred to an arbitration panel of 3 arbitrators. One arbitrator will be appointed by you, one by the employer and a third by both parties. The Arbitration panel shall use the Arbitration Rules of the EAC Court of Justice."**

37. On the contrary, the Applicants contended that it is contradictory and wrong for the Respondent to invoke the arbitration clause when the same Respondent has invalidated the same contracts from which the arbitration clauses rise. That it is the Respondent who had asked the Applicants to

remain in office and abide with the East African Staff Rules and Regulations and as a result cannot rely on arbitration.

38. We find the argument by the Applicants to be misconceived. To entertain it would be shifting the question from whether the Court has Jurisdiction over this matter to whether the arbitration clauses in the letters of appointments are valid. Clearly, in the premises, this is not a question for this Court.

39. The exercise to answer the question as to whether the arbitration clause is valid or not lies with the Arbitral Tribunal. Even if this question was to be answered by this Court, it would not be hard to track the origin of the Reference. The Reference is, in the first place, a dispute arising from a contract. Therefore, the breach of the contract alleged by the Applicants is pegged on the contract itself. It thus follows, logically, that contesting the validity of the arbitration clause on the ground that the contract is invalid is erroneous. We say so because we believe the existence of this Reference survives on the assumption that there was a valid contract that gave the Applicants the contractual rights that are said to have been breached.

40. In a persuasive decision of the United States Supreme Court in the case of **Henry Schein Inc. vs Archer and White Sales Inc, 2019,** it was unanimously held that courts should not enforce contracts that delegate threshold arbitrability questions to an arbitrator. In this case, Justice Brett Kavanaugh stated that the court **"must respect the parties' decision as embodied in the contract."**

41. Standing from the same citadel, Lord Hoffman in **Premium Nafta Products Limited (20th Defendant) & Others (Respondents) vs Fili Shipping Company Limited (14th Claimant) & Others (Appellants) [2007] UKHL 40, observed:**

> **".....it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen... In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: 'if any businessmen did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."**

42. Lord Hoffman's opinion is resoundingly persuasive.

43. We are convinced that the language in the letters of offer of appointments did not explicitly or implicitly oust the arbitration clause. Moreover, the arbitration clause is not ambiguous.

44. As a result, we hold, in answer to Issue No.1, that this Court lacks jurisdiction *ratione materiae* to deal with the Reference.

45. Having held as we have, we deem it unnecessary to delve into other issues raised at the Scheduling Conference, as the finding on jurisdiction alone sufficiently and conclusively disposes of the Reference.

46. Regarding costs, Rule 127 of the Rules of the Court provides that: **"Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order".**

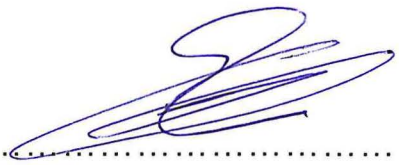
47. In exercise of our discretion, having determined the Reference at a preliminary stage due to lack of jurisdiction, we find it equitable to order that each party bears its own costs.

## G. CONCLUSION

48. For the reasons set out above, the Reference is dismissed with no orders as to costs.

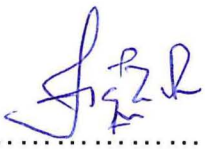
**Dated, signed and delivered at Arusha this 24th Day of June, 2022.**

Hon. Justice Yohane B. Masara
**PRINCIPAL JUDGE**

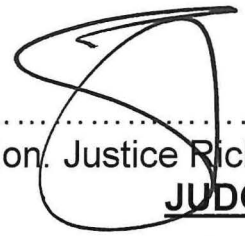


Hon. Justice Audace Ngiye
**DEPUTY PRINCIPAL JUDGE**

Hon. Justice Charles Nyachae
**JUDGE**



Hon. Justice Richard Muhumuza
**JUDGE**



Hon. Justice Richard W. Wejuli
**JUDGE**