



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



*(Coram: Yohane Masara, PJ; Audace Ngiye, DPJ: Charles O. Nyawello,
Charles Nyachae, Richard Wabwire Wejuli, JJ)*

CONSOLIDATED REFERENCES NO.15 & 16 OF 2018

**1. OSWALD ANANIAH WIDAMBE
2. BENOIT NGABONZIZA.....APPLICANTS**

VERSUS

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

22nd MARCH, 2022

JUDGMENT OF THE COURT

A. INTRODUCTION

1. The Applicants, Oswald Ananiah and Benoit Ngabonziza are retired former employees of the East African Community (EAC). On 4th September 2018, they separately brought individual References against the Secretary General of the East African Community (SG) under Article 30 of the Treaty for the Establishment of the East African Community (“the Treaty”).
2. The References were however consolidated and are now dealt with jointly. The Consolidated Reference is against the SG in his representative capacity as the Principal Executive Officer of the East African Community (EAC).
3. The Applicants seek for arrears of salaries and other emoluments allegedly underpaid while they were still in service, general damages for embarrassment caused to them by the Respondent and an order that the Respondent’s failure or refusal to appoint the Applicants as directed by the Council of Ministers was wrongful.

B. REPRESENTATION

4. The Applicants were represented by Mr. Michael Lugaiya and Professor John Ruhangisa, learned Counsel while the Respondent was represented by Dr Anthony Kafumbe, learned Counsel to the Community.

C. BACKGROUND AND APPLICANTS’ CASE

5. The 1st Applicant was appointed as a personal driver to the Deputy Secretary General from 1996 to 2001, from 2001 to 2006 he was



assigned as personal driver to the SG and from 2006-2011 he was appointed as a personal driver to the successor SG.

6. The 2nd Applicant was appointed as a personal driver to the SG from 22nd August 2011 to 2016.
7. The relevant period for which the Applicants make their claim is 2006-2011 in the case of the 1st Applicant, when he served as a personal driver to the then SG- Ambassador Juma Mwapachu. While for the 2nd Applicant it is 2011 to 2016 when he served as a personal driver to the then SG, Dr Richard Sezibera.
8. The Applicants' demands are premised on allegations that while there was a Council of Ministers' decision placing their job category at salary scale G3, which would have entitled them to relatively higher emoluments, they were employed at lower salary scales than they ought to have been placed; that in the case of the 1st Applicant, his contract was changed and renewed in 2006 for a 5 year period with effect from 1st July 2006 at a salary of \$ 2,915 per annum in G4 salary scale while the 2nd Applicant joined the Respondent in 2011 at a salary of \$ 4,160 per annum in G2 salary scale.
9. That in August 2006, G4 salary scale was recategorized into G2 salary scale at an annual salary of \$ 4,160.00
10. The Applicants contend that in 2006, the Council of Ministers also revised and approved a new grading structure which allegedly categorized the drivers to the Executive staff (SG, DSG and DG-Customs & Trade) as Senior Drivers at G3 salary scale. That following the Council Decision, the Respondent communicated the new terms and conditions of service but made no reference to the



new salary scale which the 1st Applicant was allegedly now entitled to. That the Respondent maintained the 1st Applicant's salary at \$ 4,160.00

11. That on 23rd July 2018, the Applicants wrote to the Respondent requiring him to implement the Council decision EAC/CM12/Decision 77 which had been Gazetted and published in the East African Gazette Vol.AT1-No.004 of 30th December 2007 to be read together with the EAC Staff Rules and Regulations. The Respondent did not respond to their letters and so they filed this claim.

12. The Applicants pray that the Respondent be ordered to pay the Applicants total underpaid salaries and gratuity amounting to US\$44,287.50 each, general damages, costs of this Reference and make any other orders that Court may deem just to make.

D. RESPONDENT'S CASE

13. The Respondent contended that the Reference is time barred, but that, in any case, the Applicants were not entitled to the amounts claimed and that the suits were misconceived. That the 1st Applicant having been recruited as a driver, was assigned in that capacity to drive Executive staff, which was well within the normal course of his duties, and that he was never underpaid. That the 2nd Applicant was recruited as a personal driver and served his term in accordance with his appointment letter and that there was no salary scale G3 for personal drivers.

14. That the Respondent has not refused to perform its function of implementation of decisions of the Council of Ministers, as alleged by the Applicants.



15. That there was no Council of Ministers' decision that put drivers, including personal drivers, at G3 salary scale. That the Council of Ministers' decision EAC/CM/Decision 77 which the Applicants rely upon, only took note of the proposal but did not adopt any position that put Drivers in the G3 salary scale.

E. ISSUES

16. The following issues were agreed upon for determination by this Court:

- i Whether or not the Applicants' Reference is time barred;**
- ii Whether or not the Respondent has failed or refused to perform its function of implementation of decisions of the Council of Ministers; and**
- iii Whether or not the Applicants are entitled to the remedies sought.**

F. COURT'S DETERMINATION OF ISSUES

17. Parties filed written submission's which were then highlighted by their respective Counsel.

18. Before we delve into the merits of the Reference, we would like to address some very important procedural and housekeeping issues raised by Counsel for the Applicants.

19. Counsel for the Applicants drew Court's attention to the fact that the Respondent's Affidavit in Rejoinder was belatedly served on them, after they had filed their written submissions.

20. The Court record indicates that the Applicants filed their submissions on 1st September 2020 and it would appear that the



Respondent, for some unknown reason, after filing an Affidavit in Rejoinder on the 17th August 2020, waited until 4th September 2020 to serve their Affidavit in Rejoinder.

21. This act is patently unprocedural and could be understood by anyone, including this Court, to have been an attempt to prejudice the Applicants. In an adversarial system of litigation, the essence of timelines and the order in which pleadings and submissions are filed and flow from one party to another is intended to give the other party a fair opportunity to appropriately respond to or take into account the pleadings or arguments of the other party in order to most appropriately state their own case.

22. Notwithstanding that a further reply to a Rejoinder is not an automatic entitlement to the other party, this Court is in agreement with Counsel for the Applicants that the Respondent's conduct was reprehensible.

23. In the circumstances, this Court issues an unequivocal caution to the Respondent to, in future, refrain from conduct of that nature or conducts similar.

24. The second issue of concern raised by the Applicants is that the Respondent filed a Supplementary Affidavit without first having sought leave of this Court to do so.

25. We have carefully perused the Record of proceedings of this matter and established that contrary to the allegations proffered by the Applicants, on 23rd June 2020, Court granted the Respondent leave to file a supplementary or additional affidavit.



26. The impugned Supplementary Affidavit is therefore properly on record.
27. The Applicants then raised a preliminary legal issue that, whereas the Respondent was required to file their Response within 45 days of being served, they did so 12 months out of time. We shall however deal with the first issue framed by the parties before we return to the preliminary point, if need be.
28. The first Issue agreed upon by the parties interrogates whether the action is time barred. This, by implication, questions the jurisdiction of this Court to entertain this Reference.
29. Once a question of jurisdiction is raised, it must be addressed forthwith to determine whether indeed the Court has the mandate to entertain the matter before it, before proceeding to address any other question.
30. Jurisdiction in judicial context has long been held to be a unitary concept that denotes three essential elements, namely; jurisdiction *ratione materiae* (subject matter), *ratione personae* (locus standi) and *rationae temporis* (temporal condition).
31. The jurisprudence which has been upheld by this Court is that the absence of any of the above essential elements of jurisdiction would disavow Court the mandate to entertain a dispute, [see **Manariyo Desire vs. AG of Burundi [2015-2017] EACJLR 978.**]
32. This Court is further guided by the decision of the Appellate Division of the Court in **Angella Amudo vs. SG-EAC Appeal No.4 of 2014** in which the learned Justices of Appeal, while taking note

of what had transpired in the trial proceedings where the issue of limitation of time had been raised, stated thus;

“The defence of limitation had challenged the trial Courts jurisdiction to entertain the claim and determine it on merit. What the Respondent was saying briefly, was that the trial Court lacked jurisdiction *ratione temporis*.”

33. This Court’s finding regarding whether or not the Applicants’ Reference is time barred, will also determine the question of jurisdiction over the matter.

34. Article 30(2) of the Treaty stipulates the period within which proceedings can be brought to Court by any complainant. The provision requires that such proceedings are instituted within 2 months of the occurrence of the trigger of the cause of action or of such trigger coming to the complainant’s knowledge.

35. Counsel for the Applicants contended that the Reference met all the legal requirements stipulated under Article 30(2) of the Treaty. They submitted that the Applicants were not given copies of the Reports of the Meetings of the Council of Ministers. That there was no system or mechanism that would enable the Applicants or any other staff who joined the EAC Secretariat to know Council decisions that affected him personally.

36. The Respondent adduced evidence, which the Applicants also confirm, that the Council of Ministers’ Decision 77 upon which the Applicants anchor their claim was published in the East African Gazette Vol.AT1-No.004 of 30th December 2007 and that it contained all the relevant information pertaining to the Council decisions. The Applicants’ only contention is that the information in



the Gazette was not easily accessible and that it was not sufficiently detailed.

37. Premised on the doctrine of constructive notice, the fact of publication of the Gazette meant that the Applicants were presumed to be aware and to have been put on notice of the contents thereof. The doctrine of constructive notice denotes a presumption that a party has notice when it can discover certain facts due to diligence or inquiry into the public records.

38. Once a legal notice is published in the Gazette, then constructive notice is deemed to have been given *in rem*.

39. Constructive Notice treats a person who ought to have known a fact as if he actually knew it. A person who is bound to make an inquiry and fails to do so, should be held to have notice of all the facts which would have come to his knowledge had he made the inquiry. (See: **Bepin vs. Priyabrata, AIR 1921 Cal 730**)

40. Whereas it is common ground that indeed, Council Decision 77 was carried in the EAC Gazette, no evidence was adduced to indicate that the Applicants made all or any relevant inquiry while they were still in service or at inception of their employment. Had they done so, they possibly would have accessed the full content of Decision 77.

41. Counsel for the Applicants proffered the unsubstantiated position from the Bar that the Applicants' office was the Executives' cars and that they would never have access to the library, where it is presumed, amongst other places, one would find the Gazetted Decision 77 of Council and other documents pertaining to Council decisions.



42. Diligence on their part would have led to deeper inquiry to fill up the alleged missing information, the duty to conduct due investigation lay with them.
43. The presumption of constructive knowledge imputed by Court, cannot be allowed to be rebutted once knowledge has been communicated.
44. In the absence of any evidence to corroborate their own averments that they got to know about the Council Decision 77 from their colleagues, the Applicants did not dispel the presumption that they had knowledge of these matters derived from the EAC Gazette, this indeed is acknowledged by Counsel for the Applicants. It is common ground, as discerned from Page 5 at lines 25-27 of the Applicants' submissions, that they were aware of the EAC Gazette publication in which the alleged Council Decision was published.
45. As rightly pointed out by the Respondent, the date on which they allegedly got to know about the decision from their colleagues is not specified nor is disclosure made of who the source of that information was.
46. The Applicants are presumed to have been aware of the alleged Council decisions during the currency of their respective employment contracts which lapsed several years ago.
47. The argument that they were not aware of the contents of the Gazette because they had no access to it has no standing in law. The adage that "*ignorance of the law is no defence*" comes into mind. Not to have had knowledge of the Gazetted decision of the Council would not be a reason available, in the circumstances of



this case, to allow the argument that the Applicants were never aware of the alleged Council Decision 77 until the time they were told about it by their undisclosed colleagues.

48. Article 30(2) of the Treaty requires that such proceedings are instituted within 2 months of the occurrence of the trigger of the cause of action or of such trigger coming to the complainant's knowledge.

49. The Applicants filed their References in 2018, long after the time they are presumed to have had notice of the alleged Council of Minister's Decision 77 and its alleged infraction by the Respondent when he allegedly appointed them at salary scales lower than they were entitled to.

50. There is no evidence that they ever raised any issue about underpayment of their respective emoluments during the tenure of the said contracts, or at least no such evidence was tendered.

51. In the event, **the Applicants' Reference is time barred.**

52. This Court is further guided by the decision of the Appellate Division in Angella Amudo vs SG-EAC (supra) that, **“a challenge to jurisdiction must be decided and not assumed and, once the challenge is positively proved, the proceedings must be dismissed”**.

53. Consequently, this Court lacks jurisdiction *ratione temporis*. It can neither entertain nor portend to proceed to determine this Reference on its merits. It lacks jurisdiction to do so.

54. It therefore follows that Consolidated References Nos. 15 and 16 of 2018 is dismissed in its entirety.



55. Considering the nature of the dispute herein and in the interest of justice, we direct that each party bears their own costs.

56. It is so ordered.

Dated, signed and delivered at Arusha this 22nd Day of March, 2022.



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



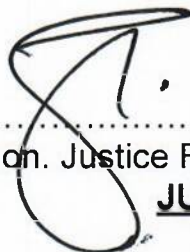
.....
Hon. Justice Audace Ngiye
DEPUTY PRINCIPAL JUDGE



.....
Hon. Justice Dr. Charles O. Nyawello
JUDGE



.....
Hon. Justice Charles Nyachae
JUDGE



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