



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



(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles A. Nyachae, Richard Muhumuza & Léonard Gacuko, JJ)

REFERENCE NO. 17 OF 2020

JUBA AIRPORT CITY PARK LIMITED APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF
THE REPUBLIC OF SOUTH SUDANRESPONDENT**

26TH MARCH 2024

RULING OF THE COURT

A. INTRODUCTION

1. This Ruling arises from a preliminary issue raised by the Court to Counsel representing parties in this Reference. It is an issue on whether the instant Reference was filed within the prescribed time as per Article 30(2) of the Treaty for the Establishment of the East African Community (“the Treaty”).

B. REPRESENTATION

2. The Applicant was represented by Mr Stephen Nelson and Mr Derrick Tumusiime, both learned Advocates from M/s Shoebill, Advocates, Fortune Plaza, 2nd Floor, Wilson Street, Kampala. The Respondent was represented by Mr Biong Pieng Kol, Counsel General, Ministry of Justice, Juba.

C. BACKGROUND

3. On 16th June 2020, the Applicant, Juba Airport City Park Limited, filed this Reference under the Provisions of Articles 5(3)(g), 6(d), 7(1)(a), 7(2), 8(1)(a), (b) & (c), 8(4), 27 and 30 of the Treaty; Articles 9(2) & (3) and 170(1) & (2) of the Transitional Constitution of the Republic of South Sudan; Sections 8(1) & (2), 12, 73(1) and 75 of the Land Act, Laws of South Sudan, 2009; Rules 4 and 25 of the East African Court of Justice Rules of Procedure, 2019 (“the Rules”), among others.
4. On 3rd July 2020, the Applicant filed an Amended Statement of Reference, reasons of which were not availed to us. The Applicant also filed **Application No. 17 of 2020** for temporary injunction, alongside the Reference.
5. On 24th June 2021, **Application No. 17 of 2021** came up for hearing whereupon Mr Biong, representing the Respondent, indicated that the

Respondent had not been served with the Application and requested for time to file a Response to the Amended Statement of Reference. Mr Nelson, upon reflection, decided to withdraw the Application so that hearing can proceed on the substance of the Reference. Two weeks were extended to the Respondent, to allow him to file a Response to the Amended Statement of Reference.

6. When the matter came up for Scheduling Conference on 9th November 2023, it was learnt that the Respondent did not file the Response as per the direction of the Court. He had done so early that morning of 9th November. Counsel Biong pleaded that his late Response be validated. The Court did not make a determination of the said prayer as it had realised that there was a possibility that the Court did not have the requisite jurisdiction to deal with the Reference in the first place.
7. In order to establish whether the matter was properly before us, we asked parties to submit in writing whether the Reference was filed within the time prescribed by Article 30(2) of the Treaty. A schedule thereof was drawn, whereby the Applicant was given 30 days to file its submissions. The Respondent, who had requested for just a week to do so, was graciously given two weeks. The Applicant was at liberty to file rejoinder submissions within two weeks of the Respondent's reply submissions.
8. The Applicant's Counsel filed its submissions on time. However, the Respondent defaulted and only filed his submissions on 9th February 2024, instead of 22nd December 2023. On 15th February 2024, the Applicant filed its rejoinder submissions, vehemently contesting the delay exhibited by the Respondent.

**D. SUBMISSIONS ON WHETHER THE COURT HAS JURISDICTION
OVER THE REFERENCE**

a) Submissions by the Applicant

9. Before submitting on the issue of limitation, Counsel for the Applicant proffered a brief background to the case. We deem it appropriate to reiterate the same.
10. The Applicant was incorporated in the year 2006. In 2007 (or 2006), the Applicant acquired what was termed as “first class plots of land” in Thumping, Juba. These were 3 plots measuring 92,078 M²; 387,857 M² and 406,620 M² respectively (“the suit land”).
11. Prior to this allocation, the Government of Bahar El Jabel, a state Government in South Sudan by then, allocated the suit land to the United Nations Mission in South Sudan (UNMISS) for 3 months. The Applicant further states that in 2011, without its knowledge, the Government of Central Equatoria State, under the orders of the Government of South Sudan, expropriated the suit land and gave it to UNMISS, without the Applicant’s consent or compensation.
12. The Applicant contends that the expropriation infringes Articles 6(d) and 7(2) of the Treaty; the Transitional Constitution of the Republic of South Sudan and the Land Act of South Sudan.
13. Regarding whether the Reference was filed within the prescribed time, Counsel for the Applicant contends that the Reference is not time barred as the Applicant became aware of the expropriation of the suit land at the time of filing the Reference. To the learned Counsel, the cause of action did not arise in 2005 when the suit land was first allocated to UNMISS because by then the Applicant had not acquired the land. Further, that the 2011 expropriation of the land was without

the knowledge of the Applicant, as UNMISS has been in physical possession of the land even before the expropriation.

14. Counsel for the Applicant also states that the admission of South Sudan into the East African Community in 2016, which took place after the expropriation in 2012, does not automatically make the Reference time barred. That what matters is that the Applicant was not aware of the expropriation.

b) Submissions by the Respondent

15. Notwithstanding the fact that the Respondent delayed to file his submissions, we find it apt to state what he submitted on this issue.

16. This, however, is not, at any rate, aimed at condoning the laxity and casual manner in which Counsel for the Respondent has exhibited himself before this Court with respect to this Reference. We do emphasise that Counsel should always respect Court orders. Where counsel fails to act within the prescribed time, he should, at the minimum, have courtesy to explain reasons that hindered his prompt compliance to the court order. We will leave it at that.

17. Submitting on the issue of time limitation, Mr Biong was of the view that the actions complained of, having taken place before the Respondent joined the East African Community, cannot be litigated before this Court. Simply, that this Court lacks jurisdiction over the subject matter of the Reference, as the impugned actions of the Respondent took place before South Sudan became a member of the Community. Further, that this Court's jurisdiction is curtailed by the international law principle of non-retrospectivity of the Treaty provisions.

18. Mr Biong went on to cite a plethora of authorities by this Court regarding time limitation. These are: **Emmanuel Mwakisha Mjawasi**

& Others vs the Attorney General of the Republic of Kenya, EACJ Reference No. 2 of 2010; Kiir Chol Deng vs Attorney General of the Republic of South Sudan, EACJ Reference No. 4 of 2018; Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011 and Alcon International Limited vs Standard Chartered Bank of Uganda & 2 Others, EACJ Appeal No. 3 of 2013, among others.

19. Mr Biong finally submitted that the Reference having been filed 15 or 9 years after the impugned acts, the same cannot be sustained as it is against the dictates of Article 30(2) of the Treaty.

c) Submissions in Rejoinder

20. As indicated before, in the rejoinder submissions, Counsel for the Applicant urged the Court to take note of the Respondent's repeated defiance of the Court orders regarding the timeframes for filing submissions and pleadings. He asked the Court to exercise its inherent power under Rule 4 of the Rules to admonish the Respondent's Counsel and, indeed, the Respondent, for defying the orders set by the Court. Counsel also cited the case of **Hon. Sitenda Sebalu vs the Secretary General of the East African Community, EACJ Reference No. 8 of 2012**, where the Court held, *inter alia* that "*nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.*"

21. Counsel for the Applicant urged the Court to disregard the Respondent's submissions in its entirety and "*take additional measures against the same for the contempt herein.*"

22. On the issues raised, and without prejudice to his preliminary prayers, Counsel for the Applicant reiterated the earlier submissions. Counsel

emphasised that he was aware and agreed with jurisdiction of the Court on time limitation as per Article 32(2) (*sic*) of the Treaty and the decision in **Attorney General of the Republic of Uganda vs Omar Awadh and 6 Others, EACJ Appeal No. 2 of 2012.**

E. COURT'S DETERMINATION

23. Having carefully considered the pleadings and the submissions of Counsel for the respective parties herein, it behoves us to make a determination on whether this Court is vested with the requisite jurisdiction to consider the Reference on its merits.

24. The Court's jurisdiction on time limitation (*ratione temporis*) is provided for in Article 30(2) of the Treaty, where it states that:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.” (Our emphasis).

25. According to the submissions by Counsel for the Applicant, the Reference is within the prescribed period as it falls under the exception of the two months underlined above; that is, the Applicant came to know of the impugned acts by the Respondent at the time of filing the Reference.

26. This assertion, however, only appears in the written submissions. It is not backed up by any information embedded in the Reference under consideration. Both in the Statement of Reference dated 16 June 2020 and the Amended Statement of Reference dated July 3, 2020, the Applicant did not insinuate that they were not aware of the

expropriation of the suit land by the Respondent until at the time they opted to proffer the Reference before this Court.

27. On the contrary, the Amended Statement of Reference, manifests the knowledge by the Applicant of the “expropriation”. In paragraph 18 of the Amended Statement of Reference, the Applicant states that it filed a suit in the Courts of Law of South Sudan against UNMISS, a suit which failed due to the immunity provision embedded in the agreement between UNMISS and the Respondent.
28. The Amended Statement of Reference is supported by the affidavit of one, *Jameson Losuk Stephen Lupai*, a director and member of the Board of the Applicant company. In paragraphs 9 and 10, the deponent attests that the land in question was expropriated in 2011 and that it was done without the consent of the Applicant or compensation thereof.
29. Nowhere in the said Affidavit can one deduce lack of knowledge by the Applicant as contended by Counsel for the Applicant.
30. It is, thus, our conclusion that the Applicant was aware of the impugned acts since 2011 when the Respondent, pursuant to a Status of Forces Agreement (SOFA), extended the tenure of UNMISS in the suit land. The Applicant was also aware that even after the expiry of the 5 years, in 2016, the land was never handed back to it.
31. Therefore, the purported reliance on the exception of the two months limitation under Article 30(2) of the Treaty by the Applicant’s Counsel is nothing but an afterthought.
32. The issue of time limitation has been extensively explored by this Court. In **Attorney General of Kenya vs Independent Medical Legal Unit** (*supra*), this Court stated that a claimant cannot avoid the time

limitation by alleging a continuing breach or violation of the Treaty. The Court held:

“The Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant.”

33. In the same breath, this Court does not have requisite jurisdiction to deal with issues that arose before a Respondent became a member of the Community. It is common knowledge that the Respondent, the Republic of South Sudan, was admitted to the EAC in 2016. The impugned acts appear to have taken place before or in 2011. It is therefore not within the jurisdiction of this Court to impugn acts or omissions of a State which occurred before it became a party to the Community.

34. This was the position advanced in **Emmanuel Mwakisha Mjawasi & Others vs Attorney General of the Republic of Kenya, EACJ Reference No. 2 of 2010**. The Court held as follows:

“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.”

35. That decision was cited with approval in **Alcon International Limited vs Standard Chartered Bank of Uganda & 2 Others** (*supra*) where it was held:

“Where then, one may ask, did the court derive 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 case there and then. As non-retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the court?”

36. Indeed, in the **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.”

See also the decision of this Court in **Kiir Chol Deng vs Attorney General of the Republic of South Sudan** (*supra*).

37. Coming back to the facts of this case, the Applicant complains of being deprived of its land by the Respondent in the year 2011. The Republic of South Sudan was not a member of the EAC by then as it only joined the EAC in 2016. This Court, being a creature of the Treaty and being

governed by international rules and norms, has no jurisdiction to deal with matters that fall outside the Treaty. As the Republic of South Sudan was not party to the Treaty in the year 2011, it follows that the same was not a subject of this Court at that time and its actions then cannot be litigated in this Court.

38. Further, Article 30(2) puts strict timelines for a complainant to submit its complaints. Having overruled the issue of lack of knowledge on the part of the Applicant, the Applicant was obliged to come before this Court within the two months limitation prescribed. It is appalling to note that South Sudan joined the Community in 2016 but the Applicant had to wait for four years before coming to Court.

39. In the upshot, this Reference is bound to fail on two fronts: one, this Court has no jurisdiction over the subject matter of the Reference, the same having arisen before the Respondent became a party to the Treaty. Two, it also fails because it was filed outside the period of limitation prescribed under Article 30(2) of the Treaty.

40. Regarding costs, Rule 127(1) of this Court's Rules provides 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**.

41. However, in the instant Reference, we deem it appropriate to depart from the principle that costs follow the event. The ineptitude and dismal ways in which Counsel for the Respondent dealt with this Court's orders militates against any award of costs.

42. In the exercise of our discretion, we believe that this is a good case befitting a direction that each party shall bear its own costs.

F. CONCLUSION

43. For the reasons stated in this Ruling, we find and hold that:

- a) this Court does not have jurisdiction to hear and determine the Reference;**
- b) the Reference is time barred.**

44. Consequently, we do hereby dismiss this Reference with no orders as to costs.

45. It is so ordered.

Dated, signed and delivered at Arusha this 26th day of March 2024.

Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

Hon. Justice Charles A. Nyachae*

Hon. Justice Richard Muhumuza

Hon. Justice Richard Wabwire Wejuli
JUDGE

Hon. Justice Kayembe Ignace Rene Kasanda
JUDGE

*[Hon. Justice Charles A. Nyachae resigned from the EACJ with effect from 8th January, 2024 but he signed this Judgment in terms of Article 25(3) of the Treaty]