



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



*(Coram: Charles O. Nyawello, DPJ; Charles A. Nyachae, Richard Muhumuza,
Richard W. Wejuli & Kayembe Ignace Rene Kasanda JJ)*

APPLICATION NO. 20 OF 2022
(Arising from Reference No. 28 of 2022)

ELARIO ADAM CHOLONG APPLICANT

VERSUS

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF SOUTH SUDAN RESPONDENT**

26TH MARCH 2024

RULING OF THE COURT

A. INTRODUCTION

1. This Application arises from Reference No. 28 of 2022. It was filed on 10th June 2022 by ELARIO ADAM CHOLONG (“the Applicant”) against the Attorney General of the Republic of South Sudan (“the Respondent”).
2. The Application is premised on Article 39 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rule 52(1), (2), (4) & (5) of the East African Court of Justice Rules of Procedure, 2019 (“the Rules”).
3. The Applicant describes himself as a public-spirited person, a citizen and a resident of the Republic of South Sudan. His address of service for purposes of the Reference is **C/o Legalline Law Chambers, Chan House, Second Floor, Juba- South Sudan.**
4. The Respondent is the Attorney General of the Republic of South Sudan, sued in Reference No. 28 of 2022 as the Chief Legal Adviser to the Republic of South Sudan, a Partner State of the East African Community. His address of service for purposes of the Reference is **C/o the Ministry of Justice and Constitutional Affairs, Airport Avenue, Juba, South Sudan.**
5. In the Notice of Motion filed in Court on 10th June 2022, the Applicant seeks for interim orders **restraining the Respondent from dredging the River Nile until the determination of the main Reference and for the Respondent to provide the Applicant with the Dredging Project Agreement between the Respondent and the Egyptian Government.**

6. The Application is supported by the Affidavit in Support of the Notice of Motion deponed on 10th June 2022 by ATHINGBIAR DENG AWUR WENYIN, Advocate of the High Court of the Republic of South Sudan.

B. REPRESENTATION

7. At the hearing, the Applicant appeared in person, while Mr Biong Pieng Kuol, Director, Civil Litigation, appeared for the Respondent.

C. GROUNDS FOR THE APPLICATION

8. The grounds for the Application are contained in the Notice of Motion and in the Affidavit of ATHINGBIAR DENG AWUR WENYIN, filed together in Court on 10th June 2022. Briefly, they are:

- a) **That the Respondent wants to start dredging the River Nile with undue regard to East African Law and International Environmental and human rights law;**
- b) **That on 3rd June 2022, the Respondent received the Egyptian water Dredging machines meant to aid the flow of water along the Naam River in Unity State and Bahr el Ghazal basin. The project is to be carried out by the Egyptian Government in partnership with the Respondent;**
- c) **That this project is environmentally untenable and will traverse protected areas in East Africa, with undue regard to livelihoods, gender, food, children and public health of the East Africans; and**
- d) **That the area through which the dredging project shall pass is comprised of several settlements, farmlands and**

water sources for thousands of indigenous persons and there has been no regard to their rights.

D. PRELIMINARY OBJECTION

9. In the course of hearing the Application, on 8th November 2023, Mr Biong orally raised a preliminary objection on a point of law concerning the Court's Jurisdiction to hear and determine the Reference from which this Application emanates.

10. He submitted that the Reference from which the Application arises is not properly before the Court, as the same was filed out of time. He relied on Article 30(2) of the Treaty that provides the time frame for the Reference to be filed. He argued that the subject matter in the Reference related to the Memorandum of Understanding between the Republic of South Sudan and the Arab Republic of Egypt to dredge the waters of Naam River, which occurred earlier before the importation of machines to carry on the work of the real dredging.

11. Counsel Biong submitted further that there is no ambiguity under Article 30(2) of the Treaty as regards the timeframe for filing a reference in this Court and as such, **Reference No. 28 of 2022** which underpins the current Application, was filed in Court beyond the stipulated two-months period prescribed by the Treaty.

12. On the other hand, the Applicant submitted that Article 30(2) of the Treaty provides for the Reference to be filed within two months of enactment, publication, directives, decision or action complained of, and that it is within the Court's record that the Respondent admitted that the equipment meant for the dredging of the River were received by the Unity State Government in June 2022, the same month the

Reference and Application were filed and, further, that the Applicant has attached to the Reference publications or official correspondences from the Minister of Water and Corporation acknowledging receipt of the equipment meant for the dredging project. Thus, it was his submission that the Reference and Application were filed within the two months of the publication within the meaning of Article 30(2) of the Treaty.

13. The Court deemed it appropriate to deal with the preliminary issue before the Application for orders mentioned in paragraph 5 of this ruling. It directed parties to file written submissions with respect to the issue of time limitation raised by the Respondent.
14. Mr Biong was directed to file within three days after the hearing and the Applicant was given the same time to file a response upon receipt of the Respondent's submissions.
15. To our dismay, Counsel for the Respondent took three months to file his submissions and without any reasonable justification as to his failure to abide by the Court's directions.
16. This conduct not only disrupts the expeditious resolution of cases but also reflects poorly on a party's commitment to uphold the standards of legal practice. We remind parties of the importance of complying with Court directives and the necessity of demonstrating the utmost respect for the judicial orders.
17. We urge Counsel for the Respondent to take immediate corrective action and ensure that future conduct aligns with the principles of professionalism and respect for the Court's authority.

E. PARTIES' SUBMISSIONS

The Respondent's Submissions

18. Addressing the issue of time limitation regarding the filing of the Reference, Counsel for the Respondent submitted that Article 30(2) of the Treaty mandates those instituting, or intending to institute proceedings in the Court, to do so within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day on which it came to the knowledge of the complainant.
19. Counsel for the Respondent submitted that in this case it is essential to first establish when the action complained of came to the knowledge of the Applicant. That, although the Applicant did not indicate in the Reference when the action complained of arose or came to his knowledge, which is essential for the determination of time limitation within which the Reference ought to be filed as provided for in Article 30(2) of the Treaty, it is noteworthy that the Government of the Republic of South Sudan entered into a Memorandum of Understanding with the Government of the Arab Republic of Egypt on 1st July 2021. That the said Memorandum pertained to the dredging and clearance of the **Naam River** up to **Lake No** in Unity State, aimed at alleviating issues caused by weed and sediment accumulation hindering water flow and leading to significant floods in Unity State, including its oil-producing areas. That given the public nature of such agreements, the Applicant should reasonably have been aware of the same.
20. He further submitted that the Memorandum of Understanding, having been signed on 1st July 2021, the subsequent filing of the Reference

in Court on June 10, 2022, clearly shows the time frame stipulated in Article 30(2) of the Treaty was exceeded, rendering the Reference time-barred.

21. Counsel for the Respondent submitted further that the Applicant's contention that the cause of action arose on 8th June 2022, when the Government of Unity State received the dredging equipment, is untenable, as the existence of the Memorandum of Understanding is a fact that should have been within the Applicant's knowledge and that the receipt of the dredging equipment does not constitute a separate cause of action from the Memorandum of Understanding itself.
22. He drew Court's attention to the case of **Kiir Chol Deng vs the Attorney General of the Republic of South Sudan & the Secretary-General of the East African Community, EACJ Reference No.4 of 2018**, and averred that this Court established that it is not vested with jurisdiction to extend time set by the Treaty and that References filed after the stipulated timeframe must be struck out.
23. He also referred to principles established in previous cases of this Court, such as **the Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011** and **Attorney General of the Republic of Uganda & others vs Omar Awadh & 6 Others, EACJ Appeal No. 2 of 2012**, that the starting point for the computation of time is when the action or decision was first taken or made.
24. Mr Biong further urged the Court to adhere to its jurisprudence on jurisdiction as decided in the case of **Attorney General of the United**

Republic of Tanzania vs African Network for Animal Welfare (ANAW), EACJ Appeal No. 3 of 2011, where the Court observed that:

“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; the fountain 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.”

25. He also asked the Court to confirm the position it took in **the Attorney General of the Republic of Kenya vs Independent Medical Legal Unit** (*Supra*) where the Court held that:

“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 recognize 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.”

26. Counsel, likewise cited this Court’s decision in **Attorney General of Uganda & Another vs Omar Awadh & 6 Others** (*Supra*) where the Court emphasized 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.”**

27. Counsel for the Respondent concluded his submissions urging the Court to declare that it has no jurisdiction to entertain the Reference and the Application as the Reference is time-barred within the meaning of Article 30(2) of the Treaty and dismiss the entire Reference with Costs.

The Applicant's Submissions

28. In reply, the Applicant, while admitting that the limitation period for matters to be brought before this Court is two months from the date the cause of action arose, as per Article 30(2) of the Treaty, stated that the Reference was filed within time as the Respondent's impugned action occurred on 3rd June 2022. He submitted that this action, involving the receipt of Egyptian water dredging machines by the Respondent, became known to them on the same date when the office of the Minister of Culture, Youth and Sports issued a Public Notice announcing the receipt of the equipment.

29. He maintained that on 8th June 2022, the office of the National Ministry of Water issued a Press Statement regarding the arrival of the dredging equipment in Unity State.

30. He submitted that copies of the Public Notice from the Unity State Ministry of Culture, Youth and Sports and the Press Statement from the National Ministry of Water, both of which were attached as Annexes to the Reference, were issued on 3rd June and 8th June 2022, respectively and thus, the Reference, filed on June 10th 2022, was well within the period of 2 months, in conformity with Article 30(2) of the Treaty.

31. Lastly, the Applicant prayed that the Court be pleased to dismiss the preliminary points of law raised by the Respondent, find the Reference merited and grant the orders and declarations sought therein.

F. THE COURT'S DETERMINATION

32. We have carefully considered the rival submissions of the parties. The issue of time limitation, having been raised by the Respondent, it is appropriate to consider and determine whether the aforementioned Reference was submitted in compliance within the stipulated two-months limitation period.

33. This 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.”

34. To elucidate this jurisdictional facet, the Court deems it expedient to delineate the sequential situation precedent to the current dispute.

35. From the pleadings and submissions made, it is not contested that the dredging equipment arrived in Unity State from Egypt in June 2022 as put forward by the Applicant. What Counsel for the Respondent opposes is taking that event as the date of reckoning for the two months period mandated by the Treaty for filing of References. He maintains that the signing of the Memorandum of Understanding between the Governments of Egypt and South Sudan

in relation to the dredging of the Naam River, and not the receipt of the dredging equipment, should be the basis of the Applicant's challenge against the Respondent.

36. The Reference was lodged in Court on 10th June 2022, after the Applicant allegedly learnt, on 3rd June 2022, of the arrival of the dredging equipment.

37. To fortify his position, the Applicant attached to the Reference a copy of the Press Statement from the Ministry of Water and Irrigation in which the arrival of the dredging machines was announced.

38. In the circumstances and for ease of reference, we find it suitable to reproduce the entire Press Statement as the information therein will, in part, form the basis of our findings. The press Statement reads as follows:

“8TH JUNE 2022: Press Statement on the Arrival of Equipment to Unity State, Bentiu:

The Ministry of Water Resources and Irrigation has learned that there is an ongoing public misconception about the recent imported equipment that were received by Unity State Government last week for clearing out weeds and sediments impeding the movement of water in Naam River.

Therefore, it is crucial to give you brief backdrop on bilateral cooperation between South Sudan and Arab Republic of Egypt in the field of water.

The cooperation between two countries dated back to the pre-colonial era where Egypt and Britain, on behalf of the downstream countries signed the 1929 Nile water agreement which was renewed in 1959. This was subsequently followed by Egypt and Sudan forming the Joint Permanent Technical Committee on the River Nile. This allowed Egypt to setup their stations along the River Nile commonly known as "Rei El Masri" - Egyptian Irrigation station which were established in the former three regional capitals of Juba, Wau and Malakal and other former provincial towns. The main aim is to monitor the flow of the River Nile by recording the water levels and discharges of the main Nile and its tributaries.

After the Comprehensive Peace Agreement (CPA) of 2005 followed by the establishment of the Ministry of Water Resources and Irrigation in 2005, in August 2006 both Ministries of Water Resources and Irrigation of South Sudan and Egypt established a cooperation through signing a Memorandum of Understanding (MoU) by the then Ministers of Water Resources and Irrigation (South Sudan and Egypt). The MoU sets out key areas of cooperation namely:

- i. Capacity building of water cadres in Egyptian Institutions;**
- ii. Dredging, and clearance of aquatic weeds in the Bahr el Ghazal Basin and construction of landing sites;**
- iii. Provision of safe drinking water through drilling of**

boreholes and motorized solar systems; and
iv. Carry out feasibility study for Sue Muiti-purpose dam in Western Bahr el Ghazal State.

The work on these aforementioned activities started but were halted by the conflict of 2013 and repeated in 2016 where all the equipment and tools mobilized for dredging and clearance of aquatic weeds were vandalized in Bentiu; however, the construction of two landing sites in Kuajok and Wau were completed and the borehole drilling are ongoing while the Sue feasibility study is being finalized.

During the 1st session of the joint High Level Commission between Egypt and South Sudan led by the HE Dr. James Wani Igga, Vice President and Chair of the Economic Cluster to Egypt in July 2021, the Ministry of Water Resources and Irrigation renewed and signed the MoU with the Egyptian Ministry of Water Resources and Irrigation on dredging of-Bahr el Ghazal river system and construction of four (4) haffirs and urgent resumption of the dredging of the 30kms stretch of Bahr el Ghazal from Unity State capital Bentiu to Lake No which is currently, blocked by aquatic weeds.

The opening up of this stretch of river is to allow smooth navigation of Petroleum products and other economic activities along rivers from the refinery to Juba.

In this regard the Ministry of Water Resources and Irrigation has been following closely with its

counterparts in Egypt and facilitating the process in Sudan to ensure that the equipment and tools for dredging and clearance of aquatic weeds arrives in Bentiu safely.

Therefore, I would like to inform you that (21) trucks loaded with equipment and tools arrived in Bentiu on 1st June 2022 from Egypt via Sudan. However, there is a negative propaganda being circulated on social media and other media outlets by prominent personalities against this initiative and went further by calling for actions to stop the ongoing project.

However, it is worth noting that dredging and clearance of aquatic weeds have been done routinely when, we were under Sudan and also after Independence. Since this river-maintenance exercises have not been taking place for years, sediments have accumulated and aquatic vegetation have overgrown and therefore both needs to be cleared for the health of the river system.

To conclude, I am hereby bringing this to your attention as it may jeopardize the government efforts for ensuring that the rivers are navigable to transport Petroleum products from the refinery to address the local consumption in this current global-fuel crisis. In line with national response to devastating floods, dredging will also help to mitigate flooding in Unity State and other parts of the country whose population has been negatively affected by natural disaster since 2019.

Gittiek Gatkuoth Wichan: Press Secretary, Minister's Office, Ministry of Water Resources and Irrigation, RSS-JUBA.”

39. With the information from the above Press Statement in mind, the Court proceeds to examine the assertions presented by the respective parties.

40. The Applicant contends that the limitation period commenced upon the date the Respondent received the equipment to dredge the Naam River; that is, on 3rd June 2022. In contrast, the Respondent asserts that the limitation period began on 21st July 2021, the date the Memorandum of Understanding was signed. These two varying positions form the crux of the dispute surrounding the issue of time limitation.

41. 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.”

42. From the information in the Press Statement above, it is clear that the importation of the dredging equipment was preceded by

negotiations spanning a number of years, giving rise to the last Memorandum of Understanding signed in July 2021.

43. As indicated in the Press Statement above, the dredging project, which forms the basis of the dispute in the current Reference, was one of the key areas of cooperation between the two States spelt out in the Memorandum of Understanding signed in 2006 and later renewed in July 2021.

44. The Applicant acknowledges the existence and signing of the Memorandum of Understanding referenced by Counsel for the Respondent. Indeed, in the Reference, the Applicant does not reject the Respondent's assertion that the signing of the Memorandum of Understanding forms the crux of the dispute between the parties. In paragraph 20 of the Reference, the Applicant stated:

“IN THE PREMISES THE SUBJECT MATTER OF THE REFERENCE IS: The signing of the River Nile dredging project agreement and the subsequent arrival of the dredging machine set to aid the flow of water along the Naam River in Unity State and Bahr el Ghazal basin has an adverse impact on the livelihoods, biodiversity, climate change and social economic aspects and is a violation of the provisions of the EAC Treaty.” (Empasis added).

45. Further, it is the Applicant's averment, in his attempt to explain the subject matter of the Reference at paragraph 22 of the same document, that:

“The signing of the dredging project by the Respondent and the Egyptian Government without notification, submission and approval by the South Sudan

Legislative Assembly violates the provisions in the Respondent's Constitution and the East African Community Law.” (Emphasis added).

46. From the above quotes, it is clear that the Applicant, at the time the Reference was filed in Court, was of the view that the project, marked by the signing of the agreement, had legal flaws and that should have been the commencement of the computation of time to file the Reference in Court challenging the impugned actions.
47. As rightly argued by Counsel for the Respondent, the question of time limitation was well settled in **Attorney General of the Republic of Uganda & Another vs Omar Awadh and 6 Others** (*supra*) where the Court held that **“the starting date of an act complained of under Article 30 (2) ... is not the day it ends but the day it is first effected.”**
48. In the instant Application, it is noted that the signing of the Memorandum of Understanding in July 2021, which spells out the activities to be undertaken, forms the backbone of the whole project; the arrival of the dredging equipment being a component of the process.
49. Consequently, we agree with Counsel for the Respondent that the decision to dredge the waters of Naam River which the Applicant impugns in the Reference started with the intent of the relevant authorities to implement the project and was expressed in the Memorandum of Understanding signed in July 2021.
50. The impression given by the Applicant when describing the subject matter of the Reference indicates that he is of the same view and as

such, the reasoning that the arrival date of the dredging equipment should be the date of reckoning when computing time to file the Reference cannot be accepted as the Court is not vested with powers to extend timelines set out by the Treaty.

51. As was stated in Attorney General of the Republic of Uganda & Another vs Omar Awadh and 6 Others (*supra*), the Treaty does not grant the Court any authority to extend, condone, waive, or alter the prescribed timeframe for filing References, even in cases of ongoing violations.

52. In view of the foregoing, the Court finds that the Reference underlying this Application is time-barred. We therefore lack jurisdiction *ratione temporis*, to entertain the Reference as well as this Application.

53. Regarding costs, Rule 127(1) of the Rules provides that “**Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order.**”

54. The said Rule places a discretionary mandate upon the Court to either have costs follow the event, as is the general rule, or otherwise depart from that procedural norm. The gravamen of the present dispute was determined on legal technicality, but given the vexatious conduct and procedural irregularities on the part of Counsel for the Respondent during the proceedings, we do exercise our discretion under Rule 127(1) not to grant costs.

G. CONCLUSION

55. In the final result, we hereby dismiss the Application as well as Reference with no order as to costs.

56. It is so ordered.

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

Hon. Justice Dr Charles O. Nyawello
DEPUTY PRINCIPAL JUDGE

Hon. Justice Charles A. Nyachae*
JUDGE

Hon. Justice Richard Muhumuza
JUDGE

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]**