

TANZANIA / JUDGMENT

independent medical unit v ag of republic of kenya and ors reference 3 of 2010 2011 eacj 5 29 june 2011

COURT
EACJDECIDED
29 June 2011

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IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA (Coram: Johnston Busingye, PJ, Stella Arach-Amoko DPJ, John Mkwawa J, Jean-Bosco Butasi J, Benjamin Kubo J,) REFERENCE NO.3 OF 2010 INDEPENDENT MEDICAL UNITCLAIMANT VERSUS

- 1) THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....1ST RESPONDENT
- 2) THE MINISTER FOR INTERNAL SECURITY OF REPUBLIC OF KENYA.....2ND RESPONDENT
- 3) THE CHIEF OF GENERAL STAFF OF REPUBLIC OF KENYA3RD RESPONDENT
- 4) THE COMMISSIONER OF POLICE OF THE REPUBLIC OF KENYA..... 4TH RESPONDENT
- 5) THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY.....5TH RESPONDENT DATE: 29TH JUNE 2011

1 Downloaded from WorldCourts | worldcourts.com RULING OF THE COURT The claimant brought a reference to this Court under Article 30 of the Treaty for the Establishment of the East African Community “the Treaty”. In the reference, the Claimant contends that the failure by the 1st, 2nd, 3rd, and 4th Respondents to take measures to prevent, investigate or punish those responsible for executions, acts of torture, cruelty, inhuman and degrading treatment of over 3,000 Kenyans resident in Mount Elgon District which were carried out by the Respondents jointly and severally between 2006 and 2008, violated several International Human Rights Conventions, the Kenya Constitution as well as the Treaty. The Respondents opposed the Reference and prayed that it be dismissed with costs. This ruling is in respect of preliminary objections raised by Counsel for the Respondents to the Reference when it came for scheduling conference on the 2nd December 2010 on the following points of law:-

- 1) The jurisdiction of the Court.
- 2) Non-compliance with Rule 24 of the EACJ Rules.

- 3) Joinder of the 2nd, 3rd, and 4th Respondents.
- 4) Cause of action against the 5th Respondent.
- 5) Limitation. After carefully considering the submissions made by both sides and perusing the pleadings on record, the following are our findings and conclusions: 2 Downloaded from WorldCourts | worldcourts.com Jurisdiction: It was contended by Counsel for the Respondents that the Court is being asked to exercise jurisdiction and address issues of human rights raised in the Reference, but that the Court has no jurisdiction to do so since the Court's jurisdiction is at the moment restricted to the interpretation and application of the Treaty under Article 27(1). He argued further that Article 27(2) expressly excludes the jurisdiction to deal with human rights issues until the Court is granted extended jurisdiction through a subsequent protocol which has not yet been concluded. Learned Counsel for the Claimant disagreed. Her contention was that the Court has jurisdiction to entertain this Reference. Counsel relied on the provisions of the Vienna Convention on the Law of Treaties that require a Treaty to be read, interpreted and performed in good faith. Counsel further relied on Article 27 of the Treaty and submitted that the reference before Court invokes the Court's jurisdiction to interpret and apply the provisions of the Treaty. That in particular, the reference seeks to invoke the Court's jurisdiction to hear and determine whether the 1st to 4th Respondents have breached the fundamental principles of the Treaty including:
 - (a) The rule of law under Articles 6 and 7(2).
 - (b) Promotion and protection of human rights in accordance with the African Charter on Human and People's Rights under Article 7(2).
 - (c) Good governance under Article 6 and 7(2) and 3 Downloaded from WorldCourts | worldcourts.com
 - (d) Maintenance of universally accepted standards of Human Rights under Article 7(2). Counsel also cited Ref. No.1 of 2007 – James Katabazi and 21 Others vs The Secretary General of the EAC and Another, where this Court held that although it does not have jurisdiction to deal with human rights issues yet, it has jurisdiction to interpret the Treaty even if the matters complained of include Human Rights violations. We agree with Counsel for the Claimant. The allegations set out in the reference are that the 1st to 4th Respondents jointly and severally carried out executions, torture, cruel, inhuman and degrading treatment of over 3,000 Kenyans resident in Mt. Elgon District, between 2006 and 2008 and that the Republic of Kenya took no measures to prevent, investigate or punish the perpetrators of those actions. It is alleged that this contravened several International Human Rights Conventions such as the Universal Declaration of Human Rights, International Law as well as the Kenyan constitution and laws and the Treaty particularly in paragraphs 64, 65, 66, 67, 70, 71, and 72 where the Claimant makes reference to Articles 4, 5(1) (3), and 6(d) of the Treaty. Article 6 (d) reads: "The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: 4 Downloaded from WorldCourts | worldcourts.com

- (a)
- (b)
- (c)
- (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection and protection of human and people's rights." In the Katabazi case, this Court was confronted with a similar objection. After considering the objectives of the Community as set out in Article 5(1), the fundamental principles of the Community particularly in Article 6(d), the operational principles in Article 7, as well as Article 8(1) where Partner States undertake, among other things to: "Abstain from any measures that are likely to jeopardize the achievement of those objectives or implementing of the provisions of this Treaty", Court held that: "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations." 5 Downloaded from WorldCourts | worldcourts.com Similarly, in this Reference, Court shall not abdicate its duty to interpret the Treaty merely because Human Rights violations are mentioned in the Reference. In the result, we hold that this Court has jurisdiction to entertain the Reference. 2 Non-compliance with Rule 24 of the EACJ Rules: This Rule provides that: "24....
- (4) Where the reference is made by a body corporate the application shall be accompanied by documentary evidence of its existence in law." The Claimant is described in the Reference as a Non-Governmental Organisation established in Kenya and registered under the Non-Governmental Organisations and Coordination Act of 1999. Initially the Certificate of Registration was not attached to the Reference. This anomaly was later on rectified after an application by the Claimant's Counsel and the Registration Certificate was filed in Court. Consequently it is no longer an issue. 3 Joinder of the 2nd, 3rd, and 4th Respondents It was contended by Counsel for the 2nd, 3rd and 4th Respondents that they were wrongly joined to the Reference since they are neither Partner States nor 6 Downloaded from WorldCourts | worldcourts.com Institutions of the Community and therefore do not fall under the ambit of Article 30 of the Treaty. That they are officers employed by the Republic of Kenya. That the maintenance of law and order is the sole responsibility of the Republic of Kenya, hence the correct party should be the Attorney General of the Republic of Kenya. Counsel for the Respondents relied on the ruling of this Court in Ref. No. 1 of 2006, Prof. Anyang Nyongo and Others vs the Attorney General of the Republic of Kenya and Ref. No.1 of 2008, Modern Holdings East Africa Ltd vs Kenya Ports Authority in support of their contention. The Claimant's Counsel made a brief response in which she contended essentially that this objection was misconceived and should be dismissed. We have carefully perused the pleadings and the authorities cited. We entirely agree with Counsel for the 2nd, 3rd, and 4th Respondents that they are merely officers employed in the Republic of Kenya. The correct party is the Attorney General. In the Anyang Nyongo case (supra), the 2nd, 5th and 6th

respondents were sued as Clerk to the National Assembly of the Republic of Kenya, the Vice-President of the Republic of Kenya and the Leader of Government Business and Chairman of NARC – Kenya, a Political party, respectively. It was argued very strenuously by Counsel for the applicants that since a natural person has the capacity to sue in this Court, a natural person must have the capacity to be sued in the same Court 7 Downloaded from WorldCourts | worldcourts.com as well. That Article 30 should be interpreted to bring persons who commit misfeasance and who infringe the provisions of the Treaty, within the ambit of Article 30, to account for their actions. This is what the Court said:- “With due respect to Counsel for the Applicants, it appears to us that enjoining the 2nd, 5th and 6th Respondents to the reference was under a misconception. A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner States or of institutions of the Community. The alleged collusion and connivance, if any, is not actionable under Article 30.” The preliminary objection was upheld and the said Respondents were struck off the reference with costs. In the case of Modern Holdings (supra), Court once again upheld an objection where the Respondent was not an institution or a Partner State of the Community. Similarly in this case, we are satisfied that the 2nd, 3rd and 4th Respondents were wrongly joined to the Reference and we order that they be struck off with costs. 4 Cause of Action Against the 5th Respondent 8 Downloaded from WorldCourts | worldcourts.com It was contended by Counsel for the 5th Respondent that the pleadings do not disclose any cause of action in the Reference against his client. On the other hand, Learned Counsel for the Claimant insisted that there is a cause of action against the 5th Respondent. With due respect to learned Counsel for the Claimant, we have perused the pleadings and we find that they do not disclose any cause of action against the 5th Respondent in that there are no allegations or complaints against the 5th Respondent. There are also no remedies sought against him. We accordingly find merit in this objection and order that the 5th Respondent be struck off the reference with costs. 5 Limitation: It was contended on behalf of the Respondents that the pleadings show that the complainant was aware of the complaint way back in 2008 and that, therefore, the Reference is barred by limitation in that it was filed outside the 2 months limitation period stipulated under Article 30(2) of the Treaty. Counsel for the Claimant submitted that the Reference is not time barred in that, the matters complained of are criminal in nature and concern the Rule of Law, good governance and justice which do not have any statutory limits. The case of Stanley Githunguri - vs - Republic (1986) KLR 1 and Republic - vs - Gray Ex- parte Graham (1982) 3 All ER 653 were cited in support of this submission. 9 Downloaded from WorldCourts | worldcourts.com Article 30 (2) provides that proceedings: ““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;” (Underlining is added for emphasis). Upon careful consideration of this point of objection, it is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide

any remedy for the alleged violations. We find that such action or omission of a Partner State cannot be limited by mathematical computation of time. We accordingly overrule this objection. In conclusion, we rule that:

- 1) This Court has jurisdiction to handle this matter.
- 2) Rule 24 was complied with.
- 3) The 2nd, 3rd and 4th Respondents were wrongly joined.
- 4) There is no cause of action against the 5th Respondent.
- 5) The 2nd, 3rd, 4th and 5th Respondents be struck off the reference with costs.
- 6) The Reference is not time barred. 10 Downloaded from WorldCourts | worldcourts.com
Dated this dayofJune 2011 Johnston Busingye Principal Judge Mary Stella Arach-Amoko Deputy Principal Judge John Mkwawa Judge Jean- Bosco Butasi Judge Benjamin Kubo Judge 11 Downloaded from WorldCourts | worldcourts.com

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