

UGANDA / JUDGMENT

**Eastern African Sub-Regional Support Initiative
for Advancement of Women (EASSI) and Others
v Attorney General of The Republic Uganda and
Another (Reference No. 13 of 2019) [2023] EACJ
17 (15 November 2023) (First Instance Division)
[2023] EACJ 17**

COURT

East African Court of Justice

BEFORE

Gacuko J, Masara PJ, Muhumuza J, Nyachae J,
Nyawello DPJ

CASE / FILE NUMBER

Reference No. 13 of 2019

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

(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles A. Nwachae, Richard
Muhumuza, & Léonard Gacuko, JJ)**REFERENCE NO. 13 OF 2019**

- 1. EASTERN AFRICAN SUB-REGIONAL SUPPORT INITIATIVE FOR ADVANCEMENT OF
WOMEN (EASSI)..... 1ST APPLICANT
- 2. SOUTHERN AND EASTERN AFRICAN TRADE INFORMATION AND NEGOTIATIONS
INSTITUTE (SEATINI) 2ND APPLICANT
- 3. CENTRE FOR FOOD AND ADEQUATE LIVING RIGHTS (CEFROHT)
LTD

VERSUS

- THE ATTORNEY GENERAL OF THE REPUBLIC UGANDA
- 2. THE ATTORNEY GENERAL OF THE REPUBLIC OF RWANDA

15th NOVEMBER 2023

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JUDGEMENT OF THE COURT

A. INTRODUCTION

- 1. On 21 st June 2019, the Applicants, Eastern African Sub-Regional Support Initiative for Advancement of Women (EASSI), Southern and Eastern African Trade Information and Negotiations Institute (SEATINI) and Centre for Food and Adequate Living Rights (CEROTH) Ltd (hereinafter referred to as "the 1st Applicant", "the 2nd Applicant" and "the 3rd Applicant", respectively), brought this Reference against the Attorney General of the Republic of Uganda ("the 1st Respondent") and the Attorney General of the Republic of Rwanda ("the 2nd Respondent").
- 2. The Reference was preferred under Articles 5, 6(b) and (d), 7, 8(1)(c), 30(1), 38(2), 104(3)(c), 105(1)(b), 110(d), 121 and 122(c) of the Treaty for the Establishment of the East African Community ("the Treaty"); Articles 5, 7(2)(b), 7(6), 16(1) and (2), 7(7), 23, 29, 45(1)(b), 45(2)(b) and 45(3)(n) of the Protocol on the Establishment of East African Common Market ("the Protocol") and Rules 1 (2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as "the Rules").
- 3. The 1st Applicant is a non-governmental organisation duly registered in Uganda, whose address of service for the purpose of this Reference is: Clo Plot 3565, Kulambiro - Ring Road Kisaasi, Opp. Ntinda View College, Kampala.
- 4. The 2nd Applicant is a non-governmental organisation duly registered in Uganda, whose address of service for the purpose of this Reference is: Clo Plot 806, Block 213, Bukoto - Kisaasi, Kampala.
- 5. The 3rd Applicant is a non-governmental organisation duly registered in Uganda, whose address of service for the purposes of this Reference is: Clo Plot 66-67 Kiriwawanvu Lane, GACCETA Estate, Gayaza-Kalagi Road, Wakiso, P. O. Box 16414 Wandegaya.
- 6. The 1st Respondent is the Attorney General of the Republic of Uganda, sued on behalf of the Government of the Republic of Uganda in the capacity of the principal legal advisor of the Government. His address of service for the purposes of this Reference is: Plot 1, Parliament Avenue, Queens Chambers, P. O. Box 7183, Kampala.

- 7. The 2nd Respondent is the Attorney General of the Republic of Rwanda, sued on behalf of the Government of the Republic of Rwanda in the capacity of the principal legal advisor of the Government. His address of service for purposes of this Reference is: the Ministry of Justice, Kimihurura Sector, Gasabo District, P. O. Box 160 Kigali.
- 8. Pursuant to a prayer made by Counsel for the Applicants; the Applicants filed an Amended Statement of Reference on 2nd June 2022.

B. REPRESENTATION

- 9. The Applicants were, at the hearing, represented by Mr David Kabanda, learned Advocate.

- 10. The 1st Respondent was represented by Mr Richard Ad role, learned Principal State Attorney, Ms Goretti Arinaitwe, learned Senior State Attorney and Mr Franklin Kwizera, learned State Attorney, all from the Office of the Attorney General of the Republic of Uganda.
- 11. The 2nd Respondent was represented by Mr Emile Ntwali and Mr Nicholas Ntarugera, learned Principal State Attorney and Senior State Attorney, respectively, from the office of the Attorney General of the Republic of Rwanda.

C. THE APPLICANTS' CASE

- 12. The Applicants' case is contained in the Statement of Reference filed in Court on 21 st June 2019, in the Affidavits in support of the Reference deposed by Sheila Kawamala Mishambi, for the 1st Applicant, Jane Nalunga, for the 2nd Applicant, and Nyapendi Janet Magadaline, for the 3rd Applicant. The case is also provided for in the Amended Statement of Reference and the Supplementary Affidavit in support of the Reference attested by Jane Nalunga, for the 2nd Applicant. The original affidavits by Sheila Kawamala Mishambi and Jane Nalunga were, pursuant to the prayer of the Applicants' Counsel, expunged from the record.
- 13. It is the Applicants' case that the Respondents' act of closing border posts between Uganda and Rwanda violated Articles 121 and 122(c) of the Treaty in that:
 - a) **It denies citizens their rights to participate in the various economic activities, specifically agricultural commodities, hence violating Articles 104(c), 105(1) and 105(2)(b) of the**

Treaty and Articles 7(7), 2(4), 5(2)(b) & (e), 5(3)(g) and 16(1) & (2) of the Protocol;

- b) The arbitrary closure of border posts violates the obligation accorded unto member states towards women under Article 121 and 122(c) of the Treaty; and

- c) That women no longer carry out trade related activities for a living that puts their livelihood at stake.
- 14. The Applicants therefore pray for the following:
- a) A declaration that the act of closing the border posts and denying accessibility of traders and citizens from either State violates the provisions of Articles 104(c), 105(1), 105(2)(b) and 122(c) of the Treaty and Articles 23, 29, 45(1)(b) and 45(2)(b) & 45(3)(n) of the Protocol;
- b) A declaration that the act of denying women the right of engaging in trade is a violation of their economic rights according to Articles 121 and 122(c) of the Treaty;
- c) A declaration that the border posts be completely opened with immediate effect without any limitations whatsoever; and
- d) Any other relief that the Court deems appropriate.

D. THE 1st RESPONDENT'S CASE

15. The 1st Respondent's case is contained in the Response to the Statement of Reference dated 2nd August 2019; in the Affidavit in support of the Response to the Reference deposed by Anne Mary

Nyakato and in the Additional Affidavit of Ambassador Julius Joshua Kivuna.

- 16. It is the 1st Respondent's case that the allegations that they breached the Treaty and the Protocol, or that they violated women's economic rights are untrue.
- 17. That, at no point in time did they close their Katuna border with the 2nd Respondent as contended by the Applicants. That it is the 2nd Respondent who did, on 28th February 2019, decide to close the said border on the allegations that the 1st Respondent was harassing its citizens and hosting elements hostile to its government; which allegations were untrue.
- 18. It is further their case that it has never restricted movement of its people and goods from its territory into the 2nd Respondent's territory. That movement of its people into the 2nd Respondent's territory has continued normally and that it has never restricted its people and the Applicants from conducting cross border business as it is an ardent advocate of regional integration and building close trade connectivity amongst the Partner States.

E. THE 2No RESPONDENT'S CASE

19. The 2nd Respondent's case is contained in their Amended Response to the Statement of Reference dated 30th July 2019; in the Affidavit in support of the Amended Response to the Statement of Reference deposed by Ingabire Mackline and in the Additional Affidavit of Murenzi Jean Bosco.
- 20. Like the 1st Respondent, the 2nd Respondent denies the Applicants' allegations that they breached the Treaty or that they violated women's economic rights.

- 21. The 2nd Respondent contends that it never closed its Gatuna border with the 1st Respondent as alleged by the Applicants and the 1st Respondent. That the 1st Respondent, including its Revenue Authority and the Ministry of Foreign Affairs were aware of the Gatuna One Stop border post construction project which led to the diversion of heavy trucks to other border posts between the 2nd Respondent and the 1st Respondent.
- 22. Further, that due to the construction work ongoing at that time at the Gatuna border post, the Commissioner General of the Rwanda Revenue Authority issued a public announcement No. 389/RRA/CG/TPS/19 to the general public that from 28th February 2019 all heavy trucks were to be temporarily diverted from Gatuna Border Post to Kagitumba/Mirama Hill.
- 23. Moreover, that the 2nd Respondent has never restricted movement of its people and goods from its territory into the 1st Respondent's territory. That movement of its people into the 1st Respondent's territory has continued normally.

F. ISSUES

- 24. At the Scheduling Conference held in Arusha on 2nd June 2022, the following issues were agreed:
 - 1. Whether the Reference is time barred;
 - 2. Whether the border was closed by the Respondents;
 - 3. Whether the alleged action of closing the border posts and denying the accessibility of traders and citizens from either State infringes the Treaty for the Establishment of the East African Community and violated the provisions of Articles 104(c), 105(1), 105(2)(b), 122(c) of the Treaty and 23, 29, 45(1)(b), 45(2)(b) and 45(3)(n) of the Protocol on the Establishment of the East African Common Market;
 - 4. Whether the alleged acts of border closure denied women the right of engaging in trade and infringes Articles 121 and 122(c) of the Treaty for the Establishment of the East African Community; and
 - 5. Whether the parties are entitled to the remedies sought.

G. COURT'S DETERMINATION OF THE ISSUES

- 25. In determining this Reference, we deem it appropriate to address Issue 1 as a preliminary issue. We will then turn to the other issues, if the Respondents' contention on it fails.

Issue 1: Whether the Reference is time barred

26. On 25th May 2022, the 1st Respondent issued a Notice under Article 39(1) and (2) urging the Court to dismiss the Reference as it was, according to them, time barred. This assertion was echoed by both Respondents during the Scheduling Conference. The Court and the parties agreed that it should form part of the issues for determination by this Court.
- 27. Submitting on this issue, Counsel for the 1st Respondent contended that the Reference by the Applicants having been filed in Court on 21 st June 2019 is time barred contrary to the dictates of Article 30(2) of the Treaty. In his view, going with the evidence supplied by the Applicants, through the Affidavits of Sheila Kawamala Mishambi, Jane Nalunga and Nyapendi Janet Magadaline, the alleged border closure took place on 28th February 2019; thus, the two-month time started reckoning on that day and expired on 30th of April 2019. Consequently, Counsel averred, when the Reference was filed on 21 st June 2019, it was late by 52 days.
 - 28. Regarding the Supplementary Affidavit in support of the Reference deponed by Jane Nalunga purporting to show that she got to know of the closure of the border in May 2019, the 1st Respondent's Counsel urged the Court to strike it off from the record as it was manifestly illegal by materially departing from her previous Affidavit that they had relied on in preparing their Response, which is contrary to Rule 38(1) of the Rules. That paragraph 4 of the Supplementary Affidavit completely changes the position earlier deponed, so it should be expunged pursuant to Rule 47(1) of the Rules as it is a ploy to defeat the Respondents' valid defence of limitation.
 - 29. Counsel for the 2nd Respondent, to a large extent, replicated what Counsel for the 1st Respondent submitted. In his view, also relying on the Affidavit of Ingabire Mackline, the alleged closure of the border (diversion) was communicated to both the general public and the Government of the P1 Respondent on 28th February 2019. In their view, the Reference was filed 54 days beyond the time sanctioned by the Treaty.
 - 30. Regarding the contention provided for by Jane Nalunga and Nyapendi Janet Magadaline that they got to know of the closure around May, it was their submission that the Applicants have not provided any evidence to support their contention relating to the time they got to know of the alleged closure. Counsel also pointed to the contradictory statements made by Jane Nalunga about when and how she got to know of the closure; that is, whether it was in the month of March, as stated in the first Affidavit deponed at the time of filing the Reference, or at around May, as stated in the Supplementary Affidavit in support of the Statement of Reference filed with the Amended Statement of Reference.
 - 31. On his part, Counsel for the Applicants, in his submissions in chief and in the rejoinder, maintained that the information about the closure of the border between the Respondents came to the knowledge of the Applicants in May 2019. Counsel relied on the Affidavit in support of the Reference by Ms Nyapendi Janet Magadaline and the Supplementary Affidavit

in support of the Reference by Ms Jane Nalunga. According to him, it was not in order for the Respondents to rely on the expunged Affidavits previously deposed by Ms Jane Nalunga and Sheila Kawamala Mishambi.

- 32. Regarding Annexure B to the Affidavit of Ms Nyapendi Janet Magadaline, it was Counsel's view that the Annex was merely a reference to the confirmation of the closure of the border as the

complainants had mentioned to Ms Nyapendi, who thereafter went to confirm physically.

DETERMINATION OF ISSUE 1

- 33. We have dispassionately considered the pleadings, the affidavits and documents from either side and the submission by Counsel for the parties. It is our view that the Respondents' contention about the legality of the Reference requires determination by this Court.
- 34. Two facts remain uncontested; first, that the decision or act of closing the border between the Republics of Uganda and Rwanda was made on 28th February 2019 and, second, that the Applicants filed this Reference in Court on 21 st June 2019, which was beyond the twomonth period provided for under Article 30(2) of the Treaty.
- 35. For the avoidance of doubt, Article 30(2) of the Treaty reads as follows:

"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." (Emphasis added).

- 36. The Court has in numerous instances held that the time limitation provided for under Article 30(2) cannot be extended. An Applicant has to knock the doors of the Court within the two-months period of the occurrence of the impugned act or decision. In the alternative, a party has to satisfy the Court that he only became aware of the impugned act, decision or action of the Treaty infringement on a date other than

the date of occurrence of the alleged infringement. If a party institutes a reference or claim beyond the time prescribed, the Court is deprived of jurisdiction and cannot purport to extend it.

- 37. In **Audace Ngendakumana vs the Attorney General of Burundi**, EACJ Reference No. 11 of 2014, the Court stated that "Article 30(2) of the Treaty demands strict application of the time limit stated therein." In **The Attorney General of Uganda vs Omar Awadh & 6 Others**, EACJ Appeal No. 2 of 2012, the Appellate Division of this Court stated, inter alia, 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. Therefore, the 2-month period limitation period under Article 30(2) started to run from the day that the arrest and detention were affected;

There is nothing in the express language of Article 30(2) that compels any conclusion that continuing violations are to be exempted from the two-month limit. Nor does the nature of the particular violation alleged in the instant case demonstrate any intent on the part of the drafters of the Treaty to treat unlawful arrest and rendition as continuous violations for purposes of the time limit of Article 30(2)."

38. The same position is manifested in the case of **Attorney General of Kenya vs The Independent Medical Legal Unit**, EACJ Appeal No. 1 of 2011, 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). MoreoverJ that Article does not recognize any continuing breach or violation of the Treaty outside the two months; nor is there any power to extend the time limit."

39. There have been innuendos that the time provided for under Article 30(2) is short and prohibitive of parties with genuine claims of the Treaty violation. However, in **Attorney General of the Republic of Kenya vs Independent Medical Legal Unit** (supra), the Appellate Division of this Court held that:

"Again, no such intention can be ascertained from the ordinary and plain meaning of the said Article (30(2)) or any other provision of the Treaty. The reason for this short time limit is critical. It is to ensure legal certainty among the diverse membership of the Community." (Emphasis added)

- 40. Turning to the case at hand, we understand the Applicants to be shielding in the last part of Article 30(2); that they only got to know of the Treaty violation about 3 months after the alleged closure of the border. This is exhibited in the Affidavit in support of the Reference by Nyapendi Janet Magadoline, dated 20th June 2019, and the Supplementary Affidavit in support of the Reference by Jane Nalunga, dated 21 st June 2022.
- 41. This position is contested by the Respondents on the grounds that; first, the deponents of the said Affidavits cannot be trusted on their contention that they only got to know of the alleged closure of the borders in May 2019 and, second, one of the deponents, Jane
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Nalunga, had previously deponed an Affidavit affirming that she was aware of the alleged closure in March 2019. That Affidavit was, however, expunged by this Court following a prayer made by the Applicants at the time they applied for amendment of the Statement of Reference.

- 42. Counsel for the 1st Applicant urged the Court to expunge or disregard paragraph 4 of the Supplementary Affidavit as it deviated from the extent of amendments sanctioned by the Court. Counsel added that the said Affidavit effectively changed the Applicants case and consequently the Response filed by the Respondents.

- 43. We agree with Counsel for the Respondents that the position taken by Ms Jane Nalunga in the Supplementary Affidavit varies with her expunged affidavit. The question is whether the Court is entitled to examine the contents of the previous Affidavit which was expunged by the Court. To answer this question, it is necessary that we revisit the prayer and reasons fronted by the Applicants before the Supplementary Affidavit was lodged in Court.
- 44. After Counsel for the 1st Respondent raised concern on the prayer made by Counsel for the Applicants regarding whether the withdrawal of part of the Applicants pleadings was to affect the Responses made, Mr Kabanda, for the Applicants stated as follows:

"My Lord, we give Counsel assurance that the affidavit that we intend to file will not in any way affect the responses that they have already filed and again my Lord, we know that their

Response is about the Reference, which we do not intend to amend or expunge from the pleadings ... "

- 45. Regarding the reasons for the withdrawal of the affidavits, Counsel Kabanda had the following to say:

"The first my Lord, is based on the fact that one of the people who had made those affidavits are no longer in those positions. So, they will not be part of the proceedings and two, my Lord, we intend to introduce again new evidence that has come up with these proceedings, of course with guidance of the Court."

- 46. It was not apparent to the Court the basis of the prayer to have the affidavits expunged in lieu of filing a supplementary affidavit to cure what was alleged to be missing. Counsel insisted and the Court obliged and expunged the two affidavits; namely, Affidavits in Support of the Reference deponed by Sheila Kawamala Mishambi and Jane Nalunga. When the Supplementary Affidavit was filed on 21 st June 2022, it became apparent to Court, we believe also to the Counsel for the Respondents, that one of the deponents of the expunged Affidavits was the deponent of the Supplementary Affidavit. In addition, she had implicitly amended or vacated her previous position.
- 47. It is the view of this Court that the prayer to expunge the Affidavit of Jane Nalunga and later substitute the same with the Supplementary Affidavit deponed by the same person was not done in good faith. It aimed at defeating the defence of limitation raised by the Respondents pursuant to the Pleadings and affidavits filed by the Applicants. In that case, it would be an abrogation of its duty, were this Court to shut its

eyes to the glaring differences in the two Affidavits constituting the cause of action for the Reference.

- 48. In her Affidavit filed alongside the Statement of Reference, Ms Nalunga had deponed in Paragraphs 4, 5 and 6 as follows:

"4. THAT I KNOW, that on 27th day of February, 2019, the 1nd and 2rd (sic) respondents closed border points. That the closure of border posts led to the denial of movement of traders from either of the two countries. (See Annexure E)

5. **THAT the 2nd applicant received complaints from communities in Katuna and Cyanika in Kabale and Kisoro district respectively about the untold suffering due to the respondents' border closure, specifically women.**
6. **THAT I in the month of March travelled to Katuna border and could not enter the second respondents state due to the border closure and was denied entry by the officers guarding the border post." (Emphasis added)**
49. In the Supplementary Affidavit, however, the same deponent came up with a different version of what transpired before coming to Court. The above 3 paragraphs were replaced by Paragraphs 4, 6 and 7. Of relevance here, however, is paragraphs 4 and 7, stating as follows:

"4. THAT I got to know about the border closure and it's (sic) effects on women's trade sometime around May 2019 as border closure denied movement of traders from either of the two countries.

7. **THAT about the same time I travelled to Katuna border and could not enter the 2nd respondent's state due to the border closure and was denied entry by the officers guarding the border posts." (Emphasis added)**
- 50. We, thus, are in agreement that the Supplementary Affidavit introduced a new cause of action, and new matters, to the Reference, contrary to the assurance given by Counsel at the time the amendments were sought and granted.
- 51. Regarding the Affidavit of Sheila Kawamala Mishambi, we also agree with Counsel for the Respondents that she was not certain on when she got to know of the border closure. In Paragraphs 3 and 4 of her affidavits she deposed as follows:

"3. THAT we received complaints from women in Katuna that the 1st and 2nd respondents' border was closed and nobody was allowed by the 1st and 2nd respondent's authorities to cross from either side of the two partner states. (see attachment when the border is closed marked annexure B)

4. **THAT I also went to the border in Katuna, in May and indeed I could not be allowed by the respondents' officers to cross from Uganda to Rwanda." (Emphasis Added)**
52. Ms Mishambi does not state when she was informed of the border closure. She only refers to the time she went to the border. We believe that the cause of action cannot be when one decides to go and confirm an impugned act, but when she becomes aware of it.

- ## H. CONCLUSION

58. It is so ordered.

Hon. Justice Yohane B. Masara

■■■■■ I ■■■■ IIII ■■■■ I Hon.
Justice Dr Charles O. Nyawello DEPUTY PRINCIPAL JUDGE

Hon. Justice Richard Muhumuza JUDGE

-----~ ----- Hon. Justice Dr Leonard Gacuko **JUDGE**

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