



**'EAC'S Ten Years of Progress; the Media as Partners in Promoting Deeper Integration'**

## **THE ROLE OF THE EAST AFRICAN COURT OF JUSTICE IN THE INTEGRATION PROCESS**

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## **1. Introduction**

First and foremost, let me start by thanking the organizers of this EAC Media Summit to have given me the opportunity to make this presentation on the Role of the East African Court of Justice in the integration process.

In order to be able to follow the discussion in this paper I found it necessary to start with a brief overview of the East African Court of Justice. Thereafter I will proceed straight away, in the interest of time, to make an assessment of the performance of the Court towards the achievement of the objectives of integration in the East African Community. While appreciating the important role played by the Court in advancing the integration agenda within the EAC, I this paper will also attempt to identify some of the major challenges facing the Court.

## **2. An overview of the East African Court of Justice**

The East African Court of Justice (The Court) like other organs of the Community is the creature of the Treaty for the Establishment of the East African Community (The Treaty).<sup>1</sup> The Court was inaugurated on 30 November 2001 after the appointment of the first Judges by the Summit of Heads of State. Indeed we can ably assess the Court's role and performance in the integration process after we have gone through its structure, mode of operation and mandate.

### **2.1 Structure of the Court**

Following the Treaty amendment, the Court is presently constituted of two Divisions: First Instance Division and Appellate Division. The First Instance

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<sup>1</sup> Article 9 of the Treaty.

division is at any given time composed of not more than ten (10) Judges whereas the Appellate Division is comprised of 5 Judges.<sup>2</sup>

The Treaty before it was amended provided for a maximum of 6 Judges, two from each of the-then three partner states, appointed by the Summit from sitting judges of any national court of judicature or from jurists of recognized competence. However, on 30<sup>th</sup> November 2006, against a background of great ire in Kenya at a ruling of the Court<sup>3</sup>, the Summit approved the division of the Court into two Chambers, to wit the First Instance Division and Appellate Division.

Article 27 gives the Court initial jurisdiction over interpretation and application of the Treaty. Its remit until extended [Art. 27 (2)] is primarily related to enforcement of the Treaty, and its role can be summed up as ensuring the adherence to law in the interpretation and application of and compliance with the Treaty.

## **2.2 Access to the Court**

Who may use it?

- Partner States: for Partner State's or Community organ's breach or failure to fulfill Treaty obligation, or decision on legality of any Act, regulation, directive, decision or action as *ultra vires* the Treaty <sup>4</sup>
- Secretary General (following political decision): for Partner State failure to fulfil obligation or breach of Treaty<sup>5</sup>,
- National court: referral of question of Treaty interpretation or determination of legality of a Community law or action<sup>6</sup> ,

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<sup>2</sup> Article 24 (2) Ibid. For the time being both divisions are composed of five judges each.

<sup>3</sup> See *Prof Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of Kenya & 5 Others*, Reference No. 1 of 2006, when the court issued an injunction against the Kenyan members of assembly to EALA from being sworn in pending determination of the reference that was challenging the process that lead to their being deemed 'elected.'

<sup>4</sup>See Article 28 Ibid.

<sup>5</sup> See Article 29 Ibid.

<sup>6</sup> See Article 34 Ibid.

- Legal/ natural persons residents of East Africa: on legality of any Partner State/Community Act, regulation, directive, decision or action as *ultra vires* the Treaty<sup>7</sup>

The Court is headed by a President assisted by a Vice-President, both appointed by the Summit of Heads of State amongst the elected Judges. The President of the Court is also the Head of the Appellate Division. The First Instance Division is functionally headed by a Principal Judge, assisted by a Deputy-Principal Judge, both also appointed by the Summit of Heads of State.

### **2.3 Mode of operation and tenure**

The Judges of the EACJ work on *ad hoc* basis and have a seven-year non renewable tenure. To ensure continuity of the Court's business the first bench of Judges serve a staggered tenure whereby each one third of the Judges will serve five years, six years and full term of seven years respectively.

### **2.4 Mandate/Jurisdiction of the Court**

In the first four years the Court stayed without handling any case, a sad state of affairs attributed by many in legal fraternity to the limitation on its jurisdiction to Treaty interpretation only.

Indeed the Court has jurisdiction over the interpretation and application of the Treaty provided that the Court's jurisdiction to interpret does not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.<sup>8</sup> It has also jurisdiction over disputes between the Community and its employees.<sup>9</sup>

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<sup>7</sup> See Article 30 Ibid.

<sup>8</sup> See Article 27 Ibid.

<sup>9</sup> See Article 31 Ibid.

It can as well hear requests for advisory opinions submitted by the Summit, the Council or a Partner State<sup>10</sup> and can hear and determine any matter:

- (a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or
- (b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
- (c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.”<sup>11</sup>

The Treaty provides also possibility for the Court to be given “such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date.” To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.<sup>12</sup> Negotiations to operationalise the extended jurisdiction of the Court to include human rights and appeals from national courts are on going.

### **3. Assessment of current performance of the Court towards the achievement of the regional integration**

While the legislative and executive organs are working towards the creation of enabling environment for the political integration to be a reality by enacting community laws and adopting policies of the implementation of these laws, the judicial organ is playing the crucial role of interpreting the Treaty and other Community laws and in ensuring respect for the founding principles of the

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<sup>10</sup>Article 36 Ibid.

<sup>11</sup> Article 32 Ibid.

<sup>12</sup> Article 27 (2) Ibid. For the time being, the Protocol on the extended jurisdiction of the Court is still under discussion.

Community. Besides, the Court is making efforts to improve working relations with Partner States.

### **3.1 Interpretation role**

In interpreting laws, courts definitely play an important role complementing that of legislators in as far as they give clear and detailed explanations of the content of laws. In a context of a regional organization aimed at full integration of partner states as is the case with the EAC, the judicial interpretation of the Community laws assists the policy makers to have a common understanding of these laws in order to take informed decisions consistent with their spirit during the implementation stage.

The East African Court of Justice has been actively playing this role as transpires from its jurisprudence. In this case, I wish to simply refer you to the cases that the Court has so far played its interpretation role. Such cases include: *Callist Andrew Mwatella & 2 others vs. EAC. Reference No. 1 of 2005*; *Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community. Reference No. 2 of 2007*; and *Prof Peter Anyang' Nyong'o & others vs. AG of Kenya & 5 Others, Reference No. 1 of 2006* among others.

### **3.2 Respect for founding principles of the Community**

As mentioned earlier, the EAC has adopted fundamental and operational principles that govern the achievement of the objectives of the Community. The Court is playing the role of ensuring that these principles are followed by the different stakeholders of the Community.

#### **a) Peaceful settlement of disputes;**

The functionalist approach to integration departs from the assumption that violence and power become obsolete as a means by which to achieve ends and

aspirations.<sup>13</sup> It claims that group conflict is not inherent in humans once they realize that everyone shares common social goals and values.<sup>14</sup>

The establishment of courts of justice within regional groupings follows from this approach to integration and therefore always responds to the need for a mechanism of peaceful settlement of disputes when they occur.

Arguably, in this regard the jurisdiction conferred upon the Court is wide enough to enable the peoples of East Africa to access the justice mechanism put in place by the EAC Treaty. It was mentioned earlier that the Court's jurisdiction includes, advisory and arbitral jurisdiction and any such jurisdiction that may be conferred upon it any time by the Council of Ministers.

However, the wideness of the Court's jurisdiction and access to it as provided for under the Treaty are not enough to make the Court the forum through which disputes within the region are settled. The Court needs to build users' confidence in its justice through fair and impartial decisions. It has included in its rules of procedure a requirement for the parties to explore first the possibility for reaching settlement out of court before the matter can be fixed for hearing. This is normally done during scheduling conference.<sup>15</sup>

The Court has so far proved to be an independent and impartial body. Indeed, some of the Court's decisions have not been well received by the very top leadership of the Community. In their joint Communiqué of the 8<sup>th</sup> Summit, being a reaction to the Court's order in *Anyang' Nyong'o case* the EAC Heads of State directed

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<sup>13</sup> J. L. Kent "Effectiveness of the European Court of Justice and its role in the Process of Integration", paper presented at the Second International Conference on "The Challenges of a New European Architecture: Implications for the European Community's Internal and External Agendas", 22-24 May 1991, George Mason University, Fairfax, Virginia, pp 6-7.

<sup>14</sup> As above.

<sup>15</sup> See Rule 53 of the EACJ Rules of Procedure.

“ that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty.”<sup>16</sup>

and that

“a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard.”<sup>17</sup>

It appears from these two interventions by the Summit that the security of tenure for EACJ Judges was seriously put at risk. However, this reaction did not deter the Judges from acting impartially and independently as it transpired in the subsequent decisions of the Court. Arguably this makes the Court an exemplary model of the Court that stands to propel the integration process as provided for in the EAC Treaty.

**b) Adherence to the principles of democracy, the rule of law, promotion and protection of human and peoples' rights**

The regional cooperation put in place under the EAC Treaty is people-centered and market driven.<sup>18</sup> If democracy means the rule of the people by the people, and is one of the fundamental principles of the EAC, then the EAC working strategy must focus on participation of all social groups from the bottom to the top. In order to get proper answers to the Court's performance to ensure respect for the principle of democracy, one should look into its jurisprudence in this regard.

Asked to consider if by reason of failure to carry out wide consultations within Partner States on the proposals for the amendments, the process constituted an infringement of the Treaty in any other way, the Court found that:

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<sup>16</sup> Joint Communiqué of the 8<sup>th</sup> Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12.

<sup>17</sup> As above.

<sup>18</sup>Article 7 (1,a) Ibid.

“It is common knowledge that the private sector and civil society participated in the negotiations that led to the conclusion of the Treaty among the Partner States and, as we have just observed, that they continue to participate in the making of Protocols thereto. Furthermore, as we noted earlier in this judgment, Article 30 entrenches the people’s right to participate in protecting the integrity of the Treaty. We think that construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation lamented in the preamble of “*lack of strong participation of the private sector and civil society*” that led to the collapse of the previous Community.”<sup>19</sup>

The Court went on to conclude that:

“failure to carry out consultation outside the Summit, Council and the Secretariat was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty (...).”<sup>20</sup>

As regards, the principle of promotion and protection of human and peoples’ rights, Janet L. Kent argues that for the European Court of Justice (as any other regional court) to be seen as an integrating institution, it has *inter alia* to facilitate the integration process through the recognition of the rights of individuals.<sup>21</sup>

Although explicit human rights jurisdiction of the Court is yet to be operationalised, the latter has been courageous enough to ensure that basic rights of individuals under the Treaty are respected. At more than one occasions, the Court has had to consider preliminary objections from defendants alleging lack of *locus standi* by individuals and legal persons. The Court consistently upheld that individuals and legal persons have access to the Court under article 30 of the Treaty,<sup>22</sup> which is a basic right to the regional

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<sup>19</sup> *East Africa Law Society and 4 others v. Attorney General of Kenya and 3 others*, type written judgment p 30.

<sup>20</sup> As above p 31.

<sup>21</sup> J. L. Kent, p 2.

<sup>22</sup> See Cases *Prof. Peter Anyang’ Nyong’o and others v. Attorney General of Kenya and others; Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community and East Africa Law Society and 4 others v. Attorney General of Kenya and 3 others*.

justice mechanism enabling the peoples to “participate in protecting the integrity of the Treaty.”<sup>23</sup>

### **3.3 Working relations with Partner States**

The Court is making efforts within its competency to improve the working relations with Partner States. In this regard, the Court is currently discussing with the national judiciaries on the modalities of putting in place sub-registries in Partner States.<sup>24</sup> Each sub-registry shall serve as Court’s Registry whenever the Court decides to hear a case out of its seat. This will immensely contribute to the improvement of the regional judicial mechanism in at least four ways.

Firstly, the litigants will have justice close to them and shall save on costs. Secondly, the Court will improve its visibility within Partner States as it will be seen as part of their respective judiciaries. Thirdly, after the sub-registries are established, it is hoped that the national Courts will be encouraged to refer to the Court questions requiring preliminary rulings in accordance with Article 34 of the Treaty. This will accelerate the process of harmonization of the laws of the Partner States and avoid duplicity in the interpretation and application of the Treaty provisions. Indeed, the Court decisions on such matters enjoy precedence over national courts’ decisions on the same.<sup>25</sup> Finally, the current problems encountered by the Court’s registry in serving various court processes to the Partner States’ Attorneys General and other parties to the suits will be solved as the established sub-registries shall serve as focal points of the Court within the Partner States.

## **4. Challenges**

Though it has been pointed out the essential role played by the East African Court of Justice in the regional integration process, it still has to overcome a number of challenges that undermine its work.

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<sup>23</sup> *East Africa Law Society and 4 others v. Attorney General of Kenya and 3 Others.*

<sup>24</sup> This is in pursuance to Rule 6 of the Court’s Rules of Procedure.

<sup>25</sup> Article 33 (2) Ibid.

Among other difficulties encountered by the Court, one could mention the following:

#### **4.1 Publicity/Awareness of the Court's Existence**

Despite the above-described work of the Court in advancing the EAC integration, very few people in East Africa know about it, its role and jurisdiction. The Court expects to publicise itself through its decisions over various matters that are brought before it for determination. However, it is very important that the stakeholders know of its existence first order for them to seek its services. This is where the idea of partnership between EAC Organs and the media becomes very relevant in the promotion of deeper integration, as the workshop theme rightly states. The Court may not have “juicy” stuff within the media context in order to secure space within media circles but the need to publicize it and its activities remains valid. The media, of course in this context faces a challenge of balancing its commercial interests by publishing juicy stuff to its readers and those interests of the EAC organs such as the Court which may not be financially well to buy media space.

Some kind of sacrifice by the media for the good of the people of East Africa cannot be overemphasized. May be the following incident can assist in illustrating the point I want to make here. When the Judges of the Court returned from Lund University, Netherlands where they had gone to train in Human Rights, the Registrar issued a Press Release and photographs to almost all major newspapers in Kenya, Uganda and Tanzania informing the people that the Court was set to handle human rights cases once the jurisdiction was operationalised. None of the newspapers found that information newsworthy. The best one Ugandan newspaper could do was to courteously forward to the Registrar a Proforma Invoice quoting the cost of space (quarter a page, half a page and full page) if he wished to have his release printed. That was the end of the exercise since the Court had no funds. Thereafter the Court started making provisions in its budget for buying space in the newspapers.

It was the Anyang’Nyong’o case that acted as an ice breaker on the part of the media especially Kenyan media to be interested in the Court’s activities.

#### **4.2 Untested national referrals**

The Treaty in its Article 34 creates a mechanism through which national courts when faced with a question of interpretation or application of the Treaty are required to request the East African Court of Justice (EACJ) to give a preliminary ruling on the matter, to enable a particular national court before which the question has arisen, to give its judgment on the parent matter. To date, this mechanism has not yet been tested in the EACJ. This is an indication that the East African Community law is not known within the Region, even by the Judicial Community. Yet the role of the national judiciaries is crucial to the implementation of the Community law. If the EACJ is entitled to interpret the Treaty in *inter alia* responding to preliminary questions, the role to apply the Treaty provisions at the national level belongs to the national courts. If this mechanism were utilized, there is no doubt that the legal integration in the region would be faster. The utilization of this mechanism would also create more awareness on the rights flowing from the Treaty and the Partner States’ obligations pertaining to these rights. The National Judges are therefore in a better position than any other stakeholders to advance the construction of the East African Community Law.

#### **4.3 Untested EACJ Arbitration Jurisdiction**

Apart from its contentious and advisory jurisdiction, the EACJ is also uniquely entrusted with Arbitration Jurisdiction. This is one of the most expeditious and cost-effective mechanism of peaceful settlement of disputes, especially in the business sector. In order to discharge this mandate, the EACJ formulated the rules to govern arbitration proceedings. As you may probably be aware, any arbitrator can not arbitrate any matter unless the parties in their commercial relationship appoint him or include a clause to the effect that in case of dispute they will all submit themselves to a certain arbitrator for arbitration. Although the EACJ as arbitrator has many advantages against other arbitrators, to

date it has not received any single case for arbitration. The East African Business Community still prefers to recourse to other arbitrators especially those in Europe. It might be a fact that no one has appointed EACJ and if any has, there has not been any dispute to lead the parties to the Court for arbitration. Even the three Governments have not been able to utilise the free services of the Court as far as arbitration is concerned but find it easier to go to France and London for exorbitant arbitration and leave out an institution of their own creation. We are gratified to hear that the Republic of Uganda has made a bold step to convince the Company to which Uganda Railway was concessioned and included an arbitration clause in the agreement to the effect that in case of dispute the two sides will submit themselves to the East African Court of Justice for arbitration. We look forward to seeing lawyers doing the same by advising their clients accordingly.

Since April 2009, the EACJ has started a sensitization campaign in order to create awareness of its arbitration jurisdiction among its stakeholders. It transpired from the interventions of the participants in these campaigns that this jurisdiction was almost unknown. It is high time the people of East Africa, especially the business community, learnt to use this regional mechanism. The EACJ has the necessary capacity and competence in terms of skills and human resources to entertain arbitration cases. Recently the Judges of the court attended a seven day intensive tailor made course on arbitration under the tutorship of Professor Julian Lew QC, an international expert in arbitration and member of the Chartered Institute of Arbitration, London. During the training, the Judges were able to familiarize themselves with modern principles and techniques of international arbitration.

This is a challenge not only to the Court but also to the media in East Africa. The Court expects and largely relies on the Media to sensitize the stakeholders on the various jurisdictions of the Court.

## **5. Conclusion**

The EAC model of integration is unique in that it is structured as a state and aims ultimately at a political federation. All its organs and institutions are

working towards the achievement of this challenging goal. The EACJ on its part is accompanying the process in providing judicial interpretation to the Treaty and to other Community laws and in ensuring respect for the founding principles of the Community. Its jurisprudence has so far proven that the Court has modeled itself to the standards of a respectable and independent organ inspiring confidence in the litigants, no matter the consequences.

If East Africans are serious about meaningful regional integration, they must be willing and prepared to invest in it, particularly in institutions that will make people develop with dignity. A fully-fledged East African Court of Justice with all its attendant jurisdictional roles is one such institution. East African leaders cannot expect a strong East African Community unless they invest in institutions that will guarantee its existence. We should not expect to reap where we have not sown.

Similarly the peoples of East Africa should know that the integration process on which the East African Community has embarked is for them. The rights that flow from the Treaty are for them. They should enjoy them and claim them where necessary through the regional justice mechanisms put in place by the Treaty. The national courts are reminded to play their crucial role in making sure that the Treaty provisions creating rights for individuals are fully implemented. They should seek guidance from the EACJ whenever the need to interpret such provisions arises.

I have not made an exhaustive discussion on the topic but due to time constraints I have just raised issues to provoke the discussion. I merely intended to provoke the debate.

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