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Date Delivered:	14 Feb 2013
Case Class:	Civil
Court:	East African Court of Justice
Case Action:	Judgment
Judge:	Isaac Lenaola, John Joseph Mkwawa, Johnston Busingye
Citation:	East African Law Society v Secretary General of the East African Community [2013]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE EAST AFRICAN COURT OF JUSTICE IN ARUSHA

FIRST INSTANCE DIVISION

(Coram: Johnston Busingye, PJ, John Mkwawa, J, and Isaac Lenaola, J)

REFERENCE NO. 1 OF 2011

THE EAST AFRICAN LAW SOCIETY …… APPLICANT

VERSUS

THE SECRETARY GENERAL OF

THE EAST AFRICAN COMMUNITY….....RESPONDENT

DATE: 14th February, 2013

JUDGMENT OF THE COURT

1. Introduction

This is a Reference by the East African Law Society (hereinafter to be referred to as the "Applicant"). It is brought under Articles 1, 4, 5, 6, 7, 8, 27, 30, 38, 67, 75, 76 and 151 of the Treaty for the Establishment of the East African Community; Rules 1 (2) and 24 of the East African Court of Justice Rules of Procedure; the Vienna Convention on the law of Treaties and the inherent powers of the Court.

The Applicant is the premier Regional Lawyers Association in East Africa. It is a dual membership Organisation, comprising of individual lawyers and six (6) Law Societies, namely, Kigali Bar Association, Burundi Bar Association, Tanganyika 5 Law Society, Law Society of Kenya, Zanzibar Law Society and the Uganda Law Society. Further to the foregoing, the Applicant is registered as a Company Limited by Guarantee in Zanzibar, and as a foreign company limited by Guarantee in Kenya, Uganda and Rwanda.

The Respondent in this Reference is the Secretary General of the East African Community and in that capacity he is also the Principal Executive Officer of the Community. He is thus being sued on behalf of the Community under Article 67 as read together with Article 3 of the Treaty.

It behoves us at this juncture to mention that Prof. Fredrick Ssempebwa and Mr Richard Onsongo appeared for the

Applicant, while the Respondent was represented by Mr. Wilbert Kaahwa, Counsel to the Community.

2. The subject matter of the Reference

In the instant Reference, the Applicant asserts that:

"i. Both Article 24 (1) (e) of the Protocol Establishing the East African Community Customs Union, and Article 54(2) of the Protocol for the Establishment of the East Africa Community Common Market are inconsistent with Articles 27(1) and Article Article 38(1) and (2) of the Treaty for the Establishment of the East African Community, because they purport to oust the (original) jurisdiction of the East African Court of Justice in matters relating to East African Community Regional Integration processes.

ii. Both Article 24(1) (e) of the Protocol Establishing the East African Community Customs Union, and Article 54(2) of the Protocol for the Establishment 5 of the East Africa Community Common Market are in contravention of Articles 33(2) and Article 8(1) (a) and (c) of the Treaty for the Establishment of the East African Community, as they purport to grant partner states, national courts, administrative and legislative authorities or Committees precedence over the East African Court of Justice in matters relating to the interpretation and application of the Treaty Establishing the East African Community.

iii. Both the Protocol for the Establishment of the East African Common Market Protocol and the Protocol for the Establishment of the East African Community Customs Union are integral parts of the Treaty for the Establishment of the East African Community as provided under Article 151 (4) of the Treaty for the Establishment of the East African Community; and cannot contain provisions that contravene the provisions of the Treaty.

The Petitioner (sic) intends to rely on the following evidence in support of this Reference:

i. The Treaty for the Establishment of the East African Community.

ii. The Protocol for the Establishment of the East African Community Customs Union.

iii. The Protocol for the Establishment of the East African Common Market.

iv. The East African Community Customs Union (Dispute Settlement Mechanism) Regulations.

v. The Vienna Convention on the Law of Treaties."

Consequent to the foregoing, the Applicant prays for the following orders against the Respondent:

i. DECLARATION that Article 24 (1) (e) of the Protocol Establishing the East African Community Customs Union infringes Articles 5(1), 8(1) (a) and (c), 27 (1), 33(2) and 38(1) and (2) of the Treaty for the Establishment of the East African Community.

ii. DECLARATION that Article 24 (1) (e) of the Protocol Establishing the East African Customs Union is null and void for being inconsistent with Articles 5(1), 8(1) (a) and (c), 27(1), 33 (2) and 38(1) and (2) of the Treaty for the Establishment of the East African Community and should be struck off.

iii. DECLARATION that Article 54(2) of the Protocol Establishing the East African Common Market Protocol infringes Articles 5(1), 8(1)(a) and (c), 27(1), 33(2) and 38(1) and (2) of the Treaty for Establishment of the East African Community.

iv. Declaration that Article 54(2) of the protocol for the Establishment of the East African Common Market Protocol EAC – CMP is null and void for being inconsistent with Articles 5(1), 8(1) (a) and (c), 27(1), 33(2) and 38(1) and (2) of the Treaty for the Establishment of the East African Community and should be consequently struck off.

v. ORDER that the costs of and incidental to this Reference be met by the Respondent.

vi. THAT this Honorable Court be pleased to make such further or other orders as may be *necessary in the circumstances.*

The Respondent filed a response challenging the legality of the claims advanced by the Applicant. In support of his stance, he relies on the affidavit sworn by Dr. Julius Tangus Rotich, Deputy Secretary General of the East African Community. Further to the foregoing, the Respondent relies on the following documents in opposing the Reference:-

(i) Treaty for Establishment of the East African Community,

(ii) Protocol on the Establishment of the East African Community Customs Union;

(iii) Protocol on the Establishment of the East African Community Common Market; and

(iv) Vienna Convention on the Law of Treaties, 1969.

3.0 Scheduling Conference

Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held at which the following were framed as points of agreement and disagreement respectively:-

3.1 Points of Agreement

Both parties agreed that:

The Customs Union Protocol was concluded and signed by the Presidents of the EAC Partner States on 2nd March 2004 and the Common Market Protocol was similarly concluded on 20th November 2009.

(a) Article 24(1) of the Customs Union Protocol establishes the East African Community Committee on Trade Remedies and vests it with dispute settlement rules in accordance with the East African Community Customs Union (Dispute Settlement Mechanism) Regulations.

(b) Article 54(2) of the Common Market Protocol provides that the Partner States shall guarantee in accordance with their Constitutions, national laws, and administrative procedures that, “the competent judicial, administrative or legislative authority shall rule on the rights of the person who is seeking redress” for infringement of rights under the Protocol.

c) The stated status of the parties is valid.

d) This Honourable Court has jurisdiction to try this Reference.

3.2 Points of Disagreement (Issues)

The parties are disagreed as to:

1. Whether the Court lacks jurisdiction over disputes arising out of both the Customs and the Common Market Protocols.

2. Whether the dispute settlement mechanism under the said Protocols excludes/ousts the jurisdiction of the Court over disputes arising there under.

3. Whether the impugned provisions of both the said Protocols contravene the Treaty.

4. Whether the Applicant is entitled to the Declarations sought.

It is common ground that at the Scheduling Conference the Parties agreed to file written submissions in respect of which they would make oral highlights at the hearing.

Further to that, both parties stated that they were not open to reconciliation, mediation or any form of settlement.

4.0 Issue No. 1

Whether the Court lacks jurisdiction over disputes arising out of the implementation ofthe Customs Union and the Common Market Protocol.

4.1 Submission by Counsel for the Applicant

Prof. Ssempebwa, learned Counsel for the Applicant, submitted as follows on the above issue:

That the Court's jurisdiction is derived from the Treaty. It is to interpret and to ensure adherence to law in respect of the Treaty. The Committee's jurisdiction on the other hand does not derive from the Treaty. Article 75 of the Treaty does not authorize the setting up of judicial mechanisms to the exclusion of the Court, but only institutions to **administer the Customs Union.** Therefore it is this Court which is properly seized with jurisdiction over the Protocol. Learned counsel further argued that the purported judicial mechanisms under the Protocol contravene both Articles 23 and 27 of the Treaty. He further pointed out the following:-

(a) That the enforcement of the Customs Union Protocol will inevitably involve interpretation of the Treaty and the Protocol. For example issues such as **Safeguard Measures** arise directly from Article 78 of the Treaty and therefore, interpretation of the Treaty may become necessary in determining a dispute involving Safeguard measures.

(b) That even disputes over other matters assigned to the Committee will inevitably impact on the objectives of the Treaty e.g facilitating free movement of goods. This falls under the jurisdiction of the Court under Articles 23, 27, 38 of the Treaty and will invariably bring these matters under the purview of the Court's jurisdiction.

(c) That Protocols become part of the Treaty and subject to interpretation by the Court.

(d) The amendment to Article 27 does not imply that a Protocol could validly confer jurisdiction to the Committee to the exclusion of the Court because:

(i) The Committee is not an organ of the Partner States within the meaning of the Treaty; and

(ii) Jurisdiction is not directly conferred on the Committee by the Treaty.

In respect of the Common Market Protocol, Counsel contended the following:-

(a) That the jurisdiction to settle disputes arising thereunder is conferred onto competent authorities of the Partner States under Article 54 of the Protocol.

(b) That the competent authorities of Partner States, to the exclusion of the Court, are not expressly provided for by the Treaty.

(c) That under Community Law, no right of appeal from a "competent authority" to the Court is provided for. Therefore the Common Market Protocol purports to exclude the Court from adjudicating disputes there under.

(d) That similar arguments made above with regard to the Customs Union Protocol apply to the Common Market Protocol to the effect that the Court **lacks jurisdiction** in disputes arising out of the Protocol as alleged by the Respondent.

(e) That the intervention of the Court is crucial with regard to the Common Market Protocol in view of the objectives of the Treaty namely, inter alia:

(i) To have free movement of factors of production; and

(ii) That in conferring **rights and freedoms to the people within the Community** the rights and freedoms should be operationalised by the Protocol.

(f) That comparisons with the European Union Treaty which has similar common market objectives and which confer similar rights of free movement of people, services and the right of establishment, show that it is the terms of the Treaty with regard to the common market which are most litigated in the European Court of Justice. This is due 5 to the fact that:-

(i) The member states, in any regional integration arrangement, are reluctant to give up protectionist measures, and to open up to free trade;

ii) The European common market provisions give a wide margin of appreciation to Member States to restrict the application of the common market freedoms and rights on the grounds of public policy, public security or public health, just as provisions of Article 13(8) of the EAC Common Market Protocol. This margin of appreciation can be easily abused as is demonstrated by the European cases below:

Adoui and Comuallie vs- Belgian State 1982 ECR 1665, 1982 (3) CMLRl 631 and Van Duyn vs Home Office [1975] 3 AII ER 190, [1975] 1 CMLR 1, [1975] WLR 760.

In both the above cases, we note that the issues that confronted the European Court ofJustice were the co-ordination of special measures concerning the movement andresidence of foreign nationals which are justified on grounds of public policy, publicsecurity and public health.

Counsel's second limb of argument was premised on policy objections. It was his argument, in this regard, that:

(i) the relevant rule of Community law is not to be found in an ambiguous directive but in clear fundamental provisions of the Treaty. **(R v Secretary of State for Transport ex-parte Factortame 5 Ltd. 1998 (1) CMLR 1353, [1999] 2 All ER 640.)**

(ii) creating disputes resolution mechanisms in addition to the Court could only be justified on the grounds of having informed or expert institutions which inter alia:

(a) are not saddled by technicalities of procedure

(b) have expertise to determine factual or technical aspects of the protocol;

(c) are quick; and

(d) from which references can be made to the Court.

(iii) Creating multiple centers of dispute resolution mechanisms to the exclusion of the Court, and reserving jurisdiction over Community derived disputes to national "authorities":

a) is against a fundamental policy objective of the Treaty which is to develop a body of jurisprudence on Community matters which jurisprudence is superior to and would guide all national organs including national courts. **(See Article 33 of the EAC Treaty)**

b) slows down, if not totally hampers, harmonization of laws and legal systems within the Community as envisaged by the Treaty (**See: Articles 34 through which Preliminary Rulings of National Courts would ensure harmony; and Article 126 which specifically envisages harmony);**

(c) increases the cost of dispute resolution.

It was further argued by Prof. Ssempebwa that in interpreting the Treaty, its preamble as well as its principles and objectives are relevant considerations. In support of his stance he cited to us the following cases: **James Katabazi and 2 Others-vs- Secretary General of the Community and Another - Reference 1 of 2007, EALS Law Digest [2005 - 2011] 29 and East African Law Society and Three Others -vs-Attorney General of the Republic of Kenya and Three Others -Reference 3 of 2007, EALS Law Digest [2005 - 2011] 58.**

In the case of (supra,) the Court at page 24 had the following to say:

"…taking into account the said general principle of interpretation enunciated in Article 31 of the Vienna Convention we think that we have to interpret the terms of the Treaty not only in accordance with their ordinary meaning but also in their context and in light of their objectives and purpose…"

Based on the above reasons, Prof. Ssempebwa asserted that a Protocol, Regulation or Directive which purports to confer jurisdiction to interpret or enforce the Treaty or the Protocols arising thereunder to another institution to the exclusion of the Court, ousts the jurisdiction of the Court, and therefore, contravenes the provisions of the Treaty.

Finally, Learned counsel for the Applicant concluded by saying that :

(a) The objectives of the Customs and Common Market Protocols are to operationalise the objectives of the Treaty.

(b) Both Protocols create/recognize rights amongst Partner States. More significantly, the Protocols confer rights and recognize liberties of natural and legal persons within the Community

(c) This Court lacks jurisdiction in respect of disputes specified in Article 24 of the Customs Union Protocol as the jurisdiction is conferred onto the East African Community Committee on Trade Remedies (the Committee).

(d) Jurisdiction over Common Market related disputes has been primarily conferred onto national courts and that this Court has no role to play in such matters.

4.2 Submission by Counsel for the Respondent

Mr. Kaahwa, Learned counsel for the Respondent started off by inviting the Court to interpret the provisions cited in the Reference, namely, Articles 6, 7, 8, 27(1), 33(2), 38 (1), 38(2) and 151 of the Treaty and Article 24 (1) of the Customs Union Protocol and Article 54(2) of the Common Market Protocol on the basis of the rules of interpretation contained in the Vienna Convention on the Law of Treaties, 1969. In this regard, he urged the Court to apply:

(a) the literal or textual approach considering the plain and ordinary meaning of words used; that when the language of a treaty, taken in the ordinary and plain meaning of the words, yields a plain and reasonable sense, it must be taken as intended;

(b) the intention of the Partner States, as Contracting Parties to the Treaty; the terms of the Treaty, as used particularly in the cited provisions must be interpreted according to the Partner States' intentions. In this regard, a question must be posed as to whether in negotiating the Customs Union Protocol and the Common Market Protocol the Partner States were aware of any jurisdiction in Customs dispute resolution or Common Market disputes which they allegedly ousted from this Honourable Court;

(c) the teleological approach; that the object and purpose in this regard is what was desired by the Partner States in negotiating and concluding Article 24(1) of the Customs Union Protocol and Article 54(2) of the Common Market Protocol; and

(d) the principle of effectiveness, which emphasizes the need to interpret a treaty in order to ensure maximum effectiveness in achieving the object of the treaty although, the International Court of Justice, while interpreting the 1947 Peace Treaties, In **The Interpretation of Peace Treaties' Case (1950) ICJ Rep 65** stated that this principle cannot overrule the plain meaning of the text of a treaty.

In further response, Counsel submitted that :

"It is important to understand and appreciate the legal term "jurisdiction". According to ***The Dictionary of Words and Phrases Legally Defined (Edited by John B. Saunders, 2nd Edition, Volume 3 at p.113)*** *the term "jurisdiction" means "the authority which a court has to define matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.*

The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and maybe extended or restricted by like means."

Counsel added that this meaning on the power of a court to hear and decide on a case was emphasized in ***Rv. Kent Justices ex parte Lye [1967]2 QB 153, Union Transport Plc v Continental Lines SA [1992] 1 WLR 5 15 and by this Court in EACJ Ref. No. 2: Christopher Mtikila vs The Attorney General of the United Republic of Tanzania and Another, EACJ Ref. no. 1 of 2008: Modern Holdings (EA) Limited v. Kenya Ports Authority and EACJ Ref. 1 of 2010: Hon. Sitenda Sebalu v Secretary General of the East African Community & 3 Others ("Hon. Sitenda's case").***

Regarding the jurisdiction of this Court, learned Counsel contended that Article 23 of the Treaty provides that:

"The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty".

The Treaty goes on to provide in Article 27 that:

"1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

2. *The Court shall have 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 operationalize the extended jurisdiction".*

It was Mr. Kaahwa's contention, in this regard, that until this Court's jurisdiction is extended as envisaged under Article 27(2) of the Treaty, its jurisdiction remains circumscribed.

Learned Counsel further contended that a further reading on jurisdictional aspects pertaining to the Court reveals that until its jurisdiction is extended, the Court has jurisdiction only in the following other specific matters:

(a) Disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the Staff Rules and Regulations. (Article 31);

(b) Disputes between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement. [Article 32) (b)];

(c) Disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the Court to which the Community or any of its institutions is a party.[Article 32 (a)]

(d) Disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court. (Article 32(c).

Counsel also argued that these specific aspects of jurisdiction do not include disputes arising out of the implementation of the Customs Union and the Common Market Protocols.

It was also his argument that if the Court was seized with unlimited jurisdiction in all matters as the Applicant seems to imply, then it would create concurrent or overlapping jurisdiction with Courts in the Partner States some of which have unlimited original jurisdiction in all matters. It would also find itself involved in extraneous jurisdiction over technical matters whose resolution the Partner States have placed under the Multilateral Trade arrangement framework.

Mr. Kaahwa further contended that much as it may be desirable for regional courts to act as enhancers of regional co-operation and integration, extraneous matters cannot be read into the jurisdiction that such courts are accorded under the law. Learned counsel also referred us to **Nyman – Metcalf, K and Papageorgious, I. F in Regional Integration and Courts of Justice, Antwerpen-Oxford, Intersentia** 2005, at pp35 - 15 93, who, while writing on the jurisdiction of the European Court of Justice and The Central American Court of Justice, point out the desire for regional courts to play an activist role in advancing integration and related aspects. Mr. Kaahwa concluded by saying that the writers, however, stress that such jurisdiction cannot be extended other than through the law for

example by amendment of relevant constitutive instruments. In this regard, they cite the imperative for:-

(a) The European Union to observe that "the [European] Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this treaty the law is observed" (Article 220 of the European Community Treaty); and

(b) The Central American Court of Justice "shall guarantee respect of the law in the interpretation and the implementation of this Protocol and its supplementary instruments and acts pursuant to it". (Article 12 of the Tegucigalpa 5 Protocol read together with Article 2 of the Statute Establishing the Central American Court of Justice).

In response to Prof. Ssempebwa's submission on policy objectives and his reliance on decisions of the European Court of Justice **Adoui and Commualle vs Belgium State, Van Duyn vs Home Office and R vs Secretary of State for Transport ex parte Factortame Ltd,** (supra). Mr. Kaahwa submitted that the decisions in these cases did not arise from disputes on, and challenges to, the jurisdiction of the European Court of Justice as a regional court. It was his argument that the decisions were made in respect of the exercise of national courts' discretion in referring matters of integrational nature to the European Court of Justice pursuant to Article 177 of the Treaty of Rome, 1957. He further contended that in those cases, the Court was dealing with instances where there was alleged violation of Article 177 which, like Article 34 of the EAC Treaty, mentions questions in respect of which preliminary rulings may be given. It was also in his submission that these questions include:-

(a) Interpretation of the Treaty of Rome;

(b) Validity and interpretation of acts of the institutions of the EC; and

(c) Interpretation of the statues of bodies established by an act of the European Council of Ministers, where those statutes so provide.

Mr. Kaahwa further contended that such is not the case in this Reference. He, however, asserted that this Reference challenges provisions in Article 151 of the Treaty, on which the Customs Union Protocol and the Common Market Protocol were negotiated and put in place in the manner intended by the Partner States as Contracting Parties to the Treaty. In any case, he told Court, the Treaty, unlike other international treaties that are comprehensive on matters of jurisdiction, is still evolving in this aspect.

Mr. Kaahwa further argued that this Court has consistently been reluctant to read in Articles 23 and 27 of the Treaty more jurisdiction than is plainly conferred on it by the Treaty. In support of his stance, he invited us to follow the decision of this Court in **Sitenda's case** (supra) where the Court, inter alia, held that:

"Article 27 of the Treaty does not confer appellate jurisdiction on the EACJ over the decision of the Supreme Court of Uganda in Election Petition Appeal No. 6 of 2009……...the provisions for appellate jurisdiction related to the future via the mechanism of a protocol which is yet to be concluded."

It was Counsel's contention that, having regard to the decision in Sitenda's case (supra) and a plain reading of Article 27(2) of the Treaty, it is certain that the provision for appellate jurisdiction relates to the future via the mechanism of a protocol, which is yet to be concluded.

In light of the foregoing, Mr. Kaahwa concluded that this Court lacks jurisdiction over disputes arising out of the implementation of the Customs Union Protocol and the Common Market Protocol.

In rebuttal, Prof. Ssempebwa and Mr. Onsongo submitted:-

(i) That a Protocol once validly enacted becomes an integral part of the Treaty as provided by Article 151 (4) thereof.

(ii) That under general principles of international law, a protocol could amend a treaty.

(iii) That the Treaty falls outside the general principles, because a special procedure for its amendment is provided for by Article 150.

(iv) That it is the procedure under Article 150 that was resorted to, though not fully complied with, when the jurisdiction of this Court was adjusted by the inclusion of the proviso to Article 27(1).

(v) That this Court has held in East African Law Society and three Others vs The Attorney-General of Kenya and three Others (Ref. 3 of 2007) that the procedure for the amendment of the Treaty must be strictly adhered to.

(vi) A protocol cannot, therefore, amend the Treaty, directly, or by infection, so as to oust the jurisdiction of this Court.

4.3 Consideration and Determination of Issue No. 1

Having carefully considered the rival submissions of both learned Counsel on this matter, we begin by observing as follows:-

One, that Protocols, once validly enacted under Article 151 (1) of the Treaty, become and form an integral part of the Treaty by virtue of the provisions of Article 151 (4).

Mr Kaahwa argued before us that the Protocols in issue in this Reference were negotiated under Article 151, and not 27, of the Treaty; and that, therefore, the question of the jurisdiction of this Court over the Protocols does not arise. We find these arguments self defeating. We agree that, indeed, the Protocols were negotiated under Article 151, and that is as it should be, given the object of Article 151. But, by dint of Article 151 (4) they formed and became integral parts 5 of the Treaty.

Two, that this Court, unlike the authorities provided for under the impugned Protocols, derives its jurisdiction from Articles 27, 23, 28, 30, 31,32, and 38 of the Treaty, among others, and it is the Judicial Organ of the Community charged, inter alia, with interpretation and application of the Treaty including, as its integral parts, Annexes and Protocols thereto. Needless to mention its jurisdiction can only be altered by amendment to the Treaty in accordance with Article 150 thereof.

Three, it is also clear to us, and we have no doubt in our minds, that Articles 75 and 76 of the Treaty do not provide for the setting up of judicial mechanisms to the exclusion of this Court, but only institutions Council may deem necessary to administer the Customs *Union and the Common Market Protocol*. We would imagine that these are Community institutions because we do not think that the Council would establish national institutions. Even then, national institutions clothed with authority to administer the Customs Union and Common Market, are obligated to do so in accordance with the Principles and Objectives of the Treaty, as if they were institutions of the Community. In any event the Treaty is law applicable in each Partner State. What is also clear to us, from a reading of the above, is that the establishment of the said institutions and conferring power upon them is not a mandatory requirement upon Council; it may or may not establish them. During the hearing we were not told, neither did we find that jurisdiction to interprete the Protocols is conferred on any known organ in the Partner States, pursuant to Article 27 (2) of the Treaty. We are, therefore, of the firm view that they came under the purview of Article 27 (1) of the Treaty.

In the premises, we find that it is not necessary to first extend the jurisdiction of this Court, as over-emphasized by the Respondent, in order for it to have jurisdiction over disputes arising from the interpretation of both Protocols.

Four, that Article 24(1) of the Customs Union Protocol establishes a mechanism for dispute resolution. The mechanism consists of a possibility for an amicable settlement through good offices, conciliation and mediation to be arranged by the parties themselves.

Pursuant to Regulation 6(7) of Annex IX of the Customs Union Protocol, decisions emanating from these mechanisms are final. It is thus clear that when parties submit themselves to a particular dispute resolution mechanism, they also undertake that the decision emanating therefrom will be final except in a case where any party wishes to challenge the decision of the Committee on grounds of fraud, lack of jurisdiction and other illegality. This mechanism, in our view, represents a pragmatic approach to Customs Union dispute resolution, is an alternative to the long and often tedious court litigation approach. Much as we appreciate and support it, however, we do not think that it takes away, directly or by implication, the interpretatative jurisdiction of this Court.

Five, that under Article 54 (1) of the Common Market Protocol, settlement of disputes between Partner States, arising from the interpretation and application of the Protocol shall be …*in accordance with the provisions of this Treaty.* Furthermore the Treaty, under Article 76 (3) provides that the ***Council "may" establish and confer "powers and authority" to institutions it may deem necessary to administer the Common Market.***

Under Article 54(2) of the Common Market Protocol, *Partner States guarantee that in accordance with their Constitutions, national laws and administrative procedures, any person whose rights under the Protocol will be infringed upon shall have a right to redress and that the competent judicial, administrative or legislative authority, or any other competent authority shall rule on the rights of the person seeking redress.*

We have deliberately quoted the Articles in extenso to show that we do not find, anywhere therein provided, expressly or by implication, that the establishment of the various authorities and conferring dispute resolution powers upon them in any way takes away or infringes upon the interpretatative jurisdiction of this Court.

Mr Kaahwa argued that the meaning of the term "*jurisdiction*" should be understood and appreciated. We repeat the definition for clarity's sake: "*the authority which a court has to define matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by like means".*

We have very carefully read, understood and appreciated the definition as provided. Having done so, we do not find, within the Customs Union and the Common Market Protocols, a provision that confers jurisdiction to resolve disputes arising from the interpretation of provisions of both Protocols either to an organ of a Partner State or of the Community, save this Court. Flowing from the above, it would appear that nothing suggests that the Court lacks jurisdiction over disputes arising out of the interpretation and application of both Protocols so long as they form an integral part of the Treaty. It is also noteworthy, that the Court remains, under the Treaty, the final authoritative forum in matters of interpretation and application of the Treaty. ***(See: Articles 5 33(2), 34 and 37)***

In essence, therefore, on a proper reflection on the whole matter, we are inclined to conclude that this Court has jurisdiction over disputes arising out of the interpretation and application of the Treaty which, for re-emphasis, includes the Annexes and Protocols thereto.

5.0 Issue No. 2

Whether the dispute settlement mechanism under the said Protocols excludes/ousts the jurisdiction of the Court over disputes arising thereunder.

5.1 Submission by Counsel for the Applicant

It is the Applicant's case, that the jurisdiction created under Article 54 of the Common Market Protocol excludes this Court from adjudicating disputes thereunder. It is quite plain from their submissions as amply demonstrated in their written submissions and from their oral submissions, that a Protocol, Regulation or Directive which purports to confer jurisdiction to interpret or enforce the Treaty, or the Protocol arising thereunder to another institution to the exclusion of the Court, ousts the jurisdiction of the Court, and therefore, contravenes the provisions of the Treaty.

Prof. Ssembebwa further contended that jurisdiction to decide disputes specified under Article 24 of the Customs Union Protocol is conferred onto the Committee whose decisions are final as specified in Article 24(5) of the Customs Union Protocol. Counsel further contended that the only recourse to this Court is reserved to Partner States.

Even then, he added, that the Partner State's right to recourse to the Court is circumscribed on grounds of fraud, lack of jurisdiction and other illegality.

He concluded by saying that flowing from above, it is clear that in respect of the Customs Union Protocol, the jurisdiction of this Court is ousted fully in respect of disputes involving persons and substantively in respect of disputes between Partner States. It is his stance that in a people-centred Community, the people should be left to access the Court and thus deepen integration.

5.2 Submission by the Counsel for the Respondent

Learned Counsel for the Respondent, in response, submitted that, further to what he had earlier on submitted under Issue No. 1, he had the following to add: Firstly, that non-existent jurisdiction cannot be ousted or excluded. This is so as Article 27(1) is succinct on the Court's jurisdiction and Article 27(2) is yet to be operationalised. Secondly, he repeated his earlier stance that the two Protocols now in question were never negotiated and concluded under the provisions of Article 151(4) of the Treaty as can be discerned from the preamble of the Protocol and not under Article 27 of the Treaty.

Thirdly, the use of dispute settlement mechanisms other than Court mechanisms for the integration process is not strange in regional integration or under the Treaty.

Fourthly, the Treaty enjoins Partner States to establish mechanisms under Articles 101(1), 101 (a), 108 (e), 110 (a), 118 (b) 124(3), 124 (h), 125 (5) and (h), 129(3) and 151(1). Of all these, it is only Articles 151(1) and 129(3) that create 5 mechanisms that are likely to assume a certain degree of jurisdiction.

Fifthly, that matters requiring interpretation or application of the provisions of the Treaty or the validity of the regulations, directives, decisions or actions of the Community, are supposed to be referred to the Court by virtue of Article 34 of the Treaty.

In sum, it was the Respondent's case that the dispute settlement under the Customs Union Protocol and the Common Market Protocol does not exclude/oust jurisdiction of this Court.

5.3 Consideration and determination of Issue No. 2

We have given anxious consideration to the opposing arguments in respect of the instant issue.

It is Article 24(1) of the Customs Union Protocol that establishes the Committee on Trade Remedies and confers power on it ***to handle matters pertaining to*** rules of origin, anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to the Protocol and any other matter referred to the Committee by the Council.

Mr. Kaahwa, for the Respondent, argued that this Court lacks jurisdiction on those areas specified under Article 24 (1).

While we agree with him generally on that interpretation, we think, however, that should an issue of the interpretation and application of the Treaty, the Protocol itself or any of its Annexes arise in course of the exercise of the Committee's mandate, nothing would stop an aggrieved party from coming before this Court to seek for authentic interpretation. We are of the decided view that the finality of the decisions of the Committee provided under Article 24(5) of the Customs Union Protocol does not take away the right of parties, including the Committee itself, who would wish to seek for the Court's interpretation of the Treaty, including the Protocol and Annexes.

It is on the basis of the foregoing, that with respect to the Applicant, we are unable to agree with him that in respect of the Customs Union Protocol, the jurisdiction of the Court is ousted fully in respect of disputes arising thereunder.

It is also clear from the provisions of Article 30(1) of the Treaty that legal and natural persons can still come to this Court for its determination on grounds of legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty.

In sum, we find that the Customs Union Protocol, specifically the provisions of its Article 24, does not oust/exclude the interpretational jurisdiction of the Court.

We must now address the Common Market Protocol. We wish to reiterate that we had said earlier in this judgment that the primary responsibility to implement community legal instruments lies with Partner States. As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impracticable if their national courts had no jurisdiction over disputes arising out of the implementation of the Protocol. Indeed, Community law would be helpless if it did not provide for the right of individuals to invoke it before national courts.

We are fortified in this view by the decision of The Court of Justice of the European Union in **Van Gend en Loos** [1963] C. M. L. R 105, where the Court held, inter alia, that:

[t]he fact that Articles 169 and 170 of the EEC Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not deprive individuals of the right to plead the same obligations, should the occasion arise, before a national court.

The same Court continued to hold that:

[a]ccording to the spirit, the general scheme and the wording of the EEC Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

Put differently, if the Common Market Protocol confers rights onto the individuals within the EAC, these

individuals should be entitled to invoke them before their national courts.

The Common Market Protocol seems not only to uphold this approach, but entrenches and expands it as well.

Article 54 of the Common Market Protocol provides that:

1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.

2. In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

(a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and

(b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.

It is clear from Article 54 (1) that disputes between Partner States over interpretation and application of the Protocol remain governed by the Treaty, which means that this Court is primarily the one vested with jurisdiction over them.

On the other hand, we note that the Protocol affords opportunity to individual persons whose rights and liberties recognized under the Protocol have been infringed upon to seek redress before their judicial, administrative or legislative authorities within Partner States.

We believe that by *judicial authorities* the Protocol refers to more than national courts. We think that Partner States can establish tribunals and other quasi judicial bodies to handle specific Common Market aspects, which would fall into this category.

They are in addition to *administrative and legislative authorities***.**

All of them, in our view, are practical alternative dispute resolution (ADR) mechanisms meant to facilitate easy and speedy implementation of the Protocol and hence realization of the Common Market objectives.

Our view, however, is that their power to rule on disputes of persons seeking redress does not and should not include final determination over questions of interpretation of the Protocol.

We also think that the duty imposed upon national courts to refer matters to this for preliminary ruling under Article 34 of the Treaty continues to exist even when the matter before them is a Common Market related one. We, therefore, find that the fact that persons whose rights and liberties recognized under the Common Market Protocol can seek redress in their respective Partner States does not oust or infringe upon the jurisdictional interpretation of this Court.

Finally, we wish to deal with the question as to whether the dispute settlement mechanisms under the said protocols exclude/oust the jurisdiction of the Court over disputes arising thereunder.

For the reasons we have adduced above we hold that the dispute settlement mechanism under the Customs Union Protocol and Common Market Protocol do not exclude/oust the jurisdiction of the Court over disputes arising out of their respective interpretation and application.

6.0 Issue no. 3

Whether Article 24(1) of the Customs Union Protocol and Article 54(2) of the Common Market Protocol contravene Article 5(1), 8(1) (a), 8(1) (c), 28(1), 33(2), 36(1) and 38(2) of the Treaty.

6.1 Submission by Counsel for the Applicant

It is the Applicant's main argument that the establishment of the dispute resolution mechanism, namely the committee on Trade Remedies or the conferring of jurisdiction upon national judicial, administrative or legislative authorities is against the policy objectives of the Treaty which are:

(a) to develop a body of jurisprudence on Community matters which jurisprudence is superior to and would guide all national organs including national courts(See Article 33 of the Treaty)

(b) to ensure harmony as provided in Articles 34 and 126 of the Treaty.

It is the Applicant's stance that the dispute resolution mechanisms defeat the objectives of the Treaty (See: Article 5), put in a nutshell, are:

(a) to have free movement of factors of production (See Artice 5(2) and 5(3) and 5(3)

(a) in particular); and

(b) to operationalise rights and freedom of the people within the 5 Community by the Protocol and not just air-curtailed. (sic)

It is on the basis of the foregoing that the Applicant asserts that Article 24(1) of the Customs Union Protocol and Article 54(2) of the Common Market Protocol contravene the Treaty.

6.2 Submission by the Counsel for the Respondent

In response to the Applicant's submission it was contended by learned counsel for the Respondent that none of the impugned Protocols take away the Court's jurisdiction to interpret and apply the Treaty. He further argued that Article 8 provides that:

1. "The Partner States shall:

(a) plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;

(b) …

(c) Abstain from any measure likely to jeopardize the achievement of those objectives or the implementation of this Treaty.

It is also his argument that Article 8 (1) of the Treaty imposes on each individual Partner State an obligation to ensure that objectives of the Community are kept on the back of its mind during the planning and allocation of resources processes. Counsel further contended that Article 8(1) (c) prohibits each individual Partner State from

taking any measure that is likely to jeopardize the achievement of the Treaty. (See: 5 Article 8(1) (c) of the Treaty).

It is thus his argument that flowing from the above, he is unable to find how the establishment of the committee on Trade Remedies or the conferring of jurisdiction upon national judicial, administrative or legislative mechanism would prevent Partner States from complying with these two obligations. Counsel concluded by saying that even if national courts use the jurisdiction conferred upon them from the impugned Protocol, this Court's decision would still prevail over national courts' ones on similar matters under Article 33 (2). In this regard, Counsel added that one should read Article 33 (2) as a cure to the possible conflicting interpretation of the Treaty by national Courts and tribunals or by any other Community institution. For the sake of clarity, we hereby reproduce the aforesaid provision which provides:

"Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter".

In further response to the Applicant's arguments Mr. Kaahwa referred us to this Court's decision in the **EACJ Appeal No. 3 of 2011: Hon. Attorney General of the United Republic of Tanzania v Africa Network for Animal Welfare (ANAW)** where the Court observed, interalia, that:

"…There is no provision at all under the Treaty which reserves environmental jurisdiction to the Partner States, or any of them or their institutions. In this regard, it is noteworthy that certain reservations to the Court's jurisdiction have been expressly stipulated in Article 24 (1), 41 (2) and Annex IX of the EAC Customs Union Protocol, as well as in Article 54(2) of the 5 EAC Common Market Protocol - through creation of parallel mechanisms for dispute resolution which aim to exclude this Court's jurisdiction. As far as we are able to ascertain, none of these reservations encompasses the environmental arena of the Treaty, to exempt this Court's jurisdiction the obligations of the Partner States in that area.

Accordingly, we have no hesitation at all to find and to hold that the many provisions of the EAC Treaty cited above do, singly and collectively, confer jurisdiction on the EACJ to entertain disputes involving the environmental obligations and undertakings of the EAC Partner States."

Counsel further contended that the foregoing, without a doubt, is the obtaining juridical position of this Court.

It is his argument that when one reads the ANAW case (supra) with the rider precluding jurisdiction of the Court in matters where jurisdiction has been conferred by the Treaty on organs of Partner States in Article 54(2) of the Common Market Protocol, he/she will inevitably come to the conclusion that the Protocols do not contravene the Treaty. It is Counsel's contention that Article 54(2) of the Common Market Protocol concerns itself with redress for any person whose rights and liberties as recognized by this Protocol have been infringed upon and enjoin the competent judicial, administrative or legislative authority or any other competent authority, to rule on rights of the person who is seeking redress.

Counsel concluded his submission by stating that the two Protocols now in question do not contravene Articles 5 (1), 8 (1) (c), 28 (1), 33 (2) of the Treaty.

6.3 Consideration and Determination 5 of Issue No. 3

After a full consideration of the written and oral arguments submitted to us by the parties we have the following to say:

That the third issue basically revolves around the construction of Articles 8 (1) (a) and (c), 27 (1), 33 (2) and 38 (1) and (2) of the Treaty and Articles 24 (1) (e) of the Protocol Establishing the East African Community Customs

Union (The Customs Protocol) and Article 54 (2) of the Protocol for the Establishment of the East African Community Common Market (the Common Market Protocol). In essence, those Articles provide as follows:-

Article 8 (1) (a) : The Partner States shall: Plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;

Article 8 (1) (c) abstain from any measures likely to jeopardize the achievements of those objectives or the implementation of the provisions of the Treaty;

Article 27 (1) The Court shall initially have jurisdiction over the interpretation and applications of this Treaty;

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of the Partner States;

Article 33 (2) Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on 5 a similar matter;

Article 38 (1) Any dispute concerning the interpretation or application of this Treaty or any of the matters referred to the Court pursuant to this Chapter shall not be subjected to any method of settlement other than those provided for in this Treaty;

Article 38 (2) Where a dispute has been referred to the Council or the Court, the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute;

From this long catalogue of Treaty provisions, it is plain and abundantly clear that the Treaty clearly and emphatically brings the actions of the Partner States into the purview of the EACJ's jurisdiction. This is so, because the Partner States have bound themselves to observe a variety of express undertakings and obligations, concerning the promotion of matters concerned therein. (See: Article 2 (6) of the Constitution of Kenya: *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.")*

We further find and hold that Article 8 (1) (a) imposes on each individual Partner State an obligation to ensure that objectives of the Community are kept on the back of its mind during the planning and allocation of resources processes. Article 8 (1) (c) on its part contains a prohibition on each individual Partner State to take any measure that is likely to jeopardize the achievement of the Treaty. We are unable to find how the establishment of the Committee on Trade Remedies or the conferring of jurisdiction upon national judicial, administrative or legislative mechanisms would prevent Partner

States from complying with these two obligations.

Article 27 provides that the Court shall initially have jurisdiction over the interpretation and application of this Treaty. We have found earlier in this analysis that none of the mechanisms established under Article 24 (1) of the Customs Union Protocol and Article 54 (2) of the Common Market Protocol takes away the Court's jurisdiction to interpret and apply the Treaty. Even if national courts may use that jurisdiction, the Court's decisions would still prevail over national courts ones on similar matters under Article 33 (2). In this regard, we read Article 33(2) as a cure to the possible conflicting interpretations of the Treaty by national courts and tribunals or by any other Community institution.

It is also clear in our minds that Article 38 just like Article 33 (2) is a cure to any possible conflict of jurisdiction over interpretation and application of the Treaty between this Court and any other method of settlement. It says that

when a matter concerning the interpretation and application of the **Treaty has been referred to the Court (emphasis added)** , it shall not be subjected to any other method of settlement. This means that national courts or any other dispute resolution mechanism cannot be seized of a matter concerning the interpretation and application of the Treaty that is before this Court.

We are further of the view that the mechanisms provided under the Protocols, as the provisions establishing them provide, are mechanisms for the administration of the Customs Union and the Common Market. None of them is a court in the technical sense of being an alternative of this Court. The assertion that the jurisdiction of this Court to interpret, apply and ensure adherence to Protocol provisions was not envisaged by the Protocols and therefore did not or does not exist is, in our view, a misconception.

We are of that view that, nowhere in the Protocols do we find a provision directly or indirectly conferring jurisdiction to interpret provisions thereof, to any organ, existing or future, of the Community or of any Partner State.

We also find and hold that the import of the ANAW case (supra), which we respectfully agree with, is that the Protocols stipulate that certain specific aspects of the administration of the Protocols shall be handled and resolved by the mechanisms envisaged in the Protocols. We have further observed that none of these mechanisms touch on the jurisdiction of this Court as provided under Article 27 of the Treaty. This, in our view, is in keeping with the provisions of Article 75 of the Treaty.

Prof. Ssempebwa, in his submissions, had raised the issue of the possibility that while executing their respective mandate, the authorities would inevitably face issues of interpretation of the Treaty. In his estimation, that possibility was high.

We venture to say that, while that may be true, we do not find that it conflicts with or contradicts the existing jurisdiction. As we had said earlier on, the Treaty provides an avenue by way of Article 34 of the Treaty. We are also of the view that even where

Article 34 is inapplicable, we would hope that interested parties to disputes whichever mechanism they choose, would raise such interpretation issues at the earliest opportunity and seek that they be determined, if their determination is considered fundamental to their case.

At this juncture we hasten to say that the reason as to why the interpretative jurisdiction of the Court has not been tampered to-date is, in our view, due to the fact that the relevant organs have been properly advised. The reason why jurisdiction to interpret and apply the Treaty has not been tampered with is plain and simple, yet fundamental.

The Treaty is the rock on which the integration process is built. Uniform interpretation and application thereof, are two main pillars of that rock. If interpretation and application of the Treaty were to be out-sourced to national judicial, administrative and legislative institutions, however competent, to interpret as they see fit, in accordance with national Constitutions and other laws, then the Community would have on its hands a real possibility of multiple interpretations of similar provisions of the Treaty which, in our view, would present a real risk to the integration process.

7.0 Issue No. 4

Whether the Applicant is entitled to the Declarations sought.

7.1 Consideration and determination of the issue

From the analysis of the issues set for determination, it is obvious that we have not found wholly in favour of the position taken by either party to the Reference. We however, concluded as follows:

The dispute settlement mechanisms created under the Customs Union and Common Market Protocols do not exclude, oust or infringe upon the interpretative jurisdiction of this Court. Further, the impugned provisions of both Protocols are not in contravention of or in contradiction with the relevant provisions of the Treaty.

In the premises any submission that this Court lacks jurisdiction over disputes arising out of the interpretation and application and implementation of the Protocols cannot be sustained, and we have given our reasons elsewhere above.

7.2 Costs

We are alive to the fact that it is a settled general rule that in civil litigation, he/she who wins is entitled to his/her costs unless there are good reasons to dictate otherwise.

It is our considered view that the instant Reference is in the form of a public interest litigation. We do not think that The East African Law Society who are the Applicant have any more interest in the result than the Partner States, the legal fraternity and the Community as a whole.

In the premises, we hereby direct that the parties shall bear their respective costs.

It is so ordered.

Appreciation

We also wish to record our appreciation to counsel for the parties for their industry, excellent research and insightful presentations which were of great assistance to the

Court.

DATED AT Arusha this 14th day of February, 2013.

……...

JOHNSTON BUSINGYE

PRINCIPAL JUDGE

…….....

JOHN MKWAWA

JUDGE

……....

ISAAC LENAOLA

JUDGE