**Anyang’ Nyong’o and others v Attorney-General and others**

**Division:** East African Court of Justice at Arusha

**Date of judgment:** 30 March 2007

**Case Number:** 1/06

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**Before:** Ole Keiwua P, Mulenga VP, Ramadhani, Mulwa and Nsekela

JJA

**Sourced by:** LawAfrica

**Summarised by:** E Ongoya

*[1] East African Community Treaty – Composition of the Legislative Assembly – To be by election –*

*Meaning of election – Article 50 of the Treaty establishing the East African Community.*

**Editor’s Summary**

This was a reference under article 30 of the Treaty for the Establishment of the East African Community

(“the Treaty”), in which the claimants sought to invoke the Court’s jurisdiction under article 27 of the

Treaty. They contended that the process in which the first, second and third interveners were deemed to be elected as Kenya’s nine members of the East African Legislative Assembly (“the Assembly”), and the rules made by the Kenya National Assembly and invoked for effecting the said process, infringe on the provisions of article 50 of the Treaty. They made prayers, for the Court to interpret and apply article 50 of the Treaty to the said process and rules and declares them to be void and that costs of the reference be awarded to the claimants.

Under article 2 of the Treaty, the contracting parties, namely the United Republic of Tanzania, the

Republic of Kenya and the Republic of Uganda, (“the Partner States”) established among themselves an

East African Community (“the Community”) and under article 9 established diverse organs and institutions of the Community. One of the 8 organs established under the Treaty is the East African

Legislative Assembly (“the Assembly”), which is the legislative organ of the Community. It consists of twenty-seven elected members and five *ex officio* members. Article 50 of the Treaty provided that the

National Assembly of each Partner State shall elect nine members of the Assembly in accordance with such procedure as it may determine. The article also stipulated that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election. When the first

Assembly was due to be constituted in 2001, the National Assembly of Kenya, made the Treaty for the

Establishment of the East African Community (“Election of Members of the Assembly”) Rules 2001

(“the election rules”). The first nine members of the Assembly, whose term expired on 29 November

2006, were elected under those rules. On 25 and 26 October 2006, pursuant to the election rules, the

House Business Committee of the National Assembly deliberated upon lists of names presented to it as persons that were nominated by the three parliamentary political parties entitled to nominate candidates for election to the Assembly. The parties were the Kenya African National Union (“KANU”), the Forum for the Restoration of Democracy – People (“FORD–K”), and the National Rainbow Coalition (“NARC”). All together, five lists were presented to the Committee. Two lists, of three nominees each, were from KANU; one list of one nominee only, was from FORD – P. Each of the other two lists contained 5 nominees of NARC. One was submitted by the party leader through the Clerk to the National

Assembly as provided by the election rules. The other was presented to the Committee, in its afternoon session on 25 October, by the Government Chief Whip.

The Committee unanimously approved the only nomination from FORD–K. In the course of the deliberations, KANU withdrew one of its lists and the Committee approved, also unanimously, the three nominees on the remaining list. Finally, with regard to the nominations from NARC, the Committee considered the two lists and then, according to its minutes, “resolved to consider the list submitted by the

Government Chief Whip for purposes of nomination…” Although it was not expressly stated in the minutes and no reasons therefor were recorded, the Committee thereby impliedly rejected the nominees on the list submitted by the party leader of NARC, except for one Gervase Buluma Kafwa Akhaabi, who was on both lists.

On 26 October 2006, the Committee, after amending the previously approved list of KANU nominees, approved nine names as “duly nominated to serve” in the Assembly and “further resolved that the list be tabled before the House” in accordance with the Election Rules.

The list was accordingly tabled in the National Assembly on that day in a Ministerial Statement by the

Vice President of the Republic of Kenya, as Leader of Government Business in the National Assembly and Chairman of the House Business Committee. Thereafter, the names were remitted to the third respondent as members of the Assembly elected by the National Assembly of Kenya.

On 9 November 2006, nearly three weeks before the second Assembly was due to commence, the claimants filed the reference in the Court with an *ex parte* interlocutory application for an interim injunction to prevent the said nine persons from taking office as members of the Assembly until determination of the reference. By order of the Court, the interlocutory application was heard *inter partes* on 24 and 25 November 2006. The Court delivered its ruling on the application and on two objections raised therein on 27 November 2006, in which *inter alia*, it granted the interim injunction restraining the third and fourth respondents from recognising the 9 nominees as duly elected members of the Assembly until disposal of the reference.

From the pleadings, the court identified for determination the issues whether the complainants had disclosed any cause of action within the meaning of article 30 of the Treaty; an election had been undertaken within the meaning of article 50 of the Treaty; the Kenya Election Rules ie the Treaty for the

Establishment of the East African Community (Election of Members of the Assembly) Rules 2001, complied with article 50 of the Treaty?

**Held –** The East African Community Treaty, being an international treaty among three sovereign states, is subject to the international law on interpretation of treaties, the main one being “The Vienna

Convention on the Law of Treaties”. The articles of the Vienna Convention on the Law of Treaties that were of particular relevance to the reference were article 26 that embodies the principle of *pacta sunt* *servanda*, article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and article 31, which sets out the general rule of interpretation of treaties.

A cause of action is a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy. (*Auto Garage v Motokov* number 3 [1971] EA 514 followed). A cause of action created by statute or other legislation does not necessarily fall within the same parameters of actions in tort and suits for breach of statutory duty or breach of contract. Its parameters are defined by the statute or legislation which creates it. The reference was not an action seeking remedy for violation of the claimants’ common law rights. It was an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty.

The Treaty at articles 28, 29 and 30 provided for a number of actions that would be brought to the

Court for adjudication. Under article 28(1) a Partner State could refer to the Court, the failure to fulfill a

Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under article 28(2) a Partner State could also make a reference to the Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under article 29, the Secretary General could also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation or an infringement of a provision of the Treaty, by a Partner State. Under article 30 subject to the provisions of article 27 of the Treaty, any person resident in a Partner State could refer for determination by the Court, the 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 was unlawful or is an infringement of the provisions of this Treaty.

None of the provisions in the three articles required directly or by implication, the claimant, to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference and there was no legal basis on which the Court would import or imply such requirement into article 30 of the Treaty.

If the only subject matter of the reference were those circumstances surrounding the substitution of the third interveners for the said four claimants, the Court would have no jurisdiction over the reference.

By virtue of article 34 of the Treaty, the East African Court of Justice has the primacy if not supremacy of jurisdiction over the interpretation of provisions of the Treaty.

Article 30 of the Treaty confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. It is therefore not necessary that before bringing a reference under article 30, a litigant has to “exhaust the local remedy” there being no local remedy to exhaust in any event. Article 50 imports two basic concepts. One concept is that the article imposes on each National Assembly the function of electing nine members of the Assembly from the respective Partner States, with a discretionary power to determine the procedure it will follow in executing that function. The other concept is that the article confers on the National Assembly of each Partner State the responsibility, with unfettered discretion, to determine how the nine members of the Assembly from the respective Partner States are to be elected.

The overriding object and purpose of article 50 was to prescribe a special mode of constituting one of the categories of membership of the Assembly. This was done by providing in express, unambiguous and mandatory terms that the section of the Assembly comprising 27 members shall be constituted by members elected severally by the National Assemblies of the Partner States, each of which is entitled to elect nine members. According to the ordinary meaning of the expression “the National Assembly of each Partner State shall elect nine members of the Assembly”, the National Assembly of each Partner State is unconditionally assigned the function of e lecting nine members of the Assembly. Article 50 constitutes the National Assembly of each Partner State into “an electoral college” for electing the Partner State’s nine representatives to the Assembly. We think that there can be no other purpose of naming the National Assembly in this regard other than to constitute it into an electoral college.

The rest of the provisions of article 50 do not add to or subtract from that assignment of election.

They only serve to leave two matters in the National Assembly’s discretion. First, while the article provides that the nine elected members shall as much as feasible, be representative of the specified groupings, by implication it appears that the extent of the feasibility of such representation is left to be determined in the discretion of the National Assembly. Secondly, the National Assembly has the discretion to determine the procedure it has to follow in carrying out the election.

The decision to constitute the National Assembly of each Partner State into an electoral college was a deliberate step towards establishing a legislature comprising of people’s representatives. The National

Assembly, being an institution of people’s representatives, is next to the people themselves, the second best forum for electing such representatives.

The discretion of determining the procedure of electing the representatives does not include an option for the National Assembly to assign the function to any other body. That would offend the well-established principle articulated in the maxim: “*Delegata potestas non potest delegari* ” (a delegated power cannot be delegated). The ordinary meanings of the words “election” and “to elect” are “choice” and “to choose” respectively; and that in the context of article 50, the words relate to the National Assembly choosing or selecting persons to hold political positions. The phenomenon of multiple meanings of words makes interpretation of documents a very difficult task; but the task is not insurmountable. Rules of interpretation have been designed to ease the burden, hence the need to invoke them. There are two trite rules of international law, which emanate from the principle of *pacta sunt servanda*, namely; treaty provisions are presumed to have meaning and must not be construed as void for uncertainty, in the way contracts between private persons may be construed at municipal law, and the parties to a treaty cannot be taken to have intended an absurdity It would lead to unnecessary uncertainty, if not to absurdity, if article 50 were construed to mean that the parties to the Treaty intended to attach no meaning to the words “election” and “to elect” used in article 50, leaving it to each National Assembly to adopt its preferred meaning of the words through the Rules of Procedure it determines. Ordinarily, a reference to a democratic election of persons to political office is understood to mean election by voting. In all three Partner States, the National Assembly has the function of electing its Speaker and Deputy Speaker. It executes that function by voting in one form or another.

It is very unlikely that in adopting article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect the members of the Assembly other than through voting procedure. An election through voting may be accomplished using such diverse procedures as secret ballot, show of hands or acclamation. The electoral process may or may not involve such preliminaries as campaigns, primaries and/or nominations. An election may be contested or uncontested. The bottom line for compliance with article 50 is that the decision to elect is a decision of, and by the National Assembly.

The National Assembly of Kenya did not undertake or carry out an election within the meaning of article 50 of the Treaty. In determining whether the Election Rules constitute an infringement of article 50 of the Treaty, it is immaterial that the claimants or any of them may have previously regarded the Election Rules as valid or may have done anything or taken any step in pursuance of their provisions. Once a question of infringement of the Treaty is properly referred to the Court under article 30, the question ceases to be of purely personal interest and the court would be failing in its duty under article 23 if it refused to determine the question on the ground of the claimant’s previous conduct or belief. The doctrine of 46, *estoppel* cannot be raised against the operation of statute. (*Maritime Electric Company Limited v General Dairies Limited* [1937] 1 All ER 748; *Southend-on-Sea Corporation v Hodgson (Wickford) Limited* [1961] 2 All ER 46 and *T Tarmal Industries v Commissioner of Customs and Excise* [1968] EA 471 followed). *Estoppel* cannot be invoked to prevent an inquiry into an alleged infringement of the Treaty. If the rules made in exercise of power conferred by article 50 are *ultra vires*, they cannot be saved on the ground that the claimants previously regarded them as *intra vires*.

To the extent that the Kenyan Election Rules provide in rule 4, that the National Assembly shall elect the nine members of the Assembly “according to the proportion of every party in the National Assembly” there is partial compliance with article 50. However, the apparent absence of any provision to cater for gender and other special interest groups is a significant degree of non-compliance, notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation. The major deviation from article 50 by the Kenya Election Rules is that the Election Rules do not provide for the National Assembly to elect the members of the Assembly.

Rule 5 provides for the nomination of candidates by the political parties and sets out the procedure for submitting nomination papers to the House Business Committee.

The National Assembly of any democratic sovereign State has the powers of regulating its conduct through the Rules of Procedure by whatever name called. Once made and adopted, they are binding until revoked, amended or otherwise modified by the National Assembly itself. Ordinarily, what the National

Assembly does in accordance with such rules is lawful and valid. However, a state, which in exercise of its sovereign power binds itself to an international treaty, may end up facing conflicting demands, namely the demand to abide by its treaty obligations and the demand to abide by its own rules that conflict with the former. A State, party to a treaty cannot justify failure to perform its treaty obligation by reason of its internal inhibitions. It cannot be lawful for a State that with others, voluntarily enters into a Treaty by which rights and obligations are vested, not only on the State parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so.

The National Assembly of Kenya did not undertake an election within the meaning of article 50 of the

Treaty, and that the Election Rules in issue infringe the same article.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Auto Garage v Motokov* number 3 [1971] EA 514 – **F**

*Ismail Serugo v Kampala City Council and Attorney-General* constitutional appeal number 2 of 1998

(UR)

*Jaramogi Oginga Odinga v Zachariah R Chesoni and Attorney-General* miscellaneous application

number 602 of 1992 (UR)

*T Tarmal Industries v Commissioner of Customs and Excise* [1968] EA 471 – **F**

***United Kingdom***

*Maritime Electric Company Limited v General Dairies Limited* [1937] 1 All ER 748 – **F**

*R v Secretary of State for Transport ex parte Factortame Limited* number 2 [1991] 1 AC 603

*Southend-on-Sea Corporation v Hodgson (Wickford) Limited* [1961] 2 All ER 46 – **F**

*St Aubyn (LM) v Attorney-General* [1951] 2 All ER 473

***India***

*Indira Sawhney v Union of India* JT [1999] (9) SC 557: [2000] 1 SCC 168

***Other***

*Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der*

*Belastingen* [1963] ECR 1

*Amminstrazione delle Finanze dello Stato v Simmenthal* [1978] E