Kenyan Court's Purposive Interpretation of Treaty Law Is Good For Regional Integration: An analysis of Nairobi High Court Petition No. 393 Of 2018 Steve Isaac Kawai & 2 Others V Council Of Legal Education & 2 Others, [2021] eKLR (30th May, 2021)

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The recent decision by the High Court of Kenya regarding the admission of students from South Sudan advocates of Kenya may not have attracted much attention in Kenya and the East African Community (EAC), but it is all the same a very important one among the many decisions that have been coming from

the Kenyan courts recently regarding the implementation of the Treaty Law In Kenya. I have in a previous post addressed this trend as well as its implication in EAC's integration especially with regards to trade in services.

This additional post continues that discussion analyzing the latest decision in the continuing saga of restrictions to the admission of advocates in EAC Partner State Advocates Training Programs. The case is Nairobi High Court Petition No. 393 Of 2018 Steve Isaac Kawai & 2 Others V Council Of Legal Education & 2 Others This case also provides important interpretive guidance on the relationship between Kenya's constitution to treaties, particularly with regard to the applicability of a purposive interpretation. The core issues in the case under review, just like in previous decisions, has been the controversy on the admission of non – Kenyan students to practice law in Kenya. It seems Kenya is one of the more lucrative legal practice markets in the EAC.

In this case, the Petitioners, then students pursuing the Advocates Training Program (ATP) at the Kenya School of Law(KLS), were South Sudanese citizens who were also registered as refugees in Kenya. The crux of the Petition was that Council of Legal Education barred the students from sitting for the Advocates Training Program (ATP) examination administered at the Kenya School of Law. This effectively meant that the Petitioners were precluded from qualifying to practice law in Kenya on the basis that they were South Sudan citizens.

The decision to deny the students a chance to sit the exams was thus challenged on two grounds. First, the Petitioners argued that this exclusion, based on section 12(a)Kenya's Advocates Act was unconstitutional for limiting the eligibility for admission to the Roll of Advocates to citizens of Kenya, Rwanda, Burundi, Uganda and Tanzania. The Act does currently mention South Sudan as an EAC partner state since it became a member of the EAC in 2016. Kenya's Advocates Act, an important basis for the suit, sought to harmonize legal training as envisaged by Article 126 of the Treaty for the Establishment of the East African Community (EAC Treaty). I should point out that by dint of Article 2 of Kenya's Constitution, Treaties that Kenya has ratified such as the EAC Treaty automatically become Kenyan law.

Second, the Petitioner had complained that his exclusion from training act violated Article 22 of the Refugee Convention, Article 4 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa as well as section 16 of Kenya's Refugee Act. Both Article 4 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Kenya's Refugees Act guarantees refugees the right not be discriminated on account of their nationality.

In addressing these issues, the Court delved at length into Treaty Law and the Constitution of Kenya 2010 to in relation to refugees' right to access education as well as the place of the EAC Treaty in under the Kenyan constitutional order. The findings of the Court on the issues are discussed below:

The Rights of Refugees in the Host Countries

The Court in finding for the Petitioners invoked Article 22(2) of the Refugee Convention which precludes the contracting parties from discriminating against refugees with regard to education in terms of access, recognition of foreign certificates, remission of fees and award of scholarships. The Court therefore held that refugees should be accorded opportunities similar to those accorded any other alien, to acquire secondary and post -secondary education. Notably, the court further relied on Article 26 of the Universal Declaration of Human Rights(UDHR) which emphasizes access to technical education, Article13 of the International Covenant on Economic, Social and Cultural Rights, and Article 17 of the African Charter on Human and People's Rights.

Kenya is also a party to the Refugee Convention and therefore bound by the Convention's general obligations. The Court did find that although Article 22 of the Convention does not put an obligation on the Government of Kenya to ensure that every refugee is granted access to studies other than elementary education, refugees should be afforded as much of an opportunity as any other alien to acquire secondary and post-secondary education. The Court premised this finding on Article 2 of the UDHR which entitles everyone to enjoyment of rights set forth in the Declaration, such as the right to technical education in Article 26 of the UDHR , without discrimination.

The Court also applied the UNESCO Convention Against Discrimination in Education whose Article 1 prohibits discrimination that deprives any person or

group of persons access to education of any type or at any level, or which limits any person or group of persons to education of an inferior standard. While emphasizing the importance of education to refugees, the Court cited the 2006 United Nation High Commissioner for Refugees policy paper Rights of Refugees in the Context of Integration: Legal Standards and Recommendations

In its final declaration on this issue, the Court held that the decision of the Council of Legal Education to bar them from sitting for the Advocates Training Program examination violates Kenya's obligations under the foregoing international legal obligations. In my view this was a progressive and welcome outcome especially because it is an important example of enforcing social and economic rights not under the Constitution of Kenya 2010 alone, but also under the treaties relied on by the Court.

What is the Place of EAC Treaty Law in Kenya's Legal Framework?

The Petitioners, South Sudanese citizens, had also faulted section 12(a) of the Kenya's Advocates Act which they contended violated Article 27 of the Kenya Constitution on equality and freedom from discrimination. Under this, only citizens from Kenya, Rwanda, Burundi, Uganda or Tanzania could be admitted to sit for the bar exam. The Advocates Act has not been amended to include South Sudan which joined EAC in April 2016. Article 126(1) of the EAC Treaty calls on EAC Partner states to cooperate in legal and judicial affairs; "In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take steps to harmonize their legal training and certification; and shall encourage the standardization of the judgements of courts within the Community."

The Court found that since including South Sudan under section 12(a) of Kenya's Advocates Act requires a legislative process, invalidating it would harm the EAC's vision to harmonize the provision of legal services. Accordingly, the Court simply issued a declaratory order that Section 12(a) of the Kenya's Advocates Act was inconsistent with Article 27 of the Constitution in so far as it does not mention South Sudan, as one of the countries, whose citizens can be admitted to the Roll of Advocates in Kenya.

This latest decision should be lauded as good law and one of the several decisions from Kenya's High Court that are making huge strides in international

and regional Treaty law viz-a-viz Kenya law. The jurisprudence being created through the purposive interpretation as seen in this decision is also very welcome for being very pro-integration.

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