What is the Future of the East African Community (EAC) Common Market Protocol?

By:

Patrick Anam

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Part I -Market Access To Legal Advisory and Representation Services vis -a'-vis Recent Jurisprudence From Kenya

Introduction There have been a rising number of cases on the issue of admission of lawyers from other East African Community (EAC) countries and their universities into legal practice in Kenya. These cases have been litigated at two levels; firstly, at the stage of admission of students to the Advocates Training Programme (ATP) and secondly at the stage of admissions of lawyers as Advocates of the High Court of Kenya. And in a number of these cases, Kenyan courts have decided in favour of those seeking admission. A cursory look at these decision reveal that most of the directives and decisions of the Council for Legal education have largely been faulted by the Court, found unlawful and discriminatory hence unconstitutional. Whereas the Courts tend to rely on the Constitution of Kenya , there are now cases where the Courts

have cited the Treaty Establishing the EAC as ousting the ability of the CLE to block citizens from other EAC countries from practicing law in Kenya. This two-part writeup seeks to trace the commitments made by Kenya under the EAC Treaty especially those that affect legal practice, the decisions made by the courts so far and also a discussion on why it may be an uphill task for Kenya to run away from these commitments.

Kenya's Commitment(s) under the EAC in Trade in Legal Services

The EAC is grounded on 5 integration pillars, among them the Common Market as is established under Article 76 of the EAC Treaty. Common market under the EAC integration pillars, is second in line after the realization of the Customs Union in 2010 and after which there will be the Monetary Union and ultimately the Political Federation. A primary goal of the Common Market is to ensure that certain market freedoms are realized with EAC. These include freedom of movement of goods, freedom of movement of persons , freedom of movement of workers/ labour, Right of establishment , Right of residence, Right of Movement of.[1] It cannot be gainsaid that legal services falls under the stated auspices.

The Basis of the Common Market

The principle of common market is anchored in the Treaty's Article 126 on "Legal and Judicial Affairs".[2] Article 126(2) calls upon the Partners states use their appropriate national institutions to establish common syllabus for training of lawyers and common examination standards leading to licensing of lawyers, provides for the harmonization of national laws and the revival of the East Africa Law Reports. In terms of the standardization process, the syllabus and the common examinations are often issues in the disputes in Kenyan Courts as discussed before.

The Common Market Protocol (CMP)

The 60-page Protocol covers various issues including services. It establishes the principles in Article 3 which include non-discrimination of nationals of other partner states based on nationality, observing Most Favourable nation (MFN) treatment, transparency and information sharing. Perhaps what is more

relevant in as far as legal services are concerned, is Article 11 of the EAC Common Market Protocol titled “Harmonization and Mutual Recognition of Academic and Professional Qualifications provides that to ensure free movement of labour within the Common Market, the partner stakes undertook to a mutually recognize the academic and professional [3] qualifications granted, experience obtained, requirements met, licences or certifications granted, in other Partner States; and b) to harmonize their curricula, examinations, standards, certification and accreditation of educational and training institutions. There has been concerted efforts toward Harmonization of the Education EAC Education Systems. Through the Arusha Convention the Recognition of Qualifications in Higher Education in Africa ,UNESCO did call for the coherent evaluation and cross border evaluation for the coherent evaluation and cross border recognition of degrees across the continent , a call that began way back the 1981.

As integration takes root within EAC and the enable the Common Market Protocol work properly harmonization of qualifications is crucial. The EAC heads of states in 2017 in , made a commitment and undertook to accomplish that objective by transforming the EAC into a Common Higher Education Area and agreed that the Inter University Council for East Africa (IUCEA) , set up in 2009 , to provide the needed technical support. [4] The above is therefore a formidable framework for standardization of qualification. Yet much is yet to be achieved partly because of structural barriers, subtle protectionism and behind -the- border regulatory barriers obtaining in different EAC counties such as licensing. The above that has been a guiding principle that the various courts have been applying in making this determination regarding the admission of advocates. It would appear within the EAC, it is Kenya that has achieved near compliance with both the treaty and the Protocol, at least by the Amendments to Kenya’s Advocates Act,[5] specifically sections 12 and 13, and also through attempts at negotiating Mutual Recognition Agreements. (MRAs). Section 13 for instance made it possible for advocates admitted in other EAC Countries to be admitted and practice law in Kenya.

Kenya’s Relevant Legislation EAC Treaty Compliant- A Look at the Kenya’s Advocates Act

We cannot belabor the fact that the EAC Partner states are bound by the Treaty and indeed expected to reform their national legislations to operationalize the different clause. The ethos and spirit of the East African Community is actually derived from Article 5 of the Treaty expecting the development of policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence security and legal and judicial affairs, for their mutual benefit.[6] Article 2(6) of Kenya's constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. By implication therefore the EAC Treaty is part of the laws of Kenya. Accordingly, in a bid to align its relevant legislation with Article 76 of the EAC Treaty and the Common Market Protocol with regard to trade in legal services and legal education standards Kenya's Parliament amended the advocates Act.

Statute Law Miscellaneous (Amendments) Act, 2012, No. 12 of 2012

The EAC was initially comprised of Kenya Uganda and Tanzania. And the Kenya's Advocates Act had already provided under section 11 for modalities of ensuring foreign lawyers practice in Kenya. Rwanda, Burundi and subsequently South Sudan joined much later and there was the need to regularize the enabling legislation to the fold. Hence the Advocates Act underwent amendments in sections 12 and 13. Under these amendments, admitted as advocates of the High Court of Kenya was extended to citizens of Burundi , Uganda , Tanzania as long as they were qualified to be admitted as advocates of the High Court of Kenya as required by section 13 of the Advocates Act. Section 13 enumerates the qualification criteria that is supposed to have been eligible to be awarded a Bachelor of Laws degree at a recognized Kenyan university or a university that the Council of Legal Education has approved. It also identifies the criteria for admission to practice law in Uganda, Burundi , Tanzania and Rwanda.[7]

Kenya's Jurisprudence

As mentioned earlier, there have been a number of cases on the obligations that Kenya has under the Common Market Protocol and the EAC treaty on the admission of Advocates from the EAC. Not all the cases make explicit reference to the EAC Treaty or the Common Market Protocol.

Nairobi High Court Petition 505 & 509 of 2016 (Consolidated) Jonnah Tusasirwe & 10 others vs Council of Legal Education & 3 others [2017] eklr

In this case the Petitioners who had obtained their degrees from Universities in Uganda and South Africa challenged the legality and constitutionality of a decision by the Council of Legal Education barring the Kenya School of Law from admitting non-Kenyans to the Advocates Training Programme(ATP). One of the Petitioners was a South Sudanese and therefore a citizen of an EAC member country. As a matter of fact, students from EAC countries had earlier been admitted to the ATP pursuant to sections 12 and 13 of the Advocates Act. However, the Council of Legal Education later changed course and argued that these admissions were made in " error." That sparked the present case. *Justice Mativo* of the High Court of Kenya held that the decision to bar the admission of the students to the Advocates Training Programmer was not supported by any law and was in fact contrary to sections 12 and 12 of the Advocates Act , hence a nullity. Accordingly , the Court ordered that the students be admitted to the Kenya School of law. What is striking about the decision was the failure of the Court to delve deeply into the EAC Treaty and the Common Market Protocol. Nevertheless, this was a progressive decision.[8] Similarly, Justice Weldon Korir in a similar case decided in 2010 held that that it is absurd to bar advocates who have not practiced for 5 years in other EAC countries from practicing in Kenya. The judge further said that barring the students contradicts the vision of the EAC noting that it will imply that "Kenya has no confidence in the law and procedures governing admission of advocates in the Partner states ".[9]

Nairobi High Court Petition No 69 of 2018 Naomi Ochieng Okello vs Council of Legal Education & 3 Respondents

The Petitioner in this case was an advocate of Rwanda with a current practicing certificate and a graduate of Busoga University in Uganda. She subsequently petitioned to be admitted as an Advocate of the High Court of Kenya under sections 12 and section 13 of the Kenya's Advocates and this Petition was rejected. The Council for Legal Education rejected her application on the basis that she had graduated from an " unapproved " university in accordance to section 13(1)(b) of the Advocates. Just as the previous case, the Petitioner

argued that her being denied admission as an advocate of the High Court of Kenya breached the EAC Treaty and Article 126 and the Common Market Protocol. The Court observed that indeed section 13 of Kenya's Advocates Act was enacted to break down the integration barriers of law practice within the East African Community. *Justice Weldon Korir* therefore allowed the Petition arguing that blocking a Kenyan who was admitted in Rwanda from being admitted in Kenya offended not only the advocates act but also the 2010 Kenya Constitution and the commitments Kenya has made at EAC. However as at the time of writing this piece, the Petitioner in the above case was yet be admitted as an advocate in Kenya; the victory seems to have been short-lived as shall be seen later. That notwithstanding, it is fair to say that the High Court of Kenya has been at the forefront advancing the spirit of the EAC and indeed ensuring that Kenya's commitments within EAC remain intact. Unfortunately, the Court of Appeal has undermined this progress by reversing a High Court decision in Appeal Nairobi Court of Appeal no 96 of 2014 Law Society of Kenya v Attorney General & 2 others.[10] That appeal succeeded in reversing the High Court decision (*Majanja, J*) in *Nairobi Petition 312 of 2018 Law Society of Kenya vs Attorney General & 2 Others*.[11](The two decisions are discussed below.

Nairobi Petition 312 of 2018 Law Society of Kenya vs Attorney General & 2 Others

The case concerned *Statute Law Miscellaneous (Amendments) Act, 2012, No. 12 of 2012 (* which amended certain sections of the *Advocates Act). The Petitioners had taken issue with the amendments that allowed foreign lawyers to be admitted to the practice of law in Kenya. According to the Petitioners, this was denying Kenya's young lawyers opportunity to practice. The Court dismissed this Petition on the basis that Kenya had made commitments pursuant to Annex V of the Common Market Protocol to liberalize market services and to offer national treatments to citizen of the EAC Countries by 2010. That as such the amendment was therefore not unconstitutional;*

*"***Article 23** of the *Protocol on the Establishment of East African Community Common Market* commits the partner states to implement free movement of services in a progressive manner. According to the schedule of Commitments

on the Progressive Liberalization of Services contained in **Annex V** to the *Protocol***,** Kenya has committed to provide market access to Legal Advisory and Representation Services in Judicial Procedures concerning other fields of law and national treatment to other citizens of the community by the year 2010. In addition to the original three Partner States, being Republics of Kenya, Uganda and Tanzania, the Republics of Burundi and Rwanda became full members of the Community in July 2007. I therefore find and hold that the amendments to **sections 12** and **13** of the *Advocates Act* are consistent with Kenya's treaty obligations and are not unconstitutional in the manner alluded to by the petitioner"

This was a refreshing decision for the reason that the Court went deeper into the Kenya's treaty obligations to address the issues at hand thereby lending credence to Article 2 of the Constitution which makes Treaties part of Kenya's law.

Kenya's Latest Court of Appeal(CA) Decision

We have seen earlier the EAC Treaty of legal services, the Common market Protocol and the subsequent Kenya's High Court decisions that have affirmed Kenya's obligations with regards to the EAC. However, in a recent decision the Court of Appeal overturned the High Court's decision which has paved way for admission of lawyers from virtually all the EAC Countries to practice in Kenya. In ***Nairobi Court of Appeal Civil Appeal No. 96 of 2014 Law Society of Kenya vs Attorney General & 2 Others*** the Law Society of Kenya (LSK) appealed *Justice Majanja's* decision on several grounds.

The Society argued that the amendment to section 12 of the Advocates Act to open up trade in legal services for non-Kenyans without a reciprocal access for Kenyan advocates was a violation of Parliament's legislative power and a violation of the relevant WTO agreements. I should point out that these treaty commitments made by Kenya in the Common Market Protocol did not need reciprocity; and the High Court correctly pointed out that Kenya having agreed to open up trade in legal services to other EAC citizens, could not run away from her obligations. This argument therefore does not stand. Further since Kenya's 2010 Constitution makes treaties part of Kenyan law, the Parliament [of Kenya] was mandated to make the amendments that would give effect to

the EAC Treaty. Interestingly the Court of Appeal held that the amendments could not stand as there was lack of public participation.

Which Way for the Common Market in EAC?

The Court of Appeal decision has the effect of denying lawyers form Rwanda and Burundi a chance to practice law in Kenya. This this has sadly brought to a halt the many progressive decisions by the High Court.

Since Kenya had made commitments, it is not far fetched to argue that non observance of these commitments especially regarding trade in legal services offends the EAC Treaty. This brings in the issue of remedies available at the East African Court of Justice. It is time this issue was addressed by the East African Court of Justice (EACJ). Under Article 23 of the Treaty , the EACJ is supposed to ensure adherence to law in the interpretation and application of and compliance with the Treaty. But even more importantly, the legal professionals within the EAC need to think seriously about standardization and mutual recognitions. This is the only way competitiveness in services can be enhanced. But as things stand it seems Kenya is the most liberalized in this respect and this was until the Court of Appeal dealt a blow to the amendments discussed above.

Part II of this series will discuss the commitments made by the other EAC members states regarding trade in legal services and whether they are aligned to what the EAC Treaty envisages.

[1] (https://www.eac.int/common-market).

[2] All this was of course aimed at “widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit” under Article 5 of the Treaty.

[3] https://wenr.wes.org/2018/12/common-higher-education-area-chea-of-the-east-african-community

[4] http://iucea.org/eahea1/declaration/. This Declaration was fashioned along the Bologna Process which had been applied largely in the EU integration process. The (EAC Heads of States) 2017 Declaration states in part thus; “We proffer that the Common Higher Education Area will facilitate and enable the mobility of students and teachers and promote the free movement of labour, people and services as envisioned under the Treaty for the Establishment of the East African Community signed in 1999 and the Protocol on the Establishment of the East African Community Common Market in 2010.” This perhaps shows the importance the Heads of States seemed to have put on harmonization of standards.

[5] Advocates Act Chapter 16 Laws of Kenya

[6] http://www.eala.org/documents/category/eac-treaty

7 (http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2016).

[8] http://kenyalaw.org/caselaw/cases/view/131768

[9] https://www.theeastafrican.co.ke/news/ea/Lawyer-trained-in-uganda-allowed-to-practise-in-kenya/4552908-5221432-dspc1w/index.html

[10] http://kenyalaw.org/caselaw/cases/view/181561/

[11] http://kenyalaw.org/caselaw/cases/view/87281)

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