Supremacy Battle between the Supreme Court of Kenya and the East African Court of Justice: A Reply to Dr. Harrison Mbori

By:

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Introduction

I immensely enjoyed reading Dr. Mbori's piece in Afronomicslaw titled '*Hidden in Plain Sight: Kenyan Supreme Court Shooting is own Foot on Merits Review and Appellate Jurisdiction in Continuing Supremacy Battle with the East Africa Court of Justice (EACJ)*. I now have the pleasure of partially disagreeing with him particularly on whether the EACJ has (merit) review jurisdiction over national laws. This comment is not an attempt at exhaustively analysing the Supreme Court Advisory Opinion in Reference No. E001 of 2022. I found that Advisory Opinion to be surface-level, a bit incoherent and internally inconsistent, and devoid of adequate reasoning. As such, I refrain from commenting on other key issues in the Advisory Opinion. Some of those issues are: how the Court

determined that it has jurisdiction to issue the opinion; the relationship between international and municipal law; the Court's repeated failure to distinguish sources of international law and their interaction with municipal law; the court's (misplaced) discussion on subsidiarity and margin of appreciation, and the apportionment of interpretation and application functions between the EACJ and domestic courts. Rather, my comment is restricted to the question of whether the EACJ has (merit) review jurisdiction over national laws, which the Supreme Court answered in the negative and which Dr. Mbori answers in the affirmative. I partially disagree with both the Supreme Court and Dr. Mbori, but for different albeit related reasons.

Does the EACJ have merit review jurisdiction over national laws?

If I understand Dr. Mbori's argument, it is that a wholesome reading of articles 23, 27(1), 30(1) and 33(2) of the Treaty for the Establishment of the East African Community (EAC Treaty) leads to the conclusion that the EACJ has limitless (merit) review jurisdiction over national laws. For clarity, I reproduce said provisions:

> Article 23(1) provides as follows–
>
> 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.
>
> Article 27(1) provides as follows–
>
> 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 any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.
>
> Article 30(1) provides as follows–
>
> Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may 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 is unlawful or is an infringement of the provisions of this Treaty.
>
> Article 33(2) provides as follows–
>
> Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.

Dr. Mbori's conclusion revolves around article 30(1), and he argues that articles 23(1), 27(1) and 33(2) cannot be read in isolation (ostensibly as the Supreme Court did), but must be read together with article 30(1), and the conclusion then is that the EACJ has unlimited (merit) review jurisdiction over national laws. I certainly agree with Dr. Mbori that the above provisions must be read and interpreted together, and he is certainly correct that article 30(1) grants the EACJ (merit) review jurisdiction over national laws. However, this argument is incomplete without recognising and accounting for the limits and nature of this review, and here is where I depart from Dr. Mbori's conclusion. I make two observations about article 30(1) which I believe Dr. Mbori elides in his analysis and conclusion.

Firstly, the provision is subject to Article 27 which restricts the EACJ's jurisdiction to interpretation and application of the EAC Treaty. Article 30(1) is not a stand-alone provision and cannot therefore be read in isolation; it must necessarily be read together with, and as subservient to article 27. The opening phrase '[s]ubject to the provisions of Article 27' in article 30(1) means that the provision is inferior to article 27 and must be read and interpreted in harmony or in conformity with article 27. Any reading and interpretation of article 30(1) that would conflict with or seek to amend or extend the EACJ's jurisdiction beyond the confines of article 27 is legally untenable. Article 27 restricts the EACJ's jurisdiction to interpretation and application of the EAC Treaty. This means then that any interrogation of municipal laws, directives or actions (and actions included judgment of domestic courts) by the EACJ pursuant to article 30(1) can only be done insofar as it relates to the interpretation and application of the EAC Treaty.

Secondly, the last part of the article 30(1), 'on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty', is key to appreciating the meaning and scope of article 30(1). From this phrasing, which is to be read disjunctively, municipal laws, directives or actions can be subject of EACJ jurisdiction if i) they are unlawful in and of themselves, or ii) they violate substantive provisions of the EAC Treaty. Dr. Mbori appears to rely on this first limb to conclude that the EACJ has unlimited (merit) review jurisdiction over national laws. The EACJ's jurisprudence concurs with this interpretation, for example in the BAT case (see paras. 29–31) where the Court held that, '[i]t seems to us that a cause of action under Article 30(1) of the Treaty would arise where the legality of the acts designated therein is an issue on account of being unlawful per se … Our construction of that legal provision is that such an unlawful act would arise from a violation of any other laws – domestic or international.' Elsewhere, Dr. Mbori lauds this interpretation thus, '[t]his interpretation, while it grants the court close to limitless jurisdiction, is textually and legally sound based on the general rule of interpretation of treaties in Article 31 of the Vienna Convention on the Law of Treaties, 1969 (VCLT). This means that unlike other international courts whose judicial review on unlawfulness might be limited to the establishment treaty and community law, the EACJ has one of the broadest subject matter jurisdictions an international court can have.' [p. 349].

I find this interpretation to be problematic because it chooses to only read a portion of article 30(1), and not the entire provision. Article 30(1) begins with the phrase '[s]ubject to the provisions of Article 27', and as discussed above, this means that the entire provision is subject to and inferior to article 27. The phrase 'on the grounds that such Act, regulation, directive, decision or action is unlawful' in article 30(1) is therefore subject or subservient to article 27, meaning that the 'unlawfulness' must relate to and be determined with respect to the EAC Treaty. Article 30(1) does not therefore refer to 'lawfulness' per se or in general terms, but rather only in so far as it relates to the interpretation and application of the EAC Treaty. Article 31 of the Vienna Convention on the Law of Treaties, 1969 (VCLT) gives primacy to textual approach to interpretation, which prevails unless there is an ambiguity necessitating additional approaches to interpretation. Article 30(1) is express that it is subject to article 27. Consequently, and in keeping with Article 31 of the VCLT, the

ordinary meaning of the language/terms used in the provision is unambiguous and therefore not subject to any alternative interpretation or search for meaning.

My reading of articles 23, 27(1), 30(1) and 33(2) is therefore that the EACJ does not have all-and-sundry, unrestricted, blanket and general (merit) review jurisdiction over national laws. It certainly has jurisdiction to review the legality of municipal laws, directives or actions (and this includes decisions of domestic courts), but only where these concern or touch on the interpretation and application of the EAC Treaty. Consequently, the Supreme Court's opinion on this specific issue is also only partially correct, if at all. The Supreme Court concludes as follows–

> As evidenced by the above provision, EACJ is specifically mandated to interpret and apply the provisions of the EAC Treaty and is expressly prohibited from interpreting national laws of Partners States outside the purview of the Treaty because national laws are beyond its jurisdiction [para. 64]. [T]he EACJ does not have appellate jurisdiction or merit review jurisdiction over decisions of the Supreme Court of Kenya in matters concerning the interpretation and application of the Constitution of Kenya or any other matter arising from the latter's decisions [para. 74]. The EACJ also does not have a merit review jurisdiction over decisions of the Supreme Court [para. 78].

Firstly, as Dr. Mbori also correctly observes, there is no such express prohibition in the EAC Treaty as the Supreme Court believes (though perhaps to spill ink over this is to quibble over semantics). Instead, the EAC Treaty expressly grants and delineates/delimits the EACJ's jurisdiction. In that regard, EACJ cannot arrogate itself any more jurisdiction than that granted by and delineated in the EAC Treaty. Secondly, and as discussed above, it is certainly not the case that national laws of judgments are beyond the jurisdiction of the EACJ.

To the extent, therefore, that the Supreme Court holds that the EACJ does not have (merit) review jurisdiction over national laws or judgments in whatsoever circumstances, that is a legally untenable position. The Supreme Court's opinion would have been entirely correct had the Court emphasised that it considers that the EACJ does not have (merit) review jurisdiction over national

laws and judgments if the issue under review does not concern interpretation and application of the EAC Treaty, but that any national laws or judgments that concern or touch on the interpretation and application of the EAC Treaty would be subject to (merit) review by the EACJ. This would have been possible had the Supreme Court engaged with article 30(1) alongside articles 23, 27(1) and 33(2), instead of proceeding, as Dr. Mbori also observes, as if article 30(1) did not exist.

Conclusion

If we have learnt anything from the unfortunate fate of the Tribunal of the Southern African Development Community following its controversial decision in Campbell, it is (or should be) that international courts are only as useful and viable as their appreciation of the legal limits of their mandate. The EACJ itself has had some taste of this State backlash when Partner States, following the EACJ's 2007 decision in Nyong'o on Kenya's representatives to the East African Legislative Assembly, forced through amendments to the EAC Treaty on removal of judges and reconstitution of the Court. The kind of judicial overreach advocated by the EACJ and Dr. Mbori, would not only be inconsistent with the EAC Treaty, but it would also be politically imprudent. International courts do not operate in a vacuum. While they are indeed independent judicial mechanisms that are or ought to be guided strictly by the law, they are nonetheless inter-governmental entities established by States through inherently political processes. They are therefore not immune to or isolated from the politics of the (group of) States establishing them.

Being alive to the express scope and limits of the unequivocal consent of Partner States in adopting and ratifying/acceding to the EAC Treaty is key to the judicial relevance of the EACJ. In establishing the EACJ, EAC Partner States certainly did not intend to create a jurisdictionally omnipotent and omnipresent court that would ride roughshod over domestic legal system. Quite the contrary. The intention of Partner States in establishing the EACJ, at least to my mind, was that the two systems would recognise, appreciate and respect each other's authority within their exclusive domains, and work harmoniously as regards their concurrent jurisdiction. Key to this understanding is the acknowledgment that the EACJ is not the defunct East African Court of Appeal whose material jurisdiction was unlimited. The EACJ ought to embrace its identity and mandate as defined and delineated in the EAC Treaty and shed off

any nostalgia for the omnipotent and omnipresent era of the East African Court of Appeal. Similarly, domestic courts must appreciate the EACJ as an entity distinct from the defunct East African Court of Appeal and disabuse themselves of any paranoia of the return of the omnipotent and omnipresent era of the latter. It follows then that if the EACJ and domestic courts were to properly appreciate their respective mandates, it would be obvious to them that any 'supremacy battle' between them is much ado about nothing and is an unnecessary distraction from their judicial functions.

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