



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(MILIMANI LAW COURTS)**

**PETITION 49 OF 2007**

**IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 60(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 1A,3,15,17,23,30 AND 46 OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF SECTION 9 OF ACT NO. 2 OF 2000; NAMELY, THE TREATY FOR  
THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY ACT, 2000 OF THE LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 150 OF THE SCHEDULE TO THE TREATY ESTABLISHING  
THE EAST AFRICAN COMMUNITY, ACT 2000**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER SECTION 77(9) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

- 1. PROF. PETER ANYANG' NYONG'O Suing as an official of the  
Orange Democratic Movement-Kenya .....1<sup>st</sup> Petitioner**
- 2. ABRAHAM KIBET CHEPKONGA Suing as an Official of the  
Democratic Movement-Kenya ..... 2<sup>nd</sup> Petitioner**
- 3. FIDELIS MUEKE NGULI Suing as the Secretary General of the  
National Rainbow Coalition (NARC) Claimant.....3<sup>rd</sup> Petitioner**

4. **HON. JOSEPH KAMOTHO** Suing as an Official of the  
**Liberal Democratic Party (LDP) ..... 4<sup>th</sup> Petitioner**
  5. **MUMBI NGARU** Suing as an official of the  
**Liberal Democratic Party ..... 5<sup>th</sup> Petitioner**
  6. **MR. GEORGE NYAMWEYA** Suing as the Secretary General  
of The Democratic Party of Kenya (DP) ..... 6<sup>th</sup> Petitioner
  7. **HON. JOHN MUNYES** Suing as Secretary General of the Forum for  
Restoration of Democracy in Kenya (FORD-KENYA).....7<sup>th</sup> Petitioner
  8. **DR. PAUL SAOKE** ..... 8<sup>th</sup> Petitioner
  9. **HON. GILBERT OCHIENG MBEO**..... 9<sup>th</sup> Petitioner
  10. **YVONNE KHAMATI** ..... 10<sup>th</sup> Petitioner
  11. **HON. ROSE WARUHIU** ..... 11<sup>th</sup> Petitioner
- AND**
- THE HONOURABLE ATTORNEY GENERAL**.....1<sup>st</sup> Respondent
- THE MINISTER FOR FOREIGN AFFAIRS** ..... 2<sup>nd</sup> Respondent

**RULING**

By an application dated 30<sup>th</sup> January 2007 and filed on the same date the applicants have sued the Attorney General and the Minister for Foreign Affairs for acting contrary to S 1A, 3, 15, 17, 23; 26, 30, 46, 60(i) 77(9) and 84(1) of the Constitution. The suit is also based on section 9 of Act No.2 of 2000 namely The Treaty for the Establishment of the East African Community Act, 2000 of the Law of Kenya and Article 150 of the Treaty for the Establishment of the East African Community Treaty.

The Orders sought include:

- (i) That the High Court be pleased to interpret the true meaning of the purport of section 9 of Act No 2 of 2000, namely, the Treaty for the Establishment of the East African Community Act 2000 of the Laws of Kenya as read with Article 150 of the schedule thereto and declare that the said section as read with the Article set out herein is inconsistent with section 30 as read with section 46 of the Constitution of Kenya and therefore void to the extent of the inconsistency.
- (ii) That the High Court be [pleased to declare that under Section 30 of the constitution of Kenya, the legislative power is an exclusive preserve of the National Assembly of the Republic of Kenya exercisable only as prescribed in section 46 of the Constitution. The Attorney General, the Cabinet or the President of the Republic of Kenya acting jointly or severally have no legal mandate to legislate, make, amend repeal, revoke, rescind, cancel, annul, replace, revoke, add or vary any enactment whatsoever and howsoever
- (iii) That the High Court be pleased to declare that the action of the 2<sup>nd</sup> respondent to execute an

instrument of ratification purporting to amend the Treaty for the Establishment of the East African Community or Articles thereof without recourse to stipulated, legislative process expressly prescribed in section 46 of the Constitution of Kenya is unconstitutional null, and void ab initio.

- (iv) That the High Court be pleased to declare that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have respectively contravened the Petitioners fundamental rights to fair hearing as is enshrined in Section 77(9) of the Constitution of Kenya
- (v) That the High Court be pleased to declare that the Petitioner's fundamental right to fair hearing is likely to be contravened if the 1<sup>st</sup> respondent were to proceed to publish or cause to be published a notice of amendments contained in the Report of the Extra Ordinary Meetings of the Attorney General's concluded at Arusha, Tanzania on 7<sup>th</sup> December, 2006 or the commencement date thereof or otherwise lay the same or cause to be laid before the National Assembly of Kenya
- (vi) That the Honourable Attorney General be and is hereby prohibited by himself, his agent and/or servant from issuing, publishing or causing to be so published in Kenya Gazette any notice purporting to amend the Treaty for the Establishment of the East African Community or any Article thereof, if such amendments are procured by a process other than what is prescribed in section 46 of the Constitution of Kenya
- (vii) That, the Honourable Attorney General be and is hereby prohibited by himself, his agent and or servant from publishing or causing to be so published in Kenya Gazette any commencement date purporting to bring into operation any amendment to the Treaty for the Establishment of the East African Community if such amendments are procured by a process other than what is prescribed in section 46 of the Constitution of Kenya
- (viii) That, the Honourable Attorney General be and is hereby prohibited by himself, his agent and or servant from publishing or causing to be so published in Kenya Gazette any commencement date purporting to bring into operation any amendment to the Treaty for the Establishment of the East African Community if such amendments are procured by a process other than what is prescribed in section 46 of the Constitution of Kenya
- (ix) That the Honourable Attorney General be and is hereby prohibited by himself, his agent and or servant from laying or causing to be laid before the National Assembly any amendment to the Treaty for the Establishment of East African Community, if such amendments are procured by a process other than what is prescribed in section 46 of the Constitution of Kenya

On 31<sup>st</sup> January 2007 the Petitioners filed a Chamber application of the same date which sought the following orders:

- (1) That the application be certified urgent and be heard immediately or as the court may deem fit
- (2) That the application be heard ex-parte in the first instance
- (3) That the Honourable the Attorney General be and is hereby prohibited by himself his agent and/or servant, from issuing, publishing or causing to be so published in Kenya Gazette any notice purporting to amend the Treaty for the Establishment of the East African Community or any Articles thereof, if such amendments are procured by process other than what is prescribed in Section 46 of the Constitution of Kenya pending hearing and the determination of the Petition herein.
- (4) That the Honourable Attorney General be and is hereby prohibited by himself, his agent and/or servant from publishing or causing to be published in the Kenya Gazette any commencement date purporting to bring into operation any amendment to the Treaty for the Establishment of the East African Community if such amendments are procured by a process other than what is prescribed in Section 46 of the Constitution of Kenya pending hearing and determination of the Petition herein

- (5) That the Honourable Attorney General be and is hereby prohibited by himself his agent and or servant from laying or causing to be laid any amendment to the Treaty for the Establishment of East African Community, if such amendments are procured by a process other than what is prescribed in section 46 of the Constitution of Kenya pending hearing and determination of the Petition herein
- (6) That costs of this application be in the cause.

The application for conservatory orders as set out above came before me on 2<sup>nd</sup> February 2007 and in an impromptu ruling I had no hesitation in granting the first prayer namely certifying the application as urgent. However I declined to hear the application ex-parte due to tentative reasons given therein including the need to have the issue of jurisdiction heard inter-partes. I therefore ordered that the application be immediately served on the respondents for hearing inter-partes on a date, I proceeded to appoint, that is, 28<sup>th</sup> February 2007. On this day the Attorney General filed and served a Notice of Preliminary objection which inter-alia raised the issue of jurisdiction and counsel agreed to have the issue of jurisdiction canvassed before me on 9<sup>th</sup> March 2007.

### **History**

The Treaty for the Establishment of the East African Community was signed by Heads of State for Kenya, Uganda and Tanzania on 30<sup>th</sup> November, 1999. The Treaty came into force on 7<sup>th</sup> July 2000 following ratification by the Partner States, Kenya, Uganda and Tanzania. The Treaty sets out a bold vision for the eventual unification of East African Community Partner States as is evident from the preamble and from Objectives and Principles of the Community.

The applicant relies on written skeleton arguments filed on 5<sup>th</sup> March 2007 with a list and bundle of authorities. The respondents rely on written skeleton arguments filed on 9<sup>th</sup> March 2007 together with a list and a bundle of authorities. I have in this ruling considered all written and oral submissions and all authorities cited.

M/s Muthoni Kimani the Deputy Solicitor, General in support of her contention that this court has no jurisdiction and that the subject matter of the application was not justiciable, drew the courts attention to the following:

1. Joint Communique of the 8<sup>th</sup> Summit of East African Community Heads of State of 30<sup>th</sup> November, 2006 ***ICC, ARUSHA TANZANIA Exhibited at page 286*** of the application. In particular at page 12 of the Communique the following endorsement by Heads of state appears:-

***“Endorsed the recommendation of the Council of Ministers to reconstitute the East African Court of Justice by establishing two divisions, namely a Court of First Instance with jurisdiction as per the present Article 23 of the Treaty and an Appellate Division with appellate powers over the Court of First Instance.***

***Directed that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty.***

***Directed that a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard”***

At page 300 the Heads of state of Kenya, Uganda and Tanzania did sign the communiqué.

2. At an Extra Ordinary Meeting of the Attorney Generals at AICCC Arusha, Tanzania on 7<sup>th</sup> December, 2006 the necessary Amendments to the Treaty were prepared
3. The 12<sup>th</sup> Extraordinary Meeting of the Council of Ministers held in Arusha Tanzania on 8<sup>th</sup>

December, 2006 the Ministers approved the amendments

4. On 14<sup>th</sup> December, 2006 in Nairobi Kenya the Summit of Heads of state adopted the Amendments pursuant to Article 150(6) of the Treaty for the Establishment of the East African community
5. On 29<sup>th</sup> December 2006 the Honourable the Minister for Foreign Affairs signed, gave, and lodged the Instrument of Ratification of the Amendments on behalf of Kenya

The significance of the above steps will become apparent in this ruling because the central argument by the applicant is that neither the Attorney General of Kenya nor the Minister has powers to make or amend laws under the provisions of the Constitution set out earlier in this ruling.

Under Article 9(1) the organs of the Community include the East African Court of Justice. Under Article 9(2) it is clearly provided that the institutions of the Community shall be such bodies departments and services as may be established by the Summit.

The respondents have argued that neither the Judiciary nor the Legislature has jurisdiction in relation to the Treaty including the impugned amendments but on the other hand the applicant/petitioners have argued that since Act No 2 of 2000 – namely The Treaty for the Establishment of the East African Community Act 2000 gave Municipal validity to certain provisions of the Treaty, the Treaty has become part of the Kenya law as it is also annexed to the Municipal Act as a schedule. Any change or amendment must therefore adhere to the Constitutional requirements pursuant to the doctrine of separation of powers which has been captured in the Kenya Constitution under s 23 where Executive powers are vested in the Executive and S 30 where the legislative powers are vested in the legislature and S 60 where the High Court has unlimited jurisdiction in criminal and civil matters (and where the courts have specifically held that the judicial power vests in the Judiciary).

In addition it is contended that the Treaty is subsidiary legislation in Kenya having been annexed to the domesticating Act.

## **ANALYSIS**

I have great sympathy for the argument presented by the respondents on the issue of jurisdiction for the following reasons.

1. The Treaty for the Establishment of the East African Community Act 2000 was as its title states, enacted to give effect to certain provisions of the Treaty and to give effect to them. The Municipal Act is therefore confined only to the provisions set out and not to all the other Treaty provisions. The Treaty has and continues to have its own existence

2. “The Treaty” in the definition section 2 of the Act:

**“means the Treaty for the Establishment of the East African Community entered into by the Governments of the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya which is set out in the schedule to this Act as from time to time amended under any provision thereof or otherwise modified.”**

The first point to note from the definition is that amendments to the Treaty are contemplated pursuant to the provision of the Treaty and not pursuant to the Act.

The Act does not purport to confer powers to amend the Treaty, it is the Treaty itself which has the necessary empowering provision to amend the Treaty.

Contrary to the arguments of the applicant/petitioners counsel, S 9 of the Act does not confer the power of amendment, instead it gives powers to the Attorney General to give notice of amendments or modification and the date when the amendment or modification concerned or is deemed to have come

into operation. He has to cause notice to be published in the Gazette and a copy of the notice is to be laid without delay before the National Assembly. The amendment then comes into operation on the date appointed in the notice.

Section 9 of the Establishment of the East African Community Act 2000 states!

**“If the Treaty is amended or modified the Attorney General shall cause a notice of the amendment or modification and of the date when the amendment or modification comes or is deemed to have come into operation, to be published in the Gazette, and a copy of the notice to be laid without delay before the National assembly, and such amendment or modification shall, for the purposes of this Act, come or be deemed to have come into operation on such date.”**

The argument by the Petitioner that by the Attorney gGneral invoking the power of issuing a notice is making or amending the law has no legal basis both under the Act and the Constitution. The section itself clearly recognizes the independent existence of the Treaty. In addition the petitioners contention that the Treaty is subsidiary legislation is a horrendous view. A Treaty as will appear shortly in this ruling is a contract between or among states or International Institutions and operate at inter states plane and the touchstone of its validity is not the Municipal constitutions (except where there are specific provisions in a municipal Constitution concerning ratification in which event ratification must be done as specified in the municipal Constitution – in the case of the Kenyan Constitution it is completely silent on Treaties). The touchstone of validity is, the International Law and the Law of Treaties and in particular the Vienna Convention on Treaties.

It is also significant to point out at the outset that strictly speaking the Act of 2000 does not incorporate all the terms of the Treaty and it cannot be said to have domesticated it as such. The Act contains only nine sections and the Treaty has 153 Articles! The Act has provided for the following:

- (i) Community to have capacity as body corperate
- (ii) Transfer of assets and liabilities
- (iii) Financial provisions
- (iv) Immunities and privileges of employees
- (v) Status immunities and privileges of the community
- (vi) Acts of the Community to have force of law
- (vii) Notification and publication of amendment

All these do not in any way touch on the substantive provisions of the Treaty itself. Instead the Municipal Act only so to speak, provides for an enabling climate for the objectives of the Treaty to be implemented. To invite a Municipal Court to assume jurisdiction over the Treaty is a serious misdirection of the applicable law.

Moreover the impugned amendments have already been ratified by the Partner States in terms of Article 150 of the Treaty for the establishment of the East African Community – pursuant to the steps set out in 1 to 5 above which culminated in the instruments of ratification (which in the case of Kenya was given last December 2006, by the Honourabe Minister for Foreign Affairs). The horse has already bolted and left the stable – even assuming that the court had jurisdiction it could not restrain what has already taken place. The amendments having been ratified in terms of the Treaty are valid. This is clear from the provisions of Article 150(1) and (6) of the Treaty which respectively read:

**“(1) This Treaty may be amended at any time by agreement of the Partner States**

**(6) Any amendment to this Treaty shall be adopted by the Summit and shall enter into force when ratified by all the Partner States.”**

It is made abundantly clear in this Article that the parties to the treaty are the Partner States. Neither the Legislature nor the Judiciary features in the Treaty making or amendments thereof.

Turning to the second limb of the Petitioners argument concerning the right of hearing conferred by the Kenyan Constitution this is provided for under S 77 of the Constitution.

- (a) to an accused person who must be charged before an independent and impartial court or tribunal established by law
- (b) to a litigant or person seeking to have determined the existence or extent of a civil right or obligation

Treaty making or amendment is neither a civil right nor obligation. What is allegedly been taken away by the amendments of a Treaty by Partner States is the right of hearing in the EACJ pending case. There is clearly no violation of an individual right or freedom under Chapter 5 of the Constitution or the Bill of rights. The wording of Section 77 takes all the Petitioners from its ambit firstly they are not accused persons secondly their aim is not to have a determination of the existence or extent of a civil right or obligation due to be established by a Kenya Court – instead they want a guarantee of continued hearing before an International Court namely the East Africa Court of Justice (EACJ). The court or Tribunal referred to in S 77 is a Municipal Court. Surely it is clear from the section that it is the Kenyan Courts that are contemplated or envisaged by section 77 of the Constitution and not International courts. To illustrate the point fundamental rights and freedoms under s 70 to 83 of the Constitution are secured, guaranteed and enforced by the State within the territorial borders of Kenya. The guarantee is a State responsibility within her territory. At international level Kenya as a State has almost similar or wider State responsibilities under the relevant Conventions but the enforcing or monitoring bodies are ordinarily United Nations organs such as the Human Rights Committees or Councils and not the Municipal Courts. It is for the Arusha Court if allowed under its establishment Treaty and other International organs to monitor State responsibilities at International level. This court clearly lacks jurisdiction both under International law and the very wording of the Constitutional provisions relied on by the Petitioners. The applicants lack standing because they are neither the applicants contemplated under Chapter 5 of the Constitution and in particular S77 and 84 nor have they demonstrated that the right if any is one that falls under Chapter 5 or any of the sections in the Chapter. Linked to the above is that the EACJ (and I cannot purport to rule on its behalf) might not have the power to undo the amendments which as presented to this court have already been ratified pursuant to s 150, and the principle of international law that Treaty making and amendments is the preserve of the States or the International institutions. It is the amendments which threaten or have caused the taking away of the “right of hearing.” This is the exclusive preserve of the Executive and a court of law has no role and cannot restrain it unless specifically empowered by the Constitution where for example a provision in the Constitution on ratification has been or is likely to be violated. It is not the case here.

In this regard S 60 creates the High Court and also declares that it has unlimited original jurisdiction in civil and criminal matters and such jurisdiction and powers as may be conferred on it by the Constitution or any other law. The section does not create a cause of action where it is non-existent. Similarly S 84 secures and enforces the rights set out in Chapter 5 of the Constitution (S 70-83) and any right that does not fall under the section is not enforceable pursuant to the section. The right guaranteed under the Chapter must also be claimed by the applicant except in the case of Habeas Corpus where another person can apply on his behalf. It is for this reason that I must express my disapproval of the blanket holding on standing, by the court in the ***KENYA BANKERS ASSOCIATION & OTHERS v MINISTER FOR FINANCE [2002] 1 KLR 61 or the RUTURI CASE.***

An applicant under Chapter 5 must be the applicant contemplated and falling within the Chapter failing which he has no standing whatsoever.

May I also take the earliest opportunity to endorse the High Court decision on jurisdiction **JARAMOGI OGINGA ODINGA & 3 OTHERS v CHESONI HC Misc 602 of 1992**. The High Court must deal with matters known to law. The matter falling within the court's jurisdiction must be justiciable. They would not be justiciable for example if they squarely fall under the Executive or the Legislature in the Constitution. The court would be usurping jurisdiction if it were to encroach on the preserve of the other two arms of Government namely the Executive and the Legislature. In this connection the Judiciary must give leadership by declining to encroach even where invited so to do as in the matter. S 23 S 30, and 46 of the Constitution demand that the courts leave the Executive and the Legislature to exercise the powers conferred on them by the Constitution. Granted that S 23 which vests Executive powers in the Executive is silent on treaty making and amendments and modification thereof international relations between States and International Law on Treaties clearly identify the States as the actors and no State can afford to ignore international practice and law on the topic.

This is why I have great difficulty in endorsing fully the holdings in the **OKUNDA** case on the validity of Community laws. If a Treaty is in conflict with the Constitution it does not per se cease to be valid at international level because the State could still have state responsibilities under the Treaty but the Municipal Court first duty, is to uphold the Supremacy of the Constitution in a conflict situation. I therefore wholly reiterate this court's holdings on this aspect in the recent case of **RM (infant) v ODHIAMBO and ATTORNEY GENERAL H.C. Civil 1351 of 2002 (O.S.)**

To illustrate my finding or holding above on jurisdiction I wish to cite the preamble to the Vienna Convention on the Law of Treaties including the definition Articles 1 and 2. The relevant parts of the preamble read:

- **Considering the fundamental role of treaties in the history of international relations**
- **Recognising the ever increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems**
- **Noting that the principles of free consent and of good faith and the pacta sunt servada rules are universally recognised**
- **Affirming that disputes concerning treaties, like other international disputes should be settled by peaceful means and in conformity with the principles of justice and international law.**
- **Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present convention**

**Article 1 of the convention provides.**

“The present Convention applies to treaties between states:

Article 2(a) provides:

**“treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.**

2(b) provides:

**“ratification” “acceptance” “approval” and “accession” mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty”**

Article 6 on Capacity of States stipulates:

## **“Every state possesses capacity to conclude treaties**

Article 7 of Full powers declares:

**“1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty if:**

**(a) he produces appropriate full powers**

**(b) it appears from the practice of the States concerned that their intention was to consider that person as representing the State for such purposes and to dispense with full powers**

**(2) In virtue of their functions and without having to produce full powers the following are considered as representing their state:**

**(a) Heads of state, Heads of Government and Ministers for foreign Affairs for the purpose of performing all acts relating to the conclusion of a treaty**

**(b) Heads of diplomatic missions for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited**

**(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.”**

The above explains why this court must totally reject the challenge on the capacities of both the Minister for Foreign Affairs and the Attorney general to do what they did or contemplate doing. The Minister for Foreign Affairs had the capacity as per the Vienna Convention (already ratified by Kenya) to ratify as he did last December and to give the instrument of ratification. Similarly under s 9 the Attorney General is specifically empowered by an Act of Parliament to proceed in the manner set out. He is not in any way making law or amending law in the manner set out in the Municipal Constitution. As regards Kenya as a state that has ratified the Vienna Convention on the Law of Treaties, her capacity is conferred by the virtue of being a state recognized under international law and as a signatory to the Convention the capacity is specifically recognized by article 6. It is the executive arm of the government which has the capacity to enter into treaties on behalf of the states and this is born out by article 7.

In international law, treaties are written agreements whereby the states entering into them bind themselves legally to act in a particular way or to set up particular relations between themselves. The agreements work on the ground because the states or international institutions oblige themselves to carry out the conditions or arrangements laid out in the treaties.

I reject totally the Petitioner/Applicants contention that the Treaty for East African Community by virtue of being annexed to the local Kenyan Act bearing the same name is subsidiary legislation. It is incredible misdirection because treaties are express agreement which operate as a form of substitute legislation undertaken by the states. In a way they are contracts in that the parties to them create binding obligations but perhaps nothing today gives colour or stamp to international relations or which reflects the character of the international system more than treaties. They have acquired a unique nature but they cannot by any standard be described as subsidiary legislation in relation to Municipal law. The Treaty for establishment of the East African Community is a treaty contract because it is between three States as opposed to some of the law making treaties which are universal by nature for example the Geneva Convention on Diplomatic Relations. In addition the Vienna Convention Law of Treaties (1969) which does to some extent reflect customary law and there is also the Convention on Treaties between States 1986.

The unbroken thread in the treaty law is the fundamental principle that treaties are binding upon parties to them and must be performed in good faith. The principle has been reproduced in the Vienna

Convention itself. This rule of good faith is also known as *pacta sunt servada*. The other important requirement is the intention of the parties to a Treaty to create legal relations as between themselves by means of the Treaty. The location of the power to make treaties depends on the Constitutional arrangement of each state where this is specifically provided. In the case of the United Kingdom the power is vested in the Crown and this is clearly borne out by their case law. In the case of the United States it resides in the President with the advice and consent of the Senate. In Kenya by virtue of the Vienna Convention the power impliedly vests in the President by virtue of Article 7 and S 23 of the Constitution which vests Executive Power in the President. In the case of Kenya in view of the Constitutional silence on any Constitutional ratification, this is done by the Executive in terms of Article 7 of the Vienna Convention or done in accordance with the special requirements of each Treaty.

The Petitioner/Applicants have contended that it is not proper for a few people to have the Treaty making power – however this is the reality of international relations and the requirements on ratification contained in some Municipal Constitutions do provide for an avenue of greater participation and consultation. A future Constitutional dispensation will be called upon to come up with a suitable Constitutional provisions on this.

Amendments are also effected by agreement of the parties to a Treaty or in the manner set out in the Treaty. This is why this court cannot question the notice of the Partner States Attorney Generals in effecting the amendment. Whether or not the effect of this amendments might affect on going matter is not a matter for a Municipal Court. The amendments are luckily done in accordance with the laid down procedure in the Treaty.

As regards the role of interpreting the Treaty this vests in the organ set out in Article 9 of the Treaty and not in this court.

In this Court's view any interpretative role does not confer a jurisdiction to interfere for example with the internal or constitutional arrangements of Partner States. The principles governing interpretation are well set out in international law.

The Petitioner/Applicants contention that what is being done in bringing into force the amendments in contravention 1A, S3, S26, S 30, S46, S77 and S 84 of the Constitution quite from the above analysis must also fail in view of Article 27 of the Vienna Convention which article sets out a general principle of international law that a State may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation or responsibility. Treaties are not *strist sensu* "laws" in terms of the Constitutional and legislative process set out in the Constitution.

Asking for a prohibition to restrain the coming into force of the amendments is misguided in that the entry into force of the amendments as per the provision of the Treaty is by agreement of the Partner States. There cannot therefore be any basis for the courts' intervention whatsoever.

Suffice it to say that all the points addressed in this ruling clearly show that all the claims raised are neither justiciable nor capable of conferring jurisdiction on this court. As international relations are sensitive and delicate courts have to tread carefully when invited to intervene in relations which turn on the principle of good faith because any careless intervention could result in paralysis or stalemate in the operations of States at international level. The need for the courts to tackle upfront the issues of justiciability and jurisdiction cannot be overemphasized. In the case before me the preliminary objection on both points is very well grounded and I have no hesitation in upholding it.

At regional level Article 150 of the Treaty for the Establishment of the East African community follows the Vienna Convention by conferring the right to amend the treaty on the Partner States through the institution of the Executive as the three Partner States did as set out in 1 to 5 and the adoption by the Summit i.e. the Heads of state.

Kenya as is being urged by the Petitioners cannot be heard to cite its internal constitutional provisions such as s 30, and 46 to defeat her intended obligation under the Treaty for the Establishment of the East

Community.

Moving on in order to determine if the applicants can in law bring this suit relying on the Treaty provisions, this court had nearly one year ago ruled in the case of the national council of non-governmental organization ***THE NATIONAL COUNCIL OF NON GOVERNMENTAL ORGANISATIONS v THE HON MINISTER PROF. PETER ANYANG NYONG'O AND ANOTHER Misc Civil Application No. 1124 of 2005*** ruled that treaty making is the preserve of the Executive. Individuals cannot enforce any rights under a Treaty because the State is not their agent or trustee. The case of ***RUSTOMJEE v THE QUEEN 1876 QB 69*** is to the point. By a treaty between the Queen of England and the Emperor of China, the emperor signed to pay to the British Government 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent being largely indebted to British subjects. The money having been recovered by the British Government:

Held:

**“affirming the judgment of the Queen Bench Division, that a petition of right would not lie by one of the British subjects to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants on grounds:**

- 1. That there was nothing in the terms of the treaty to make the Crown agent or trustee in respect of any specific sum for the supplication or any other person**
- 2. That in all that relates to the making and performing of a treaty with another sovereign, or the crown, cannot be either a trustee or agent for any subject.”**

Similarly in the cases of ***REPUBLIC OF ITALY v HAMBROS BANK, LTD AND GREDORY (CUSTODIAN OF ENEMY PROPERTY) I CH 314*** it was held that a financial agreement under the Treaty of Peace with Italy 1947 was not justiciable in the court.

To reinforce this point author PL KEIR in **CASES IN CONSTITUTIONAL LAW 3<sup>rd</sup> Edition** at page 298, as if to emphasise on what is now laid down in the Vienna Convention on the Law of Treaties has authoritatively written:

**“There is no doubt that the crown has full power to negotiate and conclude treaties with foreign states and that, the making of a treaty being an act of state, treaty obligations cannot be enforced in a municipal court.”**

In R (***CND v PRIME MINISTER 2003 3 LRC 347*** it was observed:

**That no longer are there any forbidden areas of executive action into which the courts simply cannot look; there are only aspects of decision making which the court must necessarily accept lie properly and solely with the executive, for example questions of policy and the substantive merits of factual decisions in sensitive fields like national security, defence and foreign relations. These are fields in which the court is unequipped to judge, merits or demerits and where in any event respect is properly due to the democratically elected government which is answerable politically for its actions.”**

And in ***PROSECUTOR v KALLON AND OTHERS 2004 LRC*** a special court for Sierra Leone was held to be international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone.

This explains why this court has rejected the invitation to enforce the right of hearing in the EACJ – that court and that right is in a different sphere. This court has in the circumstances no jurisdiction to intervene and the subject matter is not justiciable in the Court.

For the above reasons the Petition and the Chamber Summons are struck out with costs to the Respondents.

DATED and delivered at Nairobi this 19<sup>h</sup> day of March, 2007.

**J.G. NYAMU**

**JUDGE**