



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

REFERENCE NO. E001 OF 2022

**IN THE MATTER OF: AN APPLICATION FOR AN ADVISORY OPINION
BY THE HON. ATTORNEY GENERAL ON
BEHALF OF THE NATIONAL GOVERNMENT
UNDER ARTICLE 163 (6) OF THE
CONSTITUTION OF KENYA**

-AND-

**IN THE MATTER OF: ARTICLES 1(1), (3), 2(1), (2), (4), (5), (6), 4, 88,
(4) (5), 94 (1), (2), 136 (1), 140 (1), (2), 159 (1), 160
(1), 161 (1), 163(3) (a) AND 163 (7)**

-AND-

**IN THE MATTER OF: THE TREATY FOR THE ESTABLISHMENT OF
THE EAST AFRICAN COMMUNITY- ARTICLES
27, 30, 33 (1) (2) OF THE TREATY**

-AND-

**THE HON. ATTORNEY GENERAL (ON BEHALF
OF THE NATIONAL GOVERNMENT)APPLICANT**

-AND-

HON. MARTHA KARUA, SC.....INTERVENER

Date of Judgment: 31st May 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

BACKGROUND

The Reference by the Attorney General of the Republic of Kenya had sought the Court's Advisory Opinion on the following questions:

- i. Whether the decisions by the Supreme Court on Kenyan law may be subject to a merit review by the East African Court of Justice and what would be the legal consequences upon the Government of Kenya and the sovereignty of the people of Kenya, of orders of the East African Court of Justice premised on a differing interpretation of the Kenyan Law from that held by the Supreme Court; and*
- ii. The legal effect of a finding by the East African Court of Justice that a national court, including the Supreme Court, did not adhere to legal principles, including natural justice and the rule of law, in a case heard and determined by a national court including the Supreme Court.*

Hon. Martha Karua, SC, who was enjoined by the Court *suo motu* as an Intervener, raised a Preliminary Objection dated 6th October 2023 on the grounds that; the Court lacked jurisdiction to hear and determine the Reference because it did not concern a county government under Article 163 (6) of the Constitution; that the issues raised in the Reference were either concluded or pending litigation before the East African Court of Justice (EACJ) and were thus either resolved or unripe for the delivery of an advisory opinion; the Reference invited the Court to usurp a

role reserved by the Treaty for the Establishment of the East African Community (EAC Treaty) to the EACJ contrary to the principle of separation of powers; and Article 27 of the Vienna Convention forbids a state party, like Kenya, from invoking provisions of its internal law as justification for failure to perform its obligations under a treaty to which it is a signatory.

ISSUES FOR DETERMINATION

From the pleadings and the parties' submissions, the following issues crystallized for determination by the Supreme Court:

- i. Whether the Supreme Court had jurisdiction to render the advisory opinion;*
- ii. Whether the advisory opinion was premature for lack of advice from the AG;*
- iii. Whether decisions of the Supreme Court on the interpretation of Kenyan law can be subject to a merit review by the East African Court of Justice and if so, what is the effect of such decision?*

FINDINGS

- i. Whether this Court has jurisdiction to render the advisory opinion*

The Supreme Court exercises its mandate as provided for under the Constitution while EACJ exercises its mandate under the EAC Treaty. The EACJ is not part of the hierarchy of courts in Kenya and therefore, the Court cannot fail to issue an advisory opinion regarding matters pending or concluded at the EACJ, because of the difference in jurisdiction and authority. Hon. Karua's argument that this Court should not proffer an advisory opinion on matters pending litigation or concluded litigation at the EACJ had to fail.

Further, the issues raised by the Attorney General in the Reference constituted matters of great public importance as they concerned the question whether

decisions of this Court can be subject to merit review by a regional or international court given the finality of such decisions under the Constitution. The matters in question could not also be settled through ordinary litigation, and therefore, an advisory opinion represented an avenue for clarification of the issues raised by the Attorney General.

Given the above findings, the Court concluded that the Reference met the guidelines for the Court to exercise its advisory opinion jurisdiction, and the Preliminary Objection by Hon. Karua was therefore overruled.

ii. Whether the advisory opinion is premature for want of the Attorney General's prior advice

The Attorney General filed the Reference pursuant to the authority granted to his office under Article 156 (4) (a) and (b) of the Constitution. In line with Rule 53 of the Supreme Court, Rules 2020, and prior decisions of the Court, it is absurd to require the office of the Attorney General to seek a legal opinion from itself. If it had the capacity to resolve the matter on its own, it would have duly advised the national government and not invoked the Court's advisory opinion jurisdiction.

The Court reiterated that, despite the above finding, as a matter of good practice and following prior decisions of the court on the subject, the Attorney General's opinion should always be sought first before a dissatisfied party can seek an advisory opinion from the Supreme Court.

iii. Whether the decisions of the Supreme Court on the interpretation of Kenyan law can be subject to a merit review by the East African Court of Justice and what is the effect of such a decision?

The Court restated the binding and firm principle that, the Constitution places the Supreme Court as the apex court and a court of final judicial authority with the mandate to assert the supremacy of the Constitution and the sovereignty of the people of Kenya.

Furthermore, what international/regional courts are empowered to do, is to conduct procedural reviews on the decisions of national courts and call attention to procedural violations only but in line with the mandate conferred by their parent Treaty or Convention and not national laws. Therefore, in accordance with the EAC Treaty, EACJ's mandate is the interpretation and application of the EAC Treaty only and 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. It should also be noted that mere disagreement by the EACJ with the interpretation that domestic courts have made of pertinent provisions of their Constitutions and national laws does not constitute violations of the EAC Treaty. Interpretation of the Constitution or national laws, and weighing of evidence is the mandate of domestic courts, which cannot be replaced by the EACJ in that regard.

In addition, it should be noted that regional and international courts such as the EACJ are, by Treaty or Convention, granted the mandate to examine how State organs satisfy regional or international obligations of the State to interpret and apply national laws save in the manner expressed above. Such courts should only act as agencies and tools for strengthening of local conditions, including democracy and the rule of law but not as substitutes of State organs particularly national courts.

On the effect of a decision amounting to a merit review by the EACJ of a decision by a final national court such as this one, the question became moot once the

Supreme Court found as above as such a decision would be patently unlawful and *ultra vires*, a position the EAC Treaty has acknowledged in its Article 9(4) which provides that the organs of the EAC including the EACJ shall act only and perform such functions as are conferred on them by or under the provisions of the EAC Treaty.

On costs, the issue would not arise in a Reference of this kind and so no order as to costs was made.

