



ENFORCEMENT OF DECISIONS OF THE EAST AFRICAN COURT OF JUSTICE: PROSPECTS & PROCESS

1.0 Introduction

An advocate's work is only as good as the fruits of their judgement. It is important to note that credibility of any judicial system is seriously tarnished when its judicial decisions cannot be enforced. We discuss here how to enforce a decision of the EACJ in national courts.

The Treaty for the Establishment of the East African Community 1999 (EAC Treaty) was signed in Arusha on 30th November 1999. This treaty set up a regional Court, the East African Court of Justice (EACJ) established under Article 23 mandated to be a judicial body which shall ensure adherence to law in the interpretation and application of and compliance of the treaty and further under Article 27(1) of the Treaty, the EACJ is clothed with jurisdiction over the interpretation and application of the Treaty.

With this, various cases have been filed in Court by residents against the East African Community (EAC) Partner States and the Secretariat to the EAC on matters of conformity to the treaty. This is because the only parties one can take to Court are the Partner States or the Secretary General of the EAC.

However, the treaty itself creates its own legal system which is an integral part of the national legal systems of the Partner states. Each of the Partner states have enacted legislation. The Treaty in Article 8(2) incorporates the regional legal order in the national legal orders, EAC Legislation, regulations and directives are given the force of law within the national territories of the partner states. In complementing Article 8(2) (b) of the Treaty, Article 8(4)

deals with the hierarchy of legal norms where the community law takes precedence over "similar national law". Its important to note that a conceptual issue arises as to which legal order is Supreme, mere incorporation begs the question of supremacy of the regional versus the national legal order, thus the reception of regional laws into national legal systems leaves unanswered the question of its status in the legal system.

Many at times, litigants in the East African court of Justice (EACJ) will find themselves with the desire to execute a judgement across another jurisdiction within the East African Community. For any lawyer, this heightens interest on how to then enforce/execute the judgement of this regional Court in the local jurisdictions.

Beside the **1999 EAC Treaty**, there are international principles which must be considered in the process of executing a judgement across another jurisdiction. The principle of conflict of laws, the principle of comity and inter-jurisdictional execution of judgements.

Conflict of laws signifies the difference between the laws of two or more jurisdictions that are applicable to a dispute in question. The major question under conflict of laws is whether a Court applies its national law or the laws of another jurisdiction to a dispute. When determining a case before Court, the EACJ applies the EAC body of law. This therefore breeds the issue of sovereignty or supremacy, whether the EAC is a sovereign or a super national legal entity over and above the national partner states or whether the supremacy of regional EAC Treaty law should be appraised from the perspective of the hierarchy of norms in the legal order.

The Partner states established the community as a body corporate among themselves. Thus the Jurisdiction of the National Court is not ousted on the ground that the EAC is a party to a dispute 4, the community as a legal entity is subject to and not sovereign over the partner states, supremacy as a legal concept is then vested in and rests with the EAC Partner states & not to the community.

However, in the event of execution, the EACJ considers the law of the country where execution/enforcement is to take place.

Comity refers to courts of one state or jurisdiction respecting the laws and judicial decisions of other jurisdictions – national or international – not as a matter of obligation but out of deference and mutual respect. 6 National Courts are required to respect decisions of the EACJ. The national Court cannot come out to challenge or inhibit enforcement on erroneous grounds such as nationalistic sentiments or any other reason due to respect for the laws of other jurisdictions.

It is important to note that it's within the proper nature of the Judicial process and well established functions for national courts to have regard to international obligations which a country undertakes, whether or not they have been incorporated into domestic laws. There is limited national jurisprudence on the primacy of EAC regional law over national laws, how the national courts will interpret Article 8(4) of the Treaty as to whether it's a supremacy clause that ranks EAC law above national constitution norms remains to be seen & determined.

What is certain the judiciaries of the respective provisions. In East African Civil Societies Organization Forum (EACOSE)V Attorney General of Burundi 8, the EACJ stated that the interpretation of partner states' national constitution does not fall within the jurisdiction of the court & neither does the court have the jurisdiction to inquire into the legal soundness of the decision of partner states 'constitutional courts.

1.1 Justification for the increasing interest in enforcement of EACJ decisions.

The East African Community Treaty, its protocol, its legislation and the decision of the court of Justice represent regional law of the community that requires application and enforcement. Enforcement denotes assessing state compliance with the decisions of the EACJ, Treaty and Regional law, infringement and violation, thereby increasing the costs of non-compliance.

Enforcement and application is an obligation of the partner states in the 1st instance & of national institutions within whose territory the Regional law is to be enforced. Initially, the EACJ strictly made declarations as to contraventions against the treaty provisions. Subject to Article 28(b) of the EAC Treaty, a Partner state may refer for determination by the court, the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires*, unlawful or infringing on the provisions of the treaty or any rule of law relating its application. In Complementing Article 28(b), Article 289(a) also empowers a partner state which considers that another partner state or an organ or institution of the community has failed to fulfil an obligation under the treaty may refer the matter to the court for adjudication. But as jurisprudence grew, the Court grew less shy and begun to grant orders for damages, compensation and costs. **The case of Hon. Dr. Margaret Ziziwa V. The Secretary General of The East African Community; Appeal No.2 of 2017** opened these flood gates with the appellant receiving an award of USD 114,000 as financial loss together with interest of 6% per annum on the said sum as well as costs until payment in full.

A claimant must therefore prove to Court that the Act, regulation, directive, decision or action of the State or East African Community has caused such claimant a loss which is financially assessable and can be atoned for in damages or compensation. The element of damages and compensation at the EACJ is a mirror of damages and compensation at the national level, at least as per the Ugandan legal regime. With this, execution to obtain the said awards is an essential aspect of litigation at the EACJ.

2.0 The law and Procedure of Executing court orders under the East African Community

a) Governing law

Enforcement of a judgment of a foreign or international Court involves an interplay between international legal systems and national laws. The recognition and enforcement of foreign judgments and those of regional courts is governed by local domestic law and the principles of comity, reciprocity, conflict of law and *res judicata*.

Article 38(c) of the EAC Treaty provides that a Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court. The implication is that by signing the EAC Treaty, a Partner State undertakes to comply with the decisions of the Court in any case to which it is a party in keeping with the principle of *pacta sunt servanda*. 10 As such, there is no need of Mutual Recognition Agreement as is required under international law.

Execution is the process of realizing the benefits of the judgment. In **Re, Overseas Aviation Engineering (GB) Ltd. (1963) 24 Ch. 39 at 40** court defined execution quite simply as the process for enforcing or giving effect to the Judgment of the court.

The EAC Treaty then provides that execution of judgements is as per the laws on the national state where execution is to take place. **Article 44 of the EAC Treaty** stipulates that where the execution of the judgement imposes a pecuniary obligation on a person, execution shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place. The order for execution shall then be appended to the judgment of the court which shall require only the verification of the authenticity of the judgment by the Registrar whereupon, the party in whose favour execution is to take place, they may proceed to execute the judgment.

2.1 Enforcement in other EAC jurisdictions Article 38(b) of the EAC Treaty

enjoins Partner States to refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute before Court while Article 38(c) requires Partner States to take, without delay, the measures required to implement a judgment of the Court. This broad wording implies that although the decision itself is directed to only one Partner State, other EAC Partner States have a role to play in its enforcement.

This is interpreted to imply that enforcement is not restricting to only the jurisdiction of the concerned country. Enforcement of a judgment allows for execution within any jurisdiction of the EAC. It can be against the property of the government in another East African Community Partner State. One has to only prove that the said property belongs to State against which a decree is issued.

For instance, property of the government of Uganda in Kenya, Rwanda, DRC or even Tanzania or companies' resident in other jurisdictions but owned or run by government of Uganda. These can be subject of enforcement and execution.

We consider the persuasive decision by the Constitutional Court of South Africa in the matter of **Government of the Republic of Zimbabwe v Louis Karel Fick 2013 ZACC 22**. This was a case of enforcement of an international decision by SADC Tribunal in South Africa. It arose from the case of **Mike Campbell (Pvt) Ltd v Zimbabwe 2008 AHR LR (SADC 2008)**, where the SADC Tribunal concluded that the expropriation of property by the Zimbabwean government amounted to discrimination on the basis of race and that Zimbabwe had to pay fair compensation to white farmers in the country. Enforcement was impossible in Zimbabwe hence the application in South Africa to execute against the properties of the Republic of Zimbabwe in South Africa.

It was successful based on a similar clause in the Protocol on the SADC Tribunal, under Article 32(3) stipulating that the decisions of the Tribunal are binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the states concerned. However, enforcement in the various countries must be in consonance with their law on procedure of enforcement of foreign/international judgements of the said country.

Result/Return of execution

After the judgment has been satisfied by the recipient Court, the Court must then report back to the trial Court. The High Court of Uganda as a transferee Court must then return/forward a copy of the decree to the EACJ, stating the fact of such execution and that it was duly executed. Or where it fails to execute the same, the circumstances attending such failure with a certificate of non-satisfaction.

b) The Procedure During Execution

There are mandatory procedures that must be followed before a national court swings into action. The case of **M/s Semuyaba, Iga & Co. Advocates & Yu Sung Construction Limited Vs Attorney General of the Republic of South Sudan, African Export-Import Bank & Nile Petroleum Corporation HCMA No. 004 of 2022 (Arising from EACJ Reference No. 021 of 2019)** enlists great jurisprudence on the fact that merely branding a judgement before a national Court in the State of execution does not suffice. An advocate must follow procedure!

Rule 85(1) of the EACJ Rules of Procedure 2019 requires that a party who wishes to execute a decree or order of the Court in accordance with Article 44 of the Treaty must make an application for an execution order in accordance with **Form 9 in the Second Schedule**.

Further, if the judgement imposes a pecuniary obligation, then the same is governed by the civil procedure rules of the said country of execution.

Rule 85 (3) states that the order for execution MUST be appended to the judgment of the Court which must be initially verified by the registrar of the EACJ for authenticity whereupon, the party in whose favour execution is to take place, may proceed to execute the judgment.

Justice Stephen Mubiru has come out to state that the national Court has jurisdiction to issue an order against the Attorney General of another Partner State, in that case, the Attorney General of the Republic of South Sudan requiring compliance with the obligation to satisfy the decree and order of costs. However, to do this, the judgement debtor must fully comply with procedure of execution of a decree by a Court that did not pass the same. Court reiterated that the EACJ is not only required to transmit to the High Court of Uganda a complete and verified copy of the judgment but also pass an order for transfer of the decree specifically to that country's Court. A mere order directing the decree to be transferred for execution would by itself be inadequate.

For the case of Uganda, Order 22 Rule 4 of the Civil Procedure Rules provides additional requirements. There must be a copy of the decree extracted from the trial Court, a certificate setting forth that the decree has not been satisfied within the jurisdiction of the trial Court (or only partly satisfied), together with a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

There after the decree may be executed by another court which has the competence to implement the judgement passed by the EACJ. The decree cannot be executed by the High Court of Uganda, as a transferee Court, in the absence of a proper transmission made by the EACJ. In any event, simultaneous execution proceedings in more than one Partner State are ideally a possible occurrence if this procedure is not followed.

In order to enforce a foreign judgment, the High Court of Uganda must first recognise, and it will do so where such judgment is final, is issued by a Court with jurisdiction, obtained bona fide and conforms to the public policy of the host country. A decision is final where the matter is *res judicata* in the said Court. Interlocutory matters or matters under review by Court or on appeal cannot therefore be enforced in the foreign country as they are not a final determination of the subject matter, rights or merits of the case. It is however important to note that, for the judgment to be executable, it must be final and complete, as to their entire subject matter and all the causes of action; it must fully determine the rights of the parties so that nothing remains to be done by the trial court.

3.0 Conclusion

Enforcement of decisions by international or regional bodies is thereby an intermix of international and domestic legal principles and requirements. To purport to act on a decree of that Court without proper transfer/procedure is tantamount to usurpation of jurisdiction by the national Court of another state - an undesirable phenomenon under international law.