Hidden in plain sight: Kenyan Supreme Court Shooting its own Foot on Merits Review and Appellate Jurisdiction in Continuing Supremacy Battle with the East Africa Court of Justice (EACJ)

By:

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Three years ago, at the heart of the COVID-19 pandemic, I wrote an entry in this blog on the Martha Wangari Karua vs. Attorney General of the Republic of Kenya (Martha Karua case) in the East Africa Court of Justice (EACJ) First instance division titled: The EACJ First Instance Court Decides Martha Karua v Republic of Kenya: The Litmus Test for EACJ Jurisdiction and Supremacy. In that case, the First Instance division found that the Respondent State through the actions of its Judiciary (Supreme Court) had violated its commitment to the fundamental and operational principles of the EAC, specifically the principle of

the rule of law guaranteed under Article 6(d) and 7(2) of the EAC Treaty. The court had found that Martha Karua's right to access justice was violated and it issued a historic award for general damages in the sum of $ 25,000 to the applicant at a simple interest rate of 6% per annum. Since then, I contend that there is a supremacy battle between Kenya's apex municipal court and the EACJ in two specific arenas. The first was Kenya's appeal of this decision in the EACJ Appellate division which categorically dismissed the appeal with costs to the Appellant in February of 2022. The second venue for this ongoing conflict is in the Supreme Court of Kenya where Kenya's Attorney General filed a reference for an advisory opinion reference that many observers saw as the aftermath of the Martha Karua case. This is the long awaited advisory opinion judgement that was issued on 31 May 2024 and forms the basis of this piece.

The Martha Karua case has become something of locus classicus decision on many areas of the law. This piece focuses only on the place of the EACJ as an international court and its judicial review power over the decisions of apex municipal courts. In the just determined advisory opinion, the Kenyan Attorney General had requested the Supreme court to answer two key questions:

1. Whether the decisions of 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 the Kenya of orders of the EACJ premised on an interpretation of Kenyan law different from that held by the Supreme Court.

2. 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 the national court including the Supreme Court. In an important development the Supreme Court on 15 September 2023 found that Martha Karua had an interest in the matter and was thus admitted as an intervener to the reference. Martha Karua (the Intervener) filed a notice of preliminary objection dated 6 October 2023 seeking dismissal of the reference based on the following four grounds:

1. The Supreme Court lacks jurisdiction over the reference because the matter does not concern county governments under Article 163(6) of the Constitution of Kenya, 2010;

2. The issues raised in the reference are concluded or pending litigation before the EACJ and are thus either resolved or unripe for the advisory jurisdiction of the Supreme Court;

3. The reference invited the Supreme Court to usurp a role reserved by the EAC Treaty to the EACJ;

4. Article 27 of the Vienna Convention on the law of Treaties [VCLT] forbids state parties from invoking provisions of internal law as a justification for failure to perform a treaty.

Martha Karua's intervention in the Kenyan Supreme Court Advisory opinion made what was filed as advisory opinion stealthily and inadvertently mutate into a full-blown dispute between Martha Karua and the Attorney General of Kenya. This is because the Supreme Court in its finding, bases its jurisdiction accepting to hear the advisory opinion on the original gubernatorial electoral dispute in 2017 between Martha Karua and the Independent Electoral and Boundaries Commission (IEBC). That dispute was the source of the Martha Karua EACJ dispute. It is arguably not the only dispute that forms the backdrop for the Kenyan Attorney General intention to seek from the Kenyan Supreme Court an advisory opinion that at its core was raising a general question on whether the EACJ can conduct merits-based review of decisions from the municipal courts of EAC Partner States. I argue below that this helped the Supreme Court to cleverly accept the jurisdiction to issue the advisory opinion in a case where that jurisdiction would possibly be lacking under the Constitution of Kenya, 2010.

The Supreme Court found and held that: (i) 'EACJ does not have appellate jurisdiction or merit review jurisdiction over the 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 decisions of the latter. (ii) “The Constitution envisages the Supreme Court as the final judicial authority in asserting the supremacy of the Constitution and the sovereignty of the people of Kenya would be undermined if the converse situation were to apply.” (para 74).

In this blog post, I will make two vital claims in relation to the Supreme Court’s advisory opinion decision. The first is that the Supreme Court in the advisory opinion found it has jurisdiction based on the backdrop dispute in the Martha Karua gubernatorial elections arguably because its previous advisory decisions found that advisory decisions are binding. I argue that this finding that advisory decisions are binding was erroneous and possibly led the Kenyan Supreme Court to found jurisdiction in this advisory opinion on very weak grounds. Second, I argue that the core of the supreme court’s opinion is founded on asking the wrong question i.e. what is the EACJ’s standard of review of state acts including actions of EAC Partner States judicial actions (para 65) instead of whether the EACJ has a merits review jurisdiction over municipal courts (which was the question presented to it). This question in its very nature assumes that the EACJ has merit review jurisdiction because the issue of standard of review only arises when review jurisdiction is already in place and accepted by the adjudicating court. The Supreme Court spills most of its ink in showing how the principle of margin of appreciation borrowed from the European Court of Human Rights and the principle subsidiarity apply in this case (para 65-73). There is an implicit admission in this analysis that the EACJ possesses a merits review jurisdiction. For their simply cannot be an analysis of standard of review without a merits review existing in the first place.

In my view, this invented question stated above led the Supreme Court to make the following four doctrinal errors in relation to answering the main question:

- Ignoring the important provision in Article 30(1) of the EAC Treaty.

- Mischaracterizing the place of international law within Kenya’s 2010 constitution.

- Misapplying the principles of subsidiarity and margin of appreciation (indiscriminate borrowing from European jurisprudence).

- Finding that municipal courts cannot interpret and apply international/community law.

In this blog post, due space and time limitations, I will comment extensively on the first issue and that of the Supreme Court's jurisdiction over advisory opinions and leave the rest for another post or a longer piece in the near future.

1. **Ignoring the important provisions in Article 30(1) of the EAC Treaty**.

The Kenyan Attorney General and the Court referred to the following provisions of the EAC Treaty: Article 33(2) stipulating that Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter; Article 27(1) stating that the Court shall initially have jurisdiction over the interpretation and application of this Treaty; and Article 23 establishing the EACJ as the judicial organ of the community established to ensure the adherence to law in the interpretation and application of and compliance with the Treaty. In para 64 of its judgement, the Court finds that:

> "As evidenced by the above provision [Article 27(1)], 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. This is because national courts are mandated by national laws to adjudicate claims according to national law, culture, and customs. National courts are in the same vein not vested with jurisdiction to deal with the interpretation or application of the EAC Treaty." (emphasis mine)

I am highly constrained here to accuse the Court of making up a complete finding 'out of thin air.' There is just nowhere in Article 27(1), Article 33(2), and Article 23 of the EAC Treaty from which one can reach the conclusion that "the EACJ is expressly prohibited from interpreting national laws of Partners States outside the purview of the Treaty because national laws are beyond its jurisdiction." In fact, there is a provision in the EAC Treaty and jurisprudence that could lead to the exact opposite conclusion i.e. that the EAC Treaty grants the EACJ jurisdiction to interpret and apply national laws of Partner States. That provision is Article 30(1) of the EAC Treaty. I have argued elsewhere, that Article 30(1) of the EAC Treaty grants the EACJ a merits review jurisdiction.

Article 30(1) provides that:

> "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."

The EACJ in *British American Tobacco (U) LTD v. The Attorney General of the Republic of Uganda* found that the unlawfulness ground above i.e. the ground that a resident of the Community can invoke that a Partner State's Act, regulation, directive, decision or action is unlawful grants the court jurisdiction over claims arising from an act that violates any law – international or municipal (para 30-33 of the BAT Case) (emphasis mine).

I argued in my previous work that the EACJ has one of the broadest subject matter jurisdictions an international court can have. This means that any Act, regulation, directive, or decision that is unlawful in the sense that it violates either domestic or international law by a Partner State or an institution of the Community is amenable to the EACJ's jurisdiction. The breadth of the domestic law or international law is not circumscribed in any way and thus the EACJ hears a broad swarth of cases in terms of subject matter, from international trade to human rights and any matter or question in domestic law including the constitutional review of Acts of Parliament and executive decisions [and judicial decisions]. It is therefore not surprising that the EACJ would still have judicial

review jurisdiction over this very decision i.e the Supreme Court's advisory as an act of a Partner State within the meaning of Article 30(1) and within international law principles of state responsibility.

It is therefore surprising and perhaps perturbing that the Supreme Court does not mention Article 30(1) of the EAC Treaty in its judgment not even once in the whole opinion. The Supreme Court of Kenya in this advisory opinion and the EACJ in its previous decisions have both been like the proverbial ostrich with the heads hiding in the sand with each proclaiming that the EACJ does not have appellate jurisdiction. Since Article 30(1) of the EAC Treaty grants the EACJ jurisdiction on claims of unlawfulness over both domestic and international law, it is perhaps difficult to agree with the Kenyan Supreme Court that the EACJ cannot exercise some form of merit reviews and thus appellate review of decisions from the municipal courts of the Community without their directly engaging with Article 30(1) of the EAC Treaty. To be clear, it is possible to reach the conclusion that the Supreme Court arrived at but this is only possible through an interpretation of Article 27(1), 23, 33(2) and 30(1) of the EAC Treaty read together. The Kenyan Supreme Court cannot change this by declaring it is supreme and that the Kenyan Constitution is supreme of international law including the EAC Treaty. It can only do so if and when Kenya as a Partner State of the EAC convinces the other Partner States to change, through legislative processes, the text of Article 30(1) of the EAC Treaty and consent to this change as required under international law. The Supreme Court specifically finds municipal courts cannot interpret and apply EAC law (the EACJ has partially accepted position in the Kyahurwenda decision finding that municipal courts cannot interpret EAC law but can only apply it). The Kenyan Supreme Court also finds that the EACJ cannot interpret or apply municipal law (the EACJ has not agreed with this position, which is my core argument here).

Surprisingly, the Supreme is closing the door for municipal courts interpretation and application of EAC law while doing the same interpretation and application in the same judgement. The Supreme specifically finds that municipal courts and the EACJ do not possess concurrent jurisdiction over interpreting and applying EAC law and domestic law (para 64). The issue of concurrent jurisdiction is, however, not easily solved throw a reading of Article 30(1), 27(1), and 23 of the EAC Treaty or any of the other provisions the Supreme Court relies on. This is only possible through interpreting and applying Article 34 of

the EAC Treaty on preliminary ruling/references jurisdiction. I have argued that Partner States municipal courts and the EACJ have concurrent jurisdiction to interpret and apply both municipal and international law even though the EACJ rejected this view in its Kyahurwenda decision. The rules in Article 34 of the EAC Treaty offer a communicative technology to resolve some of the issues that might arise in case of interpretation and application conflicts between municipal courts and the EACJ i.e the preliminary reference procedure. If the Kenyan Supreme Court had used this, it in deed could have crafted some questions in relation to this case and forwarded them to the EACJ Appellate Division for a preliminary reference. This would have granted both courts a perfect and inviable opportunity to communicate in ways that could easily have resolved the existing differences more favorably for both courts. But since both courts are each guarding their jurisdictional forts jealously, this procedure remains underutilized and even unknown among judges and legal practitioners within the community Partner States.

2. **'Mission-Creep' Finding on Jurisdiction of Advisory Opinions**

From its common law heritage and, according to most its existence uses and application in most international courts and tribunals, advisory opinions are not considered binding legal commitments but rather anticipatory declarations of intent, serving as a precursor to the court's prospective stance on a specific matter before it arises. Essentially, in an advisory opinion, the court is not adjudicating a dispute. There are no disputants, and therefore advisory opinions are generally considered non-binding. They are a peculiarity in judicialism generally and are considered an exception to the main rule that a judicial organ should only adjudicate or render a decision where there is an issue in controversy. The constitution of Kenya, 2010 in Article 163 (6) states that the Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning the county government. In my opinion, the Supreme Court of Kenya committed the original sin in relation to advisory opinions in the Re Interim Independent Electoral Commission [2011] eKLR where the Justices of the court held that:

> … although the proceedings were not adversarial, they, in fact, involved robust intellectual rigour, reflected in the focused, written submissions of the amici curiae, and in-depth written and oral submissions of all learned counsel. The rich content of the arguments, the illuminating authorities and contributions in scholarly journals, as well as submissions that reflected the spirit of the Constitution, were all as powerful as though the reference was adversarial in nature.…We, therefore, hold that an Advisory Opinion, in this context, is a “decision” of the Court, within the terms of Article 163(7), and is thus binding on those who bring the issue before the Court, and upon lower Courts, in the same way as other decisions. (para 97).

It was a stretch and it remains a long stretch to date that advisory opinions of the Kenyan Supreme Court are binding. Unfortunately, the Supreme Court’s stance was as unique as an odd duck. Others have described this binding nature as ‘uniquely flying off the handle of a few widely accepted international guidelines.’ I agree with Kenson Mutethia that the only method recognized under international norms to impart a "binding force" onto an advisory opinion is to classify it as a formal decision, mirroring the approach undertaken by the Supreme Court of Kenya in the Re IIEC case above. However, this characterization can only attain legal validity through explicit provisions outlined within constituent documents, thereby endowing the opinions with decisive or binding authority. Unfortunately, the text of the 2010 Constitution doesn’t do this.

In the present advisory opinion, Martha Karua had argued that the Supreme Court lacked Jurisdiction because the advisory opinion wasn’t one concerning County governments. The Supreme court carefully avoided this argument by stating that the genesis of the advisory opinion could be traced to the gubernatorial election in Kirinyaga County in 2017 (para 32). The Court further states that “even if it were to look at the matter through the narrow prism of the dispute that gave rise to the advisory opinion, as it will become more apparent in the analysis here below, it has a bearing on the county government of Kirinyaga.” So, the Court uses another ‘dispute’ that in deed concerned County governments to find that the present advisory opinion concerns counties. The indication here is that the Court does not appreciate the inherently non-adversarial nature of advisory opinions. Martha Karua

intervention and her preliminary objection grants them a perfect setting to ‘mission-creep’ in making the reference for a general advisory opinion a ‘dispute’ between Martha Karua and the Attorney General. The Court finds the EACJ Reference No. 20 of 2019 - Hon. Martha Wangari Karua vs The Attorney General of the Republic of Kenya – laid the foundation for the reference. This is only accurate in so far as the Martha Karua case is the one case that inspired the Attorney General’s request. But that ‘dispute’ does not form the substance of the request of an advisory opinion on the question whether the EACJ has merit review jurisdiction of the Kenyan Supreme Court. If the Supreme Court is correct, the consequences of its decision would be absurd. It would mean the Supreme Court would be itself re-hearing a dispute it already determined to finality and acting as an appellate court to the EACJ.

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