

EAST AFRICAN COURT OF JUSTICE: DISPUTE BETWEEN THE REPUBLIC OF UGANDA AND THE REPUBLIC OF KENYA



INTRODUCTION

On 28 December 2023, the Republic of Uganda through its Office of the Attorney General, instituted an action against the Republic of Kenya at the First Instance Division of the East African Court of Justice.

BACKGROUND

The Republic of Uganda (which is a landlocked country) was reportedly importing approximately 90% of its refined petroleum products through Kenya's port of Mombasa. Transportation of the refined products is through a pipeline system owned and operated by a Kenyan government-owned company, Kenyan Pipeline Company Limited (KPC). The importation and supply of refined petroleum products into Uganda was initially executed by Oil Marketing Companies (OMCs) operating in Kenya through the Kenya Open Tender System, and later inter-government arrangements between Kenya and foreign governments. The OMCs operating in Kenya would in turn sell the same products to Uganda's OMCs. In an effort to discharge itself from supply vulnerabilities, the Ugandan Government adopted a new policy that resulted in the Ugandan government-owned company, Uganda National Oil Company (UNOC) becoming the sole authorised entity charged with the responsibility of sourcing, importing and supplying petroleum products for the Ugandan market.

To give effect to this new policy, the UNOC was obligated to fulfil some regulatory conditions prescribed by the Kenyan government. The conditions are the acquisition of an Import, Export and Wholesale of Petroleum Products (except LNG) Licence as well as the incorporation of a subsidiary/branch of UNOC as a company in Kenya. The Ugandan government reluctantly complied with the mandatory requirement of incorporating a subsidiary/branch of UNOC as a company in Kenya but faced difficulties in acquiring the licence.

Amidst revised correspondence that transpired between the respective Energy Ministers of both states toward a waiver of some of the licence requirements to the benefit of the Ugandan government; a Kenya High Court on 7 November 2023 gave an order restraining the Kenyan Energy and Petroleum Regulatory Authority (EPRA) from issuing the licence to UNOC and extended this order twice. This in effect, triggered the legal dispute and prompted Uganda to seek intervention from the regional court against the Kenyan government in an ongoing suit, aiming to compel Kenya to issue the necessary authorisation.

Uganda asserts that in April 2023, Kenya failed to meet its commitment to support Uganda's direct importation of fuel.

The dispute is premised on the requirements imposed by Kenya's Ministry of Energy and the EPRA, which UNOC found to be unnecessarily arduous given that the petroleum products in question are transit goods solely passing through Kenya and not intended for destination within Kenya but rather for Uganda.

LEGAL BASIS

In support of its case before the East African Court of Justice, the Attorney General of the Republic of Uganda contends that Kenya's actions contravene several crucial articles of the Treaty for the Establishment of the East African Community (these include, Articles 5, 6, 7, 8, 76, 89, and 93 of the Treaty, emphasising cooperation, peaceful coexistence, good governance and the establishment of a common market), the Protocol on the Establishment of the East African Community Common Market and Section 125 of the United Nations Convention on the Law of the Sea.



KEY PRINCIPLES THAT UNDERGIRD UGANDA'S COMPLAINTS

- i. **Cooperation and Mutual Benefit:**¹The Treaty envisages cooperation among Partner States in various fields for mutual benefit. Uganda believes that Kenya's denial of a licence hinders the attainment of sustainable growth and development, a core principle under the Treaty.²
- ii. **Peaceful Coexistence and Good Governance:**³ Peaceful coexistence, good governance, and cooperation for mutual benefit are some of the foundational principles of the Treaty that Uganda asserts that Kenya's actions go against.

¹ Article 5 Treaty for the Establishment of the East African Community.

² Article 5(3)(a)(b) and (h) Treaty for the Establishment of the East African Community.

³ Article 6 Treaty for the Establishment of the East African Community.

- iii. **People-Centred Cooperation:**⁴ People-centred and market-driven cooperation are crucial to the sustained operation of the EAC, and Uganda claims that Kenya's decision hinders the provision of an adequate enabling environment, impacting the practical achievement of community objectives.
- iv. **Planning for Economic Development:**⁵ At the core of any Regional Economic Community (REC) is economic development, and the adoption of harmonious policies. Hence, Uganda asserts that Kenya's requirements for the licence are jeopardising the achievement of community objectives, especially in the establishment of a common market.
- v. **Coordinated Transport and Communication Policies:**⁶ The Kenyan government, by implication of its actions, is countering the coordinated, harmonized, and complimentary transport and communication policies guaranteed by the Treaty.
- vi. **Maritime Transport Cooperation:**⁷ Partner States to the Treaty are obligated to rationally leverage port installations and cooperation in maritime transport for the integrated benefit of Partner States. Contextually, Uganda believes that Kenya should grant easy access to port facilities, especially for land-locked Partner States.
- vii. **Transparency:**⁸ Partner States are required to install effective measures to guarantee transparency when dealing with Partner States.⁹ Uganda stresses the importance of transparency in matters concerning Partner States.
- viii. **Common Market Objectives:**¹⁰ Partner States to the Protocol are required to accelerate economic growth through the free movement of goods, persons, and labour. To this end, Uganda maintains that Kenya's actions hinder the realization of these objectives.
- ix. **Non-Discrimination in Services:**¹¹ The Protocol safeguards the non-discrimination principle in treating services and service suppliers. Relatedly, Uganda claims that Kenya's actions fall short of this principle as enshrined under the Protocol.
- x. **Coordinated Transport Policies:**¹² The Partner States are obligated to establish the soft infrastructure of policies for the effective coordination of transport within the regional community. Uganda feels that Kenya is not forthcoming on this obligation because pipelines are included in the means of transportation.
- xi. **Honouring Commitments:**¹³ Uganda asserts that under the Treaty, Partner States are obligated to honour their commitments to other multinational and international organizations, raising questions about the implications of Kenya's denial of existing commitments.

⁴ Article 7 Treaty for the Establishment of the East African Community.

⁵ Article 8 Treaty for the Establishment of the East African Community.

⁶ Article 89(b), Treaty for the Establishment of the East African Community.

⁷ Article 93, Treaty for the Establishment of the East African Community.

⁸ Article 3 Protocol on the Establishment of the East African Community Common Market.

⁹ Article 3(2)(e), Protocol on the Establishment of the East African Community Common Market.

¹⁰ Articles 4 and 5 Protocol on the Establishment of the East African Community Common Market.

¹¹ Articles 18 Protocol on the Establishment of the East African Community Common Market.

¹² Article 38 Protocol on the Establishment of the East African Community Common Market.

¹³ Article 130 Treaty for the Establishment of the East African Community.

- xii. **Land-Locked States' Rights:**¹⁴ Uganda invokes the provisions of the United Nations Conventions on the Law of the Sea (UNCLOS), highlighting land-locked states' right of access to and from the sea. The terms for exercising freedom of transit are to be agreed upon through bilateral or regional agreements, a crucial aspect of the ongoing dispute.
- xiii. **Responsibility of State:**¹⁵ Uganda is relying on the Draft Articles on Responsibility of State for Internationally Wrongful Act, 2001 which, emphasises that the conduct of any State organ, regardless of its function, is considered an act of the state under international law. To this end, Uganda contends that Kenya is responsible for the actions of the Kenyan High Court issuing the conservation order restraining EPRA from issuing the required licence.

CONCLUSION

The International law principle of jus cogens¹⁶ is at the heart of this case, and it underscores the complexity of regional agreements and trade partnerships and raises questions about State compliance with international obligations. Furthermore, the East African Regional Economic Community is the most integrated REC on the African continent and arguably represents a befitting prelude of what the Africa Continental Free Trade Area (AfCFTA) intends to achieve at scale. The developments and outcome of this case will be instrumental in the development of international law within Africa and provide much-welcome guidance for the operationalisation of the AfCFTA Agreement.

¹⁴ Article 125 United Nations Convention on the Law of the Sea (UNCLOS).

¹⁵ Article 4 International Law, Draft Articles on Responsibility of State for Internationally Wrongful Act, 2001.

¹⁶ Latin for “compelling law”, and refers to the category of norms that govern customary international law.