PROSPECTS OF STABLE INTEGRATION IN THE EAST AFRICA COMMUNITY: THE KENYAN PERSPECTIVE

Tom Ngeri

1. Introduction

The Treaty for the Establishment of the East African Community, 1999 (hereinafter “the Treaty”) which is the constitutive legal document for the East African Community (“the EAC”) sets out ornate Objectives that the EAC seeks to progressively achieve. The Objectives are, firstly, to establish a Customs Union; secondly, a Common Market; subsequently, a Monetary Union; and ultimately, a Political Federation. Any other objective, therefore, should be deemed to be flowing either directly or indirectly from these Objectives. It is only along these Objectives that the prospects of a stable integration in the EAC can be analyzed without veering off from the domain of the Treaty. In other words, what is the likelihood that these Objectives are being or will ever be realized?

By analyzing the Kenyan perspective, this Paper looks at prospects of a deeper integration in the EAC. Kenya, as one of the (original) Partner States, has been at the forefront in implementing the Treaty as well as the Community Laws from its inception thereby offering a good starting point in considering this topic. It is worth noting, however, that all the Partner States have an obligation to implement the Treaty in pursuance with the doctrine of Pacta Sunt Servanda.

This Paper begins by discussing, in general terms, the status of the EAC integration to date. The second segment focuses on the Kenyan perspective by looking into among other issues: firstly, the Constitutional basis for regional integration in Kenya; the Kenyan Government Policy with respect to regional integration; the implication of the Kenyan Big Four Agenda with respect to the EAC integration; and the role of public awareness of the EAC integration in Kenya. The last part deals with the conclusions and recommendations.

1 Tom holds an LL.M. Degree from the University of Dar es Salaam with a strong bias in Regional Integration & East African Community Law. He is currently teaching EAC Laws at the Catholic University of Eastern Africa where he also serves as the Head of Department of Private Law. Besides academics, Tom practices Law at the Law Firm of Ngeri Omiti & Bush Advocates LLP, where he is the Senior Partner. The peer reviews and contributions by Collins Bush Wanjala, Herman Omiti, Amina Mohamed, Job Titus and Emma Ngeri are highly acknowledged and appreciated.

2 This Paper was delivered on September 26, 2018 during a Conference organized by the Tanzanian-German Centre for Eastern Africa Legal Studies (TGCL) to celebrate Ten Years of the existence of TGCL at Ramada Resort, Dar es Salaam. The theme of the Conference was “TGCL Alumni Perspectives on the Challenges and Opportunities of Regional Integration in East Africa.”


4 See Art. 8 as read together with Art. 16 of the Treaty.
2. The Current Status of EAC Integration

Even though the EAC integration has not always been a smooth ride,\(^6\) it can be argued that the current EAC has disapproved many cynics and stood the test of time. On November 30, 2018, the EAC will be celebrating Nineteen (19) years since the Treaty was promulgated.\(^7\) This is by no means a mean achievement considering that the first attempt to establish the EAC collapsed barely ten years later.\(^8\) Far from the fears that portended doom from the onset for the first EAC,\(^9\) one cannot legally and realistically say that the current EAC is headed nowhere. Painting the gloomy picture for the first EAC bequeathed by the colonial legacy, Prof. Kamanga, notes:

However, the colonial policies and practices were essentially propelled by the dual goals of subjugation and exploitation, and were inherently discriminatory and unequal. It would have been extra-ordinary for the colonial integration model to redress social, economic, let alone political inequities, let alone promote a people-centered mechanism for integration. Indeed, in nearly all the studies on this form of integration, the unequivocal verdict was that there was glaring inequity in distribution of benefits among Member States.\(^10\)

On the contrary, the current EAC has been found to stand out in “sharp, admirable contrast” to other African Regional Economic Communities such as Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA) thereby making the EAC to be comparable only to the European Union (EU).\(^11\) This perhaps would explain why from the original three Partner States, the EAC today brags of a solid six Partner States with the recent accession of South Sudan to the Treaty.\(^12\) There are rumors that the Democratic Republic of Congo could apply to join the block\(^13\) after Sudan’s application was rejected largely for failing the test of “geographical proximity to and inter-dependence between it and the Partner States.”\(^14\)

In terms of the Objectives, the EAC became a Customs Union in 2005 following the enactment of the Protocol for the Establishment of the East African Community Customs Union in 2005. In 2010, the EAC became a Common Market pursuant to the Protocol for the Establishment of the East African Community Common Market in 2010 and currently, there are ongoing discussions regarding the implementation of the East African Monetary Union after the signing of the Protocol for the Establishment of the East African

---

\(^6\) For instance, in 1977, the first EAC collapsed due to irreconcilable socio-political and economic differences.

\(^7\) The Treaty for Establishment of the East African Community came into force on November 30, 1999 when Presidents Daniel Toroitich arap Moi (for Kenya), Benjamin William Mkapa (for the United Republic of Tanzania) and Yoweri Kaguta Museveni (for Uganda) signed it at Arusha, Tanzania.

\(^8\) The first EAC existed between 1967-1977.


\(^11\) Supra, n.10.

\(^12\) Besides original Partner States of Kenya, Uganda and Tanzania, the EAC was later joined by Rwanda and Burundi in the year 2007. South Sudan joined in April, 2016 after gaining its Independence on July 9, 2011.


\(^14\) Art. 3 (d).
Community Monetary Union on November 30, 2013. This means that the only pending phase is political federation which is also under discussion as to the nature thereof.

Moreover, the EAC has seen peaceful succession in its Organs from its inception. For example, there have been four circles of the East African Legislative Assembly; there have been five Secretaries-General from at least five Partner States; in the East African Court of Justice, there have been a number of judges from the various Partner States at different times with vacancies being amicably filled by the concerned Partner States; and, with the exception of Uganda, the original Partner States have seen at least two different Presidents who sit on the Summit which is the highest decision making Organ in the EAC. The peaceful succession witnessed in each of these Organs is a powerful testament to the growing stability of the EAC integration process. It confirms that the EAC has been able to outlive individuals and is increasingly getting to appreciate the roles played by its Organs and Institutions.

However, this does not mean that EAC has been without its fair share of challenges, nay. There have been a number of challenges that have hindered a faster integration ranging from but not limited to poor and imbalanced infrastructure, weak national currencies and financial systems, poorly harmonized (regional and national) policies, delayed decision-making on critical areas such as political federation among others. But the challenges notwithstanding, the EAC has made tremendous and steady progress giving the optimism for a deeper integration in the days to come.

3. **Prospects of a Deeper EAC Integration from the Kenyan Perspective**

Beyond the general assessment of the prospects of a deeper integration at the EAC level, attention must quickly turn, microscopically, to the situation at the Partner States’ level. This is because, the Partner States, as the Contracting Parties to the Treaty, have the ultimate, onerous responsibility of implementing the Treaty. In order to do this, they (Partner States) are required to perform their obligations as a matter of good faith thereby giving credibility to international law. The question thus is: from the Kenyan perspective, are there prospects of a deeper EAC Integration?

---

15 These include, in order of time in office, Ambassador Francis Muthaura (Kenya), Amanya Mushega (Uganda), Ambassador Juma Mwapachu (Tanzania), Richard Sezibera (Rwanda) and the current one, Liberat Mfumukeko (Burundi).


17 Article 8 (1) provides:
1. The Partner States shall:
   (a) plan and direct their policies and resources with a view to creating conditions favorable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;
   (b) co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and
   (c) abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty.

18 Supra, n.10.
The Constitutional Basis for EAC Regional Integration in Kenya

The Constitution of Kenya, 2010, though the most recent in the EAC, curiously makes no reference at all to the EAC integration process. This is unlike, for instance, the Federal Republic of Germany, which makes a generous provision for the European Union (and its Laws) in the Basic Law. One would have expected that as a sign of its commitment to the ideals of the EAC, Kenya would have been bold enough to acknowledge, explicitly, the EAC and its Treaty in the Supreme Law of the Land in order to lay to rest the ghosts of Okunda –v- Republic which justifiably glorified the Constitution over the EAC Laws.

To its credit though, Kenya made an effort to insert Article 2 (6) in the Constitution with the effect that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” This provision is revolutionary considering that in no other Partner States’ Constitutions would you find a similar or better provision making Kenya to be ahead of the pack. The Kenyan Court of Appeal has pronounced itself on Article 2 (6) and, without mincing words, declared Kenya to be a monist State thereby achieving something Kenyans were shy to expressly state when they voted in the Referendum on August 4, 2010. In Karen Njeri Kandie –v- Alssane Ba & Another, the Court held:

There can be no doubt therefore that by constitutional fiat, Kenya converted itself from a dualist country to a monist one with the effect that a treaty or convention once ratified is adopted or automatically incorporated into our laws without the necessity of a domesticating statute.

While clarifying that the legislative mandate of Parliament at the national level at Article 94 (1) of the Constitution is enhanced by the enactment of the Treaty Making and Ratification Act, the Court asserted that Article 2 (6) is timeless hence can be stretched as far back as November 30, 1999 when Kenya became a Partner State to the Treaty. In its own words, the Court held:

We think it is…Starting from the constitutional text itself, it will be noted that there is no cut-off point; it only states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya. The text does not of itself contain a futuristic imperative. Nor does it directly or by implication suggest that such instruments as have been previously ratified are not part of the law of Kenya. We have at any rate made reference to the decisions of this Court that already accepted the applicability of international law within our jurisdiction.

The upshot of the foregoing is that by dint of Article 2 (6) of the Constitution, as fortified by the prevailing jurisprudence, the Treaty became part of the laws of Kenya and so did the Protocols. Similarly, any other Protocol that Kenya will enter into regarding the EAC integration process, will have a safe haven because of this Constitutional guarantee. For this reason, going by the avalanche of public interest constitutional

---

19 Art. 23 (1) of the German Basic Law.
20 (1970)KLR.
21 It is to be noted that even the united Republic of Tanzania that is currently in the process of Constitution-making is loudly silent on the question of the EAC integration process.
22 (2015)eKLR.
23 Ouko JA, Kiage JA and M’Inoti JA.
24 No.45 of 2012.
25 Supra, n. 22.
litigations in Kenya under the new Constitutional dispensation, it can be said that Kenyans will start enforcing directly the Treaty and the Protocols within the Kenyan courts since they form part of the Kenyan legal corpus. Certainly, there be no better way to imagine of greater prospects of a deeper EAC integration than when the citizens themselves start pursuing the EAC courses. That will be a quiet revolution from the bottom-up and the politicians will be forced to catch up with the ordinary mwananchi.

3.2. The Kenyan Government Policy on (EAC) Regional Integration

There is a strong economic argument that States join integration schemes to pursue certain national (economic) interests. Some have argued that Kenya, in particular, joined the EAC for economic growth and development. The main drive for Kenya to join the EAC stems from the need for a larger regional market for its goods and products with the resultant benefit of uplifting the standards of living for its people.

The argument continues that regional integration is a way to survive in the contemporary globalization era where small national economies like the ones in East Africa may not effectively compete in the prevailing atmosphere of ‘near cut-throat competition.’ Thus, the fear of Kenya being swallowed if it seeks integration into the global economy individually has compelled it to seek integration into the global economy through EAC.

Kenya, therefore, sees the EAC integration not as a threat to its sovereignty or loss of employment to its people but rather as a much needed opportunity for economic development. In his Second Inaugural Address, the current Kenyan President, Uhuru Kenyatta, underscored his Government’s Policy towards Africans and East Africans, in particular. In a speech that was lauded as integrationist-leaning, President Uhuru directed that any African visiting Kenya would be eligible to receive visa at the port of entry, without the expectation of reciprocity from Kenya’s counterparts in the Continent. The President went further to decry “the political balkanization that risks our mutual security, the negative politics of identity” and promised that those negativities “will recede as our brotherhood expands to embrace more Africans.”

Turning his focus to the EAC, and in a discernible personal, sympathetic tone, President Uhuru remarked:

93. Finally, to our Brothers and Sisters in the East African Community, you are our closest friends; our fate and yours are joined at the hip; our troubles and triumphs are yours, and yours are ours. I will work with you, my brothers, the leaders of the East African Community, to bring a renewed energy and optimism to our union. Together, we can deliver the peace and prosperity for which our citizens are crying out; divided, we will struggle to realize the full potential of our people.

26 For instance, Kenyan activist, Okiya Omtatah has earned accolades for his notorious public interest constitutional petitions.
28 ibid
30 ibid.
94. As a mark of our continued commitment to you, our Brothers and Sisters in the East African Community; from today, you will be treated like Kenyans. Like your Kenyan brothers and sisters, you will need only your identity card. You can now work, do business; own property, farm and if you wish, and find a willing partner, you can marry and settle in Kenya. And this commitment we make with no conditions for reciprocity but driven by our desire for deeper regional integration. As I welcome you I remind you that equally you shall be subject to the same rules and laws as your Kenyan brothers and sisters.

While these pronouncements may pass for nothing more than high-sounding political rhetoric, one cannot fail to see a clear political will from one of the Heads of States in the EAC Summit. As a matter of fact, “lack of strong political will” was among the main reasons that led the premature collapse of the first EAC.\(^{31}\) Therefore, if such bold statements can be given from the top leadership of a Partner State, in spite of being done under political influence, may suggest that the EAC is ready for a deeper integration and should be celebrated instead. In any case, assuming the Kenyan Government follows these pronouncements by the passage of appropriate laws and implementing the Treaty, Protocols and applicable Community Laws, then there would be a huge positive impact on Customs Union, Common Market, Monetary Union and, of course, Political Federation.

As a further demonstration of the Kenyan Government Policy on regional integration, Kenya became among the first countries to sign the African Continental Free Trade Area (AfCFTA) Agreement which seeks to create a one African Common Market as part of the Agenda 2063 of the African Union.\(^{32}\) Immediately thereafter, Kenyan Parliament ratified the AfCFTA and Kenya became the first country to deposit the Ratification Instruments at the African Union Commission. In the EAC, only the United Republic of Tanzania and Burundi did not sign the AfCFTA.

It can safely be concluded that the aggressive push by the Kenyan Government on the issues of regional integration has given monumental impetus to the EAC integration. If these measures and actions are sustained – by adhering to the rule of law – then the prospects of a deeper EAC integration, and indeed the African Continent integration looks more promising.

3.3. **The Implications of the Kenyan Big Four Agenda on the EAC Integration**

The Kenyan Government is currently implementing an ambitious project known as the Big Four Agenda. These are Manufacturing, Universal Health Care, Affordable Housing and Food Security. There have been deliberate efforts to ensure that all Government agencies and departments align their priorities with the Big Four Agenda and the Government has gone on an overdrive to court potential donors, partners and investors in helping it realize this grand vision. The Kenyan Big Four Agenda dovetails with the Sustainable

\(^{31}\) See the Preamble to the Treaty. Other reasons include lack of strong participation of the private sector and civil society in the co-operation activities, the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development and lack of adequate policies to address that situation.

\(^{32}\) The signing took place at Kigali in Rwanda during the 10th Extra-Ordinary Session of the Assembly on the Launch of the African Continental Free Trade Area. On the same day, forty-four (44) African countries, Kenya included, signed the historic trade deal. Disappointingly, Africa’s largest economies – South Africa and Nigeria – withheld from the deal. For more, see [https://au.int/en/pressreleases/20180321/list-african-countries-signed-establishment-african-continental-free-trade](https://au.int/en/pressreleases/20180321/list-african-countries-signed-establishment-african-continental-free-trade) (accessed on September 24, 2018 at 1813 hours).
Development Goals, 2015 ("the SDG’s") and have been hailed as a step in the right direction towards alleviating poverty, improving living standards and reducing unemployment.\textsuperscript{33}

A careful reading of the Treaty reveals that the Kenyan Big Four Agenda actually exist in the Treaty in one form or the other as areas of co-operation. For instance, some of the relevant chapters include, Chapter Twelve (Co-operation in Investment and Industrial Development); Chapter Thirteen (Co-operation in Standardization, Quality Assurance, Metrology and Testing); Chapter Eighteen (Agriculture and Food Security); Chapter Twenty-One (Health, Social and Cultural Activities). All these are for ensuring “the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development within the Partner States and which would in turn, raise the standard of living and improve the quality of life of their populations.”\textsuperscript{34}

Kenya’s implementation of the Big Four Agenda necessarily bolsters the EAC integration agenda in that they are akin to implementing the Treaty. Besides, they inevitably place Kenya as a hub for investment by individuals and companies from across the EAC. There is no doubt that this is a viable area of deeper integration in the region in the following manner: firstly, the other Partner states can collaborate with Kenya in expanding the manufacturing sector and focus on reducing the importation of cheap products from developed economies that may benefit local consumers but induce long-term challenges. Secondly, by ensuring universal health care and food security, the EAC citizens will have a healthier and more productive population that can turn around the economies in the EAC. Thirdly, affordable housing will go a long way in addressing long standing social security issues which have bogged the EAC for as long as it has been in existence.

Suffice it to say that the Kenyan Big Four Agenda avails several opportunities for a deeper EAC integration. This is not only by opening Kenya to for investment opportunities by the other Partner States but also by ensuring structured collaborative efforts in ensuring that the Big Four Agenda are implemented across the EAC. As has been demonstrated herein before, implementing the Big Four Agenda amplifies not just the Treaty but also the SDG’s.

\textbf{3.4. The Role of Public Awareness of the EAC Integration in Kenya}

One of the cardinal Operational Principles of the EAC is “a people-centered and market-driven co-operation.”\textsuperscript{35} In other words, in the running of the affairs of the EAC, there is the expectation that the people will be at the heart of everything. This further explains why the Principle of Subsidiarity\textsuperscript{36} is also captured as another Operational Principle of the EAC. The Principle of Subsidiarity is defined to mean “the principle which emphasizes multi-level participation of a wide range of participants in the process economic integration.”\textsuperscript{37}

\textsuperscript{33} In a series of informative newspaper articles on February 26, 27, 28 and 29 of 2018, one of the Kenyan scholars, Prof. Bitange Ndemo argued that the Big Four Agenda are transformational and will help re-engineer the Kenyan society. Available at https://www.nation.co.ke/oped/blogs/dot9/ndemo/2274486-4323102-6lt9alz/index.html (accessed on September 24, 2018, 2018 at 1848 hours).
\textsuperscript{34} Art. 5 (3) (b).
\textsuperscript{35} Art. 7 (1) (a)
\textsuperscript{36} Art. 7 (1) (d).
\textsuperscript{37} Art. 1.
It needs to be recalled that among the very first cases to be filed at the East African Court of Justice (EACJ) was filed by a group of Kenyans led by Prof. Peter Anyang Nyong'o and, predictably, it was on the question of the election of the members of the East African Legislative Assembly (EALA). *Prof Peter Anyang' Nyong'o & 10 Others –v- The Attorney General of Kenya & 2 Others* has since become a *locus classicus* in the EAC after a daring finding that the impugned election of the Kenyan EALA Members and the attendant Rules were in contravention of Article 50 of the Treaty. This case confirmed an early awareness of the Kenyan public about the Treaty and the corresponding obligations of the Partner States to the EAC. This awareness has continued and has spread across the EAC with many other References coming from across all the Partner States touching on the Treaty provisions.

Through the Ministry of East African Community and Regional Development, the Kenyan Government has carried out sensitization campaigns to various segments of the population. Among these initiatives have been workshops and seminars targeting various stakeholders in the EAC integration process. The Ministry officials have also appeared on national and vernacular radio and television with the sole purpose of educating the masses about the EAC integration process. Although empirical research is yet to show the impact of these efforts, it is reasonable to conclude that today, more Kenyans are aware about the EAC than before. This awareness was more apparent during the stand-off on the election of Kenyan EALA Members to the Fourth EALA late 2017 which generated so much debate in the National Assembly. It was refreshing to listen to Kenyans put their leaders to task over Article 50 of the Treaty.

Furthermore, a spot-check of the curriculum taught in a number of public and private Universities in Kenya reveals that East African Community Law is offered as a Course for learners. The interest for regional integration and East African Community Laws is so intense in some Universities like the Catholic University of Eastern Africa where there is a fully fledged department for the same. The subject is also spread across the learning periods from the First Year of study because it is regarded as the University’s niche area. There is also a separate Institute for Regional Integration solely dedicated to training post-graduate students. These efforts have the ultimate effect of churning out a generation that is more informed about EAC integration and therefore enhancing the probability of their (active) involvement in the affairs of the EAC.

These combined efforts by the Government through the line Ministry, increased political debates and sensitization on the EAC integration, academic training on the subject are vital ingredients deepening the EAC integration. On this basis, one can clearly see (real) prospects of a deeper integration in the EAC.

---

38 EACJ Reference Number 1 of 2006.
39 The author attended the 1st East African Community Round table on “Setting the Agenda in the East African Community Integration Process” organized by the State Department of East African Affairs held at the Laico Regency Hotel in Nairobi on May 31, 2016. He also attended a Seminar on the East African Community Integration Process and the East African Community Legislation enacted under the EAC Treaty organized by the Law Society of Kenya in conjunction with the State Department of East African Affairs held at the Kisumu Hotel in Kisumu between May 19 & 20, 2016.
40 The main point of contention was that a number of Political Parties in Kenya had nominated persons who were related to the various political leaders thereby discarding the clear terms of Art. 50 of the Treaty. Art. 50 does not limit the persons that any National Assembly can elect to EALA to “the various political parties represented in the National Assembly” but rather extends it to “shades of opinion, gender and other special interest groups in that Partner States.”
41 The Curricula for Catholic University of Eastern Africa, the University of Nairobi, Kenyatta University, Moi University, Kabarak University were sampled.
42 See Art 8 (3) (a).
4. Conclusions and Recommendations

This Paper began by identifying the Objectives of the EAC as that is the sure test of knowing whether there are any prospects of a deeper EAC integration. It has been demonstrated that, indeed, the EAC has taken practical steps in realizing its Objectives and it is commendable that its membership is enlarging. Its best bet lies in faithful implementation and adherence to the Treaty, the Protocols as well as the Community Laws by all the Partner States.

By using Kenya as a case study, the Paper has confirmed that Kenya has a Constitutional basis upon which it can articulate issues of the EAC regional integration. However, it has also been pointed out that it will take an aggressive citizenry and judicial activism by the courts to entrench the EAC integration within the Kenyan society.

Further, the study has revealed that there exists the much needed political will from the top echelons of the Kenyan Government. If well harnessed, this has the most singular ability of making the EAC integration a faster reality. But beyond the political pronouncement, a strong case has been made for ensuring a solid legal back-up to ensure that the political goodwill does not waste away at the behest of politicians. It is recommended that the rule of law must be the fulcrum upon which the EAC integration should oscillate because in its absence there will be anarchy, violation of human rights and political opportunism.

In addition, the ambitious implementation of the Big Four Agenda by the Kenyan Government, has been identified as carrying so much potential not just for Kenya but for the other Partner States. However, if parochial national interests are allowed to cloud the bigger picture of achieving better living standards and economic prosperity for the people of the EAC, then these will remain as mere aspirations with nothing tangible in the end. Besides, Kenya and the other EAC Partner States must ward off corruption from undermining the delivery of the Big Four Agenda. To this end, it is recommended that the Sectoral Committee on Preventing and Combating Corruption established by the EAC should collaborate with the National Anti-Corruption Agencies to fight the cancer of corruption which is quite prevalent in the region.

Finally, the study has revealed that from the early days, Kenyans have been aware about the EAC integration and have used their knowledge to develop jurisprudence across the region. This awareness has increased in the recent years considering the efforts by the Ministry of East African Community and Regional Development, the Kenyan political class through Parliament and in the academia through the teaching of East African Community Laws in both public and private universities. Needless to say, there can never be enough creation of public awareness hence the need to increase and continue doing so.