# A False Promise? The Right of Establishment for East Africa Community Legal Persons

Priscah Nyotah,† Edwin Abuya†† &
Francis Situma†††

The right of establishment (ROE) is fundamental in any regional block. Under this right, community citizens and firms (rights holders) are entitled to leave their countries and establish commercial ventures, on a self-employed basis, in the territory of other partner states. This article focuses on the East African Community (EAC). Pursuant to the East African Community Treaty, host countries are required to accord rights holders the same treatment they grant their nationals. The paper reviews the extent to which rights holders coming into Kenya enjoy the ROE. This subject has not attracted much scholarly attention. The article, the first in the series, seeks to plug this gap in the literature by drawing on theoretical and practical perspectives on the enjoyment of the ROE. While drawing on empirical data, the paper highlights the challenges, which rights holders face. It also explores ways of surmounting these barriers. In conclusion, the piece contends that stakeholders need to "join hands" in order to ensure that all rights holders enjoy the promises in the books.

They are all foreign legal persons.[1]

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† Doctoral candidate, University of Nairobi Faculty of Law.

†† Professor, University of Nairobi Faculty of Law (corresponding author edwina@uonbi.ac.ke). I dedicate this Article to my mother, Abigael Omolo Abuya—Nind gi kwe Nyarsare.

††† Professor, University of Nairobi Faculty of Law.

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1. Interview with Faraja, official of Kenya's Business Registration Service, Nairobi, 4 March, 2022.

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## Introduction

The East African Community (EAC) was established in July 2000 by the *Treaty for the Establishment of the East African Community* (EAC Treaty).[2] Its underlying objective was to "develop policies and programmes" geared towards "widening and deepening co-operation among the Partner States" in their commercial affairs.[3] In order to promote economic development at the regional and domestic levels, the partner states (PSs) undertook to establish, among other institutions, a common market.[4] According to the preamble of the EAC Treaty, the objective of the common market was the "realisation of accelerated economic growth and development through the attainment of . . . the rights of establishment and residence . . ."[5] To operationalize this commercial agenda, the PSs promulgated the *Protocol on the Establishment of the East African Community Common Market* (CMP) in November 2009.[6] Similar to the EAC Treaty, the CMP provides for the ROE. Under the CMP, the PSs agreed to guarantee the ROE to EAC rights holders "who are within their territories."[7] As a "fundamental"[8] entitlement, rights holders are entitled to leave their home states and "pursue"[9] legitimate economic enterprises,[10] on a self-employed basis, in the territory of another PS. Article 13(3)(a) of the CMP fleshes out the material content of the ROE. Under the terms of this provision:

> "a national of a [PS is entitled] to:
>
> (i) take up and pursue economic activities as a self employed person; and
>
> (ii) set up and manage economic undertakings,
>
> in the territory of another [PS]."[11]

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2. Treaty for the Establishment of the East African Community article 2(1), Nov. 30, 1999, 2144 U.N.T.S 255 [hereinafter *EAC Treaty*] (providing "the Contracting Parties establish among themselves an East African Community").
3. *Id.* at article 5(1).
4. *Id.* at articles 2(2) and 5(2).
5. EAC Treaty, *supra* note 2, at preamble.
6. *Protocol on the Establishment of the East African Community Common Market*, Done at Arusha on 20 November 2009 [hereinafter *CMP*].
7. Article 13(1).
8. Case 81/87, The Queen v. H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC, 1988 E.C.R 05483 ¶ 15.
9. Case 221/85 Commission of the European Communities v. Kingdom of Belgium, 1987 E.C.R 00719 ¶ 10.
10. *See* CMP, *supra* note 6, at article 1 (defining "economic activity" as "any legitimate income generating activity"). *See also* Hans Smit And Peter Herzog, The Law Of The European Economic Community: A Commentary On The Eec Treaty (1976), 2-538 (contending the ROE covers "all sectors of economic life: industry, commerce, finance, agriculture, public works, crafts, and the professions").
11. CMP, *supra* note 6, at article 13(3)(a).

Notably, the nationals of a host state cannot invoke this right. According to Article 1 of the CMP, a self-employed person is an individual "engaged in an economic activity not under any contract of employment or supervision and who earns a living through this activity."[12]

Article 17 of the CMP requires PSs to accord rights holders the same treatment as nationals of that PS.[13] Hence, rights holders are entitled to reside, establish, and operate in other PSs' branches, subsidiaries, or agencies of their commercial enterprises without any restrictions,[14] subject to the same conditions as those applicable to nationals of the host PS. The ROE accrues to one because they are nationals of a PS. Hence, they need not be residing within the EAC to benefit from this entitlement. As a precondition for the enjoyment of the ROE, companies and firms must be incorporated in a PS.[15] The underlying reason for the formation of a commercial enterprise is also immaterial. So, too, are the reasons why a company or a firm[16] is incorporated in a particular PS. The key factor is that a commercial enterprise is incorporated in a particular PS "in the same way as does nationality in the case of a natural person."[17] Unlike other fundamental rights and freedoms, which tend to be personal, the reach of this right is rather wide. In addition to the individual rights holder, this entitlement extends to their family (spouse, child and any dependent).[18] Notably excluded from the scope of this right are not-for-profit legal entities.[19] The rationale for this rule appears to lie on the assertion that, unlike commercial enterprises, these entities are deemed not to engage in "economic activities" on a self-employed basis and run "economic undertakings" in PSs.[20]

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12. *See also* The Employment Act (2012) Cap. 226 § 2 (Kenya) (defining "employee" as "a person employed [by an employer] for wages or a salary").

13. A similar standard exists in other regional blocks. *See, e.g.,* Case C-250/95 Futura Paticipations SA, Singer v. Administration des Contributions, 1997 E.C.R 2492 ¶ 24 (noting that the freedom of establishment requires firms or companies to be "treated in the same way as a natural person who is a national of a [Partner] State "[PS]", where that company or firm wishes to establish a branch in a PS different from that in which it has its seat."

14. CMP, *supra* note 6, at article 13 (11) (b). This is often referred to as the right of secondary establishment. For a wider discussion of this theme, *see* Anne Looijestijn-Clearie, *Have the Dikes Collapsed? Inspire Art a Further Breakthrough in the Freedom of Establishment of Companies?*, 5 European Business Organization L. Rev. 389, 404-08 (2004).

15. *See* British American Tobacco (U) Limited v. Attorney General of Uganda BAT (U) Ltd, EACJ Reference No. 7 of 2017, delivered 26 March 2019.

16. These terms refer to business entities incorporated or registered as a company or firm, respectively, under the respective laws of a Partner State. *See* CMP, *supra* note 6, at article 1.

17. Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd, 2003 E.C.R. I-10195 at para 97.

18. CMP, *supra* note 6, at article 13(4). According to the CMP in article 1, '"child" means "a son or daughter of a worker or self-employed person under the age of eighteen years, who is a citizen," while a "dependent" is "a son or daughter of a worker or a self-employed person who has attained the age of eighteen years, the mother, the father, a sister or a brother of a worker or a self-employed person who is wholly dependent on the worker or self-employed person, who is a citizen." This article also defines the term "spouse" as "a husband or a wife of a worker or a self-employed person, in a legally recognized marriage in accordance with the national laws of a Partner State, who is a citizen."

19. A similar rule applies in the European Union ("EU"). *See* Treaty on the Functioning of the European Union (2012) C326/49 at article 57 [hereinafter *TFEU*].

20. *See also* Stephano Lombrado, *Some Reflections on Freedom of Establishment of Non-Profit Entities in the European Union*, 14 European Business Organization L. Rev. 225,

To what extent do rights holders enjoy the entitlements due to them? This Article aims to address this key question. Using Kenya[21] as a case study, the Article examines the application of the ROE in practice. Academic works that focus on this right in Kenya are very few. So, too, are publications that specifically draw on field work in Kenya and the EAC in general. This Article, thus, seeks to plug this gap in the literature by drawing on theoretical as well as practical perspectives on the enjoyment of the ROE. It highlights the challenges ROE holders face and explores ways of surmounting them. As a duty bearer, Kenya owes EAC nationals within its territory the ROE. This right contains both a negative and a positive obligation. Under the terms of the positive obligation, PSs are required to take all measures that would guarantee the enjoyment of this right.[22] The negative obligation, on the other hand, prohibits PSs from imposing unlawful restrictions that would curtail the enjoyment of this entitlement.[23] This framework is designed to ensure that a level playing field is created for all EAC legal persons.

Despite these legal guarantees, the implementation of Article 13 of the CMP in Kenya has been problematic. Faraja's experience[24] captures the way bureaucrats view rights holders entering the country. While they have entitlements, in the eyes of officials, they are outsiders. This viewpoint impacts the extent to which rights holders enjoy their rights in the country. Firstly, the conceptualization of rights holders in Kenya is quite narrow. Consequently, some legal persons are likely to be excluded from the reach of this right. The registration process and licensing regime are also fraught with problems. Moreover, the legal environment that rights holders are required to operate under is quite restrictive. The fourth area of concern relates to the local rules, which Kenya promulgated to govern rights holders. Rather than promote the realization of the ROE, these rules created (and continue to create) further problems.

In terms of organization, this Article is divided into four sections. To gain practical experience, the authors conducted field work. Section two evaluates the data collection procedures and the outcomes of this process. Section three reviews the registration framework that rights holders are required to follow. It also examines the challenges that rights holders encounter in the country. Section four canvasses some solutions that could be used to surmount these difficulties. Section five concludes with the proposition that stakeholders need to join hands in order to ensure that rights holders enjoy the promises set out in the treaties and domestic laws in practice.

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227 (2013) (contending that these undertakings "do not enjoy freedom of establishment according to the literal wording of Article 54 TFEU").

21. In addition to Kenya, other members of the East African Community ("EAC") are Tanzania, Uganda, Rwanda, Burundi, South Sudan and the Democratic Republic of Congo. *See* CMP, *supra* note 6, at article 1 (defining partner states).

22. *See also* EAC treaty, *supra* note 2, at article 8(1)(a) & (b).

23. *See also id.* at article 8(1)(c) (requiring PSs to "abstain from any measures likely to jeopardize the achievement of [the Treaty's] objectives or the implementation of [its] provisions").

24. *See supra* note 1 and accompanying text.

## I. Data Collection: Process and Outcomes

In order to gain a practical perspective of the law in operation, the authors conducted fieldwork. They interviewed key informants both within and outside of the EAC (N=87). To maintain research protocols, they obtained a research permit from Kenya's National Commission for Science, Technology and Innovation—the national institution in charge of issuing permits for conducting research in the country.[25] Interviewees were selected owing to the central role they played in the registration and licensing processes of rights holders. The authors used the snowball sampling method[26] – once a respondent had been identified, he or she was requested to refer the researchers to other respondents. The latter would then be interviewed if they agreed to participate in the study. The research used three methods to collect data: collection through online platforms, face-to-face, or by telephone. All interviewees chose their preferred method. Each interview lasted about one hour. Most of the respondents (60%) were male. Children (persons below the age of 18)[27] were not interviewed.

In depth semi-structured interview questions[28] were asked in Kenya and Rwanda. This method was adopted because it gave respondents the liberty to express their views as much as possible. Discussions with research subjects covered three general areas:

a) The rights application process;

b) The entitlements due to rights holders in Kenya; and

c) The challenges, which applicants face, and how these can be surmounted.

The responses that were received from the interviewees were analyzed using qualitative content analysis. Table one below captures the interviewees' employment type.

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25. *See* National Commission for Science, Technology, and Innovation, https://www.nacosti.go.ke/ [https://perma.cc/QGZ3-N7R4] (last visited Dec. 26, 2022).

26. *See* Geoffrey Muga, *Food Security in the Households Headed by the Elderly Caretakers in Nyang'oma Sub-location, Bondo District of Western Kenya*, (M.A. dissertation, University of Nairobi, 2006) at 30 for a deeper discussion of this data collection method.

27. *See* Children Act (2012) Cap. 141 § 2 (Kenya) (defining "child" to mean any person under the age of eighteen years).

28. For an analysis of this mode of research, *see generally* Buys et al. *A Reflexive Lens on Preparing and Conducting Semi-Structured Interviews with Academic Colleagues*, 32 Qualitative Health Research (2022).

| Table One: Structure of Interviews | |
|---|---|
| Category of Interviewee | Number |
| Business Registration Service | 7 |
| Department of Immigration Services | 5 |
| County Officials | 12 |
| State Department of Regional Integration | 3 |
| Rights Holders | 33 |
| EAC officials | 4 |
| Researchers | 4 |
| Legal practitioners | 12 |
| Judicial Officers | 7 |
| Total | 87 |

To maintain the confidentiality of interviewees, pseudonyms were used in this Article.[29] Granted, the data, which formed the basis of this Article, is rather modest, but this Article provides the first in-depth legal empirical analysis of the ROE in Kenya. Since it is based on a field survey, the paper offers a practical perspective to the challenges that rights holders experience in the country and proposes practical solutions.

## II. Rights Holders in Kenya: Unmet Promises?

The objective of the ROE was to create an environment for the citizens of a regional block to survive and thrive economically in a PS.[30] In the context of the EAC, rights holders are entitled to move to countries such as Kenya and establish commercial enterprises.[31] Within the EAC, in addition to individual citizens of PSs,[32] a legal person is one that is incorporated or registered under the laws of a PS.[33] It is the incorporation or registration under the laws of a PS that creates a legal person "for purposes of establishment."[34] For example, a company incorporated under the Kenyan *Companies Act*[35] is a Kenyan entity. It can exercise its ROE in any other PS. Legal persons incorporated outside the laws of a PS, by contrast, do not qualify, irrespective of the length of time they

29. This is standard practice in the area of research methodology. *See also* C.A. Mumma-Martinon, Thesis Writing: A Practical Guide for Students and Supervisors 124 (Nairobi: Royallite Academic, 2021).

30. Michael Okom and Rose Ugbe, *The Right of Establishment Under the ECOWAS Common Market Protocol*, 2(5) International Journal of Law 40, 42 (2016).

31. CMP, *supra* note 6, at article 13(3)(a).

32. *See* CMP, *supra* note 6, at article 1 (stating that in the context of the EAC, the term "citizen" "means a national of a [PS] recognized under the laws governing citizenship in the [PS]").

33. *Id.*

34. *Id.*

35. The Companies Act (2015) No. 17 (Kenya).

may have been in operation in a PS or their contribution to its economy. Simply put, the incorporation theory applies only to legal persons within the EAC.

According to the CMP in Article 13(6), rights holders should be accorded equal treatment. Member states of the EAC are, therefore, required to eliminate and prohibit direct (explicit) and indirect (concealed) discrimination against rights holders on grounds of nationality.[36] This requirement, which is a principle of the EAC,[37] is mandatory. Article 27(2) of Kenya's Constitution, which guarantees every person the right to equality, reinforces the equal treatment obligation. So, too, does sub-article (1), which declares that every person is equal before the law, and (5), which prohibits discrimination. The test is the level of treatment that other legal persons in the country enjoy. Anthony Arnull and others argue that the ROE is designed to "resist the application of national measures which are liable to hinder or make less attractive the exercise"[38] of this entitlement. Despite this legal guarantee, discrimination—that is, "conduct that subjects a person to unfair, unreasonable and unjustifiable differential treatment"[39]—on grounds of nationality remains a huge barrier for rights holders. Although this situation is not unique to Kenya,[40] the net effect of this unlawful practice is to bar rights holders from enjoying their fundamental entitlements while in a PS.[41]

Contrary to Faraja's claim,[42] rights holders are not foreigners. The language of Article 13 of the CMP mandates PSs to "ensure non-discrimination of the nationals of the other [PSs], based on their nationalities."[43] This obligation is mandatory. Its essence is to ensure that there is a level playing field between Kenyan legal persons and community citizens. If access to the domestic market is hindered because of their nationality, the whole essence of the latter being rights holders will be fundamentally diluted. As a result, the intended goal of achieving socio-economic development for Kenya, in particular, and the EAC, in general, will be difficult to achieve.[44] In spite of the legal guarantees, the situation on the ground paints a different picture. Field work identified several instances where rights holders experienced difficulties in their quest to enjoy their entitlements in Kenya's commercial space. The remainder of this section examines these hurdles.

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36. *See* CMP, *supra* note 6, at article 13(2); *see also* Case C-398/95, Syndesmos ton en Elladi Touristikon Kai Taxidiotikon Grafeion v. Ypourgos Ergasias, 1997 E.C.R I-3113 ¶ 16 (laying a similar standard).

37. *See* CMP, *supra* note 6, at article 3.

38. Anthony Arnull et al, Wyatt and Dashwood's European Union Law, at 573 (Sweet and Maxwell, London: 2006).

39. Council of Governors v. Salaries and Remuneration Commission [2018] eKLR ¶ 36.

40. *See e.g.*, Ayodeji Anthony Aduloju, *ECOWAS and Free Movement of Persons: African Women as Cross-Border Victims*, 18 Journal of International Women's Studies 89, 101 (2017); Sjoerd Douma, *Non-Discriminatory Tax Obstacles*, 21 European Community Tax Review 67, 67 (2012); Case C-290/02, Amok Verlags GmbH v. A&R Gastronomie GmbH, 2003 E.C.R. I-15075.

41. Case C-298/05, Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt, 2007 E.C.R. I-10497 ¶ 33.

42. *See supra* note 1 and accompanying text.

43. CMP, *supra* note 6, at article 13(2).

44. *See* EAC Treaty, *supra* note 2, at preamble (noting that one of the objectives of creating the EAC is to realize a 'fast and balanced regional development').

## A. The Registration Framework: Procedures and Problems

The East African Community Common (Right of Establishment) Regulations, Annex III,[45] (ROE Regulations) obligate countries within this regional block to register rights holders operating within their territories. These regulations require PSs to avail mechanisms for rights holders to "register" or be "licensed in accordance with" the domestic legal framework.[46] While each PS is allowed to adopt its own registration procedures, the states are regulated in terms of the systems that can be adopted. For example, the framework that a country adopts should meet due process standards. In other words, PSs do not have broad latitude, which would, for instance, allow them to unilaterally and capriciously decide which rights holder to register and which ones to exclude. All applicants should be given a fair hearing by the relevant office in a PS.[47]

Multiple procedures govern the ROE application process. Generally speaking, an EAC national seeking to run a business in Kenya is required first to lodge an application for an entry visa or pass with the Immigration Department.[48] Usually, the offices of the department are located at the ports of entry into and exit from Kenya.[49] An immigration official will then assess the paperwork, together with the applicant's passport. If the applicant meets the admission criteria, as well as the health[50] and national security[51] considerations, the officer will issue a visa or pass, which will effectively allow them lawful entry into the country.[52] Those applicants who fail to meet these tests, by contrast, are prohibited from entering Kenya.[53] Rejected applicants can appeal the decision of an immigration officer to the High Court.[54] If they succeed, the court can issue an order compelling the Immigration Department to issue the rights holder a visa allowing them to enter Kenya.[55] Failed applicants, by contrast, are disallowed from entering the country.

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45. The East African Community Common (Right of Establishment) Regulations, Annex III, Nov. 2009, 2144 U.N.T.S 255 (CMP Annex II).

46. *Id.* at regulation 9(3).

47. *See also* the African Charter on Human and Peoples' Rights art. 7, adopted 1 June 1981 (entry into force 21 October 1986) (guaranteeing 'every individual' on the continent due process rights).

48. Kenya Citizenship and Immigration Act (2012) Cap. 172 § 35(2) [hereinafter *KCIA*]. *See also* regulation 6 of the East African Community (Right of Establishment) Regulations, Annex III [hereinafter *ROE Regulations*]. For the type of visa, which the Immigration Department can issue, see regulation 18 of the Kenya Citizenship and Immigration Regulations, 2012 [hereinafter *Citizenship Regulations*]. See also regulation 3 of the *ROE Regulations* defining 'pass'.

49. For a list of these points, see the Fourth Schedule to the *Citizenship Regulations*.

50. Public Health Act (2012) Cap. 242 § 10(2) (mandates the Medical Department to "prevent and guard against the introduction of infectious disease into Kenya from outside.").

51. KCIA, supra note 48, Cap 172 § 33 (contains a list of "prohibited immigrants and inadmissible persons.").

52. *Id.* at Cap. 172 § 35(3).

53. *See id.* at Cap. 172 §§ 33(1)-(2) (the *KCIA* contains a long list of 'prohibited immigrants and inadmissible persons.").

54. *Id.* at Cap. §§ 40(10), 57.

55. *See* AZ v. Cabinet Secretary Interior & Coordination of National Security and Another [2021] eKLR.

EAC nationals who have been issued a visa or pass are eligible to lodge applications for a permit allowing them to work before the competent authority.[56] The ROE Regulations require these applications to be filed within 30 "working days" from the date of entry into the country.[57] Section 975(3) of Kenya's *Companies Act* lists the documents, which an applicant is required to supply the Registrar with, namely:

- A copy of the bio-date page of their passport;
- A copy of their Kenya Revenue Authority Personal Identification Number certificate;
- A certified copy of their incorporation documents;
- Details of shareholding, charge or mortgage, which the rights holder has taken out; and
- The rights holder's address or place of business in their home state and in Kenya.[58]

The application process is done online via the ecitizen platform.[59] An applicant must, therefore, have reliable internet connectivity and power supply. They should also possess above average computer skills. Otherwise navigating through the online system can be a nightmare. All the rights holders who were interviewed affirmed this position. The online application requirement may be beneficial, as it enables an applicant to lodge their application from a location that is convenient to them. But this requirement is simultaneously very problematic. Internet access in the East African region is, overall, very low.[60] Access to electricity is also a huge challenge.[61] Collectively, these factors are an impediment for applicants seeking to apply and track their applications on the online platform.[62]

To kick-start the application process, one needs to create an ecitizen account. Upon successful creation, they are required to upload the relevant documents and pay a statutory fee of KShs. 7,550 (approximately US $75).[63]

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56. *ROE Regulations*, supra note 48, at Regulation 6(1).
57. *Id.*
58. *See also Citizenship Regulations*, *supra* note 48, at Regulation 20(1) and Form 25.
59. *See* eCitizen, https://accounts.ecitizen.go.ke/login (last visited Nov. 28, 2022).
60. See GSMA, *The Mobile Economy: Sub-Saharan Africa, 2022*, GSMA Intelligence 1, 27 (2022), https://www.gsma.com/mobileeconomy/wp-content/uploads/2022/10/The-Mobile-Economy-Sub-Saharan-Africa-2022.pdf [https://perma.cc/BFX2-NEEH] (last visited Jan. 3, 2023) (by the end of 2021, only 32% of the adult population in the EAC (excluding the DRC) subscribed to mobile internet services).
61. *See* The World Bank, *Access to Electricity, Urban (% of Population)*, https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS [https://perma.cc/UJ57-EVPF] (last visited Jan. 3, 2023).
62. *See also* Julius Okolo, *Obstacles to Increased Intra-Ecowas Trade*, (1988/1989) 44 Int'l J. 171, 194 (terming the lack of a reliable communication system as a "very unfavourable" condition to the regional integration process).
63. *See* guidelines on registration of foreign companies in Business Registration Service, *PN/07: Foreign Companies*, https://brs.go.ke/download/pn-07-foreign-companies/ [https://perma.cc/9QJQ-7ZDZ] (last visited Nov. 28, 2022) Chapter 1.

Successful applicants are issued a certificate of compliance by the Registrar of Companies.[64] Unsuccessful applicants can appeal adverse decisions handed down by the Registrar before the High Court,[65] and, finally, the Court of Appeal.[66] If their appeal is allowed, the court can order a Registrar to grant a compliance certificate.[67] Applicants whose applications are rejected, on first instance or on appeal, and those whose permits are cancelled, are not eligible to enjoy the ROE.[68] Figure one (below) is a diagrammatical representation of the procedures Kenya uses to determine applications by rights holders

The ROE is not absolute. To "combat possible abuse"[69] and to ensure adequate implementation of public health and security legislations, article 13(8) of the CMP permits PSs to lawfully limit the enjoyment of this right from a rights holder or their family on three grounds—public health, public policy, and public security.[70] Rights holders who fall within these limitations are lawfully disallowed from enjoying the ROE. These measures are aimed at preventing "individuals from improperly or fraudulently taking advantage of provisions"[71] of the EAC treaty. The limitations on health and public security in particular are designed to ensure that the country maintains "high level[s]"[72] of these fundamental protections at all times.

64. *Companies Act* (2021) § 975(4).

65. *See* Constitution, art. 165(3) and (6) (2010) (Kenya). *See also ROE Regulations*, *supra* note 48, Regulation 7(3).

66. Constitution art. 164(3)(a) (2010) (Kenya).

67. *See id.* at art. 23(3) (the orders that courts in Kenya can issue).

68. *See ROE Regulations*, *supra* note 48, at Regulations 7(4) and (8) (requiring failed applicants to "leave" Kenya).

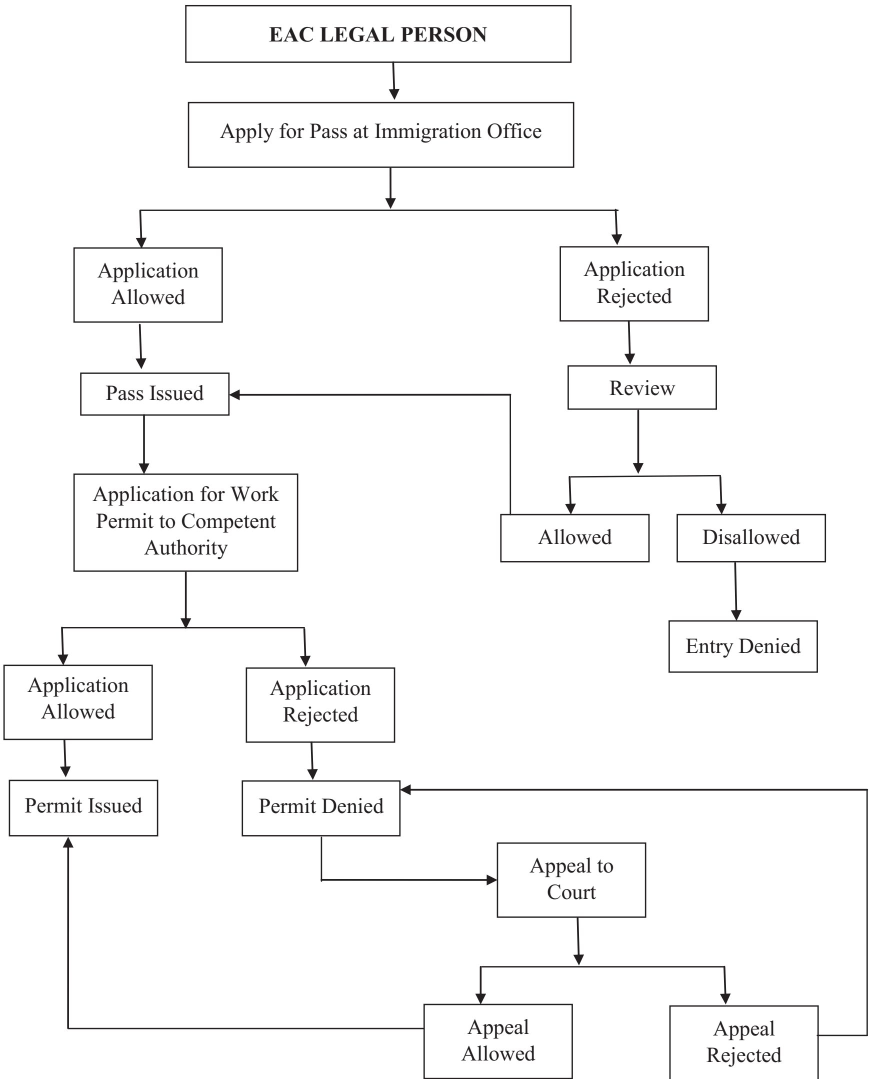
69. Centrale Raad van Beroep (10 juli 1986), 1986 79/85 m.nt. (D. H. M. Segers/ Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen).

70. For a deeper discussion of this theme, see Priscah Nyotah, Francis Situma and Edwin Abuya, *Getting it Wrong: Applying Public Security Limitation to the East African Community's Right of Establishment in Kenya*, 9 Transnat'l Hum. Rts. Rev. 1 (2022).

71. Case C-212/97, Centros Ltd v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.J., ¶ 24.

72. Crim. [Tribunal of First Instance] Brussels (5th ch.), Feb. 1, 2001, p. 856, ¶ 29.

**Figure 1: The ROE Application Process**




In order to be justifiable, the measures that are taken should suit the purposes for which they are sought. They should "not go beyond what is necessary in order to attain"[73] these objectives. The obligation of a PS, if it seeks to invoke any ground, is to notify its counterparts when it chooses to apply a limitation clause.[74] The burden of proof is on a PS[75] to demonstrate that it had lawful reasons to invoke the limitation clause.[76]

73. Case C-110/05, Commission of the European Communities v. Italian Republic, 2009 E.C.J., ¶ 59.

74. CMP, *supra* note 6, art. 13(9); *ROE Regulations*, *supra* note 48, at regulation 10(3).

75. *See* The Evidence Act (Rev. 2022) Cap. 80 § 107 (Kenya); The Evidence Act (1967) § 110 (Tanzania); The Evidence Act (2000) §101 (Uganda).

76. Samuel Mukira Mohochi v. Attorney General of the Republic of Uganda, (Ref No. 5

To meet the requirements of the CMP, a PS must give specific evidence of the limitation to the EAC Secretariat.[77] In other words, presumptions[78] or general statements will not suffice. Once a PS communicates this information, one would expect the EAC secretariat to maintain a record of article 13(8) notifications. This rule of notification is critical to a wide range of players in the market. In addition to the PSs, other legal persons, both within and outside the host state, stand to benefit from this information. These parties can utilize this data, for instance, to assess the extent to which they can engage with a particular rights holder. For rights holders, this data is crucial in making, among others, commercial decisions in the PS in which they seek to establish a commercial enterprise. Baraka, an official of the EAC Secretariat, informed the researchers that, as of July 2022, no PS had submitted an article 13(8) notification.[79] Hence, any limitation on the enjoyment of the ROE by any PS would be unlawful.

Notably, the CMP does not give any guidance on the circumstances under which the limitations can be invoked. Rather, this issue was left to the discretion of the PSs. Article 24 of Kenya's Constitution contains progressive provisions on the limitation of rights.[80] This article is a useful guide to the application of limitations to the ROE, particularly because the ROE is part of Kenya's Bill of Rights under article 19(3)(b) of the Constitution.[81] Therefore, the limitations must meet the standards under article 24 of Kenya's Constitution. Further, Article 26 of the 1969 *Vienna Convention on the Law of Treaties* requires states to perform their treaty obligations in "good faith" (expressed in the Latin term *pacta sunt servanda*).[82] Consistent with this rule, PSs are required to comply with the rule of law prior to entering an article 13(8) reservation.[83] The East African Court of Justice (EACJ) underlined the importance of taking this approach in *The Honorable Attorney General of the United Republic of Tanzania v. Africa Network for Animal Welfare* (ANAW):[84]

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of 2011) EACJ First Instance Division, ¶¶ 54 and 76 (17 May 2013). Courts in other regional blocks, such as the ECJ, have also dealt with the question of derogation from the right of establishment. *See,* for instance, Case C-158/96, Raymond Kohll v. Union des Caisses de Maladie, 1998 E.C.J., ¶ 46.

77. CMP, *supra* note 6, at article 13(9); *ROE Regulations*, *supra* note 48, at Regulation 10(3).

78. Case C-400/08, European Commission v. Kingdom of Spain, 2011 E.C.J., ¶ 58 (2011).

79. Online interview with Baraka, EAC Secretariat Officer, 14 July, 2022.

80. Constitution of Kenya, Article 24.

81. Constitution of Kenya, Article 19(3)(b) ("The rights and fundamental freedoms in the Bill of Rights – do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter. . .").

82. Vienna Convention on the Law of Treaties art. 26, May 23, 1989, 1155 UNTS 331 (entered into force 27 January 1980); *see also* Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others (Ref 1 of 2006) EACJ First Instance Division, (8 November 2006), 10-11; the Inter-American Court of Human Rights decision in *Advisory Opinion OC-17/2002 of August 28, 2002, Requested by the Inter-American Commission on Human Rights* ¶ 21 (reiterating this basic rule).

83. See the preamble to Kenya's Constitution (recognizing the rule of law as one of the 'essential values' of the country).

84. The Honorable Attorney General of the United Republic of Tanzania v. Africa Network for Animal Welfare (ANAW) (Ref 9 of 2010) EACJ First Instance Division (29 August 2011).

> The purpose of [the] Treaty provisions cannot and must not be allowed to be undermined by a narrow or restrictive reading of those provisions. Rather the provisions must be given a purposive interpretation, construction, application and implementation. Such is the essence of the Vienna Convention on the Interpretation of Treaties.[85]

However, in reality, PSs do not always comply with the provisions of the EAC Treaty.[86] In other words, reliance on good faith alone is insufficient. Failure by the CMP to provide an operational framework is fatal. This gap gives PSs room to put their national interests ahead of those of a rights holder, and, thereby, abuse the latter's entitlements. Further, the lack of a clear legal framework can expose a rights holder to an unfavorable commercial environment, especially in situations where a PS invokes the limitation clause to protect its local economy from "outsiders."[87] It is unclear whether these unintended consequences were envisaged during the drafting process of the CMP.

## B. Challenges Facing Rights Holders

For purposes of registration of rights holders, the host PSs must comply with the rules of national treatment. These rules require nationals of other PSs to be given "treatment equal or similar to nationals of the host"[88] PS undertaking similar commercial ventures. This rule emphasizes the non-discrimination requirement on the ground of nationality.[89] This section examines this theme further. Are rights-holders treated as strangers or community citizens? This is the central question this section responds to.

### *1. Unequal Treatment of Rights Holders*

Despite the legal requirement for equal treatment, this research noted several instances of discrimination of rights-holders in Kenya. Refusal by Government officials to grant rights holders their entitlements under the EAC Treaty makes it difficult for these community citizens to "fully" [90] realize the ROE. Kennedy Gastorn contends that a legal person qualifies to be accorded

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85. *Id.* at 6.

86. *See* British American Tobacco (U) Limited v. Attorney General of Uganda BAT (U) Ltd, EACJ Reference No. 7 of 2017, delivered 26 March 2019; Hamisi Omar Mandae v. R [2020] eKLR.

87. One of the reasons attributed for the collapse of the former East African Community was the unequal sharing of the benefits of the community among the PSs. *See* Ngila Mwase, *Regional Economic Integration and the Unequal Sharing of Benefits: Background to the Disintegration and Collapse of the East African Community*, 8 THE AFRICAN REVIEW 28, 28 (1978). *See also* Arthur Hazlewood, *The End of the East African Community: What are the Lessons for Regional Integration Schemes?*, 18 J. OF COMMON MARKET STUDIES 40, 42 (1979) (noting the firm belief "in Tanzania and Uganda that the [integration] arrangements worked overwhelmingly to the benefit of Kenya").

88. CMP, *supra* note 6, at Annex III (note 97), Regulation 9(5), and article 17.

89. Leonard Aloo, *Free Movement of Goods in the EAC*, *in* East African Community Law: Institutional, Substantive and Comparative EU Aspects 303, 323 (Emmanuel Ugirashebuja et al. ed., 2017).

90. Case 115/78, J. Knoors v. Secretary of State for Economic Affairs, 1979 E.C.J. ¶ 30.

equal treatment if the person does substantial business in a PS.[91] He draws on article 13(6) of the CMP, which addresses the rule on non-discrimination for legal persons that are established and "undertake substantial economic activities" in a PS. This analytical lens is rather narrow. A comprehensive examination of the legal framework would lead one to article 13(1) and (2) of the CMP. The latter provision prohibits non-discrimination on the ground of nationality. It does not lay any pre-conditions. Provided they do not fall afoul of the limitations in article 13(8), small companies and firms doing less than "substantial economic" activities should be treated equally. Would it not be absurd for the protocol to provide additional requirements that the parent treaty—the EAC Treaty—did not provide for? This is one instance where rights holders can be treated differently.

As a member of the EAC, Kenya is required to adopt an appropriate legal framework that will safeguard the ROE. Article 2(6) of Kenya's Constitution, which provides that any treaty or convention that the country has ratified forms part of domestic law,[92] buttresses this obligation. The domestic legal framework in the country must, therefore, be aligned towards implementing the CMP.[93] Despite being one of the founding members of the EAC, Kenya has yet to take robust legal steps in this regard. Bureaucrats still perceive rights holders as foreigners. Under the Companies Act[94] and Limited Liability Partnerships Act,[95] for instance, any company or a partnership incorporated outside Kenya is defined as "foreign." The definition of "foreign" includes entities incorporated in other PSs.[96]

The EACJ addressed this key issue in *British American Tobacco (U) Limited v. Attorney General of Uganda* (*BAT (U) Ltd.*[97] In this matter, Uganda defined cigarettes manufactured by a branch of the applicant established in Kenya as "imported" products from a foreign country.[98] Consequently, it imposed an excise duty consistent with its domestic law provisions.[99] Dissatisfied with the finding, the applicant challenged this interpretation in the EACJ. In the opinion, the court held that the misconstruction of the terms was a violation of the Treaty:[100]

91. Kennedy Gastorn, *Freedom of Establishment and the Freedom to Provide Services,* in Emmanuel Ugirashebuja et al, *East African Community Law* (Leiden: Brill, 2017), 374, 365–75.

92. *See also* The Treaty Making and Ratification Act, No. 45 of 2012 (outlining Kenya's treaty making legal framework).

93. *See also* British American Tobacco (U) Limited v. Attorney General of Uganda BAT (U) Ltd, EACJ Reference No. 7 of 2017, delivered 26 March 2019, ¶ 120; see also Law Society of Kenya v. The Attorney General and Other [2013] eKLR ¶ 35 (where the EACJ and High Court of Kenya, respectively, echoed this fundamental rule).

94. Act No. 17, § 3 (2015).

95. Cap 301, Laws of Kenya.

96. Companies Act, section 2.

97. *British American Tobacco*, EACJ Reference No. 7 of 2017, ¶ 41.

98. *Id.* ¶ 7.

99. *Id.*

100. *Id.* ¶ 45.

> [T]he intention of the framers of the Treaty. . .was to establish the Community as a single economic area characterized by free movement of goods, and in which goods from any of the [PSs] were not treated as imports.[101]

The judges further reasoned that the applicable test is whether comparable goods from another PS are treated the same way as their counterparts at the domestic level. The key question is:

> [W]hether the taxed imported and domestic products are "like" and, if so, whether the taxes applied to the imported products are "in excess of" those applied to like domestic products.[102]

The Court was precise in its interpretation and application of EAC law on the status of nationality of community nationals. To borrow the words of the European Court of Justice (ECJ) in *P.H. Asscher v Staatssecretaris van Financiën*[103] the ROE:

> [C]annot be interpreted in such a way as to exclude a given [PS's] own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their [PS] of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty.[104]

Uganda's action to construe rights holders as foreigners negated the whole purpose of regional integration and the ROE. The misconstruction was brought by the definition of "import" and "foreign country" in the domestic law, without excluding EAC PSs and goods. Rights holders have a unique place within the legal framework of the EAC. They are defined as business entities incorporated "under the laws"[105] of a PS. Against this background, it is apparent that the intention of the framers of the treaty was that rights holders are to be treated as local, not foreign entities.[106]

Under the CMP a firm is defined as a "business entity. . . registered in accordance with the laws governing registration of such business entity" in a PS.[107] This broad definition captures all forms of registered business entities, including sole proprietorships, general partnerships, limited liability partnerships and co-operative societies.[108] The definition of "firm" under *Kenya's Registration of Business Names Act*[109] is of concern in so far as EAC firms are concerned. A "firm" is defined under the Act as:

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101. *Id.* ¶ 41.
102. *Id.* ¶ 92.
103. Case C-107/94, P. H. Asscher v. Straatssecretaris van Financiën, 1996 E.C.J.; *British American Tobacco*, EACJ Reference No. 7 of 2017.
104. *Id.* ¶ 32.
105. CMP, *supra* note 6, at article 1.
106. This approach is not unique to the EAC. *See also* Roland Rutili v. Minister for the Interior, 1975 E.C.R. 01219 (where the ECJ affirmed the national treatment rule).
107. CMP, *supra* note 6, at art. 1(13).
108. *Id.* at art. 1.
109. The Registration of Business Names Act (Rev. 2019), Chapter 499 (Kenya).

> [A]n unincorporated body of two or more individuals, or of one or more individuals and one or more corporations, or of two or more corporations, who or which have entered into partnership with one another with a view to carrying on business for profit.[110]

Unlike the CMP, this definition is rather restrictive, as it covers partnerships only. Excluded under this head are other forms of commercial undertakings such as sole proprietorships, —commercial enterprises owned by an individual— limited liability partnerships, societies, or corporations, yet it is this definition that Registrars use to assess applications that rights holders lodge. The narrow reach of the *Registration of Business Names Act*, which is at odds with the CMP, can be problematic for applicants who ran other commercial enterprises.

Aside from companies, the legal frameworks that regulate the registration of other commercial enterprises in Kenya—general partnerships (governed by the Partnerships Act), limited liability partnerships (governed by the Limited Liability Partnerships Act),[111] and sole proprietorships (governed by the Registration of Business Names Act)—do not contain provisions permitting the registration of branches, subsidiaries, or agencies in Kenya for ventures originally registered in other PSs. Faraja, an official at Kenya's Business Registration Service, affirmed this position:

> We only register companies. The rest of business formations are not registered because we do not have a framework under which they can be registered. We are currently amending the law to cater for them.[112]

Interviewees drawn from partners of firms and owners of sole proprietorships with Ugandan and Rwandan nationalities mentioned that they had unsuccessfully tried to register their business enterprises in Kenya. Umugwaneza, a Rwandan citizen, stated:

> We have a business registered under our Partnerships Law. We tried to register it in Kenya and we were told there is no law that allows that registration. We were asked to wait for the law to be enacted. This was in 2019. We have kept on following up because we have seen great potential for our business there. That law has not been enacted to date.[113]

The status captured by these narratives is of grave concern. At the signing of the CMP in 2009, the PSs undertook to facilitate the registration of all commercial enterprises incorporated in other PSs. According to article 13(11)(b) of the CMP, PSs undertook to:

> [P]rogressively remove any administrative procedures and practices resulting from national laws that restrict the right of establishment, in respect of the conditions for:
>
> (i) setting up agencies, branches or subsidiaries of companies or firms in their territories; and

110. *Id.* § 2.
111. Limited Liability Partnership Act (Rev. 2014), No. 42 (Kenya).
112. Interview with Faraja, Nairobi, (Mar. 8, 2022).
113. Interview with Umugwaneza, Nairobi, (Nov. 10 2022).

> (ii) the entry of personnel of the companies or firms registered in another Partner State into managerial or supervisory positions in agencies, branches or subsidiaries in that Partner State.[114]

As of April 2023, Kenya had yet to comply with this legal obligation.[115] While the treaty used the word "progressively," it is doubtful whether the framers of the CMP envisaged that a PS would take over ten years to remove such barriers. To borrow the reasoning of Justice Mumbi of the Kenyan High Court in *Mitu Bell Welfare Society v. AG and 2 Others* the Government, which bears the burden of proof, has to demonstrate that it has taken steps towards the fulfilment of this duty.[116] Thus far, the State is yet to demonstrate its commitment.[117] Ironically, when asked why EAC registered partnerships, limited liability partnerships, and sole proprietorships are excluded, despite the requirements of the treaty, the explanation that Faraja offered was equivocal:

> They are all foreign entities. There is no distinction. Even if they are supposed to be treated like Kenyan firms, there is no law under which they can be registered.[118]

Other bureaucrats expressed similar sentiments with regard to entities registered in other PSs. According to Zuberi, an official of the Department of Immigration Services:

> So long as they are not Kenyan entities, they are foreigners. There is no special treatment for the sole reason that they are from the EAC [PSs].[119]

The *Companies Act* contains specific provisions regarding the registration of "foreign companies."[120] Under this legislation companies registered in other PSs are considered foreign for purposes of registration in Kenya.[121] This is a misconstrued understanding of these commercial enterprises. While rights-holders and foreign companies are both governed by the same legal framework, in practice all legal entities incorporated outside of the country are treated as foreign entities. Kwame, an officer at Kenya's Business Registration Service, affirmed this position:

> They are all foreign companies. Even those incorporated in EAC [PSs] are foreign. They are registered under the provisions governing the registration of companies under the Companies Act.[122]

These sentiments, especially from a government official, are quite troubling. They demonstrate the perceptions of these officers regarding the entitlements of rights holders. Rather than promote the undertakings, which the

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114. CMP, *supra* note 6, at article 13(11)(b).
115. Interview with Issa, Online (Apr. 7, 2023).
116. Mitu Bell Welfare Society v. AG and 2 Others, (2013) eKLR, 53.
117. *See also* MMM v. Permanent Secretary, Ministry of Education and 2 Others [2013], eKLR, ¶ 18 (where Judge Lenaola, as he then was, underscored this legal obligation).
118. Interview with Faraja, Nairobi (Mar. 8, 2022).
119. Interview with Zuberi, official of Kenya's Bus. Reg. Serv., Nairobi (20 Aug. 2022).
120. *See* The Companies Act, Part XXXVII.
121. Companies Act, section 2.
122. Interview with Kwame, Nairobi, (Mar. 4, 2022).

country made when it signed onto the CMP in 2009, they end up weakening an already fragile situation. These narratives as well as Umugwaneza's experience demonstrate the discriminatory practice that firms seeking to enter the Kenyan market experience. The lack of a domestic legal framework is of concern, particularly in a country that was at the forefront of the formation of the EAC. The net result of such practices is to seriously undermine the fundamental rights of these firms.

Several assertions can be advanced to justify the State's actions. It could be asserted that the Kenyan perspective is informed by geographical boundaries. Sovereignty could also be invoked as a ground for justifying these Government actions.[123] These assertions are weak at several points. In particular the boundary-related claim fails to recognize that, with regional integration and the creation of a common market, new transactional frontiers were created. The traditional boundaries were redrawn to capture the changed circumstances. All the PSs, and their citizens, were brought under one economic sphere. Consistent with this reasoning, it is no longer tenable to label any EAC citizen as a foreigner. Similarly, the argument on sovereignty fails for the same reason that Kenya is now part of a regional political cluster. Any decision that it makes in relation to rights-holders has to be consistent with its regional treaty undertakings.

For the equal treatment requirement to be effectively met the legal framework of the EAC had to be more specific, especially on the terms that law used. Therein lies the problem. The CMP, for instance, did not define or elaborate on the meaning of the concept of "substantial economic activity." One would, therefore, have to refer to other sources in order to gain a deeper understanding. According to Black's Law Dictionary, "substantial" means:

> Real and not imaginary; strong, solid, and firm; possessed of sufficient financial means; and large in volume and number.[124]

In the context of the ROE the concept of "substantial economic activity" could be interpreted to mean a large-scale commercial entity, which, among other criteria, is large financially sound, employs several employees and generates a substantial amount of revenue annually. That said, the terms "large," "several," "substantial," and "financially sound" are relative.[125] They do not have a single meaning. Consequently, a decision-maker would have to assess each situation's circumstances.[126] In Kenya, some officials have *conceptualized* the ROE from an economic benefits perspective.[127] In response to the question,

123. Constitution, (2010) (Kenya), art. 4 (declaring Kenya as "a sovereign Republic"); *see also* Consitution, at preamble (where Kenyans undertook to exercise their "sovereign and inalienable right to determine the form of governance of [the] country").

124. *Substantial*, Black's Law Dictionary (11th ed., 2019).

125. *See also* Antonio Santos, "What is Substantial Economic Activity for Tax Purposes in the Context of the European Union and the OECD Initiatives Against Harmful Tax Competition?", (2015) 3 EC Tax Rev. 166, 168 (contending that this determination "can be difficult").

126. Palser v. Grinling, Property Holdgins Co. Ltd. V. Mischeff (1948) 1 All ELR 1,11.

127. Interview with Maua, Nairobi, (Aug. 5, 2022); Interview with Subira, Nairobi, (Feb. 7, 2023).

who are rights holders, Zawadi, an official of Kenya's Department of East African Community (DEAC) in the Ministry of East African Community, the ASALs and Regional Development, responded:

> The framers of the CMP did not envisage movement of small and medium scale entities. The right was meant for the benefit of large scale indigenous EAC companies.[128]

Indeed, this is a very narrow view in light of the whole purpose of the ROE, and the obligation to ensure non-discrimination of all rights holders. Further, this view is at odds with the CMP and the EAC Treaty, none of which limited the enjoyment of this fundamental entitlement. If "small" or "medium" legal persons were excluded from the reach of this right, would this corpus of law not have expressly said so? Moreover, the definition of the term "small," "large," or "medium" are not contained in the CMP or the EAC Treaty. Simply put, the source of this conceptualization is rather unclear. Discriminating against commercial enterprises on account of their size goes against the spirit of integration. It is a barrier to achievement of accelerated socio-economic development, which the founders of the EAC envisaged.[129]

The duty bearers with regard to ensuring fair treatment for all legal persons are the PSs. At the drafting of the EAC Treaty[130] and the CMP[131] they undertook not to discriminate against legal persons on the ground of nationality. This obligation necessitated proper conceptualization of legal persons as EAC nationals, not "foreign" entities. We also need to appreciate that all rights holders, irrespective of size, are entitled to the ROE. The EAC Treaty and CMP foresaw the importance of clarifying that a national of a PS is not a foreigner in another PS.[132] Construing them as outsiders would negate the whole purpose of regional integration. The EACJ affirmed this rule in its decision in *British American Tobacco*,[133] where the Court's construction of the equal treatment rule was consistent with both the EAC Treaty and CMP.

### 2. *Additional Licensing Requirements*

Under the terms of the incorporation theory, a company is a creature of the law or system under which it was incorporated.[134] Applying the same argument to firms, one would contend that these entities are creatures of the

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128. Interview with Zawadi, Nairobi (Aug. 24, 2021).

129. *See* EAC Treaty, *supra* note 2, at preamble (where the countries expressed their determination to "strengthen", among others, "their economic, political, social, cultural and traditional ties and associations for their fast balanced and sustainable development by the establishment of an" EAC).

130. *Id.* at art. 76(1) and 104(1).

131. *Id.* at art. 13(2).

132. *See id.* at article 1; *See* CMP, *supra* note 6, at article 1.

133. British American Tobacco (U) Limited v. Attorney General of Uganda BAT (U) Ltd, EACJ Reference No. 7 of 2017, delivered 26 March 2019.

134. *See* The Companies Act (2015) §19 (Kenya); *See also* Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil*, 11 Journal of Int'l Bus. & L. 85, 96 (2012) (contending "Each individual corporation is regarded as having its own separate legal personality and, therefore, liability from the date of its incorporation".).

legal framework under which they were registered.[135] Thus, upon incorporation under the laws of a PS, the legal person can establish itself in another state without requiring any additional steps. In other words, they are not required to re-incorporate (for companies) or re-register (for firms) under the domestic legislation of a PS. The only requirement for a legal person to establish and operate a commercial enterprise is confirmation by the host PS of the person's legal personality as well as their nationality.[136]

Prior to engaging in any economic activity, a rights holder must first apply for and obtain a license from one or more competent authority(ies) in a PS.[137] As the registration and licensing procedures are conducted in the host PS, the duty is on this state to outline the criteria that an applicant should meet. Considering that Kiswahili is also an official language of the EAC,[138] these requirements should be outlined in this language, too, in order to reach a wider audience. We need to realize that the PSs do not have free reign to determine the registration and licensing framework for rights holders. On the contrary, they must comply with the rules of national treatment.[139] Put differently, rights holders should not be discriminated against, both in terms of process and outcomes.

National courts in EAC states such as Rwanda have reiterated this basic rule.[140] Jurisprudence from other regional blocks is also consistent with this fundamental requirement. According to the ECJ in *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, the ROE:[141]

> [I]s granted both to legal persons . . . and to natural persons who are nationals of a [PS]. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other [PS], undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up.[142]

Consequently, all procedures, including the registration fees for permits and licenses, must be the same for all commercial entities.

However, practice shows that companies registered in other PSs are not always treated equally. This research identified a number of additional registration requirements that rights holders are required to fulfill. Primarily, the *Companies Act* has built in additional requirements for these entities. For instance, all "foreign" companies are required to have "at least one local representative."[143] While the Act does not define the term "local," it is apparent from

135. Registration of Business Names Act (2012) Chapter 499 §14 (Kenya).
136. Frank Wooldridge, *Uberseering: Freedom of Establishment of Companies Affirmed*, 14 European Bus. L. Rev. 227, 231 (2003).
137. *See* CMP, *supra* note 6, at Annex III, Regulation 9(3).
138. *See* EAC Treaty, *supra* note 2, at art. 137(1).
139. *See* CMP, *supra* note 6, at Annex III, Regulation 9(5) (the rules on application of national treatment in licensing of ROE legal person in EAC).
140. *See Re. Nzafashwanayo*, (1-2021) *Rwanda Law Reports* ¶¶ 60-67.
141. Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,1995 E.C.R. I-4186, ¶23.
142. *Id.*
143. The Companies Act (2021) § 979.

a review of case law[144] and comparative statutes[145] that the phrase refers to a Kenyan national. Hence, companies from a PS are unable to register in Kenya unless they have a local person—natural person or company—on board. The legislation further requires this person to play an active, not passive role in running the affairs of the company. Their mandate under the *Companies Act* is quite broad. In the first instance, they are responsible for undertaking "all acts, matters and things that the company is required by or under [the] Act."[146] Further, they are 'answerable for' everything that the company is responsible for or "required" to do under the legislation.[147] Moreover, they are "personally liable [for penalties] imposed on the company"[148] for any infraction of the law.

Clearly, these requirements are an impediment for companies seeking to trade in Kenya from other PSs. Compelling these enterprises to have a local representative is by itself problematic. In addition to increased costs of operation, this requirement flies in the face of the basic rule requiring that commercial enterprises are established and ran on a voluntary basis.[149] According to Nuru, an official at the Companies Registry, this rule was aimed at:

> [P]rotecting locals from scrupulous foreign companies. The requirement is in public interest. Supposing someone is wronged by such a company and the directors are not resident in Kenya, who can we go for other than a local representative?[150]

This explanation could hold water, but only for foreign companies, not those incorporated in other PSs. Companies in the latter category are entitled to have their personnel take up managerial and supervisory roles in Kenya.[151] In addition, these companies are required to provide details of their directors and shareholders, including contact information.[152] Furthermore, as a condition for registration, they must have a registered office in Kenya,[153] and provide these particulars to the Registrar.[154] Are these not sufficient safeguards in the public interest? Insisting on a local representative over and above the personnel of these companies is not a persuasive argument in view of the fact that these companies have officials on the ground. Indeed, local companies can pose serious risks to the public too, yet they are not required to have an official present in the office at all times when the office is opened. Furthermore, the

144. *See* Seah Networks Limited v. David Osano Bulia and Another Companies Act (2019) K.L.R. ¶ 8, *see also* In re Liquidation of Put Sarajevo General Engineering Company Limited (2022) K.L.R. ¶ 8.

145. *See e.g.*, Corporations Act 2001 (Cth) §§ 9 & 601CG(5) (Austl.). (discussing "local agents." This legislation suggests that this person should be a local person, not a foreigner).

146. The Companies Act (2021) § 981.

147. *Id.*

148. *Id.*

149. *See* G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights at Art.6(1) (Dec. 16. 1966) ("ICESCR") (recognizing every person's right to "gain [their] living by work which he or [she] freely chooses or accepts, and will take appropriate steps to safeguard this right").

150. Interview with Nuru, Co. Registry, in Nairobi, Kenya (Mar. 15, 2022).

151. CMP, *supra* note 6, at article 13(11)(b)(ii).

152. *Id.* at Regulation 9(4).

153. The Companies Act (2021) § 983.

154. *Id.* § 982.

requirement fails to consider current business operation practices such as virtual offices. Under the terms of the current legislation, it is doubtful whether these entities are registrable in Kenya.

The requirement that these representatives are, overall, in charge of the operations of the company is inconsistent with the fundamental condition that States should refrain from interfering with the internal affairs of a commercial enterprise.[155] Lastly, the rule on personal liability creates a huge legal burden on local representatives. As a fundamental principle in company law, liabilities are borne by the enterprise, not a third party as this legislation implies. Judge Riechi of the Kenyan High Court reaffirmed this principle in *Protus Opwora Wabwoto v. Ken Manda and 2 Others*:[156]

> In company law, once registration of a company has been successfully completed a legal person separate from its Members is created. With the formation of the company the new entity acquires a veil of incorporation that completely separates the members' from being held responsible for the liabilities of the company which they have subscribed to. This veil of incorporation blocks the members from being held liable for acts of the company. This principle was set out in the old English case of Salmon and Salmon & Co. ltd (1897) AC 22. The effect of this is that there is a fictional veil between the company and its members, protecting them from being personally liable for the compan[y's] debts and obligations.[157]

The rule on personal liability for local representatives is also problematic. Considering the obligations involved, will this requirement not render the position unattractive for potential Kenyan co-investors?

Notably, the local representative's pre-condition is not provided under the CMP or Annex III. Under this corpus of law, companies registered in PSs are not foreign entities. Apparently, the drafters of the section in the *Companies Act* dealing with local representatives drew heavily from the 2001 Australian (Federal) *Corporations Act*.[158] Considering that Kenya's legislation came into operation in 2015, some sixteen years after the EAC Treaty was promulgated, one would have expected the makers of the legislation to have paid attention to the language of the EAC Treaty and the CMP. Consequently, the provisions of the *Companies Act* ought to align with Kenya's regional obligations. It is unfortunate that the current additional requirements bestowed on companies registered in other PSs are at odds with Kenya's EAC obligations.

Fieldwork established that the process of obtaining licenses was also problematic. Aside from the protracted procedures, some applicants were unable to secure the requisite registration documents. Petero, a potential investor from a PS, explained the challenges he faced in his quest to secure licenses for telecommunications and mining investments in Kenya:

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155. *See* G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights at pmbl. (Dec. 16. 1966) (recognizing the obligation for states to create "conditions" whereby "all members of the human family" can "enjoy" their "economic" rights').

156. Protus Opwora Wabwoto v. Ken Manda and 2 Others (2020) K.L.R., at 3.

157. *Id.*

158. *Cf*. Corporations Act 2001 (Cth) ss 601CD-601CS (Austl.).

> I saw a [highly ranked Government official] in 2017 and gave [them] my ideas on investment and [they] encouraged me to invest in Kenya. However, I have encountered obstacle after obstacle and none of my applications has been responded to since 2017. Kenya Investment Authority did not assist me either. Kenya takes a protectionist approach that is in-ward looking and full of petty politics. There are only 50 Tanzanian companies that have been allowed to invest in Kenya, compared to 500 Kenyan companies that are established in Tanzania. The only business that goes on unhindered is selling tomatoes, onions, and powdered milk. It is impossible to develop economically in the circumstances.[159]

It is unclear why Petero had to 'see' the Government official in order to kick-start the investment process. This narrative demonstrates the maze that rights holders face. It also raises several questions. Did Petero expect this official to assist him to wade through the bureaucratic procedures? If one does not know any well-ranked government officials, would they be able to obtain a license? What remedies are available for those rights holders who are unable to secure licenses, yet met the legal criteria? Finally, who are the duty bearers, and what are their specific obligations? While the framework is expansive, the multiplicity of laws governing the issuance of trading licenses and permits implies that one has to lodge several applications in order to obtain the relevant permit(s). Additionally, these processes tend to be expensive, both in terms of time and money.

In order to surmount these hurdles, some rights holders took matters into their own hands. Rather than engage with the protracted process, they opted to use Kenyans to obtain trade licenses and business permits.[160] According to these respondents, they followed this path, owing to corruption and unreasonable demands by officials after they disclosed they were not Kenyan citizens.[161] Ssebo, a director of a Ugandan-based company, explained his situation:

> I searched for a business permit in Nairobi City County for ten months. The officials kept asking for all manner of documents and giving excuses until I got fed up. One of them asked for a huge amount of money and said he would share it with colleagues to ensure I was issued with the licenses I wanted. I sought advice from my friends who already have businesses here. They asked me to find a Kenyan citizen to apply for the permit on our behalf. We wrote a letter stating that he was our local representative. We got the licenses we wanted within one day. Since then, most of us use Kenyans for this purpose.[162]

This experience reiterates the challenges faced by rights holders seeking to enter the Kenyan market. The protracted process that Ssebo outlined is undesirable, not only from a commercial perspective, but also from a human rights angle. Article 47(1) of Kenya's Constitution and section 4 of the *Fair Administrative Action Act*[163] require that administrative decisions are made expeditiously and efficiently. While the route that Ssebo and his friends took

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159. Interview with Petero, Nairobi, Kenya (Sept. 10, 2021).
160. Interview with Ssebo, Nairobi (Mar. 10, 2022).
161. *Id.*
162. *Id.*
163. The Fair Administrative Action Bill, No. 4 (2015) Kenya Gazette Supplement No. 25 § 4(1).

delivered the "goods," it is less than ideal. In many ways this method does very little to promote the ROE for companies registered in other PSs. Doubtless, the framers of the EAC Treaty and the CMP did not envisage a situation where one would need a third party in order for them to enjoy the entitlements contained in the community laws. Hence, they excluded this requirement from the EAC legal framework. As mentioned earlier, this mode of operation is inconsistent with the rule requiring parties to enter voluntarily into commercial ventures.

Additionally, the steps that these EAC nationals took significantly dilutes the fundamental objectives of the EAC Treaty, namely, "creating an enabling environment in all the [PSs] in order to attract investments" as well as strengthening "their economic, . . . and other ties for their fast balanced and sustainable development by the establishment of an East African Community."[164] The preamble to the CMP is also emphatic that the EAC was designed to "develop policies and programmes aimed at widening and deepening cooperation among the Partner States in, [among others], the economic" field.[165] For EAC nationals who do not have "friends," this framework suggests that they may experience challenges in their quest to enjoy the ROE. Yet article 13 of the CMP points out that this right is available for all EAC nationals, provided they do not fall within the permissible exceptions.

The third area of concern relates to fees that some counties in Kenya[166] charge when issuing licenses. Under the equal treatment rule similar commercial enterprises should attract the same levy. In reality the position is quite different. The fees, which rights holders are required to pay, are not uniform across the counties. In Elgeyo Marakwet County, for instance, the fees for non-Kenyans are different from what citizens pay for the same trade/business license.[167] The former is several times higher compared to the latter.[168] There is no justification for this differentiation, which clearly discriminates against rights holders. Under such circumstances applicants have limited options. They will have to pay the high fees if they wish to operate a commercial enterprise in this county.

### 3. *Restrictive Operational Requirements*

Like any commercial entity registered in Kenya, rights holders are required to comply with specific rules and regulations. As was the case with issues surrounding the licensing of these business enterprises, the operational legal framework of entities registered in a PS is highly regulated. This study identified a number of instances where these commercial enterprises' mode of operation is restricted.

The first restriction relates to the hours of operation for companies run by rights holders. According to section 983(2) of the *Companies Act*, these entities

164. *See* EAC Treaty, *supra* note 2, at preamble.
165. CMP, *supra* note 6, at preamble.
166. For a list of the counties, *see* Constitution (2010) (Kenya), sched. 1.
167. Elgeyo Marakwet Finance Act (2018), sched. 1.
168. For instance, Kenyans who wish to establish a casino in this county are required to pay Kes. 100,000 (US$670). Foreign nationals, on the other hand, pay ten times more—Kes. 1,000,000 (US$6,700). *See id.*, items 9-1090 and 9-1091.

are permitted to operate between "10.00am and 12 noon" and "from 2.00pm to 4.00pm" on every "business day."[169] Further, as mentioned earlier, a local representative must be present at all times when the establishment is open.[170] Moreover, they are required to register a notice stating that they are foreign with the Registrar of Companies.[171] We need to realize that neither the *Companies Act*, nor Kenya's main legislation, which defines legal terms and concepts, the *Interpretation and General Provisions Act*,[172] attempt to define the phrase "business day." According to Black's Law Dictionary, this phrase means "a day when most institutions are open for business, excluding Saturdays, Sundays and certain public holidays."[173] This definition is quite narrow, considering that it fails to take into account the practical situation. In reality, several companies in Kenya remain open on weekends and public holidays. According to Shani, an official of the Business Registration Services, the disparity in hours of operation is designed to protect local enterprises:

> The rules are indicated as they are because we are dealing with foreign companies. There must be a difference between them and Kenyan companies because we are protecting ours from competition.[174]

As was the case with the licensing requirements, the CMP does not limit the hours of operation of rights holders. On the contrary, PSs are required to 'remove' any barriers that will curtail rights holders from enjoying their rights.[175] They are also prohibited from introducing "any new restrictions" to this entitlement.[176] Regulating the hours of operation significantly limits access to the market by companies registered in the PSs. For Kenyan companies, there is no requirement to open their businesses at specific times, to indicate their nationality, or to have an officer present in that office at all times when they are in operation. Since Kenyan businesses are allowed to open for longer hours, are Kenyan businesses not accorded an unfair advantage over companies ran by rights holders? Yet under the CMP and international law, as reflected in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[177] all commercial enterprises must have an equal opportunity.

Upon successful registration, the Registrar must issue a legal person from a PS with a certificate of compliance. The *Companies Act* requires this document to indicate that the company is "foreign."[178] Further, in their places of business these companies must paint or affix their name and nationality in a

169. Companies Act (2021) § 983(2).
170. The Companies Act (2021) § 983(2).
171. *Id.* § 983(3).
172. The Interpretation and General Provisions Act (2020) Cap. 2 § 3.
173. *Business Day*, Black's Law Dictionary (11th ed. 2019) at 497. Domestic legislation in countries such as Australia contains a similar definition. Corporations Act 2001 (Cth) s 9 (Austl.). defines "business day" to mean "a day that is not a Saturday, a Sunday or a public holiday or bank holiday in the place concerned."
174. Interview with Shani, Bus. Registration Serv., Nairobi, (Mar. 15, 2022).
175. CMP, *supra* note 6, at article 15(3).
176. *Id.*
177. G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights art.2 (Dec. 16. 1966) Article 2.
178. The Companies Act (2021) § 975.

conspicuous place accessible to the public.[179] Notably, no similar provisions exist for Kenyan companies. This is the last area of concern under this head. The legal import of this rule is to label companies from other PSs as "foreign." The basis of this requirement is unclear when one reviews the drafting history of the legislation. Would the objective have been to warn traders, local and foreign, to be cautious when dealing with companies from other PSs? While this research did not explore the further effects of this requirement, it is possible that some clientele would be reluctant to deal with a non-Kenyan commercial entity. Further empirical research is required to test this hypothesis. As of now, it is clear that the imposition of these restrictive conditions is inconsistent with the national treatment principle.

## III. Towards Removing the Barriers to Access the Right of Establishment: Two Proposed Interventions

The implementation of the CMP has not been as "smooth" as some contend.[180] Kenya has failed to fulfill its obligations under the Treaty, despite its undertaking to "remove restrictions" on the enjoyment of the ROE.[181] Domestic laws, as the preceding section demonstrates, "reserves access" to local markets to Kenyans, "thus enshrining a difference in treatment on grounds of nationality which is prohibited in principle"[182] by article 17 of the CMP. In *Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt,* the ECJ was emphatic that the ROE prohibits PSs from "hindering the establishment in another [PS] of one of its nationals or of a company incorporated under its legislation."[183] Rather, as the EAC Treaty underscores, PSs are obligated to create an "adequate and appropriate enabling environment," which will guarantee the realization of the ROE.[184] Questions relating to the enforcement of this right, therefore, lie at the core of its enjoyment. In *Football Association Premier League Ltd v. Media Protection Services Ltd*,[185] the ECJ was emphatic that actions that "frustrate the Treaty's objective of achieving the integration of those markets through the establishment of a single market"[186] must be tackled, and tackled comprehensively. As a party to the Treaty, Kenya is obligated to align its national laws and practices "so that they conform to the regional laws in relation to common market."[187] This section explores two interventions, which stakeholders can take to remove the identified barriers—engage in legislative

179. *Id.* § 984.

180. *See*, *e.g.*, N.A. Check, *Free Movement of Persons, Right of Residence and Right of Establishment and Agenda 2063: What Policy Options for Africa*, Afr. J. Pub. Affs. 129, 133 (June 2022).

181. CMP, *supra* note 6, at article 5(2)(d).

182. Case C-61/08, EU v. Hellenic Republic, 2011 E.C.R. *I-04399* ¶ 73.

183. Case C-298/05, Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt 2007 E.C.R. I-10451 ¶ 33.

184. EAC Treaty, *supra* note 2, at art.7(1)(b).

185. Cases C-429/08 & C-403/08, Football Association Premier League Ltd v. Media Protection Services Ltd, 2011 E.C.R. I-09083.

186. *Id.* ¶ 247.

187. Munyalo Kamote and Others v. County Government of Kajiado (2017) eKLR at 8.

reforms as well as invoke the judicial framework at the national and regional levels. For these initiatives to be successful good faith on the part of duty bearers and stakeholders is paramount.[188]

## A. The First Intervention: Legislative Initiatives

### *1. Amending Existing Laws*

Kenya needs to formally bring its legislation in line with the country's treaty obligations. In order to seal the loopholes this article has identified, all the non-compliant pieces of domestic legislation must be amended. The process of amending any legislation involves making changes to specific section(s) in order to achieve a specific objective. Duty bearers should, therefore, pay close attention to the laws that govern the registration of rights holders. Several statutes in Kenya, including the Companies Act, the Partnerships Act, the Registration of Business Names Act and the Limited Liability Partnerships Act, contain provisions that have improperly construed rights holders as "foreigners."[189]

None of these key pieces of legislation contain provisions for registration of this cohort as nationals of the EAC. The current legal framework, which is very problematic, needs to be changed in order to allow nationals of the EAC to register their commercial enterprises in the country. To meet the intention of the EAC Treaty and the CMP, the implementing statute(s) must contain provisions for the registration of branches, agencies, or subsidiaries of rights holders. The need to make changes to the law is quite urgent, considering that, save for companies, other rights holders cannot be registered in Kenya.

As they say in Kiswahili, "umoja ni nguvu" (unity is strength). Consequently, all concerned persons—including courts, rights holders, law makers, academics, professional organizations, and civil rights groups—must join hands to ensure that the offending sections in statutes are amended in order to remove any discriminatory provision(s). Courts and rights holders have taken specific steps towards this end. In *Steve Isaac Kawai and Others v. Council of Legal Education and Others*[190] the petitioners challenged the constitutionality of section 12(a) of the *Advocates Act*, which limited the eligibility of admission to the Kenyan bar to citizens of "Kenya, Rwanda, Burundi, Uganda and Tanzania," provided they met other qualifications in the legislation. According to the petitioners, this provision was discriminatory.[191] Since they were nationals of the Republic of South Sudan, an EAC member, Kenya owed them equal treatment obligations under the EAC Treaty.[192] In response, the first respondent argued that, although the Act excluded citizens of South Sudan, the court

188. *See also* Jimmy Phazha Ngandwe, *Challenges Facing the Harmonisation of the SADC Legal Profession: South Africa and Botswana Under the Spotlight*, 46 Compar. & Int'l L. J. S. Afr. 365, 380 (2013) (contending that "nationalist mentalities" are a challenge to regional integration).
189. *See* the Companies Act (2021) § 3; the Partnership Act § 2.
190. Kawai, et al. v. Council of Legal Education, et al., [2021] eKLR.
191. *Id.* ¶ 63.
192. *Id.* ¶ 6.

had “no powers to amend” Kenyan laws.[193] Thus, they requested the Judge to dismiss the case.[194] In his holding Justice Korir of the High Court took a progressive approach. He was emphatic that, as a member of the EAC, Kenya was bound by the Treaty. The legal test was whether the applicant “was a national” of a PS and “fulfilled” the “other conditions for the application of the rule on which [he] relied.”[195] In order to discharge its obligations under article 12 of the Treaty, Kenya had to demonstrate that it had put in place legal measures that would ensure that citizens of PSs are admitted to practice law in the country, provided they meet the legal requirements. According to the court:

> Article 126 of the Treaty is not implementable directly. It can only be enforced through enactment of legislation by a Partner State.[196]

Since the Kenyan parliament had yet to pass the implementing law, the court found that the language of the legislation “created a situation where the citizens of [PSs] of the Community are not treated equally.”[197] While he found that section 12(a) of the *Advocates Act* was unconstitutional, the Judge underlined the difficulties rights holders face:

> The position the petitioners find themselves in is that as citizens of a [PS] of the Community they have been denied a benefit that is available to citizens of other [PSs] without any justification. Citizens of South Sudan find themselves in this unenviable position simply because their country joined the Community after the other States. In my view, once South Sudan signed the Treaty, the membership benefits ought to be enjoyed by its citizens. South Sudan should not be left salivating over the goodies enjoyed by members of the Community as if it is not a signatory of the Treaty.[198]

According to the court, this situation would have been avoided, if the section “provided that citizens of Kenya and Partner States of the Community are eligible for admission as advocates in Kenya.”[199]

A fundamental goal of regional integration is ‘harmonizing the conditions governing the right of establishment and provision of services in a given sector of activity.”[200] Consequently, the CMP calls on PSs to:

> [M]utually recognise the academic and professional qualifications granted, experience obtained, requirements met, licenses or certifications granted, in other [PSs].[201]

The ROE Regulations reinforce this legal obligation by requiring PSs to undertake measures, which will facilitate entry by rights holders into

193. *Id.* ¶ 9.
194. *Id.*
195. Case C-136/78, Ministère Public v. Vincent Auer, 1979 E.C.R. 00437, ¶ 28.
196. *Id.* ¶ 9.
197. *Id.* ¶ 64.
198. *Id.* ¶ 167.
199. *Id.* ¶ 66.
200. Joined Cases C-330/90 and C-331/90, *Angel López Brea and Carlos Hidalgo*, Palacios, 1992 E.C.R. I-324 ¶ 1.
201. CMP, *supra* note 6, at article 11(1)(a).

"professional" associations.[202] Access to these associations is an "essential element in promoting" the ROE.[203]

The Kenyan experience, as reflected by *Kawai*, demonstrates that the situation on the ground is not as straightforward as some contend.[204] In an effort to ensure that this PS complies with its legal obligations in the context of the freedom to provide and receive professional legal services, the Chairperson of the Departmental Committee of Justice and Legal Affairs in Kenya's Parliament introduced the *Advocates (Amendment) Bill* in October 2021. While this was a laudable initiative, the proposed legislation took a piece-meal approach since it failed to capture nationals of South Sudan. The amendment fell way short of achieving a central objective of the EAC Treaty promoting "the free movement of persons, labour and services" as well as guaranteeing the "enjoyment" of the ROE.[205] Curiously, the draft legislation ignored the decision of the High Court in *Kawai*, which had been handed down in May of the same year. Yet the country is obligated to take, "without delay," the steps that are required to "implement" judgments that the EACJ hands down.[206] The researchers were unable to establish whether the failure to take into account the *Kawai* decision was deliberate or not. That said, any law that seeks to maintain the *status quo*, unless it is justified under permissible grounds, should be discouraged. By contrast, the law review process should be comprehensive enough to cover all beneficiaries.

Attention must also be paid to statutes that regulate entry and exit of rights holders into the PSs. These are central pieces of legislation because they facilitate their movement. All the barriers that they create must be legally surmounted. To facilitate entry of rights holders and their personnel who have been hired to take up managerial or supervisory positions, the 2012 *Kenya Citizenship and Immigration Act* should also be reviewed. In order to comply with CMP[207] the conditions for issuance of work permits under this piece of legislation should be the same, irrespective of one's citizenship. Denying them entry into the country can severely compromise the realization of the ROE. Comparative lessons of this approach can be drawn from the European Union (EU). Following the decision of the ECJ in *Rush Portuguesa Lda v. Office National d'immigration*,[208] the European Commission issued a communication to the European Parliament terming the rule requiring workers from third states, who are employees of EU legal persons, to obtain work permits as

202. *Id.* at Regulation 12(1). A similar entitlement exists in the EU context. *See, e.g.,* Case 71/76, Jean Thieffry v. Conseil de L'Ordre des Advocats a la Cour de Paris, 1977 E.C.J; Case 115/78, J. Knoors v. Secretary of State for Economic Affairs, 1979 E.C.J. (emphasizing that ROE holders have the right to practice their trade or profession in the PSs that they have settled in.).

203. Josephine Steiner, Lorna Woods & CHRISTIAN TWIGG-FLESNER, Textbook on EC Law, 360 (Oxford University Press., 8th ed., 2003).

204. *See, e.g.*, Catherine Barnard, The Substantive Law of the EU: The Four Freedoms, 299-300 (Oxford University Press ed., 2004) (asserting that once a citizen of a PS has "completed the training and acquired the qualification then recognition is automatic").

205. EAC Treaty, *supra* note 2, at article 104(1).

206. *Id.* at article 38(3).

207. *Id.* at article 13(11)(b)(ii).

208. C-113/89, Rush Portuguesa Limitada v. Office National d'Immigration 1990 E.C.R. I-01417.

"disproportionate" and "unjustifiable."[209] It also emphasized that the personnel from third states should be exempted from visa requirements.[210] A similar approach can go a long way towards facilitating the enjoyment of the ROE within the EAC.

The third area of focus relates to pieces of legislation that have been (and continue to be) enacted after the coming into force of the CMP. As the case with the existing statutes, those who participate in the making of these pieces of legislation must guard against violating the ROE. Rather, they will have to ensure that these statutes are compliant with the country's regional obligations. If they fail to discharge their duties accordingly, the intended objective of the CMP, namely, "deepening cooperation among the [PSs] in the economic . . . field"[211] will be a huge challenge. Partial initiatives, such as the proposed *Advocates (Amendment) Bill, 2021*, will not bear the desired fruit.

In the process of amending their domestic laws, drafters should also consider the language that they deploy. Instead of adopting the listing method where the PSs are outlined by name, law makers should take a broad-based approach. They should adopt a generic description that covers incoming and outgoing PSs, without necessarily requiring additional legislative processes. Towards this end, section 12(a) of the *Advocates Act* can be worded in broad terms to read as follows:

> No person shall be admitted as an advocate unless he or she is a citizen of an East African Community [PS].[212]

This is the approach that the *Kawai* court took when it suggested that section 12(a) of the *Advocates Act* should be rephrased to read "citizens of Kenya and [PSs] of the Community."[213] The all-encompassing approach will definitely cover the citizens of new entrants, such as the Democratic Republic of Congo, which became a member of the EAC in July 2022.[214]

### *2. Passage of National Law*

A comprehensive domestic law is required to operationalize fully the treaty obligations. Kenya's Constitution in article 2(4) as well as the *African Charter on People and Human and People's Rights*[215] both call on the Government to pass and put into practice legislation designed to fulfil its obligations towards rights holders. Considering the crucial role it played in the making and passage of the EAC Treaty, one would have expected Kenya to cement its legal obligations by "passing a new statute."[216] Among other provisions, the State should give

209. Communication from the Commission to The European Parliament and the Council, Protection of Intra-EU Investment, at 8, COM/2018/547 final, (July 19, 2018).
210. *Id.*
211. *See* CMP, *supra* note 5, at the preamble.
212. The Advocates Act, Cap. 16 § 12 (2000) (Kenya).
213. *Id.*
214. *See* East African Community, *Democratic Republic of Congo*, https://www.eac.int/eac-partner-states/drcongo (last visited: 26 Apr., 2023).
215. *African Charter on People and Human and People's Rights,* concluded in Nairobi 27 June 1981, art. 1.
216. Bryan McMahon, *Ireland and the Right of Establishment in the Treaty of Rome*, 6 Irish

assurance in this legislation that it will not introduce any new restrictions for rights holders in their territories,[217] except as the CMP provides. An all-inclusive legislation has several advantages. Unlike the current framework where the country's obligations to rights holders are scattered across a number of laws, a comprehensive piece of legislation can prescribe in a single statute the following aspects:[218]

- the definition of key terms on the context of the right of establishment and the intended beneficiaries of this entitlement;
- the documentation, which applicants need to produce;
- the forms that applicants need to fill out;
- the rights, duties and obligations of all players;
- the enforcement regime, and penalties for breach of ones obligations; and
- the financial provisions.

This approach is likely to enable duty bearers and rights holders to appreciate their rights and responsibilities. A single statute is also beneficial to stakeholders since it serves as a one-stop-shop for identifying the rights, duties and obligations for rights holders and duty bearers.

Notably, Kenya has taken significant strides to meet its international obligation with regards to other vulnerable populations, including children,[219] refugees and asylum seekers[220] as well as persons with disabilities.[221] The lessons learnt from the drafting process and implementation of these legal frameworks can come in handy when drafting a comprehensive domestic legislation to cement its obligations under the EAC Treaty and the CMP. For courts and other stakeholders to engage effectively with the implementing legislation, drafters should adopt plain and easy to understand language.[222] To fulfill the constitutional mandate, the Government is required to produce the new legislation in Kiswahili,[223] "braille and other communication formats and technologies

Jurist 271, 291 (1971).

217. Countries on the EU have taken this position. *See* The Treaty Establishing the European Economic Commission, art. 53, Mar. 25, 1957. (prohibiting member states from introducing "any new restrictions on the establishment in their territories of nationals of other Member States".). *See also* Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.J (reiterating this basic rule).

218. *See also*, Madhwa and Others v. City Council of Nairobi [1968] EA 406, 410 (Kenya) (where the High Court of Kenya (Harris J) outlined the basic elements of an implementing legislation.).

219. The Children Act, 2022 (Act No. 29/2022) (Kenya).

220. The Refugees Act, 2021 (Act No. 10/2021) (Kenya).

221. The Persons with Disabilities Act, (Act No. 14/2003) (Kenya).

222. *See also*, Henry Mutai, *Regional Trade Integration Strategies Under SADC and the EAC: A Comparative Analysis*, SADC Law Journal 81, 95 (2011) (advocating for unambiguous language to be used when drafting legislation); Justice Mativo's opinion in Jonnah Tusasirwe and Others v. Council of Legal Education and Others [2017] eKLR at 9-10 (outlining the benefits of plain language in the context of statutory construction).

223. Constitution (2010) (Kenya) art. 7(1).

accessible to persons with disabilities."[224] Experiences from countries within the EAC, which have passed domestic legislation,[225] such as Uganda, should also be brought on board. In *Samuel Mukira Mohochi v. Attorney General of the Republic of Uganda*,[226] the ECJ praised the Ugandan legislation for defining the meaning of key terms such as "foreign country" and "persons" as well as recognizing the entitlements due to rights holders.[227] The lessons learnt from these comparative examples should be "bent" to suit the local circumstances.

## B. The Second Intervention: Judicial Involvement

Courts play a central role in the enforcement of rights.[228] The EAC Treaty and the CMP bestow jurisdiction on two forums, the EACJ[229] and national courts.[230] This section examines these dispute resolutions forums. Prior to lodging a claim in court, a litigant should consider a number of factors. In the first instance, they must identify the right or freedom, which is "violated or was threatened to be violated."[231] Further, they should locate the court, which has jurisdiction to hear and determine their complaint. Lastly, they need to ascertain the duty bearers, and demonstrate the extent to which these players have failed to meet their legal obligations. The overall objective of this approach is to ensure that a Judge hearing the claim is able to:

> [M]ake the legal nexus between the Applicant's allegations and the existence of positive provisions in the Treaty, and elsewhere, that impose on the Partner States an obligation, a duty, or an undertaking that binds the Partner States to do or to withhold from doing or engaging in certain acts; or to observe certain standards or behaviour. . .[232]

Let us now examine these judicial avenues.

### a) The EACJ: Strength and Limitations

The EACJ is one of the organs of the EAC.[233] Article 27(1) of the EAC Treaty declares that this court has jurisdiction over the "interpretation and application" of the treaty. It is also mandated to hear and determine claims for

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224. *Id.* at art. 7(3)(b).
225. *See* The East African Community Act, 2002, (Act 13 of 2002) (Uganda); The Common Market for Eastern and Southern Africa Treaty Act, 2017(Implementation).
226. Samuel Mukira Mohochi v. Attorney General of Uganda (2013) Reference No. 5 of 2011 (Uganda).
227. *Id.* ¶ 48.
228. *See also* Adewale Banjo, *The ECOWAS Court and the Politics of Access to Justice in West Africa*, 32 Africa Dev. 69, 85 (2007) (contending that "community citizens" should be able to "obtain justice through [regional] courts").
229. EAC Treaty, *supra* note 2, at article 23(1), Nov. 30, 1999.
230. CMP, *supra* note 6, at article 54(2).
231. Aboneka Michael and Another v. Attorney General, [2018] Miscellaneous Cause No. 367 of 2018 (Uganda) at 9.
232. The Honorable Attorney General of the United Republic of Tanzania v. Africa Network for Animal Welfare (ANAW) (Ref 9 of 2010) EACJ First Instance Division (29 August 2011) at 7.
233. EAC Treaty, *supra* note 2, at article 9(1).

breaches of human rights, which occur within the region.[234] Rights holders are entitled under the provisions of article 30 of the EAC Treaty to lodge references in the EACJ challenging the:

> [L]egality of any Act, regulation, directive, decision or action of a [PS]. . . on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of [the] Treaty.[235]

Unlike many international treaties,[236] the EAC Treaty does not require claimants to exhaust local remedies in Kenya before approaching the EACJ.[237] Put differently, when a rights holder identifies a violation of their rights, they can immediately invoke the protective framework of the EACJ. In this regard the EACJ is a court of first instance since a claimant is not required to run a case before a domestic court prior to commencing legal proceedings in this forum. In *Attorney General of the Republic of Rwanda v. Plaxeda Rugumba*[238] the court affirmed this basic rule. The Appellant had argued that the Respondent, who had sought orders of *habeas corpus*, should have made the application in Rwandan courts before approaching the EACJ.[239] In its findings, the court stated that the "EAC Treaty does not have a provision requiring exhaustion of local remedies."[240] The term "local remedies" refers "primarily to judicial remedies," not non-judicial reliefs.[241] The exhaustion of domestic remedies rule is designed to avoid a well-known legal adage—justice delayed is justice denied.[242]

While this requirement is a key strength in the procedural framework, the EACJ system erects a number of obstacles for litigants wishing to adjudicate their rights before this tribunal. These barriers cast serious doubts on the extent the court plays a "crucial role"[243] in safeguarding rights holder's entitlements. Under the EACJ regime, the time limit within which a litigant can file their complaint is rather limited. Article 30 requires claimants to lodge references:

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234. *Id.* at article 27.
235. *Id.* at article 30.
236. See, *e.g.*, Charter on Human and Peoples' Rights, art. 50, June 27, 1981, 21 I.L.M. 58 (1982), entered into force 21 October 1986); Treaty Establishing the Common Market for Eastern and Southern Africa, art. 26, Nov. 5, 1993; International Convention on the Elimination of All Forms of Racial Discrimination, art 11(3), Dec. 21, 1965, 660 U.N.T.S. 195.
237. Attorney General of the Republic of Rwanda v. Plaxeda Rugumba [2012] eKLR, ¶ 35.
238. *Id.* ¶ 39(1).
239. *Id.* ¶ 33.
240. *Id.* at para 35.
241. *See* also In the Consolidated Matter of Tanganyika Law Society and Another v. The United Republic of Tanzania; Reverend Christopher R. Mtikila v. The United Republic of Tanzania, Application No. 009/2011, No. 011/2011, African Court on Human and Peoples' Rights, at 82.3.
242. Edwin Odhiambo-Abuya, *Reinforcing Refugee Protection in the Wake of the War on Terror*, 30 B.C. INT'L & COMP. L. R. 277, 320 (2007).
243. John Ruhangisa, The Procedures and Functions of the East African Court of Justice' in Kennedy Gastorn, Harald Sippel and Ulrike Wanitzek, *Processes of Legal Integration in the East African Community* (Dar es Salaam University Press: Dar es Salaam University, 2011) 145, 147.

> [W]ithin two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.[244]

On its official website,[245] the EACJ clarified that these are 60 working days, rather than calendar days. The onus is on the party alleging that an action is time barred to bring the requisite evidence. Those claims that are lodged outside of these time-limits are statutorily barred. Hence, the court will not entertain them.[246]

The time-limit for filing claims is quite narrow. The fact that the treaty does not allow a party to seek an extension under any circumstance[247] sits uncomfortably with the well-known right to a fair hearing. Indeed, this restriction is a huge barrier for claimants. Ally Possi argues that the restriction is "draconian" and an "obstacle to access to justice."[248] In the words of Jabori, a former judge at the EACJ:

> It is a ridiculous limitation. The idea was to only have live cases brought before the EACJ. They did not want to bog the court down with old cases. But no one should be stopped from accessing justice especially in light of the freedoms and rights under the CMP.[249]

The situation of the EAC treaty is quite unique when considering that none of the treaties that establish comparable regional economic blocs in Africa have a provision imposing a time limitation for filing of references before their respective courts.[250] Interestingly, the PSs are members of one or more of these regional economic communities. Further, their domestic laws allow courts, on application by a petitioner, to extend the statutory period for filing a suit,

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244. EAC Treaty, *supra* note 2, at article 30(2).

245. "EACJ FAQ", East African Court of Justice https://www.eacj.org/?page_id=7946.

246. *See*, Attorney General of the Republic of Uganda & Attorney General of the Republic of Kenya (As Interested Party) v. Omar Awadh and 6 others, EACJ Appeal No. 2 of 2012, ¶ 60 (finding "The Application arising from Reference No. 4 of 2011 lodged in the First Instance Division on 15th June 2011, is hereby struck out for having been filed outside the time limit prescribed under Article 30(2) of the EAC Treaty".); *see also* Mbugua Mureithi wa Nyambura v. The Attorney General of the Republic of Uganda, Reference No. 1 of 2011 at p. 20-21 (observing "Consequently, the Court is bound by the Law (Treaty) and for the above reasons we have to take cognizance of the fact of the limitation. Therefore, we hold that the Reference is time-barred."); Malcom Lukwiya v. The Attorney General of the Republic of Uganda and Another, Reference No. 6 of 2015 at p. 22 (dismissing the Reference "for having been filed out of the two-month period prescribed by Article 30(2) of the Treaty.").

247. *See* Attorney General of the Republic of Kenya v. Independent Medical Legal *Unit* Reference No. 1 of 2011, at p. 16 ("[T]he [EAC] Treaty does not grant this Court any express or implied jurisdiction to extend the time set in . . . Article [30].").

248. Ally Possi, *An appraisal of the functioning and effectiveness of the East African Court of Justice* 21 *Potchefstroomse Elektroniese Regsblad* 1, 14 (2018)

249. Interview with Jabori, Naivasha, 21 Nov., 2022.

250. *See*, for example, Protocol A/P. L/7/91 on The Community Court of Justice with regard to ECOWAS available at http://www.courtecowas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf [https://perma.cc/4FNZ-FFB5] (accessed on 11 Oct., 2022) with regard to ECOWAS; Protocol on the Tribunal and Rules Thereof,2000 with regard to SADC accessed on 11 October, 2022); Treaty Establishing the Common Market of Eastern and Southern Africa, 2314 UNTS 265, Chapter Five.

provided a petitioner meets specific requirements.[251] It is puzzling why those drafting the EAC treaty chose this restrictive approach when they had several comparative examples to draw on, including at both the international[252] and domestic levels. In order to comply with due process requirements, the EAC Council of Ministers has to remove this limitation from the treaty.[253] As of now, rights holders have to move swiftly to avoid their claims being time barred.

Claimants are required to lodge their claims in court either physically or electronically.[254] The requirement for physical presence presents yet another barrier given that the seat of the court is in Arusha, Tanzania. For one to be able to file their claim they will need to travel, in person or through a representative, to the court. During this process a litigant is likely to incur a lot of expenses. The requirement for parties to lodge claims electronically is, therefore, a commendable initiative. Indeed, it can address some of the obstacles raised by the requirement for physical presence. However, since access to electricity and internet connection are a major challenge in the East African region,[255] an electronic method can be problematic too.

The process of preparing and presenting a claim before any court or tribunal is usually very involved. While parties are entitled to appear in the EACJ in person or by counsel,[256] a self-represented litigant may experience difficulties navigating the complex court processes.[257] For instance, in *Timothy Alvin Kahoho v. The Secretary General of the East African Community*[258] the applicant was self-represented. In its assessment, the court found that Mr. Kahoho took a "very narrow view" in his appreciation of the Treaty.[259] Almasi, a legal practitioner based in Nairobi, made the following comments on the EACJ's procedures and self-represented claimants:

> On a scale of 1 to 5, with 1 being extremely difficult to navigate and 5 being very easy to navigate, I would say 2. Even advocates who do not have experience litigating in this court do not find it easy to navigate. The procedures are complex.

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251. *See Limitations of Actions Act* (Kenya) at part III; *Limitation Act* (Uganda); Tanzanian *Law of Limitation Act* section 14.

252. *See*, Ordre des Adocats au Barreau de Paris v. Onno Klopp, *Case 107/83*, ECJ, ¶ 18 (decrying a restrictive approach to statutory interpretation).

253. *See* EAC Treaty, *supra* note 2, at art. 13 (bestowing jurisdiction on the Council of Ministers to 'promote, monitor and keep under constant review' the implementation of the treaty).

254. *East African Court of Justice Rules of Procedure 2019*, rule 14 available at https://www.eacj.org/wp-content/uploads/2023/02/EACJ-Rules-of-Procedure-2019.pdf [https://perma.cc/UQX4-QXFS] [hereinafter *EACJ Rules*].

255. Internet penetration in the East African region is, overall, very low. By the end of 2021, only 32% of the adult population in the EAC (excluding the DRC) subscribed to mobile internet services. *See* GSMA, 'The Mobile Economy: Sub-Saharan Africa, 2022', at 27 https://www.gsma.com/mobileeconomy/wp-content/uploads/2022/10/The-Mobile-Economy-Sub-Saharan-Africa-2022.pdf [https://perma.cc/NN8Z-5KU5]. Access to electricity is also a huge challenge. *See* The World Bank, 'Access to Electricity, Urban (% of Population)' https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS [https://perma.cc/LB5D-42FK].

256. EAC Treaty, *supra* note 2, at article 37(1).

257. *See* generally the EACJ Rules, *supra* note 254, at Rules 11-131.

258. *See generally,* Reference No. 1 of 2012.

259. *Id.* at para 29.

> The law applicable there is not known to many. The language of the court is also difficult for the litigants who do not have an English-speaking background.[260]

The record of the EACJ demonstrates that in most instances, claimants are represented by counsel.[261] Considering that legal fees are expensive, indigent claimants are likely to face serious difficulties accessing this court. In the end, some indigent claimants may altogether abandon their claims, irrespective of the weight of their evidence.

For a litigant to invoke the court process, the EACJ must be accessible[262] and affordable. Access to the court does not mean granting legal standing to a wide range of players, as John Ruhangisa, former Registrar of the court, contends.[263] Indeed, this is a narrow perspective to take. In addition to granting formal access, meeting this obligation requires states to put in place a framework that will facilitate access by all potential litigants. The Kahoho court took practical steps by holding the session in Dar-es-Salam—Mr. Kahoho's city of residence. These proceedings were conducted away from Arusha because the petitioner was a person of modest means.[264] In the words of the Judges, the court had to be "easily accessible to the people of East Africa."[265] While this was a laudable initiative, the record of the EACJ shows that this is an isolated case. The majority of the litigants are still required to appear in the seat of the court in Arusha. Can subsequent proceedings follow the approach the Kahoho court took by holding proceedings in locations closer to litigants' places of residence? Therein lies the challenge that the EACJ must take, if it is to serve the needs of the community.[266]

Litigants must also have faith that the court will deliver procedural and substantive justice. The interviewees that this research met expressed their lack of trust with the EACJ. Chacha, a partner of a ROE limited liability partnership, was unable to register a branch in Kenya, owing to the lack of a legal framework:

> We applied for registration in Kenya. We were told no law allows registration of a branch of a partnership business. We decided not to go to court because the court would have decided the same. Many of my friends have similar thoughts. It is of no use to go to court.[267]

These sentiments could explain why there is very little litigation by rights holders in the EACJ. Despite the guarantees that the EAC treaty offers, rights

260. Interview with Almasi, Nairobi, 23 Dec., 2022.

261. *See generally*, for instance, Alcon International Limited v. The Standard Chartered Bank of Uganda and Others [2012] eKLR; James Katabazi and 21 Others v. Secretary General of the East African Community and Another, Reference No. 1 of 2007.

262. *See also* Timothy Alvin Kahoho v. The Secretary General of the East African Community, Reference No. 1 of 2012, ¶ 65.

263. John Ruhangisa, *Role of the East African Court of Justice in the Realization of Customs Union and Common Market* (last visited Feb. 19, 2023) available at https://www.eala.org/uploads/Nanyuki_V3_18-Apr-2016_12-39-46.pdf [https://perma.cc/73NC-SATA].

264. *Kahoho*, Reference No. 1 of 2012, ¶ 65.

265. *Id.*

266. Article 23 of the Treaty outlines the role of the court, thus, to 'ensure the adherence to law in the interpretation and application of and compliance with [the] Treaty.

267. Interview with Chacha, Nairobi, 15 Nov., 2022.

holders are unable to invoke this protection. Eventually, as the case with Chacha suggests, the rights holders remain in limbo in Kenya. This is a very worrying trend, considering the guarantees that these community citizens are promised by the EAC Treaty and the CMP.

The last limitation relates to enforcement of decisions. Unlike domestic courts,[268] the EACJ lacks an enforcement framework. According to, Hodari, a former EAC Secretary General, during the drafting of the EAC Treaty PSs were concerned about their sovereignty:

> The [PSs] are the ones that created EACJ and provide funds for its operations. Most [PSs] strongly felt that EACJ could not enforce judgments against them. This feeling was mainly informed by sovereignty concerns and the principle of good faith. The [PSs] indicated that there is no way they could refuse to enforce judgments in favour of their own citizens against them. They also considered that under article 38(3) of the Treaty where they committed to take all measures to implement a judgment without delay. In light of this obligation, they did not find it necessary to have additional rules of execution.[269]

Successful claimants must, therefore, invoke the jurisdiction of domestic courts in the relevant PS in order to implement a decision.[270] This process will require more resources. Since courts in Kenya are fraught with serious delays,[271] it is doubtful whether decisions from the EACJ will be implemented "without delay," as required by statute.[272] By contrast, the road to an effective remedy can be protracted for successful claimants. Against this background, would it be appropriate to refer to the EACJ as the "guardian of the Treaty"?[273] The question of enforcement of this court's decisions is quite central in the realization of the rights of citizens of the EAC. Consequently, it is a matter that cannot be taken lightly.[274] As a regional court, the EACJ is a key forum for "fostering" the "integration" agenda of the EAC.[275] Partner States must, therefore, undertake the necessary amendments in order to strengthen the court.

268. *See*, Kenya's *Foreign Judgments (Reciprocal Enforcement) Act* (cap 43 of the Laws of Kenya) (containing provisions for enforcement of judgments given in foreign countries, which accord reciprocal treatment to judgments handed down by Kenyan courts).

269. Interview with Hodari, Nairobi, 26 Feb., 2023.

270. EAC Treaty, *supra* note 2, at art. 44.

271. *See* The State of the Judiciary and the Administration of Justice Annual Report FY 2021/22, p. 185 (accessed Feb. 9, 2023) available at https://ocj.judiciary.go.ke/state-of-the-judiciary-and-administration-of-justice-sojar-report-fy-2021-2022/ [https://perma.cc/LCE5-MWYL] [hereinafter 'SOJAR Report'].

272. EAC Treaty, *supra* note 2, at art. 38(3).

273. The Honorable Attorney General of the United Republic of Tanzania v. Africa Network for Animal Welfare (ANAW) (Ref 9 of 2010) EACJ First Instance Division (29 August 2011) at 6.

274. *But see* Harold Nsekela, 'The Performance of the East African Court of Justice in Respect of Achieving Regional Integration' in Kennedy Gastorn, Harald Sippel and Ulrike Wanitzek, *Processes of Legal Integration in the East African Community* (Dar es Salaam University Press: Dar es Salaam University, 2011) at 141 (describing the EACJ as "more of a community court than a classical international court").

275. The East African Centre for Trade, Policy and Law v. The Secretary General of the East African Community eKLR, ¶ 18 (2013).

#### b) Domestic Courts: Prospects and Challenges

Considering the limitations that litigants in the EACJ face, are domestic courts better suited to enforce the ROE? This section responds to this fundamental question. Articles 23 and 159 of the Kenyan Constitution grant courts in Kenya the authority to resolve disputes authoritatively and conclusively. This position is consistent with Article 54(2) of the CMP, which requires national courts to resolve disputes relating to the interpretation and application of the Protocol.[276] Notably, the main statutes that govern the registration and operation of commercial enterprises in Kenya—the *Partnerships Act*, *Limited Liability Partnerships Act*, *Companies Act* and the *Registration of Business Names Act*—do not provide administrative dispute resolution mechanisms. Dissatisfied claimants, therefore, have to seek relief in national courts.

Courts in Kenya have underlined that they have jurisdiction to determine claims for any violation occurring in the country.[277] Under Article 19(3)(b) of the Constitution, the ROE is part of Kenya's Bill of Rights.[278] Consequently, rights holders can litigate the violations they face in domestic courts. As Article 48 of the Constitution emphasizes, every person, regardless of their nationality, has the right to access Kenyan courts. Courts in Kenya have handled several claims by litigants alleging discrimination on grounds of nationality. In *Mustafa Abdulrahman Khogali v. Gulf African Bank Limited*,[279] the petitioner contended that the respondent closed his bank account in Kenya because he was a Sudanese national.[280] Thus, he was unable to conduct his commercial activities. The question before the court was whether the closure amounted to discrimination on the basis of nationality.[281] While finding in favor of the applicant, Justice Korir argued that "[t]he reason for the closure of the Petitioner's account is that he was a Sudanese national. He was therefore treated differently from other customers and that amounted to discrimination."[282] Although the petitioner had not moved the court under the ROE, the rule that the court established is that discrimination on grounds of nationality is prohibited.[283] The Kenyan Court of Appeal affirmed this basic principle in *Law Society of Kenya v. The Hon. Attorney General and Others*.[284]

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276. *See also* EAC Treaty, *supra* note 2, at art 33(1) (granting national courts jurisdiction to determine disputes in which the community is a party).

277. Miguna Miguna v. Lufthansa German Airlines and 6 *Others* [2021] eKLR, ¶ 16-19; AZ v. Cabinet Secretary Interior & Coordination of National Security eKLR ¶ 35 (2021) (declaring that foreigners are entitled to due process in Kenyan courts). *See also* Constitution art. 22 (2010) (Kenya) (guaranteeing every person the right to "institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened").

278. *See also Re. Rwanda Bar Association* (2022) Rwanda Law Reports 1 ¶ 35 (where the Supreme Court of Rwanda argued that, owing to the country's constitutional architecture, the CMP was 'part of the legislation of Rwanda').

279. [2020] eKLR.

280. *Id.* ¶ 4.

281. *Id.* ¶ 16.

282. *Id.* ¶ 27.

283. *Id.* ¶ 27.

284. [2019] eKLR.

Contrary to Augustus Mbila's assertion, the EACJ is not the only and "final arbiter and decision-maker on matters regarding regional integration" in the region.[285] Domestic courts play a vital role both in this regard and in the enforcement of entitlements due to rights holders. You will recall *Kawai*—the case involving a South Sudanese national challenge to the constitutionality of section 12(a) of the *Advocates Act*, which prohibited nationals of this PS from entering the Kenyan legal bar.[286] In its decision, the High Court declared this provision to be discriminatory on grounds of nationality. While finding the offending provision to be unconstitutional, the Judge argued:

> It is sufficient to make a finding on the violation of the petitioners' rights. Such a remedy is sufficient to allow the petitioners to enjoy the benefits of the provisions of Section 12(a) of the Advocates Act as the legislature find ways of aligning the provision to the vision of the Treaty and making it compliant with the Kenyan Constitution.[287]

Such provisions, as the European Court of Justice observed in *Kamer van Koophandelen Fabriekenvoor Amsterdam v. Inspire Art Ltd.*,[288] have the effect of impeding the exercise of the ROE by rights holders.[289]

Commentators have attacked domestic courts and tribunals dealing with international law matters. Anthea Roberts claims that, because the role of domestic courts in the context of international law "is split between law creation and enforcement," this leads to "ambiguity" and "uncertainty" on the "value of their decisions."[290] These comments are difficult to embrace for a number of reasons. Primarily, the survey that this work is based on is somewhat limited. Rather than review a wide range of judicial decisions, the research centered on select judgements. Further, the decisions that the author surveyed were limited since she largely drew on courts in Europe and the United States of America. There is hardly any analysis of decisions from national courts in regional blocks in Africa, Latin America, or Asia. A review of these data would have provided the author with an alternative lens for the analysis in her work. Lastly, the record of decisions handed down by national courts in the EAC fails to support the thesis that Roberts advances. On the contrary, these courts have developed rich jurisprudence on the implementation of treaty rights in general and the ROE in particular.[291]

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285. August Mbila, *'Implementation of East African Community Law by Partner States: A Review of Relevant Laws'*, 5 (2020) Strathmore L.aw Rev. Review 111, at 121–22 (2020).
286. Kawai, et al. v. Council of Legal Education, et al., [2021] eKLR.
287. *Id.* ¶ 73.
288. C-167/01, E.C.R. I-10155 (2003).
289. *Id.* ¶ 101.
290. Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 *In'l and Compar. L. Q.* 5, 61 (2011).
291. *See* Deepak K Shah and 3 others v. Mananura and 2 others [2002] eKLR (High Court of Uganda); East African Development Bank v. Blueline Enterprises Limited, Civil Appeal No. 110 of 2009 (Court of Appeal of Tanzania); Samuel Mukira Mohochi v. Attorney General of Uganda (2013) Reference No. 5 of 2011 (Uganda); Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others (Ref 1 of 2006) EACJ First Instance Division, (8 November 2006); James Katabazi and 21 Others v. Secretary General of the East African Community and Another, Reference No. 1 of 2007.

On the contrary, domestic courts offer several advantages. Compared to the EACJ, which is geographically removed from many EAC nationals, these courts are much more accessible. Therefore, rights holders who are in these PSs can run their cases with relative ease. Further, unlike the EACJ, litigants can also conserve resources since these courts are within their reach. Moreover, domestic courts have a comprehensive enforcement mechanism.[292] Those whose claims are successful can invoke this framework to ensure compliance with the decisions courts hand down.

But domestic courts are also plagued by a number of challenges. First, the civil litigation regime in countries such as Kenya is complex. A self-represented rights holder would, therefore, find it extremely difficult to navigate this maze. Many are compelled to hire counsel to represent them. Costs of engaging counsel, as noted earlier, are usually high. In the absence of legal aid, those rights holders who are unable to afford legal services could end up abandoning their claims altogether. Further, instances of graft have also been reported within the court system. In its 2021/2022 annual report titled "State of the Judiciary and the Administration of Justice," the Judiciary in Kenya acknowledged that corruption was a "systemic challenge" within this institution.[293] The net effect of this state of affairs is to dilute the confidence that a litigant would otherwise have had on this key institution. Courts are required to hear and determine cases "on merit of facts and the law applicable."[294] Consequently, stakeholders need to address the challenges identified by this article comprehensively.[295] If they fail, the domestic court system, just as the EACJ, will struggle in its quest to deliver substantive justice.

## Conclusion: Fulfilling Legal Undertakings Due to Rights Holders

To reiterate, rights holders are not foreigners. According to Hodari, a former EAC Secretary General, at the making of the CMP the ROE was designed for all rights holders:

> [T]he target beneficiaries of the Right of Establishment as provided under the EAC CMP were for all East Africans willing to move from one Partner State to another, either as self-employed persons, and those accompanying the self-employed person, the spouse and the child who is above 18 years.[296]

However, the preceding analysis has affirmed the hypothesis that, thus far, the promises due to rights holders coming into Kenya are still unmet. Rather than being facilitative, the domestic legal framework is a huge barrier for community citizens. Yet one of the specific objectives of the CMP is acceleration of,

292. *See* The Civil Procedure Act (2012) Cap. 21 Part 3 (Kenya); The Contempt of Court Act (2016) (Kenya).

293. SOJAR Report, *supra* note 271, at 28.

294. Male Mabirizi Kiwanuka v. Attorney General, Misc. App. No. 21 of 2022 at 9 (High Court of Uganda).

295. *See also* EAC Treaty, *supra* note 2, at art. 71(1)(f) (requiring the EAC Secretariat to promote and disseminate "information on the Community to the stakeholders, the general public and the international community").

296. Interview with Hodari, Nairobi, Secretary General (Feb. 24, 2023).

among other entitlements, the ROE.[297] In order to surmount the hurdles identified, this paper has underlined some of the steps that concerned parties can take in order to guarantee rights holders their entitlements. The overall objective of these measures is to ensure that the country always complies with its regional undertakings.

Failure by Kenya to comply with the law has serious consequences. First, this failure has attracted, and will continue to attract, unnecessary litigation. In *Oumarou Moumouni Ali v. Director General Kenya Citizens and Foreign Nationals Management Services and 3 Others*, Justice Makau of the High Court castigated the Director General of Kenya Citizens and Foreign Nationals Management Services for failing to comply with basic due process standards.[298] In the words of the judge, the actions of the Director General were "shameful of a democracy, callous to the extreme and insensitive to a human dignity."[299] It is in the interest of Government agencies to avoid sharp criticisms from courts by meeting their undertakings. The resources that are spent in defending these lawsuits could be utilized by the State to provide basic needs to its residents. Further, the inability by rights holders to access the domestic market is a lost opportunity for the country in particular and the region in general.[300]

In the preamble of the EAC Treaty, partner States expressed their conviction that regional co-operation would "raise the standards of living" of community nationals. The resources and expertise that rights holders are likely to bring to the domestic market will altogether be lost if access is hampered. In *European Commission v. Federal Republic of Germany*, the court argued that rights holders contribute to "economic and social interpenetration."[301] Additionally, the barriers that Kenya has erected have led to feelings of resentment by some rights holders. Zebunissa, a Burundian national, was unable to register her thriving sole proprietorship in Kenya. She expressed her frustration as thus:

> If our companies and firms cannot access Kenyan market freely without discrimination, we cannot allow Kenyan entities to have their way in our countries.[302]

One of objectives of regional integration is to "ensure the effective attainment" of the ROE.[303] In light of its membership to the EAC, the protectionist arguments proffered by Kenya's bureaucrats are no longer acceptable. The history of the regional integration within the East African region demonstrates that nationalist attitudes contributed significantly to the collapse of the former

297. *See* CMP, *supra* note 6, at art. 4(2)(a).

298. [2020] eKLR.

299. *Id.* ¶ 35.

300. A number of authors have underlined the benefits of deeper integration within a regional community. *See* Ali Mufuruki, *Doing Business in East Africa: A Personal Perspective*, in Hamid Davoodi, *The East African Community After 10 Years: Deepening Integration*, 105-08 (last visited Apr. 10, 2023) available at https://www.imf.org/external/np/afr/2012/121712.pdf [https://perma.cc/RQ8Q-V49D]; Elias Ayuk and Samuel Kabore, *Introduction: Why Integrate?*, *reprinted in* Elias Ayuk and Samuel Kabore, *Wealth Through Integration: Regional Integration and Poverty-Reduction Strategies in West Africa,* Springer: Dakar 1, 1 – 18 (2012).

301. Case C-54/08, E.C.T 1-03573 ¶ 79, (2011).

302. Interview with Zebunissa, Nairobi, (Aug. 23, 2022).

303. Gebroeders Beentjes BV v. State of the Netherlands, Case No. 31/87, E.C.R 04636 ¶11 (1988).

union.[304] These views are unacceptable, considering the objectives of the EAC Treaty and its motto—"One People, One Destiny." Countries such as Kenya have to make deliberate efforts to fulfill the integration agenda by translating the promises that the country made into actual rights.

Research in the area of regional integration, generally speaking, and the ROE in particular is also required.[305] The data that formed the basis of this article was rather modest. Its focus was also limited to the law and practice in Kenya. To have a comprehensive picture, future researchers should study the situation in other countries within the EAC. Upcoming studies on Kenya should explore other rights holders that this article did not engage with, including asylum seekers and refugees,[306] old community nationals,[307] intersex persons,[308] and persons with disabilities.[309] In order to gain an understanding of the practical situation, these works should draw on fieldwork. The data that is generated from these projects can improve our understanding of the challenges that vulnerable rights holders face in reality.[310] These findings can also provide practical perspectives for dealing with the current problems.

Lastly, the anthem of the EAC[311] reminds community citizens that they too have an obligation to protect the objectives of this regional body.[312] Hence, they need to join hands with other stakeholders in order to ensure that the ROE is realized. Implementing this right is a huge task that demands strong

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304. *See* Agrippah Mugomba, *Regional Organisations and African Underdevelopment: The Collapse of the East African Community*, 16 J. of Modern Afr. Stud. 261, 263 (1978); John Oucho, *Prospects for free movement in the East African Community*, 3 Regions and Cohesion 103, 105 (2013); Jonathan Lodompui, Tanzania's National Interest and The Collapse of the East African Community (November 2010) (unpublished Master of Arts thesis, University of Nairobi).

305. Research is one of the objectives of the EAC. *See* EAC Treaty, *supra* note 2, art. 5(1); CMP, *supra* note 6, AT art. 4(2)(e), 42.

306. *See* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. 1. (done in Addis Ababa, Ethiopia, entry into force: June 20, 1974) for the definition of 'refugee'.

307. In Kenya, article 2 of the Constitution defines "old members of society" as those individuals who have "attained the age of sixty years". Constitution art. 2 (2010) (Kenya); *See also* Constitution art. 57 (2010) (Kenya) (outlining the rights due to this category of persons).

308. *See* Constitution art. 27 (2010) (Kenya) (guaranteeing every person the right to equality).

309. Constitution art 54 (2010) (Kenya) (outlining the rights due to persons with disabilities).

310. According to the CMP in article 1, this term ""includes groups of persons who are marginalized on grounds of stigmatized illness, gender, ethnicity, disability or age". CMP, *supra* note 6, at art. 1.

311. EACAnthem,http://repository.eac.int/bitstream/handle/11671/24075/EAC-ANTHEM-BOOKLET-INSIDE.pdf?sequence=3&isAllowed=y [https://perma.cc/9TN6-RZ6A] (last visited Feb. 26, 2023) (underlining "Jumuiya Yetu sote tuilinde", that is, All community citizens have a responsibility to safeguard the EAC (translation by authors).

312. EAC Treaty, *supra* note 2, at article 30 (granting EAC residents authority to refer claims, which occur within the region, to the EACJ).

political will[313] and coordination amongst all stakeholders.[314] Continuous monitoring of the implementation process by human rights defenders[315] is also a key component of this process.[316] The central question remains, are duty bearers equal to the task?

313. "Political will" is a fundamental principle of the EAC. *See* EAC treaty, *supra* note 2, at art. 6(a). A number of authors have underscored the importance of political will in a regional block. *See* Clayton Hazvinei Vhumbunu and Joseph Rukema Rudigi, *Facilitating Regional Integration Through Free Movement of People in Africa: Progress, Challenges and Prospects*, 9 *J. of Afr. Union Stud.* 43, 49 (2020) (underscoring the importance of "political will" in the "execution of agreed [regional] commitments"); Joram Mukama Biswaro, The Quest for Regional Integration in Africa, Latin America and Beyond in the Twenty First Century: Experience, Progress and Prospects 360 (Fundacao Alexandre de Gusmao, Brasilia, 2011) (contending "neither religion nor the Sahara Desert could constitute a barrier between Arabs and Africans, provided the political will was there"); Olivier Dabene, The Politics of Regional Integration in Latin America: Theoretical and Comparative Explorations 97 – 98 (Palgrave, New York, 2009) (asserting that political will strengthens "the integration process").

314. *See* Vienna Declaration and Programme of Action, June 25, 1993, art. 13 (adopted by the World Conference on Human Rights in Vienna) (underlying the need for cooperation among all players "to ensure the full and effective enjoyment of human rights").

315. The Declaration on Human Rights Defenders grants every person the right to promote and protect the realization of fundamental rights and freedoms in all spaces. G.A. Res. A/Res/53/144, at 1 (Dec. 10, 1998).

316. The EAC Treaty and the CMP both mandate the EAC Council to undertake this role. EAC treaty, *supra* note 2, at art. 4; CMP, *supra* note 6, at art. 50. A number of authors have underlined the value of this process. *See* S.D. Edinyang, V.N. Effiom, and I.E. Ubi, *Strategies for Implementing Human Rights Education in Nigeria*, 12 Glob. J. of Educ. Rsch 27, 29 (2013) (underlying the value of "fixed milestones"); Nzolani Francois Butedi, *The Work of the African Union Liaison Office in Building Peace on the Ground: A Case Study of Madagascar*, 25 S. Afr. J. of Int'l Affs. 99, 101 (2018).