5. The "Bold" Pioneer Bench

> "Look at the first bench; they may not have been at the pinnacle in their own countries, but they were exceptional. They were all, in my opinion, integrationists. So, you are not just a judge. You also have some views on what integration is or should be like at the ideological level" (Repeat lawyer, March 1, 2022, Arusha, Tanzania).

The first set of judges was lauded as being legally sound and attuned to regional integration dynamics. As my interviewee explained, judicial biographies are inextricably linked to the performance, collective decision-making ability, and perceived legitimacy of the pioneer regional bench. This chapter explores how the pioneer judges set the pace for navigating the strategic space and forging the political and institutional relevance of the new court, which is the core question that this study seeks to address.

The chapter starts by foregrounding pioneer judges as crucial actors in their own judicial empowerment. It traces their trajectories to reveal the types of "powerhouses" that occupied the first bench. Section two explores the initial years of the bench before it received any cases to appreciate how it shaped its empowerment. Through partaking in a range of activities beyond judicial decision-making, so-called off-bench activities, the first bench set the groundwork for what would later become known as a "bold" bench. Part three examines the first set of cases leading up to the court's initial backlash. The last sections explore the strategies and practices that judges and the Registrar have assumed to resist undue interference and forge power amidst crumbling judicial authority. Close attention is paid to the pivotal role of the East Africa Law Society (EALS) in advocating for the new judicial organ. In the concluding section, the chapter elucidates why, even if the first bench has only handled two landmark rulings, it is deemed audacious, brave and trailblazing.

5.1 Judicial Biographies

As noted in the opening quote, Pioneer appointments indicated a renewed commitment by EAC leaders to the revamped integration agenda. All six pioneer judges were highly qualified legal personalities who had served

in various capacities in their countries' highest courts before their appointment to the regional bench. Table 4 summarises the pioneer bench members and their professional trajectories.

Table 4: Pioneer Bench Judges

Judges		Nationality	Short Bio
President	Moijo Ole Keiwua	Kenya	Court of Appeal Judge; High Court judge; State Counsel
Vice-President	Joseph Nyamihana Mulenga	Uganda	Supreme Court judge; Minister for Regional Cooperation; Minister of Justice and Attorney General; State Attorney
Members	Augustino Ramadhani	Tanzania	Acting Chief Justice of Tanzania; Court of Appeal Judge; Chief Justice of Zanzibar; Deputy Attorney General
	Jackson Kasanga Mulwa	Kenya	High Court judge; Member of Parliament; Advocate
	Joseph Sinde Warioba	Tanzania	International Tribunal for Law of the Sea (judge); Minister of Regional Administration and Local Government; Prime Minister; Minister of Justice
	Solomy Balungi Bossa	Uganda	High Court judge; Lecturer in Law; Co-founder and Chair of East African Law Society; Human rights activist; Chair of Law Council; Member of several global women judges' organisations
Registrar	Dr John Eudes Ruhangisa	Tanzania	Legal Academic, Registrar (High Court of Tanzania)

Source: Author's compilation from publicly available data and judicial CVs

Pioneer EACJ President Moijo Ole Keiuwa was a Kenyan national who had started in the Attorney General's Office and climbed to the Court of Appeal of Kenya before his appointment to the regional bench.[211] Jackson Kasanga Mulwa, the other Kenyan judge on the inaugural bench, was a High Court judge at the time of his appointment. Unlike Keiwua, a career judge, Mulwa had overt political exposure through his previous role as a Member of Parliament for Makueni Constituency (1969–1983).[212] Comparable to this trajectory is Vice President Joseph Nyamihana Mulenga, who had held

211 Standard Media, Kenya. 2020. "Court of Appeal judge Justice Keiwua succumbs to cancer." July 3. s://www.standardmedia.co.ke/busia/article/2000044480/court-of-appeal-judge-justice-keiwua-succumbs-to-cancer.

212 Nzia Daniel. 2015. "Former top judge takes final bow." *The Standard*. https://www.standardmedia.co.ke/article/2000155023/former-top-judge-takes-final-bow.

various leadership positions, both political and judicial at the national, regional, and continental levels before his appointment. Mulenga had served his homeland, Uganda, in various political positions. First as a Minister of Justice and Attorney General, then as Minister of Regional Cooperation (1986–1989), before joining the Supreme Court of Uganda in 1997.[213] He is also commended for his interest in endowing the EACJ with jurisdiction similar to that of the former East African Court of Appeal (Nsekela 2012, 2).

The other Ugandan on the bench, Solomy Balungi Bossa, was a judge of the High Court at the time of her appointment. The only woman and youngest judge on the bench, Bossa had no overt political exposure to second her appointment. Instead, she brought a wealth of experience and networks from human-rights-oriented civil society organisations. For instance, she co-founded the East African Law Society (EALS) and *Kituo cha Katiba*,[214] which were significant players in founding the EACJ.[215] Bossa was also a bar leader at national and regional levels, a human rights activist, and a member of many international, national, and regional women judges' organisations.[216]

Meanwhile, Tanzanian judge Augustino Ramadhani was the Acting Chief Justice of Tanzania (1999) when he ascended to the EACJ. Previously, he had served in various judicial capacities – as a Justice of Appeal at the Court of Appeal of Tanzania (1989–1999), as Chief Justice of Zanzibar (1980–1989), and as Deputy Chief Justice of Zanzibar (1978–1979). In addition to his judicial duties, Ramadhani was involved in academic work at the University of Dar es Salaam (1986–1989), was Vice-Chairperson of the National Electoral Commission of Tanzania (1993–1999) and was well-versed in other legal traditions through his numerous conferences, seminars and

213 African Court on Human and Peoples' Rights. Former Judges. "Justice Joseph Nyamihana Mulenga – Uganda." https://www.african-court.org/wpafc/justice-joseph-nyamihana-mulenga-uganda/.

214 A regional civil society organisation with observer status in the EAC and think tank based in Kampala, Uganda, that addresses East African governments' respect for constitutionalism, good governance and democratic development. See https://www.kituochakatiba.org/about-us.

215 United Nations International Residual Mechanism for Criminal Tribunals. Judge Solomy Balungi Bossa. https://www.irmct.org/en/about/judges/judge-solomy-balungi-bossa (Accessed November 1, 2022).

216 These organisations include the International Commission of Jurists, the International Association of Women Judges, the East African Judges and Magistrates' Association, FIDA Uganda, the National Association of Women Judges, and the Uganda Association of Judges and Magistrates. https://www.irmct.org/en/about/judges/judge-solomy-balungi-bossa (Accessed July 29, 2021).

study tours abroad and at home.[217] Fellow countryman Joseph Sinde Warioba had been a judge at the International Tribunal for the Law of the Sea (1996–1999), prior to his appointment to the EACJ.[218] He also participated in the drafting of the Organisation of African Unity (OAU) Charter on Human and People's Rights and was conversant with human rights provisions, governance and international law, broadly conceived. Additionally, Warioba was politically astute, having served as a Member of Parliament (1990–1995), Prime Minister and First Vice President of the Republic of Tanzania (1985–1990), and as Attorney General and Minister of Justice (1976–1985).

In summary, the pioneer bench was populated by judges whose judicial prowess had been tested at the national level. These judges had all been serving at crucial political junctures in their home countries, and as previous research shows, East African domestic courts were already forging judicial power at the time (Ellett 2013). Moreover, some individuals had expertise in human rights and previous experience in regional integration processes. Except for Moijo and Bossa, the bench had overt political exposure while all possessed judicial leadership at either national, regional, or continental levels. Through these associations, the judges garnered personal networks, friendships, and social capital at regional and national levels, which made them suitable for serving as representatives on the top regional bench. As we have argued elsewhere, the lack of experience with the new REC bench – its powers yet to be identified – did not pose a threat to the political appointers who likely perceived the courts as a prestigious space suitable to signal a commitment to international cooperation by sending judges with a background in regional integration dynamics (Stroh and Kisakye 2024). Thus, trusted members of the judiciary were selected primarily because of their reputation or professional norms as trusted representatives of their country. They were then left with a certain leeway and independence, but were later sanctioned following the contentious *Anyang' Nyong'o* ruling when they issued an unfavourable ruling. The first bench's judges seem to follow what Alter terms the trusteeship model (Alter 2008). In this case, the judges' delegated authority allows them to act relatively autonomously and, therefore, are less prone to manipulation tactics (Alter 2008, 35–40). However, states may employ "rhetorical" and "legitimacy politics" and other legal avenues (such as refusing to consent to jurisdic-

217 Curriculum Vitae (CV), Augustino Stephen Lawrence Ramadhani. All judicial CVs are on file with the author.

218 CV, Joseph Sinde Warioba.

tion) to send signals to defiant ICs (Alter 2008, 42–43). Thus, these actors employ "politics" to either persuade, delegitimise, or exercise contracting power over trustees (Ibid.). As the section on the bench's initial backlash elucidates, the judges were sanctioned heavily following a controversial ruling.

Aside from the judges, the pioneer registrar, Dr John Eudes Ruhangisa, was a fundamental force in shaping, developing and realising the EACJ. Preceding his appointment at the regional bench, he was lecturing at the Faculty of Law, University of Dar es Salaam (1998 – 2001). The inaugural Registrar, who participated in the debates on the treaty-making of the EAC, had previously assumed the role of founding Registrar of the Commercial Division of the High Court of Tanzania, where he played a central role in establishing this business bench. Thus, he was a suitable pick for the newly created REC bench. Although judicial tenure is limited to seven years, registrars typically serve for longer periods. Ruhangisa worked for the REC bench as its administrative head for the first 15 years and is praised for his role during the pioneer bench's initial backlash.

Ruhangisa was instrumental in setting up the court from scratch – from drafting its rules of procedure (East African Court of Justice 2019) to swearing in and training judges. With previous academic[219] and legal professional practice, Ruhangisa was fundamental in establishing the new court, as he states in an interview:

> "The first thing I did was to formulate – to get the design in my mind – what sort of international court I would like it to be. I had to put in place the Rules of Procedure to create the gateways of how people would approach the court. I singularly formulated the Rules of Procedure pending approval by the court when the judges would be appointed later. I was EACJ staff number one. I did so many things: when you start from plain paper, and you have to draw things, it all depends on your creativity."[220]

In addition to administrative work, especially the financial administration of the court, REC court registrars are responsible for court records, publications, and overseeing the functioning of all national sub-registry offices. While these are the official duties, registrars take on a unique role in

219 He holds a PhD from the School of Oriental and African Studies (SOAS) at the University of London, UK.

220 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.

the case of newly created REC courts. They also serve as public relations officers and negotiators on behalf of judges when they face backlash or interference. Ruhangisa persistently negotiated for the judges to reside permanently in Arusha and to have them regularly engage the court and its potential users in the hope that it would attract cases (Ruhangisa 2011, 24–25). However, he only succeeded partially, and in July 2012, the President and Principal Judge finally assumed office full-time in Arusha.[221]

5.2 Judicial Off-bench Engagements

In the early years of the bench, between 2001 and 2005, amidst its initial setup and operation, the EACJ did not receive any cases, mainly due to a lack of visibility and familiarity with the new judicial organ. The lack of visibility is not unique to the EACJ as it is a familiar obstacle in international courts (ICs) in the Caribbean and elsewhere (Caserta 2017b; Caserta and Cebulak 2018; 2021a). ICs are usually newly created international legal regimes, unlike their counterparts in national settings, and thus have considerable pressure to build their own constituency by virtue of their perceived different impact and legitimacy. Moreover, by the very nature of their positioning and ambiguous hierarchy within the national legal system, sub-regional courts need to seek and create their visibility and liaise with the existing "legal complex" (Halliday, Karpik, and Feeley 2007).

During this time, the pioneer judges and Registrar busied themselves with developing the operational, judicial and administrative needs of the new court, partook in publicity trips around East Africa, visited other international courts to build their capacity, and sought the help of regional allies like the EALS to engage members of the Bar.[222] All these off-bench judicial relations were vital tools in forging the court's pathway toward institutionalisation.

221 "EACJ Judge President, Principal Judge now full-time in Arusha." July 2, 2012. https://www.eacj.org/?p=397 (Accessed March 30, 2023).

222 Interview, Pioneer EACJ judge, Joseph Sinde Warioba, March 11, 2022, Dar es Salaam, Tanzania.

5.2.1 Mobilising Judicial Allies

Perhaps most essential, but often overlooked, is the role the pioneer judges played off-bench. Judges act off the bench using formal and informal channels to build allies "who might help them apply *allied pressure* on the government by using supranational law tools or political or public pressure" (Šipulová 2022, 8). Especially in the case of ICs, where they must cater to the needs of varied audiences – without the institutional cushions available to their national counterparts[223] – they have the additional burden of mobilising alliances amongst those different groups to enable them to conduct their work amidst the strategic space. Engaging and mobilising "compliance constituencies" (Alter 2008)[224] and judicial "allies" (Trochev and Ellett 2014) is an essential step in the social construction of judicial power. Building judicial alliances could increase public trust, social legitimacy and perceived judicial independence by the court's stakeholders. For instance, in the EACJ, the regional Bar has fought alongside the court to protect it against executive interference and facilitated trainings and workshops that educate the public about the role of the court. Through such deliberate acts of court empowerment, allies could be the missing link between the regional court and the broader public.

The types of alliances vary, and this section is not exhaustive. However, they typically range from regional and national Bar Associations, civil society organisations (CSOs), organs of the EAC, national and international courts, academia, development partners, litigants, and the media to fight for its place amidst several threats to its performance and independence. This study prioritises judicial support networks as "compliance constituencies" or members of the "global community of courts"[225] on whom the court relies for litigation and other empowerment-related support. Only those CSOs that engage the court beyond filling cases and essentially mobilising for its empowerment – broadly conceptualised – are considered.

223 For instance, member states can withdraw from the jurisdiction of ICs, which is not possible at the national level.

224 These are actors on whom IC judges draw for support to exert pressure on states to comply with IC rulings and garner political leverage over appointing states (Alter 2008, 46–47).

225 This community of courts refers to the "institutional identity of the judges who sit on them" and is forged by their collective self-awareness as national and international judges who constitute this community (Slaughter 2003, 192).

The pioneer judges sought to build the court's legitimacy, visibility, and acceptability within the revamped EAC regional bloc by engaging relevant stakeholders, especially by mobilising critical allies in the legal fraternity. The pioneer judges – who were members of various legal organisations, including the East Africa Law Society, *Kituo cha Katiba*, and the Law Societies of the three original partner states – drew on their existing networks to call attention to the new court. Pioneer judges travelled to these legal associations, met their leaders and actively sought their alliance with the new court. For instance, Justice Bossa's proximity to civil society organisations in the EAC proved helpful in establishing links to these key players in regional integration politics. Bossa, having served as both the president of the Uganda Law Society and the East Africa Law Society, had links to prominent national and regional actors whom they called and engaged in mobilising support for the new court.[226] By and large, the pioneer bench was occupied by individuals with high-reaching personal and professional networks at regional and national levels, which supported their work in publicising the new court and vouching for its place in the regional bloc. The next two sections delve into the specific ways in which the new bench mobilised allies and explore avenues of mobilisation.

5.2.2 Legal Norm Socialisation

Since its inception, the EACJ has needed to raise awareness of its mandate amongst its potential users through outreach or sensitisation programs with its internal, external, national and international stakeholders.[227] By and large, key stakeholders of ICs (lawyers, government officials, NGOs, and academics) may need to familiarise themselves with a new Court's mandate, and the role of judges and Court staff in this regard cannot be underestimated. The pioneer bench also held sensitisation workshops throughout the EAC partner states. EACJ judges, Court staff, and Registrar actively participate in and direct legal trainings organised by its allies, especially the regional Bar Association. As the pioneer registrar stated:

> "The Court worked very closely with the members of the Bar both at national and regional levels through their respective professional asso-

226 Online Interview, Pioneer EACJ judge, Solomy Balungi Bossa, June 10, 2020.

227 'East African Court of Justice 20th Anniversary Report, 2001–2021'. Arusha, Tanzania: East African Court of Justice. https://www.eacj.org/wp-content/uploads/2022/11/THE-EAST-AFRICAN-COURT-OF-JUSTICE-Final-Report-letter.pdf. Page 37.

> ciations. Occasionally, we receive invitations to attend their meetings or workshops and make presentations about the court, among other things" (Ruhangisa 2011, 23).

EALS leadership still laments that the court lacks sufficient publicity amongst regional lawyers, and thus, they have not stalled their work on raising the court's profile.[228] EALS still prioritises capacity-building initiatives for lawyers through its "East Africa Law Society Regional Practice Series."[229] In these training workshops, EALS leadership invites repeat lawyers, EACJ partner states sub-registries, court staff and the Registrar to train lawyers on the court's mandate and offer practical exercises that provide a "first-hand feel of actual litigation before the Court."[230] The court also expounds on its arbitration mandate and rules of procedure and shares "soft skills for effective trial advocacy."[231]

I observed one session in person and noted how the Registrar supported lawyers who attended the event by answering their questions, empowering them, and providing guidance on all issues that may arise. He noted that lawyers were unaware of the necessary procedure for approaching the court and urged them to participate in such trainings to learn the practice and increase the number of cases brought to the court. Additionally, he emphasised the lack of a requirement to exhaust local remedies and urged them to litigate cases lost at the national level but frame them as a different subject matter relating to the Treaty. The Registrar also advised the potential litigants that any government that violates its laws *is* breaching the EAC Treaty and thus can be sued at the EACJ.

These trainings on international legal norms usually target practitioners and potential litigants at the EACJ, where court staff proactively instructs lawyers on the court's mandate, imploring them to redirect issues of cross-border trade away from national jurisdictions to the EACJ and give guide-

228 As an EALS official reiterated, the regional Bar has not ceased to grow the Court's publicity because it is still neither well-known nor understood amongst regional lawyers (Interview, February 19, 2022, Arusha).

229 Conducted as on-site training within the EAC partner states, which offer training to lawyers on practice before regional courts. By the time of this writing, five of these trainings had been done in five partner states (East Africa Law Society 2020, 9).

230 The EALS and the Uganda Law Society hosted a one-day course on trial advocacy before regional courts and tribunals for EAC lawyers with a focus on practice before the EACJ, in which I participated. See East African Court of Justice, Twitter post, October 25, 2021, 3:44 pm. https://twitter.com/ealawsociety/status/1452632041158291467.

231 Ibid.

lines on how to navigate limits to the court's jurisdiction. In its annual reports, the court takes pride in reaching hundreds of lawyers across the region through these trainings.[232] Moreover, the court also targets various national State Attorneys in its trainings, socialising them into understanding and accepting its role, jurisdiction and functioning.[233] Furthermore, the court also targets the next generation of lawyers, seeking to familiarise them with its mandate.[234] Through training workshops and moot courts for young lawyers, which it hosts at its premises and presides over, EACJ socialises the younger generation of legal experts in the region into "deepening" their understanding of the court and the application of principles of international law so that they can comfortably litigate before the court (East African Court of Justice 2021, 46).

The court perceives these activities as "engagement platforms that have created great opportunities for the Court to reach out to many people to learn, comprehend and fully understand its mandate and functioning."[235] EACJ, through its information-sharing and legal norm sensitisation activities, is generating awareness of its role, jurisdiction, procedures and operations. Rather than "shaming of non-conforming state behaviour or praising of their norm conformity" (Squatrito 2021, 69), EACJ judges have employed non-judicial activities to promote norms and prevent apparent deficits in adherence to legal norms, rather than socialising actors after norms are violated.

The first bench sought to elucidate the court's jurisdiction, including the lesser known arbitral function, as an interview with a pioneer judge reveals:

> "We also listened to the Chambers of Commerce and even sold itself to them about arbitration. It offered that if they had any problem, the court was available, and it had the jurisdiction to do so. Therefore, we met several stakeholders, held several seminars across the region, and were able to sell the court to them. We also addressed the difference between the national courts and this court by telling them it would not be like the

232 It reports attracting over 600 lawyers from the region (East African Court of Justice 2021, 43).

233 80 State Attorneys in Bujumbura (East African Court of Justice 2021, 38), in Kigali, 15 senior State Attorneys, 45 State Advocates were trained on the Rules of Procedure of the Court (Ibid, 40).

234 For instance, a training workshop for young lawyers on tracking the status of implementation of EACJ decisions, was held in Nairobi (Ibid, 39).

235 Ibid., 37.

> former East African court, an Appeal Chamber from criminal decisions in national courts."[236]

The bench was also aware of the misconceptions about its relation to its predecessor, the former East Africa Court of Appeal (EACA), which it endeavoured to clarify. Indeed, the EACJ does not have appellate jurisdiction over decisions of national courts. However, it has precedence over national courts in matters of Treaty interpretation.[237] Clarifying the limits of the court's jurisdiction was also an issue that the pioneer judges had to confront repeatedly, and almost two decades later, the same issue kept resurfacing.

In sum, the collective biographies of the pioneer bench – having well-connected former politicians with links to executives in the partner states and individuals with close ties to regional civil society organisations – was an asset to the court's earlier outreach efforts. The former politicians were well-versed in the political landscape in the EAC, understood the regional bureaucracy, and were well-respected and connected individuals within the judicial and executive branches. Their backgrounds were valuable assets to furthering the legitimisation efforts of the embryonic court. Moreover, these efforts were instrumental in helping the new court to gain visibility as an additional avenue for addressing disputes resulting from regional integration initiatives.

5.3 From "Legal Cocoon" to Initial Backlash

The first bench only worked ad hoc, residing in their home countries, which could explain why, for the first five years of operation, the EACJ was still relatively unused. As the pioneer registrar recounted in an interview:

> "It was tricky and frustrating when you have the court, but no case is coming. That is why, at one point, I had to speak to the judges and say, 'I think we shall have to get out of this legal cocoon of waiting for cases to come. Let us go out there and educate people about the existence of this court.' […] We had to do many outreach programs for publicity purposes. We visited the capitals of all the countries and interacted with the law societies, civil societies, business communities, and all possible

236 Online Interview, Pioneer EACJ judge, Solomy Balungi Bossa, June 10, 2020.
237 Art. 33 (2) EAC Treaty.

> stakeholders – people who are potential clients – so they could get to know that the court was there. You can imagine the kind of campaign we were running then."[238]

However, despite judicial off-bench interventions, no cases were coming to the bench until 2005. Some pioneer judges even left the bench without hearing a case.[239]

The EACJ's maiden case, *Calist Andrew Mwatela and 2 Others v. East African Community*[240] was filed by members of the East African Legislative Assembly (EALA) who challenged the Council of Ministers' (the Council) decision to delay the presentation of Bills to EALA, the Council and Secretariat's role in assuming control over Assembly-led Bills, and the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs (Ruhangisa 2017b). The Council had assumed control over the policy-oriented Bills because they "had implications on the partner states sovereign interest" (Ruhangisa 2017a, 233). Upon the court's intervention, the Treaty was amended to legalise the status of Attorney Generals in the Sectoral Council for Legal and Judicial Affairs by formally recognising them as members of the Council, among other areas, to streamline decision-making in the EAC (ibid., 233). Despite such an impact, the *Mwatela* case, which was significant in opening up the court for business, did not gain much recognition in the regional media or amongst the courts' litigants.

It was the second and first major controversial case, *Anyang' Nyong'o vs Attorney General of Kenya,*[241] which prompted a backlash against the new court and saw the filing of similar cases at the EACJ. Filed in 2006 by opposition politicians Prof Anyang' Nyong'o and ten others, the court rendered decisions that almost led to its early demise. The premise of contention was that the court, in its interim ruling, rejected Kenya's representatives to the East African Legislative Assembly (EALA), citing irregularities in the electoral process. Instead of electing the representatives to the EALA,[242]

238 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.

239 Online Interview, Pioneer EACJ judge, Solomy Balungi Bossa, June 10, 2020.

240 *Calist Andrew Mwatela & 2 Others vs The East African Community*, Reference No. 1 of 2005. October 10, 2006. https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-1-of-2005-Calist-Andrew-Mwatela-2-Others-Vs-East-African-Community.pdf. Hereafter *Mwatela.*

241 *Anyang' Nyong'o, supra* note 5.

242 As is prescribed in Article 50 of the Treaty for the Establishment of the East African Community (EAC Treaty). See East African Community 2007.

Kenya's National Rainbow Coalition (NARC) party had merely appointed its nine representatives to EALA from its dominant political party, the National Alliance Party of Kenya (NAK), ignoring nominees from the Liberal Democratic Party (LDP) wing of the ruling coalition, and the opposition party, Orange Democratic Movement (ODM).[243] Aggrieved by this exclusion, members from the LDP and ODM dragged the Kenyan government to the EACJ, alleging that the EALA members from Kenya had not been lawfully elected. The opposition politicians saw this move as an attempt for the ruling party to "control the domestic legislative agenda" (Alter, Gathii and Helfer 2016, 301).[244] In its interim ruling, the court granted an order barring Kenya's candidates from being recognised as EALA members until the case was finalised. The ruling left the EAC without Parliament for over six months,[245] incensing the Kenyan government and triggering a wave of reactions, including a "campaign to kill the sub-regional court and exert greater control over its judges" (ibid., 302).

The interim injunction in *Anyang' Nyong'o* was issued on November 27, 2006, preventing Kenya's EALA members from taking office, pending the determination of the main reference. One day later, in an apparent reaction to the interim order, the EAC Council of Ministers, in their meeting, "considered the implications of the interim order and decided to recommend to the Summit that the matter be referred to the Sectoral Council on Legal and Judicial Affairs to study the jurisdiction of this Court and other related matters and advise on the way forward."[246] On November 30, 2006, the Summit, comprising the three EAC presidents, endorsed the Council's recommendations to reconstitute the EACJ as a two-tier court – with First Instance and Appellate Divisions.[247] It also expanded the procedures for the removal of judges from office and "directed that a special Summit be convened very soon to consider and pronounce itself on the proposed amendments of the Treaty."[248] A week later, on December 7, the Kenyan Attorney General chaired a meeting to consider the draft proposal, which

243 *Anyang' Nyong'o* 2007 (*supra* note 5), 5–6.

244 For extensive discussions on this case, see Onoria 2010; Gathii 2013; Alter, Gathii, and Helfer 2016.

245 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.

246 *East African Law Society (EALS) & 4 Others v. Attorney General of Kenya & 3 Others,* Reference No. 3 of 2007. August 31, 2008. https://www.eacj.org//wp-content/uploads/2012/11/Ref-3-of-2007.pdf. Page 3.

247 Ibid., 3.

248 Ibid., 3.

he had prepared, for approval to submit to the Summit (Alter, Gathii, and Helfer 2016, 304).

On December 9, 2006, the Secretary-General of the EAC, Ambassador Juma Mwapachu, wrote to the three ministers responsible for EAC Affairs, requesting their cooperation in expediting the partner state's consideration of the proposals.[249] He asked them to submit their comments within two days, citing the urgency of the matter, so that he would submit the proposals to the Summit for consideration and adoption. The partner states' ministers obliged in due time, and on December 14, 2006, Kenyan President Mwai Kibaki, also Chairperson of the EAC, hosted the extraordinary Summit, which saw the signing and adaptation of the proposals by Council to amend the Treaty. It is remarkable that within less than a fortnight after the interim ruling, amendments to the Treaty had been adopted and ready for ratification. Consequently, by March 2007, the amendments to the Treaty came into effect following ratification by the partner states (Onoria 2010, 91). By March 30, 2007, when the court rendered its decision on the main reference, the controversial amendments to the Treaty had already been adopted.

EAC executives, led by Kenyan President Mwai Kibaki, sanctioned the judges upon issuing regime-defying judicial interventions by significantly tampering with the court's structure, jurisdiction, and access rules. The court's jurisdiction was curtailed to exclude any jurisdiction conferred on or matters reserved to organs and institutions of the partner states.[250] Furthermore, the amendments also imposed strict time restrictions on individual litigants, with complaints meant to be lodged before the EACJ "within two months of the enactment, publication, directive, decision or action" that breaches the Treaty or "of the day in which it came to the knowledge of the complainant."[251] Failure to meet these requirements means that it is time-barred. This limitation was introduced to curb access to the court. Repeat lawyers in the EAC, who have met the restrictions brought on by this "draconian" rule, echo sentiments that the two-month rule is "contrary to the spirit of the EAC Treaty pertaining to sustaining the rule of law and social justice" (Possi 2018, 15). Evidently, the amendments to the Treaty were made with the consideration of limiting access to the EACJ, as litigants usually get turned away on time restrictions. As shall be explored in

249 See Annex II of the Report of the 4th Extraordinary Summit (*supra* note 207).

250 See amendments to Articles 27 and 30 of the EAC Treaty. A proviso to Art. 27 was inserted. Also, a new paragraph was added to Art 30.

251 Art. 30 (2) EAC Treaty.

subsequent chapters, the repercussions of this impediment are encroaching on the court's ability to conduct its duties as a potential guardian of the EAC Treaty.

Structurally, the unitary court was split into two, creating an Appellate Division with the power to review the decisions of the First Instance.[252] Moreover, new grounds were added to ease the procedure for removing judges from office.[253] The Treaty was heavily revised to include conditions such as misconduct,[254] bankruptcy,[255] dishonesty or fraud[256] as reasonable grounds for judicial dismissal. New grounds also allowed partner states to appoint temporary judges in the place of suspended judges. As already clarified above, judges at the EACJ operate on an ad-hoc basis, which implies that they usually hold judicial or public office in their home countries. The new provisions were aimed at ensuring that any judicial allegations of misconduct in the partner state are considered at the sub-regional level.[257] This provision takes on more weight when considering that the Kenyan government had already launched blatant attacks on the two Kenyan judges, Justice Kasanga Mulwa and the then-president of the Court, Moijo Keiwua.[258] Allegations were charged against them in Kenya, and they were subsequently removed from office.

5.4 Judicial Resistance

Unsatisfied with dismissing the judges at home, the Kenyan government sought to have them removed from the EACJ bench as well. However, despite several intimidation attempts issued to the Registrar, who was ordered to dismiss the judges or else it would taint the court's integrity, the judges continued serving their terms until completion.

252 Report of the 4th Extraordinary Summit (*supra* note 207), 3–4.
253 Ibid.
254 Art. 26 (1) (a) EAC Treaty.
255 Art. 26 (1) (c) EAC Treaty.
256 Art. 26 (1) (d) EAC Treaty.
257 Report of the 4th Extraordinary Summit (*supra* note 207), 7.
258 Okwembah David. 2003. "Kenya: Judges to Face Graft Tribunals named." *Daily Nation,* December 2, 2003. https://allafrica.com/stories/200312020489.html.

For Ruhangisa, there was no question about the court's integrity or supposedly diminishing legitimacy, as he explains:

> "It was really unfortunate! The Kenyan government took that opportunity to punish the judges from Kenya. They started unearthing, excavating some – whatever – thoughts they had back home for suspending them. And there were so many pressures. I used to receive several phone calls asking me if these judges' integrity was questioned back home. 'How do you retain them? Aren't you lowering the integrity/ fabric of the court itself?'"[259]

In a show of solidarity and bravery, the Registrar and judges resisted succumbing to the threats and pressures issued by Kenyan officials. Despite the obvious threats, the judges and Registrar did not budge. The following sections elucidate the various strategies that the pioneer bench devised to forge ahead despite the unfavourable political climate.

5.4.1 Formally Recording Pressures

The immediate strategy adopted was to document the executive interference formally. Analysing the various rulings following the *Anyang' Nyong'o* case provides a starting point for understanding judicial reactions to the attacks. For the Kenyan government, this ruling was seen as unwarranted interference in highly sensitive domestic politics. The new court was perceived as siding with the opposition at the expense of the ruling party. The President, Mwai Kibaki, and his aides were displeased by the court's intervention, which prevented their preferred candidates from being sworn in as EALA representatives. Framing their frustration as the court undermining state sovereignty,[260] Kenya challenged the court's position that its interpretation of the Treaty is binding on national courts wherein private litigants are not required to exhaust local remedies.[261]

259 Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, February 18, 2022, Moshi, Tanzania.

260 *Attorney General of the Republic of Kenya vs Prof. Anyang' Nyong'o & 10 Others,* Application No.5 of 2007. February 6, 2007. https://www.eacj.org/wp-content/uploads/2007/02/Application-No.-5-of-2007-The-Attorney-General-of-the-Republic-of-Kenya-Vs-Prof.-Anyang-Nyongo-10-Others.pdf. Hereinafter *AG Kenya vs Anyang' Nyong'o.*

261 *AG Kenya vs Anyang' Nyong'o*, 21.

By drawing on formal court processes to intimidate the court, the Kenyan government sought a legitimate way of demanding the suspension of the Kenyan judges on the EACJ bench from reviewing the case. The two judges, Moijo Ole Keiwua and Jackson Kasanga Mulwa were direct targets of the Mwai regime even before the case arose. On October 15, 2003, Justices Mulwa and Keiwua were suspended from their functions as Judges of Appeal in Kenya following a pending investigation into their alleged involvement in corruption and unethical practice.[262] By throwing the judges off the case, Kenya hoped to prevent an unfavourable final decision (following the undesirable interim ruling) that would increase the opposition's power in the EALA. Nevertheless, the two judges denied Kenya's request to have them disqualify themselves from further hearing the case.[263] During the hearing, however, the application for recusal against Justice Mulwa was withdrawn by the applicants, claiming it was "an error" to include him and was thus limited only to Justice Keiwua.[264]

Most importantly, the bench resisted these attacks and kept serving their terms at the EACJ whilst emphatically responding to them, as evidenced in the language used in the final reference:

> "The court must guard against litigants who all too often blame their losses in court cases to bias on the part of the judge [...] we note that clearly the amendment is a direct reaction to the impugned ruling of the Court."[265]

> "While we are anxious to refrain from commenting on the merits and/or demerits of the process of amending the Treaty in reaction to an interim Court order, we are constrained to say that any reasonable court would conclude as we are inclined to do, that this application was brought more out of a desire to delay the hearing of the reference than a desire to ensure that the applicant receives a fair hearing. In our view, this is tantamount to abuse of court process, and we would be entitled to dispose of the application on that finding alone."[266]

In addition, the two judges were supported by their colleagues – the bench presented a united front – who assertively ruled against the prayer to

262 Ibid., 3.
263 Ibid., 26.
264 Ibid., 11.
265 *AG Kenya vs Anyang' Nyong'o*, 21.
266 Ibid., 23.

suspend them by calling out the government of Kenya for blaming their loss on judicial bias and only bringing up their objections and seeking judicial recusal upon the loss.[267] The judges also noted that the government of Kenya filed several applications following the impugned ruling, only to delay the delivery of justice. In these reactions, we see a bench that interviewees usually referred to as "bold and assertive" because they would not succumb to the intimidation but instead fought back using their decisions.

Equally, when the government of Kenya resorted to discrediting the court, claiming that the failure of judges to recuse themselves would affect "the integrity of the Court and undermine the confidence of East Africans in the Court",[268] the judges refuted this accusation. Instead, they declared the consensual nature of the court, highlighting the unity of the bench as a body of justice that would not simply cave to the harassment tactics and instead asked the accusing government to refrain from attacking individual judges.

> "A reasonable and informed person, knowing that the judge sits in a panel of five judges, trained and sworn to administer justice impartially, would not in our view, perceive that the judge would skim to single-handedly deny the applicant a fair hearing or justice. We think a reasonable, informed, and fair-minded member of the public, appreciating the subject matter and nature of the reference, would credit the judge with sufficient intelligence not to indulge in futile animosity."[269]

In the same judgement, the judges did not hesitate to declare that the process of amending the Treaty was "a direct reaction to the impugned ruling of the court."[270] The court, even though unable to intervene in the hastened decision to amend the Treaty by the Summit, through the persuasion of the Kenyan government, still made it clear, in writing, that they disagreed with the partner states' interventions and the final amendments to the Treaty. Correspondingly, the EAC bench used the subsequent rulings to record other personal attacks on the two judges. For instance, the Solicitor General called Justice Keiwua on the morning of January 22, 2007, seeking to intimidate him rather than elicit "a response to the alleged apprehension concerning his impartiality."[271]

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267 Ibid., 21- 22.
268 Ibid., 3.
269 Ibid., 25.
270 *AG Kenya vs Anyang' Nyong'o*, 22.
271 Ibid., 14.

The court in *Anyang Nyong'o* used the chance to underline its *raison d'être* and to remind the partner states of their commitment to regional integration, highlighting that the court is not a mere bystander but an active participant:

> "One of the cardinal rules in the doctrine of the Rule of Law is respect of court decisions. If that rule is deviated from then the principle becomes hollow and remains on paper only. In the case of the Community, the Treaty and all it seeks to achieve will stand on sinking sand."[272]

In that one ruling, the judges addressed the issue of a lack of respect for court decisions and made explicit links to the perils of undermining its authority. For the new court, such explicit language and direct expression of its discomfort could be read as recording injustices it faced as a direct response to its political interference. The judges understood that their power lay with their on-bench tactical responses because, as one judge noted:

> "In a judgement, you are writing to multiple audiences and telling the parties they are right and wrong for these reasons. You are telling the law students that this is what the independence of the judiciary should be like. This is what the interface between the EACJ and national courts should be like. You are telling the policymakers that there are gaps here that you need to fill. Then you are telling whoever cares to listen – donors and all – that we are not going with the donor's agenda or the politician's agenda, or the leadership's agenda. We are simply going to do our job as best as we know how. Then you leave it for them to decide."[273]

By framing all judicial responses to the backlash from the Kenyan government in legal reasoning and not mincing their words in the subsequent rulings, the pioneer bench sought to formally record the intimidation threats and inform future audiences of the manner in which the partner states had mishandled the new judicial organ of the Community.

Not only limited to attacks initiated by the executive, but judges have also reprimanded lawyers who lavished the judges with threats and personalised attacks. For instance, repeat lawyer Mabirizi – who describes himself as a "self-styled civically active Ugandan"[274] – has garnered fame and disdain

272 Ibid., 27.

273 Interview, EACJ Judge, September 29, 2021, Kampala, Uganda.

274 *Male H. Mabirizi K. Kiwanuka vs The Attorney General of the Republic of Uganda.* Reference No 6 of 2019. September 30, 2020. https://www.eacj.org/wp-content/uploads/2020/09/Reference-No.-6-of-20191.pdf. p. 2.

from endlessly filing cases at the national and regional court,[275] and has been at the receiving end of judicial scolding.

> "Not only do we consider with disdain Mr Mabirizi's snide remarks with regard to judges and the Uganda judiciary; we categorically state here that should that *modus operandi* have been employed to exert any manner of pressure, blackmail or threats upon this Court, that misadventure has most certainly been an exercise in futility [...] There is no space in courts, this Court inclusive, for belligerence and bigotry in the guise of the enforcement of legal rights."[276]

Indeed, EACJ judges have consistently used their rulings to speak on threats to their independence. These strategic judicial reactions indicate that judges are attempting to protect their fragile independence rather than being associated with the patronage networks that generated this case in the first place.[277]

5.4.2 Reactive Scholarly Engagement

The judges and Registrar also used academic writing as a strategic means to resist interference, call out the perpetrators of the attacks, and mobilise support amongst various stakeholders while addressing the courts' future constituencies. Registrar Ruhangisa presented several papers at workshops, authored articles on the role and functioning of the EACJ, and co-authored and edited a book on EAC law with former EACJ president Emmanuel Ugirashebuja (Ugirashebuja et al. 2017). To illustrate the depth of his resistance through publications and other writing, Ruhangisa explicitly criticised the

275 Buwembo Joachim. 2024. "To get Mabirizis off your backs just take your duties seriously." *The East African*, April 29, 2024. https://www.theeastafrican.co.ke/tea/oped/comment/to-get-mabirizis-off-your-backs-just-take-your-duties-seriously--4605258.

276 *Male Mabirizi vs Attorney General of Uganda*, 71.

277 As far as the author knows, there was no particular interest on the part of Kenyan judges in deciding against their government other than the fact that they were persuaded by the submissions presented to them. Neither did it become apparent that the two Kenyan judges on the case instigated the accusations against Kenya, as may have been assumed. An interview with a Kenyan repeat lawyer at the EACJ (who later appeared as amicus in the case) clarified his own involvement in activating the proceedings against Kenya (Interview, Repeat Lawyer, March 2, 2022, Arusha, Tanzania).

backlash following *Anyang Nyong'o* in one of his paper presentations, emphasising that the Court "experienced and survived what can be termed as apparent intimidation" (Ruhangisa 2011, 15) following this ruling. He further reiterated the events leading to the Treaty amendments, reminding the audience that EAC Heads of State had convened an emergency meeting where they hastily amended the Treaty,[278] including widening the horizons for the procedure for the removal of judges from office. In this paper, the Registrar took the chance to highlight the pressures on the court, as the workshop aimed to facilitate public participation in drafting "recommendations and resolutions, which will be tabled before the EAC policymakers."[279] At this event, the court gathered members from the EAC Secretariat, the East African Legislative Assembly (EALA), other EAC Institutions, members of national judiciaries, chambers of the Attorneys General, EAC ministries, Bar Associations, civil society organisations and human rights commissions in a bid to raise support and fight the unnecessary pressures they were facing. In an interview, the Registrar confirms:

> "These judges were *really* attacked. The *Anyang' Nyong'o* case was not good – and I have never spoken well on it – it was a direct attack on the judges simply for performing their role. That was the feeling. And the subsequent papers that I went around preparing, writing and presenting – I did not mince my words!"[280]

This type of reactive scholarly engagement to mitigate backlash has also been seen in other ICs elsewhere (Caserta and Cebulak 2021a, 761). Engaging in extra-judicial communication through writing takes various forms. It can be through speeches at universities, where they hope to provide the necessary legal education for the regional bench. Judges can also give informative judicial interviews or publish scholarly work across various platforms. Scholars have highlighted the primary objective of extra-judicial judicial communication as the need to instil public confidence in the judiciary (Mallory and Tyrrell 2024, 15). Engaging the public through writing can speak directly to judicial transparency, enhance public knowledge of

278 Joint Communiqué of the 8th Summit of EAC Heads of State, 30 November 2006, Arusha, Tanzania, p. 12.

279 East African Court of Justice. 2011. "EACJ to hold sensitization workshop on its role in the EAC integration." https://www.eacj.org/?p=404 (Accessed March 30, 2023).

280 Online Interview, EACJ Pioneer Registrar, Prof. John Eudes Ruhangisa, August 25, 2020.

the legal system, and contribute to the institutional legitimacy of the courts and judiciary.

Judges can speak against practices or developments in the courts to the broader "global community of courts" (Slaughter 2003) and the "legal complex" (Halliday, Karpik, and Feeley 2007).[281] By writing to other judges and legally trained members of the public, judges can raise topical concerns. For example, Justice Solomy Bossa's academic piece on the Zero Draft Protocol (Bossa 2006) sought to advance the dialogue on the extension of the jurisdiction of the EACJ. Describing the history and trajectory of the draft protocol (zero draft) for the extension of EACJ jurisdiction to provide for a human rights and appellate mandate for the EACJ, Bossa critiqued the combination of jurisdiction of the EACJ as both a Court of Justice and as a Human Rights Court. She also pointed out that the proposed draft lacked clarity on applicable law. As a result, the draft protocol was amended even though the desired outcome – extending the jurisdiction – had not yet been actualised (Possi 2018).

5.4.3 Expansive Interpretation of Legal Principles

Table 5: Pioneer Bench (2001–2007) Judgements

Year filed	Case Type	Case Name	Verdict in favour of
2005	EAC Political affair	Calist Andrew Mwatela & 2 Others *vs* The East African Community	Applicant
2006	Electoral dispute	Prof. Peter Anyang' Nyong'o & 10 Others *vs* AG of Kenya	Applicant
2007	EACJ Jurisdiction	EALS *vs* Attorney General (AG) of Kenya	Applicant
	Electoral dispute	Christopher Mtikila *vs* AG of Tanzania and others	Dismissed
	Human Rights	James Katabazi & 21 Others *vs* Secretary General EAC & AG Uganda	Applicant

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

281 The "legal complex" is defined as "the system of relations among legally trained occupations which mobilise on a particular issue" (Halliday, Karpik, and Feeley 2007, 6–7). The legal complex can involve judges, lawyers (including those affiliated with bar associations), prosecutors, civil servants, and/or legal academics, and may extend beyond legally trained members of society.

Building on *Anyang' Nyong'o,* the bench's final case, *James Katabazi*[282] was a trailblazer in human rights adjudication. In *Katabazi*, Uganda was dragged to court over interfering with preparing bail documents for 14 individuals released on bail in the High Court.[283] These individuals were rearrested, jailed, and thereafter prosecuted before a military tribunal. The Uganda Law Society challenged the interference at the Constitutional Court, which ruled in their favour.[284] Despite a favourable ruling, they were not released from detention, prompting them to seek the EACJ. Consequently, the EACJ ruled in favour of the applicants, establishing that even though it did not have express human rights jurisdiction, it could not abdicate its responsibility to hear these cases.[285] However, legal experts on EAC law have criticised the court for its "ambiguous" role in adjudicating human rights disputes (Possi 2018, 33).[286]

Furthermore, in all five judgements issued, the court ruled in favour of the applicants except for *Mtikila,*[287] which was dismissed on jurisdictional grounds. The court was clear that the issue raised was on membership to the EALA, which they saw as "the province of the High Court of Tanzania and not of this Court."[288]

Even if the pioneer bench only heard five cases, it is hailed as a trailblazing cohort. This is because they issued two landmark rulings – *Anyang Nyong'o* and *Katabazi* – which set the ground for politically salient jurisprudence and human rights jurisprudence at the EACJ, respectively.[289] These cases, as explained by legal experts, were "a major part of the strategy of its judges and its registrar to escape the court's initial obscurity within the EAC and to overcome its severe institutional weaknesses" (Gathii 2013,

282 *James Katabazi & 21 Others vs the Secretary General of the EAC and the Attorney General of Uganda*, Reference No. 1 of 2007. November 1, 2007. https://www.eacj.org//wp-content/uploads/2012/11/NO._1_OF_2007.pdf. Hereinafter *Katabazi.*

283 Ibid., 1–2.

284 Ibid., 2.

285 See Gathii 2013, 254–56 for details on this case.

286 Even though Possi argues that the EACJ lacks legitimacy in adjudicating human rights matters, he acknowledges the relevance of human rights in the EAC integration project and the role played by the EACJ in adjudicating these matters (Possi 2018).

287 *Christopher Mtikila vs the Attorney General of Tanzania & others*, Reference No. 2 of 2007. April 25, 2007. https://www.saflii.org/ea/cases/EACJ/2007/4.pdf. Hereafter *Mtikila*.

288 *Mtikila*, 11.

289 These cases have been extensively discussed in the literature and will not be reiterated here. See Gathii 2013; 2016b; Taye 2019.

259). For judges who operate on an ad hoc basis, all of whom were serving in some capacity at the national level, this was a daring move that, as already illustrated, almost brought the court to a close. Expectedly, the new and "bold" court ruffled a few feathers with the EAC partner states, which resulted in the first backlash through hasty amendments to the Treaty.

5.5 East Africa Law Society to the Rescue

While the previous sections focused on judges, this section pays attention to the crucial role of the regional Bar – the East Africa Law Society (EALS) – which assisted the bench by filing submissions, protecting the new bench from backlash and providing tools to tackle complex legal questions of political importance. Still in reference to the pioneer bench and its rulings (see Table 5 above), this section reveals the "other" vital players behind making the pioneer bold bench.

> "Before the first cases, we deliberately, as EALS, workshopped the bench, the registry, and the Counsel to the Community extensively across the region, brought them to every annual conference from late 2002 through 2004, just telling them, 'Look here, the Bar has also got your back. We have no doubt there will be pushback from when your first decisions come out, but we will be there to back you.' And we ensured that we did so when it happened."[290]

The East Africa Law Society (EALS) was the court's earliest ally,[291] playing an active role right from its inception. It was instrumental in framing the EAC Treaty and looking out for the interests of the new regional judiciary.[292] The EALS was instrumental in the formation of the court, through its institutionalisation, to appearing as amicus (providing evidence and fact-finding) and later joining the fight for compliance with the court's decisions.

290 Interview, Former CEO EALS, Donald Deya, March 2, 2022, Arusha, Tanzania.

291 The EACJ draws on a diverse array of allies to counter threats to its performance and independence. These actors assume various roles, but this study limits itself to those activities performed by the allies *intentionally* or *strategically* in a bid to support the court in overt empowerment practices. These may include regional and national Bar Associations, civil society organisations (CSOs), organs of the EAC, national and international courts, academia, development partners, litigants, and the media.

292 Interview, EALS official, February 19, 2022, Arusha, Tanzania.

Founded in 1995 amidst prevailing currents of reviving the EAC, the regional Bar has prioritised fast-tracking the revamped regional integration agenda.[293] Furthermore, EALS has consciously built its national law societies to be more regionally oriented, allowing for institutional and individual membership. This arrangement has established legitimacy among various national legal fraternities and has provided resources, both financially and in terms of networking.[294]

The regional law society's first President, Justice Solomy Balungi Bossa, was appointed as one of the pioneer judges of the EACJ. The second President of EALS, Prof. Frederick Ssempebwa, also hailing from Uganda, led the regional Bar at the time of the inauguration of the new regional court.[295] Not only was Ssempebwa involved in drafting the Treaty for the Establishment of the East African Community, but he has also been involved in a string of public interest litigation at the EACJ and is credited with initiating and successfully arguing the first case before the EACJ.[296] A professor of law at Makerere University, former president of the Uganda Law Society, and former minister of the government of Uganda,[297] Ssempebwa has vast experience in constitutional drafting, having participated in various constitutional reviews.[298]

In the same manner, the first CEO of the EALS post-court establishment, Donald Omondi Deya, who served from June 2002 to December 2009,[299] established the EALS Secretariat in Arusha[300] and was influential in mobilising litigants to use the new court. He has remained one of the most influential figures in EALS' involvement with the court in its early days. As he clarified in an interview, the regional Bar worked alongside judges and court staff to proactively instruct lawyers on the new court's mandate, imploring them to redirect issues of cross-border trade away from national jurisdictions to the EACJ:

293 East Africa Law Society. n.d. "East Africa Law Society at a glance." https://ealawsociety.org/ (Accessed March 12, 2023).
294 Ibid.
295 Refer toTable 15 in the appendix for a list of all EALS leaders since its establishment.
296 *Mwatela, supra* note 240.
297 https://www.kats.co.ug/attorney/prof-efs/.
298 For instance, the constitutions of Uganda (1995), Kenya (2010), and Tanzania (2015). See https://tanzaniaelectionswatch.org/2020/09/23/prof-fredrick-ssempebwa/.
299 https://www.linkedin.com/in/donald-deya-19b02632/?originalSubdomain=tz.
300 Interview, Former CEO EALS, March 2, 2022, Arusha, Tanzania.

> "In the early days, we workshopped corporate lawyers and told them: 'This is your court – for those representing clients that do cross-border work. Think of it this way: there are cases you keep filing in national courts or subject to arbitration or political negotiations, which would move substantially if you used this court, and half the time, all you need to do is file. After you file, the state that wants to keep a good reputation will most likely negotiate them out of court.'"[301]

EALS has empowered the court by publicising its work amongst the "legal complex" (T. C. Halliday, Karpik, and Feeley 2007). These authors define the "legal complex" as "the system of relations among legally trained occupations which mobilise on a particular issue" (Ibid, 6–7). They note that the "legal complex" may extend beyond legally trained members of society. In the EACJ, national and regional bar associations, as well as legal academics, have actively contributed to building the court's constituencies. As earlier mentioned, in the court's first five years, it did not receive any cases due to a lack of visibility. As the pioneer judges and Registrar busied themselves with developing the operational, judicial and administrative needs of the new court, partook in publicity trips around East Africa, and visited other international courts to build their capacity. Meanwhile, EALS stepped in to engage with members of the Bar.[302] The EALS leadership and its affiliated coalition organisations[303] mobilised to create visibility for the court and enhance awareness of its mandate.

The regional Bar also reinforced the court by approaching the bench as amicus curiae[304] in several politically salient cases. As amicus, the regional Bar has availed evidence and assisted the court in fact-finding, especially in unfamiliar territory or politically sensitive topics. In the court's early years, the pioneer leadership understood that the court was struggling to stamp its visibility and authority within the EAC. Rather than burdening the young court by litigating "contentious cases directly" (Taye 2020, 357), EALS appeared as amicus right from the EACJ's maiden case, *Mwatela*.[305] As the EALS President and lead Counsel on the case explained, the premise of contention was the lack of role division between the Council of Ministers

301 Interview, Donald Deya, March 2, 2022, Arusha, Tanzania.
302 Interview, Former EACJ judge, March 11, 2022, Dar es Salaam, Tanzania.
303 Such as the East African Civil Society Forum and Kituo Cha Katiba.
304 EACJ defines amicus curiae as "a person who is not a party to a proceeding in the Court but who petitions the Court or is invited by the Court to file a brief in the proceeding because he has an interest in the subject matter" (EACJ Rules 2019, 9).
305 *Mwatela, supra* note 240.

and the East African Legislative Assembly (EALA) – which seemed to share the legislative role – as Bills to EALA would be initiated by both Council and members of EALA.[306] The discord led to a near disruption of working relationships between the two organs of the Community. Prof. Ssempebwa represented the applicants at the hearing, whilst then-President Tom Nyanduga and CEO Don Deya appeared as amici curiae.[307] In its ruling, the EACJ judges noted that they were aided by the submissions from the amicus in reaching their decision.[308] The judgement clearly shows that the judges drew from the EALS' amicus briefs and that the latter greatly influenced the decision in *Mwatela*. Moreover, the EALS submitted pleadings enabling the new court to make informed decisions in *Anyang Nyong'o*.[309]

Without necessarily appearing as amicus or filing a case directly, EALS has also been a critical player, albeit informally, in supporting the creation and filing of cases at the EACJ. In the aftermath of *Anyang Nyong'o*, they have also encouraged opposition politicians and other aggrieved members of the public to sue for violations of the Treaty to hold notoriously autocratic governments accountable. For instance, following the *Anyang' Nyong'o* cases, members from EALS guided the Kenyan opposition party, ODM, by "secretly" working with their lawyers, helping them draft their pleadings, and appearing as amici:

> "We are the ones who went and told the opposition party then (ODM) that they could sue. First, I told one guy when they went and called a secret meeting over the top ODM lawyers, and I showed them exactly how to sue. Then I sat down with my law classmate and good friend, one of the ODM lawyers, and we did the pleadings. Then I left them alone and came here and pretended that nothing had happened [...] after they had filed, we went to court the next day and said, 'We hear a case has been filed. We want to be amicus.'"[310]

Drawing on jurisdiction alone, it is already clear that litigants are highly influential in supporting the navigation of the legal strategic space – they actively reframe questions pertaining to human rights as claims and issues

306 Interview, Professor Frederick Ssempebwa, October 21, 2021, Kampala, Uganda.
307 (East African Court of Justice 2015, 4).
308 Interview, Prof. Ssempebwa, October 21, 2021, Kampala, Uganda.
309 EACJ. Application 1 of 2006. *Prof. Anyang' Nyong'o & 10 others v. The Attorney General of Kenya and 5 others*. November 27, 2006. Available at https://www.eacj.org/?cases=eacj-application-no-1-of-2006.
310 Interview, Former EALS official, March 2, 2022, Arusha.

regarding the interpretation of the Treaty and frame the issues around Article 6(d) and 7(2) that explicitly mention the rule of law and good governance, which are well within the express jurisdiction of the EACJ.

The role of judicial allies in the court's attempts to forge institutional and political relevance can also be seen through "repeat lawyers" and civil society organisations that bring claims to the court, seeking to intervene directly in their limited jurisdiction. For instance, EALS sought to remedy the curbing of the court's already limited jurisdiction in *East African Law Society & 4 Others v. Attorney General of Kenya & 3 Others*[311] when they challenged the legality of Treaty amendments following *Anyang' Nyong'o*. They also pursued an interim order against the formulation, publication, enactment, ratification, or implementation of the proposed amendments to the Treaty in *Application No. 9 of 2007*.[312] In filing this case as public interest litigation,[313] EALS cited "irreparable injury, particularly to the East African Court of Justice"[314] if the amendments were to be implemented. As argued by EALS, excluding the EAC public in the amendment constituted an infringement of the Treaty, with which the court agreed.[315] However, the amendments were expedited in an extraordinary summit held in December 2006,[316] and by the time of the interim ruling, the court resignedly stated that "what has been done so far, even if it were unlawful, cannot be undone in these interlocutory proceedings. Whatever remains to be done by way of operationalisation can be rectified if the amendments are in the end declared illegal by this court."[317] In the final decision, the EACJ, despite this slight pushback against the amendments, still shied away from calling the impugned infringement "a conscious one,"[318] thereby substantively acquiescing to political interference (Alter, Gathii, and Helfer 2016, 305).

The regional Bar also strived to empower the regional court by directly intervening in its limited jurisdiction in economic and trade-related issues. In *East African Law Society v. Secretary General of the East African*

311 *East African Law Society (EALS) & 4 Others v. Attorney General of Kenya & 3 Others* (Reference No. 3 of 2007).

312 *EALS & 4 Others v. Attorney General of Kenya & 3 Others*, Application No. 9 of 2007, July 11, 2007. https://africanlii.org/sites/default/files/judgment/ea/east-african-court-justice/2007-eacj-2//2.pdf. Page 3.

313 Ibid., 8.

314 Ibid., 4.

315 *EALS v. Attorney General of Kenya (*Reference No. 3 of 2007), 43.

316 See Report of the 4th Extraordinary Summit (*supra* note 207).

317 *EALS v. Attorney General of Kenya (*Application No. 9 of 2007), 8.

318 Ibid., 43.

Community,[319] the EALS challenged the EAC[320] on specific provisions in the Common Market Protocol and Customs Union Protocol.[321] EALS, represented by Prof. Ssempebwa, argued against excluding the EACJ from adjudicating matters of economic and trade-related issues, which would inevitably downplay the court's role in furthering the integration agenda.[322] Despite limited success in this intervention, a repeat EACJ lawyer and active EALS member, Mr Francis Gimara, continued the battle against the impugned Treaty amendments and the limited jurisdiction in trade-related issues in *East African Center for Trade Policy and Law vs Sec. Gen. EAC*.[323] The judges, in their ruling, agreed with the applicant, opining that the EACJ had broad jurisdiction before these amendments and that the amendments excluded the EACJ, where partner states organs take precedence on specific issues, albeit vaguely stating what those "organs" are, thereby making provisions in the Treaty that undermined the supremacy of the EACJ.[324] The judges seized the opportunity to emphasise that the amendments encroached on the court's previously broad jurisdiction and excluded the EACJ, where partner state organs take precedence on specific issues, which could render the EACJ "powerless" over partner state institutions.[325]

A look at the case's content alone, without examining the actors who brought it, would obscure an essential aspect of the role of judicial allies in the court's attempts at navigating its strategic space. Such strategic legal mobilisation, as illustrated here, elucidates that judicial allies intentionally pressed charges that address limitations in the court's jurisdiction to support the court when they believed the partner states were circumventing

319 *East African Law Society v. Secretary General of the East African Community*, Reference No. 1 of 2011. February 14, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EastAfricanLawSociety_v_EastAfricanCommunity.pdf.

320 The Community is sued under the Secretary-General, who is the principal executive and accounting officer of the Community, head of the Secretariat and the Secretary of the Summit.

321 *EALS v. Secretary General of the EAC* (Reference No. 1 of 2011), 3.

322 Ibid., 25.

323 *The East African Center for Trade Policy and Law vs Secretary General of the EAC*, Reference Number 9 of 2012. May 9, 2013. https://www.eacj.org//wp-content/uploads/2013/09/FI_EACommunity-EACTPL.pdf.
This case prioritised the amendments to Article 27(1) and Article 30(3) of the Treaty and the dispute settlement mechanisms provided for in the Customs Union and Common Market Protocols, arguing that they "limit/deny original jurisdiction to the EACJ by transferring matters reserved for the EACJ under the Treaty to Partner State institutions and organs" (Ibid, 4–7).

324 Ibid., 29.

325 Ibid., 27.

their allegiance to protecting the rule of law in the EAC. Additionally, these cases outline avenues where the judges' rulings acknowledge the hindrances that the Treaty amendments pose to the court's attempt to construct and expand its power. Thus, cases involving Treaty amendments provided a safe avenue for judges to challenge partner state interventions that curbed their authority, thereby giving the court an opportunity to construct and expand its power.

In sum, the pioneer bench was assisted by the regional Bar's submissions in enforcing the rule of law amidst pressures and backlash. Given the regional Bar's watchdog role, the EALS took on cases of direct relevance to the development of the Community whilst strategically protecting the new bench from backlash. The regional Bar has actively shaped the institutionalisation of EAC organs and fought to expand its political reach. By appearing as a friend of the court to aid in providing tools to tackle complex legal questions of political importance or by aiding in the filing and creation of questions that would expand the reach of the regional court, EALS proved its role as an ally to the new bench.

5.6 The Makings of a "Bold" Bench

One of the pioneer judges indicated that, even though they have been dubbed bold, activist or assertive, the pioneer bench did not perceive themselves in this way. Instead, they were simply performing their judicial duty to the best of their ability:

> "I have heard that our bench was a bold one. But that was our responsibility. Our decision was based on that. We just followed the law. So, the challenge was that the Attorney General of Kenya insisted that the court had no jurisdiction in this issue. They expected that we would not continue with the case and that we would rule that 'yes, we do not have jurisdiction.' So, we just performed our duties. And that was a good start for the court" (Pioneer judge, EA25, March 11, 2022, Dar es Salaam)

Although the judge emphasised the supremacy of the law and maintained that one was merely doing one's duty, as per regulations that govern the court, in the same breath, one can deduce the resolve that the judges exhibited throughout the entire process. The fact that the interviewee phrased the legal question as a "challenge" posed by the Kenyan government, which expected the judges to back off meekly and surrender, the bench kept its

resolve and went ahead to "simply perform its duty," wherein it knowingly paved the way for future judicial resolve to triumph. The phrasing "that was a good start" could signal taking a firm and purposive stance toward future decision-making. In the context of new judicial institutions, judges are not only making judgements but are also setting the tone for future jurisprudence. The early years are crucial in helping to establish an institutional reputation, reaching out to future litigants through an expansive interpretation of principles, and thereby developing jurisprudence.

With no cases coming to the bench until 2005, the pioneer bench only issued five judgements, two of which were landmark rulings in *Anyang' Nyong'o* and *Katabazi*. Moreover, with the exception of *Katabazi*, the earliest cases centred on streamlining EAC institutions – especially addressing administrative questions – which would not seem to carry much political weight. The chapter argues that a combination of factors has contributed to the nostalgic reference of the pioneer bench as the "bold" model bench for regional jurisprudence.

Firstly, this bench is credited with demonstrating an apparent capacity and willingness to declare states in violation of the law, even in the face of looming pushback and backlash. The fact that the backlash, even though motivated by reasons of regime survival, was "legitimated with reference to both sovereignty and the need to protect a historically fragile EAC" (Brett and Gissel 2020, 109), the EACJ's pioneer bench was highly threatened. The *raison d'être* of the judicial organ – sustaining the survival of the regional bloc – was quickly put into question. Judges could have recoiled in fear of such exaggerated accusations, especially since they still served in their national jurisdictions. However, they stood their ground, formally recorded the intimidation attempts, wrote extensively and presented to various audiences, stating categorically that they had been threatened, silenced and verbally abused by officials in the Kenyan government. They also mobilised support amongst various stakeholders whilst addressing the courts' future constituencies. As the section on the regional Bar illustrates, a robust network of allies who strengthened the court amidst its initial backlash was also fundamental to its progression into a bold bench.

The first bench was not deterred by executive interference as it continued on its path to an expansive interpretation of the EAC legal principles. The pioneer bench's two landmark rulings – *Anyang Nyong'o* and *Katabazi* – set the ground for politically salient jurisprudence and human rights jurisprudence at the EACJ, respectively. For judges who operate on an ad hoc basis, all of whom were serving in some capacity at the national level,

this was a daring move that, as already illustrated, almost brought the court to a close. Such overt on-bench judicial bravery is an actively strategic and intentional means of forging institutional relevance by the judges and their Registrar, who intended to escape the court's initial legal cocoon and political insignificance within the EAC.

The pioneer bench was mostly populated by senior judges in the twilight of their careers, who were either close to retirement or had already retired after leaving the bench. For these judges, the threat of career insecurity or career suicide through bold decision-making was not apparent. For the older judges, a career at the EACJ may be their final step in active service, and thus, they may harbour different incentives than their younger counterparts. While promotion may no longer be an issue, their judicial legacy could carry more weight. For them, service at the EACJ may be their last chance to create a lasting impact on the regional bloc and to serve their countries in such a distinguished capacity. Pioneer leader Nyamihana Mulenga and his colleague Sinde Warioba are perfect examples of the "legacy" judge. Relatedly, all six judges were highly qualified legal personalities who had amassed significant political and social capital through their previous roles in their countries' highest courts and governments. Except for Moijo and Bossa, the bench had overt political exposure while all possessed judicial leadership at either national, regional, or continental levels. With two former ministers of regional administration and cooperation, one former Member of Parliament, and a former Acting Chief Justice, the bench possessed a collective political prowess that has not yet been matched in succeeding benches. In conclusion, the judicial composition of the first bench, coupled with the support of the regional Bar, could shed light on why the first bench was deemed bold.