



**IN THE EAST AFRICAN COURT OF JUSTICE AT  
ARUSHA FIRST INSTANCE DIVISION**



*(Coram: Jean-Bosco Butasi, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, J,  
Isaac Lenaola, J, Faustin Ntezilyayo, J)*

**REFERENCE NO.6 OF 2012**

**BETWEEN**

**AMONG A. ANITA.....APPLICANT**

**VERSUS**

- 1. ATTORNEY GENERAL OF UGANDA.....1<sup>ST</sup> RESPONDENT**
- 2. THE SECRETARY GENERAL OF THE  
EAST AFRICAN COMMUNITY.....2<sup>ND</sup> RESPONDENT**

**AND**

- 1.HON.MARGARET NANTONGO ZZIWA. ....1<sup>ST</sup> INTERVENER**
- 2.HON. DORA BYAMUKAMA.....2<sup>ND</sup> INTERVENER**
- 3.HON. BERNARD MULEGANI.....3<sup>RD</sup> INTERVENER**
- 4.HON. DAN KIDEGA.....4<sup>TH</sup> INTERVENER**
- 5.HON. MIKE SEBALU.....5<sup>TH</sup> INTERVENER**
- 6.HON. NUSURA TIPERU.....6<sup>TH</sup> INTERVENER**
- 7.HON. SUSAN NAKAWUKI.....7<sup>TH</sup> INTERVENER**
- 8.HON. CHRIS OPOKA.....8<sup>TH</sup> INTERVENER**
- 9.HON. MUKASA FRED MBIDDE.....9<sup>TH</sup> INTERVENER**

**Date 29<sup>th</sup> November 2013**

## **JUDGMENT OF THE COURT**

### **Introduction**

This is a Reference by one AMONG A. ANITA, a resident of Uganda and a member of the Forum for Democratic Change (FDC) – one of the registered Political Parties in Uganda, (hereinafter referred to as the “Applicant”). She was the official party candidate who had been nominated to contest in the elections for membership to the East African Legislative Assembly (hereinafter referred to as the “EALA”) in 2012. Her address for the purpose of this Reference is indicated as C/O M/S Kyazze & Co. Advocates, Plot 2, Jumbo Plaza, Room 1.2, Parliament Avenue, and P.O. Box 3064, Kampala, Uganda.

The instant Reference was filed on 15<sup>th</sup> June 2012 under Article 30 of the Treaty for the Establishment of the East African Community and Rules 10 and 24(1) of the East African Court of Justice Rules of Procedure (hereinafter referred to as the “**Treaty**” and the “**Rules**”, respectively). It is also premised on Articles 9 (1) (f), 23(1), 27(1), 30(1), 33(2), 50(1) of the Treaty.

The Respondents are the Attorney General of the Republic of Uganda and the Secretary General of the East African Community and they are sued on behalf of the Government of Uganda and of the East African Community in their respective capacities as the Principal Legal Adviser of the Republic of Uganda and the Principal Executive Officer of the Community.

It is also worth noting that on 17<sup>th</sup> August 2012, nine interveners, namely, the Uganda Representatives to the EALA filed a Notice of Motion under Article 40 of the Treaty and Rule 36 of the Rules. This Court granted their Application on 5<sup>th</sup> February 2013. The Court also allowed the Interveners’ supporting affidavit deponed by one Hon. Margaret Nantongo Zziwa (the 1<sup>st</sup> Intervener) to serve as

the statement of intervention as provided under Rule 36(4) of the Rules. Further to the foregoing, the Interveners were allowed to make submissions.

### **Representation**

The Applicant was represented by Mr. Joseph Kyazze and Mr. Simon Kiiza. Ms. Robina Rwakoojo, Mr. Philip Mwaka, Mr. Elisha Bafirawala, Ms. Maureen Ijang and Ms. Eva Kavundu appeared for the 1<sup>st</sup> Respondent, while Mr. Wilbert Kaahwa, Learned Counsel to the Community appeared for the 2<sup>nd</sup> Respondent. The Interveners were represented by Mr. Justin Semuyaba.

### **Background**

The EALA is an organ of the East African Community established under Article 9 of the Treaty.

Article 48 of the Treaty provides for the membership of the EALA as follows:

*“1. The membership of the Assembly shall comprise:*

*(a) Nine members elected by each Partner State; and*

*(b) Ex-officio members (...).”*

As for the election of members of the EALA, Article 50 (1) provides that:

*“1. The National Assembly of each Partner State shall elect, not from its members, nine members of the Assembly, who shall represent as much as feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.”(...).”*

Pursuant to the above Article, the Parliament of Uganda passed the Rules of Procedure for the election of EALA members, 2006, providing for election of members of the EALA.

In its Ruling in Hon. **Jacob Oulanyah Vs The Attorney General of the Republic of Uganda, Constitutional Petition No. 28 of 2006**, the Constitutional Court of Uganda found that the aforesaid Rules were in contravention of Article 50 of the Treaty and various Articles of the Constitution of Uganda and declared them null and void. The Attorney General of Uganda applied for, and obtained a stay of execution of that judgment, appealed against it to the Supreme Court of Uganda and that appeal is still pending to date.

In a Reference predicated on conformity with Article 50(1) of the Treaty brought by the Democratic Party (DP), one of the registered Political Parties in the Republic of Uganda and Mr. Mukasa Mbidde, one of its members, this Court, in its judgment dated 10<sup>th</sup> May 2012, annulled the said Rules on the ground *inter alia* that they were contrary to Article 50(1) of the Treaty and consequently ordered the Government and the Parliament of the Republic of Uganda to amend the then existing Rules of procedure for election of members of the EALA, 2006 to bring them in conformity with Article 50(1) of the Treaty. (See ***Democratic Party & Mukasa Mbidde Vs The Secretary General to the East African Community and the Attorney general of the Republic of Uganda, Reference No. 6 of 2011***).

Given the foregoing obligation to comply with the provisions of the Treaty, it became necessary to make new rules for the election of members of EALA for the 2012 elections. In the course of the debate, the Parliament of Uganda failed to reach a consensus on the interpretation of Article 50(1) of the Treaty and unanimously resolved to have the matter referred to this Court by the Attorney

General for a proper interpretation of the said Article in so far as representation covering the interest groups set out in Article 50(1) is concerned.

Nevertheless, the matter was not referred to this Court but the Parliament of the Republic of Uganda, on the 18<sup>th</sup> day of May 2012, went on to enact the Rules of Procedure for the Election of Members of the East African Legislative Assembly, 2012 (hereinafter referred to as “**Rules of Procedure**”).

The instant Reference challenges the legality of the said Rules as being inconsistent with the Treaty.

### **THE APPLICANT’S CASE**

The Applicant’s case is contained in the Reference filed on 15<sup>th</sup> June 2012, her affidavits sworn on 11<sup>th</sup> June 2012 and 27<sup>th</sup> August 2012 and affidavits filed by Mr. Tuhamire Robert on 12<sup>th</sup> February 2013 and 18<sup>th</sup> March 2013, as well as her submissions.

The Applicant’s Reference challenges the legality of the Rules of Procedure, particularly Rule 13(1) and (2) of Appendix B, as being inconsistent with or constituting an infringement of the provisions of the Treaty, particularly Articles 23(1), 27(1), 38(1) and 50(1) on the grounds that, in substance, they do not cater for and guarantee representation in the EALA for each of the interest groups mentioned under Article 50(1) of the Treaty.

Another contention of the Applicant is that the Rules were never gazetted for the benefit of the interest groups envisaged in Article 50(1) of the Treaty in further infringement of the Treaty and provisions of the Constitution of the Republic of Uganda.

It is her contention that the failure to gazette the Rules renders them null and void.

The Applicant therefore seeks the following declaratory orders:

- a) **That the said Rules of Procedure for election of members of the EALA 2012 are null and void;**
- b) **That the said Rules are inconsistent with or otherwise an infringement of the provisions of Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty;**
- c) **That the nomination and subsequent election of the members of the EALA by the Parliament of Uganda conducted under or in pursuance of the said Rules is not only unlawful but an infringement of the Treaty and therefore ought to be set aside;**
- d) **That the 2<sup>nd</sup> Respondent ceases to recognize the persons elected by the Parliament of Uganda to the EALA;**
- e) **That the 1<sup>st</sup> Respondent be ordered to cause the enactment of Rules of Procedure for the Election of members of the EALA that are in conformity with Article 50(1) of the Treaty;**
- f) **That an order that fresh nominations and elections of the EALA members from Uganda be conducted under proper Rules of Procedure; and**
- g) **That the Respondents be ordered to pay the costs of the Reference.**

### **FIRST RESPONDENT'S CASE**

The 1<sup>st</sup> Respondent's case is set out in his response to the Reference filed on 10<sup>th</sup> August 2012 which was supported by the affidavits of Mrs. Jane L. Kibirige, the Clerk to the Parliament of Uganda together with that of Mr. Alex Atuhaire and his submissions.

In a nutshell, his response is as follows:-

- a) That the Parliament of the Republic of Uganda amended and adopted Rules of Procedure, particularly Rule 13(1) and (2) of Appendix B.
- b) That the 2012 Rules of Procedure are in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.
- c) That the impugned Rules enabled the various Political Parties represented in Parliament, shades of opinion, gender and special interest groups to nominate any number of candidates to participate in the EALA elections, and a total of seventeen persons were nominated.
- d) That pursuant to Rule 13 (1) of Appendix B, the National Resistance Movement Party (NRM), the Democratic Party (DP), the Conservative Party (CP), and the Uganda People's Congress (UPC), and the Independents, all nominated candidates to contest for elections to the EALA. The Forum for Democratic Change (FDC) and JEEMA opted not to nominate or otherwise participate in the election process.
- e) That the said EALA elections were conducted by secret ballot and in conformity with Articles 23 (1), 27(1), 38(1) and 50 (1) of the Treaty.
- f) That, in the alternative, but without prejudice to the foregoing, any non-conformity was not fatal or material to the enactment of the said Rules or conduct of the said elections.
- g) That the Reference is misconceived, without merit, frivolous and bad in law and the Applicant is not entitled to the orders sought. He therefore prays that the Court should dismiss the Reference with costs.

## **SECOND RESPONDENT'S CASE**

The 2<sup>nd</sup> Respondent filed his Response on 9<sup>th</sup> August 2012 and his submissions on 22<sup>nd</sup> April 2013. His case is as follows:-

- a) That the matters contained in the Applicant's case are, pursuant to Article 52 of the Treaty, tantamount to questions of an election of

representatives of a Partner State to the EALA, which must be determined by an institution of the Republic of Uganda that determines questions of the election of members of the National Assembly.

- b) That the Reference does not allege any wrongdoing on the part of the 2<sup>nd</sup> Respondent and therefore there is no cause of action against him.
- c) That the recognition of elected members of the EALA is a function of the Law as provided under the Treaty and the Rules of Procedure of the EALA. On the basis of that Law, he is bound to take cognizance of the election of members of the EALA as duly communicated to him.
- d) That the granting of the orders sought by the Applicant:
  - (1) does not arise;
  - (2) would unduly interfere with the smooth operations of the East African Community.

The 2<sup>nd</sup> Respondent therefore prays that this Court should dismiss the Reference with costs.

### **The Interveners' position**

Briefly, their position is as follows:

- a) That the process of enacting the Rules of procedure for the election of representatives of Uganda to the EALA followed the established legal mandate of the Parliament of Uganda and the adopted Rules of Procedure, particularly Rule 13(1) and (2) of Appendix B, was consistent with and not in contravention of the provisions of Articles 50(1) of the Treaty.
- b) That the 2012 Rules of Procedure are in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.

- c) That these Rules enabled the various political parties represented in the Parliament of Uganda, shades of opinion, gender and special interest groups to nominate any number of candidates to participate in the EALA elections.
- d) That the said EALA elections were conducted by secret ballot and in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.
- e) In the alternative, but without prejudice to the foregoing, that any non-conformity was not fatal or material to the enactment of the said Rules or conduct of the said elections.
- f) That the Reference is misconceived, without merit, frivolous, bad in law and the Applicant is not entitled to the Orders sought.

The interveners therefore also pray that the Reference should be dismissed with costs.

### **SCHEDULING CONFERENCE**

Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 6<sup>th</sup> February 2013 at which the following were framed as points of agreement and disagreement respectively:

#### **Points of Agreement**

Both parties agreed that:

- a) The Parliament of Uganda passed Rules of Procedure for election of members of the EALA on the 18<sup>th</sup> May 2012.
- b) The nomination and election of the members of the EALA was advertised in the “New Vision” newspaper of 17<sup>th</sup> May 2012, in which the date for picking nomination forms was publicised on 17<sup>th</sup> May 2012, nominations were set for Monday 21<sup>st</sup> to Tuesday 22<sup>nd</sup> May 2012 and elections for 30<sup>th</sup> May 2012.

- c) The Parliament of Uganda held elections for the EALA representatives on the 30<sup>th</sup> May, 2012.
- d) The elections of Uganda's current representatives to the EALA were conducted under the said Rules.
- e) Following the elections the names of Uganda's EALA representatives were gazetted in the Uganda Gazette, Volume CV No. 29 dated 31<sup>st</sup> May, 2012 and, in the East African Community Gazette under Volume AT 1/9 dated 8<sup>th</sup> June, 2012. The names of Uganda's representatives were communicated to the 2<sup>nd</sup> Respondent by the Clerk to the Parliament of Uganda in her letter Ref. AB: 117/122/01 dated 31<sup>st</sup> May, 2012.
- f) The Reference raises triable issues meriting adjudication and pronouncement by this Court.

**Points of disagreement/Issues for determination by the Court**

- 1) Whether the Court is vested with the jurisdiction to entertain this Reference.
- 2) Whether the Rules of Procedure for the election of members of the EALA cited as the Rules of Procedure of Parliament 2012 particularly Rules 13(1) and (2) are in substance inconsistent with the Treaty and its application, specially Articles 23(1), 27(1), 38(1) and 50(1).
- 3) Whether or not the Rules were gazetted and if not whether the failure to gazette rendered them null and void.
- 4) Whether in view of the Court's findings on issues (2) and (3), any acts, decisions made or elections conducted by the Parliament or Government of Uganda pursuant to the Rules are null and void.
- 5) Whether the parties are entitled to the remedies sought.

It was further agreed at the aforesaid Conference that evidence would be by way of affidavits.

The parties also agreed to file written submissions in respect of which they would make oral highlights at the hearing.

The parties noted that the case presented no possibility of mediation, conciliation or settlement.

### **Determination of the issues by the Court**

#### **Issue No.1:**

***Whether the Court is vested with the jurisdiction to entertain this Reference***

#### **Submissions**

Counsel for the Applicant contended that the issue of jurisdiction is clearly moot and academic and should not arise. It was his view that challenging the jurisdiction of the Court at the initial stage of the Reference offends the rule on approbation and reprobation. He asserted that the Respondents cannot on one hand concede that the Reference raises triable issues meriting adjudication by the Court and further to the 2<sup>nd</sup> issue inviting the Court to determine whether the rules are in substance inconsistent with the Treaty and on the other hand, dispute and challenge the Court's jurisdiction since they cannot approbate and reprobate at the same time.

Counsel went on to point out that the issue pertaining to whether the Court is vested with the jurisdiction to entertain this Reference has three facets. On the first facet, Learned Counsel submitted that since it was agreed at the Scheduling Conference that this Reference raises triable issues that merit adjudication by this Court, it is his understanding that the triable issues relate specifically to the

question of legality of the Rules of Procedure of election of members to the EALA, 2012 and that falls within the ambit of the jurisdiction of this Court under Article 23(1), 27(1) and Article 30(1) of the Treaty. In support of his submissions on this issue, Counsel cited the case of **Modern Holdings (EA) Limited Vs Kenya Ports Authority, EACJ Reference No. 1 of 2008.**

With regard to the second facet, Mr. Kyazze argued that Article 30(1) as read together with 23(1) and 27(1) confer upon this Court the jurisdiction to determine the legality of the Rules, regulations, directives and actions of the Partner States on account that such regulations are unlawful or constitute an infringement of the provisions of the Treaty and are therefore inconsistent with the Treaty. Learned Counsel contended that this calls for interpretation and application of the provisions of the Treaty within the parameters of the jurisdiction of this Court as provided for by the aforementioned Articles of the Treaty. Counsel then referred the Court to authorities which, according to him, support his submission that this Reference falls within the mandate of this Court. These authorities are: **Modern Holdings (EA) Limited Vs Kenya Ports Authority** (supra); **James Katabazi & others Vs The Attorney General of the Republic of Uganda and Secretary General of the East African Community, EACJ Reference No. 1 of 2007**; **The East African Law Society & 3 others Vs The Attorney General of the Republic of Kenya & 3 others, EACJ Reference No. 3 of 2007**; and **Prof. Peter Anyang' Nyong'o & others Vs The Attorney General of the Republic of Kenya & others, EACJ Reference No. 1 of 2006.**

Concerning the third facet, Mr. Kyazze argued that it revolves around the issue of interpretation of Articles 23, 27, 30 of the Treaty on the one hand and Article 52 of the Treaty that the Respondents seek to rely on for the submission that this Court is devoid of jurisdiction to entertain this Reference, on the other hand. He

contended that the challenge on the legality of the Rules and their being an infringement of the Treaty falls under Article 30(1) and completely outside Article 52 of the Treaty. It was his view that the said Article does not cover the challenge, which is the substance of this Reference, but that it only covers elections and membership, not the law under which those elections were conducted, which is the **'the gist of this Reference.'** He referred the Court to two cases, namely, **The East African Law Society** case and the **Katabazi** case (supra) in support of his position in that regard.

As regards the assertion by the Respondents that the matters in the Reference are tantamount to questions of an election of representatives of a Partner State to the EALA to be determined by an institution of the Republic of Uganda that determines questions of elections under Article 52 of the Treaty, and thus falling outside the jurisdiction of this Court, Counsel opposed this contention arguing that the Reference is not an election petition, but that *“the challenge is essentially on the legality of the Rules, and what transpired there-under. The nullification of the elections can only be the inescapable consequence of the nullification of the Rules under which the elections were conducted. Of course once the law is nullified, so are the acts/activities carried out there-under.”*

Counsel then distinguished between the jurisdiction of this Court and its power to grant consequential reliefs in the context of Article 52 of the Treaty, relying on two cases, namely, **The Attorney General of the United Republic of Tanzania Vs African Network for Animal Welfare (ANAW), EACJ Appeal No. 3 of 2011; Prof. Peter Anyang' Nyong'o & others Vs The Attorney General of the Republic of Kenya & others, EACJ Reference No.1 of 2006.** He thus maintained that the essence of the Applicant's Reference is to challenge the legality of the Rules of Procedure for the Election of Members of the

EALA, and not the issue whether the nine representatives of Uganda were elected members of the EALA for Article 52 to apply, putting the matter outside the jurisdiction of this Court as contended by the Counsel for the Respondents.

In the same vein, Counsel distinguished the present Reference from the Case of **Christopher Mtikila Vs Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community, EACJ Reference 2 of 2007**. The latter, as he put it, was premised on the application of Article 52 of the Treaty and was strictly on elections and membership and the issue of the legality of the Law under which the elections were conducted, which is the essence of this particular case, was never a subject of that decision.

Counsel also submitted that in terms of the scope of jurisdiction, Article 30 of the Treaty envisages that the Court determines the legality of an Act that has been enacted and come into force, any regulation that has been made, a directive that has been given, a decision that has been taken and an action that has been done or conducted. He added that, if upon reference to this Court of any of the aforementioned, the Court finds an infringement of the Treaty, or unlawful action, it has to hold so and, depending on the nature of the infringement or unlawfulness, may grant the discretionary remedy of a declaratory Judgment annulling such Act, regulation, directive, decision or action as the case may be. He referred to **East African Law Society & 3 others Vs The Attorney General of the Republic of Kenya & 3 others** (supra), at pages 41 and 43 in support of his assertion.

For all the reasons set out above, Counsel for the Applicant prayed that the Court should make a finding that this Court has jurisdiction to determine this Reference.

Counsel for the 1<sup>st</sup> Respondent, in his response, pointed out that Article 23 and 27 of the Treaty spelt out the jurisdiction of this Court. He emphasised that these provisions set out the authority and or extent of power conferred upon this Court in determining issues that are brought before it. Stressing that Article 27(1) particularly confines the exercise of the Court’s authority to matters which do not include the application or any interpretation to jurisdiction conferred by the Treaty on the organs of Partner States, he submitted that removal or annulling the election of members to the EALA are such matters to which the Court has no jurisdiction. He then referred the Court to **Anyang’ Nyong’o** and **Mtikila** cases.

He further submitted that this position is strengthened by the provisions of Article 52 of the Treaty, which vests the question of inquiry into elections of members to the EALA to the relevant institutions of Partner States.

Article 52 of the Treaty provides:

**“Questions as to Membership of the Assembly**

- 1. Any question that may arise whether any person is an elected member of the Assembly or whether a seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the elections of members of the National Assembly responsible for the election in question.**
- 2. The National Assembly of the Partner States shall notify the Speaker of the Assembly of every determination made under paragraph 1 of this Article.”**

Building on the above provisions and relying on the **Anyang’ Nyong’o** and the **Mtikila** cases, he argued that any question as to the membership to the EALA shall be exclusively determined by institutions of a Partner State.

With reference to prayers (a), (b) and (c) sought by the Applicant, Counsel submitted that the above orders and declarations seek to annul and nullify the elections conducted on the 30<sup>th</sup> May 2012 resulting in the election of the nine Ugandan Representatives to the EALA. He added that the orders and declarations also inquire into the membership of the Ugandan Representatives to the EALA, which, under Article 52 of the Treaty is a sole preserve of institutions of a Partner State. He further asserted that this Court is a creature of the Treaty and so is any jurisdiction conferred upon it and it therefore, follows that this Court cannot grant reliefs on matters which are not within its jurisdiction, namely, the prayers sought herein by the Applicant.

Counsel further pointed out that the change made by the Applicant in the prayers sought in her submissions are different from those contained in her Reference and urged the Court to restrict itself to the reliefs claimed by the Applicant in the Reference and to disregard the two other prayers added by the Applicant, namely, a declaration to set aside the nomination and election of the nine members of the EALA by Parliament of Uganda, and an order that new Rules of Procedure be enacted.

Finally, Learned Counsel refuted the statement made by the Applicant's Counsel that the 1<sup>st</sup> Respondent had conceded that the Court has jurisdiction over this matter. He then maintained that this Court has no jurisdiction conferred by the Treaty to grant the reliefs sought by the Applicant in her Reference.

As for Counsel for the 2<sup>nd</sup> Respondent, he first of all submitted on the term “**jurisdiction**” which, according to **The Dictionary of Words and Phrases Legally Defined Edited by John Saunders, 2<sup>nd</sup> Edition, Volume 3 at p.113**, means “... *the authority which a Court has to define matters that are litigated before it or to take cognisance of matters presented in a formal way for its*

*decision. The limits of this authority are imposed by statute, charter or commission under which the Court is constituted, and may be extended or restricted by the like means.”*

He went on to give a list of cases in which the said meaning on the power of Court to hear and decide on a case was emphasised. (see **Rv. Kent Justices ex parte Lye [1967] 2 QB 153, Union Transport Plc v Continental Lines SA [1992] 1 WLR 15; Christopher Mtikila Vs The Attorney General of the United Republic of Tanzania & Another, EACJ Reference No. 2 of 2007; East African Law Society Vs The Secretary General of the East African Community, EACJ Reference No. 1 of 2011; Hon. Sitenda Sebalu Vs. The Secretary General of the East African Community & 3 others; Modern Holdings (EA) Limited Vs Kenya Ports Authority, EACJ Reference No. 1 of 2008).**

Further to the above, Counsel asserted that the issue of jurisdiction of this Court in the matter at hand is a triable issue that requires interpretation by this Court as articulated by parties at the Scheduling Conference and thus contended that this issue is not “**just moot or academic.**”

Counsel also contended that the matters contained in the Applicant’s pleadings are, pursuant to Article 52 of the Treaty, questions of an election of representatives of a Partner State to the EALA, which must be determined by an institution of the Republic of Uganda that determines questions of the elections of members of the National Assembly, namely the High Court. He therefore, pleaded that the dispute on elections of the EALA members from the Republic of Uganda should not be heard by this Court, which should therefore divest itself of jurisdiction to determine it. On this submission, he relied on the decision of this Court in the **Mtikila** case (supra).

With regard to submissions by Counsel for the Interveners, Learned Counsel, in a nutshell, asserted that, since the essence of the Reference is the nullification of elections of the EALA members from Uganda, this Court has no jurisdiction over this matter which, as he pointed out, should be determined through an election petition reserved to national courts under the terms of Article 52 of the Treaty. In support of his stance, he referred the Court to the **Anyang’ Nyong’o** and **Mtikila** decisions.

### **Decision of the Court on Issue No.1**

From the outset, we deem it necessary to look into the meaning of the word “*jurisdiction*”. We agree with the Counsel for the 2<sup>nd</sup> Respondent that the definition given to the term “*jurisdiction*” is correct.

Following the above, it is noteworthy to recall, as it has been stated previously by this Court, that the Treaty is an international treaty and subject to international law on interpretation of treaties and specifically Article 31(1) of **The Vienna Convention on the Law of Treaties**, which sets out the general rule in the interpretation of treaties as follows:

- a) A treaty shall be interpreted in good faith and
- b) In accordance with the ordinary meaning to the terms of the treaty in their context, and
- c) In the light of the object and purpose of the treaty.

(see **Anyang’ Nyong’o** case, p. 10 and **East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community, EACJ Ref. 9 of 2012**, p. 13).

We shall be guided by the above principles in determining the issues framed in this Reference, particularly the issue at hand where this Court has to determine whether it has the jurisdiction to entertain the Reference.

The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions: In Article 23 (1), the Treaty provides that:

*“The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”*

Moreover, in Article 27(1), it provides that:

*“The Court shall initially have jurisdiction over the interpretation and application of this Treaty provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”*

The Treaty also provides in Article 30 (1) and (3) that:

**“1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the ground that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.**

**2...**

**3. The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”**

Applying the principles and provisions above, we hereby make the following findings:

At the Scheduling Conference, parties agreed that the Reference raised triable issues meriting adjudication and pronouncement by this Court. We have elsewhere above reproduced those issues. However, on careful examination of all those issues, we are of the view that issue No. 2 is vividly within our jurisdiction. Therefore, considering the foregoing and guided by the pre-cited cases of **Anyang' Nyang'o** and **Mtikila**, we are of the firm view that the Court would be failing in its duty under Articles 23 and 27 of the Treaty as read together with Article 30 and 50(1), if it refuses to determine the said issue on the ground that it does not have jurisdiction. We shall, therefore, hold that we have the requisite jurisdiction to determine the issues raised in the Reference, but subject to what we shall say about matters revolving around gazettelement and the nullification of election of the EALA members raised in issues No. 3 and 4.

**Accordingly, only the Applicant's prayers that fall under our jurisdiction will be the subject of our adjudication in this Reference.**

**Issue No.2:**

*Whether the Rules of Procedure for the election of members of the East African Legislative Assembly cited as the Rules of Procedure of Parliament 2012, particularly Rules 13(1) and (2) are in substance inconsistent with the Treaty and its application, specifically Articles 23(1), 27(1), 38(1) and 50(1)*

**Submissions**

Counsel for the Applicant submitted that the gist of the Applicant's contention is that the impugned Rules, specifically Rule 13(1) and (2) do not in substance comply with Article 50(1) as they failed to cater for the interests and guarantees

of representation in the EALA of each of the interest groups mentioned under Article 50(1) of the Treaty.

Counsel further argued that Article 50(1) provides for composition of nine members for the EALA as being representatives of the specified groupings that are set out herein.

According to him, the question that has to be raised first is whether there is any controversy on the correct import of the said Article vis-a-vis the Rules that were passed by the Parliament of Uganda. In this regard, he stressed that, while in the **Mbidde** case this Court has set out the essential requirements for elections as provided for by Article 50(1) of the Treaty, the Court, however, refrained from giving guidance or interpreting for the Parliament of Uganda as to what constitutes compliance with Article 50 or Article 50(1) because it considered that that issue was not in contention. Learned Counsel then urged the Court to pronounce itself on this issue in the present Reference.

In his interpretation of Article 50(1) of the Treaty, Counsel contended that the Parliament of Uganda is mandated with the power to make Rules that effectuate the letter and spirit of Article 50(1) of the Treaty. In that context, Parliament of Uganda is bound to cater for and to guarantee effective representation of the interests of each of the intended beneficiaries of Article 50(1). He argued that the mandate of the Parliament of Uganda under Article 50(1) is not unfettered to the extent that it may make any rules that suit its convenience or that of the majority in the National Assembly. In addition, he submitted that Article 6(d) of the Treaty obliges Partner States (acting directly or through their organs) to adhere to inter-alia, the principle of rule of Law. In support of his assertion, he referred to the *Katabazi* case at page 18, where this Court held that:

*“Perhaps the most important application of the rule of law is the principle that Governmental authority is legitimately exercised only in*

*accordance with written, publicly disclosed laws adopted and enforced in accordance with the established procedural steps that are referred to as due process...”*

Relying on Articles 77 and 78 of the Constitution of Uganda and on the National Youth Council Act, Cap 319, Learned Counsel went on to show how those provisions give guarantees to the persons mentioned therein, to be represented in Parliament. In this regard, he asserted that in the abovementioned provisions, nothing was left for consensus to be reached by the relevant Electoral College or the entire electorate and that each and every interest to be represented in Parliament was catered for with precision, and the beneficiaries thereof were left in no doubt as to that fact.

Counsel added that the question of the guarantee of the representation of the interests of the persons and groups mentioned in Article 50(1) is a question of law, which arises out of the interpretation of the said Article. He submitted that Rule 13(1) and (2) of the impugned Rules is supposed to have substantially provided for the specific slots for the interest groups set out in the Article and that it cannot purport to subject them to consensus.

Counsel also faulted the Parliament of Uganda on the ground that, in adopting Rule 13(1) and (2) of the impugned Rules, it reproduced the content of Article 50(1) rather than spelling out the proportionate representation that is envisaged under that Article, and for this reason, it has departed from the essence, the spirit and the intendment of Article 50(1) of the Treaty.

As for the applicability of the Treaty, Learned Counsel asserted that the impugned Rules are inconsistent with the Treaty and its application for the reasons, firstly, that they do not guarantee representation of women, the youth, and persons with disabilities, who are envisaged in Article 50(1) of the Treaty.

Reading the said Article in the context of other provisions of the Treaty including Article 5(3), he contended that the absence of guarantees for the representation of women is inconsistent with the Treaty and its application and that **“it seriously affects the set objectives of the Community.”**

Secondly, Counsel also argued that the Parliament of Uganda violated Article 6(d) of the Treaty which emphasizes the principles of democracy and rule of law and that in brief, the rule of law demands that whatever is done, ought to be done according to the law. It is therefore his stance that these principles were not respected by the Parliament of Uganda in carrying out activities such as setting up advertised dates for picking nomination forms, nomination and election dates before the Parliament had even passed the impugned Rules. To Counsel, this was a clear infringement of the Treaty since parties who intended to participate and benefit from the provisions of Article 50(1) were unable to know when to participate in the process before the Rules were passed.

Counsel also asserted that another infringement of the Treaty lies in the part of Rule 13(1) which reads: **“after consultations and consensus by political parties and other members of Parliament”**. His argument in that regard was that, such a provision does not cater for special interest groups, gender and the youth who are not political parties or are not members of Parliament but were intended to benefit under Article 50(1) of the Treaty.

Concluding his submission, Counsel reiterated his contention that the Rules, specifically Rule 13(1) and (2) on the face of them clearly evidenced non-compliance with the Treaty as they never catered for the specific groupings envisaged in Article 50(1) of the Treaty.

Counsel for the 1<sup>st</sup> Respondent, on his part, contended that the language of the impugned Rules, specifically Rule 13 which is the basic issue in contention, is

essentially the language which is contained in the Treaty itself. He further argued that, in determining whether Rule 13(1) and (2) of Appendix B of the amended Rules of Procedure is in substance inconsistent with the Treaty, it was important to examine whether the said Rules fulfil the essential requirements of Article 50 of the Treaty as set out in the **Mbidde** case (supra) where the Court stated that those essential requirements are the following:

- *“the National Assembly shall conduct an election;*
- *sitting members of the Assembly are not eligible;*
- *elected members shall be nine;*
- *the elected members shall represent as much as feasible*
  - a) the political parties in the National Assembly;*
  - b) shades of opinion;*
  - c) Gender;*
  - d) other social interest groups.*
- *the procedure for election shall be determined by the National Assembly.”*

Learned Counsel pointed out that, on 30<sup>th</sup> May 2012, the duly vetted and nominated seventeen candidates openly campaigned in the Parliament of Uganda and through secret ballot; nine of them were subsequently elected as representatives of the Republic of Uganda to the EALA. That this was done in total compliance with Article 50(1) of the Treaty and neither the Court nor the Applicant can fault the Parliament of Uganda for adopting the language contained in the Treaty.

He further asserted that, as regards the composition of the EALA, it is clear that there are nine members who traverse specific groupings provided for by the Treaty. He submitted that, since the number of possible and prospective persons who could fill those nine seats far exceeds the number of the seats, the emphasis

should be on the words “*as much as it is feasible.*” He then prayed that the Court should find that the persons who were sent to the EALA were as diverse as can be and to that extent, this Court should find that there was conformity with the Treaty.

Counsel further contended that no person from the various political groups and or special interest groups were ever barred directly or indirectly from engaging in the nomination process to contest for the election to the EALA. He strongly contended that the 2012 Rules of Procedure provide for an all-inclusive representation of members, which was and is in substance consistent with the provisions of Article 50(1) of the Treaty. It is his submission that the impugned Rules must be interpreted as being in substance consistent with Article 50(1) of the Treaty in view of the mischief of the 2006 Rules of the Procedure which the 2012 Rules sought to correct.

In the same vein, Counsel prayed that the Court should find from the wording of the Rules that, every Ugandan who wanted to participate in the elections was free to be nominated, the emphasis being on the vote that is a legislative issue, which should be left to the Parliament of Uganda as an Electoral College. He further asserted that the process should not be manipulated in such a way that certain persons are granted slots or quotas as the Applicant seems to insist on.

In conclusion, Counsel invited this Court to find that Rule 13(1) and (2) are substantively consistent with the provision of Article 50(1) of the Treaty and to answer the issue in favour of the 1<sup>st</sup> Respondent.

Mr. Kaahwa did not submit on this issue.

Counsel for the Interveners associated himself with the 1<sup>st</sup> Respondent and argued that the 2012 election Rules were lawfully enacted by the Parliament of Uganda within its discretion under, and in compliance with Article 50 (1).

In support of his assertion that the enactment of the 2012 Rules of Procedure and that the electoral process were conducted in conformity with the provisions of the Treaty, Counsel relied on three cases, namely, **Anyang' Nyong'o** case, **Mbidde** case and Hon. **Jacob Oulanyah** case (supra).

The rest of his submission dealt with matters pertaining to whether the nine interveners were duly elected by the Parliament of Uganda. He barely elaborated on the issue whether the impugned Rules were or not an infringement of Article 50(1) of the Treaty.

### **Decision of the Court on Issue No.2**

It is not in dispute that the Parliament of the Republic of Uganda passed the Rules of Procedure for the election of members of the EALA on 18<sup>th</sup> May 2012 and these Rules are part of the new Rules of Procedure of Parliament of Uganda, 2012. The provisions of those Rules falling under this Reference are Rule 13 on Election of members of the EALA and Rule 13(1) and (2) of Appendix B to the Rules of Procedure.

For clarity's sake, we reproduce the said Rules:

#### ***“Rule 13: Election of Members of the East African Legislative Assembly***

***(1)The nine members of the East African Legislative Assembly representing Uganda shall be elected by Parliament not from among members of Parliament, representing as much as feasible, the various political parties represented in the House, shades of opinion, gender and other special interest groups in Uganda.***

***(2)The election of the members to the East African Legislative Assembly shall be held in accordance with the rules set out in Appendix B to the Rules.”***

Rule 13(1) and (2) of Appendix B provides as follows:

***“Rule 13: Election of Members of the Assembly:***

***(1) The election of members to the Assembly representing the various political parties and organizations represented in Parliament, shades of opinion, gender and other special interest groups in Uganda shall be conducted after consultation and consensus by the political parties and other Members of Parliament.***

***(2) Subject to sub rule (1), the Speaker shall, where consensus is not reached put the matter to vote.”***

The issue we have to decide on is whether the 2012 Rules of Procedure, particularly Rule 13(1) and (2) are in substance inconsistent with the Treaty, specifically Articles 23(1), 27(1), 38(1) and 50(1).

The essential requirements for election rules to conform to Article 50(1) have been well articulated by this Court in the pre-cited **Mbidde** case. We have elsewhere reproduced these requirements above.

It is our view that in order to conform to the provisions of Article 50(1), the election Rules must enable the establishment of an electoral process that ensures equal opportunity to become a candidate, full participation and competition for specified groupings and at the end of the process, their effective representation in the EALA.

We agree with Counsel for the 1<sup>st</sup> Respondent that Rule 13 which specifically deals with the election procedure “mirrors” the wording of Article 50 of the Treaty and we have no doubt that the impugned Rule 13(1) and (2) does not allow sitting members of the Parliament of Uganda to run for election for position in the EALA.

Further, according to the Hansard of the Parliament of Uganda dated 15<sup>th</sup>, 17<sup>th</sup>, 22<sup>nd</sup>, and 30<sup>th</sup> May 2012 and other documents annexed to the 1<sup>st</sup> Respondent's Affidavit in support of the Reference filed on 16<sup>th</sup> August 2012 by Mrs. Jane L. Kibirige, Clerk to Parliament of the Republic of Uganda, ample details are provided on the process for the enactment of the new Rules and how the electoral process (advertisement on elections, picking nomination forms, submission of nominees, setting up of the verification Committee and voting) was conducted pursuant to the new Rules of Procedure.

As indicated in the said Hansard and evidenced by the aforementioned Affidavit and not denied by the Applicant, a total of seventeen nominees from various political parties and other special interest groups were presented to the Parliament of Uganda constituted as an Electoral College and nine of them were elected to the EALA.

It is also our view that, contrary to the Applicant's assertion, there is no requirement to be deduced from Article 50(1) of the Treaty that the said election rules should provide for specific slots for the interest groups set out in the Article or that they should provide for guarantees of representation, specifically of women, youth and persons with disabilities or any specified grouping provided for by Article 50(1) where such representation is not "**feasible.**" This Court is not clothed with the jurisdiction to determine such feasibility which is, in any event, left to the discretion of the National Assemblies of Partner States.

Further, as it was recently decided by this Court in **Abdu Katuntu Vs The Attorney General of Uganda & The Secretary General of the East African Community & 9 Intervenors, Ref. No. 5 of 2012, p. 29, that:**

**“ while Article 50 provides for the National Assembly of each Partner State to elect nine members of the EALA, it gives no directions on how the**

**election is to be done, except for the stipulation that the nine must not be elected from members of the National Assembly and as much as feasible, they should represent specified groupings. Instead, it is expressly left to the National Assembly of each partner State to determine its procedure for the election as was held in the Anyang’ Nyong’o case that: ‘... while the Article provides that the nine elected members shall as much as feasible be representative of the specified groupings, by implication, it appears that the extent of feasibility of such representation is left to be determined in the discretion of the National Assembly.’**

**This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. Here, we take judicial notice of the fact that the number of political parties in the Partner States differ from one State to another. In some of them, there are more than a dozen political parties, namely, Kenya and Tanzania. In our view, this explains why the framers of the Treaty in their wisdom, for the purposes of uniformity for all the Partner States used the word ‘various’ to allow for the diversity in their circumstances.”**

While the holding above specifically refers to political parties, our view is that the same applies to other specified groupings provided for under Article 50(1) of the Treaty as well.

Regarding the issue of consultations and consensus as envisaged by Rule 13(1) and (2) of Appendix B of the impugned Rules, it is important to note that the said Rule flows from Rule 13 of the Rules of Procedure. The latter Rule is itself a creature of Article 50(1) of the Treaty, which obliges National Assemblies of Partner States to determine the procedure for election of EALA members.

We have also carefully perused Appendix B of the Rules of Procedure and it has the following provisions:

1. The procedure for nomination of candidates – Rules 3, 4, 5 and 6;
2. The creation of a Verification Committee – Rules 8, 10 and 11;
3. Campaigns by nominated candidates – Rule 12 (1);
4. Voting by secret ballot – Rule 12(2);
5. Declaration of the results of election – Rule 14;
6. Publication in the Gazette – Rule 15;
7. Transmission of names of elected members to the Secretary General of the East African Community – Rule 16.

Rule 13(1) and (2) of Appendix B aforesaid provides for consultations and consensus in the elections of members to the EALA. This Rule is located between the provisions on voting by secret ballot in Rule 12 and declaration of results in Rule 14. It is unclear to us and no explanation was offered by the 1<sup>st</sup> Respondent why such procedure should exist at such a crucial stage of the electoral process. We say so because, in any election, consultations and consensus-building are done in the earliest stages of the electoral process and certainly not after voting. Therefore, any provision that imposes consultations and consensus after voting is unusual.

Further, it is our view that any attempt by the Rules to tamper with the smooth conduct of the electoral process as envisaged by Article 50 of the Treaty and as articulated in the **Anyang’ Nyong’o** case and in the **Mbidde** case would amount to a clear violation of the said Article.

We are alive to the fact that in the **Katuntu** case, this Court noted that the specific prayer in issue was whether all the six political parties represented in the Parliament should be guaranteed a representation in the EALA by the Rules

of Procedure. This Court held and as it has also held above that no such a guarantee exists for all political parties represented in Parliament or any other group specified in Article 50(1).

Before we depart from this issue, we would like to reiterate that in the interpretation of the Treaty, we are guided by the Vienna Convention on the Law of Treaties, Article 31(1) which reads:

**“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”**

Applying the above principle and based on the facts set out herein, it is clear to us that, Rule 13 and the rules in Appendix B, save for Rule 13 (1) and (2), in substance, meet the benchmark set out in Article 50 (1) of the Treaty. Rule 13 of Appendix B as found above is alien to both the spirit and requirements of Article 50(1) of the Treaty.

Although the Applicant adduced no evidence that the impugned Rule 13(1) and (2) of Appendix B was used in the last EALA elections, we are of the view that the impugned Rule if left in the Rules of Procedure, can derail the electoral process. In that regard, we shall make an appropriate order in this Reference.

**Accordingly, the answer to issue No. 2 is that the Rules of Procedure save for Rule 13(1) and (2) of Appendix B, are in substance, consistent with the Treaty provisions.**

**Issue No. 3:**

***Whether or not the Rules were gazetted and if not, whether the failure to gazette rendered them null and void***

## **Submissions**

The Applicant's Counsel submitted that the Rules of Procedure were never gazetted as required by the law, while stating that what was published was only a General Notice. He further asserted that the law on the requirement of gazetting the rules stems from Section 16 of the Interpretation Act, Cap 3, Laws of Uganda and that gazetting being a mandatory requirement, failure to do so renders the Statutory Instrument null and void.

It is also his submission that the requirement for gazetting the Rules of Procedure for election of members of EALA 2012 is even more profound and critical in view of the intended beneficiaries, that is, the persons falling in the categories specified in Article 50(1) of the Treaty, who were interested in seeking nomination and election as members of the EALA. He prayed that the Court makes a finding that the Rules of Procedure for election of members of the EALA, 2012 are null and void for want of due publication in the Gazette.

Learned Counsel contended that the said Rules were sufficiently gazetted as required by the law. He further asserted that there is no express and mandatory provision as to the form (whether by a notice or Legal Supplement) by which the said Rules are to be published under the 1995 Constitution of the Republic of Uganda, the Interpretation Act, Cap 3 and or the Rules of Procedure of the Parliament of Uganda, 2012.

Mr Kaahwa did not submit on this issue.

Counsel for the Intervenors associated himself with the 1<sup>st</sup> Respondent's Counsel and contended that the Rules were sufficiently gazetted as required by the law in Uganda.

### **Decision of the Court on Issue no. 3**

As the issue stands and according to the submissions of Counsel for the Applicant, the latter seeks a declaration that no valid Rules of Procedure for the election of members of the East African Legislative Assembly, 2012 were passed by the Parliament of Uganda since they were not duly gazetted, and that therefore, the said Rules are null and void.

Both Counsel for the Applicant and the 1<sup>st</sup> Respondent have indicated in their respective submissions that the matter of gazetting laws and rules after their enactment by the Parliament is governed by relevant Ugandan laws, mainly the Constitution of the Republic of Uganda and the Interpretation Act, Cap 3. It goes without saying that, consequently, the competent Ugandan institutions provided for by the said laws should resolve questions arising out of this matter.

The Court therefore, declines the Applicant's invitation to determine this issue, which, manifestly, falls outside its jurisdiction as provided for by Articles 23 and 27 as read together with Article 30 of the Treaty.

### **Issue No .4**

*Whether in view of the Court's finding on issues 2 and 3, any acts, decisions made or elections conducted by the Parliament or Government of Uganda pursuant to the Rules are null and void.*

### **Submissions**

The Applicant's Counsel invited the Court to interpret Article 50(1) of the Treaty to determine the Applicant's contention that the impugned Rules are a nullity and inconsistent with the Treaty for the reasons given in his submissions on issues 1 and 2.

On the contrary, Counsel for the 1<sup>st</sup> Respondent reiterated his submissions made under issues 2 and 3, and maintained that the Rules of Procedure for the election of members of the EALA are substantially consistent with the provisions of Article 50(1) of the Treaty. He further contended that since the said Rules were duly gazetted and considering his submissions on issues 2 and 3, all the acts and elections carried out under the impugned Rules were and are valid.

Mr. Kaahwa did not submit on this issue.

For his part, Counsel for the Intervenors contended that under Article 52 of the Treaty, this Court is not vested with the jurisdiction to entertain issues relating to the election of members of the EALA since those matters are reserved to the National Assemblies of Partner States. He then referred the Court to **Anyang’ Onyang’o** and **Mtikila** cases in support of his stance.

#### **Decision of the Court on Issue No. 4**

In light of our findings on issue No. 2, we reiterate our decision that the Rules of Procedure for election of members of the EALA, save Rule 13(1) and (2) of Appendix B, were in substance consistent with the provisions of Article 50(1) of the Treaty. As for issue No. 3, we have resolved that it did not fall under the jurisdiction of the Court under Articles 23 (1) and 27(1) as read together with Article 30 of the Treaty. Furthermore, guided by the said Articles as read together with Article 52 of the Treaty, we restate our view that, matters raised under issue No.4 revolve around the election of members of the EALA conducted by the Parliament of Uganda and therefore, questions related thereto are within the ambit of Article 52 of the Treaty and have to be dealt with by the competent institution of the Republic of Uganda. Under the Ugandan law, that jurisdiction is repositied in the High Court of Uganda.

**For the above reasons, we answer issue No.4 in the negative.**

**Issue No. 5**

***Whether the parties are entitled to the remedies sought***

Counsel for the Applicant contended that the Applicant is entitled to the remedies sought.

Counsel for the 1<sup>st</sup> Respondent, on his part, asserted that the Applicant is not entitled to the reliefs sought in the Reference.

The 2<sup>nd</sup> Respondent's Counsel brought to the Court's attention the matter of cause of action and invited the Court to establish whether or not he is the proper party before the Court. Relying on authorities, namely, **P.C. Mogha, The Law of Pleadings in India (Eastern Law House, Calcutta 1989); N.S. Brindra's Pleadings and Practice (8<sup>th</sup> ed), Allahabad 1997; Mulla: The Code of Civil Procedure, (16<sup>th</sup> ed) by Solil Paul and A. Srivastava; EACJ Appeal No. 1 of 2011: The Attorney General of the Republic of Kenya Vs Independent Medical Legal Unit and EACJ Appeal No. 4 of 2012: Legal Brains Trust (LBT) Limited Vs The Attorney General of the Republic of Uganda**), he asserted that the matters before the Court in the Applicant's case do not evince or show a cause of action envisaged under the Treaty to necessitate proceedings against him. He then pointed out that it is only in her submissions that the Applicant alleged that the 2<sup>nd</sup> Respondent violated the Treaty. He asserted that the Applicant's conduct, which is a violation of Rule 38 prejudiced him and took him by surprise since it denies him the chance to respond to such allegations in his pleadings. In support of his stance that parties are bound by their pleadings and that the Court cannot grant relief that had not pleaded, he referred the Court to **Interfreight Forwards (U)Ltd Vs East African**

**Development Bank [1009-1994] EA 117, 125, Order JSC and Captain Harry Vs Caspar Air Charters Limited [1956] EACA 139, 140.**

It is his submission that given the chronology of actions vigilantly taken by the 2<sup>nd</sup> Respondent within his lawful province of duty, which actions have not been contested, no failure on his part can be alleged as far as the process of election of the EALA by the Parliament of Uganda is concerned (see **Mbidde** case).

He invited the Court to take note of the fact that given his role and taking into account the relevant provisions of the Treaty, the Constitution of the Republic of Uganda and the Parliament Elections Act of Uganda, he had no cause whatsoever, right obligation to take any cause of action other than the one he took.

He therefore submitted that the Applicant was not entitled to any remedy sought against the 2<sup>nd</sup> Respondent and that the Court should dismiss the Reference against him with costs.

With regard to declarations and orders sought by the Applicant, the Interveners' Counsel submitted that the **Mbidde** case has examined the law on declaration and invited the Court to take into account the Court's findings in that judgment.

Learned Counsel further submitted that EALA members were already sworn in and the Assembly has been in place since the elections were held and that the doctrine of prospective annulment applies in such a situation, referring the Court to **Calist Mwatela & 2 others Vs EAC, Application No. 1 of 2005**.

It is also the Counsel's submission that the recognition of elected members of the EALA is a function of the law as provided under the Treaty and the Rules of Procedure. That, given the chronology of actions taken by the 2<sup>nd</sup> Respondent within his lawful province of duty, and contrary to the Applicant's assertions in

his pleadings, the 2<sup>nd</sup> Respondent was bound by the Treaty and the Rules of Procedure to take cognizance of the election of all members of the EALA as duly communicated to him.

Mr. Semuyaba further submitted that, following the developments in the Parliament of the Republic of Uganda and in the absence of any challenge of elections of members of the EALA or any other impediment, the 3<sup>rd</sup> EALA with duly elected members from all the Partners States was constituted on 5<sup>th</sup> June 2012.

Counsel therefore asserted that the Applicant was not entitled to the reliefs sought in the Reference and prayed that the same be dismissed with costs.

#### **Decision of the Court on Issue No. 5**

From the pleadings and the submissions, the Applicant seeks declarations and orders:

- a) **“That the said Rules of Procedure for election of members of the EALA 2012 are null and void;**
- b) **That the said Rules are inconsistent with or otherwise an infringement of the provisions of Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty;**
- c) **That the nomination and subsequent election of the members of the EALA by the Parliament of Uganda conducted under or in pursuance of the said Rules is not only unlawful but an infringement of the Treaty and therefore ought to be set aside;**
- d) **That the 2<sup>nd</sup> Respondent ceases to recognize the persons elected by the Parliament of Uganda to the EALA;**

- e) **That the 1<sup>st</sup> Respondent be ordered to cause the enactment of Rules of Procedure for the Election of members of the EALA that are in conformity with Article 50(1) of the Treaty;**
- f) **That an order that fresh nominations and elections of the EALA members from Uganda be conducted under proper Rules of Procedure; and**
- g) **That the Respondents be ordered to pay the costs of the Reference.”**

We have considered Counsel’s submissions and taken into consideration the pleadings and evidence on record. In light of our findings and conclusions on the issues herein, we make the following declarations and orders:

1. Prayers (a), (b) and (e) are disallowed, save for our findings with regard to Rule 13 (1) and (2) of Appendix B of the 2012 Rules of Procedure. Consequently, the Court orders the 1<sup>st</sup> Respondent to cause the amendment of Rule 13 (1) and (2) of Appendix B of the 2012 Rules of Procedure to bring it into conformity with Article 50(1) prior to the next EALA elections.
2. Prayers (c), (d) and (f) are disallowed.
3. On costs, the Applicant has partially succeeded and shall be awarded a quarter of the taxed costs to be borne by the 1<sup>st</sup> Respondent.

## **CONCLUSION**

In conclusion, the Reference is determined in the above terms. The Applicant shall be awarded a quarter of the taxed costs to be borne by the 1<sup>st</sup> Respondent

It is so ordered.

**Dated, Delivered and signed at Arusha this 29<sup>th</sup> day of November, 2013**

.....  
**JEAN BOSCO BUTASI**  
**PRINCIPAL JUDGE**

.....  
**MARY STELLA ARACH-AMOKO**  
**DEPUTY PRINCIPAL JUDGE**

.....  
**JOHN MKWAWA**  
**JUDGE**

.....  
**ISAAC LENAOLA**  
**JUDGE**

.....  
**FAUSTIN NTEZILYAYO**  
**JUDGE**