IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA

(Coram: *Emmanuel Ugirashebuja, P.; Liboire Nkurunziza, V.P.; Aaron Ringera; Geoffrey Kiryabwire and Sauda Mjasiri, JJ.A.*)

APPEAL NO. 02 OF 2019

BETWEEN

THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI..... APPELLANT

AND

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY..... RESPONDENT

AND

HON. FRED MUKASA MBIDDE.....INTERVENER

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha (*Monica K. Mugenyi, P.J.; Faustin Ntezilyayo, D.P.J.; Fakihi A. Jundu, Charles O. Nyawello and Charles Nyachae, JJ.) dated 2nd July 2019 in Reference No. 2 of 2018].*

JUDGMENT OF THE COURT

A. INTRODUCTION

(1). This is an Appeal against the Judgment of this Court's First Instance Division ("the Trial Court") dated 2nd July 2019 in Reference No. 2 of 2018 whereby the Trial Court dismissed the said Reference with no order as to costs and directed that each party bear its own costs.

(2). The Appellant is the Attorney-General of the Republic of Burundi in his capacity as the representative of the Republic of Burundi. He was in the same capacity the Applicant in the Trial Court. He is represented by Mr. Diomede Vyzigiro and Mr. Pacifique Barangayitse.

(3). The Respondent is the Secretary-General of the East African Community. He is represented by Dr. Anthony Kafumbe, the Counsel to the Community.

(4). The Intervener is Fred Mukasa Mbidde, a Member of the East African Legislative Assembly ("EALA"). He is represented by Mr. Justin Semuyaba, Mr. Don Deya, and Mr. Nelson Ndeki.

B. BACKGROUND

(5). In the Reference whose determination has aggrieved the Attorney-General of Burundi, the said Attorney-General (as Applicant) challenged the election of the Speaker of the 4th Assembly of EALA on the ground that the said election contravened or violated Rule 12 (1) of EALA's Rules of Procedure and infringed Articles 6(d), 7(2), 53(1) and 57(1) of the Treaty for the establishment of the East African Community ("the Treaty"). The basis of the challenge was that any decision of EALA taken in the absence of one third of the EALA members from the Republic of Burundi

and the United Republic of Tanzania run afoul of the quorum requirement in Rule 12(c) of the Assembly's Rules of Procedure.

(6). The Reference was grounded on factual averments that during the Proceedings for the election of the Speaker of the 4th Assembly held on 18th December, 2017, elected members from the Republic of Burundi and the United Republic of Tanzania did not participate in the voting.

(7). The Reference was supported by both a main and a supplementary Affidavit both sworn by Mr. Nestor Kayobera (" Kayobera"), the Director of Judicial Organization in the Ministry of Justice, Republic of Burundi. Kayobera also happened to be the Counsel with personal conduct of the Reference before the Trial Court.

(8). The Reference was opposed. In the Respondent's Response thereto it was averred that it was not true that the members from the Republic of Burundi and the United Republic of Tanzania did not participate in the voting; to the contrary, the two Partner States were present in the precincts of the Assembly and decided to exercise their right to abstain from voting given that the right to vote includes the right not to vote. It was further averred that the Members from the two Partner States participated to the extent that they nominated candidates to the positions of the Speaker and who participated in the election but lost.

(9). It was further averred in the Response to the Reference that the same was misconceived, as the election of a speaker was not governed by Rule 12(1) but Rule 6 (1) of the Rules of Procedure and the Speaker was duly elected and garnered two thirds majority as required by Rule 6 (e) of the Rules of Procedure.

(10). Honourable Fred Mukasa Mbidde intervened in the Proceedings with leave of the Court pursuant to Article 40 of the Treaty and Rule 36 of the East African Court of Justice Rules of Procedure, 2013 ("the Court Rules").

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(11). In his statement of intervention, the Intervener raised several points of law (obviously in contravention of his remit under Article 40), questioned the admissibility of Kayobera's Affidavits in support of the Reference, and supported the Respondent's contention that the applicable provision for the election of speaker was Rule 6(1) of EALA Rules and not Rule 12(1) and that the Speaker was duly and properly elected in accordance with the said provision.

(12). Upon considering the Pleadings, the Evidence, and the Parties' Submissions (oral and written), the Trial Court found and held that (i) the provision of the Rules of Procedure of EALA which governs the election of speaker is Rule 12(1) and not Rule 6(1) and accordingly, the requisite quorum for the election of the Speaker was half of the elected members of EALA who should be composed of at least one third of the elected members from each Partner State; (ii) the factual depositions in both the original and the supplementary Affidavits of Kayobera in support of the Reference amounted to hearsay evidence and were, for that reason, inadmissible in evidence in the substantive suit (the Reference), and, furthermore, the Affidavits in their entirety were improper and should be and were expunged from the Court Record for having been sworn by the Advocate with personal conduct of the case; and (iii) there being no evidence whatsoever on Record in support of the Applicant's claim, it followed that the Applicant had not proved that the election of the Speaker of the 4th Assembly was indeed fraught with the absence of the requisite quorum and, accordingly, neither Articles 53(1) nor 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules were contravened in the said election.

(13). On the issue of costs, the Trial Court observed that the substance of the dispute was determined on a legal technicality and upon consideration of what it called the intrinsic circumstances of the case, it exercised its discretion under Rule (111) and declined to award costs to the Respondent and the Intervener.

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(14). In the Result, the Trial Court dismissed the Reference with and directed that each party should bear its own costs.

C. THE APPEAL TO THE APPELLATE DIVISION.

(15). Being aggrieved by the said Judgment, the Appellant appealed to this Division and proferred the following five grounds of Appeal, namely:

> *"1.That the Honorable Learned Judges of the First Instance Division of the Court erred in Law and committed procedural irregularity by ruling that they would construe quorum to pertain to members in and at a sitting of the House and not Members outside the House's sitting albeit within the precincts of the House and at the same time deciding not to be satisfied that the election of the Speaker contravened Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure;*
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> *2. That the Honorable Learned Judges of the First Instance Division of the Court erred in Law and committed procedural irregularity by not using powers entrusted to them under Rule 1(2) of the Court's Rules of Procedure and just decided not order production of evidence from both the Respondent (who is an ex officio of the Assembly) and the intervener (who is a Member of the Assembly) that the quorum was reached during election of speaker of the 4th Assembly;*
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> *3.That the Honorable Learned Judges of the Frist Instance Division of the Court erred in Law and committed procedural irregularity by just (sic) deciding erroneously that affidavits sworn by Counsel of the Applicant are defective and contradict themselves by saying that the absence of evidence in support of a Reference would not of itself vitiate the entire Reference;*

4. *That the Honorable Learned Judges of the First Instance Division of the Court erred in Law and committed procedural irregularity by failing to interpret and apply Articles 53(1) or 57(1) of the Treaty, and Rule 12(1) of the Assembly's Rules of Procedure;*

5. *That the Honorable Learned Judges of the First Instance Division of the Court erred in Law and committed procedural irregularity by declaring not to be satisfied that the election of the Speaker contravened Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure".*

(16). The Appellant prayed the Court for Orders that:

" (a) The Speaker of the 4th East African Legislative Assembly (EALA) was elected without the elected Members from the Republic of Burundi and from the United Republic of Tanzania in violation of the provisions of Articles 53(1) or 57(1) of the Treaty, and Rule 12(1) of the Assembly's Rules of procedure;

(b). A speaker of the 4th East African Legislative Assembly be re-elected in accordance with Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure;

(c). The contested Speaker, Honorable Martin Ngoga restitutes to the East African Community all the salaries and emoluments received as speaker from the faulted election up to the full execution of the Judgment of the Appellate Division.

(d). The costs and incidental of both the Reference and Appeal be met by the Respondent and the Intervener."

(17). The Respondent and the Intervener were also aggrieved by that part of the said Judgment which denied them costs of the Reference despite their success in the litigation. They consequently gave notice of a Cross-Appeal under Rule 92(4). In the said notice, the Respondent and the Intervener indicated that at the hearing of the Appeal, they will contend

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that the Decision of the Trial Court ought to be varied or reversed partly either in any event or on the Appeal being allowed in whole or in part to the extent and in the manner and on the following grounds namely:

"1. *THAT this Honourable Court be pleased to review Paragraphs 85, 86 and 87, of Judgment delivered by First Instance Division of the East African Court of Justice dated the 2nd of July 2019 at Arusha giving an order that the Reference be dismissed and declining to award costs to the Respondent and the Intervener for the proceedings in Reference No. 2 of 2019*

2. *THAT consequent upon the above this Honourable Court does correct the order made on the 2nd July 2019 by setting aside the order declining to award costs to the Respondent and the Intervener for the proceedings in Reference No. 2 of 2019.*

3. *THAT further consequent upon the above this Honourable Court does grant the costs to the Respondent and the Intervener for the proceedings in Reference No. 2 of 2019.*

4. *THAT further consequent upon the above this Honourable Court does grant the costs to the Respondent and the Intervener for the proceedings of Appeal from The Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica K. Mugenyi (Principal Judge) Hon. Dr. Justice' Faustin Ntezilyayo (Deputy Principal Judge), Hon. Justice Fakihi A. Jundu (Judge), Hon. Dr. Charles O. Nyawelo (Judge) and Hon. Justice Charles Nyachae (Judge) dated 2nd July in Reference No. 2 of 2018.*

5. *THAT this Honourable Court be pleased to dismiss the Appeal with costs.*

6. *THAT this Honourable Court does give such consequential, further or other order (s) as it may deem just for the implementation of the*

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payment of the abovementioned costs by the Appellant ***THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI.***"

(18). It is evident from the Record of Appeal that all references to Reference No.2 of 2019 are typographical errors and the correct Reference is No.2 of 2018.

(19). The Respondent and the Intervener proposed to ask the Court for Orders that the Cross-Appeal be allowed with costs to the Respondent and the Intervener and that the Appellant pays the costs of the Appeal, Cross Appeal, and of the Reference.

(20). At the Scheduling Conference of the Appeal on 14th November 2019, the above grounds of Appeal and the Cross-Appeal were consolidated into the following issues for determination, namely:

1) Whether the Trial Court erred in Law or committed a procedural irregularity by striking out the affidavit sworn by the Counsel for the Applicant in the Reference.

2) Whether the Trial Court erred in law or committed a procedural irregularity by not invoking Rule 1 (2) of the Court's Rules to order production of evidence from the Respondent and the Intervener on the fact of quorum during the election of the speaker of the 4th Assembly.

3) Whether the Trial Court erred in Law and/or committed a procedural irregularity in not finding that the Speaker of the 4th Assembly of EALA was elected in contravention of Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure.

4) Whether the Trial Court erred in Law by declining to award the costs of the Reference to the Respondent and to the Intervener.

5) What remedies are the Parties and the Intervener entitled to.

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(21). Counsel for the Respondent in addition to the above issues indicated that the Respondent would want to argue at the Hearing of the Appeal that some of the matters envisaged in the issues as framed touched directly on evidence and fell outside the scope of Article 35A of the Treaty which prescribes that an appeal lies only on points of law, lack of jurisdiction and procedural irregularities. The Court permitted him to canvas his objections in the submissions on the pertinent issues.

(22). After the Scheduling Conference, the Parties and the Intervener in compliance with this Court's Directions filed their Written Submissions.

(23). On the 20th February 2020, both Parties and the Intervener appeared before the Court and highlighted those Written Submissions at length.

D. THE PARTIES' AND THE INTERVENER'S ARGUMENTS AND THE COURT'S ANALYSIS AND DETERMINATION.

(24). Having read the Record of Appeal with care and considered the submissions made on behalf of Parties and the Intervener, we now turn to a consideration of the Appeal on an issue by issue basis.

Issue No. 1: Whether the Trial Court erred in Law or committed a procedural irregularity by striking out the Affidavits sworn by Counsel for the Applicant in the Reference.

Appellant's Case.

(25). Counsel for the Appellant submitted that the Trial Court could not strike out or expunge from the record, as it did, the two Affidavits sworn by Mr. Kayobera in support of the Reference on mere challenge thereof by the Respondent in the absence of an application to that effect under Rule 47 of the Court's Rules.

(26). Counsel also submitted that, in any event, even if the Affidavits had been expunged pursuant to an application under Rule 47, the Trial Court should not have permitted the Applicant's right of access to justice to be

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defeated on account of its Counsel's inadvertence, negligence or mistake. In that regard reliance was placed on the Ugandan case of **Crane Finance Co. Ltd v Makerere Properties** [SCCA No. 1 of 2001] where the Supreme Court of Uganda had, as contended by Counsel, stated that *"It is now settled that an omission or mistake or inadvertence of Counsel ought not to be visited on the litigant, leading to the striking out of his appeal thereby denying him justice."*

Respondent's Case.

(27). Counsel for the Respondent contended that there was no error in law or procedural irregularity in striking out the impugned Affidavits. He submitted that the Trial Court did not commit any error of procedure by doing so and was right in finding that it was not right for Counsel to have sworn an affidavit in a matter he had personal conduct of and that the said Affidavits were defective in that they deposed to matters that were hearsay. Counsel cited the cases of **Attorney-General of the United Republic of Tanzania vs. African Network for Animal Welfare (ANAW)** [EACJ Appeal No. 3 of 2011], **Amrik Singh Kalsi v Bhupinder Singh Kalsi** [2012] eKLR, and **Oyugi v Law Society of Kenya & Another** [2005] eKLR 463 in support of his submissions.

Intervener's Case.

(28). Counsel for the Intervener submitted that no irregularity was committed by the Trial Court by striking out the impugned Affidavits. He contended that Rule 47 of the Court's Rules did not apply to challenges to the admissibility of evidence and that the Court has discretion to exclude evidence. Counsel also submitted that the Affidavits were properly expunged from the Record as they were sworn by Counsel who had personal conduct of the matter, and the material facts deposed amounted to hearsay evidence in the final Proceedings. Counsel cited several authorities from the defunct East African Court of Appeal, the superior Courts of the Partner States and the Supreme Court of India in support of his Submissions.

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The Court's Analysis and Determination.

(29). It is manifest from the Memorandum of Appeal and the issues as framed that the gist of the Appellant's complaints are perceived errors of Law and/or procedural irregularity on the part of the Trial Court. And the Respondent holds forth in its Submissions that the Appellant's Appeal does not fall within the scope of Article 35A of the Treaty as the Appellant's complaints are on matters of fact which matters are exclusively within the mandate of the Trial Court and should not be canvassed in this Court. In the premise, we are constrained once again to revisit the scope of Article 35A of the Treaty and an elucidation of what amounts to either an error of law, or a procedural irregularity.

(30). Article 35A of the Treaty provides as follows:

> *"An appeal from the Judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on:*
> *(a) Points of law;*
> *(b) Grounds of lack of jurisdiction; or*
> *(c) Procedural irregularity"*

(31). In **Simon Peter Ochieng v The Attorney-General of the Republic of Uganda** [EACJ Appeal No. 4 of 2015], we made it clear that the right of appeal to this Division is restricted to the scope provided for under Article 35 A of the Treaty and that the burden of proof falls on the party alleging the error who must advance argument in support of the contention and explain how the error invalidates the impugned decision. We clarified for the avoidance of doubt that this Court does not undertake a hearing *de novo* of the questions of fact and law examined by the Trial Court.

(32). As regards what constitutes an error on a point of law, we stated in **Angella Amudo v The Secretary General of the East African Community** [2012-2015] EACJLR 592, that a Court commits an error of law when it:

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" (a) Misapprehends the nature, quality, and substance of the evidence: see, for instance, **Peters v Sunday Post** [1958] EA 424; **Ludovick Sebastim V R**, (CAT) Criminal Appeal No. 518 of 2007 (unreported); or

(b) Draws wrong inferences from the proven facts: See, **Trevor Price & Another vs. Raymond Kelsel** [1957] EA 752, **Wynn Jones Mwambo v Weadoa Petro Aaron** [1966] EA 241;

And in **The Attorney of the Republic of Rwanda v Union Trade Centre Ltd (UTC) 6 Interveners** [EACJ APPEAL No. 2 of 2000], this Court stated:

> *"It hardly needs be stated that this Court can only find an error of law on the part of the Trial Court if it is persuaded that the latter ignored or misapprehended or misapplied a pertinent law or principle of law."*

(33). It is thus manifestly patent that an error on a point of law as a ground for an appeal to this Court is disclosed only where the Trial Court *(i)* ignores or misapprehends or misapplies a pertinent law or principle of law; or (ii) misapprehends the nature, quality or substance of the evidence; or (iii) draws wrong inferences from the proven facts.

(34). As regards what constitutes a procedural irregularity, this Court in **Attorney-General of the United Republic of Tanzania v African Network for Animal Welfare (ANAW)** [EACJ Appeal No.3 of 2014] stated as follows:

> *"Procedural irregularities are in character irregularities that attach to the conduct of a proceeding or trial. It comprises such irregularities as the inadmissibility of documents or witnesses, denying a party the opportunity to be present or to be heard at all, hearing a matter in camera (where it should have been heard in public and vice-versa, failure to notify or serve in time or at all, etc.*

. . In short, procedural irregularities attach to a denial of due process (i.e. fairness) of a proceeding or hearing."

And in **Angela Amudo (*Supra*)**, we compressed all that by stating that a Court commits a procedural irregularity when it:-

> *"acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e. fairness) e.g irregularly admits or denies admission of evidence, denies a party a hearing, ignore a party's pleadings etc."*

(35). In short, and we so emphasized in **Timothy Kahoho v Secretary-General of EAC** [2012-2015] EACJLR, 412, that an irregularity is a procedural shortcoming; not a substantive error of interpretation of the law. It is committed whenever a Court in a proceeding or trial omits to apply or enforce the applicable normative procedure.

(36). It is in light of the above understanding of what constitutes errors of law and irregularities of procedure that we shall answer not only this issue but also issue numbers 2 and 3.

(37). For a start, the legal validity or merits of the reasoning of the Trial Court in striking out the Affidavits by Kayobera have not been challenged. Indeed, they were beyond challenge. We say so for the reason that from the authorities relied upon by the Trial Court and those canvassed by both the Respondent and the Intervener in this Court, and which we need not rehash, the position of adjective law (procedural law) is clear that (i) hearsay statements of fact in an affidavit are inadmissible in proof of facts in issue or facts relevant to the issue in the substantive suit (the Reference in this case) and such deposition are for striking out, and (ii) it is impermissible and improper for an advocate with personal conduct of a matter to swear an affidavit as to contested factual matters in such a case, and any such deposition will similarly be struck out. The impugned Affidavits, containing as they did, hearsay evidence of the non-participation of Elected Members of EALA from Burundi and Tanzania in

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the election of the Speaker (which was a contested fact in issue) and having been deponed by Counsel on record and with personal conduct of the Reference thus yearned for rejection. The reason why a Court shuts its ears to affidavits sworn by Counsel with conduct of the matter in which such affidavits are sought to be relied upon is this: Advocates are, first and foremost, officers of the Court. They are expected to discharge their duty to the Court with independence in the interests of the administration of justice. Advocates appearing in court are not agents of the Parties but their representatives and, as such, they exercise an independent mind. The independence of the Bar is a cardinal tenet in the legal profession. By swearing an affidavit in a matter, he or she is conducting, the advocate drops his mantle of independence, steps down from his exalted position at the Bar and becomes a witness subject to all the vagaries of witnesses, including being found to be untruthful. That would obviously be in conflict with his role as an independent and trustworthy officer of the Court. Such conduct is unseemly, nay, indecorous and the Court's do not brook it.

(38). The real controversy under this issue is whether the Trial Court acted procedurally correct in striking out those affidavits.

(39). The Appellant's contention was that in the absence of an application by the Respondent under Rule 47 of the Court's Rules, it was not open to the Trial Court to strike out the impugned Affidavits.

(40). Now, Rule 47 provides as follows:

> *"The Court may, on application of any party, strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document-*
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> *(a). may prejudice or delay the fair trial of the case; or*
> *(b). is scandalous, frivolous or vexatious;*
> (c). *is an abuse of the process of the Court."*

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(41). We agree with the Intervener's submission that Rule 47(1) applies to the striking out of pleadings and analogous documents but not evidence. The reason is this: There is a clear difference between pleadings and evidence. Pleadings in Court by whatever name called are not evidence. They are averments of fact the proof of which is submitted to the trier of fact for investigation. That is evident from Rule 37 and the marginal note thereof which read "**facts not evidence to be pleaded**". Affidavits are evidence. Rule 47 is in Part IX of the Rules which deals with pleadings. The marginal note to Rule 47 speaks to **"striking out pleadings"**, not striking out evidence. The Rule is also clear that the documents to be struck out or expunged under the Rule are those which may be amended with or without leave. Affidavits are evidence and as such are not amenable to amendment. The lingering question is what to make of the phrase "pleadings or other document" in the Rule. We again accept the Intervener's submission that in the context of this Rule, the words *"other document"* should be construed *ejusdem generis* to mean documents of the same nature but excluding evidence. In short, we find and hold as a matter of law that Rule 47 does not apply to the striking out or expunging of inadmissible evidence from the court record. Accordingly, the Appellant's reliance on a breach of Rule 47 is misconceived and is rejected.

(42). The striking out or expurgation of irrelevant or inadmissible evidence is founded on the Court's duty as the master of its own processes to ensure the ends of justice and prevent abuse. Fairness is the hallmark of justice. If irrelevant or inadmissible evidence were to be presented to the Court and allowed to remain on record, a grievous wrong would be committed in that evidence without probative value would but sodden with prejudice to the party adversely affected thereby, would be part of the Court's record with the result that the stream of justice would be polluted. The Court prevents such a prospect by exercising an inherent power to reject, strike out, or expunge such evidence from its record either upon objection by a party, or *proprio motu*. That is exactly what happened in the Trial Court. The impugned Affidavits were challenged by both the Respondent

and the Intervener and the Court did the only proper thing in the circumstances, it struck them out and expunged them from its records.

(43). It follows from what we have said, that the Appellant having erected its case on this issue on the procedural irregularity of a breach of Rule 47 of the Rules, and having found, as we have, that Rule 47 was not applicable to the striking out of affidavits, the Appellant has not substantiated the allegation that the Trial Court committed a procedural irregularity in striking out the affidavits in issue without complying with the said Rule.

(44). The Appellant's alternative argument was that even if the Affidavit had been procedurally struck out, the Court erred by not ensuring that the Appellant's case was not defeated by mistake, omission or inadvertence of its Counsel. Counsel for the Appellant placed reliance on **Crane Finance Co. Ltd v. Makerere Properties Ltd** (supra) and submitted that the case had held that "*It is now settled that an omission or mistake or inadvertence of Counsel ought not to be visited on the litigant, leading to the striking out of his appeal thereby denying him justice.*"

(45). We have read and re-read the authority cited and which was annexed to the Appellant's Submissions. We can find no such statement of the law in any paragraph or page of the said Judgment by the Supreme Court of Uganda. In the circumstances, we cannot but deplore the conduct of Counsel for the Appellant in misleading the Court on the jurisprudence of that particular authority.

(46). Be that as it may, we are aware that in applications to strike out appeals as being incompetent for being lodged out of time or for extension of time to do something outside the time limited by the rules or by an order of court, the Court bends backwards to ensure that mistakes, omission or inadvertence of Counsel do not put an end to the intending Appellant's quest for justice. In those situations, the Court examines closely the nature of the omission, mistake or inadvertence relied on and the prejudice, if any, that could be occasioned to the parties if the appeal was struck out or time was extended as prayed.

(47). This case is outside the above league. It was not an application to strike out an appeal or extend time for lodging one or some documents pertinent thereto out of time. It was a proper trial of a Reference duly scheduled for hearing and the issue was whether or not the evidence presented in support thereof was admissible. The said evidence was struck out as being both hearsay and having been deposed to by Counsel with personal conduct of the matter.

(48). Now, the Record shows that those Affidavits were presented after the Trial Court had in an Interlocutory Ruling dated 24th April 2018 in the very Reference struck out Affidavits sworn by the same Counsel thereby putting the Appellant on his guard regarding the nature of and the proper deponent of affidavits in support of the Reference. The Attorney-General of Burundi could not in the circumstances claim not to know that affidavits sworn by Counsel on record were inadmissible. The retention of the original Affidavit in support of the Reference and the filing of the further affidavit sworn by Kayobera as evidence in substantiation of the Reference cannot in any sense be regarded as either an omission or an inadvertent act by counsel. It was a deliberate act. In that it was a legal blunder, it may be regarded as a mistake. However, as the mistake was made by the same Counsel who had been put on guard by the Decision on the Interlocutory Application spoken to above, it was a wholly inexcusable mistake. In our considered view, Counsel's action of swearing and filing the further affidavit was a case of flagrant disregard of an unchallenged ruling and orders by the Trial Court. It bespoke to a sense of recklessness and impunity by an officer of the Court. We say no more.

(49). In the upshot, we find and hold that the Trial Court did not commit any procedural irregularity or err in law by striking out the Affidavits sworn by the Counsel for the Applicant in the Reference.

(50). Issue number 1 is, accordingly, answered in the negative.

Issue No. 2: Whether the Trial Court erred in Law or committed a procedural irregularity by not invoking Rule 1(2) of the Court's Rules to order production of evidence from the Respondent and the Intervener on the fact of quorum during the election of the Speaker of the 4th Assembly.

Appellant's case.

(51). Counsel for the Appellant pointed out that the Affidavit in support of the Response to the Reference had been sworn by the Deputy Secretary General in charge of Productive and Social Sectors and who was himself a former member of EALA and that he had deposed that he had closely followed the election of Speaker and that the allegation that elected members from Burundi and Tanzania did not participate in the voting was baseless. On the basis of that, Counsel submitted that the said Deputy Secretary General and the Intervener (who was a member of EALA) were the right persons to give the Court the necessary evidence to rely on the question of quorum.

(52). Counsel for the Appellant further submitted that the Court is empowered under Rule 1(2) to make such orders as may be necessary for the ends of justice and should have used such power to order the Respondent and the Intervener to produce the evidence in their hands.

Respondent's Case.

(53). The Respondent's Counsel conceded that the Court has inherent powers which are derived from a Court's existence as a Court and which enable it to do those things that are reasonable and necessary for the dispensation of justice in the absence of legislation or constitution provision. He submitted that the Applicant ought to have moved the Court to invoke those powers during the hearing if it so desired but failed to do so.

(54). Counsel for the Respondent further submitted that in any case it was incumbent on the Applicant to prove his allegations and as such the

Court was not obliged to facilitate the Applicant to prove those allegations.

Intervener's Case.

(55). Counsel for the Intervener submitted that the Trial Court could not be put on the spot for failing to invoke Rule 1(2) after the Appellant had failed to discharge his burden of proof. Counsel added that it was not the work of the Court to assist parties to produce evidence. He pointed out that the Record of Proceeding disclosed that the Appellant was given all opportunity to adduce evidence including oral evidence and to cross examine the Respondent's witnesses but declined to do so and opted to stand on the Affidavit in support of the Reference and an additional Affidavit to be filed.

(56). Counsel for the Intervener further submitted that the Trial Court did not err in law or commit a procedural irregularity by not invoking Rule 1(2) of the Court's Rules of Procedure to order production of evidence from the Respondent and the Intervener.

The Court's Analysis and Determination.

(57). Having weighed the rival submissions, we think that the Appellant's contention that the Trial Court erred in law and/or committed a procedural irregularity by not invoking Rule 1(2) to order production of evidence by the Respondent and the Intervener is fundamentally misconceived and unmeritorious. It is fundamentally misconceived because the East African Court of Justice does not have an inquisitorial jurisdiction but presides over an adversarial system of litigation. Under the adversarial system, it is for the parties to produce such evidence as would support their respective cases. The Court has no power under the Treaty or the Rules to order production of evidence at all, and most emphatically not such evidence as would support a party's case when such party has fallen short of adducing admissible evidence. And the Appellant's submission is also without merit as the Record shows that although the

Appellant was given a number of options to effectively prosecute his case including filing further affidavits, cross-examining the Respondent's Witnesses and the Intervener and adducing oral evidence, the Appellant opted to proceed by way of affidavit evidence only and only asked to be allowed to file an additional Affidavit, which request was granted.

(58). With respect to the scope and application of Rule 1(2), let the rule speak for itself. It reads:

> "*Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*"

(59). Clearly the Court seized of a matter has plenary reserve power to ensure that justice is dispensed and the Court process is not abused. The Rule does not specify that the power is to be exercised on application. It is a power that the Court may exercise on application of a party, or *suo motu* (on its own motion). We accordingly reject the Intervener's submission that since the Applicant did not ask the Trial Court to exercise such a power, it could not do so. It was within the discretion of the Trial Court to exercise its inherent power in the interests of justice. The call to invoke the power was that of the Trial Court. It is only that Court that could determine what the interests of justice required in the case before it. Can this Appellate Division on that premise find it to be a procedural irregularity on the part of the Trial Court not to have invoked its inherent power? Our answer is a categorical negative. It cannot be a procedural irregularity not to exercise a discretionary power. Furthermore, we cannot conceive how it could have been in the interest of justice for that Court to have called for production of evidence in support of one party against the case of another party. No. If the Court had done that it would have committed an injustice and descended into the arena of conflict. And it cannot rationally be said that the omission by the Trial Court to call for production of such evidence would have prevented abuse of the process of the Court for the Respondent did not in any way abuse the process by

C.A.

objecting to inadmissible evidence and submitting that the Applicant's case had fallen short of proof. So much for the alleged procedural irregularity. Was the Trial Court's omission to invoke Rule 1(2) an error of law? No departure, misapprehension (or misinterpretation) or misapplication of any law or principle of law is manifest in the conduct, *sub- silencio*, of the Trial Court in not invoking its inherent power is shown. And it could not possibly be said to be a case of misapprehension of the evidence or drawing wrong inferences therefrom. We hasten to add that if the Trial Court had exercised its discretion under Rule 1(2), then the Appellate Court would have had a basis for establishing if such discretion had been exercised judicially.

(60). In the result, we find that Rule 1(2) of the Rules was not for application in the circumstance of the case before the Trial Court and the said Court did not commit any error of law or a procedural irregularity by not ordering production of evidence from the Respondent and the Intervener on the fact of the existence of quorum during the election of the Speaker of the 4th Assembly of EALA.

(61). The upshot is that Issue Number 2 is answered in the negative.

Issue No. 3: Whether the Trial Court erred in law or committed a procedural irregularity in not finding that the Speaker of the 4th East African Legislative Assembly was elected in contravention of Articles 53(1) or 57(1) of the Treaty or Rule 12(1) of the Assembly's Rules of Procedure.

Appellant's case.

(62). The Appellant's Counsel's submission is that the Trial Court erred in law in not basing its Judgment on the uncontested facts between the litigants. According to the Counsel, it was an uncontested fact that the election of the 4th Speaker of EALA on 19th December 2017 took place without the participation of and in the absence of the elected members from Burundi

and Tanzania. To demonstrate that contention, the Counsel for the Appellant drew the Court's attention to Paragraph 5 of the Reference, Paragraph 12 and 13 of the Response, and Paragraph 9 of the supporting Affidavit sworn by Christopher Bazivamo and Paragraph 3 of the Affidavit by Engineer Steve Mlote, another Deputy Secretary General of EAC, both in support of the Response, and Paragraph 32 of the Intervener's statement.

(63). Counsel for the Appellant further contended that in view of those uncontested facts and in view of Rule 12(1) of the Rules of the Assembly which stipulate *that "**the quorum of the House or of the committee of the whole house shall be half of the elected members and such quorum shall be composed of at least one third of the elected members from each Partner State**,"* the Trial Court committed an error which ran in the face Rule 43 of the Court's rules by coming to a holding counter to facts that were neither specifically nor generally denied by the litigants.

(64). Counsel for the Appellant further contended that the Trial Court committed an error of law by misapprehending the nature, quality and substance of the evidence.

Respondent's Case.

(65). Counsel for the Respondent submitted that the Appellant's claim that the absence of members from Burundi and Tanzania from the Assembly on the date of electing the Speaker of the 4th Assembly was an uncontested fact was not correct and, accordingly, the Appellant had the burden of proving his case but failed to do so. Counsel for the Respondent urged us to uphold the finding of the Trial Court that, in the circumstances, the election of the Speaker did not contravene Articles 53(1) and or 57(1) of the Treaty.

Intervener's Case.

(66). Counsel for the Intervener submitted that the Appellant's characterization of "facts" as "uncontested" was wrong. He further submitted that the Paragraphs referred to by the Appellant in his submission as uncontested are mere opinions by a non-member of the Assembly and not admitted as facts.

(67). Counsel for the Intervener further submitted that the question of a quorum is a matter to be established by cogent evidence and that in that regard, the Appellant had failed to discharge the burden of proof by affidavits or oral testimony as no oral testimony was adduced and the affidavits presented by the Appellant were expunged from the Court's record. Counsel invited us to find that in the circumstances the Trial Court did not err in law or procedure in not finding that the Speaker was elected in contravention of Articles 53(1) or 57(1) of the Treaty or Rule 12(1) of the Assembly's Rules of Procedure.

The Court's Analysis and Determination.

(68). Having considered the rival Submissions and read the Record of Appeal, we are unpersuaded that the Trial Court erred as contended by the Appellant. We say so for the following reasons.

(69). The Appellant's case is hinged on the contention that the absence of and non-participation of elected members of EALA from Burundi and Tanzania in the election of the Speaker was an uncontested fact and, accordingly, as per Rule 43 of the Court's Rules, the Trial Court ought to have acted on such admitted facts and found that the election was contrary to the Treaty and the Assembly's Rules of Procedure. As we demonstrate below; Rule 43 was not for application here as the facts relied upon by the Appellant were contested.

(70). Rule 43 of the Court's Rules provides as follows:

1. *Any allegation of fact made by a party in a pleading shall be deemed to be admitted by the opposite party unless it is denied by the opposing party in the pleading.*

2. *A denial may be made either by specific denial or by a statement of non–admission and either expressly or by necessary implication.*

3. *Every allegation of fact made in a pleading which is not admitted by the opposite party shall be specifically denied by that party; and a general denial or a general statement of non-admission of such allegation shall not be a sufficient denial.*

(71). In Paragraph 5 of the Statement of Reference, the Applicant pleaded as follows:

> "*During election of the 4th Speaker of EALA held on 18th December 2017, elected members from the Republic of Burundi and from the United Republic of Tanzania did not participate in the voting.*"

(72). In Paragraphs 6, 12 and 13 of the Response to the Reference the Respondent pleaded as follows:

> *"6. In response to Paragraph 5 of the Reference and Paragraph 6 of the supporting affidavit, it is not true that the members from the Republic of Burundi and the United Republic of Tanzania did not participate in the voting. The two Partner States were present in the precincts of the Assembly but decided to exercise their right to abstain from voting given the right to vote includes a right not to vote. The fact is that Members from the two partner States participated, to the extent that they nominated candidates to the position of the Speaker and who participated in the election but lost.*
>
> *12. The Respondent further pleads and requests this Honourable Court not to make a finding that may condone or validate potential paralysis of the Assembly arising from mere*

absence of some Members who were in the precincts of the Assembly and fully facilitated to participate in the election of the Speaker but for reasons known to themselves, decided to abstain from voting.

13. Further to the averments in the preceding Paragraph, the practice of walking out of the House with a view of paralyzing the business of the Assembly and come round to claim that you were absent; yet you did not register any objection and expect to benefit from such a behavior should be condemned by all means at the disposal of the Court."

And in Paragraph 9 of the Affidavit of Christopher Bazivamo, the Deputy Secretary-General of EAC, sworn in support of the Response to the Reference, the said deponent swore as follows: -

"9. *That I request this Honourable Court to strongly condemn the behavior exhibited by elected members who walked out of the house for the sake of paralyzing the business of the Assembly and come around to claim that they were absent; yet they did not register any objection to the election of the Speaker and now seek to benefit from the misdeeds.*"

And Paragraph 3 of the Affidavit sworn by Engineer Steve Mlote was to the following effect-

"*That I have noted the Applicant's inclusion of his sources of information relating to the election of the Speaker and I have no objection to it.*"

(73). In Paragraph 32 of the Intervener's Statement, the Intervener stated-

"The Intervener submits that Members from the Republic of Burundi and the United Republic of Tanzania decided to exercise their right under the Rules of the Assembly to not vote....The

Members from the two Partner States wished not to vote during the election of the Speaker by walking out of the Chambers."

(74). From the above citation of Rule 43 and the Paragraphs in the Statement of Reference and Response and in the Affidavits of the Respondent in support of the Reference and in the Intervener's statement, we take the following view of the matter. Rule 43 encapsulates the well-known procedural norm that facts which are admitted either expressly or by implication of the law of pleadings need not be proved. In this case, the alleged fact of the non-participation of elected members of EALA from Burundi and Tanzania in Paragraph 5 of the Reference is directly contradicted by Paragraph 6 of the Response. The Appellant's case that the facts were uncontested is therefore without foundation in the Pleadings. The other statements which the Appellant has invoked to support its case on the existence of non-contested facts are not helpful to the Appellant at all. Paragraphs 9 and 3 in the Affidavits of Hon. Christopher Bazivamo and Hon. Engineer Steve Mlote respectively are not pleadings but evidence and therefore outside the scope of Rule 43. Besides they are not even statement of facts but one of them is a plea to the Court and the other one is a non-objection to the disclosure of the Applicant's sources of information. As regard the statement by the Intervener, the same is also not a statement of fact but a submission on a point of law.

(75). In the premise, we find and hold that the alleged fact of non- participation by elected members of EALA from Burundi and Tanzania in the election of the Speaker was not admitted either expressly or impliedly by dint of the law of pleadings as articulated in Rule 43.

(76). Having so found and held, we cannot but conclude that the Trial Court did not commit any procedural irregularity by not applying Rule 43 to find for the Applicant.

(77). Did the Court commit an error of Law? Now, in the absence of the existence of the alleged admission of non-contested facts, the Applicant

could only prove his case by evidence of non-existence of quorum during the election of the Speaker. In that regard, there was no such evidence as the Applicant's Affidavits were struck out and expunged from the Record. That being so, the Trial Court could not but hold that the election of the Speaker had not been proved to have contravened Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure. That conclusion cannot be said to be an error of Law. It was perfectly in accordance with the Law.

(78). The upshot of our consideration of this issue is that we are not persuaded that the Trial Court committed any procedural irregularity or erred in any point of law. Issue No. 3 is, thus, answered in the negative.

Issue No. 4: Whether the Trial Court erred in Law and committed a Procedural Irregularity by declining to award the costs of the Reference to the Respondent and the Interveners.

Appellant's Case.

(79). Counsel for the Appellant submitted that the Reference was one of public interest as it involved the interpretation and application of Articles 53(1) and 57(1) of the Treaty and, accordingly, it was proper for each party to be ordered to pay its own costs. Counsel relied on the Decisions of this Court in **Attorney-General of the United Republic of Tanzania v Anthony Calist Komu** [EACJ APPEAL No. 2 OF 2015] and **Simon Peter Ochieng and John Tusiime v Attorney-General of the Republic of Uganda** [EACJ]

Respondent's Case.

(80). Counsel for the Respondent contended that although Rule 111 of the Court's Rules vests discretion in the Court to deny a successful party costs, this was a proper case where costs should have been awarded to the winning party.

(81). Counsel further contended that although it was true that the Applicant's evidence had been struck off on a legal technicality that was only after the Respondent had gone to great length to contest it. In the circumstances, costs should have followed the event and there was no strong justification for departing from that norm. In the premise, Counsel for the Respondent prayed for an award of costs to the Respondent and to the Intervener.

Intervener's Case.

(82). In a lengthy and convoluted submission which at times was self-contradictory and did not focus entirely on the costs of the Reference, Counsel for the Intervener, as we understood him, submitted that although the award of costs is discretionary, this was a proper case where costs should have been awarded to the winning parties, namely, the Respondent and the Intervener for the following two reasons.

(83). First, he contended, it was not really true that the Reference was struck out on a legal technicality, it was struck out because the Appellant failed to discharge the burden of proof bestowed upon it and relied on affidavits sworn by its Counsel. In the circumstances of this case, costs should have followed the event and there was no strong justification for departing from the norm.

(84). Secondly, he argued, this Court set a precedent for award of costs to Interveners in **Anyang Nyong'o v Attorney-General of Kenya** [Taxation Cause No. 6, arising from Reference No. 1 of 2006]. He also cited a plethora of English, Canadian and European Court of Justice decisions in which Interveners have been awarded costs.

The Court's Analysis and Determination.

(85). We have carefully considered the rival Submissions and read the authorities cited. Having done so, we have taken the following view of the matter.

(86). The general principles applied by the Court when called upon to award costs are well settled. We recently restated them in **Dr. Margaret Zziwa v The Secretary-General of EAC** [EACJ Appeal No. 2 of 2017]. They are: one, costs are in the discretion of the Court; and, two, in exercising such discretion, the Court bears in mind that costs follow the event and that a successful party may only exceptionally be deprived of costs depending on the particular circumstances of the case such as the conduct of the parties themselves or their legal representations, the nature of the litigants, the nature of the proceeding or the nature of the success.

(87). In this Court, whenever we are called upon to review an order of costs by the Trial Court, the only pertinent consideration is whether the Trial Court exercised its discretion judicially in either awarding or declining to award costs to the successful party.

(88). Now, the reasons the Trial Court gave for declining to award costs to the Applicant and the Intervener in the Reference are articulated at Paragraph 86 of its Judgment in the following words:

> *"The gravamen of the present dispute was determined on legal technicality; the applicant's evidence having been struck off the record and thus obviating the need to put the Respondent to his defence. Given the intrinsic circumstances of this case, therefore, we do exercise our discretion under Rule 111 to decline to grant an award of costs."*

(89). Counsel for the Appellant supports that Decision on the ground that the Reference was public interest litigation and the jurisprudence of the Court is clear that in public interest litigation, the Court orders each party to bear its own costs. We have two things to say in this regard. First, Counsel has stated the rule too broadly and misleadingly. It is not the case that every matter involving the interpretation and application of the Treaty is considered public interest litigation and, accordingly, no award of costs is made to the successful party. If that were so, no order for costs would ever be made in this Court, a proposition which runs counter

to the jurisprudence of the Court. What we stated in the cases relied upon by Counsel is this:

> *"Where a case has been instituted by a public- spirited person and it is arguable and raises significant issues as to the interpretation and future application of the Treaty provisions, this Court exercises its discretion not to award costs against this kind of litigant when he or she loses the Reference."*
> *[see* ***The Attorney-General of the United Republic of Tanzania v Anthony Calist Komu*** *(supra)].*

The Court considered Anthony Calist Komu such a litigant. A Similar situation prevailed in the **Simon Peter Ochieng case** (supra). Ochieng too was considered a public- spirited litigant. The emphasis is that a public- spirited person should not be burdened with costs when he/she brings forth an arguable case raising significant issues of Treaty interpretation. In our discernment, a Partner State cannot be considered as a public- spirited person. That moniker is reserved for a person whether corporate or otherwise. Secondly, the Trial Court did not base its discretion on the ground of public interest litigation. Had it done so; it would have so stated expressly as it has done in several of its Decisions. In the premise, if the Appellant desired to contend, as it has, that the Decision of the Trial Court should have been affirmed on a ground other than or additional to that relied on by that Court, it was obliged by Rule 92 to give notice to that effect, specifying the grounds for its contention. The Appellant did not give such a notice, and, accordingly, his contention in support of the Trial Court's award on costs is, in any event, inadmissible.

(90). We now ask ourselves whether the Decision by the Trial Court to deprive the successful Parties their respective costs on the reasoning that the Applicant's case *"was determined on legal technicality"* and *"given the intrinsic circumstance of the case"* should be disturbed and set aside. It is trite law that for an Appellate Court to depart from a decision by a Trial Court made in exercise of its discretion, it should be demonstrated that

the discretion was not exercised judicially. And the Appellate Court will consider the discretion to have been exercised un-judicially where it was exercised irrationally, capriciously or whimsically, and/or the Court erred in principle.

(91). Bearing in mind those considerations and the principles on award of costs articulated in Paragraph 86 above, we think it was irrational to deny the successful litigants their costs for the reason that the Applicant had lost on a technicality. We say so for the following reasons. Cases are lost either on technicalities or the merits. A loss is a loss whatever be the reason. We know of no authority, and none was cited to us from the jurisprudence of this Court or any other persuasive jurisprudence, that a party who wins litigation on a technicality should not get costs. And, in any case, we agree with the submission by Counsel for the Intervener that the reason for the dismissal of the Reference was not a technicality. It was lost on the merits in that the party with the burden of proof did not discharge it. But even if the striking out of inadmissible and improper affidavit evidence adduced by the Applicant was to be properly regarded as a technicality, the Trial Court should have taken into account the fact that the Applicant had been put on notice by the Trial Court's Ruling of 24th April 2018, whereby Counsel for the Applicant's Affidavit had been struck out and expunged from the record, that such depositions would be inadmissible in evidence during the Trial and would face the same fate. That the Trial Court did not take into account such a relevant factor was, in our view, an improper exercise of discretion. With respect to the reason of "intrinsic circumstances of the case", we observe that none of the circumstance weighing on the mind of the Trial Court were disclosed. To our mind, to place reliance on factors which are not disclosed is irrational and therefore an improper exercise of judicial discretion.

(92). In short, we think the reason given by the Trial Court to deny the successful litigants their costs in the Reference could not be said to be an exceptional reason or ground to justify such a decision; nay, it was a limping and irrational decision which ignored the relevant procedural history of the matter and which we regard as un-judicial exercise of

discretion. For that reason, we find that the Trial Court erred in law in denying the Respondent and the Intervener their costs.

(93). In the result, issue No. 4 is answered in the affirmative.

Issue No. 5: What remedies are the Parties and the Intervener entitled to.

(94). Counsel for the Appellant prayed for the Orders specified in the Memorandum of Appeal and which we have set out in Paragraph 17.

(95). Counsel for the Respondent submitted that the Appellant should not be granted remedies (a) to (d) for the reasons that (i) the Appellant did not prove that the election of the Speaker of the 4th Assembly was conducted without the elected Members from Burundi and Tanzania, (ii) the Court could not order re-election of the Speaker without violating the doctrine of separation of power and, in any case, such order could only be made if the election of Speaker was faulty, (iii) the serving Speaker could not be ordered to restitute to the East African Community all salaries and emoluments earned from the date of the faulted election as the prayer was not pleaded in the Reference, and (iv) the Respondent and the Intervener should not be condemned to the costs of the Reference and the Appeal as the Appellant had not won the Reference or the Appeal. Counsel prayed that the Appeal be dismissed with costs to the Respondent and the Intervener.

(96). Counsel for the Intervener opposed the grant of relief sought by the Appellant and associated himself with the submissions of the Respondent. He prayed that the Appeal be dismissed with costs to the Intervener and that the said costs be certified for two Counsel as the Intervener had instructed two separate law firms to represent him.

The Court's Analysis and Determination.

(97). The Appellant's challenge to the Judgment of the Trial Court on the validity of the election of Speaker of the 4th Assembly has failed. Accordingly, the substantive Prayers of the Appellant, stemming, as they do, from the postulate that the Speaker was elected in breach of the Treaty and the Assembly's Rules of Procedure, cannot be granted and are hereby rejected.

(98). The only live remedy remaining for considerations is Costs.

(99). Under Rule 111, the Costs follows the event unless the Court for good reasons orders otherwise. The Respondent and the Intervener have prevailed in the Appeal. And we see no exceptional reason to deprive them of their costs. Accordingly, we dismiss the Appeal with costs to the Respondent and the Intervener.

(100). Should we certify the said Costs for two Counsel? We bear in mind that Article 40 of the Treaty restricts the intervention of an intervener to submissions in respect of evidence in support of one or another of the parties and obviously such submissions of law as are pertinent to those facts. That being so, it cannot be said that the Intervener's intervention is as complex as to require the talent, skills and energy of two Counsel. Indeed, it is not a complex task at all. In the circumstances, we don't think it would be a proper exercise of discretion on our part to certify costs for two Counsel as prayed by the Intervener. We decline to do so.

E. CONCLUSION.

(101). It is now clear that the Appellant's challenge to the election of the Speaker of the 4th Assembly of EALA has failed in both the Trial Court and in this Court as issue numbers (1) (2) and (3) have all been answered in the negative and we are minded to award the Costs of the Appeal to the Respondent and the Intervener. It is also clear that the cross-Appeal has succeeded, with the result that the Respondent and the Intervener will be awarded their Costs in the Trial Court.

F. DISPOSITION.

(102). The upshot of our consideration of the Appeal and the Cross-Appeal is that-

(1) The Appeal be, and is hereby dismissed;

(2) The Cross-Appeal be, and is hereby allowed;

(3) The Order of the Trial Court dated 2nd July 2019 dismissing the Reference with no order as to Costs and directing each party to bear its own costs be, and is hereby set aside and substituted with an Order that-

> "The Reference be, and is hereby dismissed with Costs to the Respondent and the Intervener."

(4) The Appellant should bear the costs of the Appeal and the Cross-Appeal.

IT IS SO ORDERED.

DATED, DELIVERED AND Signed at ARUSHA this 4th day of June 2020.