IN THE EAST AFRICAN COURT OF JUSTICE

(APPELLATE DIVISION)

AT ARUSHA

(CORAM: P. K. Tunoi VP; J.M. Ogoola and L. Nzosaba, JJA)

APPEAL NO. 3 OF 2012

BETWEEN

MARY ARIVIZA AND ANOTHER …… ……..APPELLANTS

AND

ATTORNEY GENERAL OF KENYA ……..1ST RESPONDENT

SECRETARY GENERAL OF THE EAST AFRICAN

COMMUNITY ……2ND RESPONDENT

(An appeal from the Judgment of the First Instance Division at Arusha, Johnston Busingye PJ; Mary Stella Arach Amoko DPJ; John Mkwawa, Jean Bosco Butasi and Benjamin Patrick Kubo, JJ. Dated 30th November 2011 in Reference No. 7 of 2010)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the First Instance Division dated 30th November, 2011 in Reference No. 7 of 2010. Initially, there were two Appellants to this appeal: Mary Ariviza and Okotch Mondoh. Subsequently, Miss. Ariviza chose to withdraw from the case. She wrote a letter to that effect; but despite this Court's prompting and assistance, Miss Ariviza neglected to complete the requirements of Rule 94 of this Court's Rules of Procedure – whereupon the Court was left with no option but to rule that Miss Ariviza had *abandoned* her appeal. Accordingly, her appeal was dismissed on 21st June, 2013 – leaving only the second Appellant: Mr. Okotch Mondoh, to continue with this appeal.

Out of the Appellants' many grounds of appeal, contained in the Memorandum of Appeal, the Parties mutually agreed the following two issues:

(i) Whether the First Instance Division arrived at its decision without considering and /or appreciating the facts of the matter?

(ii) Whether that Court misinterpreted Article 6 (c) and (e) of the EAC Treaty?

In the course of hearing the appeal – and especially so, as regards the Parties' written submissions (which were "highlighted" during the oral proceedings) – it became quite evident that:

(a) only the first issue above (i.e alleged non-consideration of facts), was the real bone of contention between the Parties;

(b) the second issue (i.e. alleged misinterpretation of the Treaty), was largely neglected and eventually abandoned. In this regard, the transcript of the oral

proceedings of 21st June, 2013 contain (at page 14) the following unchallenged statement by the learned Counsel for the First Respondent:

> *"**Mr. Mbita**: …on the second ground for appeal that we had agreed to canvass before your Lordships you will notice from the appellants' submissions that they have more or less abandoned it. There has been no attempt made by the appellant to demonstrate how the court of first instance misinterpreted the provisions of the treaty; none whatsoever. So, this appeal is entirely premised on appreciation or mis-appreciation of facts".*

Accordingly, the gravamen of this appeal now rotates on but one issue only, namely: whether the First Instance Division considered the Appellants' evidence before arriving at its judgment; and, if it did, whether it gave that evidence appropriate appreciation? In her submission, learned counsel for the Appellants (Mrs. Madahana) narrowed down this issue to one specific matter of evidence, namely: whether the First Instance Division of this Court did consider the fact that there was a petition before the Interim Independent Constitutional Dispute Resolution Court ("IICDRC") of Kenya touching on the referendum. That was the sole issue for determination by this Appellate Division of the Court. This remained the sole issue – even though at one stage, the same counsel seemed to open wide the issue in contention. Such was the case when in her supplementary submission (i.e. Reply to the First, and Second Respondents' submissions) dated 4th April, 2013, she seemed to allege that the First Instance Division "failed to take into account the facts, evidence and law". Clearly, this was an overstatement; one without any foundation whatsoever. We will let it rest at that.

That being the case, what then was the fact which the Court failed to consider or, alternatively, to appreciate? According to their record of appeal (as repeated in their written submissions of 14th March, 2013, at p.3) the Appellants

> "*feel aggrieved that the Court of First Instance failed to look at the evidence supplied by the Appellants …which clearly showed that there is a pending petition that was left undetermined [by the IICDRC"] before and after the promulgation [of the Constitution of Kenya]. Neither did the Court make a finding as to the evidence given in support of the first issue before it and which it was legally bound to do, thus occasioning a failure of justice."*

In this regard, the Appellants conceded that the First Instance Division did, indeed, raise and address the issue of IICDRC 's determination of Interim Application No. 3 of 2010. However, they emphasized that the Division then incorrectly ruled that IIDRC had conclusively determined that issue by dismissal of the petition for want of prosecution. The Appellants challenge that factual finding of the First Instance Division. They assert, instead, that IICDRC merely marked the case as SOG (i.e. "stood over generally").

In this Court's view, it is quite evident that the appeal before us raises a single question, but with two limbs: one simple limb; and one complex one. The simple one is this: Did the First Instance Division address the matter of the Interim Application, No. 3 of 2010, which was before the IICDRC? That is purely a question of fact. All that this Appellate Division of the Court needs to do is to carefully examine the Judgment and the relevant Record of the proceedings of the First Instance Division, to discover

whether or not that issue was entertained by the First Instance Division. In undertaking that examination, this Court would of necessity be exploring the factual terrain that was traversed by the First Instance Division.

In doing so, however, the Appellate Division has to tread gingerly and with circumspection. It must not dig overly deep into the underlying facts of the case. It can only deal with the "facts" of what happened at the First Instance Division. What was the First Instance Division presented with? What were the issues before it? How did it handle them? What were its findings, conclusions and rulings – as set out in their Judgment? These are the kinds of "facts" (i.e considerations) that the Appellate Division takes into account on appeal. To go beyond that and attempt to reconstruct the evidence underlying the Appellants' case – and, especially, so as that evidence was presented and played out before the municipal courts and tribunals in Kenya, is not for this Appellate Division to probe into. That is the complex question we referred to above.

But first, in dealing with the simple question, then, we find that the matter of Interim Application No. 3 of 2010 was indeed canvassed before the First Instance Division. That Division did deal with that matter. It did so at two levels. First, it held that the majority in the IICDRC had decided that since the Interim Independent Electoral Commission (IIEC) had already published the final results of the Referendum, it meant that the Constitution was going to be promulgated anyway; and that, therefore, the IICDRC was now faced with a mere *fait accompli*.

Second, the IIDRC Judges unanimously concluded that they had no jurisdiction to challenge the operationalisation of the new Constitution.

Given the factual nature of the issue before us, it wll be necessary to look closely and extensively at the impugned judgment of the First Instance Division. That judgment recounts, among others, the following detailed facts:

- That the specific arrangements for the Constitutional Review process in Kenya were set out in the Constitution of Kenya Review Act, No. 9 of 2008;
- That those arrangements were to culminate in a Referendum in which the population of Kenya would vote for or against the proposed Constitution of 2010;
- That the Appellants (the then "Claimants") challenged various aspects of the conduct of the entire Constitutional Review process. In Miscellaneous Civil Application No. 273 of 2010, Ariviza sought: (i) judicial review of the decision by the Interim Independent Electoral Commission (IIEC) to publish the Referendum result; and (ii) prohibition of the promulgation of the proposed Constitution.
- That the High Court found no jurisdiction to entertain the above Miscellaneous Application – given the ouster of that jurisdiction by Sections 60-60A of the replaced Constitution; but noted that Ariviza had already petitioned the IICDRC as well, concerning the whole conduct of the Referendum – which petition was still pending determination before the IICDRC;
- That on 19th August, 2010, the Appellants filed Petition No. 7 of 2010 against the IIEC and Others, seeking a recount, an audit and a nullification of the Referendum result – on the grounds that the conduct of the Referendum flouted the law, had irregularities, and contained inaccuracies in the tallying of votes;
- That on 24th August, 2010, the Appellants filed with the IICDRC another Application (No. 3 of 2010: arising from the above petition) seeking to suspend

the publication and promulgation of the Proposed Constitution, until the hearing and determination of that Petition;

- That the IICDRC heard Application No. 3 of 2010 and decided:

(a) by a majority of 3 Judges, that even if IICDRC granted the interim orders sought, such orders would be in vain for being based on an inchoate Petition, because the requisite K.Shs.2 million security for costs had not been deposited and, in those Judges' opinion, it was now too late to deposit it within the prescribed time. Thus, the IICDRC dismissed the Application; and

(b) by unanimity of all the Judges, that the IICDRC had been presented with a *fait accompli,* in as much as the IIEC had already published a Gazette notice on 23rd August, 2010 confirming the result of the Referendum as final;

- That on 13th September, 2010, the Applicants filed Reference No. 7 of 2010 before the EACJ, followed by Application No. 3 of 2010 for a temporary injuction to restrain and prohibit the Kenyan Authorities from legislating and/or implementing the new Constitution, until the hearing and determination of the EACJ Reference;
- That on 23rd February 2011, the First Instance Division delivered its Ruling, dismissing Application No. 3 of 2010; but with a finding that:

> *"from the totality of the facts disclosed by the affidavits and submissions of the parties, there were bona fide serious issues warranting to be investigated by this Court."*

Having regard to the entire factual exposition presented above, the First Instance Division made its determination of the matter, thus:

"The question of their Petition No. 7 of 2010 not having been heard and determined on merit before the promulgation of the New Constitution has clearly kept nagging the Claimants at all material times. Notwithstanding the Claimants' complaint on the matter, we take cognizance of the fact that the IICDRC by majority decision found, while dealing with interlocutory Application No. 3 of 2010 for interim reliefs, that there was no valid Petition. Whether that decision was right or wrong, the fact of the matter is that it is a judicial decision."

Moreover, cognizant of the subtlety and complexity of the prayer before it, the First Instance Division added the following definitive statement for emphasis;

"*The material placed before us in this Reference reveals that the challenge posed before this Court relating to the conduct and result of the Referendum was subjected to the judicial process in Kenya, notably vide IICDRC Constitutional Petition No. 7 of 2010. The Claimants herein have taken issue with IICDRC's action of disposing of the petition at interlocutory stage while dealing with Application No. 3 of 2010 which was seeking interim reliefs pending the hearing of the Petition on merit. We note from its Ruling of 26th August, 2010 that the IICDRC categorically stated that it was well within the Attorney General's and IIEC's mandate to publish the final results.*

In essence what the instant Reference is asking this Court to do, in the exercise of its original jurisdiction, is to inquire into and review the decision of the IICDRC not to hear the Petition on merit. With respect, we do not consider it to be within this Court's competence to do that. If we did so, we would in effect be sitting on

appeal over the subject IICDRC's decision. We do, respectfully, decline the invitation to inquire into and review the correctness or otherwise of IICDRC's decision on Petition No. 7 of 2010." [emphasis added]

It is quite evident, then, that the First Instance Division:

(1) was seized of the issue concerning the facts of this case;

(2) duly addressed that issue at great length and adequately – namely, by providing an exhaustive recitation of and background to the facts; followed by reasoned analysis of those facts (embracing the evidence, the affidavits, the submissions, and the oral hearings);

(3) only then, did that Court finally conclude with its own findings and determination.

In particular, the First Instance Division was careful not to treat the facts that had been presented before the Kenyan courts as if those facts were now before the First Instance Division "on appeal". The more reason then why this Appellate Division cannot and must not revisit those same facts under the guise of an appeal.

To claim, therefore, as the Appellants seemed to do, that the First Instance Division neither addressed nor appreciated the facts of their case, is erroneous and misconceived – if not naughty and mischievous. In our view, the First Instance Division cannot be faulted on those grounds. The judgment, as quoted in great detail above, speaks for itself.

As to whether the First Instance Division appreciated the facts "correctly", is quite another matter. It is not for this Appellate Division to second-guess, let alone to assess, the correctness or wrongness of the First Instance Division's determination of the **facts** of a Reference or Application before it. In our system, the Treaty in Article 23 (3), confers on the First Instance Division, exclusive jurisdiction to entertain and determine the contentions of fact that are presented before it. Facts are the exclusive preserve of that Division in its original jurisdiction. The Appellate Division has no concurrent jurisdiction in the area of Facts. The latter's jurisdiction is circumscribed by the Treaty – in particular, by Article 35A of the Treaty.

From the totality of the foregoing, it is clear that the First Instance Division was not only seized of the issue of Interim Application No. 3 of 2010; it did, indeed, entertain it extensively. Its analysis of that issue is evident on the record. Its findings and conclusions are equally evident. Now, whether those findings were "correct" or "wrong", is not for this Court to assess. Whether the First Instance Division's determination of the facts was right or wrong, is not appealable to this Division. What is relevant and justiciable in this Division, is the issue of law – namely: Did the First Instance Division reach its findings and conclusions judiciously, after due consideration of the evidence; after taking into account only relevant (not irrelevant) factors; and after exercising due analysis (not mere caprice)? On all these, there was not even an attempt, let alone allegation, by the Appellants to discredit the First Instance Division. In any event, we are satisfied that in reaching its findings and conclusions in this case, the First Instance Division exercised its discretion judiciously, not capriciously; and fairly, not unreasonably. Accordingly, even if for arguments sake, those conclusions were wrong,

they would not be reviewable by, nor appealable to, this Appellate Division. In this connection, in our Judgment of 18th August, 2010 in the case of **Attorney General of Kenya v Anyang' Nyong'o & 10 Others, Appeal No.1 of 2009**, we made the following review principles patently clear:

- *"It is not the role of an appellate bench in a judicial review, to consider the substantive merits underlying the grounds of appeal. Rather, the role of the appellate bench is to review the propriety of the exercise of discretion by the trial judge on each ground of appeal.*
- *The question to ask, in respect of each ground is: whether the trial judge in reaching his decision, did so on the basis of a proper, judicious exercise of his discretion? Did he arrive at the decision after a judicious process rooted in dispassionate and empirical analysis of the facts and the law; or merely on a flight of fancy, unanchored in any sound basis?*
- *If the judge applied the empirical process, it matters not that he arrived at the "wrong" decision, unless such decision was plainly wrong. If, on the other hand, the judge engaged only in the fanciful or the whimsical, then it matters little that he arrived at the "right" conclusion, to the extent that the process and procedure was plainly and patently misconceived, irregular, unjust and wrong."*

Next, we consider the more complex question (mentioned above) of whether in this appeal, this Division can and should deal with the facts of this case? First, and foremost, the East African Court of Justice (EACJ) is not a Court of Appeal *vis- à- vis* decisions of the municipal courts and tribunals of the Partner States. Neither the First Instance Division, nor this Appellate Division, has jurisdiction to review the judicial

decisions and judgments of those municipal courts and tribunals. This is because of at least two primary reasons. Under Articles 27 (1) and 30 of the EAC Treaty, the initial jurisdiction of the EACJ pertains only to the interpretation and application of the provisions of the Treaty. Indeed, Article 27 (2) makes it crystal clear that the wider "appellate" jurisdiction for the EACJ over decisions of the municipal courts and tribunals of the Partner States, will be determined by the Council of Ministers only at "*a suitable subsequent date*", for which the Partner States "*shall conclude a Protocol to operationalise the extended jurisdiction".*

Secondly, and equally importantly, the respective causes of action in the present case are quite distinct. In the Kenyan courts; including the IICDRC, the cause of action was the alleged lack of propriety of the Constitutional process for promulgating the new Constitution of the Republic. In particular, the complaint was the alleged non-observance of the electoral Procedure for presenting the Constitution to the Referendum as set out in the Constitution of Kenya Review Act, No. 9 of 2008. In effect, the complaint was tantamount to an electoral petition before the IICDRC. Before this Court, however, the cause of action is totally different – namely: alleged violation, infringement and breach of Article 6 (c) and (d), and Article 7 (2) of the EAC Treaty – in effect, a violation of a Partner State's Treaty obligations and undertakings to ensure adherence to the Rule of Law in its territory. Clearly, then, the matter before this Court cannot, and must not, be treated as an appeal of the electoral petition which formed the judicial process that took place in the Kenyan courts. Accordingly, the First Instance Division was right in holding, as it did, that it had no jurisdiction to review the decisions of the Kenyan courts in this matter. Indeed, even the Kenyan High Court declined

jurisdiction, and left the matter to the IICDRC, pursuant to Sections 60 – 60A of the replaced Constitution of Kenya. To that extent, the underlying facts of this instant case as presented before the Kenyan courts, are not unlike those of the case of **Mtikila v Attorney General of Tanzania, Reference No. 2 of 2007,** in which this Court declined jurisdiction on the grounds that the Application, being in the nature of an election petition, was more in the province and domain of the High Court of Tanzania, and not of this Court.

The jurisdiction of the Appellate Division to entertain appeals proferred from the First Instance Division, is governed by provisions of the EAC Treaty: and in particular, by Article 35A of the Treaty (and Rule 77 of the EACJ Rules of Procedure). That Article provides as follows:-

> "35A. *An appeal from the judgment or any order of the First Instance Division of the Court shall be to the Appellate Division on –*
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> *(a) points of law;*
>
> *(b) grounds of lack of jurisdiction; or*
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> *(c) procedural irregularity."*

Rule 77 of this Court's Rules of Procedure is an exact replica of the wording of Article 35A above. It is quite clear from the above-quoted language, that appeals from the First Instance Division to this Appellate Division are allowed and are possible only on points of law (not fact) . [For avoidance of doubt, no issue arises in the instant case – and none was argued – regarding "lack of jurisdiction" under paragraph (b), nor "procedural irregularity" under paragraph (c) of Article 35A].

This Court has had occasion to pronounce itself on the question of appeals on points of law, excluding facts. In the recent case of **Alcon International Limited v Standard Chartered Bank of Uganda & Others. EACJ Appeal No. 2 of 2011 (Judgment of 16th March, 2012)** this Appellate Division stated unequivocally that:

> "*The Appellate jurisdiction of this Division is derived from the Treaty. It is evident from Article 35A above that matters of fact are in principle the exclusive province of the First Instance Division. Consequently, prospective appellants to this Division of the Court should bear in mind Article 35A and Rule 77 of the Rules of Procedure when lodging appeals."*

In the **Alcon** case referred to above, the issue in contention was one of mixed law-and-fact. The parties disagreed as to who were the Parties to the litigation in the Supreme Court of Uganda. This Court held that:

> "*This is a question of mixed law and fact which cannot be resolved by the Appellate Division of this Court… This is a disputed matter of fact and the court below [i.e First Instance Division] did not make a finding. With respect, we of the Appellate Division cannot make findings of fact on appeal."*

We are satisfied that, as with the **Alcon** case (*supra),* the instant case involves a contention of fact, namely: Whether there was or there was no constitutional petition pending before the IICDRC. That is purely a question of fact – the assessment of which is, under Article 23 (3) of the Treaty, a preserve of the First Instance Division from which no appeal lies to this Appellate Division. To do otherwise would be to ask the Appellate Division to probe deep into the underlying facts of the case – including

those facts as they played out in the Kenyan courts. Such a scenario might call for rehearing the evidence afresh; perhaps even recalling witnesses; and, then, making determinations of its own findings of fact. Clearly, that is not what was intended for the Appellate Division, nor envisaged under the legislative architecture of Article 35A of the EAC Treaty.

In this regard, the Treaty's exclusion of matters of fact from issues that may be appealed to the Appellate Division, is neither unique nor abnormal. Similar arrangements of that kind abound in all the municipal jurisdictions of the EAC Partner States. For example, the Judicature Act of Uganda (Cap. 13 of the Laws of Uganda, Revised Edition of 2000) provides, in Sections 5 and 6, for the appellate jurisdiction of the Supreme Court. In civil matters, appeals to the Supreme Court from judgments originally emanating from magistrates courts, are allowed only on points of law of great importance or which are in the interests of justice (Section 6 (2)). In criminal matters, appeals to the Supreme Court are generally allowed only on points of law, except where the offence is punishable by a sentence of death (Section 5). In Kenya, comparable rules apply in Articles 163, 164 and 165 of the new Constitution of 2010; as well as in Sections 15 through 24 of the Supreme Court Act of 2011 (Cap. 9A). In this connection, Article 163 (4) of the Constitution provides that:

"(4) Appeals shall lie to the Supreme Court --

(a) as of right in any case involving the interpretation of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved…"

Similarly, Sections 15 and 16 of the Supreme Court Act, provide for appeals to the Supreme Court, but only:

- with the leave of the Supreme Court (Section 15); and
- only where the Supreme Court is satisfied that the appeal is in the interests of justice – that is to say, if the appeal involves a matter of general public importance or reveals substantial miscarriage of justice (Section 16).

Other examples, at a lower judicial level, include the Tax Appeals Tribunal of Uganda, whose decisions are appealable to the High Court, but only on points of law. The same formula exists in Kenya – where an identical rule is applied to decisions of a multitude of Tribunals, including the Business Premises Tribunal, Rent Restriction Tribunal, National Environmental Tribunal, National Tax Tribunal, and the Public Procurement Tribunal.

In the result, the appeal is dismissed against the remaining sole Appellant.

As regards the costs of this appeal, and of the Reference as a whole, the Court is satisfied that this enitre litigation was in the best traditions of the public interest of the general public of not only Kenya, but of East Africa as a whole. The Appellants were registered voters and accredited polling agent/observer – one in the Westlands Constituency of Nairobi; the other in Nangoma Location of Busia District, Kenya. Clearly, their judicial odyssey in pursuing this important Constitutional-cum-Rule of Law matter was motivated, not by their own personal (let alone selfish) ends, but by the overarching interest of the public good.

We, therefore, order each party to bear its own costs in this matter.

DATED AT ARUSHA this 8th day of November, 2013.

……
Philip K. Tunoi
VICE PRESIDENT

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James Ogoola
JUSTICE OF APPEAL

……..
*Laurent Nzosaba**

JUSTICE OF APPEAL

* This Judgment was delivered under Rule 109 (2) of the EACJ Rules of Procedure 2013. Hon. Justice Nzosaba participated fully in all the proceedings of this appeal, including in the Court's deliberations of this judgment. However, his Lordship retired from the Court, before the signing and pronouncement of this Judgment.