THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA, TANZANIA

(Coram: Emmanuel Ugirashebuja, P.; Liboire Nkurunziza, VP.; James Ogoola, JA; Edward Rutakangwa, JA; Aaron Ringera, JA.)

APPEAL No. 5 OF 2014

ARISING FROM APPLICATION No. 17 OF 2014 AND REFERENCE No. 2 OF 2011

BETWEEN

THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....APPELLANT

AND

THE EAST AFRICAN LAW SOCIETY.....1ST RESPONDENT

THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY.....2ND RESPONDENT

JUDGMENT

The Appellant herein (the "Attorney General" of the Republic of Uganda) brought this Appeal against the Ruling of the First Instance Division of this Court dated 13th September 2014. In that Ruling, the First Instance Division

struck out the Attorney General's Application No. 17 of 2014 in which the Attorney General had sought Orders that the Court:

1) *conduct a voir dire in respect of the admissibility of the affidavit of one, James Aggrey Mwamu and the electronic Digital Video Disk (DVD) evidence filed on 4th March 2013;*

2) *find that the said affidavit and electronic DVD evidence submitted by James Aggrey Mwamu is inadmissible; and*

3) *[leaves] the costs of the Application to be in the cause.*

The Application followed on the heels of an Appeal (No. 1 of 2013) in which the Attorney General had moved, without success , this Appellate Division to set aside the Ruling of the First Instance Division allowing the East African Law Society to adduce additional evidence in electronic format (DVD) in the main Reference No. 2 of 2011.

Counsel for the 1st Respondent ("the East African Law Society") submitted that the Application, No. 17 of 2014, had been served on him only the previous day; and he would therefore be denied the right to reply to that

Application, if the said Application were to be heard on that same day – all in breach of Rule 23(1) of the EACJ Rules of Procedure.

For its part, the First Instance Division (referring to its own previous Ruling in Application No. 12/2014, and to the Order of the Appellate Division of this Court in Appeal No. 1 of 2013), decided the matter before it as follows:

> *"8… It is our view that the Applicant, rather than filing the Application, ought to have filed any evidence in rebuttal to the DVD evidence lodged by the Applicant in the main Reference if he so wished, as it was directed by the Court.*
>
> *9. In the result Application No 17 of 2014* ***cannot be entertained*** *by this Court since it does not comply with Court Orders and Rules 22(1) and 23(1) of the Rules. Accordingly, the Application is* ***struck out.***
>
> *10. No Order as to costs".* (Emphasis added).

It is evident that the First Instance Division decided **not to entertain** Application No. 17/2014. It is equally evident that that Division of the Court then decided to **strike out** the Application. The sum total of these two decisions led the Court to strike out an Application without first hearing the

merits of the same. Both the Applicant (the Attorney General) and the two Respondents (the East African Law Society, and the EAC Secretary General) were thus denied the opportunity to present their viewpoints on the merits of the Application before the Court struck it out.

The Court struck out the Application, presumably, on the grounds that the Application lacked "competence". However, to make that finding or similar finding of that kind a court of law needs to hear the merits of the case carefully, comprehensively, exhaustively and judiciously. This requires the court to hear and assess those merits **first**; then, and only then, to pronounce itself on the matter. The Court in this Application, did not do so. By its own explicit admission (expressly recorded in paragraph 8 of its Ruling, quoted above), the Court simply declined to entertain the Application at all; and then, proceeded to strike it out. This was an error. It was not just a simple procedural error. It was a very grave error of procedure.

By denying the Parties to the Application the opportunity to canvass their respective cases on the merits, the Court denied them the substantive right

to be heard. It is trite law and a cardinal principle of our jurisprudence that no litigant should be denied his or her day in court. Any such denial goes against the grain of our much-valued doctrines of natural justice, due process, and fair trial – which constitute the very foundation and bedrock of our brand of jurisprudence. Indeed, even by our own Rules of Procedure in this Court, the related power of the Court to strike out or to expunge the Parties' pleadings under Rule 47, is extremely circumscribed: as to the *process* to be followed, and as to the *grounds* to be adduced for the exercise of that power. The process requires a special and specific application; and the *grounds* for it are limited only to those specifically enumerated in that Rule. to by the Court. In Application No. 17 of 2014, none of these analogous notions were adverted to by the Court.

In view of all the above, we find that the First Instance Division erred in striking out Application No. 17 of 2014, without first entertaining the merits of that Application.

In the result, this instant Appeal is granted.

Accordingly, we make the following Orders:

1. The Order of the First Instance Division striking out Application No. 17 of 2014 is set aside.

2. Application No. 17 of 2014 is hereby restored.

3. The above Application is hereby remitted to the First Instance Division for hearing and determination on the merits; in accordance with the directions contained in the Judgment of this Appellate Division in Appeal No. 1 of 2013 – namely:

   (a) That the additional electronic (DVD) evidence has been permitted to be adduced.

   (b) That the Attorney General of Uganda is at liberty to challenge the relevance, accuracy, authenticity, credibility, and evidential value of that additional evidence as specified in *inter alia,* Paragraphs 58, 59 and 97 of our Judgment (in Appeal No. 1 of 2013).

4. Each Party shall bear its own costs of this Appeal.

It is so ordered.

Dated and Delivered at Arusha this 15th day of April, 2015.

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Emmanuel Ugirashebuja
PRESIDENT

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Liboire Nkurunziza
VICE PRESIDENT

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James Ogoola
JUSTICE OF APPEAL

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Edward Rutakangwa
JUSTICE OF APPEAL

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Aaron Ringera
JUSTICE OF APPEAL