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2015 - 2017

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2015 - 2020

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Hon. Mr. Justice J. J. Mkwawa	
Hon. Mr. Justice J. B. Butasi	Principal Judge

INTRODUCTION

In 2015, the inaugural East African Court of Justice Law Reports were published in two volumes. Since then, the Court has developed jurisprudence in diverse subjects-areas including: the responsibilities of States and the Community for internationally wrongful acts or omissions of their organs; and reparations that can ensue for breaches of the Treaty for the Establishment of the East African Community, the Custom Union and Common Market Protocols and Community Laws.

This volume, the largest the Court has produced so far, contains select cases: determined since 2015; some delivered virtually via video conference; and decisions where the Court's Rules of Procedure 2019, that took effect in February 2020, have been applied.

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Hon. Justice Dr. E. Ugirashebuja
President, EACJ
Arusha, Tanzania
November, 2020

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ABBREVIATIONS AND ACRONYMS

ACHPR	African Court for Human and Peoples' Rights
AG	Attorney General
Anor	Another
Appl.	Application
CAK	Court of Appeal of Kenya
CAT	Court of Appeal of Tanzania
CAU	Court of Appeal of Uganda
EA	East African Law Reports
EAC	East African Community
EACA	East African Court of Appeal
EALA	East African Legislative Assembly
EACJ	East African Court of Justice
EACJLR	East African Court of Justice Law Report
ECOWAS	Economic Community of West African States
eKLR	Kenya Law Reports electronic version
ICJ	International Court of Justice
ILC	International Law Commission
J	Judge
JA	Judge of Appeal / Justice of Appeal
JJ	Justices / Judges
JJA	Justices of Appeal
Misc.	Miscellaneous
Ors	Others
P	President of the East African Court of Justice
PCIJ	Permanent Court of International Justice
PJ	Principal Judge
Ref.	Reference
RIIA	Reports on International Arbitral Awards
RSS	Republic of South Sudan
S.A.R.L	Société Anonyme à Responsabilité Limitée
SCI	Supreme Court of India
SCK	Supreme Court of Kenya
SCU	Supreme Court of Uganda
SG	Secretary General
Treaty	The Treaty for the Establishment of the East African Community
T.L.R	Tanzania Law Report
UCA	Uganda Court of Appeal
U.L.R	Uganda Law Reports
UNRIAA	United Nations Reports of International Arbitral Awards
URT	United Republic of Tanzania
v	Versus
VP	Vice President

First Instance Division

Reference No. 2 of 2011
East Africa Law Society v The Attorney General of the Republic of
Uganda,
Secretary General of the East African Community

Coram: I. Lenaola, DPJ; F. Ntezilyayo, F. Jundu, JJ
March 28, 2018

Freedom to assemble and demonstrate – Right to peaceful protest - Admissibility of electronic and digital evidence- Authentication-Chain of custody history- Movement and location of evidence - Probative value of evidence –Hearsay concerns - Locus standi - Cause of action - Notoriety of events - Burden of proof

Articles: 6(d), 7(2), 27, 29, 30(1), 38 & 71 of the Treaty – Rules: 56(1) (3) 63 EACJ Rules of Procedure, 2013 - Rule 69(4) International Criminal Court Rules of Procedure & Evidence – Articles: 21, 22, 24, 29 of the Constitution of the Republic of Uganda - Articles: 3,4,5,6,11 & 28 of the African Charter on Human and Peoples Rights - Sections: 5, (1), (2), 7, 8(1),(2),(4),(5), Electronic Transactions Act of Uganda- Sections (6) of the Act- Sections: 58, 64(1)(c), 68(1)(a)(ii) & 113, Evidence Act Cap 6, Laws of Uganda - Section 106(B) (i) Evidence Act, Cap 80, Laws of Kenya

On or about 11th April, 2011, groups of Ugandan citizens participated in the ‘walk to work’ protests against the high costs of fuel, transport and living in Uganda. The Applicants alleged that the police and military attacked the protestors resulting in the death of over ten people and injury to hundreds. Others were allegedly arrested and detained for engaging in an unlawful assembly, inciting violence and disobeying lawful police orders.

The Applicant filed this Reference averring that the 1st Respondents agents willfully disregarded a decision of the Constitutional Court of Uganda in *Constitutional Petition No. 9 of 2005* which had nullified Section 32(2) of the Police Act. This was an affront to the independence of the Judiciary and amounted to State inspired impunity for human rights violations in contravention of the Treaty. Relying on electronic evidence, they sought a declaration that the actions of the agents of the 1st Respondent violated the Constitution of the Republic of Uganda, the EAC Treaty and the African Charter on Human and Peoples Rights. They also claimed that the 2nd Respondent had failed to fulfill his Treaty obligations. In support of their claims, a video clip was annexed to the Affidavit of Mr. James Mwamu, the erstwhile President of the Applicant who in a *voir dire* examination testified on how he obtained the video clip. The producer of the video did not swear any affidavit or testify in court in support of the electronic evidence.

The 1st Respondent denied that any protestors were arrested, tear gassed, killed or assaulted and contended that: the Reference was time barred: raised matters that were not justiciable; invoked jurisdiction not bestowed on the Court; and undermined the sovereign jurisdiction of the national Courts. They claimed that the Applicant lacked *locus standi* to bring this case.

The 2nd Respondent on their part stated that he had written to the government of the Republic of Uganda, on 30th August, 2011, requesting for reports on the matter to enable him report to the Council of Ministers.

On 13th February, 2013, the Court allowed an application by the Applicant for the production of the video evidence and also granted leave for the production of additional evidence in documentation and electronic format after the close of pleadings.

Held:

1. The Applicant has previously instituted many cases before this Court, as a legal entity and person within the meaning of Article 30(1) aforesaid and has the *locus standi* to institute these proceedings alleging violations of the Treaty.
2. From comparative jurisprudence, it can be concluded that admissibility of evidence electronically generated such as a DVD, video clip or other electronic and/or digital evidence would depend on: the manner in which the evidence was obtained, preserved and produced; the relevance of the evidence; the reliability of the evidence; whether it would prejudice the fair hearing of the matter; and whether there is an element of public interest in it.
3. The former President of the Applicant society was not the maker of the video clip; the maker filed no affidavit nor did he testify as to its authenticity. The transcriber on her part filed an affidavit authenticating her work but did not testify in Court as to how she came into contact with it to be cross-examined on that issue. In the circumstances it is very difficult to authenticate the video clip. While the video clip may be relevant to the matters in the Reference, its reliability is suspect and it would certainly prejudice the fair trial of the matter. Public interest is also irrelevant in such circumstances as public interest would not be served by admitting evidence whose authenticity cannot be independently confirmed. Thus the video clip is inadmissible and cannot be of any use to the Applicant in proof of its case.
4. A cause of action exists where it is the contention therein that the matter complained of violates the national law of a partner state or infringes the provision of the Treaty (*Sitenda Sebalu* case). To the extent that a complaint regarding alleged violation of the Treaty by the 2nd Respondent or his obligations thereto have been made, then a cause of action has been established against him.
5. The 2nd Respondent took appropriate measures as provided under Articles 29(1) and 71(1) (d) by seeking to address the issues arising out of this Reference but only after the Reference was filed. There was no evidence before that he had notice of the acts complained of prior to the filing of the Reference. Notoriety of events is not sufficient a claim in the present context without specific allegations of violation of the Treaty directly being brought to his attention. There was no violation of the Treaty.
6. While the right to assemble and demonstrate is not absolute as it is subject to the limitations inherent in it, Article 43 of the Ugandan Constitution also creates other limitations to wit; that in the enjoyment of any right, “no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.” In the context of Articles 6(d) and 7(2) plus Article 11 of the African Charter on Human and Peoples Rights, the right to assemble is an

integral part of the rule of law, good governance.

7. The Applicant had the burden to prove its allegations on a balance of probability. Save for the bare deposition and with the video clip evidence which was inadmissible, no evidence was adduced no evidence showing that protestors were beaten, tear gassed, maimed or killed. The identities of the affected protestors are not given nor are the nature of the violations against them. No documentary evidence; medical records of injuries; and death certificates of the deceased were produced. In addition, the 1st Respondent having produced evidence in rebuttal, the Applicant did not wholly respond to the rebuttal.

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JUDGMENT

A. Introduction

1. The Reference before the Court was filed by the Applicant on 31st May, 2011. It is predicated upon the provisions of Articles 21, 22, 24 and 29 of the Constitution of the Republic of Uganda, as read together with Articles 6(d), 7(2), 27, 29, 30, 38 & 71 of the Treaty for the Establishment of the East African Community (the Treaty), Articles 3, 4, 5, 6, 9, 10, 11 & 28 of the African Charter on Human and Peoples Rights, Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (the Rules) as well as the inherent powers of the Court.
2. By a notice of motion Application No. 7 of 2011, dated 23rd August, 2011 premised on the provisions of Rules 12, 21(4), 48 & 50 of the Rules, the Applicant sought to amend the Reference. The Application was predicated upon the grounds that the amendments were necessary to determine the real question in controversy between the parties, and, to correct an error in the phraseology to better bring out the issues for determination by this Court. The Court, (Busingye, PJ; Stella Arach-Amoko, DPJ; & Butasi, J) delivered its ruling on 27th September, 2011 allowing the amendments to be made.

B. Parties and Representation

3. The Applicant has described itself as the premier regional lawyers' Association in East Africa with dual membership of over 8,000 individual lawyers and 6 Law Societies. It is registered as a Company Limited by guarantee in Tanzania and as a foreign company limited by guarantee in Kenya, Uganda and Rwanda. It was, in these proceedings, variously represented by Prof. Fredrick Ssempebwa, Alex Mogongolwa, Otiende Amolo, Richard Onsongo and Humphrey Mtuy,

Advocates, and its address for service is given as Plot No. 64, Haile Selassie Road, P. O. Box 6240, Arusha, Tanzania.

4. The 1st Respondent is the Chief Legal Advisor of the Government of Uganda and issued on behalf of that Government and his address for service is Plot No.1, Parliament Avenue, P. O. Box 7183, Kampala, Uganda.
5. The 2nd Respondent is sued in his capacity as the custodian of all legal instruments of the East African Community, the principal Executive Officer thereof and Head of its Secretariat as well as Secretary of its Summit. His address for service is the EAC Building, EAC Road, P. O. Box 1096, Arusha, Tanzania.

C. The Applicant's Case

6. In the Amended Reference, the Applicant contends that there was violation by the 1st Respondent, of the provisions of Articles 21, 22, 24 & 29 of the Constitution of the Republic of Uganda, 1995, in circumstances to be set out shortly. It is thus averred that the actions, as reaffirmed by the Constitutional Court of Uganda in *Muwanga Kivumbi v Attorney General, Constitutional Petition No. 9 of 2005*, contravened the provisions of Articles 6(d) and 7(2) of the Treaty and Articles 3,4,5,6,9,10,11 and 28 of the African Charter on Human and Peoples Rights.
7. The Applicant further contends that there was continued willful disregard of the decisions of the Constitutional Court of Uganda by the agents of the 1st Respondent, namely the police, military and other state agencies, which actions amounted to an affront to the independence of the Judiciary and amounted to State inspired impunity for human rights violations in contravention of the Treaty.
8. The grounds upon which the alleged violations of the Constitution of Uganda and Treaty were violated are set out in the Reference as follows:
 - (a) On or about 11th April, 2011, various groups of Ugandan citizens decided to exercise their fundamental and constitutional rights to freedom of movement and association by walking to work in protest against the high costs of fuel, transport and living in their Country;
 - (b) By various public announcements, the police were also duly informed of planned peaceful and unarmed protests that the citizens intended to engage in within the City of Kampala;
 - (c) The police responded by declaring that the planned walk to work protests were illegal, and vowed to arrest any person who attempted to or participated in them;
 - (d) On or about 11th April, 2011, and on diverse dates thereafter, those that participated in the walk to work protests were violently and brutally attacked by the police and military under the direction of the 1st Respondent, allegedly resulting in hundreds being injured and the death of over ten (10) people, including two (2) children. Scores of others were also allegedly arrested and detained for purportedly engaging in an unlawful assembly, inciting violence and disobeying lawful police orders;
 - (e) On 29th April, 2011, an agent of the 1st Respondent, one Gilbert Arinaitwe, armed with a pistol, teargas and pepper spray, smashed the windshield of a vehicle belonging to one of the opposition leaders in Uganda, Col. (Rtd) Dr. Kiiza Besigye, who was unarmed and being driven to work, and

thereafter sprayed him with the pepper spray and deployed the teargas;

- (f) Under the direction of the agents and servants of the 1st Respondent, the police continued to arrest, detain and charge innocent citizens in the guise that they had illegally and unlawfully participated in the walk to work protests. This, it was alleged, was in contravention of the Constitutional Court of Uganda decision in *Constitutional Petition No. 9 of 2005* aforesaid that nullified the provisions of Section 32(2) of the Police Act, relied on by the police for their actions, for being unconstitutional;
 - (g) The continued crackdown on unarmed peaceful protestors in Uganda by the police and military forces was unlawful, and amounted to cruel, inhuman, degrading treatment, and which allegedly occasioned the death of over ten (10) innocent civilians, caused injuries, suffering, disfigurement and loss of property to many other innocent civilians and citizens, which was a contravention of Uganda's obligations under the Treaty to uphold human rights, good governance and adhere to the rule of law;
 - (h) That the violations as stated above were widely reported in both the print and electronic media all over the world and East Africa in particular, and that they became so notorious that every person, including the 2nd Respondent, had notice or must have had notice of them;
 - (i) The Applicant duly notified the 1st and 2nd Respondents that their actions amounted to a violation of fundamental human rights and were thus unconstitutional; and that the 2nd Respondent, despite being made aware of these violations, failed and/or neglected to fulfill his obligations under Articles 29(1) and 71(1) (d) of the Treaty to conduct investigations, collect information and verify facts relating to the said violations and take consequential action under the aforementioned Articles.
9. The Reference is supported by the affidavits of Sam Mugumya and Francis Mwijukye both sworn on 27th May, 2011, Ssemujju Ibrahim Nganda (undated) and James Aggrey Mwamu sworn on 2nd April, 2012. Their contents will be discussed later in this Judgment. The Applicant also filed its submissions dated 9th May, 2012 on the same day.
10. The prayers sought by the Applicant for the above reasons are the following:
- (a) A declaration that the actions of the agents of the 1st Respondent and its employees, servants and of the military and the police of Uganda under the direction of the 1st Respondent are in violation of Articles 21,22,24 & 29 of the Constitution of the Republic of Uganda, and contravene Articles 6(d) & 7(2) of the Treaty for the Establishment of the East African Community and Articles 3,4,5,6,11 & 28 of the African Charter on Human and Peoples Rights;
 - (b) A declaration that the 2nd Respondent failed to fulfill his obligations under Articles 29 & 71 of the Treaty for the Establishment of the East African Community;
 - (c) Order that the costs of and incidental to the Reference be met by the Respondents; and That this honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.

D. The 1st Respondent's Case

11. The 1st Respondent replied to the Reference by filing its response dated 25th July, 2011 and a further Amended Response dated 6th October, 2011. In both responses, the 1st Respondent denied the allegations, made by the Applicant, of violation of fundamental human rights and denied that the Reference was in any event barred in law and offends the provisions of the Treaty.
12. The 1st Respondent further contends that the issues raised are not justiciable and that the Reference invoked a jurisdiction not bestowed upon this Court and seeks declarations and orders which cannot be granted by this Court in fact and in law. That they also undermine the sovereign jurisdiction of the respective national Courts specifically those of the Republic of Uganda.
13. The 1st Respondent further states that at all times and in all instances, he acted professionally under the constitutional mandate given to him in accordance with and within the confines of the laws of Uganda, the Treaty, the African Charter on Human and Peoples Rights and all related instruments.
14. The 1st Respondent in addition further denies that the walk to work protests were ever declared illegal, nor that any person who attempted to walk to work was arrested, tear gassed, killed nor assaulted. That in fact on the material days, his agents issued guidelines regulating the orderly movement of citizens in observance of the rule of law and in accordance with the Constitution of Uganda, laws of Uganda and related instruments. They also provided security as well as protection to all citizens and maintained law and order during the protests.
15. Furthermore, it was denied that the agents of the 1st Respondent willfully or otherwise disregarded the decisions of the Constitutional Court of Uganda or undermined the independence of the Judiciary or condoned impunity as alleged.
16. The 1st Respondent has also in addition stated that the Applicant was not entitled to the remedies claimed and that the dismissal of the Reference was proper and without prejudice. That in any event, the Reference and the accompanying affidavits were of a generalized and amorphous nature and did not specifically plead facts and grounds supporting the reference and therefore violated Rule 38 of the Rules.
17. The Response was supported *inter alia* by the affidavit of Nanding' Christine, the Acting Assistant Commissioner of Police in the Legal Department of the Uganda Police Force, sworn on 21st July, 2011 and who reiterated the issues canvassed in the Response, and further deposed that the Uganda Police Force acted in accordance with their constitutional mandate and the laws of Uganda in dealing with volatile and escalating circumstances during the walk to work protests. And that the persons arrested at all material times were suspected of having committed criminal offences under the Penal Laws of Uganda. The Affidavits of Grace Turyagumanawe, Amos Mpungu George and Ekaju William further addressed and deposed to specific incidents during the protests which led to police intervention within their mandate to ensure law and order in Kampala. They all denied that the police fired live bullets, acted brutally, unlawfully or unprofessionally on the material dates as alleged by the Applicant.
18. The contentions by the 1st Respondent were further elaborated upon in the submissions filed on 4th June, 2012 and 2nd November, 2017, respectively.

E. 2nd Respondent's Case

19. The 2nd Respondent filed his Response to the Reference on 8th July, 2011 and a further Response to the Amended Reference on 11th October, 2011.
20. The 2nd Respondent contends that he was not aware or had knowledge of the events described by the Applicant as alleged in the Reference, but that he had, on 30th August, 2011, written to the government of the Republic of Uganda in terms of Article 7(1) (d) of the Treaty requesting to be furnished with reports on the matters forming the subject of the Reference.
21. The 2nd Respondent further denies that he was informed or notified by the Applicant of the alleged violation of fundamental human rights, or at all, and that he did not therefore abdicate his mandate and responsibilities under the Treaty as alleged by the Applicant. Furthermore, that he took appropriate measures to address the matters raised once they came to his knowledge by writing to the government of Uganda, through the office of the Permanent Secretary in-charge of the East African Community Affairs on 30th August, 2011, seeking information and a report on the subject matter to enable him report to the Council of Ministers.
22. Both responses were supported by the affidavits of Dr. Tanguis Rotich, the then Deputy Secretary General of the East African Community, sworn on 7th July, 2011, and 11th October, 2011, respectively. The deponent reiterated the depositions made in the responses and the said Respondent further filed Submission on 23rd May, 2012.

F. Applicant's Reply to the 1st Respondent's Response

23. On 25th August, 2011, the Applicant filed a Reply to the 1st Respondent's Response on the issues raised therein. The Applicant objected to the argument that the 1st Respondent's agents had acted professionally and in accordance with the law and reiterated the issue of the 1st Respondent's agents' disproportionate use of force, acting unprofessionally and outside the confines of the law, undermining the independence of the Judiciary and condoning impunity.

G. The Issues for Determination

24. At the Scheduling Conference held on 23rd February, 2012, the following were the issues highlighted for determination:
 - (1) Whether the 1st Respondent and its agents committed the acts alleged in the Reference and in particular:
 - (a) Whether the 1st Respondent and its agents declared that the walk to work procession was illegal and prevented them from proceeding;
(sic)
 - (b) Whether the 1st Respondent acted lawfully, proportionately and professionally in providing and working by guidelines aimed at regulating the movement of the persons and observance of the rule of law;
 - (2) Whether the 2nd Respondent:
 - (a) Had personal knowledge of the alleged facts;
 - (b) Took appropriate action under Articles 29(1) and 71(1) (d) of the Treaty.

- (3) Whether on a proper construction of Articles 29(1) and 71(1)(d) of the Treaty, there is a cause of action disclosed against the 2nd Respondent;
 - (4) Whether the alleged acts or omissions of the Respondents or the 1st Respondent's agents amounted to violation of the Treaty;
 - (5) Whether the Applicant is entitled to bring this Reference;
 - (6) Whether the affidavit of James Aggrey Mwamu and the accompanying electronic evidence is admissible; and
 - (7) Whether the Applicant is entitled to the declarations/remedies sought.
25. We have considered the pleadings filed by the respective parties, submissions made, both oral and written, and the arguments made in open court. In that regard, Issue Nos. (5) and (6) must be determined first as they relate to *locus standi* and admissibility of evidence. Issues Nos. (2) and (3) will then be determined together as they both relate to the question whether the 2nd Respondent was properly sued. Issues Nos. (1) and (4) will also be determined jointly as they go to the merit of the Reference before finally Issue No. (7) is determined i.e. whether the Applicant is entitled to any remedies.

H. Determination of Issues Nos. 5 and 6

26. With regards to the issue of *locus standi* and whether the Applicant was entitled to file the Reference (Issue no. 5), the Applicant submitted on the import of Article 30 of the Treaty as well as the case of *East Africa Law Society & 4 others v The Attorney General of Uganda & Others*, EACJ Reference No.2 of 2007. At Article 30(1) of the Treaty, it is provided that;
- (1) Subject to the provisions of Article 27 of this Treaty, any person who is resident in a partner state may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this treaty.
27. Further, in *East Africa Law Society & 4 Others v The Attorney General of Uganda & Others* (supra), it was held at para 16 thus:
- “The Applicants herein are bar associations in their respective partner states and have a duty to promote adherence to the rule of law. We are therefore satisfied that the applicants are genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the Respondents. We therefore hold that the Applicants have *locus standi* to make this application.”
28. In consideration of the provisions of Article 30(1) of the Treaty therefore and guided by the holding in *East Africa Law Society & 4 Others v The Attorney General of Uganda & Others* (supra), we have no hesitation in holding that the Applicant, which is the same entity that has previously instituted many cases before this Court, as a legal entity and person within the meaning of Article 30(1) aforesaid has the *locus standi* to institute these proceedings alleging violations of the Treaty and we do not understand the basis for the objection raised in that regard.
29. Having determined that the Applicants had *locus standi* to institute these proceedings, the next issue for determination would be as to whether the

affidavit of James Aggrey Mwamu and the accompanying electronic evidence is admissible. (Issue No. 6). This issue requires deep examination as it formed the basis for the delay in finalizing the Reference with applications and appeals taking the better part of the six years between the filing of the Reference and the conclusion of the hearing.

30. On that issue, we note that the question of the production of the video evidence attached to Mr. Mwamu's Affidavit had been considered by the Court in *Application No. 12 of 2012* dated 2nd September, 2012 filed by the Applicant pursuant to Rule 46(1) of the Rules of Procedure, where it sought leave to produce additional evidence in the form of documentation and electronic format after the close of pleadings. In its determination of the application on 13th February, 2013, the Court allowed the application and the Applicant was granted leave to produce the additional evidence.

31. Being aggrieved by the decision of the Court, to grant leave aforesaid, the 1st Respondent filed an Appeal to the Appellate Division of this Court, being *Appeal No. 1 of 2013* (Tunoi, VP, Ogoola & Nkurunziza, JJA). The Court in dismissing the appeal and referring the matter back to this Division for determination stated as follows:

“The First Instance Division exercised its discretion properly, within the principles enunciated by our law- including the series of well-known and well accepted case law of our jurisprudence. We believe the new evidence sought to be produced is relevant to the issues at hand; is substantive and substantial; and is likely to influence resolution of the issues before the Court by adding value to the deliberation and resolution of those issues. The new evidence does not constitute a new cause of action; as it merely reflects one of the series of events which occurred in the same transaction. The new evidence will not occasion the Appellant any prejudice, as he is well afforded all reasonable time and opportunity to reply and to rebut that evidence. In the interests of justice, we order that the proposed evidence be allowed to be adduced- notwithstanding any points of legal technicality that may otherwise arise.”

32. In consideration of the ruling and orders of the Appellate Division, the Applicant was thus allowed by this Court to adduce additional evidence in the form of an affidavit and electronic evidence. The 1st Respondent was still not satisfied and filed *Application No. 17 of 2014* brought under the provisions of Rules 1(2) & 21(1) of the Rules of Procedure challenging the admissibility of the evidence produced by the Applicant. In its determination of the said application, this Court stated *inter alia*:

“In light of the foregoing and given the nature of the case before us, we find that the test for admissibility of the electronic DVD evidence cannot conclusively be conducted at this stage of the proceedings. We are of the view that this matter should properly be revisited during hearing of the main reference itself when the Court deals with the totality of the evidence adduced by the parties before it, rather than taking a piecemeal approach by singling out one piece of evidence and determining its probative value in an evidential vacuum where all other evidence presented by all parties is not before the Court.”

33. The above cited determination was made following a successful appeal by the 1st Respondent in *Appeal No. 5 of 2014* (Ugirashebuja, P; Nkurunziza, VP; Ogoola, Rutakangwa & Ringera, JJA) where the Appellate Division on 15th April, 2015 stated *inter alia* that:

“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;

- (i) The order of the First Instance Division striking out Application No. 17 of 2014 is set aside;
- (ii) Application No. 17 of 2014 is hereby restored;
- (iii) The above application is hereby remitted to the First 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;
- (iv) That the additional electronic DVD evidence has been permitted to be adduced; and
- (v) 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 & 97 of our judgment in Appeal No. 1 of 2013.”

34. At the hearing of the Reference, the 1st Respondent argued further to what has already been stated above that the production of the new evidence by the Applicant was untenable as the evidence was presented after the close of pleadings. It was also argued that the evidence could not be taken in isolation without verifying documentation otherwise the Court would be taking the initiative of, more or less on its own, reviewing evidence without the support of a witness testifying in that regard.

35. It was further argued that the standard for authenticating electronic evidence takes the form of testimony by someone with direct knowledge that the produced evidence is what it purports to be. Reliance in that regard was placed on the case of *US v Briscoe 896 F.2d 1476 (7th Circuit 1990)* where it was held that a proper foundation of computer records was generally established if the party presenting the computer records, provides sufficient facts to warrant a finding that the records are trustworthy and the opposing party is afforded an opportunity to inquire into the accuracy thereof and testify as to how the records were maintained and produced.

36. In countermanding the arguments raised by the 1st Respondent, the Applicant in its submissions dated 14th November, 2017 submitted that by dint of Section 5 of the Electronic Transactions Act of Uganda, read together with Sections 7(1) and (2) as well as 8(1),(2),(4),(5) and (6) of the Act, Sections 58,64(1)(c), 68(1) (a)(ii) & 113 of the Evidence Act Cap 6 of the Laws of Uganda and Section 106(B) of the Evidence Act Cap 80 of the Laws of Kenya, the electronic evidence produced before the Court was admissible and tenable in the circumstances, and as such, the Court should allow it to be admitted as credible evidence of the events it was intended to show and authenticate.

37. The Applicant furthermore argued that it was trite law that a party seeking the

admission of video or audio recordings is not required to prove beyond doubt the accuracy of the record, rather, that enough evidence required to satisfy the inquiry has been placed before the Court and the burden thereafter shifts to the opponents to prove that the recording is unreliable or that they have evidence to the contrary. They also relied on the Ruling in *The Attorney General of the Republic of Uganda v The East Africa Law Society & The Secretary General of the East African Community Application No. 17 of 2014* in which the Court held that rather than have video evidence expunged from the record, the opposing party ought to have produced its own video evidence to contradict the evidence that had been adduced earlier.

38. In addition to the above, it was also submitted that the Court should take judicial notice of the fact that the walk to work protests, which were the subject of the electronic evidence sought to be adduced by the Applicant, was a matter of public notoriety at the time, and that the events that transpired or occurred were not only covered by the local Uganda media, but also regionally and internationally by reputable media houses.
39. The Applicant thus invited the Court, in the absence of any information or fact to the contrary, to presume that the electronic evidence that had been produced before the Court was authentic, and that it was indicative of the incidences and scenes therein depicted as events that likely occurred or happened in relation to the alleged human rights abuses during the walk to work protests.
40. As regards Section 106(B) (i) of Cap 80 of the Laws of Kenya which provides that an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer shall be deemed to be a document, if it satisfies the conditions as set out in sub-section (2) of the said Section, the Applicant thus submitted that it has met those conditions. That the said provisions, as read together with sub-section (4), which provides for the production of a certification verifying the conditions as set out in sub-section (2), shall together form part of the record of what is to be produced before Court as electronic evidence, a condition it had also met.
41. For avoidance of doubt, Section 106(B)(2) reads;
 - (1)
 - (2) The conditions mentioned in sub-section (1), in respect of a computer output, are the following:
 - (a) The computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or

the accuracy of its contents; and

- (d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

42. In accordance with the provisions of Sections 106(B)(2) above, read together with sub-section (4) thereof, for such or any electronic evidence to be produced, it has to satisfy the conditions as set out therein and a certificate made verifying that the conditions as set out have been satisfied. These provisions are similar to those in Sections 64 & 68 of the Evidence Act, Cap 6 of the Laws of Uganda and it was the Applicant’s submission that all the above principles of municipal law are relevant in determining the issue at hand.

43. Having taken into account the above submissions, on our part, we must first address the import of affidavit evidence generally and in that regard, we note that the Appellate Division of this Court in *Appeal No. 1 of 2015 Union Trade Centre Limited (UTC) v The Attorney General of Rwanda* stated *inter alia*;

“...But the record discloses that there was no affidavit from the Appellant or anyone else with knowledge of the matter in support of any of the averments in the body of the Reference. And the annexures to the Reference, though notarized, were neither annexed to an affidavit nor produced orally at the hearing in the trial court as exhibits. We state categorically that any annexures to a document unless the document is an affidavit and they are not annexed thereto, or the same are produced at the trial as exhibits, are not evidence.”

44. Further, at paragraph 43 of the Judgment, it was stated;

“The unfortunate consequence of the procedural failure to give directions on when the affidavit evidence would be filed was threefold; first, the Appellant did not file any affidavit; secondly, the Respondent filed together with its submissions an affidavit in purported support of the Response and annexed to the aforesaid submissions laws and documents in proof of its case; and third, and most grievously, the trial court proceeded with the trial on the basis of written submissions which were not founded in any admissible evidence.”

45. At para. 45, the Court further stated;

“We have considered whether to proceed and dispose of the appeal despite the above irregularity. We have come to the conclusion that to do so would be to condone and perpetuate, nay participate, in an irregularity which has occasioned an irreparable injustice to the parties. This is not the path which a Court of Justice should tread, and we unequivocally decline to do so.”

46. Taking guidance from the Appellate Division therefore, we note that the question before us is whether the video clip annexed to the Affidavit of Mr. Mwamu is admissible or not. In addressing that issue, it is uncontested (from the *voir dire* examination conducted and where Mr. Mwamu testified on how he obtained the video clip) that he, as the then President of the Applicant, was entitled to swear an Affidavit in support of the Reference but was not the maker of the electronic DVD. Further, there was the certified translation and sworn statement by Ms. Deborah Gasana, an advocate, where she also confirmed that she too was not

the maker of the electronic DVD. The producer or maker of the video that the Applicant sought to produce as evidence, one Julius Ssenkandwa, did not testify in court nor did he swear any affidavit in support of the electronic evidence that was produced before the Court, nor was he cross-examined as to the veracity of the evidence contained in the electronic DVD.

47. In that context and following the decision in *Union Trade Centre Limited (UTC) v The Attorney General of Rwanda* (supra), it is our understanding that evidence that is produced without adhering to procedure and whose authenticity cannot be proved, is inadmissible. Given the nature of the allegations that have been made against the Respondents, in the present Reference, therefore, it would only be prudent for the Court to admit only evidence that can be verified, or at least, whose veracity can be tested through cross examination. In that regard, we note at this stage that no cogent reason has been presented before the Court as to why the maker of the video which the Applicant sought to introduce, one Julius Ssenkandwa, did not swear an affidavit in support of his video clip nor why Deborah Gasana could not be subjected to cross-examination as James Aggrey Mwamu was. We say so, with respect, because fear of repercussions was loosely expressed as the reason why they could not do so but without the Court being asked to use its powers to compel attendance by those witnesses, the explanation is rendered unhelpful.
48. Having so stated, we have perused our Rules and as regards evidence generally, Rules 56(1) and (3) as well as Rule 63 provides as follows:
- “56(1) Any party in a claim or reference may obtain on application to the Court, summons to any person whose attendance is required either to give evidence or to produce documents.
- (3) The Court may on its own motion summon any person to give evidence or to produce any document if in the opinion of the court such evidence or document is essential for the just determination of any matter before it. and;
- (63) (1) At the hearing, the party having the right to begin shall state its case and produce evidence in support of the issues which it is bound to prove. The other party shall then state its case and produce evidence, and may then address the Court generally on the case. The party beginning may reply.
- (2) Where, after the party beginning has produced its evidence the other party does not produce any evidence, the party beginning shall address the Court first on the case, and the other party shall then address the Court in reply. The Court may then allow the party beginning to comment on a new point raised in the address by the other party.
- (3) A party may present its legal arguments in writing.”
49. There is as can be seen above, no specific reference to production of electronic evidence including video clip evidence hence the question, what is the criteria for admissibility of such evidence? In that regard, the Applicant has submitted to us the United Kingdom Court of Criminal Appeal authority of *R v Maqsum Ali & Ashiq Hussain* (1965) 2 All ER 464 dated 9th April, 1965 where the decision of *Brabin J* in *R v Bryant & Bryant Newport Assizes*, a decision made by the same Court on 27th July 1964 (unreported), was quoted with approval and where the

Learned Judge stated that a tape recording of a conversation is good evidence if it is proved to have been accurately recorded.

50. In *Maqsud* (supra), the Court went further than that finding and held that a tape recording is admissible in evidence provided the accuracy of the recording is proved and the voices can be properly identified and further, that the evidence is relevant and otherwise admissible. The Court also issued a caveat that such evidence should be regarded with caution and assessed in the light of all the circumstances of each case.
51. Further to the above, we have perused the transcript of proceedings of 14th February 2007 in *Prof. Anyang' Nyong'o and 5 Others v Attorney General of Kenya, Reference No.1 of 2006* On that day, the Applicants sought to introduce a DVD regarding certain events relevant to the case before the Court. The Court admitted the DVD only when one of the Applicants, Ms. Yvonne Khamati, testified on oath as to how she had obtained it (from the Nation Media Group which is also the source of the contested video clip before us). Although the maker of the DVD was not called to give evidence, the Court admitted it after Ms. Khamati testified that she had watched NTV news on a particular day and the following day she went to Nation Media Group offices in Nairobi and obtained the news clip in the form of a DVD from its library at Ksh. 5, 900/- which she paid. All parties then consented to the DVD being played in Court.
52. In addition to the above, we have taken note of Section 78A of the Evidence Act, Cap. 80 Laws of Kenya purely for reasons of comparison which provides as follows:

“Admissibility of electronic and digital evidence

- (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
 - (2) The Court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
 - (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to: -
 - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - (c) the manner in which the originator of the electronic and digital evidence was identified; and
 - (d) any other relevant factor.
 - (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”
53. In the above context, and noting the lacunae in our Rules as to electronic

evidence, what criteria should this Court adopt in admitting electronic evidence including the video clip in contention? In addressing that question, we are alive to the fact that this Court does not have its own Evidence Act such as the Kenyan one referred to above and in *Attorney General of Uganda v East African Law Society and Another, Appeal No.1 of 2013* the Appellate Division of this Court stated that the Court cannot rely on the Evidence Acts of its respective Partner States but on the “Treaty; Protocols (if any, on this subject); its own rules of Procedures (such as Rule 46); International Conventions of a general nature (such as the Vienna Convention on the Law of Treaties) as well as the practice and jurisprudence of similar international judicial tribunals.”

54. In that context, we have taken into account persuasive approaches from outside this Court and we are aware, for example, that Rule 69(4) of the International Criminal Court (ICC) Rules of Procedure and Evidence directs Judges to admit evidence “taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.”
55. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), while avoiding the common law rules of evidence nonetheless have stated that for evidence to be admissible, it must satisfy “the minimum standards of relevance and reliability” (See – *Prosecutor v Brdanin and Talic, Case No.IT 99-36-T*).
56. Specifically, on digital evidence, the ICC has developed standards specific to such evidence and electronic evidence is commonly admitted as corroborative evidence and not direct evidence in its proceedings. As to its probative value, the following criteria has been developed:
 - (i) Authentication – because digital evidence can be manipulated, authentication by external indicators such as expert testimony is required.
 - (ii) Hearsay – digital evidence may raise hearsay concerns because it is not live testimony and is removed from the originating source.
 - (iii) Chain of custody – it is important to determine the movement and location of the evidence as well as the history of the persons who have had it in their custody from the time it is made to the time it is presented in Court.
 - (iv) Presentation of the evidence – this criterion ensures that the evidence is error free and is reliable in the long-term.
57. Further to the above, the European Court of Human Rights in its *Application No. 33394/97 Khan v the United Kingdom* considered the admissibility of digital and electronic evidence and concluded that its admissibility would depend on:
 - (i) Whether there is fairness in doing so.
 - (ii) Whether there is an element of public interest involved.
 - (iii) Whether the evidence is relevant.
 - (iv) Whether the evidence was lawfully obtained.
58. From the above comparative jurisprudence, it can be concluded that admissibility of evidence electronically generated such as a DVD, video clip or other electronic and/or digital evidence would depend on:
 - (a) The manner in which the evidence was obtained, preserved and produced.
 - (b) The relevance of the evidence.

- (c) The reliability of the evidence.
 - (d) Whether it would prejudice the fair hearing of the matter.
 - (e) Whether there is an element of public interest in it.
59. Taking all the above factors together, we have already stated that James Aggrey Mwamu was not the maker of the video clip in contention and the maker who is identified, filed no affidavit nor did he testify as to its authenticity. The transcriber on her part filed an affidavit authenticating her work but did not testify in Court as to how she came into contact with it to be cross-examined on that issue. It is in the circumstances very difficult to authenticate the video clip. While therefore, the video clip may be relevant to the matters in the Reference, its reliability is suspect and it would certainly prejudice the fair trial of the matter. Public interest is also irrelevant in such circumstances as public interest would not be served by admitting evidence whose authenticity cannot be independently confirmed.
60. For the above reasons therefore, it is our finding that the video clip evidence annexed to the Affidavit of James Aggrey Mwamu is inadmissible and cannot be of any use to the Applicant in proof of its case before this Court. His Affidavit is however admissible and so Issue No .6 is partly answered in the affirmative.

I. Determination of Issues Nos. 2 and 3

61. On the question whether there has been established a cause of action against the 2nd Respondent and whether he had personal knowledge of the alleged acts of violation of the Treaty by the agents of the Government of Uganda and further, whether he took appropriate action under Articles 29(1) and 71(1) (d) of the Treaty, the first place to begin is the meaning of cause of action.
62. In that regard, a cause of action has been defined to mean “a set of facts or circumstances that in law give rise to a right to sue or to take out an action in Court for redress or remedy” – See *Anyang’ Nyong’o* (supra) at page 18.
63. The above complaint against the said 2nd Respondent to the extent that the Applicant alleges a violation of the Treaty certainly creates a cause of action because as was stated by this Court in *East African Law Society v The Attorney General of Burundi and the Secretary General of the EAC, Reference No. 1 of 2014*, ... “the Treaty provides for a number of actions that may be brought to this Court for adjudication ... Article 30 of the Treaty, among others, virtually creates a special cause of action, which different parties may refer to this Court for adjudication” and referring to *Anyang’ Nyong’o* (supra), it further stated that “... by the same provision (Article 30) it creates a cause of action.” More succinctly, in *Sitenda Sebalu vs Secretary General of the EAC & 3 Others, Reference No.1 of 2010*, it was stated that a cause of action exists “where it is the contention therein that the matter complained of violates the national law of a partner state or infringes the provision of the Treaty.” We accept that definition as squarely applicable to the issue under consideration.
64. In that regard, therefore, we have no hesitation in finding that to the extent that a complaint regarding alleged violation of the Treaty by the 2nd Respondent or his obligations thereto have been made, then a cause of action has been established against him and we so hold. We shall now proceed to interrogate whether he had personal knowledge of the alleged acts but failed to take appropriate action under his Treaty mandate.

65. Without repeating the arguments by parties, it is beyond debate that the Applicant did not raise any of the issues now in contest with the 2nd Respondent before filing the Reference but instead pleads that the said issues were of such general public notoriety that the 2nd Respondent ought to have known of them.
66. This Court has previously been faced with the same argument and as early as 2007 in *James Katabazi and 21 Others v Secretary General EAC and Another, Reference No.1 of 2007*, it stated thus:
“Without knowledge, the Secretary General could not be expected to conduct investigations and come up with a Report under Article 29(1)”.
67. Further, in *East Africa Law Society v Attorney General of Burundi and Secretary General, EAC* (supra), this Court having analyzed the actions taken by the 2nd Respondent, the Secretary General, upon a matter under the Treaty being brought to his attention, concluded that it was the 1st Respondent, the Republic of Burundi, that was hindering his investigations and directed both to operationalize a task force set up on 15th January 2015 to investigate alleged violations of Treaty obligations by the Republic of Burundi. The converse is true in the present case and to expect the Secretary General to act without a clear, concise and actionable complaint being brought to his attention is to stretch the concept of public notoriety too far.
68. We further note that in a *note verbale* dated 11th June, 2011 addressed to the President of the Republic of Uganda, the 1st Deputy Prime Minister and Minister for East African Affairs as well as the Minister for Foreign Affairs, the 2nd Respondent intimated that he had sought audience with the relevant authorities during his official tour of the country to get a report regarding the matters raised in the present Reference. This action, we have no doubt, was indicative that the 2nd Respondent had taken appropriate measures to ventilate the alleged matters with the 1st Respondent but only after the Reference had been filed.
69. In that context, Article 29(1) of the Treaty provides that:
“Where the Secretary General considers that a partner state has failed to fulfill an obligation under this Treaty or has infringed a provision of the Treaty, the Secretary General shall submit his or her findings to the partner state concerned for that partner state to submit its observations on the findings.”
70. In interpreting the above provision, this Court in *Hon. Sitenda Sebalu* (supra) observed that:
“In almost all jurisdictions, Courts have the powers to take judicial notice of certain matters. We are not prepared to say that what is complained of here is one such matter. However, the powers that the Secretary General has under Article 29 are so encompassing and are pertinent to the advancement of the spirit of the re-institution of the Community and we dare observe that the Secretary General ought to be more vigilant than what his response has portrayed him to be. In any case, it is our considered opinion that even if the 1st Respondent is taken to have been ignorant of these events, the moment this application was filed and a copy was served on him, then he became aware, and if he was mindful to the delicate responsibilities he has under Article 29, he should have taken the necessary actions under that Article. That is all that the complainants

expected of him; to register with the Uganda government that what happened is detestable in the East African Community.”

71. In following the above decision, it is not contested that indeed the 2nd Respondent did write a letter to the Government of Uganda after he had observed that in the Reference, allegations had been made that there were riots, demonstrations and police action to address riots and related incidences in Uganda. This was in line with the provisions of Article 29(1) of the Treaty, and on the basis of which he requested for information in that regard before submitting his report to the Council of Ministers as provided in Article 29(2).
72. This action by the 2nd Respondent was also in line with his functions as provided under Article 71(1) of the Treaty, and in particular sub-section (d) which provides that his office is obligated in;
- “ (a)
- (b) the undertaking either on its own initiative or otherwise, of such investigations, collection of information or verification of matters relating to any matter affecting the Community that appears to merit examination.”
73. As has been observed above therefore, the 2nd Respondent took appropriate measures in exercising his mandate and functions as provided under Articles 29(1) and 71(1) (d) by seeking to address the issues arising out of this Reference but only after the Reference was filed because there is no evidence before us that he had notice of the acts complained of prior to the filing of the Reference. Notoriety of events is not sufficient a claim in the present context without specific allegations of violation of the Treaty directly being brought to his attention.
74. In concluding on this issue, and since the 2nd Respondent had no notice of (and knowledge on his part was casually claimed) the alleged actions on the part of the Republic of Uganda, we are unable to find any liability on his part for alleged violation of Articles 29(1) and 71(d) of the Treaty and we so hold. Issue No.2 is consequently answered in the affirmative while Issue No.3 is answered in the negative.

J. Determination of Issues Nos. 1 & 4

75. Having so held, we shall now turn to the facts laid before us (without the video clip whose admissibility we have rejected) and determine whether the 1st Respondent’s agents committed the acts alleged in the Reference i.e. whether they declared the protests to be illegal and violently prevented them from proceeding; and whether they acted lawfully, proportionately and professionally in providing and working, by the guidelines regulating the movement of persons and observance of the rule of law. We shall also address alleged violations of the Treaty in that context.
76. In that context, in the Reference, there were allegations that there were acts or omissions committed by the 1st Respondent’s agents that violated the fundamental rights and freedoms of the people of the Republic of Uganda. In the affidavits filed in support of these allegations, the deponents thus contended that the acts by the 1st Respondent through its agents amounted to gross violation, intimidation and violation of their fundamental rights and freedom to freely assemble and peacefully demonstrate. In support thereby, a number of copies

of newspaper cuttings were annexed to one Affidavit and to the Reference itself.

77. On its part, the 1st Respondent contended that its agents, who included the military and the police, acted within the laws of Uganda and the Constitution of the Republic of Uganda, and that they never denied any person or group of persons the opportunity to exercise their fundamental rights and freedoms to assemble or protest. It was further argued that there were no notices given to the 1st Respondent that there were any protests or demonstrations that were to be conducted, and that in any event, the provisions of the Police Act of Uganda and the Constitution were explicit in the event that any person(s) wanted to engage in protests and demonstrations. That therefore the Reference is misguided and ought to be dismissed.

78. The straightforward issue to address here is whether the right to assemble and protest, as an aspect of human rights was violated as alleged. To put matters into context, Article 6(d) of the Treaty provides as follows:

“The fundamental principles that shall govern the achievement of the objectives of the Community of the Partner States shall include:

- (a) mutual trust, political will and sovereign equality;
- (b) peaceful co-existence and good neighbourliness;
- (c) peaceful settlement of disputes;
- (d) good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights;
- (e) equitable distribution of benefits; and
- (f) co-operation for mutual benefit.”

79. Article 7(2) provides as follows:

“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

80. In addressing the import of these two Articles, this Court has been consistent in holding that the two provisions are justiciable and not merely aspirational. That is why in *James Katabazi & 21 Others v Secretary General of the East African Community & Another* (supra) the Court stated thus:

“Here at home in East Africa Justice Kanyeihamba in Kanyeihamba’s *Commentaries on Law, Politics and Governance* at pg. 14 reiterates that essence in the following words;

“The rule of law is not a rule in the sense that it binds anyone. It is merely a collection of ideas and principles propagated in the so called free societies to guide law makers, administrators, judges and law enforcement agencies. The overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land.”

It is palpably clear to us, and we have no flicker of doubt in our minds, that the principle of the rule of law contained in Article 6(d) of the Treaty encapsulates the import propounded above. But how have the Courts dealt with it? In *Republic*

v Gachoka & Another the Court of Appeal in Kenya reiterated the notion that the rule of law entails the concept of separation of powers and its strict observance. In *Bennet v Horseferry Road Magistrate's Court & Another*, the House of Lords took the position that the role of the Courts is to maintain the rule of law and to take steps to do so.”

81. The same principles were discussed and applied in *Attorney General of Rwanda v. Plaxeda Rugumba*, EACJ Reference No .8 of 2010 and *Samuel Mukira Mohochi v Attorney General of Uganda*, EACJ Reference No. 5 of 2011. We adopt the reasoning in these decisions in as far as they are relevant to issue at hand. In addition to the above and as regards the rule of law and the human rights provisions of the African Charter on Human and Peoples Rights, Article 10(1) of the Charter provides thus:

“Every individual shall have the right to free association provided that he abides by the law.”

82. What then are the obligations of a State in ensuring that the right to assemble and protest, which is the core issue in this Reference is respected? In that regard, Article 29(1) of the Constitution of Uganda provides thus:

“(1) Every person shall have the right to –
... freedom to assemble and demonstrate together with others peacefully and unarmed and to petition; and ...”

83. Further, in *Constitutional Petition No. 9 of 2005 Muwanga Kivumbi* (supra) the Court, while holding that the right to peaceful protest is not absolute, set out the standards against which every limitation on the enjoyment of the said right under Article 43(2) of the Constitution of Uganda should be tested. The Court held that the standard was an objective one, and was explicitly enunciated in the case of *Onyango-Obbo & Another v Attorney General Appeal No. 2 of 2002* where the Court stated thus:

“The right to peaceful protest is not absolute. The police have a wide range of powers to control and restrict the actions of the protestors. These powers should not be exercised by the police in an unaccountable and discriminatory manner...The Act gives powers to the police to arrest persons who engage in disorderly conduct, or who threaten violence etc.”

84. Noting the provisions of the law in Uganda as expressed above, while the right to assemble and demonstrate is not absolute (it is subject to the limitations inherent in it), Article 43 of the Ugandan Constitution also creates other limitations to wit; that in the enjoyment of any right, “no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.”

85. In the context of Articles 6(d) and 7(2) as well as Article 11 of the African Charter on Human and Peoples Rights, therefore, the right to assemble is an integral part of the rule of law, good governance and any violation thereof would amount to a violation of the Treaty specifically.

86. Applying the above expectations of the law to the present circumstances, the Applicant contended that on the material dates, citizens were demonstrating peacefully after a call had been made for them to participate in the walk to work protests but were viciously attacked by agents of the 1st Respondent leading to injuries, maiming and the killing of some of the protestors. On the

other hand, the 1st Respondent argued that it did not declare the protests illegal neither did the Government of Uganda arrest or threaten to arrest any person participating in them nor injure, maim or kill any person but rather that it issued guidelines regulating the orderly movement of the citizens in accordance with the Constitution and the laws of Uganda during the walk to work protests. In the affidavit of Nanding' Christine, for example, it is deponed in response to the allegations on violence and intimidation, that the Police Force only intervened and responded to situations where law, order and peaceful conduct of day to day business were either disrupted or were under immediate threat of disruption and so the police acted by guiding the movement of pedestrians and motor traffic to ensure that the rights of non-protestors were not violated.

87. Further, the 1st Respondent contended that certain arrests made against some protesters are admitted, but stated that these arrests were made due to suspicion of committal of offences under the penal laws of Uganda, including unlawful assembly and inciting persons to riot and cause public nuisance, and that the perpetrators had for those reasons been arraigned before local Courts. We note that no evidence was adduced by the Applicants to show the contrary of that submission.
88. From the evidence before us, therefore on various dates after 11th April 2011, a number of Ugandan citizens decided to participate in what later came to be dubbed the walk to work protests. The right to do so is guaranteed by Article 29(1) of the Constitution of Uganda and affirmed by the Supreme Court of Uganda in *Muwanga Kivumbi (supra) vs. Attorney General (supra)*. For avoidance of doubt, in that Judgment, the Supreme Court declared that Section 32(2) of the Police Act “authorizing the Police to prohibit assembly including public rallies or demonstrations would be unconstitutional” (per Hon. Lady Justice L.E. M. Mukasa – Kikonyongo, DCJ). The Learned Deputy Chief Justice further stated that “the police will not be powerless without the powers under sub-section 2; they can deploy more security men. Further, they have powers to stop the breach of peace where it has occurred by taking appropriate action including arresting suspects.”
89. The decision above is binding on all parties to this Reference as it is a decision of the apex Court in Uganda and the 1st Respondent cannot hide behind Section 32(2) of the Police Act by stating that he received non-formal notification of the walk to work protests and so the police, if at all, were entitled to break them up violently.
90. The point of departure between the Applicant and the 1st Respondent is therefore, whether the protests were violently disrupted by the police and military in contravention of the right to peaceful assembly and protest. As is the law, the burden in proof of that contention lies with the Applicant and the next question to address is this: What evidence has been placed before us in support of the said claim?
91. In support of the Amended Reference, the Applicant has annexed the following affidavits:
- (i) , That of Sam Mugumya sworn on 27th May 2011. He deponed that on a number of days in 2011, various groups of people in Uganda decided to exercise their right to freedom of association, movement and assembly, to

walk to work in protest against the high cost of fuel, transport and living, generally. That he, together with Col. (Rtd) Dr. Kiiza Besigye, decided to participate in the protest by walking from Kasangati, a suburb of Kampala, towards Kampala Central Business District. He further deposed to that on one occasion, as they were walking, officers of the Uganda Police Force ordered them to stop walking because according to the Police, they were committing an offence by participating in an unauthorized assembly. He further deposed that despite it being that the protests were peaceful and they were unarmed, the Police descended on them with batons and gun butts, sprayed them with teargas and shot at them with both rubber and live bullets, injuring many people, including Dr. Besigye.

He reiterates that specifically on 28th April, 2011, Dr. Besigye was driving from Kasangati towards Kampala when at Mulango, he was stopped and ordered not to use the route he was using, but that he should instead use an alternative route. He contends that as he and Dr. Besigye protested against the interference by the Police of their freedom of movement, an officer by the name, Gilbert Bwana Arinaitwe armed with a pistol, teargas and pepper spray, smashed the windscreen of Dr. Besigye's car, sprayed the occupants with the teargas and pepper spray, before brutally kicking and beating them and dragged Dr. Besigye to the police truck and then drove him to Kasangati Police Station.

- (ii) That of Francis Mwijukye sworn on 27th May 2011. His deposition was similar to that of Sam Mugumya, and he further deposed that he was aware through print and electronic media that many other people who had participated in the walk to work protests had been brutally beaten and injured by the Uganda Police Force in Kampala, its suburbs and other parts of the country.
- (iii) That of Ssemujju Ibrahim Nganda sworn on an unclear date. He deposed that he participated in the walk to work protests and was arrested twice, on 18th April and 21st April, 2011 by the Uganda Police Force. He further deposed that the actions by the Uganda Police were illegal as he was brutally stopped from exercising his right to associate, assemble and move, and was unnecessarily detained for five (5) days.
- (iv) That of James Aggrey Mwamu sworn on 2nd April 2012. We have already addressed this Affidavit in part and apart from the video clip evidence attached to it, he deposed that he stood by the pleadings and supporting affidavits filed by the Applicant, and denied all the contentions by the Respondents.

92. On their part, the 1st Respondent responded to the above depositions by filing Affidavits sworn by Nading' Christine, Grace Turyagumanane, Rulwea James Akiiki, Gumisiriza, Amos Mpungu George and Ekaju William the import of which is that the latter four having been present during the walk to work protests, deposed that the allegations by the Applicant are not true and there were no violations of Ugandan Law and its Constitution in the manner that Law enforcement agencies dealt with the walk to work protests.

93. On our part, we have weighed the evidence tendered by the Applicant who has the burden to prove its allegations on a balance of probability. Save for the

bare deposition by the persons named elsewhere above, and with the video clip evidence having been rejected, nothing else of substance was placed before us to show that protestors were beaten, tear gassed, maimed or killed. The identities of the affected protestors are not given nor are the nature of the violations against them. Even in the case of Col. (Rtd) Dr. Kiiza Besigye who was named, no affidavit was filed by him and no documentary or other evidence was tendered to authenticate his alleged ordeal at the hands of agents of the 1st Respondent. In saying so, when in an affidavit, some deponent claims that people were injured, maimed and killed during a lawful protest or assembly, what better evidence is expected than the identities, medical records of injuries and death certificates of the deceased? Without such evidence, how can a court conclude that the events complained of really happened?

94. In addition to the above, while we agree that affidavits are by their very nature good evidence, it would also be expected that in a matter as contentious as the present one, more evidence than the depositions of witnesses is expected. The 1st Respondent having produced evidence in rebuttal, we expected the Applicant to respond to the rebuttals wholly but did not do so.
95. Having so said, we also need to state that the only attachments in the Affidavit of Ssemujju Ibrahim Nganda is a copy of a newspaper cutting regarding Dr. Besigye's arrest. Copies of other newspaper cuttings are also annexed to the Reference itself which is a contravention of the decision in *UTC* (supra). None of those copies of newspaper cuttings were in any event properly tendered in evidence and with respect, we are of the view that they have no probative value as presented to this Court.
96. In the end therefore, we are of the firm view that the evidence tendered by the Applicant is weak and cannot lead us to conclude that the 1st Respondent's agents breached Uganda's Laws, its Constitution or even the Treaty let alone the African Charter on Human Peoples' Rights. Neither can we rely on alleged notoriety of the events complained of as no basis in fact or in law has been laid for us to do so. Issues Nos. 1 and 4 are therefore answered in the negative and we so hold.

K. Determination of Issue No. 7

97. Having held as above, we must now return to the prayers in the Reference which can be summarized as follows:
- (i) Whether the 1st Respondent and its employees and servants, including the military and police forces of the Republic of Uganda, violated Articles 6(d) and 7(2) of the Treaty.
 - (ii) Whether the 2nd Respondent failed to fulfill his obligations under Articles 29 and 71 of the Treaty.
 - (iii) Costs
98. In answer to both questions, we have found insufficient evidence on which to found a favourable finding in favour of the Applicant. It is not enough to allege a fact, however notorious one may consider it to be, and fail to bring forth credible, authentic, reliable and admissible evidence to support such an allegation. We found the evidence in the Reference, looked at in its totality, to be of such a caliber as not to be reliable in proof of the allegations made in the Reference and we so hold. However, this finding should not be taken to mean

that in appropriate situations and with sufficient evidence, this Court would not have held the Republic of Uganda guilty of breach of the principles of the rule of law and good governance if, in violation of Article 29 of its Constitution and the decision in *Muwanga Kivumbi*, it is found that in cracking down on lawful protestors, disproportionate force is used. As was held in *Samuel Mukira Mohochi* (supra), where the Government of Uganda breached its own laws, that action is sufficient to lead to a conclusion of violation of the Treaty principles aforesaid. Let this Judgment therefore serve to reinforce this Court's consistent approach to ensure that those principles are given life in the conduct of the affairs of Partner States.

99. Regarding costs, although under Rule 111, costs ordinarily follow the event, in the instant case, we consider that the Applicant filed the Reference in the wider interests of the rule of law within the East African Community and to punish it with costs would be a fetter on the exercise of its public-spirited mandate. In the event, let each Party bear its own costs.

L. Final Orders

100. From the foregoing, and in light of our findings above:

- (a) The present Reference is hereby dismissed.
- (b) Each party shall bear its own costs.

It is so ordered.

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First Instance Division

Application No. 9 of 2014
(Arising from Reference No. 10 of 2013)**Union Trade Center Limited (UTC) v The Attorney General of the Republic
of Rwanda**
And
**Succession Makuza Desire Represented by Makuza Jean Fred, Succession
Nkurunziza Gerard Represented by Nkurunziza Janvier and Ngofero
Tharcisse (Interveners)**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, J; & F. Jundu, J
March 29, 2017

*Interveners – Shareholders -Statement of interest - Notice of Motion - Grounds of
application are mandatory- Authority conferred by Powers of Attorney*

Article 40 of the Treaty – Rules: 21(1), 36(2) (d), (e), EACJ Rules of Procedure 2013

The three Applicants sought leave to be enjoined in Reference 10 of 2013 as Interveners claiming that: as shareholders in Union Trade Center Ltd., they were not aware of any resolution of shareholders or its Board authorizing the majority shareholder to file Reference 10 of 2013; that the reference impeded potential investors from investing in UTC Ltd; and that if the Claimant loses the Reference, they as minority shareholders would be liable to pay legal fees and costs; and therefore they should not be condemned unheard. They filed two affidavits in support of their application and annexed two Powers of Attorney.

The Claimant, UTC Ltd opposed the application submitting that: it did not meet the criteria for intervention prescribed in Rule 21 of the Court's Rules; lacked evidentiary support and was merely intended to in delay the reference. Additionally, the results of the case would not affect the Applicants directly as their interests were fully protected and no costs could be imposed on the shareholders. Furthermore, the deponents of the affidavits lacked authority and the annexed Powers of Attorney were undated and did not mandate the Applicants to file this application.

Held

1. Stating grounds of an application in a Notice of Motion is a mandatory requirement under Rule 21(1).
2. While the grounds of the Application were stated, no Statement of the Interveners Interest was furnished and no mention was made of the order in Reference No. 10 of 2013 in respect of which the Applicants sought to intervene. Thus, the Applicants failed to comply with Rule 36(2) (d) and (e).
3. The authority conferred by a power of attorney is within the instrument expressly or by necessary implication. The Powers of Attorney of the 1st and 2nd Applicants authorized their Representatives in matters of the shares held in UTC Ltd. There was no express or implied authorization to represent the 1st and 2nd Applicants

in this specific application. Therefore, the Application was incompetent and therefore struck out this with costs to the Claimant.

Case cited

Edward Bamugye v Tropical Africa Bank Ltd, CAU Civil Appeal No .48 of 2007

RULING

Introduction

1. This Application filed by the above named three Applicants/Interveners (“Applicants”) arises from *Reference No. 10 of 2013* (“the Reference”). It has been instituted, brought and made under Article 40 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rules 21 and 36 of the East African Court of Justice Rules of Procedure 2013 (“the Rules”).
2. Whereas the 3rd Applicant has made the Application himself, the 1st and the 2nd Applicants have purportedly appointed Makuza Jean Fred and Nkurunziza Janvier (“the Representatives”) to represent them in this Application respectively.
3. As to the orders being sought of from this Court, the Applicants in their Notice of Motion prayed as follows:
 - “i) The Applicants herein be granted leave by this Honorable Court to intervene in this Reference in opposition to arguments of the Claimant in so far as they affect the Applicants; and
 - ii) For an order that the costs of and incidental to this Application abide the results of the case.”
4. The said two Representatives for the 1st and 2nd Applicants respectively and the 3rd Applicant have each deponed an Affidavit in support of the Application.

Representation

5. Ms. Molly Rwigamba, Learned Counsel represented the Applicants. Mr. Francis Gimara and Mr. Isaac Bakayana, Learned Counsel represented the Claimant while Mr. Nicholas Ntarugera and Mr. George Karemera, Learned Counsel represented the Respondent.

The Applicants’ Case

6. In their Affidavits, and as elaborated at the hearing, the Applicants contended firstly that as shareholders in UTC Ltd., they are not aware of any resolution of shareholders of UTC Ltd. or its Board in terms of Article 223 of the Company Act 2009 of Rwanda that authorized Mr. Rujugiro Tribert Ayabatwa, the majority shareholder in UTC Ltd. to file the aforesaid Reference or Claim against the Respondent in this Court. Secondly, they further contended that in the event the Claimant loses the Reference, it may be subjected to payment of legal fees and costs which as shareholders of UTC Ltd will affect them. Thirdly, they argued that the Reference or the Claim impedes potential investors from investing in UTC Ltd. Fourthly, if the Reference would be heard, they contended that they will be condemned unheard.

The Claimant’s Case

7. On the other hand, the Claimant vide its Affidavit in Reply deponed by Mr. Rujugiro Tribert Ayabatwa as elaborated at the hearing opposed the Application

vigorously.

8. Firstly, the Claimant contended that the Application falls outside the scope of Article 40 of the Treaty and Rule 35(5) of the Rules as there is lack of evidence on the part of the Applicants opposing or supporting the Respondent's arguments in the Reference save for the bare allegation of lack of any resolution authorizing filing of the Reference, costs implication on the part of the Applicants in case the Claimant loses the Reference and impediment of potential investors from investing in UTC Ltd.
9. Secondly, the Claimant contended further that the Application does not meet the criteria for intervention in that the Applicants have unduly delayed to bring this Application as the Reference has been in Court since 2013 nor will its results affect them directly since the Claimant enjoys a veil of incorporation. In its view, the interests of the Applicants are fully protected in the Respondent's arguments hence the presence of the Applicants is not necessary in the Reference.
10. Thirdly, the Claimant alleged that under the Company Act of Rwanda it is the company, the Claimant herein, not shareholders such as the Applicants herein which is mandated or authorized to sue but a court has power to impose costs on any shareholder who risks taking a company to Court and loses thereof. The Claimant alleged further that the contention of the Applicants of being condemned unheard has no merit because the Reference is not against the shareholders but against the Respondent brought in accordance with the provisions of the Treaty.
11. Fourthly, the Claimant contended that Jean Fred Makuza and Nkurunziza Janvier who deponed Affidavits for the 1st and 2nd Applicants have no authority to file this Application as there is no mention of such authority in the undated Powers of Attorney annexed to their supporting Affidavits. Even the additional or complimentary Power of Attorney dated 25th November, 2016, and annexed to the Affidavit in Rejoinder filed on 28th November, 2016 by the Applicants does not authorize or mandate the said two Representatives to represent the 1st and 2nd Applicants in this Application.
12. Lastly, the Claimant contended that the Affidavits of the Applicants contain deliberate lies in that on one hand it is contended that UTC Ltd. has not been taken over while there is evidence in the same Affidavit showing that the same has been taken over by the Abandoned Property Nyarugenge/UTC.

The Respondent's Case

13. The Respondent on his part had no objection to the Application. This was clear from the Affidavit in Reply deponed by one Kabibi Specioza the Division Manager of the Civil Ligation in the Respondent's Office as well as on what the Respondent stated at the hearing. In his view, in terms of Article 40 of the Treaty and Rule 36(4) and (5) of the Rules, this Court may grant the Application. He disputed the Claimant's arguments on the Powers of Attorney and said that the said Powers of Attorney were dated 3rd September, 2016.

The Applicants' Response

14. In reply to the Claimant, the Applicants firstly contended that this Application is within the scope of Article 40 of the Treaty in that they are only required to

provide evidence in support of the opposing arguments that is the Respondent's case. Secondly, they contended that the Powers of Attorney doned by the Applicants are dated. Thirdly, they furtherer contended that Mr. Rujugiro Tribert Ayabatwa filed the Reference contrary to the Company Act 2009 of Rwanda as no Resolution of shareholders or Board of Directors of UTC Ltd. exists mandating him to file the Reference. They also contended that in terms of Rule 36 (5) of the Rules, they will accept the case as it is at the time of intervention.

15. However, upon being asked to show us compliance in the Application in terms of Rule 36(2) (d) as to which order they are seeking to intervene in the Reference, and to show whether they had provided a statement of interveners' interest as required under Rule 36(2) (e) of the Rules, Ms. Rwigamba did not answer in the affirmative claiming that this was her "first time" so she did not have answers to the said questions. She left the matter to the Court to decide though in her view, she thought that the grounds stated in the Notice of Motion were the same as Statement of Intervenors 'Interest mentioned under Rule 36(2)(e) of the Rules.
16. Upon being asked to explain whether the Powers of Attorney done by the 1st and 2nd Applicants gave mandate or authorized the two above mentioned Representatives to conduct this Application for intervening in *Reference No. 10 of 2013* when there is no specific averment or mention to that effect in the said Powers of Attorney save that they should represent them in the shares or shareholding issues in UTC Ltd., Ms. Rwigamba replied that the said Powers of Attorney under Rwanda law were general in nature which mandated the donee to "follow up everything without boundaries and limits". She further argued that even in the Power of Attorney doned by Makuza Jean Fred dated 25th November, 2016, the matter was not corrected since it was not an issue that was raised by the Claimant in their Reply.

Determination

17. Upon close scrutiny of the pleadings filed by the Parties and having heard the rival arguments of the Parties at the hearing, it dwelt upon us that the competency of this Application in terms of Rule 36(2) (d) and (e) and the Powers of Attorney, allegedly doned by the 1st and 2nd Applicants is in issue. In our considered view, we have to determine and settle the said issue first before considering the merits of this Application if it will be necessary.
18. In their Notice of Motion and at the hearing, the Applicants vide their Learned Counsel Ms. Rwigamba contended that the Application is brought under Article 40 of the Treaty and Rules 21 and 36 of the Rules. Mr. Ntarugera, Learned Counsel for the Respondent did not object to the Application contending that it was properly brought under Article 40 and Rules 36(4) and (5) of the Rules. However, Mr. Bakayana, Learned Counsel for the Claimant opposed the Application contending that it was outside the scope of Article 40 and Rule 36(5) of the Rules. Indeed, we agree that these mentioned provisions provide for how an application for intervention in a pending Reference before this Court should be made and the conditions it should comply with. However, for the purpose of this Ruling we shall examine the provisions in Rule 36(2) (d) and (e) only.
19. At the hearing, the Court asked Ms. Rwigamba as to whether the Applicants had complied with conditions stated in Rule 36(2)(d) and (e) of the Rules which are

mandatory for an application seeking intervention in a reference pending in this Court. We hereby reproduce the said provisions for ease of reference:

“36. (1) An application for leave to intervene under Article 40 of the Treaty and an application for leave to appear as *amicus curiae* shall be by notice of motion.

(2) An application under sub-rule (1) shall contain:

- (a)
- (b)
- (c)
- (d) the order in respect of which the intervener or *amicus curiae* is applying for leave to intervene;
- (e) a statement of the intervener’s or *amicus curiae*’s interest in the result of the case.”

20. The word used in these provisions is “shall” meaning the aforesaid conditions are mandatory to an application seeking intervention in a pending reference before this Court.

21. It was vividly clear to the Court from the response of Ms. Rwigamba at the hearing that the Applicants had not complied with the aforesaid Rule 36(2) (d) and (e) in their Notice of Motion or supporting Affidavits in pursuance of this Application. There is no mention of the Order in *Reference No. 10 of 2013* in respect of which the Applicants are seeking to intervene nor have they furnished or provided their Statement of Interveners’ Interest in the results of the said Reference. Ms. Molly Rwigamba in her futile attempt to save a sinking boat argued that Rule 36(2) (e) had been complied with because grounds for the Application had been stated in the Notice of Motion. We think not.

22. In our considered view, stating grounds of an application in a Notice of Motion is a mandatory condition or requirement under Rule 21(1) of the Rules. It provides as follows:

“21. (1) Subject to sub-rule (4) of this Rule, all applications to the First Instance Division shall be by motion, which shall state the grounds of the application.”

23. Providing “Statement of Intervener’s Interest” is a mandatory, condition or requirement under Rule 36(2) (e). Since an application for intervention is to be made by way of a Notice of Motion under Rule 21(1), it means that the Applicants had to comply with both conditions, that is, stating grounds of the Application as required under Rule 21(1) and furnishing a Statement of Interveners’ Interest as required under Rule 36(2) (e). Therefore, the position of Ms. Rwigamba that stating grounds of the Application under Rule 21(1) sufficed as providing “Statement of Interveners’ Interest” is incorrect. We have carefully looked at the Notice of Motion together with the supporting Affidavits filed by the Applicants in pursuance of this Application and we are satisfied that grounds of the Application as required under Rule 21(1) have been stated but no Statement of the Interveners’ Interest as required under Rule 36(2) (e) has been furnished. We so hold.

24. We now move to the Powers of Attorney doned by the 1st and 2nd Applicants contained in their supporting Affidavits purporting to mandate or authorize Makuza Jean Fred and Nkurunziza Janvier to represent them in this Application

seeking intervention in *Reference No. 10 of 2013* pending in this Court. Mr. Bakayana, Learned Counsel for the Claimant in his submission before this Court strongly disputed such appointments, authorization or mandate emanating from the said Powers of Attorney. He argued that the authority or mandate given to the said two Representatives of the 1st and 2nd Applicants is on issues of shares of the Applicants which they hold in UTC Ltd only. However, Ms. Rwigwamba, Learned Counsel for the Applicants in her response at the hearing submitted that the said Powers of Attorney were general in nature and “without boundaries and limits” hence they authorized the said two Representatives to act in all issues emanating from the shares held by the 1st and 2nd Applicants in UTC Ltd. including representing them in this Application seeking intervention in *Reference No. 10 of 2013* though it is not expressly so stated.

25. We have carefully read the two Powers of Attorney annexed to the Affidavits in support of the Application. As far as the given authorization is concerned, they are similarly worded as follows:

“His is mandated to take all decisions concerning my shares in UTC Ltd and handle any issue as may be deemed to do so by responsibility of shareholder in company including votes, and taking resolutions. He is mandated without boundaries and limits.”

26. It is vividly clear from the aforesaid wording of the said Powers of Attorney that the 1st and 2nd Applicants mandated or authorized their said two Representatives in matters of the shares they hold in UTC Ltd. There is no averment therein express or implied mandating or authorizing the said two Representatives to represent the 1st and 2nd Applicants in this Application seeking intervention in *Reference No. 10 of 2013* pending in this Court. The words “mandated without boundaries and limits” do not confer such authority expressly or by implication contrary to the view held by Ms. Rwigwamba at the hearing. In *Edward Bamugye vs. Tropical Africa Bank Limited, Civil Appeal No .48 of 2007*, the Court of Appeal of Uganda reiterated that, “a power of attorney must be construed strictly” (citing *Fredick Zaabwe Case*) and “the authority conferred by a power of attorney is that which is within the four corners of the instrument either in express terms or by necessary implication”. (citing: *Fridiman’s Law of Agency* at page 66).
27. We have also read the complementary Power of Attorney dated 25th November, 2016 and annexed to the Applicants’ Affidavit in Rejoinder sworn by Nkurunziza Janvier on 28th November, 2016. It only confers the same authority or mandate conferred in the two previous Powers of Attorney that is to represent the said Applicants in matters of the shares they hold in UTC Ltd. It does not confer any authority or mandate whatsoever to represent the said Applicants in this Application seeking intervention in *Reference No. 10 of 2013*.

Disposal

28. In conclusion, in our considered view, having adequately dwelt on shortfalls of this Application, in terms of Rule 36(2)(d) and (e) and the Powers of Attorney done by the 1st and 2nd Applicants as shown in the foregoing paragraphs, we firmly conclude and hold that the Application is seriously and grossly incompetent. It has not complied with Rule 36(2) (d) and (e) of the Rules which ground alone would suffice to strike out this Application. However, as far as

the Powers of Attorney doned by the 1st and 2nd Applicants are concerned, have not expressly or by implication granted any authority or mandate to the above named two Representatives to conduct this Application seeking intervention in *Reference No. 10 of 2013* pending before this Court save to issues or matters of shares they hold in UTC Ltd. Having so concluded, we hereby strike out this Application with costs to the Claimant.

29. We so order.

M. Rwigamba, Counsel for the Applicants
E. Gimara and I. Bakayana for the Claimant

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First Instance Division

Application No. 17 of 2014
(Arising from Ref. No. 2 of 2011)

**Attorney General of the Republic of Uganda v The East African Law Society
&
The Secretary General of the East African Community**

Coram: I. Lenaola, DPJ; F. Ntezilyayo & F. Jundu, JJ
September 30, 2016

Procedure- Totality of evidence to be assessed - Testing authenticity of Electronic Digital Video Disk evidence

Rules: 1(2), 21(1) East African Court of Justice Rules of Procedure, 2013

On 3rd March 2016 the Applicant's Counsel cross-examined Mr. James A. Mwamu on his additional affidavit adduced together with the accompanying Electronic Digital Video Disk (DVD) evidence with the aim of demonstrating that the DVD should not be admitted in evidence.

In the present Application, the Applicant averred that the Respondent's evidence was inadmissible due to defects in the affidavit and that Mr Mwamu was not qualified to depone to any matter in the DVD as he was not in Uganda during the "Walk to Work" events, the subject matter of the Reference. Furthermore, the DVD videos sourced from "You Tube", were heavily edited with a number of scenes skipped; and that the Affidavit contained hearsay evidence and the *jurat* was incurable defective and should be struck out.

The 1st Respondent argued that Mr. Mwamu's Affidavit supporting the electronic DVD evidence qualified as secondary evidence, admissible in law and urged the Court to uphold substantive justice rather than technicalities or "clerical errors" which did not go to the root of the matter.

Held

1. Proving the authenticity of a digital object requires provision of sufficient evidence to showing that the object that has been retrieved is a faithful representation of what it claimed to be the 'original', or a reliable representation of the object that was relied upon by the originator.
2. It was up to the Respondent, to present sufficient evidence to support a finding that the electronic DVD in question was what the deponent claims it to be and the authorship of the DVD. The chain of transmission from the alleged author to the deponent were not given sufficiently to enable the Court drawn a conclusive opinion on the admissibility of the electronic DVD.
3. Given the nature of the case the test of admissibility of the electronic DVD evidence could not conclusively be conducted at this stage of the proceedings. It should be revisited during hearing of *Reference No.2 of 2011* when the Court deals with the totality of the evidence adduced by the Parties, rather than by

taking a piecemeal approach singling out one piece of evidence and determining its probative value in an evidential vacuum where all other evidence to be presented by all parties is not before the Court.

Cases cited

AG of Uganda v The East African Law Society & Anor [2012-2015] EACJLR 396, Appeal No. 1 of 2013

AG of Uganda v The East African Law Society & Anor, EACJ Appeal No. 5 of 2014

RULING

Introduction

1. This Application arose from *Reference No.2 of 2011* and has been brought under Rules 1(2) and 21(1) of the East African Court of Justice Rules of Procedure, 2013 (“The Rules”).
2. The Applicant is seeking the following Orders from this Court: -
 - (a) This Honourable Court be pleased to conduct a *voir Dire* in respect of admissibility of the Affidavit of Mr. James Aggrey Mwamu and the Electronic Digital Video Disk (DVD) evidence submitted therein filed on the 4th day of March, 2013; and
 - (b) This Honourable Court be pleased to find that the said Affidavit and electronic DVD evidence submitted by James Aggrey Mwamu is inadmissible.
3. The Application is supported by the Affidavits deponed by Mr. Denis Bireije and Mr. Sam Rogers Kambere, the Commissioner for Civil Litigation and Information Scientist, respectively, in the Ministry of Justice and Constitutional Affairs of the Republic of Uganda.
4. At the hearing, the Applicant was represented by Mr. Phillip Mwaka (Principal State Attorney), Ms. Charity Nabasa (State Attorney) and Ms. Sandra Mwesige (State Attorney) all of them from the Applicant’s Chambers. The 1st Respondent was represented by Mr. Richard Onsongo and Mr. Humphrey Mtuy, learned Counsel while the 2nd Respondent was represented by Mr. Stephen Agaba, Principal Legal Officer of the East African Community.
5. At this juncture, it is important to mention that this Court (“The First Instance Division) had an occasion previously to deal with this Application and had struck it out on 13th September, 2014. However, the Applicant vide *Appeal No. 5 of 2014* successfully appealed to the Appellate Division of this Court which set aside the said Order and restored the Application before remitting it back to this Court “for hearing and determination on merits” as we shall later on explain in detail.

The Applicant’s case

6. The Applicant, in the supporting Affidavit, Submissions and during oral hearing moved this Court to conduct a *voire dire* in respect of the Affidavit of Mr. James Aggrey Mwamu and the Electronic Digital Video Disk (DVD) evidence filed by the 1st Respondent on 4th day of March, 2013 in support of *Reference No.2 of 2011*. The Applicant by the present Application also prays to this Court to find that the said Affidavit deponed by Mr. James Aggrey Mwamu and the electronic DVD evidence therein are inadmissible.
7. The Applicant, in the Application and supporting Affidavits thereto, has raised a

number of defects or reasons, which were expounded on in his Submissions and during the hearing, in a bid to show that the said Affidavit of Mr. James Aggrey Mwamu and the electronic DVD evidence are inadmissible.

8. At the hearing of the Application aforesaid, the Applicant, through its learned Counsel, Mr. Phillip Mwaka, sought and was granted leave to cross-examine Mr. James Aggrey Mwamu, the deponent of the alleged contested Affidavit which also had the Electronic DVD evidence as an annexure thereto. The purpose of the said cross-examination was to show that the said Mr. James Aggrey Mwamu had admitted alleged defects raised by the Applicant in its pleadings against the said Affidavit and the said electronic DVD evidence.
9. In submissions after the said cross-examination, the Applicant firstly, asserted that the said electronic DVD allegedly shows recordings of the events that took place around Kampala, Bwaise and Masaka areas on 10th, 22nd and 20th April, 2011 during the now famous “Walk-to-Work” demonstrations in Uganda. However, the Applicant argued that Mr. James Aggrey Mwamu, the deponent of the alleged Affidavit, was and is not qualified to depone to any matter in the DVD as he was not in Uganda during the said events as was evident from a perusal of his passport nor was he the author of the DVD neither did he meet one Julius Ssenkadwa, the alleged author of the said electronic DVD, or one Ms. Deborah Gasana, who allegedly transcribed the said DVD. It is also contended that Mr. James Aggrey Mwamu admitted in cross-examination that he obtained the alleged DVD from one Anna Abeja of the Uganda Law Society who was not the author of the DVD.
10. Secondly, the Applicant further asserted that the said DVD does not establish the nature of the device used in recording it and the chain of handling the same nor the storage means of the same. It is further alleged that the DVD is not in original form but contains incomplete chips which do not reveal the entire context of the recordings and cannot be verified as to its authenticity, source and content.
11. Thirdly, the Applicant has contended that the alleged DVD is comprised of videos sourced from “You Tube” which have been heavily edited with a number of scenes skipped.
12. Fourthly, the Applicant has made the submission that the Affidavit of Mr. James Aggrey Mwamu does not establish a foundation for adducing the DVD evidence and falls short of the required standards for such electronic evidence and it is his further submission that such evidence is hearsay evidence which this Court should not admit or act upon.
13. The Applicant in his further submission and during the hearing asserted that in principle, electronic evidence is admissible and he cited various provisions of Law relating to electronic transactions and evidence law in Uganda, Kenya and Tanzania, namely Sections 63 and 106 B(1) & (4) of Kenya’s Evidence Act, Cap. 80, Revised Edition (2010); Sections 59-60 of Uganda’s Evidence Act, Cap. 6 and Section 8 of the Uganda’s Electronic Transactions Act No 8 of 2011; Sections 18-20 of Tanzania’s Electronic Transactions Act, 2015 and Section 62 of the Tanzania’s Evidence Act. Reference was also made to various judicial authorities, to wit, *US vs. Briscoe*, 896 f. 2d 1476 at page 1494-95 (7th Cir 1990), *Lorraine Vs. Markel America Insurance Co.* 2007 WL 13000739 (D.MD May 4, 2007). Based on the

said provisions of law and Judicial authorities, the Applicant has strongly argued that the Affidavit of Mr. James Aggrey Mwamu and the electronic DVD evidence therein do not qualify as primary or secondary evidence and consequently are inadmissible. He also contended that the said evidence is hearsay evidence and that the said Affidavit of Mr. James Aggrey Mwamu together with its *jurat* clause therein are incurably defective and ought to be struck out at this stage of the proceedings.

The 1st Respondent's case

14. The 1st Respondent in its response, Submissions and during the hearing maintained that in principle, electronic evidence is admissible. Referring to various provisions of Law related to electronic transactions and evidence law in Uganda, Kenya and Tanzania (i.e. Sections 5 and 8 of the Electronic Transactions Act 2011 of Uganda, Sections 64 of the Evidence Act (Cap. 6 of the Laws of Uganda) and Sections 68(1)(a)(ii) and 106(B) of the Evidence Act (Cap. 80 of the Laws of Kenya) and citing various judicial authorities, to wit, *County Assembly of Kisumu & 2 Others Vs. Kisumu County Assembly Service Board & 6 Others [2015] eKLR; US Vs. Young Bros, INC 728 F, 2d 682, 693-94 (5th Cir, 1984); MacDonnell Vs. Evans, (1852) common pleas 21 L.J.P 141; Aguimatang Vs. California State Lottery; S. Pratap Singh Vs. State of Punjab, AIR 1964 SC 72; Kirenga Vs. Uganda [1969] E.A.C.A. 562; REG. V. Raojibhai Girdharbhai Patel and Another (1956), 23 E.A.C.A. 536, it argued that the Affidavit of Mr. James Aggrey Mwamu and the electronic DVD evidence qualify as secondary evidence hence admissible in Law.*
15. As regards the allegations that the Affidavit of Mr. James Aggrey Mwamu together with its *jurat* clause are incurably defective, the 1st Respondent called upon this Court to uphold substantive justice rather than technicalities especially where mere “clerical errors” are in issue or in case of omissions which do not go to the root of the matter before the Court.
16. The 1st Respondent has therefore called upon this Court to dismiss the Applicant's Application with costs and admit the impugned DVD evidence and to allow the main Reference to proceed to its full hearing and substantive determination.

The 2nd Respondent's case

17. The 2nd Respondent chose not to participate in the present Application at all.

Court's Determination

18. We have carefully considered the pleadings, submissions and the rival arguments of the Applicant and the 1st Respondent as advanced during the hearing of the Application. We have also considered and taken into account what transpired during the cross-examination of Mr. James Aggrey Mwamu in pursuance of the requested *Voir Dire* by the Applicant.
19. It is worth recalling that the two issues for consideration in this Application are: (1) whether Mr. James Aggrey Mwamu's Affidavit and the accompanying DVD submitted on 4th March 2013 are admissible in evidence and (2) whether the *jurat* page of Mr. Mwamu's Affidavit is defective and that the whole Affidavit and annexures to it should be struck off.

20. In addressing those two issues, we had earlier mentioned elsewhere above, that this Court had previously dealt with this Application and after considering it, proceeded to strike it out. The Applicant vide *Appeal No. 5 of 2014* successfully appealed to the Appellate Division of this Court as shown in its Judgment dated 15th April, 2015. The Appellate Division had also dealt with the issue of the admissibility of the DVD evidence in *Appeal No. 1 of 2013* delivered on 16th January, 2015. In the two decisions, guidance and directions were given to this Division on the way to deal with this Application. In fact, in its Judgment in *Appeal No. 5 of 2014*, the Appellate Division of this Court directed as follows:
- “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*.”
21. In line with the foregoing, a hearing was held on 3rd March 2016 whereby the Applicant’s Counsel cross-examined Mr. James Aggrey Mwamu on his additional affidavit together with the accompanying DVD evidence in an aim to demonstrate that the latter should not be admitted in evidence. The same contention was presented by the Applicant and strongly opposed by the 1st Respondent, on 30th June 2016 when parties came for highlighting of their submissions in respect of the present Application.
22. As stated elsewhere above, the Applicant has urged the Court to determine that the electronic DVD is not admissible in evidence because it does not meet the standards for presentation of electronic evidence. In that regard, his main argument is that for electronic evidence to be admitted in evidence, there must be a degree of certainty that the evidence being presented is authentic and was handled in such a way that it has not compromised the integrity of its content.
23. It is indeed admitted that, given the nature of electronic evidence which is subject to manipulation, whenever the admissibility of electronic evidence is called into question, one important requirement is to authenticate the digital evidence. Hence the statement that “to a certain extent, the technical focus of proving the authenticity of a digital object is on having checks and balances in place to demonstrate the history of how the data has been managed, which leads to the assertion that the data has not been modified, replaced, and corrupted and must, therefore, be original. (...) Proving the authenticity of a digital object means providing sufficient evidence to convince the adjudicator that the object that has been retrieved is faithful representation of what it claimed to be the ‘original’, or a reliable representation of the object that was relied upon by the originator.” (See Mason, Stephen et al., *Electronic Evidence: Disclosure, Discovery and Admissibility*, Butterworths, 2007, p. 85).
24. Considering the above in the context of the present Application, it is up to the Party offering the electronic evidence, in this case the Respondent, to present

sufficient evidence to support a finding that the electronic DVD in question is what the deponent claims it to be. In his pleadings and submissions, the Applicant raised questions as regards the authorship of the electronic DVD, the chain of transmission from the alleged author to the deponent, Mr. James Aggrey Mwamu, whether the electronic DVD was certified by one Deborah Gasana, etc. It is our view that all these questions were not given sufficient answers that can enable the Court have a conclusive opinion on the admissibility of the electronic DVD as evidence in the Reference. We are saying so bearing in mind that one important aspect of the authentication process of electronic evidence, that is the certification, was hotly disputed. No evidence was adduced to show that the exhibit was what it was claimed to be. This may require for example the testimony of the person who allegedly certified the electronic DVD or to adduce any other relevant evidence, but this was not done.

25. In light of the foregoing and given the nature of the case before us, we find that the test of admissibility of the electronic DVD evidence cannot conclusively be conducted at this stage of the proceedings. We are of the view that this matter should properly be revisited during hearing of the main Reference itself when the Court deals with the totality of the evidence adduced by the Parties before it, rather than by taking a piecemeal approach by singling out one piece of evidence and determining its probative value in an evidential vacuum where all other evidence to be presented by all parties is not before the Court. This finding will not and should not cause any prejudice to the Applicant as his arguments on evidential foundations for adducing the digital evidence into legal proceedings, accuracy, authenticity, integrity, value of the evidence, etc. can still be marshaled and taken up at that time.
26. In stating so, we are alive to the given great effort by the Applicant's Counsel in the *voir dire* or simply the cross-examination of Mr. James Aggrey Mwamu in relation to the various alleged shortcomings and alleged incurable defectiveness of the Affidavit of Mr. James Aggrey Mwamu and the accompanying electronic DVD evidence. Indeed, in some instances, Mr. James Aggrey Mwamu admitted to some of them which are matters now on record. However, as stated above, these matters, along with other alleged inconsistencies and conflicting inferences regarding the authenticity of the electronic DVD evidence will be addressed in the determination of the merits of the main Reference. That also includes the issue of the *jurat* page of Mr. Mwamu's Affidavit which is related to the truthfulness of his evidence in totality.
27. We so hold

Disposal

28. In view of our findings above, we make the following orders:
- (1) Since Prayer (a) was granted by the *voir dire* proceedings being conducted on 3rd March 2016, the same is now moot.
 - (2) Prayer (b) cannot be granted at this stage as the issue of admissibility of the DVD evidence will be dealt with when the Court assesses the totality of all evidence to be presented in *Reference No.2 of 2011* and its probative value in the determination of the said Reference.
 - (3) Costs shall abide the outcome of the Reference aforesaid.

It is so ordered.

P. Mwaka, C. Nabasa and S. Mwesige Counsel for the Applicant

R. Onsongo & H. Mtuy for 1st Respondent

S. Agaba for 2nd Respondent

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First Instance Division

Reference No. 6 of 2014

**Human Rights Awareness & Promotion Forum (HRAPF) v The Attorney
General of Uganda**

And

The Secretariat of the Joint United Nations Program on HIV/AIDS

Coram: M. Mugenyi, PJ; F. Ntezilyayo & F. Jundu, JJ
September 27, 2016

Amended Reference - Cause of action limited - Doctrine of mootness - Live controversy - Whether the matter was justiciable – Degree of general public importance established by a large section of the public

Articles: 1(2), 6(d), 7(2), 8(1) (c), 30(1), 48, 50 of the Treaty - Rules: 24(1), (4) EACJ Court Rules of Procedure, 2013 -Sections: 5(1), 7, 13(1), (2) Anti-Homosexuality Act No.4 of 2014, Uganda (Repealed)

On 10th March 2014 the Anti-Homosexuality Act No.4 of 2014, was enacted by the Parliament of the Republic of Uganda, prohibiting any form of sexual relations between persons of the same sex. On 23rd April 2014 the Applicant filed the present Reference challenging certain provisions of the Act alleging they violated Articles 6(d),7(2) and 8(1) (c) of the Treaty as they abrogated the rights of sexual minorities, persons living with HIV/AIDS and persons with disabilities.

On 1st August, 2014 before the Reference was determined, the Constitutional Court of Uganda struck down the Act No 4 holding that it was unconstitutional, having been passed without the requisite quorum in Parliament. Consequently, the Applicant amended the Reference contending that notwithstanding the nullification of the Act, certain provisions namely: sections 5(1), 7 and 13(1) and (2) violated Articles 6(d), 7(2) and 8(1) (c) of the Treaty as they *inter alia*: promoted impunity, homophobia and stigma; exonerated victims of homosexuality from criminal prosecution for actions taken in self-defence; and criminalised the aiding, abetting, counselling, procuring and promotion of homosexuality. The sections created broad offences and impeded access to HIV-related and other health services thus contravening the rule of law social justice and the standards of human rights guaranteed in the Treaty. The rights of sexual minorities, persons living with HIV/AIDS, persons with disabilities; including their rights to privacy; dignity; equality before the law; fair trial; freedom from cruel, inhuman and degrading punishment or treatment; freedoms of expression, ^{thought} and conscience, assembly, association and access to health care.

The Respondent contested the justiciability of the Amended Reference stating: the Court had no jurisdiction to consider human rights issues or to interpret international treaties and the Constitution of Uganda. Furthermore, the impugned provisions of the Act did not violate the Treaty, the African Charter on Human and Peoples Rights or any human rights and were valid under the Constitution of Uganda; and that the Reference was overtaken by events and was no longer moot

following the repeal of the impugned Act.

The Amicus Curiae submitted inter alia that: criminalising homosexual relations and activities of persons aiding and working with individuals and organizations in relation to homosexuality, violate international human rights standards and ignore the principles of good governance, social justice and human rights guaranteed in the Treaty.

Held:

1. The Applicant did not obtain the Respondent's consent or the leave of Court to introduce a cause of action premised on the ignominies allegedly suffered by homosexuals during the duration of the impugned Act. Although the affidavits in support of the original Reference alluded to the incidence of the ignominies, the original Reference merely challenged certain provisions of the Act alleging they violated the Treaty. Thus the said statement concerning enactment was struck out. However, the adaptations in the Amended Reference with regard to 'past' rather than 'present' tense were upheld.
2. The Amended Reference challenged the effect of Act No.4 of 2014 "between its enactment on 20th December 2013 and its repeal on 1st August 2014 by the Constitutional Court of Uganda". Thus the cause of action in the Amended Reference was limited to the: compliance or lack thereof of sections 5, 7 and 13 of the impugned Act with Articles 6(d) and 7(2) of the Treaty; the legality of these selected sections of the nullified Act.
3. The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. A court of law will not adjudicate hypothetical questions or engage its efforts in applying a specific law to a set of speculative facts.
4. Since Act No 4 was struck down in its entirety by the Constitutional Court of Uganda, the *raison d'être* of the Reference disappeared. Thus the substratum of the original Reference or live controversy could not be resurrected by the Amended Reference.
5. A matter would only be of general public importance where it is important to a sufficiently large section of the public. Further, even where such matter is adjudged to be of general public importance that would not necessarily enjoin courts to resolve it in the public interest. While the Affidavits on record highlighted the ignominies that were allegedly suffered by some members of the Uganda population during the period the Act was in force, they did not sufficiently establish the degree of public importance attached to the practice of homosexuality in Uganda as would warrant the Court to adjudicate the merits of the Amended Reference. Consequently, the Court did not consider the merits of the Amended Reference and it was dismissed.

Cases cited

Alcon International Ltd v Standard Chartered Bank & Ors, [2012-2015] EACJLR 430, Appeal No. 3 of 2013
Joseph Borowski v Attorney General of Canada (1989) 1 SCR 342
Joseph O. Wengi v Attorney General of Uganda (2007) 600 KaLR
Legal Brains Trust Ltd v Attorney General of Uganda, [2012-2015] EACJLR 237, Appeal No.4 of 2012
R (On the application of Corner House Research) v Secretary of State for Trade and Industry (2005) 4 All ER 1
The Queen on the Application of Crompton v Wiltshire Primary Care Trust (2008) ECWA Civ.749

JUDGMENT

Introduction

1. This Reference was brought under Articles 6(d), 7(2), 8(1) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as ‘the Treaty’) and Rules 24(1)-(4) of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as ‘the Rules’)
2. The Applicant, Human Rights Awareness and promotion Forum (HRAPF) is a Human Rights Organisation that promotes non-discrimination and equal access to justice for marginalised groups in Uganda.
3. The Respondent is the Attorney General of the Republic of Uganda, and is sued as the legal representative of the Government of the Republic of Uganda.
4. Pursuant to Article 40 of the Treaty and Rule 36 of the Court’s Rules, the Secretariat of the Joint United Nations Programme on HIV/AIDS did successfully apply to be joined as *amicus curiae* in this Reference.
5. At the trial the Applicant was represented by Mr. Ladislaus Rwakafuuzi and Ms Frida Mutesi; the Respondent was represented by Ms Patricia Mutesi, and Mr Donald Deya represented the *Amicus Curiae*.

Background

6. An Anti-Homosexuality Act (hereinafter referred to as ‘the Act’) was enacted by the Parliament of the Republic of Uganda on 10th March 2014, the essence of which was ‘to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion of such relations and to provide for other related matters.’ (See long title to the said law)
7. Aggrieved by the Act for allegedly abrogating the rights of sexual minorities, persons living with HIV/AIDS and persons with disabilities, on 23rd April 2013 the Applicant instituted the present Reference in this Court challenging various provisions of the Act that it considered a violation to Articles 6(d), 7(2), 8 (1) (c) of the Treaty.
8. On 1st August, 2014 the Constitutional Court of Uganda struck down the Act for being unconstitutional, having been passed without the requisite quorum in Parliament. Consequently, the Applicant amended the Reference and, in effect, restricted its challenge of the Act to selected provisions thereof.

The Applicant’s Case

9. The Applicant contends that certain provisions of the Act were, between its enactment on 10th March 2014 and its repeal on 1st August, 2014, in violation of Articles 6 (d), 7 (2), and 8 (1) (c) of the Treaty. In this regard, the Applicant postulates case that, the nullification of the Act notwithstanding, the ‘act’ of enacting a law with sections 5(1), 7 and 13 (1) and (2); which provisions allegedly promoted impunity, homophobia and stigma, was contrary to the dictates of rule of law, social justice and universally accepted standards of human rights as postulated in Articles 6 (d) and 7(2) of the Treaty.
10. The Applicant specifically took issue with section 5(1) of the Act for exonerating purported victims of homosexuality from criminal prosecution for actions taken in self defence. It did also challenge sections 7 and 13 (1) and (2) for ‘criminalising’ the aiding, abetting, counselling, procuring and promotion of homosexuality as

well as creating offences that were overly broad, penalizing legitimate debate hampering professional counsel and impeding access to HIV-related and other health services.

11. It was the Applicant's contention that the foregoing provisions contravened the following rights of sexual minorities, persons living with HIV/AIDS and persons with disabilities: the right to equality before the law; the right to privacy; the right to fair trial; the right to dignity and freedoms of expression, thought and conscience, assembly, association and civic participation; and the right of access to healthcare.

The Respondent's Case

12. The Respondent countered the justiciability of the Amended Reference on three (3) grounds. First, it is the Respondent's contention that the Reference is not justiciable before this Court given that it would require the Court to consider human rights issues, and interpret international treaties, as well as the Constitution of Uganda, a jurisdiction that the Court is not clothed with.
13. Related to the foregoing position, the Respondent contends that the impugned provisions of the Act do not violate the Treaty, African Charter on Human and Peoples Rights or any human rights; but rather, were valid under the Constitution of Uganda.
14. Finally, the Respondent maintains that the Reference was overtaken by events and rendered moot following the repeal of the impugned Act by a competent Court.

Amicus Curiae

15. In a nutshell, the Amicus Brief can be summed up as follows:
 - a. The Partner States of the Community have committed themselves to international human rights and international public health standards in their joint and respective responses to the HIV epidemic.
 - b. Laws criminalising homosexual relations, as well as the activities of persons purportedly aiding, abetting and working with individuals and organizations in relation to homosexuality, violate international human rights standards. Such laws ignore the principles of good governance, social justice and human rights stated in the Treaty.
 - c. Laws criminalizing homosexual relations, as well as the activities of persons purportedly aiding, abetting and working with individuals and organizations in relation to homosexuality, ignore the commitment of the Partner States to advance effective responses to the HIV epidemic that are grounded in public health and the protection of human rights for all. Evidence shows that such criminal laws hinder an effective public health response to the HIV epidemic by increasing vulnerability to HIV and comprising access to HIV services for a key section of the population.
 - d. Homosexual men and transgender people represent a significant proportion of people living with or at risk of HIV. These populations are disproportionately vulnerable to HIV infection, in part, because of the legal and social environments in which they live. Homophobia, transphobia, discrimination, violence and laws criminalising homosexual relations, as

- well as other forms of overly broad legislation targeting individuals and organizations in relation to homosexuality, continue to constitute serious barriers preventing the persons affected from accessing HIV services and participating in national and regional responses to the epidemic.
- e. Effective, evidence-based HIV programs targeting homosexual males and transgender people are based on three strategic objectives:
 - to improve their health and human rights;
 - to strengthen and promote the evidence base for responding effectively to HIV vulnerability and impact; and
 - to strengthen capacity and promote partnerships to ensure more far-reaching and effective HIV interventions.
 - f. UNAIDS and others have consistently stated that the realization of these strategic objectives requires the creation of enabling social, legal and policy environments where high risk populations can participate in the design and implementation of effective HIV prevention and treatment programs. This entails: the decriminalisation of homosexual relations between consenting adults, the elimination of other punitive laws and practise against people who have homosexual relations and transgender people, and the enforcement of laws protecting these sections of the population from discrimination and violence, and guaranteeing their right to access health and other services.

Issues for Determination

16. The parties framed the following issues for determination:
 - a. Whether this matter is justiciable in light of the fact that Act No. 4 of 2014 was declared to be void by a competent court of a Partner State.
 - b. Whether the Reference is justiciable in as far it requires the Court to adjudicate and determine a human right dispute, to interpret Uganda's obligations under international treaties, and to interpret Uganda's Constitution, which jurisdiction it is not vested with.
 - c. Whether Sections 5(1), 7 and 13 (1) & (2) of Act No. 4 of 2014 were in violation of Articles 6(d) and 7(2) of the Treaty.
 - d. What reliefs are available to the parties, if any.

Court's Determination

17. Before we proceed to a determination of the issues framed herein, we propose to dispose of the question of the irregular amendment of the Reference, as raised by the Respondent in Submissions.
- 18 The gist of the Respondent's objection is that, whereas it did consent to an amendment to restrict the Reference to subparagraphs 3(f) and (g) of the original Reference, the Applicant did not secure its consent or the leave of Court as required by Rules 48 and 50 of the Court's Rules of Procedure to introduce a cause of action premised on the ignominies allegedly suffered by homosexuals during the duration of the impugned Act. In that regard, the Applicant contests the purported amendment of the Reference to cater for the effect of the Act during its short life span, as well as the facts alleged in paragraph 1.1(e) (iv) of the Applicant's Submissions.

19. The issue of the ambit of the Applicant's amendment to the Reference was first raised by learned Counsel for the Respondent, Ms. Patricia Mutesi, on 6th November 2014. In response, Mr. Rwakafuuzi did confirm that the nature of the amendment sought was to strike out most of the Reference and restrict it to only two or three challenges to the Act. It appears to have been on that basis that Ms Mutesi conceded to the amendment sought.
20. On 7th January 2015, the Applicant filed an amended Reference in which he did delete most of paragraph 3 of the original Reference, only saving sub-paragraphs 3 (f), (g), (h) and (i) thereof. However, the Applicant did also introduce to those provisions a challenge specifically premised on the effect of Act 'between its enactment on 20th December 2013 and its repeal on 1st August 2014 by the Constitutional Court of Uganda'.
21. Be that as it may, on 22nd April 2015, when the issue was brought to its attention, with the guidance of the Court, Mr. Kosia Kasibayo (then appearing for the Respondent) did seem to suggest that the amended Reference did not affect this client's Defence. We now perceive Ms. Mutesi's objection to be that, although the Amended Reference did not affect the Respondent's Defence as stated by Mr. Kasibayo, the specific introduction of the above statement without either the leave of Court or opposite Party's consent was irregular and in contravention of Rules 48 and 50 of the Court's Rules.
22. We have carefully scrutinized the original and Amended References in this matter. We find that there was no reference whatsoever in the original Reference to the disputed averment within the context prevailing at the time. Had the Applicant sought to merely adapt the Reference to the ensuing repeal of the law, as has been argued herein, there should have been a basis for such adaptation in the first place. There would have been an averment making reference to the effect of the Act 'since its enactment', that would have been contextualized to factor in the nullification of the Act. This is not the case herein. Although the affidavits in support of the original Reference did allude to the incidence of the ignominies mentioned by the Applicant in Submissions, the said Reference had merely challenged stated provisions of the Act to the extent that they allegedly violated the Treaty.
23. We do, therefore, strikeout the statement 'between its enactment on 20th December 2013 and its repeal on 1st August 2014 by the Constitutional Court of Uganda ' in paragraphs 3(f), (g), (h) and (i) of the amended Reference, as well as in the Declarations sought in respect thereof. However, we do uphold the necessary adaptations highlighted in the Amended Reference with regard to 'past' rather than 'present' tense. We so hold.
24. It would appear from the Respondent's Submissions that the second issue herein above was abandoned following the consensual amendment of the Reference to delete other pleadings in paragraph 3 of the original Reference, save for sub-paragraphs 3(f) and (g). We do, therefore, propose to determine the Reference on that basis and shall, therefore, consider the points of law raised in the first issue above prior to a consideration of the substantive legal questions presented in the third and fourth issues.

Issue No 1: Whether or not the Reference is justiciable in light of the fact that

Act No. 4 of 2014 was declared to be void by a competent court of a Partner State

25. It was a well conceded fact in the Scheduling Conference Notes dated 22nd April 2015 that the Anti-Homosexuality Act was struck down by the Constitutional Court of Uganda on 15th August 2014. Nonetheless, we understood it to be the contention of the Applicant that, the said nullification notwithstanding, the ‘act’ of enacting the Act with provisions that purportedly violate the rights of stated sections of the Ugandan Community contravened Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty and thus presented justiciable matters before this Court. Stated differently, the Applicant postulates that the nullification of the Act did negate its cause of action under the Treaty.

26. The Applicant’s premised for this position was tri-fold. First it was submitted therefore that in so far as the Interpretation Section of the Treaty did in Article 1(2) define a law or protocol to include one that had been repealed, suggested that a repeal law could be challenged before this Court under Article 30 (1) of the Treaty. Learned Counsel for the Applicant argued that the consequence of actions that ensued while a repealed law was still in force, as well as the continue effects of such actions after its repeal would be in contention, hence the need for the Court to inquire into a repealed a repeal law. Mr. Rwakafuzi did also make the curious argument that a domestic law of a Partner State that violates the Treaty had the effect of amending the Treaty contrary to Article 150 thereof that provides for the procedure of amendment, and such law should be struck down.

27. The second premise for the Applicant’s endorsement of the justiciability of the Amended Reference was rooted in section 13(2) of Uganda’s Interpretation Act, which provides as follows:

“Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not:-

- a.....
- b. affect the previous operations of any enactment so repealed or anything duly done or suffered under any enactments or repealed,
- c....., or
- d.Affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed.”

28. Mr. Rwakafuzi argued that the subsequent repeal of the Act could not negate the actions undertaken there under during its duration and, therefore, whereas the victims of the said actions could not claim damages, this Court should not shun the Amended Reference and the Declarations sought there under in so far as the grievances suffered under the Act had not been extinguished. On that premise, learned Counsel maintained that the Amended Reference was a live dispute.

29 .Citing the definition of a ‘moot case’ advanced in Black’s Law Dictionary and distinguishing the Amended Reference from the decisions in Justice Okumu Wengi vs Attorney General of Uganda (2007) 600 KaLR and Joseph Borowski vs. Attorney General of Canada (1989) 1SCR 342, we understood Mr. Rwakafuzi to reiterate his earlier argument that the grievances suffered during the duration of the Act presented a live dispute for determination and, therefore, the Reference was not moot. He opined that the issue before this Court was whether

or not a law that permitted indignities such as harassment, arrest and eviction on account of their homosexuality was inconsonance with Article 6 (d) and 7 (2) of the Treaty.

30. For ease of reference, were produce the legal authorities cited by learned Counsel above. *Black's Law Dictionary, 9th Edition, p .1099* defines a 'moot case 'as' a matter in which a controversy no longer exists; a case that presents only an abstract Question that does not arise from existing facts or rights.'
31. In *Justice Okumu Wengi vs Attorney General (supra)*, a judge who had been recommended for investigation by the Judicial Service Commission successfully requested the appointing authority to be allowed to retire in lieu thereof. He subsequently challenged the recommendation for his investigation in court. It was held:-
- “Courts of law do not decide cases where no live dispute exists between the parties. Courts do not decide cases or issue orders for academic purposes only. Courts cannot issue orders where the issues in dispute have been removed or merely no longer exist. It is now a mere moot case.”
32. The court in the *Justice Okumu Wengi case* relied on the reasoning in the *Joseph Borowski* case, in which a constitutional provision that had been challenged by a litigant in a lower court had been struck down by the Supreme Court before the matter went on Appeal. On Appeal, the Supreme Court dismissed the constitutional challenge for being 'moot'.
33. Finally, the Applicant did postulate that the causes of action envisaged under Articles 27 and 30 of the Treaty were rooted in public rights; such rights, often exercised in the public interest, include the right of a Partner State's resident to access the Court to enforce the provisions of the Treaty; and the Amended Reference sought to resolve the legality of a municipal law that permitted the ignominies of arbitrary arrests and evictions.
34. Mr. Rwakafuuzi urged the Court to find that a question of considerable importance was raised by the Amended Reference that necessitated recourse to the merits thereof, even if the dispute was indeed found to be moot. In that regard, he referred us to the 'public interest exception' to determination of moot cases as encapsulated in *Black's Law Dictionary, Ibid. p 1350*. It reads:
- “Public interest exception is the principle that an appellate court may consider and decide a moot case - although such decisions are generally prohibited - if (1) the case involves a question of considerable public importance, (2) the question is likely to arise in future, (3) the question has evaded appellate review.”
35. Learned Counsel cited the following parameters a stated in *The Queen on the Application of Crompton vs. Wiltshire Primary Care Trust (2008) ECWA Civ. 749* to explain what a question of general public importance would entail:
- “(i) that the matter involves the elucidation of public law by higher courts; in addition to the interest of the parties.
- (ii) that the matter is of general importance to a general class...”
36. Mr. Rwakafuuzi further argued that in so far as the Constitutional Court of Uganda did not address the merits of the matter that was before it, but rather struck down the impugned Act on account of a procedural anomaly in its

enactment, the merits of that matter were likely to arise in future. He did also allude to the fact that a Notice of Appeal having been filed by the Respondent in that matter as an indication that the merits thereof had not been conclusively resolved. Furthermore, learned Counsel submitted that the matter had not been subjected to appellate review. Consequently, Mr. Rwakafuuzi argued that the Amended Reference presented matters of public interest, which should be subjected to judicial determination, even if the said Reference was found to be moot.

37. Conversely, it was argued for the Respondent that the Amended Reference was moot and academic in so far as the challenge to the legality of the Anti-Homosexuality Act had been rendered redundant following the nullification of the Act. Adopting the approach of this Court's Appellate Division in *Alcon International Ltd vs Standard Chartered Bank & 2 Others EACJ Appeal No. 3 of 2013 and Legal Brains Trust Ltd vs Attorney General of Uganda EACJ Appeal No. 4 of 2012*, Ms. Mutesi argued that following the nullification of the Anti-Homosexuality Act in 2014, the substratum of the present Reference had been removed and there was no live controversy between the Parties.
38. For ease of reference, we reproduce the pertinent decision in the *Legal Brains Trust* case (*supra*):

“In this regard, it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions - namely, those concerning which no real dispute exists. A court will not hear case in the abstract, or one which is purely academic or speculative in nature - about which there exists no underlying facts in contention..... Absent from such a dispute, the resulting exercise would be an abuse of the court's process.”
39. Ms. Mutesi also sought to rebut the Applicant's Submissions on this issue with the following counter-arguments. On the Applicant's interpretation of Article 1 (2) viz Article 30 (1), we understood Ms. Mutesi to argue that Article 1 (2) had to be construed in good faith and in accordance with the ordinary meaning of terms, therefore the ordinary meaning of Article 30(1) of the Treaty was that only a validly existing Act could be challenged before this Court.
40. On the question of acts allegedly done under the authority and during the duration of the impugned Act, it was Ms. Mutesi's contention that no such grievances were averred in the pleadings, and neither the original nor Amended Reference challenged the legality of any acts meted out under the Act as a cause of action. On the contrary, the Reference was restricted to challenging the validity of specific provisions of the impugned Act for violating the Treaty. Ms. Mutesi maintained that, whereas Article 30(1) recognized challenges to Acts or laws, as well as challenges to actions undertaken there under; those were to separate causes of action and should have both been pleaded by the Applicant.
41. Finally, Ms. Mutesi did address the public interest exceptions to the general rule that courts should not entertain moot disputes as advanced in *Black's Law Dictionary*. Learned Counsel relied upon extracts of the decision in *Joseph Borowski (supra)* to fortify her argument that this Court's determination of a nullified law would not be in the public interest. On the contrary, it would impede upon Partner States' legislative prerogative, yet the Court would have the opportunity to inquire in to the validity of any laws enacted by them. We

reproduce the pertinent extract for ease of reference:

“The mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient...Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law.... To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.”

42. On the question of the likelihood of the subject matter of the Amended Reference arising in future, it was Ms. Mutesi’s submission that this was a question of fact that had not been sufficiently proved by the Applicant. She further argued that it would be speculative for this court to assume that an Appeal lodged by the Respondent in the Supreme Court of Uganda would be successful or a Private Members’ Bill on the same subject would be enacted by the Parliament of Uganda. Ms. Mutesi invited the Court to adopt the following reasoning in the *Joseph Borowski* case:

“The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.”

43. We have carefully considered the arguments of both Parties. We are constrained to state from the onset that the attempt by the Applicant to introduce a cause of action premised on the ‘act’ of enacting the impugned Act, without having pleaded the same in the Reference is clearly misconceived. We would, therefore, disregard his Submissions on that issue.

44 With regard to the issue under review, it seems to us that the justiciability of the Amended Reference hinges firmly on the mootness question and, whether if found to indeed be moot, the circumstances of the Reference are such as would warrant the Court to exercise its discretion and entertain it on its merits. Stated differently, would the circumstances of this Reference fall within the ambit of the exception to the general rule on mootness of suits.

45. The general rule on the question of mootness is most succinctly stated in *Joseph Borowski vs. Attorney General of Canada (1989) 1 SCR 342 at 353* as follows:

“The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no live controversy exists which affects the rights of the parties, the case is said to be moot.”

46. Our construction of the foregoing holding is that an essential ingredient in the

determination as to whether or not a matter before a court is moot is the existence of a live controversy that affects the rights of parties. In the absence of such a live dispute, a court decision would have no practical effect on the purported rights of any party and would, accordingly, be hypothetical and academic.

47. In the *Legal Brains Trust* case, the Appellate Division explicitly declared to be an abuse of court process the adjudication by this Court of hypothetical questions in respect of which no real dispute exists, or such as are academic or speculative, with regard to which there exist no facts in contention. The Court provided the following rationale for its position:

“The reason for this is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts. There must be pre-existing facts arising from a real live situation that gives rise to, for instance, a breach of contract, a tortuous wrong, or other such grievance on the part of one party against another.”

48. Turning to the Amended Reference before us, it is manifestly clear to us that the cause of action therein is limited to the compliance (or lack of it) of sections 5,7 and 13 of the impugned Act with Articles 6(d) and 7(2) of the Treaty. Indeed, that is the substantive issue for determination by the Court. The question is, following the nullification of the said Act, did any live controversy remain that affects the rights of the Parties and would, therefore necessitate adjudication? We think not for the reasons that we shall expound forthwith.

49. It seems quite clear to us that the substratum of the original Reference was the Anti-homosexuality Act. That Act, having been struck down in its entirety by the Constitutional Court of Uganda, the *raison d'être* of the Reference disappeared. Given that the Amended Reference is grounded in the legality of selected sections of the nullified Act, we do not think it resurrects any live controversy or concrete dispute either. Indeed the reliefs sought from this Court buttress this position further. We reproduce them below for ease of reference:

“WHEREFORE the Applicant brings this Reference as an aggrieved person and in public interest and humbly prays that this Court may be pleased to grant the following Declarations and Orders:-

f. Section 5(1) of the Anti-Homosexuality Act 2014 in decriminalizing any criminal act done by a victim of homosexuality in his or her purported defence against acts of homosexuality created impunity ...and was counter to the dictates of the principle of rule of law enunciated in Articles 6(d) and 7(2) of the Treaty;

g. THAT sections 7 and 13(1) and (2) of the Anti- Homosexuality Act 2014...in criminalizing aiding, abetting, counseling, procuring and promotion of homosexuality, created offences that were overly broad, penalized legitimate debate, hampered professional counsel and impeded HIV related service provision and access to health service, were in violation of Articles 6(d) and 7 (2)of the Treaty that enjoin Partner States to abide by the principles of rule of law, social justice and the maintenance of universally accepted standards of human

rights.

h. The spirit of the Anti-Homosexuality Act 2014, by promoting and encouraging homophobia amounted to the institutionalized promotion of a culture of hatred and was inconsistent with Article 7(2) of the Treaty that enjoins Partner States to abide by the principles of good governance, rule of law, social justice and the maintenance of universally accepted standards of human rights.

i. THAT the Anti-Homosexuality Act 2014, by encouraging homophobia and stigmatization...was in contravention of the duty of the government to respect, protect and promote the rights and freedoms of persons likely to be affected by the Act since Uganda is a Partner State to the Treaty which requires in Article 7(2) that every Partner State abides by the principles of good governance, rule of law, social justice and the maintenance of universally accepted standards of human rights.”

50. Every one of the reliefs sought above entails Declarations by the Court that cited provisions of the nullified Act, as well as the spirit and content of the Act, contravened Articles 6(d) and 7(2) of the Treaty. Each of them has been overtaken by events and is no longer relevant. We are, therefore, satisfied that the Amended Reference is moot.

51. Having so found, we would ordinarily have gone ahead to decline to entertain it further as opined by the Appellate Division in the *Legal Brains Trust* case. However, learned Counsel for the Applicant did raise the issue of exceptions to the general rule in the event of a court finding a matter to be moot. Common law does acknowledge the discretion of courts to depart from the general rule on moot cases. See *Borowski vs Attorney General of Canada (supra)* and the definition of ‘Public Interest Exception’ in *Black’s Law Dictionary, Ibid, and p. 1350*.

52. In *Joseph Borowski (supra)*, the following exceptional circumstances were advanced as a guide to the judicious exercise of courts’ discretion in moot cases:

If a court’s decision will have some practical effect on the rights of the parties, notwithstanding that it will not have the effect of determining the controversy which gave rise to the action.

In order to ensure that an important recurring question which might independently evade judicial review is heard by the court.

Matters that raise an issue of public importance, the resolution of which would be in the public interest.

53. The Applicant here in sought to rely upon the public interest exception above and as expounded upon in *Black’s Law Dictionary (supra)*. We did reproduce that exposition earlier in this judgment. He did also seek to rely upon the afore-cited classification of what would amount to ‘public importance’ as proposed in *The Queen on the Application of Crompton (supra)*.

54. We are constrained to observe that whereas that case did indeed make reference to the elucidation of public law and the general importance of a matter to a general class as guiding parameters, the majority position in that case was that whether a matter was deduced to be of general public importance was ultimately

a question of degree to be determined by judges on a case by case basis. In that regard, it was held (Waller LJ at p. 989):

“I would accept that a local group may be so small that issues in which they alone might be interested would not be issues of ‘general public importance’. It is a question of degree and a question which Corner House would expect judges to resolve.”

55. In the earlier case in reference above, R (on the application of Corner House Research) vs. Secretary of State for Trade and Industry (2005) 4 All ER 1 at 36, it had been held:-

“It does not necessarily follow, simply because an issue is raised which is of ‘general public importance’, that ‘the public interest requires ‘that that issue should be resolved. Whilst I have agreed that the issues are of importance to a sufficiently large section of the public to be of general public importance, I consider it much more marginal whether ‘the public interest requires’ that they should be resolved.”

56. It would appear from the foregoing legal precedents that a matter would only take on the stance of ‘general public importance’ where it is important to a sufficiently large section of the public. Further, even where such matter is adjudged to be of general public importance that would not necessarily enjoin courts to resolve it’ in the public interest’.

57. In Teraya Koji, *Emerging hierarchy in International Human Rights and Beyond: From the perspective of Non-derogable Rights*, EJIL (2001), Vol. 12, No. 5, 917 at 921, due regard was given to the normative values that inform communities’ interests in the following terms:

“Because law is not merely a means of dealing with issues, but concerns the purposive self-ordering of society, each articulation of law carries social and value- related implications.”

58. Drawing from that analogy, it would appear that due cognizance should be made of matters of public interest in Nation States that derive from their socio-cultural diversities. Thus the normative values intrinsic to different practices and ‘rights’ cannot be said to be identical indifferent global communities.

59. The question then is would the Amended Reference be categorised as a matter of general public importance in Uganda, so as to warrant a departure from the mootness rule in the public interest? We deem it necessary to evaluate this question against the underlying rationale behind the mootness doctrine.

60. We have carefully scrutinised the material on record. We have seen Affidavits on record that do highlight the ignominies that were allegedly suffered by some members of the Uganda population during the period the Act was in force. However, we would not go so far as to find that the said Affidavits sufficiently establish the degree of public importance attached to the practice of homosexuality in Uganda as would warrant the Court to adjudicate the merits of the Amended Reference.

61. The *Amicus* Brief was not very helpful in that regard either in so far as it primarily dwelt on the correlation between homosexuality and HIV/AIDS infections in males, and the vitality of interventions and programs that would engender access to health services by affected persons.

62. On the other hand, the mootness doctrine is rooted in an adversarial legal system

that is synonymous with the Common Law and necessitates a live controversy in adjudicated matters, as well as the judicial economy principle that obviates the squandering of scarce judicial resources on moot and hypothetical questions. These 2 parameters have already been canvassed in this judgment.

63. A third premise for the mootness doctrine is to be found in the traditional adjudication function of judiciaries viz their legislative and executive counterparts' functions. This aspect of the mootness doctrine is aptly addressed in the *Joseph Borowski* case as follows:-

“The third underlying rationale for the mootness doctrine is the need for the court to display a level of awareness of its proper law-making function. The court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.”

64. We respectfully agree with the principle advanced in that case and find it most applicable to the circumstances of the Amended Reference before us. It seems to us that this Court is being invited to adjudicate legal provisions that allegedly violated the rights of homosexuals in Uganda in the abstract; in the absence of the law that purportedly usurped those rights. The Applicant's case is apparently premised on the possibility of another Anti- Homosexuality Act being enacted by a private member's Bill of the Parliament of Uganda. These set of circumstances would lend credence to Ms. Mutesi's assertion in Submissions that the Amended Reference is speculative and intended to pre-empt the legislature's legislative function by dictating the form of legislation it should enact. As was held in the *Borowski case*, we too find this to be a marked departure from the traditional role of courts.

65. Consequently, we do respectfully decline the most generous invitation extended to the Court to usurp the legislative function of the Parliament of Uganda. We are fortified in this position by the provisions of Article 27(1), which do enjoin the Court to take due cognisance of the mandate of organs of EAC Partner States. The Parliament of Uganda is one such organ.

66. In the result, faced with a Reference that is devoid of sufficient proof of the public importance of its subject matter and in due recognition of the legislative function of the legislature viz the traditional adjudication role of courts, we are unable to exercise our judicial discretion to adjudicate a matter that is moot and hypothetical. We so hold.

Issue No. 3: Where sections 5(1), 7 and 13(1) & (2) of Act No.4 of 2014 were in violation of Articles 6(d) and 7(2) of the Treaty.

Issue No.4: What reliefs if are available to the Parties, if any

67. Having held as we have in issue No.1 above, we find no reason to delve into the merits of the Amended Reference.

We hereby dismiss this Reference with no Order as to costs.

L. Rwakafuuzi & F. Mutesi Counsels for the Applicant.

P. Mutesi, for the Respondent

D. Deya for the Amicus Curiae

First Instance Division

Reference No. 7 of 2014**East African Law Society v The Secretary General of the East African Community**

Coram: M. Mugenyi PJ; I. Lenaola DPJ; F. Ntezilyayo; K. Jundu & A. Ngiye JJ
March 22, 2016

Cause of action - Whether the Secretary General of EAC breached statutory obligations - Due diligence expected - Ineffective action on expulsion of immigrants - Time, when infringement came to the knowledge of the Applicant

Articles: 6, 7, 27, 29, 30(2), 71 (1) (d), (l), 124 of the Treaty - Rules: 1 (2), EACJ Rules of Procedure, 2013

In August 2013, the United Republic of Tanzania (URT) expelled Rwandan and Burundian immigrant residing in Ngara and Karangwe, Kagera regions. On 20th August 2013, the Applicant and others issued a statement expressing concern and calling on the Respondent to take remedial actions in compliance with duties and obligations under Article 71(1) of the Treaty. In this Reference, the Applicant averred that by failing to implement Council's directives in order to resolve the problem of the Respondent had abdicated his duties and obligations under Article 71 (1) of the Treaty.

In response, the Respondent stated that the said expulsions were considered by the EAC Council of Ministers on 31st August 2013 and directives to resolve the problem issued. Prior to the expulsions, the Council of Ministers had proposed a meeting between the Republic of Rwanda and URT on 4th October 2013 but the meeting had aborted.

In September 2013, a fact-finding mission visited the Rusumo border areas and prepared a report that was to be availed to the two Partner States concerned and the EAC Policy Organs for appropriate action. The two Partner States had not yet met. Relying on decision-making mechanisms within the Community, the Respondent argued that the resolution of the problem was work in progress and that it was premature for him to be faulted for negligence and or inaction. The responsibility to expeditiously convene a meeting and implement Council's directive lay squarely with the two Partner State. They should be held individually liable for not doing so and there was no cause of action against the Respondent, furthermore, the Reference was time-barred under Article 30(2) of the Treaty.

Held:

1. With respect to computation of time, the starting time is when the alleged infringement came to the knowledge of the Applicant, that is on 19th March 2014, and that the Reference was filed on 28th April 2014, thus, the Reference was filled timeframe prescribed by Article 30(2) of the Treaty.
2. The cause of action was the failure by the Respondent to effectively perform his Treaty obligations and address the problem pertaining to the expulsion

of immigrants as per the Council of Ministers' directives. This is inaction triggered the Reference which was filed on 28th April 2014.

3. Computation of time starts when the alleged infringement came to the knowledge of the Applicant that is on 19th March 2014 after receipt of the Respondent's letter dated 19th March 2014 from which it found that no effective action had been taken by the Respondent. Given that the Reference was filed on 28th April 2014, it was within the timeframe prescribed by Article 30(2) of the Treaty.
4. The Respondent ought to have been vigilant and taken effective and proactive measures to thoroughly investigate the alleged illegal expulsion of immigrants and violations of the Treaty and reported to the Council of Ministers in line with his responsibility under Article 29 of the Treaty.
5. Although some actions were undertaken in line with the Respondent's responsibilities under Article 71(1) of the Treaty, no effective action was initiated by the Respondent to effectively resolve the issue of the expulsion of immigrants. The Respondent cannot shun his responsibilities by stating that he took ineffective measures such as initiating meetings which never took place.
6. The Respondent should have, as a matter of urgency submitted the findings and recommendations of the fact finding mission to the Council of Ministers for consideration and exercised due diligence expected by, a person who seeks to satisfy a legal requirement or to discharge an obligation. By failing to do so, he breached his statutory obligations under Article 71 (1) (d) & (1) of the Treaty. An order is issued directing the Respondent to submit the findings and recommendations of the fact finding mission of the Kagera Region to the next meeting of the Council of Ministers.

Cases cited

Attorney General of Kenya v Independent Medical Legal Unit [2005-2011] EACJ LR 377, Appeal 1 of 2011
James Katabazi & Ors v Secretary General of EAC & Anor [20015-2011] EACJ LR 51, Ref. No. 1 of 2007

JUDGMENT

Introduction

1. This is a Reference filed by the East African Law Society (herein after referred to as the "Applicant"), which is the apex regional Bar Association of East Africa registered as a Company Limited by Guarantee in Tanzania, and as a Foreign Company Limited by Guarantee in Kenya, Rwanda and Uganda. Its address for service, for the purpose of this Reference is No. 6, Corridor Area, Arusha, Post Office Box Number 6240 Arusha, in the United Republic of Tanzania.
2. The Reference was filed on 28th April 2014 under Articles 4, 5, 6, 7, 27, 30, 71 and 124 of the Treaty Establishing the East African Community and Rules 1 (2) and 24 of the East African Court of Justice's Rules of Procedure (herein after referred to as the "Treaty" and the "Rules", respectively).
3. The Respondent is the Secretary General of the East African Community and issued on behalf of the East African Community in his capacity as the Principal Executive Officer of the Community.

Representation

4. The Applicant was represented by Prof. Frederick Ssempebwa, Mr. Samuel Olumo and Mr. Humprey Mtuy while Dr. Anthony Kafumbe appeared for the Respondent.

Background

5. The Applicant is a dual membership organization comprising of individual lawyers and 6 Law Societies namely, Burundi Bar Association, Rwanda Bar Association, Law Society of Kenya, Tanganyika Law Society, Uganda Law Society and Zanzibar Law Society. I has formal Observer Status with the East African Community.

The abridged background to this Reference is that:

6. Beginning from around August 2013, Rwandan and Burundian immigrants from Ngara and Karangwe in the Kagera region of the United Republic of Tanzania were expelled from that region.
7. On 20th August 2013, the Applicant issued a statement whereby it, among others, expressed concerns over reports of the expulsion of the said immigrants and thus called on the Respondent to take remedial actions ensuring that the expulsion was done in accordance with international and regional legal standards and principles.
8. By its letter of 27th February 2014, the Applicant inquired from the Respondent of the remedial steps taken over the expulsion.
9. The Respondent, in his letter dated 19th March 2014, indicated that the said expulsion had been considered by the Council of Ministers in its meeting of 31st August 2013 and had given directives to address the problem.
10. The Applicant, considering that, by failing to abide by, or to implement Council's directives in order to resolve the problem of the immigrants, the Respondent had abdicated his duties and obligations under Article 71 (1) of the Treaty, filed the present Reference seeking orders as pleaded below in the Applicant's case.
11. When the matter came for scheduling conference, on 05th November 2014, the Court, proceeding under Rule 54 of the Court's Rules, took note of the statement of the parties that the Reference had potentiality for settlement and directed parties to engage in that process. But, on 14th July 2015, having been informed by the Parties that no settlement had been reached, the Court resolved that the matter had to be fixed for hearing and timelines were given for submissions.

The Applicants Case

12. The Applicant's case is contained in the Reference dated 28th April 2014, an Affidavit sworn on 28th April 2014 by Mr. James Aggrey Mwamu, the then President of the East African Law Society, the Applicant's Reply to the Respondent's Response filed on 21st July 2014 and the Applicant's written submissions filed on 03rd August 2015.
13. The Applicant alleged that, on 27th February 2014, it requested in writing from the Respondent, information on the remedial steps taken by the East African Community over the irregular expulsion of immigrants from the Kagera Region by the Government of United Republic of Tanzania and that

the said communication was the second in a series by which the Applicant had called upon the Respondent to take remedial measures.

14. The Applicant then averred that the Respondent replied by letter 19th March 2014 indicating that the EAC Council of Ministers had considered the matter at its meeting of 31st August 2013 and directed that arrangements be made for Tanzania and Rwanda to meet to resolve the issue.
15. The Applicant further alleged that following the directives of the Council, the Respondent indicated that:
 - (a) A fact-finding mission took place in the affected areas and made findings and recommendations to be considered by Council; and
 - (b) The Secretariat of the Community was working out modalities to establish a Peace and Security Council to address such problems.
16. It also alleged that after the Respondent's aforementioned letter, it came to the Applicant's knowledge that, at the 28th Council of Ministers meeting of 22nd - 29th November 2013, it was noted that the Council's directives to the Respondent regarding the matter of unlawful expulsions of EAC Partner States' citizens from the Kagera region of the United Republic of Tanzania were still outstanding. It thus pointed out that, contrary to the Respondent's letter of 19th March 2014, no action had been taken.
17. In this regard, the Applicant alleged that, since the Respondent had produced any status report on remedial measures undertaken to implement the EAC Council of Ministers' decisions made in the aforesaid meeting, he had "demonstrated failure and negligence in the performance of his obligations and responsibilities under the Treaty which is inimical to the principles and objectives of the Treaty."
18. In summing up its case, the Applicant alleged that it was the issue of non-compliance with Council's directives by the Respondent and the failure to play a monitoring and oversight role, rather than the illegal expulsion of EAC citizens that was the basis of this Reference.
19. The Applicant thus pleaded for the following declarations and orders against the Respondent:
 - (1) A declaration that the Respondent has failed and/or neglected his obligations under the Treaty Establishing the East African Community;
 - (2) An order compelling the Respondent to convene and facilitate the execution of Resolution EAC/CM/28/Decision 04 directing the United Republic of Tanzania and the Republic of Rwanda to urgently meet to resolve the issues regarding the Republic of Rwanda's concerns on the Kagera Region expulsion of Rwandans by 30th January 2014;
 - (3) In the alternative, an order compelling the Respondent to within thirty (30) days submit a detailed Report setting out the remedial measures taken by the Respondent pursuant to Resolution EAC/CM/28/Decision 04 as reproduced herein above;
 - (4) An order that the costs of and incidental to this Reference be met by the Respondent;
 - (5) This Honorable Court be pleased to make such further orders as may be necessary in the circumstances.

The Respondents Case

20. The Respondent filed a response to the Reference on 10th June 2014 together with an Affidavit in support sworn by Dr. Enos S. Bukuku, EAC Deputy Secretary General, as well as written Submissions on 10th August 2015.
21. The Respondent first of all alleged that, long before the intervention of the Applicant, he had taken up the matter of the expulsion of immigrants from the Kagera Region by taking it to the Council of Ministers of 31st August 2013. Moreover, he stated that he had proposed a meeting between the Republic of Rwanda and the United Republic of Tanzania for 4th October 2013 which aborted due to the inability of Tanzania to attend as the relevant Tanzanian Minister who would have attended was conducting a fact finding mission in Manyovu and Rusu.mo border at about the time of the meeting.
22. The Respondent also alleged that he had, on or about 11th September 2013, constituted a fact-finding mission which visited the Rusumo border areas to witness the situation and prepared a report that was to be availed to among others the two Partner States concerned and the EAC Policy Organs for appropriate action. He hastened to add that the findings would at the earliest opportunity have been considered by the United Republic of Tanzania and the Republic of Rwanda which were yet to meet.
23. Basing on the decision-making mechanism within the Community, the Respondent argued that the resolution of the problem of irregular immigrants expelled from the Kagera Region was work in progress and that it was premature for him to be faulted for negligence and or inaction, about the plight of the immigrants.
24. The Respondent also averred that, while still in the process of addressing this challenge, the matter was considered on 28th March 2014 by a Joint Meeting of the Sectoral Council on Cooperation in Defence, Interstate Security and Foreign Policy Coordination which directed that a detailed concept paper on the Proposed Peace and Security Council be developed and circulated to the Partner States for consideration at an Extraordinary Joint Meeting of the said Sectoral Council by 30th June 2014. He stressed that that was work in progress and that a relevant report was to be submitted to the 29th Meeting of the Council that was scheduled for August 2014.
25. The Respondent categorically refuted the Applicant's allegation that he had acted irresponsibly or failed to act in any matter complained of or as alleged in the Statement of Reference. He rather alleged that the Council directive being targeted at the aforementioned countries, the responsibility to expeditiously convene a meeting and implement the directive lay squarely with them and that consequently, they should be held individually liable for not doing so.
26. In summing up his case, the Respondent pleaded that, since he had ably performed his duty; there was no cause of action against him, that all claims against him were misconceived; that the granting of declarations and orders sought by the Applicant did not arise and that the Reference was time-barred as it was instituted outside the two-month time limit required under Article 30(2) of the Treaty.
27. For the above reasons, the Respondent submitted that no breach of the Treaty

arose and that, therefore, the Reference should be dismissed with costs.

Scheduling Conference

28. At a Scheduling held on 5th November 2014, Parties agreed up on that the following issues fall for determination:
1. Whether the Reference is time barred under Article 30(2) of the Treaty;
 2. Whether the Respondent failed to discharge his obligations under Article 71(d) and (l) of the Treaty;
 3. Whether the Applicant is entitled to the remedies sought.

Determination of Issues

Issue No. 1: Whether the Reference is time barred under Article 30(2) of the Treaty Submissions

29. The issue as to whether the Reference was time barred was raised by the Respondent. In this regard, his Counsel submitted that the Reference was time barred in terms of Article 30(2) of the Treaty considering that the expulsion of foreigners from the Kagera Region was done in August 2013 but, the Reference was only filed in April 2014 more than two months since the matters came to the attention of the Applicant.
30. Learned Counsel relied on the case in *Attorney General of the Republic of Kenya Vs .Independent Medical Legal Unit, EACJ Appeal 1 of 2011* to argue that “Article 30(2) of the Treaty is unambiguous and categorical that the Reference ought to have been instituted within the time specified therein .Moreover, it is easy to ascertain and subject the time within which the Reference could be lodged to mathematical computation of time on the basis of the reports of the events since those reports were recorded and widely publicized.”
31. He further argued that it was clear that the Treaty limits References over such matters like the one at hand to two months after the action or decision was first taken or made, or when the Claimant first became aware of it. He maintained that the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the article above. It was also his stance that, as provided by Article 9(4) of the Treaty, the Court ought to act within the limits of its powers under the Treaty.
32. In light of the foregoing submissions, Counsel for the Respondent urged the Court to find that this matter was time barred.
33. Conversely, Counsel for the Applicant contended that the Reference was lodged on 28th April 2014 well within the time prescribed by Article 30(2) of the Treaty.
34. As arguments in support of his position, learned Counsel submitted that the gist of the complaint was that the Respondent failed to effectively fulfil his obligations as provided for under Article 71(1) of the Treaty, in particular; (a) by failing to investigate, collect or verify matters affecting the Community, the forceful expulsion of immigrants by a Partner State to another Partner State (Article 71 (l) (d)], and (b) by failing to implement the decisions of the Council (Article 71(1) (1)).
35. Counsel then stated that the aforesaid infringement came to the knowledge

of the Applicant after receipt of the letter dated 19th March 2014 signed by the Secretary General of the East African Community in response to the Applicant's letter dated 27th February 2014 requesting for a feedback on the action taken by the Community over the forceful expulsion of immigrants.

36. Counsel thus stressed that the date of the Secretary General's letter which is 19th March 2014, is the date that led to the Applicant's inquiries from which it was realized that no effective action had been taken by the Respondent as this was evident from the proceedings of the Council.
37. Reiterating his argument that the action complained of was not the expulsion of the immigrants, but the failure of legal duty by the Respondent, Counsel for the Applicant, therefore, submitted that the Reference was lodged within the two-month time limit prescribed by Article 30(2) of the Treaty.

Determination of Issue No. 1

38. Having carefully reviewed the parties' respective pleadings and submissions on the issue at hand, we consider that its determination requires determining the cause of action of the present Reference.
39. The Respondent's position was that, since the Reference was triggered by the expulsion of alleged irregular immigrants from the Kagera Region that occurred in August 2013 and since it was filed on 28th April 2014, this was evidently outside the two months required by Article 30(2) of the Treaty.
40. For ease of reference, Article 30(2) provides that:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence of thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”
41. On its part, the Applicant, both in its pleadings and submissions, has emphatically and repeatedly stressed the point that the Reference did not rely on the expulsion of the immigrants as a cause of action although it stated that that action itself run afoul of the fundamental principles enshrined in the Treaty and other international instruments to which the United Republic of Tanzania was signatory. The Applicant, instead, argued that the cause of action was the alleged failure by the Respondent to effectively perform his Treaty obligations and address the problem pertaining to the expulsion of immigrants as per the Council of Ministers' directives.
42. The Applicant also pointed out that the alleged infringement came to its knowledge after receipt of the Respondent's letter dated 19th March 2014 from which it found that no effective action had been taken by the Respondent. The Applicant affirmed that it was that failure or inaction by the Respondent that triggered the Reference filed on 28th April 2014.
43. The Respondent forcefully asserted that, since the Reference hinged on the irregular expulsion of immigrants, it was not enough for the Applicant to issue a Press Statement; it should have instead instituted an action before this Court.
44. It is worth noting that, although the Applicant, in his statement dated 20th August 2013, has condemned the expulsion of citizens of Partner States from another Partner State without following the due process as running

afoul of the fundamental principles enshrined in the Treaty and other relevant international instruments, it nevertheless did not file any action in that regard. Instead, it instituted an action against the Respondent, faulting him for noncompliance with the Council's directives and failure to play the monitoring and oversight role as provided by Article 71(1) of the Treaty.

45. Given the case as it stands, therefore, we find no reason to disagree with the Applicant's assertion made in his pleadings and constantly reaffirmed in oral and written submissions that the fact that gives it the right to seek judicial redress or relief against the Respondent, that is the cause of action of the Reference, is the alleged failure of legal duty by the Respondent.
46. Having said that, we now revert to the computation of time to assess whether the Reference was filed within the required two month time limit. If we consider, as submitted by the Applicant, that the starting time is when the alleged infringement came to the knowledge of the Applicant, that is on 19th March 2014, and that the Reference was filed on 28th April 2014, it is evident that the Applicant was within the timeframe prescribed by Article 30(2) of the Treaty.
47. Consequently, we answer issue No.1 in the negative.

Issue No. 2: Whether the Respondent failed to discharge his obligations under Article 71(1) (d) and (e) of the Treaty

Applicant's Submissions

48. On this issue, the Applicant's Counsel submitted that the Respondent failed in his Treaty obligations for different reasons. Firstly, he argued that, in the performance of his duties, the Respondent ought to be vigilant as this is the standard cast upon him by this Court in *James Katabazi and 21 Others v Secretary General of the East African Community and Another, EACJ Reference No. 01 of 2007*.

Secondly, learned Counsel further contended that the judgment of this Court in the aforementioned Reference placed a duty on the Respondent to be even more vigilant once a legal action has been commenced against him. He asserted that the said Court's stand was in response to the Respondent's defence that he could not have taken action because he was not aware of the infringement by a Partner State. He then quoted the court as stating:

“...The moment this Application was filed (Respondent) became aware and if he was mindful of his obligations under Article 29, he should have taken necessary actions under that Article.”

In line with that argument, Counsel also submitted that the Respondent was aware of the alleged infringement by a Partner State (Tanzania) and that, by analogy with the *Katabazi case*, performance of his obligations became more exigent after this Reference was filed.

49. Thirdly, in light of the Respondent's own line of defence outlining measures taken to address the matter, the Applicant's Counsel castigated the Respondent's failure to take effective action in compliance with his Treaty obligations. It was thus Counsel's argument that the Respondent cannot claim to have diligently discharged his obligations by simply initiating meetings

which did not take place, or establishing a fact finding mission whose report was never availed or considered or alleging that it was only the duty of the Partner States concerned to implement Council's directives to resolve the immigrants' problem.

50. Asserting that all the above did not exhibit vigilance required for such a serious matter, Counsel submitted that it was the Respondent's duty to ensure that a meeting to resolve the issue as per Council's directives took place. Further, he contended that Article 71 (1) of the Treaty was clear, as it was incumbent upon the Respondent to implement Council's directives. In the same vein, learned Counsel argued that it was not tenable for the Respondent to shun his responsibility by pointing out that the two Partner States had not carried out theirs. It was his view that if the States were *inparidelicto*, they had to answer individually for infringing the Treaty, and that; therefore, the fact that the Applicant could have sued the Partner States as suggested by the Respondent was irrelevant.
51. It was Counsel's final submission that the substance of the Reference was that there had been no effective intervention and remedial measures taken by the Respondent. He further argued that the Respondent was aware that recalcitrant States could be brought to order in terms of Article 29 of the Treaty which he could have utilized with respect to one or both of the Partner States.

Respondent's Submissions

52. Counsel for the Respondent refuted the Applicant's allegation that he had failed to execute his obligations under the Treaty. Citing the provisions of Article 71(1) (d) &(1) of the Treaty, he contended that he had already ably discharged his obligations under the Treaty because he had made credible initiatives to cause the implementation of directive EAC/CM28/Decision 04 requiring the United Republic of Tanzania and the Republic of Rwanda to meet and resolve issues relating to the expulsion of Rwandans from Kagera Region. He added that the above initiative did not bear fruits owing to reasons beyond his control as evidenced by requests for postponement of the Meeting and that since then, none of the two Partner States concerned had notified him of the new dates convenient for them to meet and execute the said Council's directive.
53. With regard to Article 71(1) (1) of the Treaty, learned Counsel asserted that the matter had been considered by the 27th Meeting of Council of Ministers in 2013 and that the latter had directed the United Republic of Tanzania and the Republic of Rwanda to urgently meet and resolve the issue of mass expulsion of Rwandans by the United Republic of Tanzania. He, however, pointed out that the said directive has not been implemented for a long time and as such, while considering that outstanding decision, at its 30th Meeting in November 2014, the Council had directed the Secretariat to always coordinate the implementation of the Summit Decisions/Directives to the Council and Council's Decisions/Directives to Partner States as a whole. In line with the foregoing, he averred that the Secretariat had attempted to cause the implementation of that outstanding directive

by convening another meeting which would have taken place on 27th - 28th February 2015, but with no success.

54. For ease of reference, Article 71 (l) (d) and (1) provides as follows:

1. The Secretariat shall be responsible for.

(d) the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination;

(...)

(l) the implementation of the decisions of the Summit and the Council.”

Determination of Issue No.2

55. We have considered the pleadings of both parties, as well as their respective arguments in submissions. As the case stands, the bone of contention is whether or not, given the issue of the expulsion of immigrants from the Kagera Region of the United Republic of Tanzania and the Council's directives aimed at resolving the matter, the Respondent failed to comply with his obligations under Article 71 (1) (d) & (1) of the Treaty.

56. In this regard, the heart of the Applicant's arguments was that, beyond the steps taken, the Respondent did nothing; there has been no appraisal of any concrete action taken with regard to this issue, and this was, in the Applicant's view, a breach of the Treaty in several aspects considering that the issue was a very fundamental matter within the Community. The Applicant thus opined that the Respondent ought to have done more for an effective resolution of the matter and this in fulfillment of his duties embodied in Articles 29 and 71 (l) (d) & (1) of the Treaty. The latter Article is reproduced herein above .as for Article 29, it states that:

“1. Where the Secretary General considers that a Partner State failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned for that Partner State to submit its observations on the findings.

2. If the Partner State concerned does not submit its observations to the Secretary General within four months, or if the observations submitted are unsatisfactory, the Secretary General shall refer the matter to the Council which shall decide whether the matter should be referred by the Secretary General to the Court immediately or be resolved by the Council.

3. Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary General to refer the matter to the Court.”

57. It is on record that the Respondent did initiate two meetings intended for the two Partner States concerned, as clearly indicated in his pleadings and submissions, but all the said meetings aborted, the first due to the unavailability of one Partner State, the second for undisclosed reasons.

58. The Respondent has also averred that pursuant to the directives made by the 27th Meeting of Council of Ministers held on 31st August 2013 vide EAC/CM27/Directive 66, a fact-finding mission took place in the affected areas and made findings and recommendations which had to be considered by the Council. In another part of his submissions, however, Counsel for the Respondent maintained that the said findings and recommendations had not been considered due to the fact that the meeting between the two Partner States concerned did not take place.
59. But, are the arguments of the Respondent tenable in light of his Treaty obligations enshrined in Article 71(1)?
60. As canvassed during the Court hearing on 3rd November 2015, one of the functions of the Secretariat, as provided for by Article 71(l) (d) is “the undertaking of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination.” It is undeniable, for us, that a matter such as the alleged illegal expulsion of citizens of a Partner State by another Partner State of the Community is one that calls for examination in order to assess the truth about it and take appropriate remedial measures.
61. It is our considered view that, faced with alleged violations of some of the objectives and fundamental principles encapsulated in the Treaty as it could be the case with the alleged illegal expulsion of immigrants at issue, the Respondent ought to have been vigilant (See *Katabazi* case , supra) and taken effective and proactive measures in order to ensure a thorough investigation into the matter and come up with a comprehensive report with relevant recommendations on how to resolve the matter.
62. It was also possible for the Respondent, informed by the findings of the investigative mission as regards instances of failure by a Partner State to fulfil its Treaty obligations or infringement of a provision of the Treaty, to take appropriate remedial actions in line with the Respondent’s responsibility under Article 29 of the Treaty.
63. We can only assume that it was in that regard that the Respondent has established the aforementioned fact-finding mission to investigate the matter and come up with recommendations on how to resolve the problem of the said immigrants.
64. The normal course of action would have been then to submit the findings and recommendations from the mission’s report to the Council for consideration. This would have been in fulfilment of the Secretariat’s other function of initiating, receiving and submitting recommendations to the Council ((Article 71 (1) (a)).
65. We are of the firm view that, although some actions have been undertaken in line with the Respondent’s responsibilities under Article 71(1) of the Treaty, no effective action was initiated by the Respondent to effectively resolve the issue of the expulsion of immigrants from the Kagera Region of the United Republic of Tanzania. The Respondent cannot shun his responsibilities by stating that he took ineffective measures such as initiating meetings which never took place or establishing a fact finding mission whose report was never submitted to the relevant organ of the Community for consideration.

66. Given the imperative need to shed light on the foresaid alleged illegal expulsion of immigrants which, if its illegality was confirmed, would constitute a flagrant violation of the objectives and fundamental principles of the Community and gravely undermine the spirit of regional integration high on the Community agenda, the Respondent should have, as a matter of utmost urgency, submitted the findings and recommendations of the aforesaid fact finding mission to the Council of Ministers for consideration. In those circumstances, indeed, the Respondent ought to have exercised due diligence in carrying out his Treaty obligations. Due diligence is defined as “the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.” (See *Black’s Law Dictionary, 9th Edition, 2004, p.523*). The Respondent has failed to pass this test for the above reasons.
67. We hold, therefore, that by failing to do so, he breached his statutory obligations under Article 71 (1) (d) & (1) of the Treaty. We shall make an order in this regard later in the judgment.

Issue No. 3: Whether the Applicant is entitled to the remedies sought

68. We have addressed all the issues as framed during the Scheduling Conference and we now proceed to determine the prayers sought in the Reference in light of our findings.
69. The Applicants urged the Court to grant the prayers and orders as reproduced elsewhere above in this judgment.
70. Conversely, the Respondent submitted that, since there was no violation of the Treaty on his side and that the Reference was time barred, the Applicant was not entitled to any of the prayers sought and pleaded that the Reference be dismissed with costs to the Respondent.
71. Given our findings on Issue No.2, Prayer (i) is granted in the following terms: By failing to submit to the Council of Ministers the report of the fact-finding mission that had been established and had visited areas of the Kagera Region of the United Republic of Tanzania, affected by the alleged illegal expulsion of immigrants, the Respondent breached his statutory obligations under Article 71 (1) (d) & (1) of the Treaty.
72. When the matter came for hearing, on 5th November 2015, the Applicant abandoned Prayer (ii) which was seeking an order compelling the Respondent to convene and facilitate the execution of the Council’s Resolution EAC/CM28/ Decision 04 because it was overtaken by events. It should be recalled that the said resolution directed the United Republic of Tanzania and the Republic of Rwanda to urgently meet to resolve the issues regarding the Republic of Rwanda’s concerns on the Kagera Region expulsion of Rwandans by 30th January, 2014.
73. As for Prayer (iii), given the matter in issue, a practical order would be as follows: An order is hereby issued directing the Respondent to submit to the next meeting of the Council of Ministers for consideration, the findings and recommendations of the fact-finding mission that had been established and had visited areas of the Kagera Region of the United Republic of Tanzania, affected by the alleged illegal expulsion of immigrants.
74. As for costs, considering that the matter in issue falls in the category of public

interest litigation, we deem it just that each party bears its own costs.

Conclusion

75. In light of our findings above, judgment is hereby entered in favour of the Applicant in terms of the following declaration and orders:

- (a) A declaration be and is hereby issued that, by failing to submit to the Council of Ministers the report of the fact-finding mission that had been established and had visited areas of the Kagera Region of the United Republic of Tanzania, affected by the alleged irregular expulsion of immigrants, the Respondent breached his statutory obligations under Article 71 (1) (d) & (1) of the Treaty.
- (b) An order be and is hereby issued directing the Respondent to submit to the next meeting of the Council of Ministers for consideration, the findings and recommendations of the fact finding mission that had been established and had visited areas of the Kagera Region of the United Republic of Tanzania, affected by the alleged irregular expulsion of immigrants.
- (c) Each party shall bear its own costs.

It is so ordered.

F. Ssempebwa, S. Olumo & H. Mtuy Counsel for the Applicant
A. Kafumbe for the Respondent

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First Instance Division

Reference No. 10 of 2014**Dr. Mpozayo Christophe v The Attorney General of the Republic of Rwanda**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo; F. Jundu & A. Ngiye, JJ
September 28, 2018

International judicial review of domestic court decisions - Certified judgment - Principle of non bis in idem- Whether there was fair trial, due process of law - Translation of court proceedings - Certification of Annexures - Conclusive evidence required- Remedies

Articles: 6(d), 7(2), 27(1), 29(1), 30(1), 30(2), 73, 138(3) of the Treaty - Article 8(1) of the Treaty - Article 29 Constitution of the Republic of Rwanda 2003 - Articles: 50, 150 Rwandan Code of Criminal Procedure - Rules: 8, 17(1), 39(1) 50(5), 67, 69, 74(2), 111, 112 EACJ Rules of Procedure, 2013

The Applicant claimed that on 8th November, 2013, he was unlawfully arrested from his hotel room at Imanzi village, Bibare Cell, Kimironko Sector, Gasabo District, Rwanda and detained until 11th November, 2017 when he was charged with defamation, conspiracy against the Government of the Republic of Rwanda and illegal possession of ammunition. On 16th November, 2013, the Prosecutor at Kacyiru Primary Court discharged the Applicant of the offence of conspiracy but the offences of defamation and illegal possession of a grenade were retained. Upon trial, he was acquitted on 31st March, 2014. However, upon his release from detention on 2nd April 2014, he was re-arrested and detained at Remera Police Station for allegedly inciting insurrection amongst the population. On the 16th April, 2014, the Intermediate Court of Nyarugenge ordered the Applicant's provisional detention at the Central Prison of Nyarugenge for a case that was not registered. The Applicant's appeal to the High Court was dismissed on 6th May 2014. On 11th February, 2015, he raised the issue of double jeopardy in the High Court of Rwanda, however, his application was dismissed on 18th February, 2015. Thereafter on 8th April, 2015 the Applicant was found guilty and sentenced to ten years imprisonment.

In his Reference, lodged on 7th July 2014, the Applicant alleged that the Respondents actions breached several provisions of the Constitution of Rwanda, the Penal Code, the Criminal Procedure Code of Rwanda and the rule of law principles enshrined in Articles 6(d), 7(2) and 8(1) of the Treaty. Furthermore, the same material evidence: a Skype chat between the Applicant and a friend was used in both cases; and that no witnesses were called in the second case thus denying the Applicant an opportunity for cross-examination. This breached the universally accepted principles of criminal justice *non bis in idem*- double jeopardy. He sought *inter alia*: a declaration that his arrest, detention, trial and imprisonment were unlawful; violated good governance, rule of law and universally accepted principles of law; an order setting aside his conviction; general and aggravated damages. The Applicant availed a translated copy of the Judgment (RP0017/14/HC/KIG) from Kinyarwanda to English.

The Respondent asserted that the Applicant underwent two different trials for two

different charges. While in the first trial, he was acquitted and released, in the second trial he was convicted and the Applicant was not subjected to double jeopardy.

Held

1. The responsibility of this Court in respect to court decisions from Partner States, is to carry out an international judicial review of the said domestic court decisions so as to ascertain whether the impugned acts result in an injury and whether the acts which caused it violate any rule of international law, in the present case, Articles 6(d), 7(2) and 8(1) of the Treaty.
2. Several documents were annexed as records of the court proceedings but there was no evidence to show that each one was a certified copy of the original. Moreover, the certification provided by the translator that he translated the proceedings from Kinyarwanda to English, was of a general nature and was not applied to a particular document in the bundle. There were no translated records of court proceedings on the two criminal cases so Rule 39(1) was not complied with. There was insufficient material to support a determination as to whether the impugned acts of the Respondent infringed Rwandan laws and the Treaty.
3. The application of the doctrine *non bis in idem* entails: an initial proceeding in which jurisdiction was properly exercised; a determination on the merits properly made in the initial proceedings with respect to the particular acts constituting the crime; and crimes or acts that are the subject of the successive trial are substantially similar.

This required an interrogation of the court record of the proceedings to ascertain the Rwandan courts' compliance with domestic laws and procedures or the lack thereof. Without the certified records the Applicant did not sufficiently establish that the criminal trials were not conducted in accordance with the Respondent's national laws, or that the Applicant's constitutional and legal rights were violated in the course of the said trials.

4. Claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. In the absence of such conclusive evidence, the Applicant's allegations of violation of Articles 6(d) and 7(2) of the Treaty remain unproven.
5. The Applicant is not entitled to the remedies sought. Furthermore, as Counsel representing the Applicant were under a legal aid brief by the East African Law Society, it is in the interest of justice that each party should bear its own costs.

Cases cited

Baranzira Raphael & Anor v The AG of Burundi, EACJ Ref. No. 15 of 2014
 B. E. Chattin (USA) v United Mexican States, 1927, UNRIAA, vol. IV, p. 282
 Chorow Factory Case, Judgment No. 13 of P. C. I. J of 13 September, 1928, Series A No. 17
 Grands Lacs Supplier S.A.R. L. & Ors v The AG Burundi, EACJ Ref. No. 6 of 2016
 Henry Kyarimpa v The AG of Uganda, EACJ Appeal No. 6 of 2014
 Hon. Dr. Margaret Zziwa v The Secretary General of the EAC, EACJ Appeal No.2 of 2017
 Ida Robinson Smith Putnam (USA) v United Mexican States, 1927, UNRIAA, vol. IV, p. 151
 Manariyo Désiré v The AG of Burundi, EACJ Ref. No. 8 of 2015

Editorial Note: Appeal 3 of 2019 is pending before the Appellate Division

JUDGMENT

A. Introduction

1. The Applicant, one Dr. Mpozayo Christophe, a citizen of the Republic of Rwanda and currently serving a sentence of ten (10) years imprisonment at Gicumbi (Miyove) prison in Rwanda, lodged this Reference in this Court on 7th July, 2014 against the Attorney General of the Republic of Rwanda, the Respondent. However, on 13th April, 2017, the Applicant filed an Amended Statement of the Reference (“the Reference”). It is premised on the provisions of Articles 6(d), 7(2), 8(1), 27(1), 29(1), 30(1), 30(2), 73 and 138(3) of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rules 8, 17(1), 50(5), 67, 69, 74(2), 111 and 112 of the East African Court of Justice Rules of Procedure, 2013 (“the Rules”).
2. In this Reference, the Applicant seeks to challenge the process of his arrest, detention, prosecution, conviction and sentencing for the offence of inciting insurrection or trouble amongst the population vide Penal Case No. RP0017/14/HC/KIG allegedly based on the same facts as Penal Case No. RP1184/13/TB/KCY in which he was arrested, detained, prosecuted, acquitted and released for *inter alia* the offence of being in illegal possession of ammunition (a grenade). Pursuant to the said challenge, the Applicant, therefore, seeks for the following reliefs from this Court:
 - i. A declaration be made that his arrest, detention, trial and imprisonment was unlawful as it was done against universally accepted principles of law;
 - ii. A declaration that the Republic of Rwanda violated [the] East African Treaty and principles of good governance and the rule of law;
 - iii. An order that the sentence imposed on the Applicant in Criminal Case No. RP0017/14/HC/KIG be and hereby set aside;
 - iv. A declaration be made that the Applicant’s conviction was unlawful;
 - v. An order that the Applicant’s conviction be hereby set aside;
 - vi. General damages be awarded;
 - vii. Aggravated and/exemplary damages be awarded;
 - viii. Costs of the litigation be awarded; and
 - ix. Further and or any other relief this Honourable Court be deemed fit and or apt to grant be made.
3. Before proceeding further with this Judgment, we noted from outset that the Respondent in his written response to the Reference filed on 25th May, 2017 as well as in his written submissions filed on 1st March, 2018 had raised and labored on a Preliminary Objection, that the Reference is time barred and lacks cause of action. However, this Court had already dealt with the said Preliminary Objection in its Ruling delivered on 28th September, 2016. In the said Ruling, we “.....over-ruled the Preliminary Objection raised” by the Respondent and held that “the Reference was filed within the stipulated time limit” and has lawful causes(s) of action to be determined at the hearing of the Reference. The said Ruling remains valid and intact to date as it has never been challenged or reversed by way of an appeal or otherwise. Therefore, we do not find it necessary to dwell again on the said matter in this Judgment.

B. Representation

4. Mr. Joel Kimutai Bosek, Learned Counsel assisted by Ms. Amy Kyerure and Ms. Maureen Awuor Okoth, represented the Applicant. On the other hand, Mr. Nicholas Ntarugera, Learned Senior State Attorney assisted by Ms. Specioza Kibibi, Learned Senior State Attorney represented the Respondent.

C. The Applicant's Case

5. The Applicant, in this Reference seeks to challenge his arrest, detention, prosecution, conviction and imprisonment aforesaid by the Respondent's agents as being unlawful. The Reference is supported by an Affidavit deponed by Mr. Joel Kimutai Bosek on 13th April, 2017 and another Affidavit by Ms. Maureen Awuor Okoth deponed on 2nd October, 2017 together with her additional Affidavit of 21st November, 2017. Further, elaboration of the Applicant's case was made at the Scheduling Conference held on 12th September, 2017, in his Written Submissions filed on 21st November, 2017 and at the oral highlights thereof held on 19th March, 2018.
6. The Applicant alleged that on 8th November, 2013, he was unlawfully arrested at his hotel room at Imanzi village, Bibare Cell, Kimironko Sector, Gasabo District. He was held and imprisoned without charge until 11th November, 2017 when he was taken to the Prosecutor at Kacyiru Primary Court and charged with defamation, insulting a person in a private area, conspiracy against the Government of the Republic of Rwanda and being in illegal possession of ammunition (a grenade) vide Penal Case No. RP1184/13/TB/KCY. On 16th November, 2013, the said Court vide its Decision No. 394/13/TB/KCY discharged the Applicant of the offence of conspiracy against the Government of Rwanda while the offences of defamation and being in illegal possession of a grenade remained. Through the said decision, the Applicant was put under provisional detention at the Gasabo Prison.
7. The Applicant allegedly underwent full trial on the remaining offences and on 31st March, 2014, he was found innocent and was accordingly acquitted vide Judgment No. RP1184/13/TB/KCY. He was released on 2nd April, 2014 but the police promptly re-arrested him and detained him at Remera Police Station for allegedly having committed a new offence of inciting insurrection or trouble amongst the population, which offence was purportedly premised on the same material facts that had been used as evidence for the criminal defamation charges for which the Applicant had been acquitted by a competent. The said material evidence was the Skype chat between him (the Applicant) and a friend, one Munyampeta Jean Damascene. On the 16th April, 2014, the Intermediate Court of Nyarugenge ordered the Applicant's provisional detention at the Central Prison of Nyarugenge for a case not registered. The Applicant appealed against his provisional detention to the High Court but the said appeal was dismissed on 6th May 2014 vide decision No.RPA0305/14/HC/KIG, prompting him to lodge this Reference in this Court on 7th July, 2014.
8. The Applicant further averred that, having seen that he was being tried twice for offences based on the same material evidence or the same conduct. On 11th February, 2015, he raised the issue of double jeopardy at the High Court of Rwanda vide Penal Case No.RP0017/14/HC/KIG moving the said court to

strike out the second criminal case against him. However, his application was dismissed on 18th February, 2015.

9. When the second trial commenced on 27th February, 2015, the prosecution neither called witnesses nor adduced documentary evidence in support of the charges. The Applicant was thus deprived of his right of cross examination and denied a fair trial as, in his view, no due process of law was adhered to or followed. He also raised the issue of the authenticity of the Skype chat “documents” produced by the Prosecutor as evidence as well as the identity of the Skype account, both pertinent issues at the trial, but the same were overruled by the trial court.
10. The Applicant further contended that on 8th April, 2015, the trial court delivered its Judgment for the second criminal case against him. It found him guilty of the offence he was charged with, and convicted him and sentenced him to ten (10) years imprisonment. Challenging the said decision of the trial court, the Applicant averred that, the charges against him were whimsical and lacked clarity, neither was the said case against him proved beyond reasonable doubt. He was allegedly subjected to two series of criminal trials based on similar conduct and the second trial was but a re-characterization of material facts of the first trial. He further averred that even if the facts were different, in the two cases, the trials should have been merged into one for providing an expeditious trial to the Applicant. He contended further that the Respondent in the process breached the universally accepted principles of criminal justice “*non bis in idem*.”
11. The Applicant contended *inter alia* that the Respondent in the two sets of criminal trials against him did not abide with due process, rule of law and good governance, thereby resulting into miscarriage of justice and violation of among others the Treaty, the African Charter on Human and Peoples’ Rights, the Vienna Convention and the Universal Declaration of Human Rights. He therefore prayed to this Court to grant the reliefs sought by him in the Reference.

D. The Respondent’s Case

12. The Respondent in his Response to the Reference filed on 25th May, 2017, together with the supporting Affidavit in Reply deponed by one Mr. Nicholas Ntarugera and elaborations made in the Written Submissions, as well as at the oral highlights made on 19th March, 2018 denied and disputed all the Applicant’s allegations. He categorically denied the Applicant’s contention that he was subjected to two trials for the same facts. He asserted that the Applicant underwent two different cases for two different charges or offences. In the first trial, he was arrested, detained, prosecuted, found innocent, acquitted and was accordingly released, while in the second trial he was arrested, detained, prosecuted, found guilty, convicted and sentenced to ten (10) years imprisonment. The Respondent denied violating the laws of Rwanda and the provisions of the Treaty as far as the Applicant’s arrest, detention, prosecution, conviction and sentencing are concerned. He further denied that the Applicant was subjected to “double jeopardy” or that the *non bis in idem* principle was violated.
13. The Respondent further contended that in the first criminal case, the Applicant was arrested on 8th November, 2013, detained and charged with the offences of defamation, insulting a person in a private area, conspiracy against the Government of Rwanda and being in illegal possession of arms (a grenade).

He was acquitted of the charges on 31st March, 2014 and released on 2nd April, 2014. In the second criminal case, the Respondent contended that the Applicant was arrested on 2nd April, 2014, detained and charged with a different offence to *wit* inciting insurrection or trouble amongst the population. The Applicant was tried on the said offence and on 8th April, 2015 was found guilty, convicted and sentenced to ten (10) years imprisonment.

14. The Respondent further contended that the fact that the Applicant was acquitted of the charges initially brought against him meant that he received a fair trial and due process of law was followed including the rule of law. The Respondent denied any violation of Articles 21, 22, 23 and 34 of the Law N. 30/2013 of 24/05/2013 relating to the Criminal Procedure Code in the Republic of Rwanda, or of the Constitution of Rwanda, or the Organic Law No. 01/2012 of 02/05/2012 instituting the Penal Code or the Treaty during the Applicant's trial.
15. The Respondent also averred that the Applicant was aggrieved by the provisional detention order issued by the Intermediate Court of Nyarugenge on 16th April, 2014 and had appealed to the High Court of Rwanda but the same was dismissed vide Decision No.RPA0305/14/HC/KIG, thereby confirming Decision No. RONPJ05361/53/14/RN/NR of the Nyarugenge Intermediate Court ordering the said provisional detention. He further averred that the Applicant had appealed to the Supreme Court of Rwanda vide Appeal No. (RPA0059/14/CS PR0019YRPA0440/14/HC/KIG), but on 2nd January, 2015 the said Court declared the appeal inadmissible.
16. The Respondent further contended that the Applicant was lawfully arrested on 8th November, 2013 with a search warrant signed by Prosecutor Nkeshimana Janvier and on 9th November, 2013, a grenade was seized in his hotel room hence the Statement of Seizure No. 1 and 2 in proof thereof signed by Supt. Mbabazi Modest, a judicial police officer. Thus, the Respondent averred that the Applicant was legally arrested by competent judicial organs of the Public Prosecution Authority, who later transmitted the same to the trial court within the prescribed time under Article 1 of Law No. 20/20/12 of 24/5/2013.
17. As regards the Skype Chat documents, the Respondent averred that the WhatsApp conversation between the Applicant and one Munyampeta Jean Damascene was discovered in his seized laptop and produced before the trial court as evidence in the case against him of inciting insurrection or trouble amongst the population and the same were discovered after issuance of the decision to intercept the relevance communication and correspondence by the National Prosecutor, one Ruberwa Bonaventure on 25th October 2013. This was pursuant to Articles 72, 73, 74 and 75 of law No.30/2013 of 24th May 2013 relating to the Code of Criminal Procedure and Articles 463, 462 of law No. 01/2012/01 of 2nd May 2012 instituting the Penal Code of Rwanda and warrant of search signed by the Prosecutor, Nkeshimana Janvier on 08th November 2013 and a statement of seizure No.1 and No.2 were signed on 9th November by Supt. Mbabazi Modest.
18. The Respondent in his pleadings, prayed for the dismissal of the Reference with costs.

E. Scheduling Conference

19. At a Scheduling Conference held on 12th September, 2017, the following issues were framed by the Parties for determination by this Court:
- I. Whether the Respondent's acts of arresting, detaining, prosecution, conviction and imprisonment of the Applicant is an infringement of the Rwanda laws and the principles of good governance and rule of law as enshrined in Articles 6(d), 7(2) and 8(1) of the EAC Treaty;
 - II. Whether Respondent violated the principle of *non bis in idem* by subjecting the Applicant to trial twice based on similar facts;
 - III. Whether the Respondent violated the Applicant's rights to fair trial and due process of law; and
 - IV. Whether the Applicant is entitled to the reliefs sought.

F. Court's Determination

20. Given their similarity, we propose to address issues No. (i) and (iii) together.

Issue No. (i): Whether the Respondent's acts of arresting, detaining, prosecution, conviction and imprisonment of the Applicant is an infringement of the Rwanda laws and the principles of good governance and rule of law as enshrined in Articles 6(d), 7(2) and 8(1) of the EAC Treaty

Issue No. (iii): Whether the Respondent violated the Applicant's rights to fair trial and due process of law

21. With regard to Issue No. (i), the Applicant contended that his arrest, detention, prosecution, conviction and imprisonment by the Respondent's agents were unlawful as they breached several provisions of the Constitution of Rwanda, the Penal Code of Rwanda, the Criminal Procedure Code of Rwanda as well as the rule of law enshrined in Articles 6(d), 7(2) and 8(1) of the Treaty.
22. The Applicant submitted that the Respondent violated his right to due process of law as enshrined in Article 29 of the Constitution of the Republic of Rwanda¹ given that in the second trial, having been arrested on 2nd April 2014 and taken to Court on 8th April 2014 for hearing of his provisional detention, he had been held illegally for six (6) days without being informed of the reasons for his arrest contrary to the aforesaid provisions. He contended that his right to due process of law was further violated as he was arrested, detained, prosecuted and imprisoned for an act that did not constitute a crime or an offence under the laws of Rwanda, specifically Articles 2 (Definition of an offence), 3 (No punishment without law) and 463 (Offence of inciting insurrection or trouble amongst the population) of the Organic Law No. 01/2012 instituting the Penal Code. It was also the Applicant's submission that the Respondent violated his right to defence as provided in the Constitution and Articles 50 and 150 of the Rwandan Code of Criminal Procedure since in the second trial, there were no witness (es) called by the Prosecutor to testify against him nor did the Prosecutor present any exhibit to the trial court, thus depriving him of his right of cross-examination.
23. The Applicant also contended that the Respondent violated his constitutional right to be presumed innocent until proved guilty by a competent Court as

¹ The Applicant has initially referred to Article 18 of the Constitution of Rwanda 2003, but it was revised in 2015.

enshrined in Article 29 of the Constitution, alleging that the Police Officers never adhered to any law or procedure during his arrest, detention and trial and that there was no moment he was presumed innocent.

24. The Applicant contended that given the foregoing violations of the laws of Rwanda, the Respondent had flouted the principles of good governance and the rule of law under Article 6(d) and 7(2) of the Treaty.
25. Conversely, the Respondent vigorously denied the Applicant's allegations. He insisted that there was no violation of the Constitution of Rwanda and its laws or Articles 6(d), 7(2) and 8(1) of the Treaty as the Applicant had alleged. He contended that the arrest, detention, prosecution, conviction and imprisonment of the Applicant were lawful under the laws of Rwanda and due process was continuously observed. In this regard, he asserted that the Applicant was legally arrested under warrants signed by competent Police Officers who duly complied with the pertinent provisions of the Code of Criminal Procedure as regards the timeframe within which bring the Applicant before the Court. With respect to the allegations that the Applicant's right to a fair trial was violated considering the way evidence was adduced, the Respondent contended that in the second trial, proceedings were conducted in accordance with the relevant provisions of the law relating to the Code of Conduct Procedure on production of evidence during trial in Court and the law relating to the Code of Criminal Procedure. It was the Respondent submission on this issue that due process of law had been observed at all stages of the Applicant's trial and that therefore, no violation of the rule of law did occur, contrary to the Applicant's allegations.
26. With regard to Issue No. (iii), the Applicant argued *inter alia* that the right to a fair trial is guaranteed under the Constitution of Rwanda, as well as the Treaty and the African Charter on Human and Peoples' Rights. He submitted that by trying him twice for the same act he had already been tried and acquitted of, the Respondent violated his right to due process of the law. He asserted that in the second trial, he was illegally held in detention for six (6) days without being informed of the alleged offence he was being charged with, was eventually charged with an act that did not constitute an offence under the Rwanda, denied an opportunity to defend himself by the Prosecution's failure to call witnesses, thus denying him the right of cross-examination, all of which amounted to infringement of the principle of rule of law, good governance, the right to fair trial and due process.
27. On the other hand, the Respondent in his pleadings and submissions argued that the Applicant had enjoyed all his rights of fair trial with regard to the second criminal case. He submitted that all provisions of the Penal Code as well as those of the Code of Criminal Procedure were respected and observed. He further submitted that there was no violation of the principles of the rule of law, fair trial and due process of law as enshrined under the Treaty and the African Charter on Human and Peoples' Rights. He argued that the evidence produced at the Applicant's second trial was lawfully tendered including the electronic messages in Word format produced.

Determination on Issue No. (i) and Issue No. (iii)

28. We have carefully considered the pleadings and submissions of the Parties on the

above issues. With regard to Issue No. (i), we noted first of all that the Applicant had complained about being subjected to unlawful arrest and illegal detention for the period from 8th November 2013 to 2nd April 2014 and unsuccessfully challenged those alleged illegalities up to Appellate Court levels in Rwanda. The Applicant also challenged the legality of court proceedings in his second trial alleging that they violated his right to due process of law as enshrined in the Constitution of the Republic of Rwanda and its Code of Criminal Procedure. The Applicant therefore requested the Court to find that those acts attributable to the Respondent violated the cited laws of Rwanda and therefore, infringe the Respondent's obligations under Articles 6(d) and 7(2) of the Treaty.

29. We must point out forthwith that in the matter before us the question of the Respondent's responsibility for the impugned acts of a court within its jurisdiction was neither canvassed nor disputed. Indeed, we are cognizant of a well-established rule of international law that the conduct of an organ of a State, including the conduct of an organ otherwise independent of a State must be regarded as an act of that State.²

30. We are also mindful of the principle advanced in the case of *B. E. Chattin (USA) Vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 282 at 288*, where state responsibility for wrongful judicial acts was limited to "judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient governmental action." Similarly in the case of *Ida Robinson Smith Putnam (USA) Vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 151 at 153*, it was held:

"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.³ A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."

31. In the matter before us, no attempt was made by either party to address us on whether or not the acts complained of by the Applicant were, in fact, judicial acts showing outrage, bad faith, willful neglect of duty, acts of clear and notorious injustice, visible at mere glance so as to make them acts attributable to the Respondent State. The Applicant simply sought to invoke the Court's mandate to review the acts of the Respondent's domestic courts in so far as they allegedly violated designated Treaty provisions.

32. The duty of this Court in this regard was amply summed up in the case of *Manariyo Désiré Vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 8 of 2015* as follows:

"Where a domestic adjudication process is alleged by any of the parties thereto to have been unsatisfactory, an international adjudication process

² See Advisory Opinion of the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p. 62 at pp. 87-88, paras. 62, 63 and *Salvador Commercial Company, 1902, UNRIAA, vo. XV, p. 455 at p. 477*.

³ See case of *Margaret Roper, Docket No. 183, paragraph 8*.

would be required to interrogate whether indeed there has been a violation of a State's international obligation.”

33. Indeed, the considerations to be taken into account in such an interrogation were espoused by the Appellate Division of this Court in *Henry Kyarimpa Vs. The Attorney General of the Republic of Uganda, EACJ Appeal No. 6 of 2014* as follows:

“Where the complaint is that the action was inconsistent with internal law, and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.”

34. In *Manariyo Désiré Vs. The Attorney General of the Republic of Burundi* (supra), the Court did cite with approval the following exposition in the matter of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina Vs. Serbia & Montenegro), Judgment, ICJ Reports 2007, p. 43, para 203* on the burden of proof applicable to international claims:

“On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and paramilitary Activities in and against Nicaragua (Nicaragua Vs. United States of America)*,⁴ “it is the litigant seeking to establish a fact who bears the burden of proving it.”

35. In the same vein, in *Henry Kyarimpa* (supra), the following preposition in Shabtai Rosenne, *The Law and Practice of the International Court*, 1920 – 2005, Vol. III, Procedure, p. 1040 had been cited with approval:

“Generally... the court will formally require the Party putting forward a claim or particular contention to establish the elements of fact and of law on which the decision in its favour is given.”

36. In the instant case as stated above, the Applicant's complaint is that he has been subjected to illegal court proceedings that led to his condemnation and requests this Court to declare that that adjudication process violated the laws of Rwanda as well as the principles of good governance and rule of law as enshrined in Articles 6(d) and 7(2) of the Treaty. We reproduce Articles 6(d) and 7(2) of Treaty for ease of reference.

Article 6(d) provides that:

“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(.....)

(d) good governance including adherence to the principle of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter of Human and Peoples' Rights.”

Article 7(2) provides that:

⁴ *Judgment, ICJ Reports 1984, p. 437, para. 1010*

“(…)

2. The Partner States undertake to the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

37. Considering the issue at hand, we take the view that this Court is required to interrogate the impugned court proceedings and decisions so as to ascertain whether the Courts of Rwanda, in their handling of the two cases complained of by the Applicant, made wrongful acts or decisions that can be attributed to Rwanda’s failure to comply with its international obligations thus infringing the provisions of Articles 6(d), 7(2) and 8(1) of the Treaty, the African Charter on Human and Peoples’ Rights and the Vienna Convention. This is a question of evidence. It seems quite clear to us that both the Judgments of the courts and their record of proceedings are extremely relevant. The Applicant in filing the Reference, availed a translated copy of the Judgment RP0017/14/HC/KIG) from Kinyarwanda to English to aid the Court in appreciating those judgments. In the Affidavit deponed on 2nd October, 2017 by Ms. Maureen Awuor Okoth (para. 30) she promised to avail copies of the proceedings translated from Kinyarwanda to English. In a further Affidavit of Maureen Awuor Okoth deponed on 21st November, 2017, the said deponent purported to annex a bundle of documents that were allegedly records of the court proceedings having been translated from Kinyarwanda to English.

38. First, looking at this bundle of documents, it is not easy to make out which particular document in Kinyarwanda has been translated into English. It appears to be a fishing expedition. Secondly, the certification thereof made by one Habarurema Aloys, that he translated the proceedings from Kinyarwanda to English is of a general nature. It is not applied to a particular document in the bundle. It is omnibus. Thirdly, under Rule 39(1) of the Rules annexed documents are to be “certified copies”. In the annexed bundle, there are several documents but there is no evidence to show that each one is a certified copy of the original. We are therefore of the view that the mandatory requirements of Rule 39(1) have not been complied with. In the circumstances, we conclude that no proper translated records of the court proceedings from Kinyarwanda to English have been furnished to this Court in respect of the two aforementioned criminal cases.

39. In *Manariyo Desiré* (supra), the importance of the record of court proceedings was emphatically mentioned. It was stated as follows:

“Even more specifically, the record of proceedings would have informed this court’s findings as to whether the Supreme Court administered Burundian law in an outrageous way, in bad faith, with willful neglect of their duties or conducted the proceedings in blatant violation of the substance of natural justice, such as would engender international liability. Whereas the abuse of the Applicant’s rights to be heard and be availed an opportunity for cross-examination of witnesses was indeed raised in pleadings, we find that insufficient evidence was adduced in proof thereof ----”

40. The Court further stated:

“In the absence of the record of proceedings, we are unable to determine

the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether or not the resultant decision was iniquitous and thus engendered the Respondent legal liability. We do therefore find that the Applicant has not satisfactorily proved the violation of the principle of the rule of law enshrined in Article 6(d) and 7(2) of the Treaty. We so hold."

41. Similarly, in the present case, a little demonstration would suffice to show the importance and relevance of the record of the court proceedings in the present case. The Applicant's allegation that the same material evidence (Skype chat) used in the first criminal case was used in the second criminal case; that no witnesses were called and that he was denied an opportunity to cross-examine them did require verification by the perusal of the record of the proceedings of the cases in issue. We are of the firm view that the record of the court proceedings was crucial to our interrogation of the said court's decisions in respect of the Applicant's complaints of unlawful arrest, detention, prosecution, conviction and imprisonment.
42. We have also considered our jurisdiction in relation to the complaints before us. With regard to the issue as to whether the acts with which the Applicant was charged in the second criminal case did or did not constitute an offence under Rwandan law, we are of the view that the determination of this issue is appropriate for an appellate review before competent Rwandan Courts which may examine elements of the offence in relation to the relevant provisions of the Rwandan law. The responsibility of this Court in respect to court decisions from Partner States, as reaffirmed in this judgment herein above, is to carry out an international judicial review of the said domestic court decisions so as to ascertain whether the impugned acts cause an injury and whether the acts which caused it violate any rule of international law, in the present case, Articles 6(d), 7(2) and 8(1) of the Treaty.
43. In the present case, in the absence of records of proceedings, we do not find sufficient material before us as would support a determination as to whether those impugned acts of the Respondent were an infringement of the Rwandan laws and the principles of good governance and rule of law as enshrined in Articles 6(d) and 7(2) of the Treaty. For these reasons, Issue No. (i) is resolved in the negative.
44. Turning to Issue No. (iii), in the case of *Baranzira Raphael & Another Vs. The Attorney general of the Republic of Burundi*, EACJ Reference No. 15 of 2014, this Court did cite with approval the following definition of due process from *Black's Law Dictionary*:⁵

"The notion of due process advances the conduct of legal proceedings according to established rules and principles for the protection and promotion of private rights."
45. In the same dictionary, the notion of fair trial is defined as follows:

"A trial by an impartial and disinterested tribunal in accordance with regular procedures; especially a criminal trial in which the defendant's constitutional and legal rights are respected."
46. On the other hand, Article 14.1 of the International Covenant on Civil and

⁵ *Black's Law Dictionary (8th Ed.)*, pp. 538-539.

Political Rights (ICCPR) does recognize the right to a fair trial, delineating the basic tenets thereof to include persons' equality before the courts; hearings in open court before a competent, independent and impartial tribunal, and judgments or rulings arising from such hearings being made public.⁶ It reads:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law... any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

47. Article 14.3. of the same Covenant does provide minimum standards for criminal trials in the following terms:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a)....

(b)....

(c)....

(d)....

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f)....

(g)....

48. The Applicant argued that his right to a fair trial was violated by the Respondent's omission to call witnesses in his second trial in so far as this course of action by the Prosecution violated his right of cross-examination. However, as clearly depicted in Article 14.3 of the ICCPR, an accused person would only have the right to cross-examine such witnesses as have been called by the Prosecution, but the Prosecution is not obliged to call any witnesses. Consequently, the decision by the Prosecution in the Applicant's trial not to call witnesses cannot be deemed to be a violation of the Applicant's right to fair trial. We so hold.

49. In light of the foregoing, we are of the considered view that the Applicant has not sufficiently established that either the trials in issue in the present Reference were not conducted in accordance with the Respondent's national laws, or that the Applicant's constitutional and legal rights were violated in the course of the said criminal trials. It seems abundantly clear to us that both principles as invoked by the Applicant would require the interrogation of the court record of the proceedings to ascertain the Rwandan courts' compliance with domestic laws and procedures (or the lack thereof). As we did find in Issue No. (i), such record of proceedings were not availed to the Court.

50. In *Bosnia & Herzegovina Vs. Serbia & Montenegro* (supra), the onerous duty on an Applicant before an international court or tribunal was appositely stated by the ICJ as follows:

⁶ Closed hearings are only permitted for reasons of privacy, justice or national security; and judgments may only be suppressed in divorce cases or to protect the interests of children.

“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.⁷... The same standard applies to the proof of attribution for such acts.”

51. We are persuaded by that elucidation of the standard of proof. In the absence of such conclusive evidence, therefore, we are constrained to find, as we did in Issue No. (i) that the Applicant’s allegations with regard to violation of Articles 6(d) and 7(2) of the Treaty do remain unproven with regard to the principles of rules of law, fair trial and due process. We so hold.

Issue No. (ii): Whether the Respondent violated the principle of *non bis in idem* by subjecting the Applicant to trial twice based on similar facts:

52. The Applicant in his submission argued that there was only one act that constituted two sets of offences upon which the prosecution relied in the two trials. The Applicant asserted that the prosecution failed to prove his guilt on the first trial hence reframing facts and instituting the second trial. He further argued that the second trial was based on similar facts to the first trial, to wit the Skype Chat conversation between him and one Munyampeta Jean Damascene. The Applicant submitted that in the second trial, he did raise the said issue but the Prosecution insisted on taking the position that the facts did not matter, only the offence did. He strongly argued that the said position was contrary to the principle of “*non bis in idem*” because the same is emphatic that a man may not be put twice in jeopardy for a conduct in which he has been tried and acquitted and/or convicted. He further invoked the *maxim* of “*autrefois acquit*”, that is, if an accused person has been tried of an offence and not found guilty of that offence by a competent court, and is instead acquitted, the acquittal is a bar to a second charge. He submitted that the prosecution having lost in the first trial ought to have appealed against the acquittal instead of instituting a second trial.
53. Conversely, the Respondent denied any violation of the principle of “*non bis in idem*” or subjecting the Applicant to trial twice based on similar facts. He asserted that the Applicant was tried twice on different charges. In the first trial, in case No. RP1184/13/TB/KCY, the Applicant was charged of being in possession of ammunition (a grenade) contrary to Article 670 and 671 of laws No. 01/2012 of 02/05/2012 instituting the Penal Code for which he was found innocent, acquitted in Judgment No. RP1184/13/TB/KCY and was released on 2nd April, 2014. In the second trial, the Applicant was charged with inciting insurrection or trouble amongst the population contrary to Article 463 of the said Penal Code, he was convicted and imprisoned for ten (10) years. It was the Respondent’s contention that both trials were therefore not conducted in violation of either the principle of *autrefois acquit* or *non bis in idem*.

Determination on Issue No. (ii)

54. From the outset, we deem it appropriate to define the concept *non bis in idem* as relied upon. *Non bis in idem* which literally translates to “not twice for the same thing,” is a legal doctrine to the end that no legal action can be instituted twice for the same cause of action. It is essentially the equivalent of the double jeopardy

⁷ See *Corfu Channel (United Kingdom Vs. Albania)*, Judgment, ICJ Reports 1949, p. 17.

(*autrefois* acquit) doctrine found in Common law jurisdictions. Indeed, Article 14.7 of the International Covenant on Civil and Political Rights forbids double jeopardy in the following terms:

“No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

This rule finds expression in Article 6 of the Penal Code of Rwanda which provides that:

“A person shall not be punished twice for the same offence.”

55. The application of the doctrine *non bis in idem* entails thus several ingredients. These include (a) an initial proceeding in which jurisdiction was properly exercised; (b) a determination on the merits was properly made in the initial proceedings with respect to the particular acts constituting the crime; and (c) the crimes or acts that are the subject of the successive trial are substantially similar.
56. In the instant case, it is our considered view that whether similar material evidence or “similar conduct” was used in the two cases is a matter that necessitates the perusal of the two impugned Judgments of the Courts of Rwanda as well as the record of the proceedings in respect thereof so as to verify the Applicant’s allegations. In the purported translated record of the court proceedings on record, we did not find the court proceedings for the first criminal case No. RP1184/13/TB/KCY nor did we see the Skype chat documents that were allegedly used as material evidence in that case. We did not see the alleged Skype documents in the translated proceedings of the second criminal case RP0017/14/HC/KIG either. Therefore, we were unable to verify the alleged similarity of material or conduct as alleged by the Applicant in the absence of the record of proceedings of the two cases.
57. In the absence of the record of proceedings to ascertain the actual evidence used in the two cases, a plain reading of Articles 670 and 671 of the Penal Code of Rwanda in relation to the first criminal case RP1184/13/TB/KCY and Article 463 in relation to the second criminal case RP0017/14/HC/KIG clearly shows that the two offences were framed differently and *prima facie*, in the absence of material to the contrary, we cannot conclude that the Applicant was subjected to “Double Jeopardy” or was tried twice for an offence which he had already been acquitted of. We do therefore resolve Issue No. (ii) in the negative.

Issue No. (iv): Whether the Applicant is entitled to the relief sought:

58. The Applicant in his submission prayed to this Court to grant him reliefs as reproduced earlier in Para.2 above. In addition, the Applicant asserted that he was the Head of ICT at the East African Legislative Assembly (EALA) with a salary of USD 6000 a month, and thus prayed to the Court to apply the said figure in computation of his compensation from the date he was arrested, that is 8th November, 2013 to the date of his release from prison. The Applicant further asserted that the Court should hold that the Respondent violated the principles of the established law of Rwanda, the provisions of Articles 6(d) and 7(2) of the Treaty and the African Charter on Human and Peoples’ rights.
59. In his submission, the Respondent on the other hand submitted that the

Applicant is not entitled to the reliefs sought in the Reference. He argued that the Applicant had been accorded fair trial in both trials and in the circumstances, prayed to this Court to:

- i. Find that the Applicant is not entitled to the reliefs sought;
- ii. Find that the Respondent never violated any provision of the domestic and international laws and the Treaty of the EAC as far as the principles of good governance and rule of law are concerned;
- iii. Order that the sentence being served by the Applicant in Criminal Case No.RP0017/14/HC/KIG is a legal one and cannot be set aside by this Honorable Court;
- iv. Find that the Applicant's conviction respected the rule of law and is considered valid and legal;
- v. Find that no damages sought should be awarded to the Applicant since the whole procedure of conviction and sentencing the Applicant was legal;
- vi. Order that the Applicant's prayer in paragraph 50 concerning the compensation of the Applicant's salary of USD 6000 from 8th of November, 2013 up to date not be granted; and
- vii. Dismiss the Reference with costs.

Determination on Issue No. (iv)

60. Before considering the prayers for remedies from the Parties, it is worth recalling that in *Appeal No.2 of 2017, Hon. Dr. Margaret Zziwa vs. the Secretary General of the East African Community*,⁸ the Appellate Division of this Court considered the question as to whether the remedy of damages is available in this Court and held that Articles 23(1) and 27(1) of the Treaty confer on the Court, being an international judicial body, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty. The Court also held:

“The remedies of compensation (usually known as damages in internal law) is very firmly established in international law, and is available for the Community's breach of its Treaty obligations where a claimant establishes that the Act, regulation, directives, decision or action of the Community complained of has caused such claimant a loss which is financially assessable.”⁹

61. We have also perused the International Law Commission (ILC) provisions (Article 31) and considered various international courts' decisions on reparation including the famous case of the *Chorzow Factory Case, Judgment No. 13 of P.C.I.J of 13 September, 1928, Series A No. 17* where the Court stated as follows:

“The foundation of the international law on remedies is that an international wrong generates an obligation of reparation, and the reparation must so far as possible eradicate the consequences of the illegal act. Every breach of an international obligation carries with it a duty to repair harm and an international tribunal with jurisdiction over dispute has jurisdiction to award reparation upon determining that a breach of international law has occurred.

⁸ *Hon. Dr. Margaret Zziwa case, para 35, p. 19.*

⁹ *Idem.*

Full reparation may take the form of restitution, compensation and satisfaction as required by the circumstances. Wiping out all the consequences of the wrongful act may thus require some or all the forms of reparation to be provided depending on the type and extent of the injury that has been caused.”

62. Furthermore, in *Grands Lacs Supplier S.A.R. L. 7 Others Vs. The Attorney General of the Republic of Burundi*, EACJ No. 6 of 2016, this Court held that, as an international Court set up by a Treaty, it is vested with the jurisdiction to determine whether the Applicants were entitled to the damages and interest thereof sought as a remedy to the unlawful seizure of their goods by the Respondent.

63. In light of the foregoing case law on the subject of reparation by an international court's such as the East African Court of Justice, we now proceed to deal with the determination of Issue No. (iv) as stated above.

Prayer (i), (ii) and (iv)

64. Given our holding herein above, we find that the Applicant has not satisfied us that Criminal Case No.RP0017/14/HC/KIG was conducted against universally accepted principles of law, therefore prayer (i) is declined. Further, prayers (ii) and (iv) are also declined for the same reason that the Applicant has not satisfactorily proved violation of the principles of law enshrined in Articles 6(d) and 7(2) in the Treaty.

Prayer (iii) and (v)

65. We are of the considered view that granting prayers (iii) and (v) would be tantamount to exercise an appellate jurisdiction over national courts, which jurisdiction we are not clothed with. The said prayers are therefore hereby declined.

Prayer (vi) and (vii)

66. Generally, as far as prayer (vi) is concerned, the Court may award general damages in an appropriate case as above explained. However, in the present case, we are unable to do so because the Applicant has not proved his claims in the Reference. Hence, prayer (vi) is declined. Similarly, we find no basis to award aggravated and exemplary damages as sought in prayer (vii), the Applicant having not succeeded in this Reference.

67. The Applicant did in his Written Submissions raise a claim for his unpaid monthly earning. In our view, such a claim is akin to a claim for special damages. It is now well settled law that specific damages must be pleaded and proved. In this case, they were not pleaded. In any event, the Applicant has not even succeeded in the Reference. We do therefore disallow this prayer.

Prayer (viii)

68. With regard to the prayer for costs, as stated in Rule 111(1), costs follow the event unless the Court for good reasons otherwise orders. In the present case, the Applicant having failed to prove his claims under this Reference, he would not be entitled to costs. Ordinarily, he should be subjected to pay costs to the Respondent. However, we are aware that the Applicant could not afford to engage a lawyer to represent him initially and that the ones that represented him subsequently were doing so under a legal aid brief by the East African Law Society. In the circumstance, it is in the interest of justice that each party should

bear its own costs.

G. Conclusion

69. In the result, the Reference is hereby dismissed. We order each party to bear its own costs.

70. It is so ordered.

J. Bosek, A. Kyerure & M. Okoth, Counsel for the Applicant

N. Ntarugera & S. Kibibi, Counsel for the Respondent

^^*^*

First Instance Division

Reference No. 11 of 2014**Audace Ngendakumana v the Attorney General of the Republic of Burundi**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; .F. Jundu, J
November 27, 2015

Jurisdiction - Applicant's knowledge - Whether the case was filed within prescribed time

Articles: 6(d), 7 (2), 12, 23(1), 27(1) (2), (3), 30(1) (2),(3) of the Treaty - Rule 53 EACJ Rules of Procedure, 2013 - Article 38 Constitution of the Republic of Burundi 2005 - Articles 70, 199, 371 & 372 Civil Procedure Code of Burundi- Law No.1/13 of 4th April, 2006

The Reference concerned a disputed house located outside Ruhero I and II in Nyakabingi area. The house initially belonged to one Sebastian Ntirandekura who was killed during civil war in 1972. He was the husband of Kizininda Catherine a cousin of Audace Ngendakumana, the Applicant in this Reference. On 6th August, 1975, the Kizininda Catherine, sold the said house to Audace Ngendakumana, the Applicant. On 3rd March, 1976, a Senior State Attorney wrote to the Land Registry recognizing the transfer of title from Kizininda Catherine to the Applicant. Later, the Applicant also sold the disputed house to Ntukamazina Jean who upon his death, left the house to his wife, Niyonzima Leocadie.

In 1972, a Commission of Lands and Other Assets was formed to manage and take care of land and properties belonging to those killed during the war to address claims by occupants. On 29th March, 1972 and 8th August, 1973 the Applicant claimed that the Minister of Justice of Burundi wrote letters confirming that houses located outside Ruhero I and II were still private property and not affected by proceedings of the said Commission. Between 1976 to 2013, the Applicant had peaceful occupation of the disputed house.

The Applicant alleged that the Commission later nullified the sale of the house without giving him an opportunity to defend his claim thus breaching Article 38 of the Constitution of Burundi on the right to be heard. On 21/5/2014 the Applicant complained to the Appellate Chamber of that Commission but received no reply. This is tantamount to a refusal to act under Articles 371 and 372 of the Civil Procedure Code of Burundi. He also sought a declaration that his agreement with Kizininda Catherine for purchase of the house was legal.

The Respondent asserted that many houses and properties left behind by those who died or fled Burundi were illegally and unprocedurally seized and occupied by other people without title thereto. That is how the Applicant gained possession. Moreover the Applicant the said Kizininda Catherine, in her testimony denied having sold the disputed house to the Applicant. Thus on 2nd May, 2013, the Commission, Provincial Level restored the disputed house to Ntaconayigize Sebastian, the son of the late Ntirandekura Sebastian, declaring Niyonzima Leocadie an illegal occupier of the house her husband bought from the Applicant who did not own the house. Further, the Applicant failed to appeal within 60 days and it was only on 21st

May, 2014 that the Applicant wrote a letter to the Appellate Chamber of the said Commission. Therefore, the Applicant was time- barred in his appeal against the current Reference is also aid time-barred furthermore, the Court has no jurisdiction to entertain the Reference in terms of Articles 27(2) and 30(3) of the Treaty.

Held:

1. This Court has jurisdiction under Articles 23(1) and 27(1) read together with Article 30(1) to interpret and apply Articles 6(d) and 7(2) of the Treaty. However, The prayer for an order that “the agreement between Catherine Kizininda and the Applicant is legal and made in respect of the Law of Burundi “ is a matter a matter within the jurisdiction of the National Courts in Burundi as per Articles 27 (2) and 30 (3) of the Treaty hence the Court has no jurisdiction to entertain the same
2. The Applicant was aware of the decision of the Commission, Provincial Level of 2nd May, 2013 nullifying the sale agreement of the disputed house. Thus taking into account the said dates, the filing of the Reference on 18th July, 2014 was beyond the limit of two months period provided for under Article 30(2) of the Treaty.

Cases cited

Hilaire Ndayizamba v AG of Burundi & Anor [2012-2015] EACJLR 49, Ref. No.3 of 2012
 Hon. Sitenda Sebalu v Secretary General of EAC & Ors [2005-2011] EACJLR 160, Ref. No. 1 of 2010
 Independent Medical Legal Unit v AG of Kenya & Ors [2005-2011] EACJ LR 190, Ref. No.3 of 2010
 Prof. Nyamoya Francois v AG of Burundi & Anor [2005-2011] EACJLR 320, Ref. No. 8 of 2011
 Samuel M. Mohochi v AG of Uganda [2005-2011] EACJLR 274, Ref. No. 5 of 2011
 The AG of Uganda & Anor v Omar Awadh [2005-2011] EACJLR 214, Appeal No. 2 of 2012

JUDGMENT

A. Introduction

1. This Reference was lodged by the Applicant in this Court on 18th July, 2014. However, before the same could be heard, the Applicant filed an Amended Reference (“The Reference”) on 3rd February, 2015.
2. The Reference has been brought or filed under Articles 3(3) (b), 6(d), 7 (2), 12, 27(1), 30(1) and (2) of the Treaty for the Establishment of the East African Community (“The Treaty”).
3. The Applicant is a natural person and resident of Bujumbura in the Republic of Burundi, a Partner State of the East African Community. His address for service for the purpose of this Reference is care of Mr. Horace Ncutiyumuheto, a member of Burundi Bar Association and Advocate before the Courts and Tribunals in the Republic of Burundi. His address is Avenue Boulevard, Patrice Lumumba Immeuble “Kwangoma”, P.O. Box 374, Bujumbura, Burundi.
4. The Respondent is the Attorney General of the Republic of Burundi and he is sued in his capacity as the Principal Legal Advisor of the said Government. His address for service for the purpose of this Reference is care of the Ministry of Justice, the Republic of Burundi, and P.O. Box 1870, Bujumbura, Burundi.
5. Initially, the Secretary General of the East African Community had been joined as the 2nd Respondent by the Applicant. However, he later on withdrew or discontinued the Reference against the said Respondent as reflected in the proceedings of this Court dated 13th February, 2015.

B. Representation

6. Mr. Horace Ncutiyumuheto, Learned Counsel represented the Applicant. On the other hand, Mr. Nestor Kayobera, Learned Director of Judicial Organization in the Ministry of Justice, Burundi represented the Respondent.

C. The Applicants Case

7. The Applicant recounted in his Statement of Reference and supporting Affidavit that the Reference principally refers to a disputed house which is located outside Ruhero I and II which are in Nyakabingi area. The said house initially belonged to one Sebastian Ntirandekura who was killed during the war crisis in 1972. He was the husband of Kizininda Catherine who is a cousin of Audace Ngendakumana, the Applicant in this Reference. It is stated that on 6th August, 1975, the said Kizininda Catherine, sold the said house to his said cousin Audace Ngendakumana, the Applicant and that on 3rd March, 1976, a Senior State Attorney wrote to the Land Registry recognizing the transfer of title from Kizininda Catherine to the Applicant. Later, the Applicant also sold the disputed house to Ntukamazina Jean who on his death left the sold house to Niyonzima Leocadie, his wife.
8. The Applicant further contends that in 1972, a Commission was formed to manage and take care of land and properties whose owners had been killed during the war period in Burundi for the reason that there were many claims that some people were allegedly occupying houses which belonged to people killed during the war. In that regard, on 29th March, 1972, and 8th August, 1973, the Applicant claims that the Minister of Justice of Burundi had written letters confirming that the houses located outside Ruhero I and Ruhero II were still private property and were not affected by proceedings of the said Commission. The Applicant therefore, alleges that from 1976 to 2013, the occupation of the disputed house was peaceful and that no one contested or claimed title or ownership of that property neither did any one seek a nullification of the title thereto.
9. The Applicant claimed that, the Commission of Lands and Other Assets later nullified the sale of the house between Kizininda Catherine and Audace Ngendakumana, the Applicant as well as the sale from the Applicant to Ntukamazina Jean and declared both sales as null and void. It proceeded to award the disputed house to Ntaconayisige Sebastian, stating that he was the child of the late Ntirandekura Sebastian the deceased husband of Kizininda Catherine who had sold the house to the Applicant. It also directed that Niyonzima Leocadie should look for another house from the Applicant having nullified the sale to her.
10. The Applicant contends further in his pleadings and submission before this Court that he is aggrieved by the decision of the said Commission (Provincial Level) in that he had not been summoned by the said Commission to defend himself or explain what had happened on his part as far as the sale of the disputed house was concerned. He further argues that the said decision is contrary to Article 38 of the Constitution of the Republic of Burundi as the said Article provides for a right to be heard to anyone who has a case before a judicial or administrative tribunal.

11. In challenging the decision, the Applicant therefore wrote a letter to the resident of the Appellate Chamber of that Commission on 21/5/2014 complaining that he was not summoned by the Provincial Chamber of that Commission to explain himself on the said sale of the disputed house before it made its decision. To date, he has not received any response from the said Appellate Chamber and argues that such silence from an established authority is tantamount to a refusal to act under Articles 371 and 372 of the Civil Procedure Code of Burundi.
12. Based on the aforesaid assertions, the Applicant prays for the following declarations and orders from this Court:-
 - a) A declaration order that the judicial power given to the Commission of Goods and Other Assets by the Respondent is an infringement of Articles 6(d) and 7(2) of the Treaty;
 - b) A declaratory order that the proceedings and decision made by the First Instance Division of the Commission was unlawful and infringes Articles 6(d) and 7(2) of the Treaty;
 - c) An order that an agreement made between Kizininda Catharine and Audace Ngendakumana is legal and made in respect of the Law of Burundi.
 - d) Direct that the Respondent shall pay all the costs of this Reference.

D. The Respondent's Case

13. In its Reply, Supporting Affidavits and Submission before this Court, the Respondent vigorously contests and opposes the Reference. He asserts that the owner of the disputed house was one Ntirandekura Sebastian who was killed in 1972 following the war crisis in Burundi, leaving the said house located at Nyakabinga, 111 area, 14th Avenue No. 14 Bujumbura to Bazukondi Rose, his first wife as his second wife one Kizinda Catherine was living upcountry. Thereafter, the said Bazukondi Rose fled to the Democratic Republic of Congo (DRC) in the wake of the killings that were taking place in Burundi.
14. The Respondent contends further that, following the killings of people during the war and those forced to flee Burundi like Buzukondi Rose, had most of their houses and properties that they had left behind illegally and un procedurally seized and occupied by other people who had no title or ownership thereof. In that regard, on 6th August, 1975, the Applicant, who is a cousin of Kizininda Catherine, the second wife of the late Ntirandekura Sebastian, purported to have bought the disputed house from her. In 1977, the Applicant then sold the disputed house to one Ntukamazina Jean who left the said house to his wife Niyonzima Leocadie upon his death. In 1983, it transpired that they found the disputed house occupied by Niyonzima Leocadie who alleged that her late husband Ntukamazina Jean had bought the said house from the Applicant in 1977.
15. With the signing of the Arusha Peace and Reconciliation Agreement in 2000, and the formation of the Commission of Lands and Other Assets in 2006, Bazukondi Rose and her son, Ntaconayisige Sebastian, filed a complaint in the said Commission at the Provincial level in Bujumbura against the occupation of the disputed house by Niyonzima Leocadie, the wife of the late Ntukamazina Jean. The Respondent asserted that both the Applicant and Kizininda Catherine were invited to testify before the said Commission and the said Kizininda

Catherine, in her testimony categorically denied that she had sold the disputed house to the Applicant.

16. In its decision made on 2nd May, 2013, the said Commission at the Provincial Level restored the disputed house to Ntaconayigize Sebastian, the son of the late Ntirandekura Sebastian, the initial legal owner for the said disputed house. It further decided that Niyonzima Leocadie, the illegal occupier of the house should deal with Audace Ngendakumana the Applicant who had purportedly sold the disputed house to her well knowing that did not belong to him.
17. The Respondent strongly contends that it is not true that the Applicant was not summoned by the said Commission at the Provincial level to explain himself on the disputed house. Further, that the Law establishing the Commission provides for a period of 60 days to appeal to the Appellate level of the said Commission and thereafter any appeal is to the Special Court on Lands and Other Assets. That the Applicant has never appealed against the decision of the Commission delivered on 2nd May, 2013 and that it was only on 21st May, 2014 that the Applicant wrote a simple letter to the Appellate Chamber of the said Commission disagreeing with its decision (Provincial level). The Respondent also avers that in terms of the Law establishing the Commission, the Applicant was time- barred in his appeal against the said decision of the Commission dated 2nd May, 2013 and that he is also time-barred in filing the Reference before this Court in terms of Article 30(2) of the Treaty taking into account that the decision of the Commission (provincial level) was made on 2nd May, 2013 and the Reference was only filed on 18th July, 2014. Apart from alleging that the matter is time-barred, the Responded further alleges that the Court has no jurisdiction to entertain the Reference in terms of Articles 27(2) and 30(3) of the Treaty.
18. Based on the aforesaid, the Respondent prays for the following orders:-
 - (a) That this Honourable Court is requested to dismiss the Reference as a whole with costs for being time-barred;
 - (b) That this Honourable Court lacks jurisdiction to determine the Reference and therefore is requested to dismiss the Reference with costs.

E. Scheduling Conference

19. Pursuant to Rule 53 of the Rules of this Court, a scheduling conference was held on 13th day of February, 2015 where all the parties were present and agreed that:-
 - i) The National Commission on Lands and Other Assets, its composition, functions and operations was established by Law No.1/13 of 4th April, 2006 which was amended in 2009 and 2011;
 - ii) Audace Ngendakumana sold a house situated in Nyakabinga 111, 14th Avenue No. 14 to Ntukamazina Jean in 1977;
 - iii) Sebastian Ntaconayisige filed a matter to the National Commission on Lands and Other Assets in Bujumbura alleging that the house of his father Ntirandekura Sebastian who was killed in 1972 was occupied by Niyonzima Lecoadie who indicated that her husband had bought it from Audace Ngendakumana in 1977;
 - iv) The National Commission on Lands and Other Assets at the Provincial level rendered its decision on 2nd May, 2013;
 - v) There are triable issues based on the provisions of Articles 6, 27 and 30 of

the Treaty for the Establishment of the East African Court of Justice.

20. On the other hand, the following points were framed as points of disagreement or issues for determination by the Court:-
- i) Whether the Reference is time-barred;
 - ii) Whether the East African Court of Justice has jurisdiction to entertain the Reference;
 - ii) Whether the Applicant is entitled to the remedies sought.

F. Consideration of Issue No.2: Whether the East African Court of Justice has Jurisdiction to Entertain the Reference

21. Although at the Scheduling Conference, the above named issue was framed as Issue No.2, we deem it necessary to consider it first because the determination of all other framed issues depends first on whether this Court has jurisdiction to entertain the Reference. We propose to determine issue No.1 thereafter.
22. In that context, the Applicant and the Respondent have each submitted on the afore said issue as reflected below:

G. The Applicant's Submission

23. The Applicant contends that this Court has jurisdiction to entertain and determine the Reference and that it derives its jurisdiction from Articles 23(1), 27(1) and 30(1) of the Treaty. In support thereof, the Applicant has cited a number of authorities of this Court where it has held that it has jurisdiction on interpretation, application and compliance with the provisions of the Treaty (*see: Independent Medical Legal Unit vs. Attorney General of the Republic of Kenya & 4 Others, EACJ Ref. No.3 of 2010 and the East African Centre for Trade Policy and Law vs. The Secretary General of the East African Community, EACJ Ref. No.1 of 2011*).
24. The Applicant further asserts that nullification of the sale of he disputed house between the Applicant and Kizininda Catherine by the Commission on Lands and Other Assets (provincial level) on 2nd May, 2013 by a mere declaration without involving the Applicant and without cogent proof is contrary to Article 199 of the Civil Procedure Code of Burundi and Articles 6(d) and 7(2) of the Treaty and that under the above cited provisions of the Treaty and from the various cited decided cases, this Court has jurisdiction to entertain the Reference for determination. He also contends that once there is an allegation of infringement of the provisions of the Treaty as is the case in the present Reference, it follows that the Court is clothed with jurisdiction to determine the Reference. (Citing: *Hon. Sitenda Sebalu vs. Secretary General of the EAC & 3 Others EACJ Ref. No.1 of 2010; and Samuel Mukira Mohochi vs. AG of Uganda, EACJ Ref. No. 5 of 2011*).

H. The Respondent's Submission

25. The Respondent contends that the Court does not have jurisdiction to entertain and determine the Reference except on matters relating to interpretation and application of the provisions of the Treaty under Articles 27(2) and 27(3). Elaborating further, the Respondent asserts that this Court has in its various past decisions Extensively explained that it is clothed with jurisdiction to interpret

and apply the provisions of the Treaty including Articles 6(d) and 7(2) of the same [citing: *The Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba*, EACJ Appeal No.10 of 2012; and *James Katabazi & 21 Others vs. The Secretary General of the East African Community & The Attorney General of Uganda*, EACJ Ref. No. 1 of 2007.

26. Relying on the aforesaid authorities, the Respondent further contends that the Court is not clothed with jurisdiction to grant prayer (c) in the Reference as it would contradict the provisions of Articles 30(3) of the Treaty and also contradict Article 30 (2) of the same as being time-barred having been filed 39 years after the alleged sale agreement was made in 1975. It further asserts that, although the Court has jurisdiction to entertain prayers (a) and (b) in the Reference, it prays for the same to be dismissed as similarly time-barred as will further be elaborated in issue No.1 below. The Respondent has cited decided cases of this Court in his submission that the Court may have jurisdiction on some of the prayers and not have jurisdiction on others, (citing: *Hilaire Ndayizamba vs. The Attorney General of Burundi and The Secretary General of the East African Community*, EACJ Ref. No.3 of 2012; and *Prof. Nyamoya Francois vs. the Attorney General of Burundi and the Secretary General of the East African Community*, EACJ Ref. No. 8 of 2011).

I. Decision of the Court on Issue No.2

27. We have carefully considered the rival submissions and arguments of both parties on Issue No.2 above and our determination is as hereunder.
28. The contention of the Applicant is that this Court has jurisdiction to entertain and determine this Reference under Article 23(1), 27 (1) and 30(1) of the Treaty. However, the Respondent in reply has strongly contended that jurisdiction under the said provisions applies only to prayers (a) and (b) in the Reference but not to prayer (c) thereof in view of the provisions of Articles 27(2) and 30(3) of the Treaty. In any event, the Respondent argued further that even the said prayers (a) (b) and (c) in the Reference are time-barred under Article 30(2) of the Treaty.
29. What is therefore, the position of this Court on the aforesaid arguments of the Parties? In answer to that question, there is need to have a glance at the Applicant's prayers in the Reference above (para.12) in order to understand the basis for our decision.
30. It is very clear in our considered view that the Applicant has invoked Article 30(1) of the Treaty in accessing this Court. It provides:-
 "Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such as regulation, directive, decision, or action is unlawful or is in infringement of the provisions of this Treaty."
31. Thereafter, notwithstanding the exceptions which the Respondent has tried to address in his submission, it is our position that this Court has jurisdiction under Articles 23(1) and 27((1) to interpret and apply the provisions of the Treaty as well as ensure compliance of the same in that context. We note that in this Reference, the Applicant has alleged that there is an infringement of Articles 6(d) and 7(2)

of the Treaty and therefore given the fact that this Court has jurisdiction under Articles 23(1) and 27(1) read together with Article 30(1) to interpret and apply the said provisions of the Treaty, then it similarly has jurisdiction to interpret and apply Articles 6(d) and 7(2). In numerous past decisions, this Court has asserted itself that once there is an allegation of infringement of the provisions of the Treaty then it is seized with jurisdiction to interpret and apply the same (*see: Hon. Sitenda Sebalu vs. Secretary General of the EAC & 3 Others*, EACJ Ref. No.1 of 2010; and *Samuel Mukira Muhochi vs. Attorney General of the Republic of Uganda*, EACJ Ref. No. 5 of 2011).

32. We will revert to argument of the Respondent that though this Court has jurisdiction to grant prayers (a) and (b), the same should not be granted because they are time-barred under Article 30(2) of the Treaty. In our considered view, whether the said prayers are time barred or not under Article 30(2) of the Treaty is a matter to be considered when considering Issue No.1, hereinafter. At the moment, it is our considered view that the Court under Articles 23(1), 27(1) read together with Article 30(1), and as argued by the Respondent himself, the Court has jurisdiction to grant prayers (a), (b) and (d) depending on their merit. This leads us to the contention of the Respondent that this Court has no jurisdiction to grant prayer (c) in the Reference as per the provisions of Articles 27(2) and 30 (3) of the Treaty. The Applicant has not respond to this Submission at all and we shall shortly revert to our decision on it.
33. It is the argument of the Respondent that this Court has jurisdiction to grant some prayers in a Reference only and that it does not have jurisdiction to grant other prayers on account of Articles 27(2) and 30 (3) of the Treaty. This Submission was backed by previous decisions of this Court. In that regard, in *Hillarie Ndayizamba (supra)*, the Court stated as follows:-
- “...we are of the decided opinion and in agreement with the respondent that this Court has jurisdiction to entertain prayers (a), (c) and (e) of the Reference and that it is not clothed with the jurisdiction to grant prayers (c) and (d) since the latter clearly falls outside the Court’s jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.”
34. In *Prof. Nyamoya Francois (supra)*, the Court considered a similar contention and held as follows:-
- “Without be labouring the point we hold that this Court has jurisdiction to entertain the Reference in so far as prayers (a), (b) and (e) of the Reference are concerned. As regards prayer (c) and (d) we have no jurisdiction to make such orders and we decline the invitation to perform the duties properly conformed on the National Courts of Burundi.”
35. We have carefully considered prayer (c) in the Reference which requests this Court to make “an order that the agreement between Catherine Kizininda and the Applicant is legal and made in respect of the Law of Burundi.” We have also carefully read Articles 27 (2) and 30 (3) of the Treaty as cited by the Respondents, we are of the firm view that prayer (c) is a matter within the jurisdiction of the National Courts in Burundi hence, this Court has no jurisdiction to entertain the same [*see Prof. Nyamoya Francois (supra)*].
36. In conclusion subject to the aforesaid considered views of this Court on Issue

No.2, we hold that this Court has jurisdiction to entertain this Reference to the extent explained above.

J. Consideration of Issue No.1: Whether the Reference is Time-Barred

37. Each Party submitted on the above issue as below reflected here below.

K. The Applicant's Submission

38. The Applicant contends that the Reference is not time-barred. He avers that he was aggrieved by the decision of the Commission of Lands and Other Assets (Provincial Level) to nullify the sale agreement of the disputed house without summoning him to explain himself on the matter as an intervener under Article 70 of the Civil Procedure Code of Burundi as read with Article 38 of the Constitution of Burundi. These provisions provide for the right of hearing to every affected party to be heard before any judicial or administrative body makes a decision on a dispute before it.
39. The Applicant avers further that, having been aggrieved by the decision of the Commission on 21st May, 2014, he wrote a letter to the President of the Commission of Lands and Other Assets (Appellate Chamber) in which he explained the events that led to the sale of the disputed house. He contends that to date he has not received any reply to the said letter from the said Appellate Chamber of the said Commission.
40. The Applicant contends that the thrust of the Reference hinges on the failure of the Appellate Chamber of the said Commission to respond to his letter of 21st May, 2014 which was received on the same date by the said Appellate Chamber of the said Commission. He argues that the Reference was filed before this Court on 18th July, 2014 well within the period of two months stipulated under Article 30(2) of the Treaty. For these reasons, he strongly asserts that the Reference is not time-barred contrary to the Respondent's contention.

L. The Respondent's Submission

41. On the other hand, the Respondent strongly contends that taking into account the facts and events set out in the Applicant's Statements of Reference as well as the Prayers therein, the Reference is hopelessly time-barred under the provisions of Article 30(2) of the Treaty.
42. First, the Respondent contends that in prayer (a) of the Reference, the Applicant's complaint is based on the fact that the law that grants power to the National Commission on Lands and Other Assets infringes Articles 6(d) and 7(2) of the Treaty. However, the said law has been in use or place since 2006 and was also subsequently revised in 2009, 2011 and 2013.
43. Secondly, the Respondent further contends that the Applicant's prayer (b) in the Reference seeks to reverse the decision of the National Commission of Lands and Other Assets (Provincial level). However, the said decision was delivered by the said Commission on 2nd May, 2013.
44. Thirdly, the Respondent alleges that in prayer (c) in the Reference, the Applicant prays that, this Court ought to declare that the above sale agreement executed with Kizininda Catherine, which was nullified by the said Commission, is lawful. However, the Respondent contends that the said sale agreement is said to have been entered into on 6th August, 1975.

45. Fourthly, the Respondent contends that taking into account the dates of the events stated above, clearly when the Applicant filed this Reference on 18th July, 2014, he did so beyond the limit of the two months period provided for under Article 30(2) of the Treaty. The Respondent further contends that in its previous decisions, this Court has given strict interpretation and application to Article 30(2) of the Treaty and has held that it does not provide room for extension of time [see: *Independent Medical Legal Unit (Supra)*; *Hilaire Ndayizamba (supra)*; and *Prof. Nyamoya Francois case (supra)*].

M. Decision of the Court on Issue No.1

46. We have carefully considered the rival submissions and arguments of the Parties as far as the above named issue is concerned. The Applicant in his pleadings, submission and arguments before this Court has tried to impress upon the Court that the Reference is not time-barred in terms of Article 30(2) of the Treaty in that, his Reference is hinged or based on the failure of the National Commission on Lands and Other Assets (Appellate Chambers) to reply to his letter dated 21st May, 2015.
47. His argument in that regard is that, since the Reference was filed on 18th July, 2014, it was still well within the time limit of two months period as provided for in Article 30(2) of the Treaty.
48. We have carefully considered the Respondent's pleadings, submissions and arguments before this Court to the effect that the facts, events and prayers stated in the Reference clearly showed that the Reference is time-barred in terms of Article 30(2) of the Treaty.
49. What does Article 30(2) of the Treaty provide? It states as follows:-
“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of or in the absence there at of the day in which it came to the knowledge of the complainant, as the case may be.”
50. The Applicant in his response before this Court hinged his claim on the date he wrote his letter to the Appellate Chamber of the National Commission of Lands and Other Assets that is on 21st May, 2014. In other words, this is the starting date for computation of the time on his part and he has argued that since he filed the Reference on 18th July, 2014, the Reference was filed well within the time limit provided for under Article 30(2) of the Treaty.
51. After careful consideration, we are in full agreement with the contention of the Respondent that at a close glance of the facts, events and prayers by the Applicant in the Reference, it clearly emerges that the complaints are based on the law that provides administrative powers to the National Commission of Lands and Other Assets which has been in operation since 2006 and revised in 2009, 2011 and 2013. His complaints are also based on the decision of the said Commission (Provincial Level) dated 2nd May, 2013, which nullified the sale of the disputed house entered into on 6th August, 1975 Taking into account the said dates, it is clear to us that the filing of the Reference on 18th July, 2014, as was done by the Applicant was well beyond the limit of two months period provided for under Article 30(2) of the Treaty aforesaid.
52. It is certainly clear to us, as correctly argued by the Respondent, that the

Applicant was fully aware or ought to have been aware of the Law that establishes the aforesaid Commission in 2006, and the amendments to it in 2009, 2011 and 2013. He was also aware of the decision of the said Commission (Provincial Level) on 2nd May, 2013 that nullified the sale agreement of the disputed house.

53. In the above regard, the stand of this Court as far as the issue of limitation of time provided for under Article 30(2) of the Treaty is concerned has widely been expressed in the cases of *The Attorney General of the Republic of Uganda, and the Attorney General of The Republic of Kenya, vs. Omar Awadh, EACJ Appeal No. 2 of 2003 (supra)*; *the Independent Medical Legal Unit (supra)*, *Hilaire Ndayizamba (supra)* and *Prof. Nyamoya Francois (supra)*. It has been stated by the Court in all these cases that Article 30(2) of the Treaty demands “strict application of the time limit” stated therein and there is no “room for the Court to extend” the time limit set Under the said provision (see: *Prof. Nyamoya Francois (supra)*).

54. In conclusion, based on the aforesaid matters, we find that, the Reference is time-barred and we agree with the Respondent on his interpretation of prayers (a) and (b) asset out while addressing Issue No.2 above. Having so found, we need not deal with the remaining issues having held that the Reference is time-barred [see: *Prof. Nyamoya Francois [supra]*].

We are also not persuaded by the assertion of the Applicant that his complaint is merely based on the failure of the Commission (appellate level) to respond to his letter dated 22nd May, 2014.

N. Conclusion

55. Having held that the Reference is time-barred, we hereby strike it out. However, the nature of the matter necessitates that we should not make any order as to costs.

56. We so order.

H. Ncutiyumuheto Counsel for the Applicant

N. Kayobera for the Respondent

^^*^*

First Instance Division

Reference No. 13 of 2014

**Mr. Bonaventure Gasutwa, Mr Tatien Sibomana, Mr Jean Baptiste
Manwangari**

v

The Attorney General of the Republic of Burundi

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ & F. Ntezilyayo, J
November 26, 2015

Interpretative Jurisdiction-Principle of non-interference in internal functioning of political party - No connection between Treaty principles and Minister's actions proved - Matters reserved for national courts - Time

Articles: 6(d), 7(2), 23(1) (3), 27, 30 of the Treaty - Article 80 Constitution of the Republic of Burundi – Articles: 4, 11 Act No. 1/006 Organization and Functioning of Political Parties, of June 2003- Rules 1(2), 24 (1), (2), (3) EACJ Rules of Procedure, 2013

The Applicants were elected members of the Central Committee (Committee) of UPRONA Party at its Congress held in 2009. Mr. Bonaventure Niyoyankana and Ms. Concilie Nibigira were elected President and the Vice President respectively. Mr. Niyoyankana suspended some of the members of the Committee and this was challenged before, the Supreme Court of Burundi, which on 11th September 2012 reinstated them. On 6th January 2014, Mr. Niyoyankana resigned from the presidency. Subsequently, Ms. Nibigira wrote to the Minister for Home Affairs requesting him to declare her as the recognized President and the Legal Representative of UPRONA Party.

Protracted conflict continued between the interim President and certain members of the Committee and on 9th June 2014, some members of the Executive Committee requested Ms. Nibigira to convene a meeting of the Central Committee as per Article 11 of UPRONA Rules. When she declines, they resolved called for a meeting on 13th July 2014. However, the Minister for Home Affairs instructed the Police to stop the meeting as unlawful. Thereafter, Ms. Nibigira convened a State General Meeting on 27th July 2014, with the authorization of the Minister for Home Affairs. The Applicant's sought *inter alia* a nullification of Ms. Nibigira's recognition the party's legal representative.

The Applicants averred that the Ministers actions were an interference in the internal affairs of a political party in n violation of Article 80 of the Constitution of the Republic of Burundi and sought a declaration that the Minister's the recognition of Ms. Nibigira and decision barring of the Central Committee from meeting and were unlawful and an infringement of Articles 6(d) and 7(2) of the EAC Treaty.

In response, the Respondent's alleged that: the meeting the Committee attempted to convene was illegal and had to be dealt with in accordance with the law; legal meetings convened by the Legal Representative of UPRONA were not stopped and the meeting convened by Ms. Nibigira did not violate the Treaty. Furthermore, the

Applicants' claim was time-barred under and the Court lacked jurisdiction to: order elections of a new President and Legal Representative of UPRONA: or to nullify the decisions and resolutions taken by the meetings of party representative as this would contravene Articles 27(2) and 30(3) of the Treaty.

Held:

1. The Court had jurisdiction to determine issues pertaining to whether the Minister for Home Affairs' decisions were unlawful and an infringed Article 6 (2) and 7(2) of the Treaty because they were in line with the interpretative authority conferred by Article 27(1) of the Treaty. However, the issue of nullification of the decisions taken by Burundian authorities was reserved for the National Courts of Burundi.
2. The recognition of Ms. Nibigira as the President and Legal Representative of UPRONA by the Minister for Home Affairs on 11th February 2014 was challenged in this Court on 29th August 2014 when the Reference was filed. It is barred by the two-month time limit under Article 30(2) of the Treaty.
The principle of non-interference enshrined in Article 80 in the Constitution of the Republic of Burundi is not absolute; an exception to this principle is permitted when "the restrictions are necessary for the prevention of ethnic, political, religious or gender-based hatred and the maintenance of public order." No submissions were made on the action being reasonably necessary for the sake of preserving public order and whether the Minister's decision it amounted to an interference in UPRONA's internal functioning.
3. The Minister for Home Affairs' impugned actions and interventions in the affairs of UPRONA, on 11th July 2014 and 13th July 2014, respectively were not barred by time limit in terms. However, assessing whether the Applicants' allegation that the Minister's refusal to authorize the meeting of one faction of UPRONA's Central Committee was unlawful and inconsistent with Article 6(2) and 7(2) would lead to assessing whether or not the decision complained of was taken in conformity with the Laws of Burundi.
4. The Applicants did not provide credible and persuasive submissions in support of their allegations. They failed to make a connection between the principles embodied in Articles 6(d) and 7(2) of the Treaty and the issue of refusal to authorize the meeting of one faction of the UPRONA's Central Committee and the alleged Government interference in the internal functioning of their political party. Therefore, no conclusive finding could be made on whether the Minister for Home Affairs' refusal to authorize the meeting of one faction of UPRONA's Central Committee was unlawful and/or inconsistent with Article 6(2) and 7(2) of the Treaty.

Cases cited

AG of Rwanda v Plaxeda Rugumba [2012-2015] EACJLR 204, Appeal No. 1 of 2012
 AG of Uganda & Anor v Omar Awadh & Ors [2012-2015] EACJLR 214, Appeal No. 2 of 2012
 Benoit Ndorimana v AG of Burundi [2012-2015] EACJLR 259, Ref. No. 2 of 2013
 Bonaventure Gasutwa & Ors v AG of Burundi [2012-2015] EACJLR 540, Appl. No. 18 of 2014
 Hilaire Ndayizamba v AG of Burundi & Anor [2012-2015] EACJLR 49, Ref. No. 3 of 2012
 Independent Medical Legal Unit v AG of Kenya [2005-2011] EACJLR 190, Ref. No. 3 of 2010
 James Katabazi & Ors v Secretary General, EAC & Anor [2005-2011] EACJLR 51, Ref. No. 1 of 2007
 Prof. Francois Nyamoya v AG of Burundi & Anor [2005-2011] EACJLR 320, Ref. No. 8 of 2011
 Samuel M. Mohochi v AG of Uganda [2005-2011] EACJLR 274, Ref. No. 5 of 2011

Venant Masenge v AG of Burundi [2012-2015] EACJLR 136, Ref. No. 9 of 2012

JUDGMENT

A. Introduction

1. This is a Reference filed on 29th August 2014 by Mr. Bonaventure Gasutwa, Mr. Tatien Sibomana and Mr. Jean Baptiste Manwangari Residents of the Republics of Burundi (hereinafter Referred to as “the Applicants”). Their address for the purpose of this Reference is indicated as C/0 Mr. Horace Ncutiyumuheto, Advocate, Boulevard Patrice Lumumba, P.O. Box 1374 Bujumbura, Burundi.
2. The Reference was made under Articles 6(d),7(2), 23(1) (3), 27 and 30 of the Treaty Establishing the East African Community (hereinafter referred to as “the Treaty”) and Rules 1(2) and 24 (1) (2) (3) of the East African Court of Justice Rules of Procedure (hereinafter referred to as “ the Rules”). The Respondent is the Attorney General of the Republic of Burundi, who is the Principal Legal Adviser of the Republic of Burundi, and is being sued on behalf of the Government of Burundi.

B. Representation

3. The Applicants were represented by Mr. Horace Ncutiyumuheto while Mr. Nestor Kayobera appeared for the Respondent.

C. Background

The background of the case can be summarized as follows:

4. The Applicants are members of the Central Committee of UPRONA Party elected in the Party’s 2009 Congress, during which Mr. Bonaventure Niyoyankana was elected President and Legal Representative, whereas Ms. Concilie Nibigira was elected Vice-President and Deputy-Legal Representative of UPRONA.
5. During his mandate, Mr. Niyoyankana had political disagreements with some members of the Central Committee of UPRONA, who then resolved to suspend them.
6. The suspended members then filed a matter with the Supreme Court of Burundi against Mr. Niyoyankana, and the Supreme Court, on 11th September 2012, by its judgments in RAP 34, RAP 35, and RAP 36, ruled that the expelled members of the Central Committee should be reinstated and that the General Conference of UPRONA at the Provincial Level organized in February 2012 was null and void.
7. On 6th January 2014, the leadership of UPRONA suffered a blow when Mr. Niyoyankana resigned from the presidency of UPRONA. Since then, a protracted conflict has been ongoing between the interim President of the Party and certain members of the Central Committee who allegedly have never been granted the permission to organize meetings and who, instead, have allegedly been harassed and chased by the police force every time they tried to meet.
8. Before the Reference was fixed for hearing, the Applicants filed a Notice of Motion, on 5th September 2014, seeking to obtain interim *ex-parte* orders.
9. The Application was heard on 19th September 2014 and the Court, after due consideration of the Applicants’ arguments, declined to hear the Application

ex-parte. Instead, the Court ordered that the Application be heard inter-parties in November 2014. In this regard, an interim order was issued on 13th November 2014 to the extent that pending hearing and determination of the Reference, the UPRONA Central Committee elected in 2009 could convene meeting in accordance with the Laws of the Republic of Burundi and as resolved by the Supreme Court of Burundi in 2012.

10. The Reference was thereafter heard on 21st July 2015 on its merits or otherwise hence this judgment.

D. The Applicants' case

11. The Applicants' case is contained in the Reference dated 29th August 2014, their respective Affidavits sworn on 26th August 2014 and their written submissions filed on 30th March 2015.
12. They stated that they were members of the Central Committee of UPRONA Party elected in the 2009 Congress, which also elected Mr. Bonaventure Niyoyankana as the President and Legal Representative, and Ms. Concilie Nibigira as Vice-President and Deputy-Legal representative of UPRONA.
13. They alleged that during his tenure, Mr. Niyoyankana came to be in political conflict with some members of the Central Committee of UPRONA and resolved to suspend them from the membership of the Central Committee while illegally appointing some others to replace them.
14. The Applicants submitted that, as stated elsewhere above, the suspended members filed a matter in the Supreme Court of Burundi against Mr. Niyoyankana, in cases RAP 34, RAP 35 and RAP 36, and that that Court decided that the suspended members of the Central Committee had to be reinstated. They further asserted that the Court also nullified all decisions of suspension that had been imposed on some members of leading organs of the Party as well as on Presidents of Committees, in violation of Articles 46, 47 and 48 of UPRONA Statutes.
15. Moreover, the Applicants stated that the aforesaid decision of the Supreme Court recognized as lawful the organs and members of the Central Committee elected by the UPRONA Congress of 2009 and that it confirmed Mr. Niyoyankana and Ms. Nibigira as President and Vice-President of the UPRONA Party, respectively.
16. The Applicants also pointed out that following Mr. Niyoyankana's resignation, Ms. Nibigira wrote to the Minister for Home Affairs requesting him to declare that she should be recognized as the Legal Representative of UPRONA Party.
17. The Applicants alleged that, on 9th June 2014, some members of the Executive Committee requested Ms. Nibigira to convene a meeting of the Central Committee as provided for by Article 11 of UPRONA Rules, and that following her refusal to do so, they resolved to convene a meeting of the Central Committee to be held on 13th July 2014 at the Headquarters of UPRONA Party. They also averred that Ms. Nibigira, on her part, convened a meeting on 27th July 2014, which had received the authorization of the Minister for Home Affairs.
18. It was the Applicants' further contention that although the 13th July 2014's

Central Committee meeting was legally convened in accordance with UPRONA Statutes and Rules, the said meeting never took place due to massive police intervention. It is thus contended that the instruction given by the Minister for Home Affairs to stop, by Police force, the meeting convened by the Executive Committee, was unlawful and constituted interference of the Executive in internal matters of a political party, in violation of Article 80 of the Constitution of the Republic of Burundi.

19. The Applicants also urged the Court “to declare that the decision of the Minister for Home Affairs to bar the legal Central Committee of UPRONA from holding its meeting, the recognition of Ms. Concilie Nibigira as the President and Legal Representative of UPRONA by the Minister for Home Affairs as well as the authorization given by the latter to hold the States general of UPRONA, are unlawful and constitute an infringement of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.”
20. The Applicants thus pleaded for the following prayers and orders, against the Respondent:
 - (1) A declaration that the decision of the Minister for Home Affairs to stop the legal Committee of UPRONA from holding its meeting is unlawful and is an infringement of Article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
 - (2) A declaration that the recognition of Ms. Concilie Nibigira as the President and Legal Representative of UPRONA by the Minister for Home Affairs is unlawful and constitutes an infringement of Article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
 - (3) A declaration that the authorization given by the Minister for Home Affairs to Ms. Concilie Nibigira to hold the States general of UPRONA is unlawful and constitutes an infringement of Articles 6(d) and 7(2) of The Treaty for the Establishment of the East African Community;
 - (4) An order that the decision of the Minister for Home Affairs to stop the Central Committee of UPRONA from holding its meeting is nullified;
 - (5) An order that the recognition of Ms. Concilie Nibigira as the President and Legal Representative of UPRONA by the Minister for Home Affairs is nullified; and the Central Committee of UPRONA is allowed to hold its meetings and to proceed to the election of the new President and Legal Representative of UPRONA;
 - (6) An order that the authorization given by the Minister for Home Affairs to Ms. Concilie Nibigira to hold the States general of UPRONA is nullified and all the decisions and resolutions taken by the States general as well;
 - (7) An order that the costs and incidental to this Reference be met by the Respondent;
 - (8) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances.
21. We wish to point out that the terms “States general” used in the parties’ pleadings and submissions herein are a loose translation of the French terms “*Etats*

generaux”. [In France under the Old Regime, the Estates General or States General (French: *etats generaux* was a legislative and consultative assembly of the different classes (or estates) of French subjects].

E. The Respondent’s Case

22. The Respondent filed a response to the Reference on 23rd October 2014 together with an Affidavit in support sworn by Mr. Sylvestre Nyandwi, as well as written Submissions on 29th May 2015.

23. The Respondent’s case is:-

Firstly, that Mr. Bonaventure Niyoyankana and Ms. Concilie Nibigira were respectively elected President and Legal Representative and Vice-President and Deputy Representative of UPRONA Party by the Congress held in November 2009;

Secondly, that on 11th September 2012, the Supreme Court of Burundi ruled, in a matter of suspension of some members of the Central Committee of UPRONA, that the leadership of UPRONA elected by the 2009 Congress was the legitimate one and that those who had been suspended from the Central Committee, including the Applicants, were to be reinstated to their positions;

Thirdly, that the aforesaid decision of the Supreme Court confirmed that the President and Legal Representative of UPRONA was Mr. Niyoyankana, and the Vice-President and Deputy Legal Representative was Ms. Nibigira as per the decision of the Party’s 2009 Congress;

Fourthly, that Mr. Niyoyankana resigned from office on 6th January 2014 and following that resignation, Ms. Nibigira wrote to the Minister for Home Affairs, who is in charge of political parties, on 10th February 2014, informing him that, as provided by Articles 33 and 39 of UPRONA Statutes, she had assumed the Presidency and the legal representation of UPRONA;

Fifthly, that on 11th February 2014, the Minister for Home Affairs responded to Ms. Nibigira’s letter and recognized her as the President and Legal Representative of UPRONA in accordance with UPRONA Statutes and with the decisions of the Supreme Court rendered on 11 September 2012 which recognized UPRONA’s organs as elected in 2009;

Sixthly, that since meetings of the Central Committee were convened and chaired by the President and in his absence, by the Vice-President, as provided by Articles 33 and 39 of UPRONA Statutes and Rules 7 and 8 of the Internal Rules of the Central Committee of 06th September 2009, the meetings of the Central Committee that so mere instated Members of the Central Committee attempted to convene without consulting the President and the Legal Representative of UPRONA and without complying with Articles 11 and 13 of that Party’s Internal Regulations, were illegal and had to be dealt with in accordance with the law, especially for security purpose and reasons;

Seventhly, that on 27th July 2014 and as provided by Article 56 of the 2014 Statutes, UPRONA Party organized a State General Meeting, which was convened by the President and Legal Representative of UPRONA,

and a Directorate comprising of 4 Members from the Central Committee was put in place to prepare and organize, among others, the General Elections of 2015; Eighthly, that the Minister for Home Affairs has never stopped any legal meeting of the Central Committee of UPRONA as long as the meeting was convened and chaired by the Legal Representative of UPRONA and not by anyone else. In this regard, it is the Respondent's contention that the Minister for Home Affairs' authorization to hold the State General Meeting convened by Ms. Nibigira as the Legal Representative of UPRONA did not violate any provision of the Treaty; Ninthly, that the recognition of Ms. Nibigira by the Minister for Home Affairs did not violate any provision of the Treaty, since it was done in accordance with Articles 33 and 39 of UPRONA Statutes. It is the Respondent's further contention, In this regard, that the Applicants' prayer to nullify Ms. Nibigira's recognition was time-barred as it contravened Article 30(2) of the Treaty; Tenthly, that this Court did not have jurisdiction to order elections of a new President and Legal Representative of UPRONA as this would contravene the jurisdiction conferred upon it as provided by Articles 27(2) and 30(3) of the Treaty; Lastly, that this Court did not have jurisdiction to nullify the decisions and resolutions taken by the meetings of UPRONA convened by the Legal Representative of UPRONA in accordance with the National laws and Statutes governing UPRONA.

For the above reasons, the Respondent submitted that the Reference should be dismissed with costs.

F. Scheduling Conference

24. On 13th February 2015, a Scheduling Conference pursuant to Rule 53 of the Court's Rules was held and Parties agreed upon that the following issues fall for determination:
- (i) Whether the Court has jurisdiction to entertain the Reference;
 - (ii) Whether the Reference is time-barred;
 - (iii) Whether the recognition by the Minister for Home Affairs of Ms. Concilie Nibiqira as the President and Legal Representative of UPRONA is unlawful or inconsistent with Articles 6(d) and 7(2) of the Treaty;
 - (iv) Whether the refusal by the Minister for Home Affairs to let the members of the Central Committee elected in 2009 convene a meeting is unlawful and/ or inconsistent with Articles 6(d) and 7(2) of the Treaty;
 - (v) Whether the Applicants are entitled to the remedies sought.

G. Determination of the Issues by the Court

Issue No. 1: Whether the Court has jurisdiction to entertain the Reference Submissions

25. Counsel for the Respondent submitted that some prayers and orders sought by the Applicants fell outside the jurisdiction of this Court as set out in Article 27 of the Treaty. He thus pointed out that, while the remedies sought under prayers (a), (b), (c) and (g) may be granted by this Court if proved by the Applicants,

prayers (d), (e) and (f) did not fall within the scope of the Court's jurisdiction. Article 23(1) reads: "The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty."

And Article 27(1) provides that: "The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such Interpretation

26. In support of his submission, learned Counsel referred the Court to a number of case law, to wit, *Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba EACJ Appeal No.1 of 2012*; *James Katabazi & 21 Others vs. The Secretary General of the East African Community & the Attorney General of the Republic of Uganda, EACJ Ref. No.1 of 2007*, and *Prof. Francois Nyamoya vs. The Attorney General of the Republic of Burundi & the Secretary General of the East African Community, EACJ Ref. No. 8 of 2011*.
27. In reply, Counsel for the Applicants started his submissions by recalling how the protracted conflict over the UPRONA leadership had unfolded. He averred, in this regard, that on 9th June 2014, some elected members of UPRONA's Executive Committee wrote to Ms. Nibigira asking her to convene a meeting of the Central Committee in order to solve some problems of leadership prevailing within their Party, especially to elect its new President following the resignation of the former one. That when Ms. Nibigira refused to accede to their request, they resolved to convene a meeting of the Central Committee to be held on 13th July 2014 at UPRONA's Headquarters.
28. It was Counsel's further submission that Ms. Nibigira, with the approval of the Minister for Home Affairs dated 27th July 2014, convened a meeting of the State's General of UPRONA, an organ allegedly unknown in UPRONA's Statutes and Rules. With regard to that meeting, Counsel contended that, by his decision to authorize Ms. Nibigira to hold an illegal meeting of an unknown organ of UPRONA, by his subsequent request to the Minister for Security to prevent the meeting convened by one third of UPRONA' Executive Committee's members, and by deploying police force all around and inside the venue of the convened meeting, the Minister for Home Affairs interfered in UPRONA's affairs and caused a huge prejudice to that Party. He hastened to add that that interference constituted an infringement, not only of the provisions of Article 80 of the Constitution of the Republic of Burundi which states: "The law provides for the Government non-interference in the internal functioning of political parties, except for the restrictions necessary for the prevention of ethnic, political, religious, regional or gender - based hatred and the maintenance of public law and order", but also violated the decision of the Supreme Court of Burundi rendered on 11th September 2012 in RAP 34, RAP 35 and RAP 36 To buttress that submission, reliance was placed on the decisions of this Court in the *Katabazi case (supra)*; *Samuel Mukiri Mohochi vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 05 of 2011*; and *the Plaxeda Rugumba Case (supra)*.

Determination of Issue No. 1

29. From the outset, it is worth recalling that the jurisdiction of the Court is

provided by Articles 23 and 27 of the Treaty.

Article 23(1) reads: “The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”

And Article 27(1) provides that: “The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”

30. Considering then the acts complained of, does the Court have the requisite jurisdiction to determine the Applicants’ allegations against the Respondent?
31. As the Applicants’ case stands, the bone of contention stands on three legs: the alleged unlawful recognition of Ms. Nibigira as the President and Legal Representative of UPRONA; alleged unlawful authorization by the Minister for Home Affairs to Ms. Nibigira to organize a meeting of an alleged unknown Party’s organ called “States General of UPRONA” and the alleged unlawful decision taken by the same Minister in collaboration with the Minister for Security stopping some elected members of UPRONA’s Central Committee from holding a meeting.
32. In the instant Reference, the Applicants seek to invoke the Court’s interpretative jurisdiction to determine whether the Respondent through the Minister for Home Affairs, by taking the aforesaid decisions complained of, has breached the fundamental and operational principles of the Community set out in Articles 6 (d) and 7(2) of the Treaty.
33. For ease of reference, Article 6 (d) states that one of the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States is “good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunity, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter of Human and Peoples’ Rights.” And Article 7(2) reads: “The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”
34. In his submissions, Counsel for the Respondent conceded that this Court has jurisdiction to entertain some prayers of the Reference, namely, prayers (a), (b) and (c), all related to whether the acts complained of are unlawful and prayer (g) on costs. Learned Counsel, however, maintained that the Court lacks jurisdiction to determine other prayers i.e. prayers (d), (e) and (f) reproduced hereinabove, all urging this Court to nullify decisions taken by the Burundi’s Minister for Home Affairs while addressing the leadership problem within UPRONA Party.
35. In similar cases, which were all brought against the Attorney General of the Republic of Burundi, the Court had the opportunity to state clearly that issues that fell into the interpretative jurisdiction conferred upon it by Article 27(1) had to be entertained, but that those only aimed at nullifying the decisions and

actions of the Respondent which did not have any relation with its aforesaid jurisdiction had not to be entertained since they fell within the competence of the National Courts of Burundi (see *Venant Masenge vs. The Attorney General of the Republic of Burundi*, EACJ Ref. 9 of 2012; *Benoit Ndorimana vs. The Attorney General of the Republic of Burundi*, Prof. Nyamoya Francois vs the Attorney general of the Republic of Burundi, EACJ No. 11 of 2011). Likewise, we are of the decided opinion that this Court has jurisdiction to determine issues pertaining to whether the Minister for Home Affairs' decisions were unlawful and an infringement of the provisions of Article 6 (2) and 7(2) of the Treaty (see *supra* prayers (a), (b) and (c)) because they fit well into the interpretative authority conferred upon it by Article 27(1) of the Treaty. We, however, in light of the aforementioned case law, decline the Applicants' invitation to entertain prayers (d), (e) and (f) whereby this Court is asked to nullify the decisions taken by Burundian authorities in the UPRONA leadership problem, since they are reserved to the National Courts of Burundi.

36. We therefore answer issue No. 1 partly in the affirmative.

Issue No.2: Whether the Reference is time-barred

37. The Respondent contended that this Court cannot entertain the Reference because it was time-barred in terms of Article 30(2) of the Treaty which prescribes the time limit within which references are instituted in the Court. He stated that Article 30 (2) provides that: "The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."
38. Counsel for the Respondent further averred that this Reference, which is mainly challenging the recognition of Ms. Nibigira as the President and Legal Representative of UPRONA, was filed on 29th August 2014; six months and nineteen days after that recognition.
39. It was Counsel's submission that the Applicants were aware of such recognition as from 11th February 2014, but waited until 29th August 2014 to file the case before this Court, out of the two-month time-limit provided for under Article 30(2) of the Treaty.
40. In support of his contention that the Reference was time-barred, learned Counsel referred the Court to a number of decisions where the Court had addressed various aspects of the question of time-bar, such as (i) the manner of computing time for that purpose (see *Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6*); (ii) obligation to comply strictly with the time limit given the imperative of ensuring legal certainty in the Court's proceedings (see *Hilaire Ndayizamba vs. The Attorney General of the Republic of Burundi and Prof. Francois Nyamoya vs. The Attorney General of the Republic of Burundi & the Secretary General of the East African Community*); (iii) no possibility for the Court to extend the time limit outside the two-month time limit (see *Independent Medical Legal Unit vs. Attorney General of the Republic of Kenya*, EACJ Ref. No. 3 of 2010).
41. In response, Counsel for the Applicants contended that the Reference was not time-barred since the decisions and acts challenged by the Applicants for being

unlawful were those of the Minister for Home Affairs made on 11th July 2014 and 13th July 2014.

42. In this regard, he asserted that the first action complained of was the Minister for Home Affairs' authorization given to Ms. Nibigira, "unlawfully addressed to as the President of UPRONA, to hold a meeting of the illegal States general meeting of UPRONA Party, through his letter dated 11th July 2014 He further averred that on the same day, the aforesaid Minister wrote to the Minister for Security asking him to take all necessary measures to prevent a legal meeting of UPRONA and its organisation, and that, subsequently, the police force was deployed around and inside the venue for the meeting of the Central Committee convened by one third of UPRONA's Executive Committee's members according to the provisions of Article 11 of UPRONA Rules, and that the meeting was stopped from taking place.
43. In light of the foregoing arguments, it was Counsel's submission that the Reference was filed within the required time.
44. We understand the Applicants' contention to be revolving around not only the recognition of Ms. Nibigira as the President and Legal Representative of UPRONA, but also that in that capacity, she was authorized by the Minister for Home Affairs to organize a meeting of an allegedly unknown organ of the Party and the prohibition by the Minister for Home Affairs from holding a meeting convened by one third of UPRONA's Central Committee's members.
45. It is an undisputed fact that the recognition of Ms. Nibigira as the President and Legal Representative of UPRONA was made by the Minister for Home Affairs on 11th February 2014 and as such, its challenge made on 29th August 2014 when the Reference was filed is barred by the two-month time limit to institute a case. But as mentioned above, the Applicants' case stands on another leg, namely, the Minister for Home Affairs' impugned actions and interventions in the affairs of UPRONA, on 11th July 2014 and 13th July 2014, respectively. The latter are evidently not barred by time limit in terms of the provisions of Article 30(2) of the Treaty given that, as stated above, the Reference was filed on 29th August 2014.
46. For all the above reasons, issue No.2 is partially answered in the affirmative Issue No. 3: Whether the recognition by the Minister for Home Affairs of Ms. Concilie Nibigira as the President and Legal Representative of UPRONA is unlawful or inconsistent with Articles 6(d) and 7(2) of the Treaty
47. Given our finding herein above with respect to the contention that Ms. Nibigira's recognition as President and Legal Representative of UPRONA was time-barred in terms of the provisions of Article 30(2) of the Treaty, it would be a futile exercise to entertain issue No.3 since it is improperly before the Court. Issue No. 4: Whether the refusal by the Minister for Home Affairs to let the members of the Central Committee elected in 2009 convene a meeting is unlawful and/or inconsistent with Article 6(d) and 7(2) of the Treaty
48. The Applicants' submission with respect to this issue was that the refusal by the Minister for Home Affairs to let some members of the Central Committee of UPRONA elected in 2009 convene their meeting as permitted by UPRONA Statutes and Rules violated the pre-cited Article 80 of the Constitution of Burundi, Article 4 and 11 of Act No. 1/006 of June 2003 relating to the

organization and functioning of political parties in Burundi, and ran afoul of the 2012 decision of the Supreme Court of Burundi which had held that the Central Committee elected by the 2009 Congress of UPRONA was the only legal organ competent to manage and organize the activities of that Party.

49. Then, referring to this Court's decision in *James Katabazi case (supra)* where it was held that: "... the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently the Treaty. Abiding by the Court decision is the cornerstone of the independence of the judiciary which is one of the principles of the observation of the rule of law", the Applicants' Counsel contended that the refusal to authorize that meeting was unlawful and inconsistent with Article 6 (d) and 7 (2) of Treaty, reproduced elsewhere above.
50. In reply, Counsel for the Respondent submitted that any meeting of the Central Committee had to be convened and chaired by the Legal Representative of UPRONA as Stipulated in that Party's Statutes and the Internal Rules of the Central Committee and that in that regard, the Minister for Home Affairs had never refused such a meeting to take place as long as it was held in conformity with the Laws of Burundi. In support of that submission, learned Counsel also referred the Court to its Ruling in *Bonaventure Gasutwa and 2 Others vs. The Attorney General of Burundi, Application No. 18 of 2014*, which had arisen from the instant Reference. He also alluded to the *Ndorimana Case (supra)* where it was stated that "the Applicants cannot disclose any cause of action against the Respondent to give rise to violation of Articles 6 (d) and 7(2) of the Treaty."
51. Considering the Applicants' pleadings and submissions on the issue at hand, the first argument in support of their case is that the refusal by the Minister for Home Affairs to authorize a meeting convened by a faction of UPRONA representing one third of the Central Committee's members violated the provisions of Article 80 of the Constitution of Burundi as well as Articles 4 and 11 of Act No.1/006 of June 2003 on the organization and functioning of political parties.
52. Article 80 of the Constitution of Burundi was reproduced elsewhere above. As for Article 4 of Act No. 1/006 of June 2003, it reads: "Political parties are created, organized and exercise their activities freely, subject to the provisions of Article 21 of the present Act. "Regarding Article 11 of the said Act, it provides that "Political parties can hold meetings, organize events and make propaganda under the conditions prescribed by law."
53. From the Applicants' case as indicated herein above, considered in line with the aforementioned provisions of the Constitution and the Law on political parties, it can be gleaned that the Applicants faulted the decision of the Minister for Home Affairs for being interference in the internal functioning of their political party. However, the principle of non-interference enshrined in Article 80 of the Constitution is not absolute; an exception to this principle is permitted when "the restrictions are necessary for the prevention of ethnic, political, religious or gender-based hatred and the maintenance of public order."
54. On this point, Counsel for the Respondent did not clearly indicate there as on

why the meeting was not authorized by the Minister for Home Affairs, but only stated that the said Minister has never refused that a meeting of the Central Committee of UPRONA elected in 2009 could be held in accordance with the National Laws of Burundi. In this regard and echoing the provisions of Article 11 of the Act on political parties, learned Counsel reiterated his position that all political parties' meetings had to be convened as prescribed by the National Laws of Burundi. On this matter, although learned Counsel did not explicitly refer to the restrictions embodied in Article 80 of the Constitution, he nevertheless alluded to the issue of maintenance of public order as a justification of the decision to stop the meeting of the faction of UPRONA's Central Committee. But here again, a question that may have arisen, probably coming from the Applicants who challenged the decision taken would have been whether that decision was reasonably necessary for the sake of preserving public order.

55. The Applicants, on their part, were silent on the aforesaid *proviso* of Article 80 of the Constitution. There was no hint on whether the Minister for Home Affairs' decision allegedly amounting to interference in UPRONA's internal functioning was faulted for not being "necessary" in terms of the provisions of the said Article.
56. The Applicants did not also provide any authority or make credible and persuasive submissions in support of their allegations, and more importantly, they failed to make a connection between the principles embodied in Articles 6(d) and 7(2) of the Treaty and the issues they have raised, i.e. the refusal to authorize the meeting of one faction of the UPRONA's Central Committee allegedly amounting to the Government's interference in the internal functioning of their political party.
57. In the result, we are unable to make any conclusive finding on whether the Minister for Home Affairs' refusal to authorize the meeting of one faction of UPRONA's Central Committee was unlawful and/or inconsistent with Article 6(2) and 7(2) of the Treaty.
58. We now turn to the second argument presented by the Applicants in support of their allegations that the impugned refusal to authorize a meeting convened by some members of the UPRONA's Central Committee contravened a decision of the Supreme Court of Burundi rendered in 2012. We understand that argument built around the *Katabazi Case (supra)* to be that, since the meeting of a faction of UPRONA's Central Committee was convened in the framework of the implementation of the aforesaid decision of the Supreme Court, the refusal by the Minister for Home Affairs to let those members hold that meeting ran afoul of the principles of rule of law and good governance enshrined in the Treaty.
59. Although the similarity between the two cases was not shown nor proved by the Applicants, we are of the view that assessing the validity of the Applicants' allegations will ultimately lead to assessing whether or not the decision complained of was taken in conformity with the Laws of Burundi. As stated above, we were unable to make a final finding on this matter due to lack of sufficient supporting evidence. It is incumbent up on the Applicants, therefore, to bear the risk of failure of proof.
60. Given the above reasons, we would answer issue No. 4 in the negative.

Issue No. 5: Whether the Applicants are entitled to the remedies sought

61. The Applicants urged the Court to grant the prayers and orders as reproduced elsewhere above in this judgment.
62. Conversely, the Respondent submitted that since there was no violation of the Treaty on his side and that the Reference was time-barred, the Applicants were not entitled to any remedy and pleaded that the Reference be dismissed with costs to the Respondent.
63. As found above, the Applicants did not adduce evidence that there has been a Treaty violation imputable to the Respondent. Therefore, prayers (a), (b), (c), are disallowed. Prayers (d), (e), and (f) cannot be the Treaty. As for costs, considering that the Applicants were not pursuing any personal interest in this matter, we deem it just that each party bears its own costs.

H. Conclusion

64. In light of our findings and conclusions on issues herein, we make the following declarations and orders:
 - i) Prayers (a), (b) and (c) are disallowed.
 - ii) Prayers (d), (e) and (f) are not tenable because we have no jurisdiction to grant them.
 - iii) Each party shall bear its own costs.
65. It is so ordered.

H. Ncutiyumuheto Counsel for the Applicants

N. Kayobera for the Respondent

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First Instance Division

Reference No. 15 of 2014**Baranzira Raphael & Ntakiyiruta Joseph v The Attorney General of the Republic of Burundi**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ & F. Ntezilyayo J
March 22, 2016

Good governance - Separation of powers - Special Courts - Whether the law guaranteed an independent, impartial judicial system - Appointment of Judges - Parties' right to trial - Right of appeal - Effective administration of justice - Jurisdiction - Time

Articles: 6(d), 7(2), 23(1), 27 (1), 30(1) & (2) & 42(1) of the Treaty- Rules: 3(1) (d), 38(1) (2) (a)& (b), 110 & 111(1) of EACJ Rules of Procedure - Articles: 4, 9, 22, 23, 25 & 31 of Act No. 1/31 – Articles: 2, 4, 5(2), 7, 8, 9, 40, 44, 50, 52, 73, 87 89 of Act No. 1/26 - Articles: 209, 222 & 226 Constitution of the Republic of Burundi - Article: 27, Vienna Convention of the Law of Treaties -Article: 10, Universal Declaration of Human Rights – Articles: 7(1) & 26 of the African Charter - Article 14(1), International Covenant on Civil and Political Rights

On 31st December 2013, the Republic of Burundi enacted Act No. 1/31 concerning the amendment to Act No. 1/01 of 4th January 2011 determining the mandate, composition, organization and work of the National Commission of Land and Other Property (Commission). Article 23 provided for appeals from the Commission's decision to a Special Court of Land and Other Property (Special Court). On 3rd September 2014, the Constitutional Court of Burundi held that the creation of the Special Court conformed with the Constitution of the Republic of Burundi. Thereafter, on 15th September 2014 the law on a Special Court on Land and Other Assets, Act. No 1/26 was promulgated.

The Applicants challenged the apparent fusion of the Executive and the Judiciary as under Article 9 and 31 of Act No. 1/31, which provided that members of the Commission would be appointed by the President of the Republic of Burundi to whom the Commission would also report. Furthermore, Articles 22 and 25 negated litigants' right of appeal, fair and equitable trial as they underscored the immediate enforceability of decisions of the Commission, notwithstanding the existence of a pending Appeal before the Special Court.

The Applicants also challenged the legality of Act. No 1/26 on the premise that: it impeded the effective administration of justice, obliterating the independence of the Judiciary from the Executive, and thus negating the right to a fair trial contrary to infringed international instruments and Articles 6(d) and 7(2) of the Treaty. Article 2 of the Act denied parties a right of appeal to superior national courts by prescribing the finality of the Special Court's decision when exercising its appellate jurisdiction viz decisions of non-judicial bodies; and Articles 5(2), 8 and 9 eroded the independence of the judiciary as the appointment and determination of judges emoluments was carried out by the Executive.

The Respondent averred that: the Reference was time barred, having being instituted

on 17th November 2014 yet the Acts of Parliament were enacted on 15th September 2014; the Court lacked jurisdiction to determine matters concerning the annulment of the impugned Act; and that Article 4 of Act No. 1/26 addressed the right of appeal in through the Appellate Division for the Special Court. Furthermore, the alleged lack of independence of the Judiciary was resolved by the Constitutional Court of Burundi which endorsed the constitutionality of the Bill that preceded Act No. 1/26, in effect confirmed that the then proposed Act did not contravene the Treaty.

Held:

1. Jurisdiction arises from an allegation that the matter complained of infringes a provision of the Treaty in a relevant manner. Violation of Partner States' domestic laws amounting to a violation of the Treaty also constitute matters that are justiciable before the Court. In the instant case, where the complaint is that an Act of Parliament contravened the Treaty, the internal or domestic laws of the Partner State that would be immaterial to a determination of whether or not such Act contravenes the Treaty. It would be incumbent upon this Court to make a determination as to whether the provisions of Act 1/26 violate the principles of rule of law and good governance as invoked by the Applicant. Notwithstanding, the decision of the Constitutional Court of Burundi there are matters of Treaty interpretation presented by the Reference that beg the Court's interrogation within its jurisdiction
2. Act No.1/26 was enacted on 15th September 2014. Rule 3(1) (d) of the Court's Rules provides that if a period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following working day. Article 42(1) postulate that whereas the Treaty makes general provisions for the institutionalization of the Court, the detailed conduct of the Court's business or the Court's routine operations would be provided for in its Rules of Procedure. Therefore, for purposes of implementing the Court's mandate, the Treaty must be applied and read together with the Court's Rules of Procedure. In that regard, the time limit stipulated in Article 30(2) of the Treaty would be computed in the manner outlined in Rule 3(1) (d) of the Court's Rules. In the result, the Reference was filed within time.
3. Act No. 1/26 makes provision for an appellate process from the First Instance Division to the Appellate Chambers of the Court and judges of the Special Court appear to have the same standing in terms of qualifications as judges of the Supreme Court of Burundi. Hence the question of the legal proficiency of the Court's judgments would not arise. Burundi's Constitution provides for the Supreme Court as the highest court of the land does not necessarily translate into all judicial matters having the option to progress thereto.
4. The fact that the commencement of an appeal process does not serve as an automatic stay of execution would not *per se* impute procedural or legal impropriety or lack of transparency; it is quite common place for judicial systems to abide such a clause. Articles 2 and 9 of Act No. 1/26 do not infringe the rule of law or good governance.
5. By designating the appointment of judges to the Special Court as the sole preserve of the Executive, without any demonstrable safeguards against the unwarranted concentration of the said function in that branch of government, Article 5 of

the impugned Act offends the principle of separation of powers. Similarly, in so far as Article 89 of the same Act subjugates a purely judicial review process to executive authority and intervention, this constitutes a blatant violation of the principle of separation of powers.

6. The appointment and remuneration of the Special Court's judges by the executive *per se* is not sufficient reason to deduce them as partial, especially given the criteria for appointment stipulated in Article 5 of Act No. 1/26. That provision enjoins the appointing authority to appoint members of the Special Court from judges and lawyers of proven moral integrity, impartiality and independence. Consequently, the Applicants' claims of breach of the right to fair trial were disallowed.
7. The appointment and remuneration of the Special Court's Judges as outlined in Article 5 and 8 of the Act respectively have been proven to impute partiality of the Executive branch of government on the Judges part. This offends the principle of good governance in Articles 6(d) and 7(2) of the Treaty and principle of separation of powers inherent therein. Therefore, the Republic of Burundi shall, in accordance with Article 38(3) of the Treaty, cause the amendment of Article 5 of Act No.1/26 within its internal legal mechanisms.

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 Hon. Sitenda Sebalu v Secretary General, EAC & Ors [2005-2011] EACJLR 160, Ref. No.1 of 2010
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 Mullane v Central Hanover Bank & Trust Co 339 US 306, 314 (1950)

JUDGMENT

A. Introduction

1. On 31st December 2013, the Republic of Burundi enacted Act No.1/31 of the 31st December 2013 Concerning the amendment to Act No.1 /01 of 4th January 2011 - Determining the mandate, composition, organization and work of the National Commission of Land and Other Property hereinafter referred to as 'Act No. 1 /31'), Article 23 of which provides for 'appeals' from the Commission's decision to a Special Court of Land and Other Property.
2. Following a decision by the Constitutional Court of Burundi endorsing the constitutionality of a Bill in respect thereof, the Republic of Burundi did enact Act No.1/26 of the 15th September 2014 - Dealing with the creation, organization, structure, functioning and power of the Special Court on Land and Other Assets as well as its proceeding (hereinafter referred to as 'Act No. 1/26').
3. The Applicants challenge the legality of Act No. 1/26 on the premise that it impedes the effective administration of justice; obliterates the independence of

the Judiciary from the Executive, and negates the right to a fair trial contrary to Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as ‘the Treaty’).

4. The Applicants are natural persons, resident in the Republic of Burundi, and closely interested in the issues of good governance and rule of law in Burundi; while the Respondent is the Principal Legal Advisor to the Government of the Republic of Burundi, and is being sued on behalf of the said Government.
5. At the hearing of the Reference, the Applicants were represented by Mr. Horace Ncutiyumuheto while Mr. Nestor Kayobera appeared for the Respondent.

B. Applicants’ Case

6. It is apparent from the Reference that the Applicants’ case is premised on the alleged infringement by Act No. 1/26 of international instruments that underscore the right to a fair and equitable trial. It is the Applicants’ contention that Article 2 of the Act denies parties a right of appeal to superior national courts by prescribing the finality of the Special Court’s decisions when exercising its appellate jurisdiction viz decisions of non-judicial bodies. The Applicants also challenge Articles 5(2), 8 and 9 of the same Act for allegedly eroding the independence of the Judiciary by placing the appointment and determination of judges’ emoluments in the hands of the Executive.
7. In the same vein, it is the Applicants case that Articles 22 and 25 of Act No.1/31 negate litigants’ right of appeal and, consequently, the right to a fair and equitable trial in so far as they underscore the immediate enforceability of decisions of the National Commission on Land and Other Assets (hereinafter referred to as ‘the Commission’), the existence of a pending Appeal before the Special Court notwithstanding. The Applicants do also appear to challenge the apparent fusion of the Executive and the Judiciary as denoted by Articles 9 and 31 of Act No. 1 /31, which provide for the appointment of members of the Commission by the President of the Republic of Burundi, to whom the Commission reports.
8. The Reference was supported by two identical Affidavits deponed by the First and Second Applicants respectively on 17th November 2014.
The Affidavits basically regurgitate the provisions of Articles 2, 5, 8 and 9 of Act No. 1/26, as well as Articles 4, 9, 22, 23, 25 and 31 of Act No. 1/31, and the deponents’ understanding thereof.

C. Respondent’s Case

9. The Respondent contends that the Reference is time barred, having been instituted on 17th November 2014 yet the Act of Parliament in issue had been enacted on 15th September 2014. It is the Applicant’s contention that the Reference was, therefore, filed outside the two- month limit prescribed by Article 30(2) of the Treaty.
10. The Respondent does also question this Court’s jurisdiction to determine the matters in issue herein, contending that some of the prayers sought do not fall within the ambit of the Court’s mandate. The Respondent specifically took issue with the prayer for the annulment of the impugned Act.
11. It is the Respondent’s case that Article 4 of Act No. 1 /26 address the Applicants’ concerns with regard to parties’ right of appeal in so far as it makes provision

for an Appellate Division for the Special Court. The Respondent further contends that the alleged lack of dependence of the Judiciary was resolved by the Constitutional Court of Burundi which, by endorsing the constitutionality of the Bill that preceded Act No.1 /26, in effect confirmed that the then proposed Act did not contravene the Treaty.

12. The Respondent relied on the Affidavit of the Permanent Secretary in the Ministry of Justice of Burundi, one Sylvestre Nyanddwi, which in essence reiterated the Respondent's case as stated above.

D. Scheduling Conference

13. Pursuant to a Scheduling Conference held under Rule 53 of the Court's Rules, the Parties framed the following issues for determination:
- i) Whether the East African Court of Justice has jurisdiction to entertain the Reference.
 - ii) Whether the Reference is time barred.
 - iii) Whether Act No.1/26 is inconsistent with the right to an independent and impartial judicial system and the right to a fair trial, and therefore inconsistent with international instruments and/ or Articles 6(d) and 7(2) of the Treaty.
 - iv) Whether the Applicants are entitled to the prayers sought.

E. Issues

Points of law:

14. We propose to dispose of the points of law raised in Issues 1 and 2 above together given that they could dispose of the entire Reference without recourse to the merits thereof.

Issues 1& 2: Whether the East African Court of Justice has jurisdiction to entertain the Reference AND Whether the Reference is time barred.

Applicants' Submissions:

15. On the question of jurisdiction, it was submitted for the Applicants that the promulgation of Act No.1 /26 and some of the content thereof constituted a violation of the rule of law and, consequently, contravened the Treaty. We understood it to be Learned Counsel's argument that the compliance of Act No. 1/26 with the Treaty (or the lack thereof) was a matter of Treaty interpretation, the jurisdiction of which lay squarely with this Court under Articles 27(1) and 30(1) thereof. He relied upon the cases of *Emmanuel Mwakisha Mjawasi & 748 Others vs. Attorney General of the Republic of Kenya EACJ Ref. No. 2 of 2010* and *Samuel Mukira Muhochi vs. Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011* in support of his position. Mr. Ncutiyumuheto made no reference whatsoever to Act No. 1/31 in this context.
16. With regard to the question of time limitation, he relied upon the provisions of Rule 3(1)(d) of this Court's Rules of Procedure in support of his contention that where, as in the present case, a deadline for filing of any pleading fell on a weekend, such deadline would be extended to the next working day which, in

the present case, was Monday 17th November 2014.

Respondent's Submissions:

17. Conversely, the Respondent raised two (2) arguments. First, that this Court's jurisdiction is restricted to the interpretation and application of the Treaty, and does not extend to the interpretation of Partner States' Constitutions, neither is the Court vested with appellate jurisdiction on constitutional matters decided by National Constitutional Courts. Learned Counsel for the Respondent relied on the provisions of Article 27(1) of the Treaty in support of his argument; as well as the following cases: *Attorney General of the Republic of Uganda vs. Omar Awadh & 6 Others EACJ Appeal No. 2 of 2012*; *Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba EACJ Appeal No.1 of 2012*, and *James Katabazi & 21 Others vs. Secretary General of the East African Community & Attorney General of the Republic of Uganda EACJ Ref. No. 1 of 2007*.
18. Secondly, it was argued for the Respondent that this Court does not have jurisdiction to entertain prayers for the annulment of Partner States' national laws, therefore the Court's jurisdiction for present purposes is restricted to Prayers (a), (b), (c), (d), (f) and (g) of the Reference, subject to satisfactory proof thereof. Mr. Kayobera cited Articles 23, 27 and 30 of the Treaty in support of his case, as well as the cases of *Hilaire Ndayizamba vs. Attorney General of the Republic of Burundi & Secretary General of the East African Community EACJ Ref. No. 3 of 2012* and *Professor Nyamoya Francois vs. Attorney General of the Republic of Burundi & Secretary General of the East African Community EACJ Ref. No. 8 of 2011*.
- 19 With regard to the issue of limitation of time, it was Mr. Kayobera's contention that the promulgation dates of Act No. 1 /26 and Act No. 1 /31 were such that the Applicants' challenge of the said laws was time barred. Learned Counsel argued that, having been promulgated on 15th September 2014, any challenge to Act No. 1/26 should have been filed by 15th November 2014 but the present Reference had been filed on 17th November 2014. Similarly, he argued that Act No.1/31 had been promulgated on 31st December 2013 therefore the present Reference was filed well beyond the time stipulated in Article 30(2) of the Treaty. Mr. Kayobera cited the cases of *Independent Medico Legal Unit vs Attorney General of the Republic of Kenya EACJ Ref. No. 3 of 2010*, *Hilaire Ndayizamba (supra)* and *Professor Nyamoya (supra)* in support of his argument.
20. Clarifying his submission on this issue before the Court, Learned Counsel argued that whereas Rule 3(1) (d) of the Court's Rules was applicable to time lines set by the said Rules or by Court Order, it was inapplicable to time frames that were set by the Treaty.

Court's Determination:

21. We have carefully considered the pleadings of both Parties, as well as their respective arguments in submissions. We are constrained to observe that beyond the allegations made in the Reference, no effort was made to address us on Act No. 1/31 in submissions. Clearly, having been enacted in 2013, any purported action in respect of that law would run afoul of the two-month time limit prescribed in Article 30(2) of the Treaty. As quite rightly argued by Mr. Kayobera, the question

on limitation of time was well settled in *Independent Medico Legal Unit (supra)* in the following terms:

“The Treaty does not contain any provision enabling the Court to disregard the time limit of two (2) months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the complainant”.

22. We are most respectfully bound by the foregoing decision and do, therefore, find any claim in respect of Act No.1/31 time barred. In any event, it is abundantly clear from the prayers in the Reference that the law that is in issue in this Reference is Act No.1/26. Consequently, it is to a consideration of the issues raised in respect of that law that we now revert.
23. For ease of reference we reproduce the pertinent Treaty provisions on the issue of jurisdiction.

Article 23(1): Role of the Court

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

Article 27(1): Jurisdiction of the Court

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret and this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”

Article 30(1): Reference by Legal and Natural Persons

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

24. This Court has had occasion to consider the question of its jurisdiction in previous cases. We were referred to the case of *Hon. Sitenda Sebalu vs. The Secretary General, East African Community & Others EACJ Ref. No 1 of 2010* where the Court cited with approval its decision in the case of *Prof. Peter Anyang’ Nyong’o & 10 Others vs. Attorney General of the Republic of Kenya & 2 Others EACJ Ref. No. 1 of 2006* and held:

“We have no hesitation in reiterating what this Court said in *Anyang’ Nyong’o (supra)* about the import of Article 30(1) of the Treaty, namely, that a claimant is not required to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the Reference in question. It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner.”

25. In addition to jurisdiction arising from the infringement of a Treaty provision as stated in *Hon. Sitenda Sebalu (supra)* above, this Court has in the past pronounced itself on the violation of Partner States’ domestic laws amounting to a violation of the Treaty and thus constituting a matter that is justiciable before

the Court. See *Rugumba vs. Attorney General of Rwanda EACJ Ref. No. 8 of 2010 and Muhochi vs. Attorney General of Uganda EACJ Ref. No. 5 of 2011*.

26. More recently, the issue of the Court's jurisdiction was aptly summed up in the case of *Henry Kyarimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014* as follows:

“In short, in adjudging an impugned state action as being internationally wrongful this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the Principle of rule law, it is the Court's inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.”

27. Thus, where the subject matter complained of under Article 30(1) is a 'directive, decision or action', it would be evaluated against the totality of a given Partner State's laws to determine its legality. In the instant case, however, where the complaint is that an Act of Parliament contravenes Treaty provisions, the internal or domestic laws of the Partner State that enacted that Act would be immaterial to a determination of whether or not such Act contravenes the Treaty. Rather, it would be incumbent upon this Court to make a determination as to what is envisaged by the principles of rule of law and good governance as invoked by the Applicant and enshrined in the Treaty, and whether, in fact, the provisions of Act 1/26 do violate the said principles as has been alleged.

28. We are fortified in this approach by the provisions of Article 27 of the Vienna Convention on the Law of Treaties. It reads:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

29. Article 46 pertains to the competence of a State Party to the Convention to consent to be bound by a treaty in contravention of its internal laws. The competence of the Republic of Burundi to be bound by the provisions of the Treaty has not been questioned in any way in this Reference. Specifically, the Respondent has not advanced any defence as to its consent to be bound by the Treaty having been granted in contravention of its internal laws. Consequently, we are satisfied that the Respondent cannot invoke its internal laws as justification for a Treaty violation. Needless to say, the decisions of national courts do form part of the case law of that nation. See *Henry Kvarimpa (supra)*.

30. We do also find appropriate persuasion on this matter in the decision of the International Court of Justice in the case of *Electtronica Sicula S.P.A (Elsi) Judgment (ICJ REPORTS) 1989 p. 15, para. 73*. In that case it was held as follows:

“Compliance with Municipal Law and compliance with the provisions of the Treaty are different questions. What is a breach of Treaty may be lawful in the Municipal Law and what is unlawful in the Municipal law may be wholly innocent of a violation in the Treaty.”

31. In the instant case, although the constitutionality of the Bill that preceded Act No. 1/26 was tested and sanctified by the Constitutional Court of Burundi, it is

the Applicant's contention that the Act nonetheless contravenes Articles 6(d) and 7(2) of the Treaty in so far as it offends the principles of rule of law and good governance. Clearly, the decision of the Constitutional Court of Burundi notwithstanding, there are matters of Treaty interpretation presented by the Reference that beg the Court's interrogation. To that extent, therefore, we are satisfied that this Court does have jurisdiction to entertain the Reference. We so hold.

32. With regard to the question of time limitation, it is not in dispute herein that Act No.1/26 was enacted on 15th September 2014, neither did the Applicants claim to have been unaware of the said date of enactment. It would appear that the crux of the matter is whether or not the provisions of Rule 3(1) (d) of the Court's Rules of Procedure apply equally to time lines set by the Treaty as to those set by the Rules themselves or by Court Order. Rule 3(1) (d) provides:

"Any period of time fixed by these Rules or by any order of the Court for doing any act shall be reckoned as follows:

(d) If a period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following working day."

33. On the other hand, Article 30(2) provides:

"The proceedings provided for in this Article shall be instituted within two months of the enactment ... or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."

34. The Court's Rules were promulgated under the provisions of Article 42(1) of the Treaty. It reads: 'The Court shall make rules of the Court which shall, subject to the provisions of the Treaty, regulate the detailed conduct of the business of the Court.' Consequently, the Court's Rules derive their legality and legitimacy from Article 42 of the Treaty and, to the extent that they regulate the detailed conduct of the Court's business, they do compliment and operationalize the function of the Court as stipulated in Articles 23(1) and 30 of the Treaty.

35. We take the most considered view that Article 42(1) is couched in terms that postulate that whereas the Treaty makes general provisions for the institutionalization of the Court, the detailed conduct of the Court's business or the Court's routine operations would be provided for in its Rules of Procedure. Therefore, for purposes of implementing the Court's mandate, the Treaty must be applied and read together with the Court's Rules of Procedure. In that regard, it seems abundantly clear to us that the time limit stipulated in Article 30(2) of the Treaty would be computed in the manner outlined in Rule 3(1) (d) of the Court's Rules. We so hold.

36. Before we take leave of this issue, we deem it necessary to distinguish the cases cited by learned Counsel for the Respondent on the issue of limitation of time. We have carefully considered the decisions in *Independent Medico Legal Unit (supra)* and *Hilaire Ndayizamba (supra)*. Both cases addressed the import and scope of Article 30(2), categorically designating the time limit prescribed therein as fixed and binding, and negating any considerations of continuing violations on account of the principle of legal certainty advanced therein. We do most respectfully abide by those positions.

We hasten to add, however, that the matter under consideration in the present Reference is not the scope or import of Article 30(2) of the Treaty but, rather, how the time limit prescribed therein may be computed. Clearly, the applicable law in that regard would be Rule 3(1) (d) of the Court's Rules.

37. In the result, we find that the Reference was filed within time and do answer Issue No. 2 in the negative.

Issue No. 3: Whether Act No. 1/26 is inconsistent with the right to an independent and impartial judicial system and the right to a fair trial, and therefore inconsistent with international instruments and/ or Articles 6(d) and 7(2) of the Treaty

Applicants' Submissions:

38. In a nutshell, we understood it to be the argument for the Applicants that Articles 2, 5, 7, 40, 44, 50, 52, 73, 87 and 89 of Act No.1/26 contravene the principles of constitutionalism, human rights and good governance as stipulated in the Treaty. It was Mr. Ncutiyumuheto's contention that the Respondent's case hinges on the provisions of Article 23(1) of the Treaty, which enjoins the Court to 'ensure the adherence to law in the interpretation, application and compliance with the Treaty.' He cited the cases of *Independent Medico Legal Unit (supra)* and *Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba (supra)* to augment his submission on the court's role in ensuring Partner States' adherence to law and compliance with the Treaty.
39. It was also argued for the Applicants that Act No.1/26 contravened Article 209 of the Constitution of the Republic of Burundi, as well as Article 10 of the Universal Declaration of Human Rights, Articles 7(1) and 26 of the African Charter on Human and People's Rights and Article 14(1) of the International Covenant on Civil and Political Rights, all of which international instruments had been ratified by the Respondent and fully integrated in the Burundi Constitution by Article 19 thereof.

Respondent's Submissions:

40. Conversely, it was argued for the Respondent that the Constitutional Court of Burundi had rendered a decision in which it held the creation of a Special Court on Land and Other Assets to be in conformity with the Constitution of the Republic of Burundi. Mr. Kayobera argued that the right of appeal was guaranteed under Act No. 1/26 in so far as the said law made provision for an Appellate Division. Finally, citing the case of *East Africa Law Society vs. Attorney General of the Republic of Burundi EACJ Ref. No 1 of 2014*, as well the decision of the Constitutional Court of Burundi, Learned Counsel argued that Act No. 1/26 was consistent with the right to an independent and impartial judicial system, as well as the right to a fair trial, and was therefore consistent with international instruments and Articles 6(d) and 7(2) of the Treaty.

Court's Determination:

- 41 We have carefully considered the pleadings and submissions of both Parties on the alleged non-compliance of the Act with Articles 6(d) and 7(2) of the Treaty.

As can be deduced from paragraphs 5, 11, 15 and 16 of the Reference, the specific legal provisions in contention are Articles 2, 5, 8 and 9 of the Act.

42. However, the Applicants did also take issue with the following provisions of Act No. 1/26: Articles 7, 40, 44, 50, 52, 73, 87 and 89. These Articles provide as follows:

Article 7

“Upon assuming their duties, judges of the Court are placed on secondment position.”

Article 40

“The appeal against the Commission’s decisions before the Court does not suspend execution of the contested decision. However, property that is subject to litigation pending before the Court can neither be alienated, nor distorted, nor transformed nor encumbered with other rights before the final decision of the Court.”

Article 44

“The court hearings are public unless such publicity is a threat to public order or morality. In that case the court immediately orders the hearing to be in camera.”

Article 50

“When it is proved that a regular witness called before the Commission is not physically available to be heard, his testimony adduced before the Commission remains with its value in the Court.”

Article 52

“In case of connection found between a case under investigation in the court and another pending before the Commission, the President of the Court by order suspends the proceedings initiated before it and is waiting for the delivery of the decision by the Commission to resume the proceeding and possibly approve the two joined cases.”

Article 73

“The one who does not appear before the court to stand his case at the second occasion by default is no longer allowed to apply for a new opposition.

In any case, the opposition does not stay execution of the judgment already undertaken, unless the President of the Court decides otherwise by a reasoned order. Made contradictorily, this order is served on all parties by the diligence of the court registrar.

However, in case of execution of judgment, property acquired can neither alienated, nor distorted, nor transformed nor encumbered with other rights before the final decision of the Court.”

Article 87

“The review can be requested only by people who are parties to the case. After the death or declared absence of a party, the request shall be exercised by his successors or his universal legatees.”

Article 89

“The application for review is addressed to the Minister of Justice. If the Minister determines that the application is admissible, it refers the case to the Appeals Chamber of the Court. This Chamber determines again the

case on merits by a new quorum.”

43. We are mindful of the function of due process in the determination of matters before this Court or indeed any tribunal. The notion of due process advances the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights. See *Black's Law Dictionary, 8th Edition, pp. 538, 539*. Indeed, a basic and fundamental requirement of due process in any proceeding is provision for notice that sufficiently apprises interested parties of the pendency of the action and affords them an opportunity to present their objections or defence. See *Mullane vs. Central Hanover Bank and Trust Co. 339 U'S 306, 314 (1950)*.
44. It is certainly not for cosmetic purposes that Rule 38 of this Court's Rules of Procedure enjoins parties to specifically plead 'the necessary particulars of any claim, defence or other matter', or that Rule 38(2) (b) explicitly underscores the need to plead matters which would otherwise take an opposite party by surprise. This is necessary to avert the undesirable practice of trial by ambush and promote the principle of natural justice. Consequently, it seems to us that the introduction of additional aspects of Act No. 1 /26 at the stage of submissions, that were not encapsulated in the Reference, offends the provisions of Rule 38(1) and (2)(a) of the Court's Rules, the notion of due process and, ultimately, parties' right to a fair hearing. We do, therefore, refrain from a consideration of the additional provisions cited in the Applicants' submissions and shall restrict ourselves to the provisions of Act No. 1 /26 as cited in the Reference.
45. Before we progress further with this issue, we deem it necessary to reproduce the provisions of the Treaty that are under scrutiny herein for ease of reference.
- Article 6(d)
 “The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:
 (d) good governance including adherence to the principles of the rule of law, accountability, transparency as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.”
- Article 7(2)
 “The Partner States undertake to abide by the principles of good governance, including adherence to the principles of the rule of law ... and the maintenance of universally accepted standards of human rights.”
46. Similarly, the provisions of Act No.1 /26 that were challenged in the Reference are reproduced below.
- Article 2
 “The Court is a legal framework with the jurisdiction to hear appeals at the last resort against decisions made by the National Commission on Land and Other Properties.”
- Article 5
 “The Court shall be comprised of the President, a President of each Chamber and as many members as needed. The members of the Court shall be appointed from judges and lawyers who are of proven moral integrity, impartiality and independence.”
 The judges of the Court are appointed by decree on the proposal of the

Minister of Justice.”

Article 8

“The salary and benefits of the judges of the Court shall be determined by decree.”

Article 9

“The President of the Court has the rank of Minister.

The Presidents of the Chambers have the rank of the Vice-Presidents of the Supreme Court.

The judges of the Court have the rank of judges of the Supreme Court.”

47. It is a cardinal rule of procedure that s/he who asserts must prove their case. Indeed in *Henry Kyarimpa (supra)* that principle as encapsulated in *Shabtai Rosenne: The Law and Practice of the International Court, 1920-2005, Vol. III, Procedure, p. 1040* was cited with approval in the following terms:

“Generally, in the application of the principle of *actori incumbit probatio* the court will formally require the Party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given.....As the Court has said: ‘Ultimately... it is the litigant seeking to establish a fact who bears the burden of proving it.’..”

48. In the instant case and with regard to Article 2 of Act No. 1/26, the Applicants argued that the fact that the Special Court decides in the last instance on the decisions of the Commission, without any possible appeal to the Supreme Court, was a violation of Articles 6(d) and 7(2) of the Treaty as it negated the opportunity for the Court constitutionally designated as ‘a guarantor of good application of law’ to test the legal soundness of the Special Court’s decisions.
49. With regard to Article 5, on the other hand, it was argued for the Applicants that the second component thereof, which deals with the appointment of the Special Court’s members, contravened Burundi domestic laws that prescribe consultation with the Superior Council of the Judiciary, as well as the approval of the Senate as part of the appointment process for judges of the higher bench. See Article 222 and 226 of the Burundi Constitution. Learned Counsel for the Applicants imputed a violation of the principle of separation of powers in so far the impugned Act ignored the role of the Senate in the appointment process, placed the said process solely with the Executive and thus rendered judges of the Special Court vulnerable to the influence of the said branch of government.
50. The Court was not addressed on Articles 8 and 9 either in written submissions or during oral clarification of the same. The Articles address the manner in which the emoluments of judges of the Special Court would be determined, and prescribe the ranking or status of judges of the Special Court viz the Supreme Court. Learned Counsel did, nonetheless, cite the *United Nations Resolution No. 40/32* on the independence of the Judiciary in support of his case.
51. We are aware that Article 6(d) of the Treaty designates good governance as a fundamental principle of the Community and, for present purposes, recognizes as inherent within that fundamental principle, the principles of rule of law, accountability and transparency. The same principles are reflected in Article 7(2) thereof. A clear understanding of the cited principles is critical to a determination of the compliance of the impugned Act with the Treaty.

52. In an Article published by the International Fund for Agricultural Development (IFAD), 'Good Governance: An Overview', *IFAD Executive Board - 67th Session, September 1999*, p. 6, the term 'good governance' was defined by the United Nations Development Fund (UNDP) as follows:

"The existence of effective mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences."

53. In the instant case, the Applicants' claim that the principle of good governance has been contravened within the context of right to fair trial and the principle of separation of powers does, in our considered opinion, bring into purview the principle of rule of law. In a Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (2004), para. 6, the concept of the rule of law was defined as follows:

"It refers to the principle of governance to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."

54. It is quite clear from the foregoing definition that the rule of law is the king-pin that ferments, and by which nation states progressively aspire towards the ideal of good governance. For present purposes, the standard for rule of law captured therein is first, the existence of laws that are publicly promulgated, equally enforced and independently adjudicated, and secondly, measures that ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, and procedural and legal transparency.

55. The evidence on record in the instant case is that Act No. 1/26 was indeed publicly enacted by the Parliament of Burundi. On the other hand, no question was raised as to whether or not the said law is equally enforced for all persons, natural or juridical. The only bone of contention herein is whether it is independently adjudicated. In the same vein, no issues were raised as to Act No.1/26 being devoid of recognition, supremacy or otherwise being derogated, neither was non-submission or non-accountability to the law in contention herein. On the contrary, the allegation herein is that the impugned law subverts the Constitutional provisions in respect of appeals to the Supreme Court; contains provisions that curtail the notion of fair trial with regard to the independence of the Special Court judges; reflects measures that impede the doctrine of separation of powers, and infringes upon recognized standards of procedural and legal propriety.

56. Before we progress further with the issue of the Act's compliance with the Treaty (or lack thereof), we deem it necessary to interrogate the intrinsic nature of special courts such as the one set up by the impugned Act. The *Merriam-*

Webster dictionary defines a special court as ‘a court created for an exceptional and temporary purpose (such as a commission or tribunal to hear claims for war damages against a State by nationals of the victorious State).’ On the other hand, the *Free Online Legal Dictionary* defines such courts as ‘bodies within the judicial branch of government that generally address only one area of law or have specifically defined powers.’ It expounds the distinction between special courts and general-jurisdiction courts as follows:

“Special courts differ from general-jurisdiction courts in several other respects besides having a more limited jurisdiction. Cases are more likely to be disposed of without trial in special courts, and if there is a trial or hearing, it is usually heard more rapidly than in a court of general jurisdiction. Special courts usually do not follow the same procedural rules that general-jurisdiction courts follow; often special courts proceed without the benefit or expense of attorneys or even law-trained judges.”

57. As may be deduced from the foregoing literature, it is quite commonplace that special courts would hear a much narrower range of cases than those entertained by general-jurisdiction courts; hear the cases before them more rapidly; and do not usually apply the same procedural rules as the general-jurisdiction courts.
58. Against that yardstick, therefore, we do not think that Act No. 1/26 contravenes the principle of rule of law simply because it does not provide for appeals from the Special Court to the Supreme Court. In any event, as quite rightly argued by learned Counsel for the Respondent, the said law does make provision for an appellate process from the First Instance Division to the Appellate Chamber of the Court. In fact, the judges of the Special Court do appear to have the same standing in terms of qualifications as judges of the Supreme Court of Burundi. Hence the question of the legal proficiency of the Court’s judgments would not arise. We take the view that the fact that the Burundi Constitution provided for the Supreme Court as the highest court of the land does not necessarily translate into all judicial matters having the option to progress thereto.
59. Indeed, had we considered the provisions of Article 40 of the law, the fact that the commencement of an appeal process does not serve as an automatic stay of execution would not per se impute procedural or legal impropriety or lack of transparency. We cannot yield to the temptation to speculate as to the rationale behind that provision without the benefit of the Respondent’s input, but we do note that it is quite commonplace for judicial systems to abide such a clause. Indeed, an analogy can be drawn with the legal regime within this Court’s jurisdiction, where Rule 110 of the Court’s Rules of Procedure negates the incidence of an automatic stay of proceedings pending an interlocutory appeal.
60. We take the view that it would suffice for purposes of compliance with the rule of law that the law setting up the Special Court is promulgated in accordance with the law, and is applied in a transparent, fair and consistent manner by an independent and impartial tribunal. Such a legal environment would meet the international standards of accountability to and fairness in the application of the law, legal certainty, and procedural and legal transparency propounded earlier hereinabove. In the instant case, as we have stated hereinabove, we did not hear the Applicants to suggest that the law was promulgated in a manner that violated the laws of Burundi. They merely took issue with the content of the

law. Consequently, we do not deduce any infringement of the rule of law or good governance from the provisions of Articles 2 and 9 of Act No.1/26.

61. The Applicants did, however, raise issues about the independence of the judges of the Special Court. It seems to us that the Applicants are particularly aggrieved with the appointment of judges of the Special Court 'by decree on the proposal of the Minister of Justice' to the extent that it restricts the function of appointment solely to one branch of government - the Executive. To compound matters, the same branch of government is responsible for the determination of the judges' emoluments. Furthermore, the Act's purported concentration of power in the Executive appears to contradict the known procedure for the appointment of judges in Article 222 of the Constitution of Burundi, which provides for judicial appointments to the Supreme Court to be made in consultation with the Superior Council of the Judiciary and subject to the Senate's approval. The Applicants did allude to this anomaly violating the doctrine of separation of powers, as well as parties' right to a fair trial and, ultimately, compromising the independence of the judicial branch of government.
62. We must, from the onset, clarify the distinction between the institutional independence of the judicial branch of government, which concept is inter-related with the principle of separation of powers; and the individual independence or impartiality of judges that has a bearing on the notion of fair trial. We intend to address the issue of judicial independence that was raised herein in that context.
63. The principle of separation of powers is the cornerstone of an independent judiciary. It is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of separation of powers is a *sine qua non* for a democratic State. See *Report of the Special Rapporteur on the independence of judges and lawyers, UN document EICN.4/1995/39, para. 55*. Indeed, under international law, nation states are obliged to organize their state apparatus in such a manner as would be compatible with their international obligations. It is incumbent upon them to ensure that the structure and operation of state power is founded on the true separation of its executive, legislative and judicial branches, as well as the existence of an independent and impartial judiciary. See *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioner's Guide No. 1, International Commission of Jurists, 2004, p.19*.
64. The principle of separation of powers is aptly captured in Articles 3 and 4 of the Inter-American Democratic Charter as follows:

"The executive, the legislature and the judiciary constitute three separate and independent branches of government. Different organs of the State have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere."
65. However, we do also reproduce a persuasive argument in Phillips, O. H. & Jackson, P., *'Constitutional and Administrative Law', Sweet & Maxwell, 2001. 8th Edition, pp.* on the limitations of a complete separation of powers:

"A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs

with no over-lapping or co-ordination, would (even if theoretically possible) bring government to a stand-still. What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another.”

66. On the other hand, the *UN Basic Principles on the Independence of the Judiciary, Resolution 40/32* do, in the First Principle thereof, lay down the requirement of judicial independence in the following terms:

“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary”.

67. As can be deduced from the second component of the principle of judicial independence enumerated above, the institutional independence of the judiciary essentially entails the non-subordination of the judicial branch of government to the other branches of government. The non-subordination envisaged therein would encompass issues pertaining to the recruitment and remuneration of judges, as well as the respect by the other branches of the judiciary’s decision-making function including the recognition of, compliance with and insulation of judgments emanating from the judiciary from tinkering by any non-judicial authority. See *Report on the Human Rights Committee on the Congo, UN document CCPR/C/79/Add 118, para. 14.* and Principles 3 and 4 of the *UN Basic Principles on the Independence of the Judiciary*. It does also entail freedom of the courts from influence, threats or interference from the other branches, as well as appropriate provision for security of tenure and professional training of judges. See *Report on Terrorism and Human Rights. OAS document OVA/Ser. LV/11.116, Doc. 5, 2002, para. 229.*

68. In the instant case, a special court was set up by the Republic of Burundi under a legal regime that is significantly different from that which governs general-jurisdiction courts in the country, and operates under specially designated powers as enshrined in Act No. 1/26. Whereas the general-jurisdiction courts subscribe to a legal regime that duly makes provision for all the branches of government in the appointment of judges, the regime governing the Special Court designates the appointment and remuneration of the said judges as a preserve of the Executive.

69. We are mindful of the fact that, by their very nature and purpose, the dictates of a special court would vary considerably from the intricacies of general-jurisdiction courts. Special courts are created to address specific issues that are of special concern to a country. In the instant case, as quite elaborately explained by learned Counsel for the Respondent, the Special Court was created to address a grave, historical problem that was intertwined with the Republic of Burundi’s socio-political history. Given that background, it would be reasonable that judges to the Special Court would be appointed with the participation of all the branches of government. Therein lies the fallacy of a complete separation of powers or the absolute independence of the judiciary. An eventuality where the appointment of judges is the sole responsibility of the judiciary would, in itself, constitute an unwarranted concentration of power in that branch of

government.

70. Similarly inappropriate, nonetheless, is the present scenario where the judges of a special court in Burundi are exclusively appointed by the Executive without any input from the judicial and/or legislative branches of government. It was argued at length for the Respondent that the judges are appointed from among duly appointed sitting judges therefore, given the provisions of Article 222 of the Burundi Constitution, the participation of the other branches of government is inadvertently secured.
71. Article 222 provides for the appointment of judges to the Supreme Court in consultation with the Superior Council of the Judicature and with approval of Senate. However, given the express provisions of Article 5 of Act No. 1/26, we do not find the practice highlighted by learned Counsel for the Respondent to provide sufficient protection against the concentration of power for judicial appointments to the Special Court in the Executive. We take the view that Article 5 is couched in language that gives the appointing authority the option to either appoint sitting judges or lawyers. Whereas sitting judges would have been duly appointed in consultation with the Superior Council of Judicature and the participation of the Senate, the same safeguards cannot be said of lawyers appointed to the Special Court as judges.
72. There is no agreement in international law as to the method of appointment of judges. It would appear that a degree of discretion is left to individual States, provided that the appointment procedure guarantees the judiciary's institutional independence and the selection criteria is premised on recognized standards of professional qualifications and competence, as well as personal integrity. This would underscore the principle of separation of powers, as well as provide indispensable safeguards for the individual independence and impartiality of judges.
73. To this end, some international institutions make appropriate provision for the role of the other branches of government in the appointment of Judges. The Council of Europe has, for instance, detailed guidelines on the appointment procedures that pertain to and the body responsible for selection of Judges. It posits that the body responsible for the selection of Judges should be independent of 'the government and the administration.' It does, however, acknowledge that whereas the selection of Judges should be undertaken by an independent body, the appointment of Judges by the executive branch of government would not be incompatible with the independence of the Judiciary, provided that certain safeguards are in place. See *International Principles on the Independence and Accountability of Judge, Lawyers and Prosecutors*, *Ibid.* pp. 42-43. We find the position adopted by the Council of Europe quite persuasive and pertinent to the East African Community in as far as it aptly caters for judicial independence.
74. Against that standard, we are satisfied that Article 5 of the impugned act does offend the principle of separation of powers in so as it designates the appointment of judges to the Special court as the sole preserve of the executive branch of government, without any demonstrable safeguards against the unwarranted concentration of the said function in that branch of government. In the same vein, had we considered Article 89 of the same Act our reading of that provision would have been that it constitutes a blatant violation of the principle of

separation of powers in so far as it subjugates a purely judicial review process to executive authority and intervention. We so hold.

75. We now revert to the allegations that the pivotal roles of the executive in the appointment and remuneration of the Judges of the Special Court compromises their impartiality and negates parties' right to a fair trial. What would amount to a fair trial is in *Black' Law Dictionary, 8th Edition, p. 634* as 'a trial by an impartial and disinterested tribunal in accordance with regular procedures.'

76. The right to a fair trial requires judges to be impartial, having neither a stake nor interest in the cases they adjudicate, and no prejudices or biases about cases or the parties. See *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Ibid. pp.* Indeed, Principles 2 and 8 of the *UN Basic Principles on the Independence of the Judiciary address the question of judges' impartiality* as follows:

Principle 2

"The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

Principle 8

"In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

77. In *Incal vs Turkey 41/1997/825/1031, para. 65*, the manner of appointment of judges was held by the European Court of Human Rights to be an important consideration in determining their impartiality and independence from the influence of external authority. However, the same case did also portend judges' security of tenure; the existence of safe guards against external pressure, and whether or not judges are employees of the other branches of government or otherwise subordinated to them as critical parameters to a determination of judges' individual independence.

78. No evidence was adduced by the Applicants as satisfactorily established a lack of security of tenure of the Special Court's judges that could engender deference to their appointing authority, or the absence of adequate safe guards in the said court against external pressure. The Applicants did allude to the court's judges as being seconded from civil service but no semblance of evidence was furnished in support of that allegation. The question of judges' partiality might largely hinge on perception but, once subjected to a judicial process such as the present proceedings, must be duly established by cogent and credible evidence. The appointment and remuneration of the Special Court's judges by the Executive per se is not sufficient reason to deduce them as partial, especially given the Criteria for appointment stipulated in Article 5 of Act No. 1/26. That provision enjoins the appointing authority to appoint members of the Special Court from judges and lawyers of proven moral integrity, impartiality and independence. Consequently, we would disallow the Applicants' claims of breach of the right

to fair trial.

79. In the result, we find that Articles 2, 8 and 9 of Act No. 1/26 have not been proven to contravene the principles of rule of law and good governance, and accordingly do not violate Articles 6(d) and 7(2) of the Treaty. We are satisfied that Article 5 of the said law does contravene the principle of good governance as enshrined in Articles 6(d) and 7(2) of the Treaty in so far as it offends the principle of separation of powers inherent therein. However, we are not satisfied that that appointment and remuneration of the Special Court's Judges as outlined in Articles 5 and 8 of the Act respectively has been proven as outlined in Articles 5 and 8 of the Act respectively has been proven to impute partiality the Executive branch of government on the Judges; part. To that extent, therefore, Issue No.3 hereof succeeds in part and fails in part.

Issue No.4: Whether the Applicants are entitled to the prayers sought

80. The Applicant sought the following Prayers in the Reference:
- a. A declaration that the system of administration of justice and governance adopted by Act No.1/26 is not conducive to the effective administration of justice as envisaged in the spirit of Articles 6(d) and 7(2) of the Treaty.
 - b. A Declaration that judicial power is dependent on the Executive, which constitutes a breach of Articles 6(d) and 7(2) of the Treaty.
 - c. A Declaration that that the procedure adopted by Act No.1/26 and employed by the Special Court is a breach of international instruments on the right to an independent and impartial judge as well as the right to a fair trial as provided by Articles 9(d) and 7(2) of the Treaty.
 - d. A declaration that Act No. 1/26 constitutes an infringement and violation of the provisions of the Treaty.
 - e. A Declaratory Order for the immediate annulment of Act. No. 1 /26.
81. Given our findings Issue No. 3 above, we are unable to grant the prayers in paragraphs (a), (d) and (e) above are not tenable as the Applicants were only able to establish one (1) aspect of breach of the Treaty in the entire impugned Act. Whereas the Applicants did establish breach of the principle of good governance in aspects of Article 5 of the said Act and thus succeeded in paragraph (b) above, they fell short on proof of the Prayers sought in paragraph (c).
82. With regard to the issue of costs, Rule 111 (1) of the Court's Rules explicitly provide for costs to follow the event unless the court, for good reason, decides otherwise. In the instant case, where the Reference has succeeded in part, we deem it just to order each Party to bear its own costs.
83. In the final result, therefore, we hereby make the following Declarations and Orders:
- a. The Declarations and Orders sought in Prayers (a), (c), (d) and (e) of the Reference are not tenable and are hereby disallowed.
 - b. A Declaration is issued that Act No. 1/26 does infringe Articles 6(d) and 7(2) of the Treaty in so far as aspects of Article 5 thereof offend the principle of separation of powers inherent in the principle of good governance enshrined in the said provisions of the Treaty.
 - c. The Republic of Burundi shall, in accordance with Article 38(3) of the

Treaty, cause the amendment of Article 5 of Act No. 1/26 within its internal legal mechanisms.

84. We so order.

H. Ncutiyumuheto Counsel for the Applicants

N. Kayobera for the Respondent

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First Instance Division

Reference No. 17 of 2014

Hon. Margaret Zziwa v Secretary General, East African Community

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo, J; F. Jundu, J & A. Ngiye, JJ
February 3, 2017

Governance and leadership- Impeachment of East African Legislative Assembly Speaker – Parliamentary proceedings -Malfeasance in office – Whether actions of the temporary Speaker were lawful- Whether there was compliance with natural justice - Bias - Preliminary points of law - Privileged documents - Damages - Costs

Articles: 6(d), 7(2), 8(1)(c), 44, 48(1)(b)(iii), 49(2)(g) 53(3), 56, 60, 69(1) of the Treaty – Section 20(1) EALA (Powers & Privileges) Act, 2003 - Rules: 9(2), 32(1), 78(2)(b) & (6), Annex 3 EALA's Rules of Procedure, 2015- Section 16(2)(b),(c) Parliamentary Privileges Act, 1987, Australia - Rule 53(1)(a) EACJ Rules of Procedure 2013

On 26th March 2014, thirty two Members of the East African Legislative Assembly (EALA), submitted a 'Notice of intention to move a motion' for the removal of the Applicant from the office of Speaker, to the Clerk of EALA. On 1st April 2014, the Applicant presided over the Assembly plenary and ruled that the motion was *sub judice* as Reference No. 3 of 2014 was pending before this Court. Other cases were filed and in the interim several Members withdrew their support for the motion. On 4th June 2014 when the matter of censure arose again, the Applicant ruled that the Motion lacked the requisite number of signatures and had had lapsed.

Subsequently, on 26th November 2014, the Members convened and summoned the Clerk to 'preside over the Assembly'; allegedly locking the Applicant in her office. They elected a 'temporary' Speaker to preside over the reinstated Motion, suspended the Speaker from office and referred the said Motion to EALA's Committee on Legal, Rules and Privileges for investigation. Thereafter, on 17th December 2014, the Assembly commenced censure proceedings that culminated in the Applicant's removal from the office on 19th December 2014.

In this Reference, the Applicant challenged her removal from office claiming that: the Motion for removal violated Rule 9(2) of the Assembly's Rules of Procedure; the investigating Committee was not impartial and did not give her a fair hearing or comply with the rules of natural justice; there were no rules governing the investigative function of the Committee on a censure Motion; the grounds for her removal did not fall within the ambit of the term 'misconduct' as envisaged under Article 53(3) of the Treaty; and her suspension and the appointment of a Temporary Speaker breached Articles 53 and 56 of the Treaty and Rule 9 and Annex 3 of EALA's Rules of Procedure. The Applicant contended that there was no legal basis for her suspension given that Rule 9(6) only barred an impugned Speaker from presiding over their own impeachment proceedings, but in this case the impeachment proceedings had not yet commenced.

The Applicant sought orders quashing the actions of EALA and reinstatement to the position of Speaker and recompense through special, general, and exemplary

damages; as well as compensation for lost earnings as a consequence of the allegedly unlawful interruption of her five-year term of office.

The Respondent denied any bias in the Committee's handling of the Motion; rather, investigations were in accordance with Article 53(3) of the Treaty the Assembly's rules and parliamentary practice. The accusations of misconduct against the Applicant relating to: poor governance, leadership, abuse of office and disrespect for Members and staff conformed to Article 53(3) of the Treaty, and were articulated in the Committee's report and confirmed by the Assembly on 17th December 2014. The Furthermore, the Applicant's non-compliance with Rule 9(6) orchestrated recourse by the Assembly to the procedural actions in review presently.

Held

1. The Office of the Speaker is vital to the operations of EALA therefore, the removal of the holder thereof should never be approached casually or flippantly. The Treaty, the Assembly's Rules of Procedure and the Administration of EALA Act contain no provisions for the suspension of a Speaker thus, there was no legal basis for the course of action taken by the House. Furthermore, there is no provision for a Temporary Speaker or the election thereof. Neither Article 53(3) of the Treaty nor Rule 9 of the Assembly's procedural rules prescribe any recourse whatsoever to Annex 3 which pertains to the election of a Member to preside over the House during the temporary 'absence' of the Speaker. Reliance on Annex 3 to remove the Speaker was misconceived. The dictates of respect for the rule of law and due process would have required that the House accord due respect to the Office, if not the person, of the Speaker and explore available legal rules in pursuit of its desired result.
2. The attempt by the Temporary Speaker to preside over the House and refer the Motion to the Committee contravened Article 56 of the Treaty was null and void, and any actions that would have cascaded from the said nullity were similarly a nullity.
3. The prohibition in Rule 9(6) against a Speaker in respect of whom impeachment proceedings have commenced from presiding over the said proceedings does not necessarily translate into such Speaker being absent from the House during the said proceedings. S/he would only be prohibited from presiding over the House. On 1st April 2014 the Applicant presided over a House whose sole business was her removal from office. This was an obvious conflict of interest and offended the rules of natural justice for the Applicant to have presided over and made decisions in her own cause. Rule 9(6) sought to avert such a mischief. Thus, the Applicant breached Rule 9(6) of the Assembly's Rules of Procedure.
4. The circumstances surrounding the composition of the House Committees do not necessarily negate the allegations of bias or lack of natural justice raised by the Applicant. However, a committee that had 12 out of its 15 members support the motion for removal of the Speaker cannot be deemed to have been devoid of bias. A 'hearing' before a partial and demonstrably biased Committee was a mockery of the tenet of a fair and impartial hearing inherent in the principle of natural justice.
5. Article 53(3) of the Treaty permits the removal of the Speaker of the House either for infirmity of mind or body, or misconduct. However, neither the Treaty nor the

Rules define the sort of misconduct that would kick start removal proceedings. Misconduct in office is defined as ‘a public officer’s corrupt violation of assigned duties by malfeasance, misfeasance or nonfeasance.’ Thus malfeasance in office or official misconduct entails an act or omission done by a public official in an official capacity, which amounts to a dereliction of duty as a result of failure to perform their official obligations. Whereas some of the Applicant’s conduct amounted to unbecoming conduct of a senior public official, such unprofessional conduct did not necessarily translate into non-performance of official obligations however, some allegations corresponded with grounds of misconduct envisaged under Article 53(3) of the Treaty.

6. General damages are awarded to a party as a matter of discretion and taking into account the circumstances of each case. The Applicant contravened Rule 9(6) of the Assembly’s Rules of Procedure, which action might have triggered other actions thus she could not then be seen to benefit from her role in the procedural impasse that dogged the Assembly. Given the interpretative jurisdiction of the Court Articles 23 and 27 of the Treaty, the issuance of declarations on Treaty compliance or the lack thereof has been deemed to be sufficient remedy to parties. Further, there are no legal provision in this Court’s Rules of Procedure for the award of damages as a remedy, therefore they are not granted.
7. The purported sitting of the Assembly on 26th November 2014 without the elected Speaker of the Assembly violated Article 56 of the Treaty; was unlawful, procedurally wrong and of no legal consequence; additionally, the Committee on Legal, Rules and Privileges was improperly constituted and breached the rules of natural justice and the report arising therefrom was null and void. The Applicant, having succeeded in three of the five issues framed and was entitled to 3/5 of the costs.

Cases cited

Benjamin Leonard MacFoy v United Africa Company Ltd (1962) AC 152

Daugherty v Ellis 142W. Va 340, 357-358

James A. Koroso v The Attorney General of Kenya & Anor, EACJ Ref. No. 12 of 2015

Mbidde Foundation Ltd & Anor v EAC Secretary General & Anor [2012-2015] EACJLR 521, Consolidated Applications No. 5 & 10 of 2014

Venant Masenge v Attorney General of Burundi [2012-2015] EACJLR 136, Ref. No. 9 of 2012

Editorial Note: On 25th May 2018, the Appellate Division in Appeal No 2 of 2017 found that the removal of Applicant as Speaker was an internationally wrongful act attributable to the Community. To avoid further delay, compensation and costs were granted.

JUDGMENT

A. Introduction

1. This Amended Reference seeks to challenge the removal of the Applicant, Dr. Margaret N. Zziwa, from the Office of Speaker of the East Africa Legislative Assembly (hereinafter interchangeably referred to as ‘EALA’ or ‘the Assembly’) on the premise that the procedure adopted by the Assembly flouted provisions of the Treaty for the Establishment of the East African Community (hereinafter referred to as the “Treaty”), as well as rules of natural justice.
2. The Reference is *inter alia* premised on Articles 6(d), 7(2), 8(1)(c), 44, 53(3) and

56 of the Treaty, as well as Rule 24 of the East African Court of Justice Rules of Procedure.

3. It is instituted against the Secretary General of the East African Community (EAC), who is sued in a representative capacity on behalf of the EALA, as provided under Article 4(3) of the Treaty.
4. At the hearing thereof, the Applicant was represented by Mssrs. Jet Tumwebaze and Justin Semuyaba, while Mr. Stephen Agaba appeared for the Respondent.

B. Factual Background

5. In June 2012, the Applicant was elected the Speaker of EALA but a few years later the idea of her removal from that office was apparently mooted by some Members of the House. On 20th March 2014, possibly to pre-empt such a move, Mbidde Foundation Ltd filed *Reference No. 3 of 2014 (Mbidde Foundation Ltd vs. The Secretary General of the East African Community and The Attorney General of Uganda)*, contesting the procedure prescribed for the removal of the Speaker of EALA for allegedly violating designated Treaty provisions. The same applicant did also file an application for interim orders pending the determination of the Reference, to wit, *Application No. 5 of 2014*.
6. On 26th March 2014, a Notice of intention to move a Motion for the removal of the Applicant from the Office of Speaker of EALA was formally lodged with the Clerk to the Assembly, duly signed by a minimum of four (4) members from each country of the EAC as follows:

1. Burundi	All 9 members
2. Kenya	5 members
3. Rwanda	All 9 members
4. Tanzania	4 members
5. Uganda	5 members
7. The Clerk forwarded the said Notice to the House on 27th March 2014. On the same day, the Clerk received a Motion detailing the grounds for the removal of the Applicant. The Motion for the Speaker's removal was subsequently placed on the Assembly's Order Paper and brought to the Applicant's attention on 31st March 2014.
8. On 1st April 2014, the Motion was presented to the Assembly Plenary but, before it could be referred to the Committee on Legal, Rules and Privileges, Hon. Mukasa Mbidde raised a point of order invoking the Assembly's *sub judice* Rule¹⁰, given the pending determination of *Reference No. 3 of 2014* by this Court. Following the ensuing debate, the Applicant ruled that the House could not proceed with the Motion and adjourned the House *sine die*.
9. She subsequently filed *Reference No. 5 of 2014 (Margaret Zziwa vs. The Secretary General of the EAC)* in this Court challenging her (then) intended removal for allegedly violating Treaty provisions that guarantee her right to a fair hearing. The Applicant did also file *Application No. 10 of 2014*, in which she sought interim orders restraining the EALA from investigating or removing her from office pending the determination of the above Reference. This Application was subsequently consolidated with an earlier *Application No. 5 of 2014* and the

¹⁰ Rule 43(1) of the Assembly's Rules of Procedure prohibits reference to any matter that is *sub judice*.

consolidated Application was dismissed by this Court.

10. On 29th May 2014, prior to any further deliberation thereof, three (3) Members of the Assembly from the United Republic of Tanzania withdrew their signatures from the Motion for the removal of the Speaker and, on 2nd June 2014, another signature was withdrawn from the same Motion by a Member from the Republic of Kenya. Against that background, on 4th June 2014 when the matter of her censure arose in the re-called Assembly, the Applicant ruled that the Motion had lapsed given that it lacked the four requisite signatures from the United Republic of Tanzania. In the same vein, on 15th August 2014, this Court did register the withdrawal of *Consolidated Reference 3 & 5 of 2014* by consent of the parties.
11. Whereas the foregoing chronology of events would seemingly have rendered closure to the Applicant's removal proceedings, fresh actions were initiated in respect thereof in November 2014. On 26th November 2014, 32 Members of EALA convened in the designated Assembly Chambers in Nairobi; summoned the Clerk to 'preside over the Assembly'; allegedly locked the Applicant in her office; elected a 'temporary' Speaker to preside over the Motion for the Speaker's removal; referred the said Motion to the Assembly's Committee on Legal, Rules and Privileges for investigation, and suspended the Applicant from the Office of Speaker of the Assembly.
12. The Applicant contested the legality of the foregoing actions through *Reference No. 17 of 2014* and, vide *Application No. 23 of 2014*, unsuccessfully sought interim orders to forestall the reconvening of the Assembly to consider the Committee report. In the event, on 17th December 2014, the Assembly did commence censure proceedings that culminated in her removal from the Office of Speaker of EALA on 19th December 2014. It is her removal from office pursuant to a process that she deemed to have flouted Treaty provisions, as well as the Assembly's own Rules of Procedure that forms the basis of the present Amended Reference. Whereas the original Reference had sought a permanent injunction against her removal from office, the Amended Reference contests the legality of the said removal.

C. Applicant's Case

13. It is the Applicant's case that, following the withdrawal of 3 signatures by EALA Members from the United Republic of Tanzania, the Motion for her removal was no longer tenable in so far as it violated Rule 9(2) of the Assembly's Rules of Procedure. The said Rule requires such a Motion to be signed by at least 4 elected Members from each Partner State before it can be presented to the Assembly. The withdrawal of 3 signatures would have left the United Republic of Tanzania with only 1 signature in support of the Motion, rather than the requisite 4 signatures. The Applicant contends that no Member of the Assembly contested her ruling that the Motion had lapsed on the floor of the House.
14. The Applicant does also question the impartiality of the House Committee on Legal, Rules and Privileges, to which the Motion was forwarded for investigation arguing that the Committee's Chairperson was the originator and draftsman of the censure Motion; 12 out of the 15 Members thereof had signed the Motion and would therefore not give her a fair hearing; an investigation by the allegedly biased Members would be contrary to the rules of natural justice, and there were no known rules governing the investigative function of the Committee on a

- matter such as a censure Motion. The Applicant did also highlight the practical difficulty of re-constituting the Committee's membership for purposes of the said Motion given that all the EALA Members from the Republics of Burundi and Rwanda had endorsed the Motion, yet it was an established practice of the House that the Committee be comprised of 3 Members from each Partner State.
15. The Applicant further contests the validity of the grounds advanced for her removal, arguing that they did not fall within the ambit of the term 'misconduct' as envisaged under Article 53(3) of the Treaty since they alluded to matters of a personal and/or private nature rather than her inability to perform the functions of the Office of Speaker. She does also contend that some of the grounds of censure that were investigated by the Committee were not outlined in the Motion as by law required.
 16. Furthermore, the Applicant contests the legality of all the actions undertaken by some Members of the Assembly on 26th November 2014 with regard to the reinstatement of the Motion; its referral to the Committee on Legal, Rules and Privileges for investigation; her suspension from the Office of Speaker, as well as the appointment of a Temporary Speaker. It is her contention that the said actions violated Articles 53 and 56 of the Treaty, as well as Rule 9 and Annex 3 of the Assembly's Rules of Procedure.
 17. On that basis, it is the Applicant's contention that the Assembly conducted itself contrary to the Treaty, its own Rules of Procedure, and the dictates of natural justice; as a result of which she has suffered embarrassment, inconvenience, mental anguish and reputational injury. She accordingly seeks recompense by way of special, general, and exemplary damages; as well as compensation for lost earnings as a consequence of the allegedly unlawful interruption of her five-year term of office.

D. Respondent's Case

18. Conversely, it is the Respondent's contention that there was no bias in the Legal, Rules and Privileges Committee's handling of the Motion; rather, it duly conducted its investigations in accordance with Article 53(3) of the Treaty; Rules 9(2), 78(2) (b) & (6) and Annex 3 of the Assembly's Rules of Procedures, as well as established parliamentary practice which allegedly provides for peer review of legislators' conduct.
19. The Respondent contests the allegation of absence of Rules regulating the Committee's investigation function as in his view that matter had been settled in *Consolidated Application & 10 of 2014* (Arising from *Consolidated Reference 3 & 5 of 2014*), where this Court observed that the Assembly had formulated its own procedural rules pursuant to Articles 49(2) (g) and 60 of the Treaty.
20. The Respondent further contests the contention that the accusations of misconduct against the Applicant did not conform to Article 53(3), maintaining that the grounds of misconduct against her were well articulated in the Committee's report of 27th November – 16th December 2014 and confirmed by the entire Assembly on 17th December 2014.
21. It is the Respondent's case that the censure Motion could not have lapsed given that, once it had been moved, it could only be withdrawn pursuant to Rule 34(1) of the Assembly's Rules of Procedure, which was never done in this case. The

Respondent thus maintains that the procedure adopted by the Assembly was well within its mandate and the confines of Article 53 of the Treaty, as well as Rule 9(6) of its Rules of Procedure.

E. Scheduling Conference

22. At a Scheduling Conference held on 6th May 2015, the Parties framed the following issues for the Court's determination.
- a. Whether the Assembly's Rules of Procedure were followed by EALA in the suspension of the Applicant from the Office of the Speaker, and whether the proceedings were null and void and ought to be set aside.
 - b. Whether the appointment/election of a Temporary Speaker was in conformity with the Treaty and the Assembly's Rules of Procedure.
 - c. Whether the actions, proceedings and findings of the Committee on Legal, Rules and Privileges, and the eventual removal of the Applicant as Speaker by the Assembly were in conformity with the provision of Articles 53 and 56 of the Treaty; Rule 9 and Annex 3 of the Assembly's Rules of Procedure, as well as the rules of natural justice.
 - d. Whether the grounds for removal of the Speaker presented before and investigated by the Committee on Legal, Rules and Privileges were the grounds envisaged under Article 53 of the Treaty.
 - e. Whether the Applicant is entitled to the remedies sought.

F. Issues

23. We observe with some degree of consternation that the Respondent purported to raise what he termed 'preliminary issues' that he sought to have this Court consider prior to a determination of the issues as framed. The 2 supposedly inter-related issues are:
- a. Whether the Motion was tabled in the Assembly, and
 - b. When the proceedings for the removal of the Applicant from the Office of Speaker commenced.
24. We are constrained to observe that we find the notion of 'preliminary issues' in submissions a gross misrepresentation of civil procedure as is known either at Common Law or in the EAC jurisdiction. Rule 53(1)(a) of this Court's Rules of Procedure provides for a Scheduling Conference where all matters in controversy between parties are considered and reduced into issues for determination by the Court. The Respondent was represented at the Scheduling Conference in this matter that was held on 6th May 2015 but did not deem it necessary to have the so-called preliminary issues framed as issues for determination. Neither, we might add, had the Respondent bothered to raise the said issues in his pleadings in the first event.
25. Quite clearly, the so-called preliminary issues do not conform to what are typically referred to as preliminary points of law, the gist of which was aptly surmised in *EAC Secretary General vs. Hon. Margaret Zziwa EACJ Appeal No. 7 of 2015*. That case essentially upheld the regional *locus classicus* of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributor Co. Ltd (1969) EA 696*, where it was held (per Law, J. A):

"So far as I am aware, a preliminary objection consists of a point of law

which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

26. We take the view that it is a blatant misrepresentation of the Court’s Rules of Procedure for the Respondent to purport to raise preliminary legal issues at the stage of submissions in the absence of any legal or procedural basis therefor. The sanctity and respect for procedural rules cannot be overstated. On that premise alone, we would have disregarded them in their entirety. However, we find that they have a bearing on Issues 1 and 2 as framed, and shall therefore address them under our consideration thereof. We propose to address Issues 1 and 2 together in so far as they relate to the procedure adopted by the ‘whole’ House.

ISSUES 1& 2: Whether the Assembly’s Rules of Procedure were followed by EALA in the suspension of the Applicant from the Office of the Speaker, and whether the proceedings were null and void and ought to be set aside; AND Whether the appointment or election of a temporary Speaker was in conformity with the Treaty and the Assembly’s Rules of Procedure.

Applicant’s Submissions:

27. The Applicant advanced four (4) reasons for her preposition that the Treaty, as well as Assembly’s Rules of Procedure were flouted with regard to her suspension and the election of a Temporary Speaker by the Assembly.
28. First, it was argued that there was no legal basis for Applicant’s purported suspension. It was the Applicant’s contention that Rule 9(6) of the Assembly’s Rules of Procedure only bars a Speaker against whom impeachment proceedings have commenced from presiding over the same, but such Speaker is mandated to continue conducting other business of the House that does not relate to the impeachment proceedings. It was opined, therefore, that the Motion in this case ought to have been forwarded to the Assembly while the Applicant was still in office. The Applicant relied upon a letter from the Clerk to the Assembly dated 26th November 2014 that informed her of her purported suspension (Exhibit P.12) as proof of the fact of suspension.
29. Secondly, it was the Applicant’s submission that her removal from office was superintended by a ‘Crisis Management Committee’, a committee that is neither recognised nor created by the Assembly’s Rules of Procedure.
30. It was further argued for the Applicant that the informal meeting of Members of the House that was held on 26th November 2014 at 10.00 am was illegal, irregular, null and void given that the House had been officially adjourned to 2.30 pm of the same day. It was also contended that the said meeting was not premised on a valid impeachment Motion, the original Motion having lapsed.
31. Finally, it was the Applicant’s contention that the purported election of a Temporary Speaker was not provided for anywhere in EALA’s legal regime but, rather, was in direct conflict with Article 48(2) of the Treaty, as well as Rule 8(1) of the Assembly’s Rules of Procedure, both of which prescribe a substantive Speaker as the only person mandated to preside over the Assembly’s proceedings. Whereas, learned Counsel for the Applicant did acknowledge the provisions of Article 56(b) of the Treaty that permit the election of any Member of the Assembly to preside over it ‘in the absence of the Speaker’, such election to be

conducted pursuant to Annex 3 to the Assembly's Rules of Procedure; it was their contention that the evidence adduced at trial was that the Applicant was present within the precincts of the Assembly's designated Chambers when recourse was erroneously made to Annex 3 of the Rules. It was further argued that a strict interpretation of Clause (1) of Annex 3 was that the Speaker would be required to be 'present but not presiding' when an election for another Member to preside over the House in his/ her absence was held and the Assembly would be presided over by the Clerk for purposes of such an election.

32. Learned Counsel opined that the omission to invite the Applicant to the said informal meeting; the absence of the procession to the Office of the Speaker as prescribed by Clause (7) of Annex 3, and the exclusion of 13 Members of the House from the said meeting eroded its legitimacy as a purported sitting of the Assembly and underscored the illegality of any decisions that emanated therefrom or, indeed, from subsequent sittings presided over by the Temporary Speaker.

Respondent's Submissions:

33. It was the Respondent's contention, on the other hand, that the Assembly did comply with Rule 9 of its Rules of Procedure but the Applicant contravened Rule 9(6) thereof that forbade her from presiding over proceedings for her removal. Mr. Agaba argued that the Motion complied with Rule 9(2) of the Assembly's procedural rules in so far as it bore the prescribed number of signatures, and also adhered to sub-Rules 9(3) and (4) to the extent that it was forwarded to the Assembly within 24 hours of its receipt by the Clerk and duly tabled in the House within seven (7) days.
34. Learned Counsel questioned the legality of the Applicant presiding over the Assembly on 1st April 2014 when the Motion was first introduced, as well as on 4th June 2014 when she ruled that it had lapsed. He opined that the proceedings for the removal of the Applicant from office had commenced on 27th March 2014, when the Motion was submitted to the Clerk, and cited the following definition of parliamentary proceedings in Section 16(2) of the Parliamentary Privileges Act, 1987 (Australia) in support of this position:

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business, and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

35. In the alternative, Mr. Agaba relied upon the evidence of RW2 (Hon. Judith Pareno) to suggest that the proceedings commenced when the Motion was placed upon the House Order Paper for deliberation.
36. It was further argued for the Respondent that the withdrawal of 4 signatures from the Motion was inconsequential given that the procedure for withdrawal of Motions as prescribed under Rule 34(1) of the Assembly's Rules of Procedure had not been followed. Mr. Agaba cited the evidence of RW1 (Hon. Abdallah Mwinyi) and RW3 (Hon. Patricia Hajabakiga), who each testified that a similar attempt by an Honourable Member to withdraw his signature from written support of the Applicant during the elections for the Office of Speaker had been thwarted by the Clerk to the Assembly in their presence. We did understand him to also contend that since the Motion had not been debated to its conclusion, it had not lapsed but was governed by Rule 18(2) that provides for such Motion to be placed on the Order Paper for the next sitting of the House. In his view, Rule 18(2) thus preserved the life line of the Motion that was first presented to the House on 1st April 2014.
37. With specific regard to Issue No. 1, it was the Respondent's contention that the Applicant had never been suspended from the Office of Speaker but, rather, was suspended from presiding over the Motion for her removal from that office. Mr. Agaba further argued that the Crisis Management Committee that was contested by the Applicant was set up as an *ad hoc* committee to address a crisis, which eventuality is not prohibited by any law. He similarly maintained that there was no law that barred Members of the Assembly from holding informal meetings such as the one that was held on 26th November 2014.
38. With regard to Issue No. 2, in a nutshell it was the Respondent's contention that interpreting Clause (1) of Annex 3 in such a manner as to suggest that the Speaker should be present when the House elected another Member to preside over the House in his/ her absence would be absurd. He invited this Court to consider the provision for the Speaker's presence therein as a typographical error. In the same vein, he urged the Court to interpret that clause in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, which advocates for the interpretation of Treaties 'in good faith in accordance with the ordinary meaning to be given to the terms thereof in their context and in light of its object and purpose.'
39. The Respondent cited a supposed 'precedent' that had been set by the Assembly in 2003, when a Member was elected to preside over the Assembly in the absence of the then Speaker, Rt. Hon. Kinana. He also suggested that a Speaker's procession in November 2014 would not have been feasible; contested the allegedly uncorroborated evidence of PW2 (Hon. Mumbi Ngaru) that the election of the Temporary Speaker was done by 32 Members who locked themselves in the Assembly Chambers, and similarly contested the Applicant's allegedly contradictory evidence on her having been locked inside her office when the election took place. It was his submission that the election of Hon. Chris Opoka to preside over the Assembly when the Applicant was precluded by law from doing so was done in conformity with the Treaty and the House Rules of Procedure.

Applicant's Submissions in Reply:

40. In Reply, the Applicant essentially reiterated her earlier submissions on the framed issues but sought to respond to the so-called preliminary issues. On the question as to whether the Motion was properly tabled, the Applicant maintained her contention that it had not been moved in the House on 1st April 2014 owing to the interruption of its proposer (Hon. Mathuki) by Hon. Mbidde, standing on a point of procedure.
41. On the other hand, with regard to when the proceedings in the House would have commenced so as to invoke the provisions of Rule 9(6), it was argued that the term 'proceedings' in parliamentary parlance refers to the debate in respect of a Motion; only ensues after a Motion has been moved, seconded and tabled and, given that in this case debate could only ensue in the House during consideration of the Committee report, the proceedings could only be deemed to have commenced once the Motion had been forwarded to the Committee for investigation. It was opined that the Applicant could not have presided in her own cause because the Motion had not yet become the property of the House. It was further argued that Rule 34(1) was inapplicable to the present case given that the Motion was not withdrawn but lapsed. In a nutshell, the Applicant reiterated her position that there was no live Motion before the supposedly illegal 'House' sitting of 26th November 2014.

Court's Determination:

42. The 2 issues under review presently literally question the Assembly's compliance with the legal regime applicable to the suspension of the Applicant from the Office of Speaker, as well as the election of a Temporary Speaker. This brings into purview the legal framework within which a Speaker of EALA may be properly removed from office.
43. Article 53(3) of the Treaty provides the legal basis for such course of action, as well as the grounds therefor. It reads:
- The Speaker of the Assembly may be removed from office by a resolution supported by not less than two thirds majority of the elected members for inability to perform the function of his or her office, whether arising from infirmity of mind or body or for misconduct.
44. Rule 9 of the Assembly's Rules of Procedure, on the other hand, delineates the procedure to be followed in the removal of a Speaker. Whereas Rule 9(1) and (7) prescribe the legislative manner in which such removal may ensue, to wit, by a resolution passed by not less than two thirds majority of elected members of the Assembly; the actual process that underpins such a legislative decision is described in Rule 9(2), (3) and (4). We reproduce them below for ease of reference.
- Rule 9(2)
A motion for a resolution to remove the Speaker from office shall be signed by at least four elected members from each Partner State and submitted to the Clerk.
- Rule 9(3)
The Clerk shall within twenty-four hours of receipt of the list of names, forward the Notice to the House.
- Rule 9(4)

The motion shall be tabled in the Assembly within seven days of its receipt by the Clerk and the House shall refer the motion to the Committee on Legal, Rules and Privileges to investigate and report its findings to the Assembly for debate.

45. Rule 9(1) is couched in terms that would suggest that the ‘motion’ in reference therein should bear signatures of the Members of the House in support thereof. That motion is submitted to the Clerk. Rule 9(3) then postulates the action to be taken by the Clerk upon receipt of ‘*the* list of names’. The Clerk would be required to forward that ‘Notice’ to the House within 24 hours. Consequently, our construction of Rule 9(2) and (3) is, first, that the ‘motion for a resolution’ referred to in sub-rule (2) is, in fact, synonymous with the ‘Notice’ highlighted in sub-rule (3). Secondly, that Motion/ Notice should depict names and signatures of at least 4 elected Members of the House from each Partner State. It is that Motion/Notice that is then tabled in the Assembly within 7 days of its receipt by the Clerk and referred to the Committee on Legal, Rules and Privileges for investigation under sub-rule (4).
46. Accordingly, a literal interpretation of the 3 sub-rules would suggest that the process for the removal of a Speaker of EALA is initiated by a Motion/Notice signed by at least 4 elected Members from each Partner State. The said Motion/ Notice is submitted to the Clerk who, in turn, forwards it to the House within 24 hours of receiving it. Reference to ‘the House’ in this context refers to all members thereof, including those that may not have signed the Motion/ Notice. Thereafter, the Motion/ Notice should be formally tabled in the Assembly within 7 days from the date it was first received by the Clerk. Upon being tabled, it is immediately referred to the Committee on Legal, Rules and Privileges for investigation, the results of which would form the basis for debate and the ultimate legislative decision. That, in a nutshell, is our summation of the procedure governing the removal of the EALA Speaker so far as it relates to proceedings in the House. The question then would be whether that procedure was, in fact, adhered to by the Assembly.
47. As we commence our interrogation of that question we are mindful of the prohibition in Section 20(1) of the EALA (Powers & Privileges) Act with regard to Parties’ reliance upon the proceedings of the house in evidence without special leave of the Assembly. It reads:
- Notwithstanding the provisions of any other law, no member or Officer of the Assembly and no person employed to take minutes or record evidence before the Assembly or any Committee shall, except as provided in this Act, give evidence elsewhere in respect of the contents of such minutes or evidence or of the contents of any documents laid before the Assembly or such Committee, as the case may be, or in respect of any proceedings or any examination held before the Assembly or such Committee, as the case may be, without the special leave of the Assembly first hand and obtained in writing.
48. It is a conceded fact in this Reference that a ‘Notice of intention to move a motion’ for the removal of the Applicant from office, signed by 32 Members of EALA, was submitted to the Clerk to the Assembly on 26th March 2014.¹¹ That document was

¹¹See Clause 1.3.2 of the Joint Scheduling Conference Notes.

adduced in evidence as Exhibit P.1A. Quite clearly there was some confusion as to the title of that document viz the specific provisions of the Assembly's Rules. Whereas Rule 9(2) makes reference to a 'motion for a resolution to remove the Speaker', the document to which signatures were appended in this case was titled differently, as has been illustrated hereinabove.

49. Nonetheless, in our judgment, such anomaly would neither discredit the import of the document nor negate its evidential value. It obviously sought to capture both the reference to a 'motion for a resolution of removal' in Rule 9(2), as well as the Notice under reference in Rule 9(3). We do find the content of that Notice to have complied with both sub-rules in so far as it did depict the minimum number of signatures and names required. The Applicant did also confirm under cross examination that the Clerk duly forwarded the said Notice to the House on 27th March 2014 as specifically required under Rule 9(3). We are satisfied, therefore, that the Notice that was adduced in evidence as Exhibit P.1A did comply with Rule 9(2) and (3) of the Assembly's Rules of Procedure.
50. On the other hand, a Motion that outlined the grounds for the removal of the Speaker was adduced in evidence as Exhibit P.1B. The Applicant herein did testify that she was served with that document on 31st March 2014, it was well within her possession and would not be ousted by the provisions of Section 20 of the EALA (Powers and Privileges) Act. She did, in fact, respond to the grounds stipulated therein in her communication on the censure issue with the Heads of State of the Partner States. Her letter to their Excellencies, the Presidents, as well as her response to the grounds of removal that was attached to the said letter were adduced in evidence as Exhibits P.21 and P.23.
51. Therefore, in the instant case, 2 separate documents were relied upon to kick start the removal proceedings: the Notice bearing the list of Members in support of the Speaker's removal and a Motion that detailed the grounds for the said removal. As we have found earlier herein, the Notice was duly forwarded to the House. We find no evidence, however, that the Motion bearing the grounds of removal and delineated in Exhibit. P.1B was forwarded to the House too.
52. Nonetheless, it is not in dispute that the motion for the removal of the Speaker was placed on the Order Paper on 31st March 2014 as an item for consideration by the House on 1st April 2014, and was indeed duly considered on that date. This was the Applicant's uncontroverted oral evidence.¹² She did also testify that on 1st April 2014, Hon. Mathuki sought to move that Motion in the House but was interrupted on a point of procedure by Hon. Mbidde. We were unable to verify this aspect of her evidence with the Hansard's recount of the day's proceedings given that neither Party herein was granted leave by the Assembly to rely upon its proceedings in evidence. The question then is can it be said that it has been established before this Court that at this stage of the process the Motion had been duly tabled in the Assembly as required by Rule 9(4) of the Assembly's Rules?
53. First and foremost, the wording in Rule 9(3) clearly states that the Notice that is submitted to the Clerk would be '*forwarded*' to the House. On the other hand, Rule 9(4) provides for the '*tabling*' of the said Motion in the Assembly. The ordinary meaning of each of those terms in their verbal (as opposed to noun)

¹² Applicant's evidence in chief, p. 67

sense is sufficient to deduce the context within which they are used in the Rules. Whereas ‘forward’ simply means to send, pass on or relay information; ‘table’ means to present a subject formally for discussion.¹³ Therefore, quite clearly, forwarding the Notice to the House, as was done in this case, cannot by any means be synonymous with tabling the Motion in the Assembly as required by Rule 9(4).

54. We find appropriate indication of what is envisaged in the practice of legislative ‘tabling’ from the following definition of the term in a glossary of parliamentary terms on the UK (United Kingdom) Parliament website:

“Tabling is the act of formally putting forward a question, a motion or an amendment in the Commons or the Lords. Members of either House do this by submitting it to the procedural clerks by hand, by post or, in some circumstances, digitally. The item will then appear in the next day’s business papers ...”

55. The foregoing definition postulates that tabling entails the presentation of a Motion to a Clerk by a Member of the House, and the placement of that Motion on the Order Paper in the requisite parliamentary format. Such presentation does not necessarily take place in the House but may be done physically, by post or digitally. The process culminates into the inclusion of the Motion on the Order Paper for consideration by the House. Indeed, whereas the term ‘table’ is literally albeit unhelpfully defined in the Assembly’s Rules to mean ‘the Clerk’s table’, it is reasonable to deduce from the UK’s more elaborate definition that the submission of a Motion to the Clerk is what would correspond to placement on ‘the Clerk’s table’, but the parliamentary act of tabling would only be complete upon having the said Motion formally placed on the House Order Paper.

56. During re-examination, the Applicant sought to explain the process of tabling and moving a motion within EALA practice. In a nutshell, she testified that once a Motion had been moved and seconded, it was then laid on the Clerk’s table as the act of tabling. On that premise, it was her evidence that the Motion in issue presently was neither moved nor tabled. With respect, we are unable to agree with this position because it is not borne out by the Assembly’s Rules of Procedure. Rule 32(1) is fairly instructive on the chronology of the tabling and moving of Motions in EALA. It reads:

When a motion has been moved and if necessary seconded, the Speaker shall propose the questions thereon in the same terms as the motion, and debate may then take place upon that question.

57. Quite clearly, the moving and secondment of a motion is immediately followed by the proposal of the question by the Speaker and the commencement of debate thereon. There is no mention of the tabling of a motion after it has been moved and seconded, as was testified by the Applicant. On the contrary, the UK definition has the tabling of the motion being undertaken prior to the moving of the same. In the absence of a more elaborate exposition on tabling in the Assembly’s procedural rules, we find no reason to disregard the definition thereof in the UK Parliamentary Glossary as stated above.

58. That, in fact, was what transpired in the present case. We find sufficient proof of this in the Applicant’s oral evidence that the Motion was brought to her attention

¹³ *Oxford Advanced Learners Dictionary, Oxford University Press, 7th Edition.*

on 31st March 2014, was placed on the Order Paper and constituted the sole business of the Assembly on 1st April 2014. As we have held hereinabove, the terms Notice and Motion appear to have been used interchangeably in Rule 9(2), (3) and (4) but the Notice that was forwarded to the House by the Clerk clearly demarcated the motion in issue. It was this motion that was duly placed on the Order Paper and considered by the House on 1st April 2014. We are, therefore, satisfied that the Motion in the present case was duly tabled in the Assembly. We so hold.

59. Be that as it may, the instructions under Rule 9(4) are two-fold: first, it prescribes the tabling of the Motion and, secondly, the referral of the tabled Motion to the Committee on Legal, Rules and Privileges. We have established that the Motion was duly tabled but cannot say the same of the legal obligation to refer the matter to the Committee.
60. It was the Applicant's uncontroverted evidence that, on 1st April 2014, she had ruled that the Motion for her removal could not be debated as the matter was *sub judice* owing to the pending determination of *Reference No. 3 of 2014* by this Court. She did also testify that between that date and 4th June 2014 when it arose in the Assembly again, 4 Members of the House had formally communicated the withdrawal of their signatures from the Motion. The withdrawal of those signatures is further established by Exhibits P.25 and P.26, the latter being a written response from the Clerk to the Applicant, confirming the withdrawal of signatures by 3 Members from Tanzania and 1 Member from Kenya. It was also an agreed fact that on 4th June 2014, she made a ruling that the Motion had lapsed on account of lack of the requisite signatures. Rightly or wrongly, the Applicant's decision of 4th June 2014 was apparently the end of the matter at the time. Clearly, therefore, the Motion that was duly tabled in the House on 31st March 2014 and considered on 1st April and 4th June 2014 respectively was not, on either date, referred to the Committee on Legal, Rules and Privileges as required by Rule 9(4).
61. An attempt was subsequently made in November 2014 to re-initiate the removal proceedings, move the same Motion and forward it to the said Committee. It was in the course of the said re-initiated proceedings that the Applicant was suspended from the Office of Speaker and a Temporary Speaker was elected. The question is whether these actions were sufficiently clothed in legal propriety.
62. We have carefully considered the arguments of both Parties on this issue. Whereas, the Respondent sought to deny the incidence of the Applicant's suspension, we find the fact of the suspension to have been conclusively proved by Exhibit P.12 – a letter from the Clerk dated 26th November 2014, which *inter alia* conveyed the Applicant's suspension from the Office of Speaker until the Committee's investigations had been completed. The said letter was addressed to the Applicant and was within her possession well before it was included in the Committee's report as an annexure. We therefore find no reason to stop the Applicant from relying on it in evidence, the provisions of section 20(1) of the EALA (Powers and Privileges) Act, notwithstanding.
63. We have also dutifully scanned the Treaty, the Assembly's Rules of Procedure and the Administration of EALA Act. We find no provision whatsoever for the suspension of a Speaker of the Assembly. In the result, in the absence of any

legal provision that provides for the suspension of a Speaker of EALA by the Assembly, we find no legal basis or justification whatsoever for that course of action by the House. We would, therefore, answer Issue No. 1 in the negative.

64. In the same vein, we find no provision whatsoever in either the Treaty or the House Rules of Procedure for a Temporary Speaker or the election thereof, or indeed recourse to Annex 3 thereto by the House. Neither Article 53(3) of the Treaty nor Rule 9 of the Assembly's procedural rules, which provide the legal framework for the Speaker's removal, prescribe any recourse whatsoever to Annex 3. The prohibition in Rule 9(6) against a Speaker in respect of whom impeachment proceedings have commenced from presiding over the said proceedings does not necessarily translate into such Speaker being absent from the House during the said proceedings. S/he would only be prohibited from presiding over the House during the removal proceedings but might very well preside over other business of the House, as opined by learned Counsel for the Applicant.
65. On the other hand, Annex 3 derives its legal basis from Article 56(b) of the Treaty, which provides for the election of a Member to preside over a specific sitting of the House in the absence of the Speaker. It is not grounded in Article 53(3) that explicitly provides for the removal of a Speaker. Therefore the absence envisaged under the Annex cannot be presumed to have had anything to do with the Speaker's removal proceedings, as appears to have been the stance adopted by the Assembly. On the contrary, it seems to us that Annex 3 pertains to the election of a Member to preside over the House during the temporary 'absence' of the Speaker. Certainly a Speaker that recuses himself/ herself from presiding over proceedings for his/ her removal would not necessarily be absent from the House. Recusal and absence cannot be construed to mean one and the same thing.
66. It was testified by Hon. Mwinyi that the Applicant was deemed to be absent for purposes of the Motion for her removal hence the Members' recourse to that Annex. It was also submitted by learned Counsel for the Respondent that recourse was made to the election of a Temporary Speaker to preside over the impeachment process given the Applicant's own disregard for Rule 9(6); her decision to preside over the proceedings of 1st April and 4th June 2014 that legal provision notwithstanding, and her deliberate skewing of her Rulings on those dates to frustrate the progression of the Motion for her removal.
67. With utmost respect, we do not share learned Counsel's apparent deference to extra-legal means to resolve a legal or procedural impasse. The proverbial 'end' cannot and should not justify the means in a civilised dispensation such as the EAC. We are unable to find any legal justification for recourse to a wrong procedure to rationalise an alleged procedural abuse by the Applicant. Quite clearly, the Members of the House that resorted to the course of action pursued on 26th November 2014 were alive to the procedural and practical hitches before them, but sought to address a supposed 'crisis'. In our considered view, the dictates of respect for the rule of law and due process would have required that the House accord due respect to the Office, if not the person, of the Speaker and explore available legal rules in pursuit of its desired result.
68. Article 48(1) (b) (iii) grants the Office of Counsel to the Community (CTC) *ex-officio* membership status in the EALA. On the other hand, Article 69(1)

designates the same office as the principal legal adviser to the East African Community. The Assembly is a recognised organ of the Community under Article 9(1) (f). Consequently, faced with the procedural hitches it purported to have identified, the House was at liberty to consult the said office for legal advice on how to navigate the uncharitable procedural waters it so apparently found itself in.

69. We have seen reference to numerous incidences of guidance from the CTC in the list of annexures appended to the Committee's report of December 2014. We are, however, mindful of the Assembly's refusal to grant the Applicant leave to use its records and proceedings when she sought such leave in accordance with Section 20(1) of the EALA (Powers and Privileges) Act. Indeed, learned Counsel for the Respondent fastidiously objected to any recourse whatsoever to such records and proceedings throughout the trial. We are not aware that the Respondent was granted leave to refer to parliamentary proceedings either. Obviously, in the absence of such leave from the House, its records and proceedings remain within the realm of privileged material under the said Act, and this Court is not at liberty to rely on the said material in the determination of this case. Consequently, the nature, scope and content of guidance advanced by the office of the CTC remain unproven.
70. In the event, the preferred course of action adopted by the House bespoke an incredible ambivalence to this Court's observation in *Mbidde Foundation Ltd & Another vs. EAC Secretary General & Another EACJ Consolidated Application No. 5 & 10 of 2014*, that 'the Office of the Speaker is vital to the operations of EALA and the removal of the holder thereof should never be approached casually or flippantly.' In the result, we find Annex 3 inapplicable to the process for the removal of a Speaker of EALA and the Assembly's recourse thereto was misconceived. Consequently, we are satisfied that the election of a Temporary Speaker contravened Article 56 of the Treaty and was devoid of legal basis. We would, therefore, answer Issue No. 2 in the negative.
71. Having so held, we nonetheless wish to address a matter inherent in the foregoing issues that, interestingly, was not framed as an issue for determination but was canvassed quite extensively by both Parties: the question of the Applicant's own non-compliance with Rule 9(6) of the Assembly's Rules of Procedure. The Applicant contended that there was no legal basis for her suspension given that Rule 9(6) only bars an impugned Speaker from presiding over his or her own impeachment proceedings, but in this case the impeachment proceedings had not yet commenced. On the other hand, it was the Respondent's contention that it was the Applicant's non-compliance with Rule 9(6) that orchestrated recourse by the Assembly to the procedural actions in review presently.
72. Rule 9(6) is reproduced below for ease of reference.
- "The Speaker in respect of whom proceedings for removal have commenced shall not preside over the proceedings."
73. As quite rightly argued by both Parties, compliance with Rule 9(6) is indeed tied to the question as to when the removal proceedings commenced. We find difficulty with learned Respondent Counsel's apparent reliance on section 16(2) (b) of the Australian Parliamentary Privileges Act to argue that the proceedings commenced on 27th March 2014 when the Motion was submitted to the Clerk.

The submission of a document to the Clerk of an Assembly cannot, in our view, be equated to its submission to the Assembly or a Committee thereof. Such presentation to the House or a Committee can only be achieved by the formal tabling of the document.

74. However, we find no reason to disregard the provisions of Section 16(2) (c) of the same Act, which tie the meaning of parliamentary proceedings to the definition of a House's business. In that legal provision, the business of a House is defined to include 'the preparation of a document for purposes of or incidental to the transacting of any such business.' Thus, in our view, parliamentary proceedings would include the formulation of a Motion for the removal of a Speaker. We do not consider the term 'preparation' in its procedural sense to include preparatory activities preceding a document, but rather would interpret it to mean a completed, formulated or prepared document. Accordingly, we cannot fault the view that was advanced by Hon. Pareno that the commencement of such proceedings would ensue once the Motion was formulated and duly tabled in the Assembly, ready to be moved. It begets logic that at that point the presiding Speaker would have been sufficiently placed on notice that a Motion for impeachment has commenced.
75. We do not accept the preposition advanced by learned Counsel for the Applicant that parliamentary proceedings entail the debate in respect of a Motion, only commencing once a Motion has been moved, seconded and tabled. As we did illustrate earlier in this judgment, Motions in the Assembly are not considered in the manner described above.
76. In any event, Rule 9(6) necessitates a purposive interpretation to deduce the mischief it was intended to avert and avoid absurdity. Learned Counsel for the Applicant did refer us to a succinct summation of the rules of natural justice as aptly elucidated in *Halsbury's Laws of England, Vol. 1(1), p. 218, para. 95*. It reads: Natural justice comprises two basic rules; first, that no man is to be a judge in his own cause (*nemo iudex in causasua*), and second, that no man is to be condemned unheard (*audial teram partem*).
77. We agree entirely with the principle stated therein. In the instant case, it would appear that on 1st April 2014 the Applicant presided over a House the sole business of which was her removal from office. It bespoke an obvious conflict of interest and clearly offended the rules of natural justice for the Applicant to have presided over and made decisions in her own cause. In our considered view, it was precisely such a mischief that Rule 9(6) sought to avert. We do, therefore, find that there was a breach of Rule 9(6) of the Assembly's Rules of Procedure by the Applicant.

ISSUE No. 3: Whether the actions, proceedings and findings of the Committee on Legal, Rules and Privileges, and the eventual removal of the Applicant as Speaker by the Assembly were in conformity with the provision of Articles 53 & 56 of the Treaty, and Rule 9 & Annex 3 of the Assembly's Rules of Procedure, as well as the rules of natural justice.

78. We must from the onset reiterate our findings in Issue No. 2 above that the House wrongly reverted to Annex 3 yet the said Annex was intended to address

a different scenario from that envisaged under Article 53(3) of the Treaty and Rule 9 of the Assembly's procedural rules. We therefore underscore our earlier finding that Annex 3 was inapplicable to the process for the removal of a Speaker as prescribed in Article 53(3) of the Treaty and Rule 9 of the House Rules.

79. Furthermore, having held as we have under the same issue that the election of a Temporary Speaker was not anchored in any legal provision, could the same illegitimate Speaker have legally referred the Motion to the Committee on Legal, Rules and Privileges for investigation? We think not. We are fortified in this position by the principle advanced in the case of *Benjamin Leonard MacFoy vs. United Africa Company Ltd (1962) AC 152* that actions premised on a nullity are similarly incurably bad. In that case it was held (per Lord Denning):
- If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad.
80. In the instant case, the attempt by the Temporary Speaker to preside over the House and refer the Motion to the Committee on Legal, Rules and Privileges contravened Article 56 of the Treaty; was therefore null and void, and any actions that would have cascaded from the said nullity were similarly a nullity. That would have disposed of the present issue but, this being a court of first instance, we shall pronounce ourselves briefly on the issue as framed.
81. Both Parties opted to restrict their arguments with regard to Issue No. 3 to the question of natural justice, making no reference whatsoever to the compliance of the Committee with either Article 53 of the Treaty or Rule 9 of the Assembly's Rules of Procedure. In a nutshell, it was the Applicant's contention that she did not receive justice from the Committee because its Chairperson was the architect of the impeachment motion against her, 12 out of the 15-member committee had endorsed the said Motion and therefore the Committee was demonstrably biased against her. To this end, Counsel for the Applicant cited the case of *R. vs. London Rent Assessment Panel Committee, Ex. P. Metropolitan Properties Co. (FDC) Ltd (1969) 1 QB 577*, where Lord Denning reduced the test of bias to whether right-minded persons would, with regard to the circumstances of a matter, perceive that there was a real likelihood of bias.
82. Conversely, the Respondent contested the allegation of bias, maintaining that the Committee proceedings were conducted in accordance with the Treaty, House Rules and rules of natural justice within the circumstances of the case. The circumstances in reference, in that regard, was the practical difficulty of re-constituting the Committee's membership for purposes of the said Motion given that all the EALA Members from Burundi and Rwanda had endorsed the Motion, yet an established practice of the House was that each House Committee would be comprised of at least 3 Members from each Partner State. Learned Counsel sought to rely on the following definition of rules of natural justice in *The Concise Law Dictionary, 5th Edition, p. 217* to rebut the allegation of bias raised by the Applicant.

"The chief rules are to act fairly, in good faith, without bias, and in judicial temper; to give each party the opportunity of adequately stating his case,

and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other.”

83. In our judgment, the circumstances surrounding the composition of the House Committees do not necessarily negate the allegations of bias or lack of natural justice raised by the Applicant. A committee that had 12 out of its 15 members in support of the Motion cannot by any shade of persuasion be deemed to have been devoid of bias. For the same promoters of the Motion to conduct an investigation against the Applicant was indeed a mockery of the tenet of a fair and impartial hearing inherent in the principle of natural justice. To compound matters, even when asked to recuse themselves, all 12 members declined to do so.
84. Obviously a ‘hearing’ before a partial and demonstrably biased Committee cannot have been tantamount to being heard at all within the parameters of natural justice set forth in *Halsbury’s Laws of England* (supra) that ‘no man is to be condemned unheard’. Neither is it conceivable that a committee that was constituted in the manner the Committee on Legal, Rules and Privileges was could be perceived by any right-thinking persons to have acted fairly and in good faith. It was incumbent upon the House, having decided to remove the Applicant from office, to ensure that the process of removal was conducted as by law provided and within the tenets of rule of law as underscored by the rules of natural justice. We take the view that an investigation that was reasonably fair and just was neither a far-fetched nor unachievable feat within the prevailing legal regime.
85. To begin with, we must respectfully dispel the notion that the House’s hands were tied with regard to the membership of the Committee owing to the parliamentary culture of peer regulation of legislators’ conduct allegedly implicit in Article 53(3) of the Treaty. We have carefully perused the Treaty, the Assembly’s Rules of Procedure, as well as the Administration of EALA Act, 2011 and find nothing therein that prescribes that practice. That was simply an adopted albeit commendable practice that does not, nonetheless, appear to have been grounded in any express legal provision.
86. On the other hand, at the onset of the investigations in issue presently, the Committee was faced with an absence of procedural rules to regulate either its general mandate or specifically govern its investigative proceedings. Further, despite assertions to the contrary, we find that only 28 out of the 45-strong membership of the House had endorsed the impugned Motion at the Committee stage of the proceedings, 4 Members having since withdrawn their endorsement thereof.
87. Articles 49(2) (g) and 60 of the Treaty do mandate the House to promulgate, amend and add to procedural rules governing the House and its Committees. Indeed, it was the uncontroverted evidence of both the Applicant and Hon. Ngaru that the House subsequently enacted Rules of Procedure for the Committees on 12th January 2015, well after the event. Hon. Pareno did allude to this too in her evidence. From our view point it is apparent that the House had every reason and opportunity at the time it considered the Applicant’s removal to formulate rules that would guide an impartial investigative process able to stand the test of a fair hearing and due process. Certainly, given the number of Members available

to either side of the divide, it did have the option of formulating such rules for the investigative process as would have enabled a balanced representation of Members for and against the Motion on the Committee. The Members of such a Committee would then have elected the Committee Chairperson.

88. As it is, the circumstances of this case are that the House fell short on its honourable duty in this regard. In the result, we find that even if the Temporary Speaker that forwarded the Motion to the Committee had been validly elected, the Committee proceedings themselves were laced with demonstrable bias and disregard for the rules of natural justice. We would therefore answer Issue No. 3 in the negative.

ISSUE No. 4: Whether the grounds for removal of the Speaker presented to and investigated by the Committee on Legal, Rules and Privileges were the grounds envisaged under Article 53 of the Treaty

89. Having carefully considered the submissions of both Parties, we deem it necessary to delineate the scope of the Court's interrogation of this issue. The jurisdiction of this Court is restricted to the express provisions of Articles 23(1) and 27(1) of the Treaty. They read:

Article 23(1)

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

Article 27(1)

The Court shall initially have jurisdiction over the interpretation and application of the Treaty.

90. The sum effect of the foregoing Treaty provisions is to give the Court the jurisdiction to interrogate Parties' adherence to the law in execution of their mandate in so far as it pertains to the interpretation, application of and compliance with the Treaty.

91. In the present case, what is under review is the procedure adopted by the Assembly in the enforcement or application of its prerogative to remove the Speaker of the House. Therefore, the Court would be required to interrogate whether or not the course of action adopted by the House in that regard did, in fact, adhere to the law applicable thereto or was legally tenable. This was the gist of this Court's interrogation of the preceding issues.

92. With specific regard to the present issue, this Court's mandate is restricted to a determination as to whether or not the grounds that formed the basis of the Speaker's removal were, in fact, such grounds as are envisaged in Article 53(3) of the Treaty. We do not think the judicial duty described above would extend to a detailed review of the Committee's deliberations or the process that informed its report. That, in our view, would be to stray within the ambit of judicial review as it is known at Common Law, a domain that we are not at liberty to explore. It is therefore on that basis that we consider the present issue.

93. The evidence in this case is that the grounds that were investigated by the Committee were outlined in the Motion for her removal that was adduced in evidence as Exhibit P.1B. They include:

1. Poor governance and leadership skills

1.1 Unilateral decision-making and abuse of the consensus principle

required in decision making of the Commission; for example mishandling of the Assembly's established policy and practice of rotational sittings in Partner States whereby the Speaker's decision was so unpopular to the extent that it paralysed the work of the Assembly; the decision to stop the rotational sittings was announced in Kigali prior to any consultation.

1.2 Poor time management and *laissez-faire* attitude to Assembly responsibilities; this causes delays and postponement of meetings – for example, the Kigali Meeting on the Strategic Plan and the meeting for the Commission and the Committee Chairs that preceded the Capacity Building Workshop which was held in Mombasa in 2013. On these 2 occasions, the Speaker went to a different mission without notifying the Members. As a result, Members spent a whole day at the venue. No Member was tasked to deputise and this led to loss of resources.

1.3 Whereas the Speaker is paid a Housing Allowance that enables her to reside in Arusha in order to supervise the work of the Assembly, the Speaker hardly stays in Arusha.

2. Abuse of Office

2.1 Unilaterally involving family members in the services of the Assembly such as irregular hiring of staff without consulting the Commission and bringing family members to play in the Inter-parliamentary EAC netball games, where these family members were favoured by the Speaker above the EALA Members (and) staff.

2.2 Family interventions in the affairs of the Assembly – in particular the Speaker's husband, whose interventions were disruptive, disrespectful and posed veiled threats to Members.

2.3 Misallocation of resources earmarked for Assembly Plenary to other matters where she has a personal interest, for example the hosting of the meeting for Global Parliamentarians for Habitat (GPH), where she is an African Chapter Chairperson, which utilised days programmed for Assembly activities.

2.4 Attendance of most meetings that the Assembly is invited to even if it requires changing the approved EALA calendar of activities, for example, she changed the EALA calendar of activities for 2013/14 in order to accommodate her attendance of the IPU where EALA is just an observer. In such an instance, attendance of the IPU could have been delegated to any other Member.

2.5 Practicing Nepotism where the Speaker consistently favours some Members of the Assembly in, for example, the allocation of foreign missions. Haphazardly nominating Members to represent the Assembly in different for a without laid down criteria which loophole allows her to favour some Members over others.

3. Disrespect and intimidation of Members and Staff

3.1 Using the media to character assassinate the Members.

3.2 Being disrespectful to Members.

3.3 Holding acrimonious staff meetings where abusive language,

accusations, threats and intimidation were issued to staff.

3.4 Refusal to take advice.

3.5 Dishonesty, slander and intrigue.

4. Loss of confidence and trust by Members

4.1 Walk-out of Members on 2 occasions

4.2 Number of signatures appended to the Motion.

94. The question would be whether they do entail the grounds envisaged under the Treaty. Article 53(3) permits the removal of the Speaker of the House for either infirmity of mind or body, or misconduct. Neither the Treaty nor the Rules define the sort of misconduct that would kick start removal proceedings. Be that as it may, the term 'misconduct' is defined in *Black's Law Dictionary, 8th Edition, p. 1019* as 'a dereliction of duty; unlawful or improper behaviour.' In the same dictionary¹⁴, misconduct in office or official misconduct is specifically defined as 'a public officer's corrupt violation of assigned duties by malfeasance, misfeasance or nonfeasance.'

95. In the case of *Daugherty vs. Ellis 142W. Va 340, 357-358*, the Supreme Court of West Virginia defined 'malfeasance' as follows

Malfeasance is the doing of an act which an officer had no legal right to do at all and that when an officer, through ignorance, inattention, or malice, does that which they have no legal right to do at all, or acts without any authority whatsoever, or exceeds, ignores, or abuses their powers, they are guilty of malfeasance.

96. Thus malfeasance in office or official misconduct would entail an act or omission done by a public official in an official capacity, which amounts to a dereliction of duty as a result of failure to perform their official obligations.

97. We do not find grounds 1.3, 2.4, 3.1, 3.2, 3.3 and 4 to constitute such misconduct by the Applicant. A Speaker's residential arrangements or his/ her non-delegation management style cannot *per se* be equated to dereliction of duty, unless they can be proven to directly impinge on the performance of his/ her official duties. Similarly, whereas we do acknowledge that the conduct described in ground 3 would amount to conduct that is unbecoming of a senior public official such as a Speaker of EALA, we do not find such unprofessional conduct to necessarily translate directly into non-performance of official obligations. In the same vein, we find that the conduct described in ground 4 cannot be attributed to the Applicant but the Members. If it was a result of the Applicant's alleged misconduct, this would amount to an effect thereof not a dereliction of duty *per se* on her part.

98. However, we cannot say the same of the residual grounds of the Motion. The Speaker's functions are outlined in Article 48(2) and 56(1) of the Treaty to essentially entail presiding over the Assembly. As such, s/he would be required to provide technical and administrative leadership to the House, failure of which s/he would be deemed to have fallen short on his/ her official obligations. It seems to us that the residual grounds of the Motion go to the heart of those functions. Unilateral decision-making, poor time management, misallocation of Assembly resources, dishonesty and intrigue as embodied in grounds 1.1, 1.2, 2.3, 3.4 and 3.5 (if true) do pose poignant questions on the effective administration of the

¹⁴ Ibid

House. Similarly, family engagement and nepotism as stipulated in grounds 2.1, 2.2 and 2.5 (if proven) would negate the impartiality, objectivity and prudence of the head of a vital organ of the Community.

99. In the result, we are satisfied that grounds 1.1, 1.2, 2.1, 2.2, 2.3, 2.5, 3.4 and 3.5 do correspond to the grounds of misconduct envisaged under Article 53(3) of the Treaty. Issue No. 4 does therefore succeed in part and fail in part.

ISSUE NO. 5: Whether the Applicant is entitled to the remedies sought.

105. Having held as above, what are the remedies available to the Applicant? We note that in the Amended Reference she specifically prayed for the following declarations and orders:

- a. A declaration that the purported sitting of the Assembly on 26th November 2014 without the elected Speaker of the Assembly violated Articles 53 and 56 of the Treaty for the Establishment of the East African Community and the Rules of Procedure of the Assembly.
- b. A declaration that the said sitting and any subsequent sittings not presided over by the elected Speaker and actions of some members of EALA are ultra vires, illegal, unlawful, procedurally wrong, null and void and of no legal consequence.
- c. A declaration that the Committee on Legal, Rules and Privileges was improperly constituted for the purpose of this particular matter as majority of its members were also accusers/petitioners/complainants and witnesses against the Applicant in this case and thus their participation in Committee constituted a breach of the rules of natural justice, specifically the rule against bias.
- d. A declaration that the proceedings of the Committee violated the rules of natural justice and its report is null and void.
- e. A declaration that the alleged grounds of misconduct listed in the Motion were manifestly frivolous and constitute a violation of Articles 53(3) of the Treaty.
- f. A declaration that the ruling of the Speaker of 4th June 2014 and the ruling of the Court of 15th August 2014 disposed off the impeachment motion and whoever is aggrieved should appeal to Court. An order quashing the actions of the East African Legislative Assembly in removing the Applicant from the office of the Speaker.
- g. A declaration that the removal of the Applicant from office was ultra vires the Treaty, Rules of Procedures of the Assembly and Rules of Natural Justice.
- h. An award of General Damages for the embarrassment, inconvenience, pain, mental anguish and her reputational damage.
- i. An award of aggravated and/or exemplary and punitive damages for the wanton conduct of the Members of the East African Legislative Assembly.
- j. An award of special damages in form of loss of earnings of a salary of USD 6,700 per month and Housing Allowances of USD 3,000 per month, plus other allowances and financial benefits.
- k. Interests on the sums awarded above from the date of the removal of the Applicant from the office of the Speaker until payment in full.

- l. An Order of reinstatement of the Applicant, Rt. Hon. Margaret Nantongo Zziwa to the office of the Speaker of the East African Legislative Assembly.
 - m. A permanent injunction restraining and prohibiting the Respondent and directing the East African Legislative Assembly to refrain from considering a non-existing impeachment Motion.
 - n. Any other reliefs and/or remedies that this Honourable Court deems fit.
 - o. An Order that the Respondent shall pay all the costs of this Reference.
106. Regarding Prayers (a), (b), (c) and (h), we have held that the Assembly of 26th November 2014 was presided over by a Temporary Speaker, an entity and office unknown to the Treaty and the Rules of Procedure of the Assembly. The import of such an action is that the sitting was unlawful and we so declare. However, such an action was also unlawful to the extent only that Article 56 of the Treaty and the Rules were violated. We do not see any violation of Article 53 in that context and we so find.
107. Further to the above, we have also found that the Committee on Legal, Rules and Privileges, in allowing Members of the Assembly who initiated the Motion for removal of the Applicant to sit and determine whether she should in fact be removed, violated the basic rules of natural justice that an accuser cannot also be the judge in proceedings against the accused. We need not reiterate the fact that any real or perceived bias on the part of the Committee invalidated its proceedings.
108. On Prayer (d), having made a finding regarding the composition of the Committee and its proceedings, it follows that its Report, whatever the merit thereof, was rendered invalid and we so find.
109. Prayers (f) and (m) are in our considered view superfluous and have in any event been overtaken by events. They are consequently disallowed.
110. Prayers (g) and (l) seek orders quashing the actions of EALA and reinstating the Applicant to the position of Speaker. We have reflected on the import of granting such an order viz a viz the mandate of this Court under Articles 23 and 27 of the Treaty. It is the Court's mandate thereunder to interpret and apply the Treaty within the principles set out in Articles 6, 7 and 8 thereof. One of the principles in Article 6(d) is that of democracy and the rule of law, which necessarily include the principle of separation of powers. This Court should not, in the event, be seen to be directing EALA on how it should conduct its business. It may declare EALA's actions to be in violation of the Treaty upon which EALA can, within its own mandate, proceed to ensure compliance with such a decision. In the circumstances, we are unable to grant the said prayers.
111. In Prayers (i), (j), (k) and (l), special and general damages, as well as interest thereon are sought. In support thereof, the Applicant has relied on the following decisions:
- i. *Omunyokol Akol Johnson & Anor V. Attorney General of Uganda, C.A. No. 6 of 2012;*
 - ii. *Iyamulemye David v Attorney General of Uganda, C.A. No. 104 of 2010.*
112. Both decisions related to dismissal of an employee from service and damages were awarded by the Ugandan Courts to the employees for unlawful dismissal. The said decisions are, with respect, irrelevant to the issue before us because the Applicant is and was not an employee of EALA. She was elected by peers who

also have the mandate under Article 53 of the Treaty to remove her.

113. Further, it is our understanding that general damages are awarded to a party as a matter of discretion and taking into account the circumstances of each case. In the present Reference, we have found the Applicant to have contravened Rule 9(6) of the Assembly's Rules of Procedure, which action might have triggered other actions, some patently unlawful. She cannot, then, be seen to benefit from her role in the procedural impasse that dogged the Assembly.
114. Even more fundamentally, given the interpretative jurisdiction of the Court as depicted in Articles 23 and 27 of the Treaty, the issuance of declarations on Treaty compliance or the lack thereof has been deemed to be sufficient remedy to parties. Further, we find no legal provision in this Court's Rules of Procedure for the award of damages as a remedy. See *James Alfred Koroso Vs. The Attorney General of the Republic of Kenya & Another EACJ Reference No. 12 of 2015*.
115. We now turn to the issue of costs. This Court is guided by the express provisions of Rule 111 of its Rules of Procedure. It reads:
- Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order.
116. In the case of *Venant Masenge vs. Attorney General of Burundi EACJ Ref. No. 9 of 2012*, where the applicant therein won only one (1) of the four (4) issues framed, this Court did award 1/2 costs. The Applicant in this matter was successful in three (3) of the five (5) issues as framed. She did also partially succeed on Issues 4 and 5 hereof. On the basis of the same precedent, the Applicant herein would be entitled to 3/5 costs hereof. On the other hand, the circumstances of that case are that the applicant therein did not share the blame of the matters that were in issue in that case, the respondent having been solely responsible therefore.
117. In the instant case, as we have stated earlier herein, although not specifically framed as an issue for determination, the Applicant herein did also flout Rule 9(6) of the Assembly's Rules of Procedure by presiding over a matter in her own cause. Quite possibly this conduct on her part, as the steward of the Assembly, could have triggered the unfortunate series of events that have been the subject of this Reference. We do find that to constitute sufficient, judicious reason for this Court to depart from the principle advanced in Rule 111 that costs follow the event. We do therefore decline to grant an award of costs in this matter.

G. Conclusion

118. As we take leave of this Amended Reference, we are constrained to observe that it did illuminate the vitality of respect for and submission to the rule of law in the conduct of public affairs. To that end, we deem it our duty to and do hereby propose that it is a basic expectation that all holders of public office would discharge their duties with respectful regard for designated processes; demonstrable deference to legal propriety and due diligence, and a reasonable disdain for impunity, partiality and bad faith. The trampling roughshod over designated legal processes and basic principles of natural justice would certainly not, in our most considered view, engender an environment conducive to harmonised regional integration in the EAC.
119. The Reference has also brought to the fore the need for EALA to relook at its House and Committee procedural rules, and address lacunas that could cause

confusion in its legislative function.

120. In the final result, we do allow the Amended Reference in part with the following Orders:

- a. A declaration doth issue that the purported sitting of the Assembly on 26th November 2014 without the elected Speaker of the Assembly violated Article 56 of the Treaty; was unlawful, procedurally wrong and of no legal consequence.
- b. A declaration doth issue that the Committee on Legal, Rules and Privileges was improperly constituted for purposes of the Speaker's removal and constituted a breach of the rules of natural justice owing to demonstrable bias, and accordingly the report arising therefrom is null and void.
- c. A declaration doth issue that grounds 1.1, 1.2, 2.1, 2.2, 2.3, 2.5, 3.4 and 3.5 do correspond to grounds of misconduct under Article 53(3) of the Treaty.
- d. Each Party to bear shall bear its own costs.

121. It is so ordered.

J. Semuyaba & J. Tumwebaze, Counsel for the Applicant
S. Agaba, Counsel for the Respondent

March 3, 2017

CORRECTION OF JUDGMENT

1. Rule 70(1) of this Court's Rules of Procedure provides for the correction of judgments of the Court. It reads:
Clerical or arithmetical mistakes in any judgment of the Court or any error arising in it from accidental slip or omission, may at any time whether before or after the judgment has been embodied in an order be corrected by the Court either of its own motion or on the application of any of the parties so as to give effect to what the intention of the Court was when judgment was given.
2. We do hereby invoke the foregoing Slip Rule to correct the Judgment in *Reference No. 17 of 2014* as delivered by this Court on 3rd February 2017 as follows:
 - I. The repetition of ground 2.1 in paragraph 120(c) thereof is corrected to read "...2.1, 2.2 ...". The phrase "... to bear ..." in paragraph 120(d), which does also amount to a repetition is deleted.

^^*^*

Appellate Division

Appeal No. 5 of 2014

Arising from Application No. 17 of 2014 [2012-2015] EACJLR 537 & Reference No. 2 of 2011

The Attorney General of the Republic of Uganda v The East African Law Society, The Secretary General of the East African Community

Coram: E. Ugirashebuja, P.; L. Nkurunziza, VP. J. Ogoola; E. Rutakangwa, JA; A. Ringera, JJA.

April 15, 2015

Grave procedural error - Due process and fair trial - Competence of an application - Additional electronic Digital Video Disk evidence permitted - Hearing on the merits

Rules: 22(1), 23(1), 47 East African Court of Justice Rules of Procedure, 2013

The Appellant appealed against a decision of the Trial Court not to entertain Application No. 17 of 2014 despite orders from the Appellate Division, in *Appeal 1 of 2013*: allowing the Respondent to adduce additional evidence in electronic format (DVD); and the Appellant to challenge its admissibility and authenticity through a *voir dire* examination. The Court did not hear the Appellant and the Respondent before making its decision stating that the Application was incompetent and non-compliant with the Rules of the Court.

Held

1. It is trite law and cardinal principle of the Court's jurisprudence that no litigant should be denied his or her day in court. Any denial goes against the grain of the doctrines of natural justice, due process and fair trial- which constitute the very foundation and bedrock of the Court's brand of jurisprudence.
2. To make a finding that an application lacked competence, a court of law needs hear and assess the merits first then to pronounce itself on the matter.
3. The Trial Court did not do so and simply declined to entertain the Application at all and then, proceeded to strike it out. This was a very grave error of procedure. Consequently, additional electronic Digital Video Disk (DVD) evidence has been permitted to be adduced and the Respondent is at liberty to challenge the relevance, accuracy, authenticity, credibility and evidential value of this evidence. The case remitted to the Trial Court for hearing on its merits.

JUDGMENT

1. 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 of 2014. In that Ruling, the First Instance Division struck out the Attorney General's *Application No. 17 of 2014* in which the Attorney General 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.
2. 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*.
 3. Counsel for the First 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 the same day- all in breach of Rule 23(1) of the EACJ Rules of Procedure.
 4. For its part, the First Instance Division (referring to its own previous Ruling in *Application No. 2/2014*, 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 an 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”.
 5. It is evident that the First Instance Division decided not to entertain *Application No. 17/2014*. It is equally evident that the Division of the court then decided to strike out the Application. The sum total of these two decision led to 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 viewpoint on the merits of the Application before the Court struck it out.
 6. 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. This was not just a simple procedural error. It was a very grave error of procedure.
 7. By denying the Parties to the Application the opportunity to canvass their respective cases on the merits, the court then denied them the substantive right to be heard. It is trite law and cardinal principle of our jurisprudence that no

litigant should be denied his or her day in court. Any 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 buy our own Rules of Procedure Court, the related power of the Court to strike out or to expunge the Parties' pleading under Rule 47, is extremely circumscribed: as the process to be followed and as to the grounds to be adduced for the exercise of that power. This process requires a special and specific Application; and the grounds for it are limited only to those specifically enumerated in the Rule by the Court. In *Application No. 17 of 2014*, none of these analogous notions were adverted to by the Court.

8. In view of all above, we find the First Instance Division erred in striking out *Application No. 17 of 2014*, without first entertaining the merits of that Application.
9. In the result, this instant appeal is granted.
10. 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 judgement 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 the 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 Appeal.

It is so ordered

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Appellate Division

Appeal No. 6 of 2014**Henry Kyarimpa v The Attorney General of Uganda**

Appeal from the Judgment of the First Instance Division: Butasi, PJ; Lenaola, DPJ, Ntezilyayo, Mugenyi and Jundu, JJ of 28th day of November, 2014 in Reference No. 4 of 2013, [2012-2015] EACJLR, 267

Coram: E. Ugirashebuja, P; L. Nkurunziza, VP; E. Rutakangwa, A. Ringera and G. Kiryabwire, JJ. A
February 26, 2016

Rule of law - Procurement- Burden of proof - Non production of bilateral agreement- Whether a Memorandum of Understanding was inconsistent with the Treaty - Disregard of national court orders - Jurisdiction beyond declaratory orders- Cross appeal - Remedies- Costs

Articles: 6 (c), (d), 7(2), 8(1), 35A, 38(2), 39 the Treaty - Article 123 The Constitution of the Republic of Uganda 1995 - Section 4 (1) the Public Procurement and Disposal of Assets Act, 2003, Uganda - The Public Procurement and Disposal of Public Assets Regulations 2003, Uganda - Article 33 Draft Articles on State Responsibility, 2001, ILC - Article 31 Vienna Convention on the Law of Treaties, 1969

In 2013, the Government of Uganda (GoU) requested for bids for the construction of the 600 MW Karuma Hydroelectric Plant. The Appellant, a Procurement Consultant, aligned himself with China International Water and Electric Construction Corporation which placed a bid. However, before the tender was awarded, the Inspector General of Government of Uganda (IGG) received a complaint regarding the transparency and integrity of the procurement process. After investigations, IGG issued a report on 22nd March, 2013 recommending that the whole procurement process be cancelled and repeated.

Subsequently, Mr. Andrew B. Aja, filed a judicial review case at the High Court of Uganda, Nakawa, seeking *inter alia* an injunction against the Attorney General in the implementation of the recommendations of the IGG Report and an order to the Permanent Secretary, Ministry of Energy and Mineral Development (ME&MD) to declare the best evaluated bidder of the initial procurement process. On 18th April, 2013, the Appellant /Applicant obtained an interlocutory order *ex parte* for the preservation of the *status quo* pending the *inter partes* hearing. Thereafter, on 22nd April, 2013, the parties recorded a consent order: maintaining the *status quo*; prohibiting the implementation of the IGG's recommendation; and directing the Permanent Secretary ME&MD to write to the complainant and other bidders requesting them to extend the validity dates of their bids and securities by 23rd April, 2013 which was the expiry date. Nevertheless, on 23rd April, 2013, the Contracts Committee of the ME & MD Ministry rejected all the bids and cancelled the procurement process pursuant to Section 75 of the Uganda Public Procurement and Disposal of Assets Act of 2003 (PPDA Act).

On 20th May, 2013, the High Court issued Final Orders restraining the Respondent

from implementing the recommendations in the IGG Report and directed that the Permanent Secretary ME & MD declare the best evaluated bidder for the construction of the dam. Thereafter, the Respondent lodged an Appeal in the Court of Appeal of Uganda however, on 20th June 2013, the GoU signed a Memorandum of Understanding (MoU) with Sinohydro Corporation Ltd for the construction of the dam. No contempt of Court proceedings were brought against the Respondent. Aggrieved by the cancellation of the bids and selection of Sinohydro, the Appellant / Applicant filed a Reference in the Trial Court alleging *inter alia* that: the signing of the MoU infringed the EAC Treaty was not transparent, objective, fair or competitive; and that the MoU was signed in contempt of Court, violated court orders and should be cancelled.

In response, the Respondent submitted that the signing of the MoU was in line with a bilateral arrangement between the GoU and the Government of China to secure funding through Exim Bank of China for the construction of the Karuma dam by Sinohydro, a company wholly owned by the China Government. However, the Respondent did not produce the bilateral agreement as evidence.

The Trial Court held *inter alia* that: the signing of a MoU and selection of Sinohydro did not breach Uganda's laws; that the Court had no jurisdiction to determine whether the actions complained of disobeyed Court Orders since the Courts' of Uganda had not found the Respondent in contempt of their orders; and that by implementing the MoU after the filing of the Reference, Article 38 (2) of the Treaty was not infringed.

Dissatisfied with the decision, the Appellant averred on appeal *inter alia* that the Trial Court erred in finding that the signing of the MoU and the selection of Sinohydro was not inconsistent with the Treaty. In its cross-appeal, the Respondent contended that by failing to award costs to the Respondent, as the successful party, on the ground that the Reference was brought for personal reasons and not in the public interest, the Trial Court erred in law.

Held:

1. Observance of the rule of law is the premier value of the East African Community. Disregard of it will torpedo the ship of regional integration. Rule of law dictates that when an act has been prohibited by a court order, unless and until such an order has been set aside or vacated by the same Court or another court of competent jurisdiction, such act is prohibited, and no reason or ground advanced for doing it can suffice to legitimize such action. Lawful justification for disobedience of Court orders, is not a creature known to the law. It is a pure and simple contradiction in terms.
2. The Trial Court erred in law in finding that it lacked jurisdiction to delve into the alleged contempt and disobedience of the orders of the National Courts in Uganda and to determine whether disobedience of their orders was a contravention of the principle of the rule of law under the Treaty. This was an abdication of the Court's mandate to interpret Articles 6(d), 7(2) and 8 (1) (c) of the Treaty.
3. The Trial Court's conclusion that it could not make a finding on whether the actions of the Respondent were in contempt of Court and were made in disobedience or disregard of Court Orders, without a finding to that effect by the Courts of Uganda, was an abdication of that Court's duty to interpret the Treaty.

The invocation of Section 75 of the PPDA could not, and did not remove the stigma of contempt of or disobedience of Court orders from the decision. Thus the selection and signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro was in disobedience of pertinent Court orders and, as such, a violation of the Treaty Principle of the Rule of Law.

4. The Respondent's failure to produce the written bilateral agreement or arrangement leads to the conclusion that the selection and subsequent signing of the MoU between the GoU and Sinohydro was arbitrary, illegal and unlawful under Ugandan law and was outside the provisions of the PPDA Act and Regulations.
5. The jurisdiction of this Court is not limited to granting of declaratory relief only. On the authority of Article 23, this Court has the Jurisdiction and duty to make such other relief as may be congruent with adherence to law in the interpretation and application of the Treaty. Remedies are only to be granted to the extent possible. In the instant case, the record revealed too many actions, which ought not to have been done, were been done, and it was impractical to reverse the construction of the Karuma Dam by Sinohydro.
6. A Declaration be issued that the selection and subsequent signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro was inconsistent with and an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty

Cases cited

Advisory Opinion [2005-2011] EACJLR 98, Advisory Opinion No. 1 of 2015

Bennet v Chappell [1960] CH. 391, (C.A)

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Olmstead v United States [1928], 277 U.S. 438

Timothy A. Kahoho v The Secretary General of EAC [2012-2015] EACJLR 181, Appl. No. 5 of 2012

The East African Centre for Trade Policy & Law v Secretary General of EAC [2012-2015] EACJLR 146, Ref. No. 9 of 2012

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Uganda Revenue Authority v Siraje Hassan Kajura Civil Appeal No. 26 of 2013

Williams v Home Office (No. 2) [1981] ALL ER 1211

JUDGMENT

A. Introduction

1. This is an Appeal by Henry Kyarimpa ("the Appellant") against the Judgment of this Court's First Instance Division ("the Trial Court") dated 28th November, 2014 in Reference No. 4 of 2013 ("the Reference") by which the Trial Court dismissed the Reference and ordered the Parties to bear their own costs.
2. The Appellant, who is a resident of Uganda, was the Applicant in the Trial Court. He described himself as a Procurement Consultant and Specialist operating and doing business in Uganda.
3. The Respondent is the Attorney General of the Republic of Uganda, and was sued in the Reference as a representative for and on behalf of the Republic of Uganda.
4. The Appellant was, both in the Trial Court and in this Court, represented by Mr. Mohamed Mbabazi, instructed by the firm of Nyanzi, Kiboneka and Mbabazi Advocates of Kampala, Uganda, and the Respondent was represented by Mr.

Elisha Bafirawala, Senior State Attorney, Mr. Richard Adrole, State Attorney and Ms Susan Akello, State Attorney.

B. Background

5. The background to this Appeal as gleaned from the Memorandum and Record of Appeal filed in this Court is as outlined below.
6. Sometime in the year 2013, the Government of Uganda (“the GoU”) requested for bids for the construction of the 600 MW Karuma Hydroelectric Plant and its associated transmission lines (“the Karuma Dam”). The Appellant, in his capacity as a Procurement Consultant, aligned himself with a Company known as M/s China International Water and Electric Construction Corporation (“China International”) which placed a tender bid for the Karuma Dam.
7. Before the award of the Tender was made, the Inspector General of Government of Uganda (“IGG”) received a complaint regarding the transparency and integrity of the procurement process and, after investigations, issued a report dated 22nd March, 2013 recommending that the whole procurement process be cancelled and repeated.
8. The Cabinet of the Republic of Uganda- under minute 190 (CT 2013) dated 12th April, 2013- debated the IGG’s Report and directed the Minister of Energy and Mineral Development to cancel the procurement process for the Karuma Dam (“the initial procurement process”).
9. Subsequently, one Andrew Baryayanga Aja, instituted *Judicial Review Miscellaneous Application No. 11 of 2013* at the High Court of Uganda, at Nakawa, seeking Orders, *inter alia*, that the Attorney General be enjoined from implementing the recommendations of the IGG Report and that the Permanent Secretary, Ministry of Energy and Mineral Development (“ME&MD”) be ordered to declare the best evaluated bidder of the initial procurement process.
10. During the pendency of the hearing of the aforesaid Judicial Review Application, the Applicant therein lodged an Interlocutory Application by way of *High Court Miscellaneous Application No. 162 of 2013* in the same Judicial Review Cause. On 18th April, 2013, the Court issued, *ex parte*, an interlocutory order for the preservation of the *status quo* pending *inter partes* hearing of the Application. On 22nd April, 2013, at the scheduled *inter partes* hearing, and in the presence of both Counsel for the Attorney General and Counsel for the Applicant, the Court, by consent, (i) ordered that the *status quo* be maintained, restraining/prohibiting the implementation of the recommendation of the IGG Report, and (ii) directed the Permanent Secretary ME&MD to write to the complainant and responsive bidders requesting them to extend the validity dates of their bids and renew their bid securities before the end of 22nd April, 2013 as the bids were to expire on the 23rd April, 2013.
11. On the 23rd April, 2013, the Contracts Committee of the Ministry of Energy and Mineral Development pursuant to Section 75 of the Uganda Public Procurement and Disposal of Assets Act of 2003 (“PPDA Act”) rejected all the bids and cancelled the procurement process of the Karuma Dam, and the decision to cancel was communicated to all bidders involved in the initial procurement process.
12. On 24th April, 2013, the Constitutional Court of Uganda, in *Constitutional*

Application No. 03 of 2013: Andrew Baryayanga Aja vs The Attorney General of Uganda, issued an interim injunctive order restraining the Government of Uganda (“the GOU”) /Cabinet, or the ME & MD from implementing the recommendations of the IGG report dated 22nd March, 2013, or in any other manner from interfering with the final process of the initial procurement process, including awarding a contract to the best evaluated bidder, or in any other manner implementing the said recommendations or any of them, or from doing any other act or taking any further steps in connection therewith, until the determination of the main Constitutional Application ,or until such other or further order of the Court. That Order was served on the Respondent on 25th May, 2013.

13. On 20th May, 2013, the High Court of Uganda, at Nakawa, issued Final Orders in the Judicial Review Miscellaneous Cause No. 11 of 2013 referred to in paragraph 9 above. Those Final Orders restrained the Respondent from implementing or taking into account the recommendations in the IGG Report, and directed the Respondent, through its agent, the Permanent Secretary ME & MD, to declare the best evaluated bidder for the Engineering Procurement and Construction Contract (“EPC Contract”) for the Karuma Dam.
14. The Respondent lodged an Appeal in the Court of Appeal of Uganda against the aforesaid orders.
15. No contempt of Court proceedings were ever lodged in the High Court of Uganda against the Respondent in relation to the Orders issued in Miscellaneous Cause No. 11 of 2013.
16. On 20th June 2013, the Government of Uganda signed a Memorandum of Understanding (“MoU”) with M/s Sinohydro Corporation Limited (“Sinohydro”) for the construction of the Karuma Dam.

The Reference

17. Aggrieved by the cancellation of the bids and the subsequent selection of Sinohydro as the Contractor for the construction of the Karuma Dam, the Appellant instituted the Reference subject matter of this Appeal in the Trial Court on 26th June, 2013, under Articles 6, 7(2) , 8(1) (c), 23, 27 (1) and 30 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rule 24 of the East African Court of Justice Rules of Procedure, 2013 (“the Rules”).
18. In the Reference, the Appellant averred that:
 - a) The selection and subsequent signing of the MoU was shrouded in mystery, secrecy and manipulation by the GoU officials, and was not transparent, objective, fair and competitive, but instead was full of illegalities, arbitrariness, discrimination and scheming of power brokers and “rain makers” in the Government.
 - b) The selection and subsequent signing of the MoU was done in violation and breach of the PPDA Act and Regulation S1 70 of 2003 (“the Procurement Regulations”), which lay down the governing legal and statutory framework for Public Procurement, the MoU in dispute included.
 - c) The selection and subsequent signing of the MoU was done in contempt

of Court and violation of Court Orders granted in a Judicial Review Application for declarations, Mandamus and injunction in Nakawa High Court Miscellaneous Cause No. 11 of 2013.

- d) All the acts in (a) to (c) above breached and infringed the principles of rule of law, good governance, accountability and democracy and were inconsistent with Articles 6 (c) and (d), 7 (2) and 8 (1) of the Treaty.

19. In the premises, the Appellant moved the Trial Court for Orders:

- a) Declaring that the selection of Sinohydro by the GoU and the subsequent signing of the MoU between the GoU and Sinohydro on 20th June, 2013 for the construction of the Karuma Dam were a breach of and an infringement of the Treaty.

- b) Enforcing and Directing the immediate compliance with the Treaty and/or performance of the State obligations and responsibilities of the GOU under the Treaty by:

(i). Directing the GoU to cancel the MoU signed between it and Sinohydro on 20th June, 2013 for the construction of the Karuma Dam.

(ii). Directing the GoU to comply with the Court Order in *Nakawa High Court Miscellaneous Cause No. 11 of 2013 – Hon. Andrew Baryayanga Aja vs. Attorney General* ordering award of the Contract to the best evaluated bidder for the EPC contract for the Karuma Dam.

(iii). Reinstating the *status quo* before the selection of Sinohydro and subsequent signing of the contract between the GoU and Sinohydro.

- c) That the costs of the Reference be paid by the Respondent.

20. Contemporaneously with the Reference, the Appellant filed Applications Nos. 3 and 4 of 2013 seeking for a temporary injunction and an interim order, respectively, restraining the implementation of the MoU by:-

(i). Performing any of the scheduled activities there under including contract negotiations and the signing of the EPC Contract for the project.

(ii). Government of Uganda negotiating financing terms with China Exim Bank and obtaining disbursement.

(iii). Launching the on-site construction activities of the project by Sinohydro.

(iv). Mobilization by Sinohydro of engineers and technicians for the project to carry out further site investigations, detailed construction Planning and design works.

(v). Carrying out of preparatory works in the Annex to the MoU until the hearing and final disposal of the main Reference No. 4 of 2013.

21. The Applications were not immediately heard but were scheduled for hearing on 28th August, 2013.

22. On 18th July, 2013, before the Respondent filed its Response, the Appellant wrote to the Respondent and all stakeholders objecting to the continued implementation of the MoU on the grounds that he had filed the Reference together with an application for interim orders of injunction and the Government of Uganda had knowledge of the existence of those matters. The Respondent's reply on 23rd July, 2013, noted that the Appellants application for interim orders had not been adjudicated upon by the East African Court of Justice, and, therefore, no

injunctive reliefs were issued, and none could emanate from the mere filing of an application for interim orders. The Respondent, for those reasons, advised the concerned officials to disregard it with the contempt it deserved. On the 26th July, 2013, the Appellant again wrote to the Respondent beseeching the Respondent to apply the provisions of Article 38 (2) of the Treaty and refrain from doing an act that would be detrimental to the resolution of the dispute or which would aggravate it.

23. During the period between the filing of the Reference and the scheduling of the same, when issue No. 2 was framed, there were various activities that were done by the Respondent towards the implementation of the MoU. They included the handover of the site of the Karuma Dam to Sinohydro as per the letter dated 3rd July, 2013, a formal ground breaking ceremony presided over by the President of Uganda on 12th August, 2013, and the signing of the Engineering, Procurement, Construction and Financing (“EPCF”) Contract on 16th August, 2013.
24. After hearing the Applications for Interlocutory Relief, the Trial Court refused to grant the Temporary Injunction sought and dismissed the Application for an Interim Order. That Order was not appealed.

The Response to the Reference.

25. In brief, the Respondent’s case was that the Appellant was engaged in frivolous, vexatious, scandalous and outrageous litigation aimed at derailing and/or delaying the construction of the Karuma Dam. The Respondent considered that the Appellant’s interest in the matter was that of an agent who had not been paid for his services by his client and, accordingly, his remedy lay outside the Reference.
26. With respect to the cancellation of the initial procurement process, the Respondent contended that upon the IGG recommending cancellation of the process, the Cabinet decided to accept the recommendation and, on 23rd April, 2013, the Contracts Committee of the ME&MD rejected all bids for the tender under Section 75 of the PPDA Act and Regulation 90 thereof.
27. The Respondent also contended that the decision to select Sinohydro was neither arbitrary nor illegal and the same was carried out in a transparent manner and in conformity with the Constitution and the laws of Uganda. The Respondent also contended that the signing of the MOU with the said Company was in line with a bilateral arrangement between the GoU and the Government of China to secure funding through Exim Bank of China for the construction of the Karuma dam by Sinohydro, a wholly owned Government of China Company. The Respondent further contended that it was on the basis of the existence of the said bilateral arrangement that the award of the Karuma Dam contract to Sinohydro, without following the tender process prescribed by the PPDA Act, was based.
28. It was the Respondent’s further case that the Order of 24th April, 2013 by the Constitutional Court of Uganda restraining the Government from implementing the IGG recommendations was served well after the cancellation of the initial procurement process and the rejection of all bids, and thereafter the proceedings in Court were rendered lifeless and spent. The Respondent contended that the same fate befell the Orders issued by the High Court on 20th May, 2013. Moreover, the Respondent further argued, the said Orders of the High Court

had been appealed against.

29. The Respondent also took the position that the cancellation of the tender process was not caught in the web of disobedience of Court Orders as the said Orders did not suspend or put in abeyance Section 75 of the PPDA Act pursuant to which the cancellation was made.

The Rejoinder to the Response.

30. In his rejoinder to the Respondent's case, the Appellant averred that there was no lawful bilateral arrangement between the Republic of Uganda and the Peoples' Republic of China as alleged, or at all. In any event, the Appellant further contended, if such a bilateral arrangement existed, the same would have been unconstitutional by dint of Article 159 of the Constitution of Uganda which requires that all loan agreements by the Government of Uganda had to be executed as authorized by an Act of Parliament.
31. The Appellant further contended that a Cabinet Directive, such as the one relied on by the Respondent, could not override a Court Order. It was also the Appellant's case that the Orders for the maintenance of the *status quo* issued on 22nd April, 2003, with the consent of the Respondent, meant that the relevant Government authorities, including the Permanent Secretary, ME&MD, knew of the said orders, and could not, therefore, change the *status quo* as they purported to do.
32. The Appellant also made the point that after the Reference was filed, and in spite of the express provisions of Article 38 (2) of the Treaty, the GoU proceeded to implement the challenged MoU in furtherance of the construction of the Karuma Dam. The Respondent contended that those actions were a perpetuation of the Government's unlawful conduct.

The Issues for Determination

33. At the Scheduling Conference of the Trial Court, the Parties agreed that the issues for determination were:
- 1) Whether the selection and subsequent signing of the MoU between the GoU and Sinohydro was inconsistent with and an infringement of Articles 6 (c) and (d), 7 (2) and 8 (1) of the Treaty;
 - 2) Whether the acts of the GoU in implementing the MoU after the filing of the Reference was inconsistent with and an infringement of Article 38 (2) of the Treaty; and
 - 3) Whether the parties were entitled to the orders sought.

The Trial Court's Determination

34. After considering the Pleadings of the Parties and Affidavits in support thereof, as well as the Submissions of Counsel, the Trial Court found that:
- a) The selection of Sinohydro to undertake construction of the Karuma Dam without a tender, and the subsequent signing of a MoU between the GoU and Sinohydro, was not in breach of Uganda's own laws because:-
 - (i). though the bilateral agreement or arrangement relied upon by the Respondent as legitimizing the actions was not annexed to any affidavit or otherwise produced before the Court, the existence of

the same could be, and was, in fact, inferred by the Court from the references thereto in the MoU dated 20th June, 2013, the Contract dated 16th August, 2013, and in the correspondence of various high ranking officials of the GoU. And furthermore, the burden of producing the evidence of such an agreement or arrangement in the context of the dispute before the Court was placed on Sinohydro, and the GoU could not be held responsible for actions of a party not before the Court; and

- (ii). the Courts of Uganda having not found the Respondent to be in contempt of Court, as alleged by the Respondent, the Trial Court had no jurisdiction to determine whether the actions complained of were done in disobedience of Court Orders. Had the Courts of Uganda found the Respondent to have acted in contempt of their Orders, the Court could have properly taken their decision and applied it in determining whether the Respondent had, by that fact, acted in contravention of the principle of the rule of law under the Treaty.

Issue No. (1) Was, thus, answered in the negative.

- b) The acts of the GoU in implementing the MoU after the filing of the Reference were not inconsistent with and were not an infringement of Article 38 (2) of the Treaty, because the Article did not expressly or impliedly provide for an automatic injunction or stay of the process or action complained of without the adverse party being heard.

Issue No. (2) Was, thus, also answered in the negative.

- c) The Appellant was not entitled to the remedies sought and, as the litigation was partly in the public interest, it was a proper case for each party to bear its own costs.

C. The Appeal and the Cross Appeal to the Appellate Division.

- 35. Dissatisfied with the entire Judgment of the Trial Court, the Appellant instituted this Appeal on 31st December 2014 by lodging a Memorandum of Appeal. The Memorandum enumerated thirty three (33) grounds of appeal some of which, in the Court's view, displayed ignorance of the mandate of the Court, others were complaints about *obiter dicta* of the Court, and many others of which were simply argumentative and repetitive. Be that as it may, the substance of all of the said grounds of appeal was that the Trial Court erred in law in finding that the selection of Sinohydro as the contractor for the Karuma Dam and the subsequent execution of a MoU between it and the Government of Uganda, as well as the actions of the Government of Uganda in implementing the said MoU after the filing of the Reference, were, respectively, not in breach or contravention of Articles 6(c) and (d), 7(2) and 8(1) or inconsistent with and an infringement of Article 38(2) of the Treaty.
- 36. The Attorney General of Uganda, on his part, lodged a Notice of a Cross-Appeal on 31st March 2015 pursuant to the provisions of Rule 91(3) of this Court's Rules. The said Notice of Cross-Appeal was lodged out of time but was subsequently validated with the consent of both parties on 20th April 2015. In the Notice of Cross-Appeal, the Attorney General contended that the Trial Court erred in law

in failing to award costs to the Respondent who was the successful party in the Reference on the ground that the Reference was brought for personal reasons and not in the public interest.

37. At the Scheduling Conference of the Appeal, held on 20th April 2015 pursuant to Rule 99 of the Court's Rules, the Parties with the guidance of the Court agreed that those grounds of Appeal and of the Cross-Appeal may be distilled and compressed into the following issues:-
- (i). Whether the Trial Court erred in law in finding that the selection and subsequent signing of the MoU between the GoU and Sinohydro was not inconsistent with and was not an infringement of Articles 6 (c) and (d), 7 (2) and 8 (1) of the Treaty.
 - (ii). Whether the Trial Court erred in law in finding that the acts of the GoU in implementing the MoU between itself and Sinohydro, after the filing of the Reference, was not inconsistent with and was not an infringement of Article 38 (2) of the Treaty.
 - (iii). Whether the Trial Court erred in law in declining to award costs to the Respondent.
38. The Learned Advocates for the Parties canvassed those issues in that order in their written submissions which submissions they wholly adopted at the hearing of the Appeal. Their respective cases are summarized hereinafter.

Issue No. 1 : Whether the Trial Court erred in law in finding that the selection and subsequent signing of the Memorandum of Understanding between the GOU and Sinohydro was not inconsistent with and was not an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.

Appellant's Submissions.

39. Mr. Mbabazi, the Learned Counsel for the Appellant, submitted that the Trial Court having found that there was no written bilateral agreement or arrangement produced before it, the Trial Court erred in law in finding that such an agreement existed on the basis of inferences drawn from other documents including correspondence between Government Officials. Counsel further argued that, in any case, the inferences made by the Trial Court were not predicated on the pleadings, evidence, or submissions of the Respondent, but were a departure from such pleadings and evidence and, accordingly, amounted to an error of law. In support of that submission, Counsel referred extensively to the Statement of Reference and the affidavit of Mr. Christopher Gashirabake, the Director of Legal Services in the Office of the Attorney General of Uganda, and submitted that the Respondent's pleaded and sworn case before the Trial Court was that there was an executed bilateral agreement between Uganda and China, made pursuant to Article 123(1) of the Uganda Constitution, according to which the Karuma Dam would be funded through China Exim Bank and also that presentations by various Chinese Companies would be the method of selecting a Chinese Company to undertake the project.
40. Counsel further submitted that the Trial Court ought to have found that the absence of a written bilateral agreement before the Court meant that the PPDA Act, 2003 was the applicable and operational law to the Procurement of the

Contractor for the Karuma Dam and, accordingly, the procurement and selection of Sinohydro without applying the PPDA Act, 2003 was arbitrary, illegal and unlawful under Ugandan law and was, by extension, a breach of the Treaty's Fundamental and Operational Principles of adherence to good governance, the rule of law, transparency and accountability.

41. With regard to disobedience of or failure to honour Court Orders, Mr. Mbabazi submitted that the Trial Court erred in law in finding that since the National Courts of Uganda had not been called upon to find, and had not found, that the Respondent in cancelling the initial procurement process, selecting Sinohydro to undertake the Karuma Dam and signing a MoU with Sinohydro to execute the project was in contempt of Court, it lacked jurisdiction to delve into alleged contempt and disobedience of the orders of those Courts and to determine whether such disobedience was a contravention of the principle of the rule of law under the Treaty. In that regard, Counsel recalled that the Respondent's case in the Trial Court was not that the Respondent should be found guilty of contempt and sanctioned for such contempt, but rather its case was that in refusing to honour and comply with Court orders stopping the cancellation of the initial procurement process, the Respondent was in breach of the rule of law and good governance principles encapsulated in the Treaty.
42. Counsel submitted that from a consideration of the sequence of events starting with the IGG recommendations, the Cabinet's Directive, the cancellation of the bids before the Award, the Selection of Sinohydro as the Contractor and the execution of a MoU with the said Company, it was patent that the Respondent had disobeyed or failed to comply with the orders of the High Court, as well as of the Constitutional Court, issued on 18th and 22nd April, 2013, 24th April, 2013 and 20th May, 2013. Consequently, the Respondent was in breach of its Treaty obligations.
43. Counsel invoked the authority of the landmark case of *James Katabazi & 21 Others vs. The Secretary General of the East African Community and the Attorney General of Uganda [EACJ Reference No. 1 of 2007]*, for the proposition that the Court had jurisdiction to determine whether the acts of the Government of a Partner State in disobeying a Court Order amounted to a breach of the Treaty's fundamental and Operational Principles of rule of law and good governance without there being in existence in the first instance a finding of contempt by the National Courts.
44. Counsel argued that the Trial Court's stand that the National Court's had first to determine whether the Respondent had acted in contempt of their orders, and the First Instance Division could, then, properly take that decision and apply it in determining whether the Respondent had, by that fact, also acted in contravention of the principle of the rule of law under the Treaty, was an abdication of the Court's mandate to interpret Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty so as to determine whether the acts of the Respondent violated and infringed the principles of the rule of law and good governance.
45. Counsel concluded his submissions on Issue No. 1 by asking us to answer the issue in the affirmative.

The Respondent's Submissions.

46. On whether there existed a bilateral agreement/arrangement between the Government of Uganda and the Peoples' Republic of China, Mr. Bafirawala, the learned Counsel for the Respondent, submitted that the documents from which the Trial Court inferred the existence of such agreement/arrangement were all part of the Court record and formed part of the evidence, and the Trial Court did not, therefore, err in referring to them, despite the Respondent having not referred to them in its submissions, and drawing the irresistible conclusion that there was a bilateral arrangement/agreement between the two countries to finance the construction of Karuma Dam through China Exim Bank by Chinese Construction Companies.
47. As regards the cancellation of the initial procurement process and the subsequent selection of Sinohydro as the Contractor for the Karuma Dam, Counsel submitted, firstly, that the cancellation was done under Section 75 of the PPDA Act, 2003 and the Appellant had not challenged the authority of the Contracts Committee of the ME&MD to apply that provision of law; and secondly, that the procurement of Sinohydro was not challenged by the Appellant or any Chinese Company as being unfair, oppressive or devoid of transparency. Indeed, Counsel added, it was an incontrovertible fact that the selection was conducted through presentations made by several interested Chinese Companies which included M/s China Three Gorges Corporation (a parent Company of M/s China International) and that process resulted in M/s Sinohydro being selected for the Construction of the Karuma Dam and China International too benefited from the new process by being given the task of constructing the 183 MW Isimba Hydro Electric Power Project.
48. On the sub issue of contempt of Court orders or disobedience of such orders, Counsel invited us to uphold the reasoning and findings of the Trial Court to the effect that in order to establish whether or not there was disobedience of Court Orders, an inquiry by the Court which issued the said orders was necessary in the first place. In that regard, Counsel pointed out that the acts of contempt complained of were never brought before any court in Uganda for determination by Andrew Baryayanga Aja (the Applicant in the proceedings in which the Court orders were issued).
49. For all the above reasons, Counsel for the Respondent asked us to answer Issue No. 1 in the negative.

Appellant's Replying Submissions.

50. Counsel for the Appellant replied that the import of Section 4 (1) of the PPDA Act and Regulation 5 (1) of the PPDA Regulations was that the bilateral agreement had to exist as a hard copy and contain provisions which, upon being read, had to be found to be in conflict with the PPDA Act before such an agreement could be allowed to prevail over the said Act. In his view, reliance on an inferred agreement or arrangement was contrary to Ugandan Law and was, thus, a contravention of the principles of the rule of law, good governance and accountability contrary to Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty.

Issue No. 2 : Whether the Trial Court erred in law in finding that the acts of the Government of Uganda in implementing the MOU between itself and

Sinohydro after the filing of the Reference was not inconsistent with and was not an infringement of Article 38(2) of the Treaty.

Appellant's Submissions.

51. Counsel for the Appellant submitted that the Trial Court erred in law in its interpretation of Article 38(2) and thereby rendered it redundant. According to Counsel, the Trial Court erred in basing its decision on what the Court discerned to be the intention of Article 38(2) not to confer on an Applicant in a Reference an automatic injunction as to do so would undermine the long held position that injunctions are discretionary judicial remedies. That approach, Counsel submitted, had two pitfalls. First, it presupposed that the Treaty is subordinate to internal law (also alternatively referred to as Municipal Law) and jurisprudence and, accordingly, it had to be harmoniously interpreted and enforced to conform therewith. Secondly, it equated the restraint called for in Article 38(2) to an order granted by the East African Court of Justice while exercising its judicial discretion. Counsel submitted that the correct approach was to have used the ordinary meaning of Article 38(2) in the context of the Treaty objectives and purposes. According to Counsel, the ordinary meaning of the provision is for a Partner State which has a dispute before the Council or Court to refrain from doing such acts as are detrimental to the resolution of the dispute or which would aggravate it. In Counsel's submission, Article 38 (2) was an automatic injunction on a Partner State to refrain from doing acts that were detrimental to the resolution of the dispute or which would aggravate it. Counsel submitted that the Respondent breached Article 38(2) when it did the acts it did after the filing of the Reference and issue No. 2 should be answered in the affirmative.

Respondent's Submissions.

52. Counsel for the Respondent submitted that Article 38 (2) of the Treaty called for self-censorship by the Partner State to a dispute that had been lodged with either the Council or the Court, to refrain from any action that might be detrimental to the resolution of the dispute, but did not bar or stop the Partner State from doing acts which such State conceived not to be detrimental to the resolution of the dispute or which would aggravate it. Counsel further submitted that the actions of the Respondent in implementing the MoU did not contravene or infringe upon Article 38(2) because what the Appellant had challenged in the Reference was the selection of Sinohydro and the subsequent signing of the MoU by the said Company with the Government of Uganda, and not the implementation of the MoU. Counsel added that the injunctive relief which sought to restrain the Respondent from implementing the MoU was an afterthought, and was not part of the Reference as filed on 26th June, 2013. In those circumstances, Counsel contended, the Respondent's actions could neither be detrimental to the resolution of the dispute as contained in the Reference nor aggravate the same.
53. In Support of the submission that Article 38(2) did not bar or stop a Partner State from any further action once a dispute had been referred to the Court or the Council, Counsel for the Respondent relied on the authority of the Trial Court's own decision in *Timothy Alvin Kahoho VS The Secretary General of the*

East African Community [EACJ Application No. 5 of 2012], where the said Court delivered itself as follows:

“As for the Provisions of Section 38(2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of an injunction is a function of the Court in exercise of its discretionary power. Therefore Article 38 (2) cannot be seen to be removing that long held position without expressly saying so. Further, in the authority the Applicant referred to us, that is, *The East African Law Society and 3 Others VS the Attorney General of Kenya and 3 Others* [Reference No. 3 of 2007], the Applicant did not show us, neither were we able to find where the Court held that Article 38 (2) acts as an automatic injunction once a dispute has been referred to the Court or to the Council.”

Counsel submitted further that to hold otherwise would in effect render Article 39 of the Treaty redundant, and would be contrary to the intention and spirit of Article 38(2), as a window for abuse would be opened because parties would be encouraged to file frivolous and vexatious applications in Court with the sole intent of paralyzing a Partner State’s operations.

54. In the result, Counsel submitted that issue No.2 should be answered in the negative.

The Appellant’s Reply

55. The Appellant’s Counsel replied that the Respondent’s invocation of the intention and spirit of Article 38(2) of the Treaty was misleading and contrary to the Law and Principles of Treaty Interpretation to the extent that the Respondent’s interpretation required the Court to ignore the express language of the Treaty, which the Court could not do.

56. Counsel submitted that the Court should adopt the ordinary meaning rule of interpretation as provided in the Case of *The East African Centre for Trade Policy & Law VS The Secretary General of the East African Community – [EACJ Reference No. 19 of 2012]* and other cases such as *The Sussex Peerage* (1844) and *Uganda Revenue Authority V. Siraje Hassan Kajura [Civil Appeal No. 26 of 2013]*. All those cases hold that where the words of a text (Treaty or Statute) are clear and unambiguous, they must be given their natural and ordinary meaning. The Court should look at what is clearly said rather than the intendment or presumption.

57. In Counsel’s view Article 38(2) was clear and unambiguous: A Partner State which has a dispute before the Council or Court is to refrain from doing acts that are detrimental to the resolution of the dispute or which would aggravate it. It was an automatic injunction on the Partner State from doing acts which were detrimental to the resolution of the dispute or which would aggravate the same.

58. As regards the argument that the interpretation advanced by the Appellant would in effect put Article 39 in abeyance, Counsel pointed out that Article 39 was wider than Article 38 in that the orders issued under the former were not confined to injunctive relief but could also be mandatory ones for inspection, survey, valuation, taking of accounts, appointment of Receivers or even mediation.

Issue No. 3: Whether or not the Trial Court erred in law in declining to award costs to the Respondent.

Appellant's Submission.

59. The Appellant reserved its submission on costs until after knowing the Respondent's submissions thereon for the reason that he truly believed that the judgment ought to have been entered for him with costs.

Respondent's Submissions.

60. Counsel for the Respondent submitted that the Trial Court erred in law in depriving a successful party of costs in a matter where the Appellant was fronting his personal interests – the recovery of his remuneration and commission fees from China International. Counsel further submitted that based on the pleadings, the Reference, though disguised as brought for and on behalf of the people of Uganda, was not a Reference in the public interest because the Appellant not only sought declarations but also costs and fees lost as a result of the Uganda Government's failure to select China international for the Karuma dam Project.
61. The Respondent thus asked for costs in both the Trial Court and the Appellate Division.

Appellant's Reply.

62. The Appellant did not respond to the Respondents submissions on costs. He merely contented himself by contending that the Appeal should be allowed with costs here and below.

The Court's determination.

63. We intend to make our own findings on the issues framed systematically.
Issue No. 1: Whether the Trial Court erred in law in finding that the selection and subsequent signing of the Memorandum of Understanding between the GoU and Sinohydro was not inconsistent with and was not an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.
64. It is apposite to recall, albeit briefly, the way the Parties approached this issue and the Trial Court's Findings and Holding thereon. In doing so, we bear in mind that the conduct of the Respondent complained of by the Appellant was impugned as being inconsistent with and an infringement of Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty on two grounds: first, that it was done in violation and breach of the PPDA Act and Regulations, which lay down the governing legal and statutory framework for Public Procurement in Uganda, and secondly, that it was done in contempt of Court and in violation of High Court orders granted by the Courts of Uganda. We will highlight the Parties approach and the Trial Court's Findings on a ground by ground basis.
65. With regard to the challenged procurement's compliance with the internal law of Uganda, the Appellant's case, as disclosed in his Pleadings, Affidavit and Written Submissions was that the PPDA Act, which prescribed a tender process, was not followed and, accordingly, the procurement of Sinohydro and the subsequent signing of a MoU between it and the GoU were illegal. The Respondent's answer, as disclosed in its Pleading, the Affidavit in support thereof, and the Written Submissions was that the procurement, though not following the tender process prescribed by the PPDA Act, was legitimate on the strength of the existence of an executed bilateral agreement between the GoU and the Government of

China to secure funding for the Karuma Dam through Exim Bank of China. The Appellant, in reply to the Respondent's case denied the existence of such a bilateral agreement. During the highlighting of the Parties Submissions at the trial, the Respondent, for the very first time, invoked the provisions of Article 123 of the Constitution of the Republic of Uganda and contended that though the physical document was not produced in Court, its existence was established in other documents on Court record, and it was the prerogative of the President of Uganda to make such a bilateral arrangement and the form thereof was not prescribed by the said Article of the Constitution. In a rejoinder to this new argument, Counsel for the Appellant argued that both Article 123 of the Constitution of Uganda and Section 4 of the PPDA Act contemplated a written agreement.

66. The Trial Court dealt with this aspect of the issue in Paragraph 51 of its Judgment as follows:

“Taking all matters above into account, the bilateral arrangement may not be with us in writing but we have reflected over that fact and noting the terms of the contract signed on 16th August, 2013 as read with MOU dated 20th May, 2013 (sic), it is clear to us that an arrangement under Article 123(1) of the Uganda Constitution exists between the Government of Uganda and the Peoples' Republic of China whereby the latter, through its subsidiaries and agencies, would finance projects in Uganda on such terms as may be agreed between them. We say so because, it is inconceivable, to us at least, that the President, the Attorney-General, the Permanent Secretary in the relevant Ministry, the Executive Director of the PPA would all refer to “an arrangement” that does not exist. We have also noted that the obligation to produce evidence of such an arrangement in the context of the dispute before us was on Sinohydro. It is on record that Sinohydro was initially a party to these proceedings but was struck out for being improperly joined. How then can we hold the Respondent responsible for actions of a party not present to speak for itself? We reiterate that Clause 8 of the MOU enjoined Sinohydro in the following terms:

“This MOU shall be subject to Sino hydro's producing a supporting letter regarding this project from the Chinese Government within the bilateral arrangement between the Government of Uganda and the Chinese Government.”

67. Before progressing further, we think it is essential to reproduce the pertinent Constitutional, Statutory, and Treaty Provisions relied upon by the Parties herein. The Constitution of the Republic of Uganda.

“Execution of Treaties, Conventions and Agreements.

123(1) The President or a person authorized by the President may make treaties, conventions, agreements, or other arrangements between Uganda and any other Country or between Uganda and any other international organization or body, in respect of any matter.

(2) Parliament shall make laws to govern ratification of treaties, conventions, agreements, or other arrangements made under Clause 1 of this Article.”

The Public Procurement and Disposal of Assets Act, 2003

“2(1).This Act shall apply to all Public Procurement and disposal activities and in particular shall apply to –

(a). . .

(b) Procurement or disposal of works, services, supplies or any combination however classified by –

(i) Entities of Government within and outside Uganda;

4(1) Where this Act conflicts with an obligation of the Republic of Uganda rising out of an agreement with one or more states, or with an international organization, the Provisions of the agreement shall prevail over this Act.”

The Public Procurement and Disposal of Public Assets Regulations 2003

“5(1)Where an International Agreement requires a procuring and disposing entity to use an alternative procurement or disposal method, the entity shall inform the Authority in writing with supporting documents, including a copy of the International Agreement embodying the obligation.”

The Treaty for the Establishment of the East African Community

“Article 6

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(a). . .

(b). . .

(c) Peaceful settlement of disputes;

(d) good governance including adherence to the principles of democracy, rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples Rights;”

“Article 7

(2) The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

“Article 8

(1) The Partner States shall:

(a). . .

(b). . .

(c) Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of the Treaty.”

68. With that brief recall of the respective party’s cases and the conclusions of the Trial Court on this aspect of the matter, and bearing in mind the above provisions of Uganda’s internal law and of the Treaty, and having fully considered the rival submissions, we take the following view of the matter.

69. We accept the Appellant's submissions that the Trial Court having found there was no written bilateral agreement or arrangement produced before it, the Court erred in law in finding that such an agreement existed on the basis of inferences drawn from other documents on record including correspondence between Uganda Government officials. The Respondent's submissions to the contrary are rejected. We do so for the following reasons. First, as contended by Counsel for the Appellant, the Respondent's case as pleaded in the Response to the Reference and as deposed in the Supporting Affidavit of Christopher Gashirabake, the Director of Legal Advisory Services in the Attorney General's Chambers, was that the Government of Uganda had executed a bilateral agreement with the Peoples' Republic of China to, *inter alia*, secure funding through China Exim Bank for exclusive use in the construction of the Karuma Dam. Needless to state, an executed bilateral agreement had to be a written one. Secondly, the Internal Laws of Uganda all contemplated a written agreement. The heading to Article 123 of the Constitution of Uganda refers to execution of Treaties, conventions and agreements. And sub-article (2) thereof enjoins Parliament to make laws to govern ratification of such treaties, conventions, or arrangements. Again it is plainly obvious to us that one cannot execute or ratify an oral instrument. Only an instrument in written form is capable of execution or ratification. The PPDA Act in Section 4 bespeaks of an international agreement embodying an obligation on the part of the Government of Uganda conflicting with the Act. We agree with Counsel for the Appellant that this Section contemplates a written instrument whose terms could be compared by any concerned person with the provisions of the PPDA Act. The *coup de grace* is delivered by Regulation 5 of the PPDA Regulations. It requires a copy of the international agreement to be furnished to the Public Procurement Authority. Obviously, there cannot be a copy of an oral agreement.

70. Why then, it may be asked, all this analysis of Uganda's Internal law when the Court's jurisdiction is limited to the interpretation and application of the Treaty? To answer that question, we would adopt the exposition of the law and the reasoning of the Trial Court in Paragraphs 45 and 46 of its Judgment. The Trial Court delivered itself as follows:

"45. It cannot be gainsaid that this Court's jurisdiction is limited to the interpretation and application of the Treaty. In doing so, there may be instances where the Court may have to look to Municipal Law and compliance thereto by a Partner State only in the context of the interpretation of the Treaty. That is why for example, in *Rugumba V Attorney General of Rwanda*, EACJ Ref. No. 8 of 2010, this Court had to invoke the Penal Laws of the Republic of Rwanda to find that where a Partner State does not abide by its own Penal Laws and Procedures, then its conduct amounts to a violation of the rule of law and hence the Treaty.

46. Similarly, in *Muhochi Vs The Attorney General of the Republic of Uganda*, EACJ Ref No. 5 of 2011, the Court found that where a Partner State had declined to follow its immigration laws in declaring the Applicant a prohibited immigrant, then it was in breach of the Treaty and the Protocol on the Common Market which included the right of free movement of persons with EAC..."

We entirely agree. In short, in adjudging an impugned state action as being internationally wrongful this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with Internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the Principle of the rule of law, it is this Court's inescapable duty to consider the Internal Law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.

Be that as it may, we hasten to nonetheless sound a caution that it should constantly be borne in mind that the characterization of an act of the State as internationally wrongful- which is what a breach of a treaty is- is governed by international Law, and is not always necessarily coincident with the characterization of the same act as lawful by Internal Law. That principle was well stated in *Elettronica Sicula S.P.A. [Elsi] Judgment, [ICJ REPORTS], 1989*, p. 15 at paragraph 73, as follows:

“Compliance with Municipal Law and compliance with the provisions of the Treaty are different questions. What is a breach of Treaty may be lawful in the Municipal Law and what is unlawful in the Municipal law may be wholly innocent of violation of a Treaty provision.”

With that understanding of the law, we now proceed to determine whether the challenged procurement was in violation of the Treaty.

71. It is a cardinal principle of procedure in International Courts that he who asserts must prove. In Shabtai Rosenne: *The Law and Practice of The International Court, 1920-2005, Volume III, Procedure*, p. 1040, the general principles of evidence in the International Court of Justice is expressed thus:

“Generally, in the application of the principle *actori Incumbit probatio* the court will formally require the Party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given. ...As the Court has said: ‘Ultimately...it is the litigant seeking to establish a fact who bears the burden of proving it...’”

In other words, the burden of proof is on the one who would fail if no proof was offered. In the instant matter, it was the Respondent who asserted the existence of a bilateral agreement between the GoU and the Peoples' Republic of China which ousted the application of the PPDA Act in the Procurement of Sinohydro. It was the Respondent who was bound to fail in the absence of proof of such an agreement. The burden of proof was thus squarely on the Respondent. The Respondent could only discharge such a burden by producing the agreement relied upon either as an annexure to an affidavit or through a competent witness. In the event, the Respondent did not do so, and thus miserably failed to discharge its burden of proof. The proposition by the Trial Court that the obligation to produce the evidence of the existence of such an agreement was on Sinohydro is patently wrong. Sinohydro was not a party to the Reference and was not obligated to prove anything. Even the sentence in the MoU referred to by the Trial Court to support its conclusion in this respect does not, on a plain reading thereof, obligate Sinohydro to produce the bilateral agreement in any proceedings. Indeed, we wonder how an entity which was not a party to the

agreement could have been expected to have had custody of that agreement in order to have been in a position to produce the same in Court. The Respondent having failed to discharge its burden to produce the written bilateral agreement or arrangement, the legal conclusion that the selection and subsequent signing of the MoU between the GoU and Sinohydro was arbitrary, illegal and unlawful under Ugandan law, for being outside the provisions of the PPDA Act, was inescapable, for it was only its production which would have revealed the provision thereof that required the use of and choice of the procurement method that was used by the Respondent to select Sinohydro outside the PPDA Act and the Regulations. The Trial Court's finding that a bilateral agreement existed on the basis of inferences drawn from other documents including intra-governmental correspondence, though attractive at face value on the basis of the doctrine of good faith on the part of public officials, was misconceived in law and cannot be supported by this Court. We are fortified in that view of the matter by a journal article by Anthony D'Amato entitled "*Good Faith*" in Encyclopaedia of Public International law, 599-601, and (1992). The author after considering the evolution and application of the principle of good faith in international law concludes:

"In general, the uses to which the Principle of good faith now seem to be applied include statements made publicly, or in negotiations, or in the course of judicial proceedings. Nations must be more careful of what they say, because they may be held to it. This expanded role for the concept of good faith indeed appears to be consistent with its roots in a natural law conception of international law."

Taking inspiration from the above, we take the view that the Respondent having stated in its Response to the Reference and deponed in the supporting affidavit thereto that there existed an executed bilateral agreement between the Peoples' Republic of China and the Republic of Uganda on the financing of the Karuma Dam, the principles of good faith and of transparency required nothing less than production in Court of the said executed bilateral agreement by the GOU which placed reliance thereon to legitimize its departure from the provisions of the PPDA Act.

72. The upshot of our consideration of this aspect of the issue is that the procurement of Sinohydro to construct the Karuma Dam was in contravention of the Internal Laws of Uganda. We find in this case that such conduct by the Respondent offended the principles of the rule of law, transparency and accountability encapsulated in Articles 6(d) and 7(2) of the Treaty. We note in passing that the Appellant did not make out a case for the said conduct to be considered a violation of Article 6(c) of the Treaty which deals with peaceful settlement of disputes. However a case exists for holding that any conduct in breach of the rule of law is conduct which is likely to jeopardize the achievement of the objectives of the Treaty and, accordingly, offends Article 8(1) (c) thereof.
73. With respect to the complaint about the procurement having been done in contempt of Court or in disobedience or disregard of Court orders, the Trial Court dealt with the matter at Paragraphs 51,58,59 and 60 of its Judgment as follows:

"51.....The Respondent submitted that this Court cannot find

contempt when the affected Courts have not done so. We have no choice but to agree with the Respondent in that regard.

58 We say so because; the contempt of Court has been defined to mean “conduct that defies the authority or dignity of a Court. . .” – *Black’s Law Dictionary, Ninth Edition*. If that be so, the law and practice as we know it, is that contempt proceedings are in the nature of criminal proceedings and ordinarily an enquiry ought to be made as to the circumstances in which the alleged contempt was committed. Issues of service of the Court Orders, its contents and manner in which it was allegedly contravened are then addressed by the court that issued the said Orders. In the instant reference, we have seen no evidence that either the High Court or the Constitutional Court of Uganda were ever addressed on alleged disobedience of their orders. How then can this Court purport to take their place and determine that those orders were disobeyed or not; when the said Courts have not received any complaints in that regard?

59 Whatever our view on the orders issued by the said Courts, and whether or not they were disobeyed, is a matter that we deem unfit to delve into lest we fall foul of our jurisdiction. Had those Courts found the Respondent to have acted in contempt of their orders, then this Court could properly take that decision and apply it in determining whether the Respondent by that fact had also acted in contravention of the principle of the Rule of Law under the Treaty.

60 Having declined the invitation to address the issue of contempt of a court other than contempt committed in this Court, it follows that we have nothing more to say on the subject.”

74. We have carefully considered the rival submissions on the aspect of contempt or disobedience of Court Orders. Having done so, we accept the Appellant’s submissions that the Trial Court erred in law in finding that since the National Courts in Uganda had not been called to find, and had not found, that the Respondent in cancelling the procurement bids, selecting Sinohydro to undertake the Karuma Dam, and signing a MOU with Sinohydro to execute the project, was in contempt of Court, it lacked jurisdiction to delve into the alleged contempt and disobedience of the orders of those Courts and to determine whether such disobedience was a contravention of the principle of the rule of law under the Treaty. We also accept the submission that such a stand was an abdication of the Court’s mandate to interpret Articles 6(d), 7(2) and 8 (1) (c) of the Treaty. In the same breath, we reject the submissions by the Respondent to uphold the reasoning and findings of the Trial Court in that regard. We do so for the following reasons: First, it is the duty of the East African Court of Justice to interpret the provisions of the Treaty and to determine whether there is a contravention thereof. The Court can only do so by applying the facts found by itself to the provisions of the Treaty. We have seen in Paragraph 69 above that when the Court has to consider whether particular actions of a Partner State are unlawful and contravene the Principle of the Rule of Law under the Treaty, the Court has jurisdiction, and, indeed, a duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty. The Court does not and should not abide the determination of

the import of such internal law by the National Courts. By parity of reasoning, it should be equally obvious that when what is alleged to be a violation of the Treaty Principle of the Rule of Law is the disobedience of an order of the Court of a Partner State, the Court should not abide the determination, if any, by such National Court on whether such Court's order has been disobeyed. It is for this Court to satisfy itself, without the input of the National Court, whether there has been disobedience or disregard of a Court order and to apply that finding in the interpretation of the Treaty; Secondly, the stand taken by the Trial Court was a departure from this Court's previous decision in *James Katabazi & 21 others vs. the Secretary General of the East African Community and the Attorney General of the Republic of Uganda*, [EACJ Reference No. 1 of 2007]. In that case, James Katabazi and other persons were in 2004 charged with the offences of treason and misprision of treason and remanded in custody. The High Court of Uganda granted bail to fourteen of them. Immediately thereafter the High Court was surrounded by security personnel who interfered with the preparation of bail documents and they were re-arrested and taken back to jail. Subsequently, all the Claimants were taken before a Military Court Martial and charged with offences of unlawful possession of firearms and terrorism. The Uganda Law Society challenged in the Constitutional Court the aforesaid interference with the Court process by the security personnel. The Constitutional Court ruled that the interference was unconstitutional. Despite that decision of the Constitutional Court, the complainants were not released from detention. They referred the matter to this Court averring that the rule of law required that public affairs be conducted within the law and decisions of the Court are respected, upheld and enforced by all agencies of the Government and citizens, and that the actions of the Government of Uganda and its agencies were in blatant violation of the Rule of Law and an infringement of the provisions of Articles 6(d), 7(2) and 8(1) (c) of the Treaty on grounds of contempt of Court and interference with the independence of the Judiciary. After hearing arguments, the Court (which then, unlike today, did not have an Appellate Division) proceeded to propound on the meaning of the rule of law, and delivered itself as follows:

“We hold that the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court Order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the Court decision is the cornerstone of the independence of the Judiciary which is one of the principles of the observation of the rule of law.”

What is important for the purpose of this Appeal - and we would emphasize it- is that the Court did not fold its arms and await the filing and determination of any contempt proceedings in the Ugandan Courts before considering and determining that the conduct complained of was a violation of the rule of law and, as such, a contravention of the Treaty .If we may say so, the approach taken by the Bench that presided in the *Katabazi* case was manifestly correct. Contempt of Court is defined in *Black's law Dictionary, 7th edition* as:

“A disregard of or disobedience to, the...orders of...a judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the

proceedings or to impair respect due to such a body.”

If pertinent facts about the existence of National Court orders and a State’s subsequent contrarian conduct are brought to the attention of this Court, the Court does not need, let alone require, the assistance of the National Court, in any form or shape, to determine whether the Treaty has been breached in those circumstances. Thirdly, it is offensive to principle and logic that in a Court whose jurisprudence is clear that a party does not have to exhaust domestic remedies before approaching it, the exercise of the Court’s jurisdiction to interpret the Treaty should be tied to a determination of the import of the internal law or an adjudication of contempt of court by that State’s National Courts. To support the position taken by the Trial Court would be perilously close to making this Court subservient to, and subject to, the vagaries of judicial interpretation by National Courts. It would be tantamount to surrendering to National Courts our jurisdiction to interpret the Treaty. We refuse to countenance such a spectacle. In short, we are of the firm view that the Trial Court was entitled to find whether there had been contempt of or violation of Court orders by the Respondent even without their having been such a finding by the National Courts of Uganda and to apply such a finding(s) to its interpretation of Articles 6, 7 and 8 of the Treaty.

75. Having found that the Trial Court abdicated its jurisdiction to interpret the Treaty in the context of alleged disobedience or contempt of Court orders by the Respondent, and the facts of the existence of the Court Orders and the Respondent’s subsequent conduct being undisputed, we must now exercise that jurisdiction.
76. From the record, it is not evident what date Sinohydro was selected to undertake the construction of the Karuma Dam. However, it is crystal clear that it was sometime between 24th April, 2013, when all bidders in the initial procurement process were notified of the cancellation of their bids, and 20th June, 2013, when the MoU between GoU and Sinohydro was executed.
77. It is not in dispute that at all material times, the following Orders were in place:-
 - (a). In *Judicial Review Miscellaneous Application No. 11 of 2013*, the Uganda High Court at Nakawa had issued:
 - (i). An *ex parte* interlocutory order for the preservation of the *status quo* restraining/prohibiting the implementation of the IGG Report pending the final disposal of the Judicial Review Application on 18th April 2013, and the same was extended, by consent, on 22nd April, 2013.
 - (ii). Final orders restraining the Respondent from implementing or taking into account the recommendations in the IGG Report and directing the Respondent through the Permanent Secretary ME & MD to declare the best evaluated bidder for EPC Contract for the Karuma Dam on 20th May, 2013.
 - (b). In *Constitutional Application No. 13 of 2013: Andrew Baryayanga vs. the Attorney General of Uganda*, the Constitutional Court on 24th April 2013 issued an Interim Injunctive order restraining the GoU/ Cabinet, or the ME & MD from implementing the recommendations of the IGG report dated 22nd March, 2013, or in any other manner from interfering with the final process of the procurement of a Contractor for the Karuma

Dam, including awarding a contract to the best evaluated bidder, or in any other manner implementing the said recommendations until the determination of the main application or such further or other Order of the Court. This Order was served on the Respondent on 25th May, 2013.

78. Despite those orders, the original procurement bids were cancelled on 23rd April 2013 and Sinohydro was selected as the Contractor of the Karuma Dam outside the framework of the original procurement process subject matter of the IGG Report and the MoU between the Company and the Government of Uganda was signed on 20th June, 2013.
79. The Appellant's case, it may be recalled, was that those actions were in contempt of or in breach of the Court Orders and, as such, a contravention of the principle of the rule of law encapsulated in Articles 6(c) and 7(2) of the Treaty. The Respondent's case was that those Orders did not suspend the application of Section 75 of the PPDA Act, under which the cancellation of the initial procurement process was effected, and that such cancellation rendered the Court orders futile, spent and lifeless.
80. Upon full consideration of the rival arguments, we have come to the following findings and holding. Had the initial procurement process subject matter of the IGG Report not been cancelled on 23rd April, 2013, the selection of Sinohydro as the Contractor for the Karuma Dam and the subsequent signing of the MoU on 20th June, 2013 would not have happened. From the Statement of Response and the Affidavit of the Director of Legal Advisory Services in the Attorney General's Chambers, the sequence of events is crystal clear: the IGG issued its report recommending cancellation of the procurement on 22nd March 2013; the Cabinet of Uganda debated the Report on 12th April, 2013 and directed the ME & MD to cancel the procurement process; and on 23rd April, 2013 the Contracts Committee of the ME & MD pursuant to Section 75 of the PPDA Act obliged. As of the date of the cancellation, there was in existence the Consent Order of 22nd April, 2013 given by the Ugandan High Court. The subsequent selection of Sinohydro was, therefore, *ex facie*, in disobedience or defiance of the said Court Order. And the signing of the impugned MoU on 20th June, 2013 was also, *ex facie*, in disobedience or defiance of the same order as well as the order of the Constitutional Court issued on 24th April, 2013. We find the argument by Counsel for the Respondent to the effect that since the cancellation was grounded on Section 75 of the PPDA Act it did not offend the Court Orders to be disingenuous. True, the said provision of law was not suspended or placed in abeyance by the said Court orders, nor was it in anywise mentioned in the said orders. However, the cancellation of the Procurement was clearly prohibited by the terms of the Order of 22nd April, 2013, preserving the *status quo*. Section 75 was merely the technical legal ground on which the cancellation- which was an obvious alteration of the *status quo*- was pegged. The Cabinet having directed the cancellation, it was not expected that the Procuring entity would implement the decision on the mere authority of the Cabinet Decision. Some legal basis had to be given. The invocation of Section 75 could not, and did not, however, remove the stigma of contempt of or disobedience of Court orders from the decision. Observance of the rule of law dictates that when an act has been prohibited by a court order, unless and until such an order has been set aside or vacated by the

same Court or another court of competent jurisdiction, such act is prohibited, and no reason or ground advanced for doing it can suffice to legitimize such action. Lawful justification for disobedience of Court orders, we say loudly, is not a creature known to the law. It is a pure and simple contradiction in terms. In the result, we find and hold that the selection and subsequent signing of the MoU between the GoU and Sinohydro was in disobedience or disregard of pertinent Court orders and, as such, a violation of the Treaty Principle of the Rule of Law.

81. In Paragraph 72, we found and held that the selection and subsequent signing of the MoU between GoU and Sinohydro was in violation of the Law of Uganda and a contravention of the Treaty Principle of the Rule of Law. In Paragraph 80 above, we have found and held that the actions were also in disobedience or disregard of pertinent Court orders and, for that reason also, a contravention of the Treaty Principle of the Rule of Law. We have further found that any action which offends the Principle of the Rule of Law has the effect of jeopardizing the achievement of the objectives of the Treaty.
82. Before concluding our consideration of the Principle of the Rule of Law in the Treaty, we must say this: Observance of the Rule of law restrains the arbitrary will of the strong, it is the sure protection of all, it equalizes the unequal, it is the antithesis of arbitrariness, and it is the nemesis of anarchy. Without the Rule of Law, justice, peace and security would be mere chimeras. In light of that, it is clear that observance of the Rule of Law is the premier value of the East African Community. Disregard of it will torpedo the ship of regional integration. If laws are disregarded and court orders treated with contempt, we will march back to the dark cold days of Thomas Hobbes' state of nature when life was solitary, poor, nasty, brutish and short. We believe it was in recognition of the above self-evident truths that the framers of the Treaty created this Court and placed it at the centre of its scheme of regional integration by vesting it with the authority to ensure adherence to law in the interpretation and application of, and compliance with the Treaty (Article 23).
83. With respect to any Government's adherence to the rule of law, we think that the cardinal importance thereof was best expressed by Justice Louis Brandeis of the United States Supreme Court in the following eternal words in *Olmstead V United States*, [1928], 277 U.S. 438 :
- “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.... If the Government becomes a law breaker, it breeds contempt for the law.”
- We cannot agree more. It behoves all Government functionaries, and especially those in the service of the law, to constantly keep their eyes fixed on that truth.
84. In the result, whichever way we look at this matter, we are impelled to conclude that the conduct of the Respondent complained of was inconsistent with and an infringement of the Treaty. And the further inexorable conclusion is that the Trial Court erred in law in finding that the selection and subsequent signing of the MoU between the GoU and Sinohydro was not inconsistent with and was not an infringement of Articles 6(d), 7(2) and 8 (1) (c) of the Treaty.
85. We accordingly answer Issue No. 1 in the affirmative.

Issue No. 2: Whether the Trial Court erred in law in finding that the act of the

Government of Uganda in implementing the MoU between itself and Sinohydro after the filing of the Reference was not inconsistent with and was not an infringement of Article 38(2) of the Treaty.

86. We think it is necessary for the determination of this issue to read the pertinent Treaty provision. It reads:

“38 (2). Where a dispute has been referred to the Council or the Court, the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute.”

87. We observe at once that this provision of the Treaty is incongruous. The heading to Article 38 is “Acceptance of Judgments of the Court”. The provision clearly has nothing to do with acceptance of the Court’s Judgments and is, thus, misallocated. Perhaps at an appropriate time, the Competent Authority to revise or amend the Treaty will find a more appropriate location for it.

88. We now return to the consideration of the issue. We have seen in Paragraph 34 (b) above that the Trial Court found and held that Article 38(2) of the Treaty did not expressly or impliedly provide for an automatic injunction or stay of the process or action complained of without the adverse party being heard, for to hold otherwise would render the Rule of Law meaningless.

89. The substance of the Appellant’s submissions on this aspect of the matter was that the Trial Court erred in its interpretation of Article 38(2). In his view, a proper interpretation would have led to the conclusion that the Article was an automatic injunction on a Partner State to refrain from doing acts that were detrimental to the resolution of the dispute or which would aggravate it. Counsel for the Respondent, on his part, took the view that the provision called for self-censorship by the Partner State in a dispute before either the Council or the Court, but that it did not bar or stop a Partner State from doing acts which it conceived as not being detrimental to the resolution of the dispute or not aggravating the same.

90. We have considered the rival submissions. Having done so, we think our entry point into the issue should be a consideration of the proper approach to Treaty interpretation. We dealt with the matter extensively in the case of *A Request by the Council of Ministers for an Advisory Opinion, [EACJ Advisory Opinion No. 1 of 2015]*. In that case, we invoked the general rules of interpretation of treaties codified in Article 31 of the Vienna Convention on the Law of Treaties, 1969. That Article stipulates that:

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

2. The context for the purpose of the interpretation of a Treaty shall comprise, in addition to the text, including its preamble and annexes;

(a) An agreement relating to the Treaty which was made between all the parties in connection with the conclusion of the Treaty;

(b) An instrument which was made by one or more parties in connection with the conclusion of the Treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the Treaty or application of its provisions;

- (b) Any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rule of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

91. Pursuant to the above guidance of Article 31 of the Vienna Convention of 1969, we take it that the golden rule of treaty interpretation is that the words of a treaty must, in the absence of ambiguity, be interpreted in good faith and in accordance with their ordinary and natural meaning. Adopting that approach, we think the issue here is what the good faith ordinary meaning of the phrase “the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute.” According to *Collins English Dictionary & Thesaurus*, the word “refrain” means “to abstain (from action); to forbear.” In the Thesaurus, the alternative meaning is given as “stop, avoid, give up, cease, eschew, and leave off.” To our mind, there is no difficulty in comprehending the meaning of the words “refrain from any action”. It simply means to apply a break to an intended action. The real difficulty lies in the interpretation of the phrase “which might be detrimental to . . . or might aggravate”. We think the word “might” in the clause imports an element of opinion or judgement. The answer to the question of whose opinion or judgement is the material one is crucial to the determination of the issue before us. We are of the persuasion that the relevant opinion or judgement is that of the Partner State involved in a dispute which has been referred to either the Council or the Court. Being of that mind, we agree with the submission of the Respondent’s Counsel that the sub article is really a call by the Treaty to self-censorship by the Partner State concerned and does not amount to an automatic injunction by the Treaty against the Partner State concerned as contended by Counsel for the Appellant.
92. The Government of Uganda having been thus entitled to exercise a judgement on whether or not the implementation of the MoU could have aggravated the dispute or been detrimental to its resolution, and having exercised such judgement in favour of the implementation of the MoU, could its conduct be censored and sanctioned by this Court as a contravention of the Treaty? No matter what our own views may be of its conduct in the circumstances obtaining at the time, our answer must be “No!”
93. The above conclusion is sufficient to dispose of this issue. However, as the Trial Court reached the same conclusion on different reasoning, we are impelled to delve further into the matter.
94. As seen in Paragraph (34) (b) and (53) above, the Trial Court arrived at its decision by relying on the authority of its own decision in *Timothy Alvin Kahoho vs. The Secretary of the East African Community [EACJ Application no of 2012]* where it opined that Article 38 (2) did not act as an automatic injunction once a dispute had been referred to the Court or to the Council. The Court put the matter this way:

“As for the provisions of Section 38(2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of Injunctive relief is made by the Court in exercise of its discretionary

power. Therefore Article 38(2) cannot be seen as removing that long held position without expressly saying so.”

Counsel for the Respondent supported that reasoning and submitted that to hold otherwise would in effect render Article 39 of the Treaty redundant, and would be contrary to the intention and spirit of Article 38(2), as a window for abuse would be opened because parties would be encouraged to file frivolous and vexatious applications in Court with the sole intent of paralyzing a Partner State’s operations.

95. We wish to state that, in our opinion, Articles 38(2) and 39 are not related, and they address different concerns and situations. Article 38(2) concerns the conduct of a Partner State in a situation where a dispute in which it is a party has been referred to either the Council or the Court. It enjoins such Partner to exercise self-restraint in respect of conduct or actions with a possibility of aggravating the dispute or which would be detrimental to its resolution. The provision has nothing to do with the grant of coercive judicial injunctive relief. The latter is the province of Article 39. In the circumstances, the appreciation that Article 38(2) does not amount to an automatic Treaty (as opposed to a Judicial) injunction does not require to be supported by any references to the principles germane to the grant of judicial injunctive relief. In that regard, we think that the Appellant’s Counsel’s criticism of the Trial Court’s reasoning is well merited, as the Court’s reasoning suggested that the provisions of Article 38(2) were to be read subject to and with a view to harmonizing them with the Partner States’ Internal law jurisprudence on interlocutory injunctions. That view was manifestly wrong as it offends the principle of customary international law now codified in Article 27 of the Vienna Convention on the Law of Treaties of 1969 which provides that:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”

We need not say that National court decisions and their long held jurisprudence are internal laws and, as such, cannot be invoked to circumvent treaty obligations.

96. In short, our opinion is that the Trial Court, albeit on flawed reasoning, arrived at the right conclusion in law on the import of Article 38(2) of the Treaty.
97. The upshot of our consideration of this issue is that the Trial Court did not err in law in finding that the acts of the Government of Uganda complained of were not inconsistent with or an infringement of Article 38(2) of the Treaty.
98. Issue No. 2 is, accordingly, answered in the negative.

Issue No 3: Whether the Trial Court erred in law in declining to award costs to the Respondent?

99. We think that this issue is inextricably tied to the respective parties entitlement to the remedies prayed for. Indeed the award of costs was only one of the remedies sought. We will accordingly determine it under the broad rubric of remedies.

The Remedies.

100. The Appellant prayed that the Judgment and Order of the Trial Court dated the 28th day of November, 2014 in Reference No. 4 of 2013 be set aside and the Appeal be allowed with costs to the Appellant here and in the Trial Court. He further prayed that judgment be entered for the Appellant as prayed in the

Statement of Reference.

101. The Respondent naturally prayed for the Appeal to be dismissed with costs both in the Trial Court and in this Court.
102. In Paragraph 19 above, we set out the remedies sought by the Appellant. We shall consider them one by one. Before we do so, we are constrained to observe that in this Appeal we did not have the benefit of the arguments of Counsel on the remedies. Perhaps that was as a result of how the issues in the Appeal were framed by the Parties with the guidance of the Court. No specific issue was framed with respect to remedies, and so it came to pass that no arguments thereon were made. We are in the circumstances impelled to proceed on the basis that the submissions made thereon in the Trial Court and that Court's determination thereof, were taken by the Parties as adequate for the disposal of the Appeal.
103. Our entry point into the issue of remedies is that in international law, a breach of a treaty obligation by a contracting State is an internationally wrongful act of that State and it entails its international responsibility. Treaties usually do not prescribe the remedies available. The remedies for a treaty violation are found in the body of law known as state responsibility. In 2001, the International Law Commission (ILC) produced a final set of draft articles (ILC draft articles) to codify the law on state responsibility [For a complete text of the draft articles and the official commentary thereon see *Year Book of the International law Commission, 2001, volume II*]. Part II of the ILC codification details those remedies. They are cessation of the wrongful conduct and assurances of non repetition (article 30) and reparation (article 31). Reparation encompasses restitution in kind, compensation, and satisfaction. It is important to note that it is not disputable that the ILC Draft Articles are a codification of customary international law on State Responsibility.
104. The Reference subject matter of this Appeal was however not made by an aggrieved Partner State but by an individual under Article 30 of the Treaty which creates a procedure whereby a non state entity can invoke the state responsibility of a Partner state on its own account without the intermediation of any other state as would have been the norm in customary international law, where individuals were not subjects of international law. The crucial question therefore is whether the above remedies which are available to other Contracting States are also available to non state subjects of international law, such as the Appellant. In that regard ILC draft article 33 is salutary. It reads as follows;
- “33 (1). The obligations of the responsible state set out in this part may be owed to another state, to several states, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
- (2). This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”

The ILC official commentary on this Draft Article states that:

“The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than states, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and

to what extent persons or entities other than States are entitled to invoke the responsibility on their own account. Paragraph 2 merely recognizes the possibility; hence the phrase “which may accrue directly to any person or entity other than a state...” [See *Year Book of ILC, 2001, vol .II, p .95*]

Now, we apprehend the provisions of Draft Article 33 and the commentary thereon to be comprehended in this: where a primary rule of international law (such as the Treaty) entitles a non-State actor to invoke the international responsibility of a State, the legal consequences are not to be sought in the ILC Draft Articles 30 or 31 but are left to be determined by the Tribunal before which such responsibility is invoked in accordance with the primary rule.

105. Article 23 of the Treaty has conferred on this Court the duty to ensure adherence to the law in the interpretation, application and compliance with the Treaty. And Article 30 has given any person who is resident in a Partner State the right to directly invoke State responsibility on his own account without the intermediation of the State to which he is a national. The Treaty itself (not unusually) has not prescribed the nature and form of the international responsibility entailed by a breach thereof. In those circumstances, we are of the considered opinion that the Treaty having provided a right, it is for the Court to provide such remedy or remedies as may be appropriate in each individual case. And it may be said that in providing a remedy, the Court does no more than implement the obligation that was not respected. In our view, the legal consequences to be visited upon the State in breach of its international obligation to a resident of a Partner State may, in appropriate cases, include cessation (usually known as Injunction in Internal law), or reparation (which usually takes the form of Damages), or similar, or other remedies. The jurisprudence of this Court indeed discloses that the remedies of Declaration and Injunction have been granted in appropriate cases. On that footing, we now proceed to consider the remedies sought by the Appellant *seriatim*

(a) Declaration that the selection and subsequent signing of the MOU between GOU and Sinohydro was inconsistent with and an infringement of Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.

106. In the Trial Court, the Appellant contended that a finding in the affirmative on Issue No. 1 in that Court (it was in substance Issue No. 1 in the Appeal) – should entitle him to the above order.

107. The Respondent’s submission was twofold: First, that issue number 1 was to be answered in the negative; and secondly, that Courts should not grant a declaration unless the remedy would be of real practical value to the Claimant. Reliance was placed on the English cases of *Bennet V Chappell* [1960] CH. 391, (C.A), where the Court held that “the Court in its discretion will not grant a declaration unless the remedy would be of real value to the Plaintiff”, and *Williams V. Home Office* (No. 2) [1981] ALL ER 1211, where it was held that “the Court will not grant declarations which are academic and of no practical value.” It was the Respondent’s argument that the declaration sought is of no real value as the impugned MOU had already been fully implemented and replaced with a Commercial Contract for Engineering Procurement and Construction of the Karuma Dam signed on 16th August, 2013 between the GOU and Sinohydro.

108. The Appellant’s rejoinder was that this Court gives interpretative decisions

declaring whether acts of Partner States are infringing or have infringed Treaty Provisions; and that a declaration to that effect was a sufficient driver for a Partner State respecting the principle of adherence to the rule of law to reverse all acts done pursuant to the impugned actions.

109. The Trial Court answered Issue No. 1 in the negative and, accordingly, it did not deal with the Issue of the practical value of the declaration sought.

110. On our part, we have answered the issue in the affirmative. The Appellant should, therefore, be entitled to the declaration sought unless we have been persuaded by the English authorities cited by the Respondent that the declaration sought ought to be declined on the grounds that it is of no real value to the Appellant.

111. We say straight away that the English cases cited are of no persuasive value to this Court. They propound the law in a jurisdiction where the grant of the remedy of Declaration is discretionary [see *Halsbury's Laws of England, 4th Edition (Reissue), paragraph 108*]. In our Court, the interpretation and application of the Treaty is our core mandate. A declaration of violation, or infringement of, or inconsistency of any action of a Member State with a Treaty violation is not a discretionary remedy. It is a command of the Treaty. The submission of the Respondent to the contrary is rejected as being ill founded. In the result, we find that the answer to Issue No. 1 being in the affirmative, the Appellant is entitled to the Order of Declaration sought subject to slight amendments thereof to align the facts with pertinent Treaty Provisions. We saw in Paragraph 83 that the Treaty Provisions offended by the Respondent's actions were Articles 6(d), 7(2) and 8(1) (c). An Order of Declaration will issue accordingly.

(b) Order enforcing and directing the immediate compliance with the Treaty and/or performing of the State obligations and responsibilities of the GoU under the Treaty by:

(i). Directing the GoU to cancel the MoU signed between it and Sinohydro on the 20th June 2013 for the construction of the Karuma dam.

(ii). Directing the GoU to comply with the Court Order in Nakawa high Court Miscellaneous Cause No. 11 of 2013 – *Hon. Andrew Baryayanga Aja Vs Attorney General* ordering award of the Contract to the best evaluated bidder for the Engineering Procurement and Construction Contract for the Karuma dam.

(iii). Reinstating the *status quo* before the selection of Sinohydro and subsequent signing of the contract between the GoU and Sinohydro.

112. The Appellant submitted that under Article 23 of the Treaty, the Court has jurisdiction to ensure adherence to the law in the interpretation and application of and compliance with the Treaty against a Partner State found in breach. He further submitted that compliance meant doing what was required to be done under the Treaty and the Court was empowered to ensure such compliance by reversing acts done in breach of the Treaty. The Appellant strongly contended that it was not enough for the Court to make and issue declarations. It had the duty to right the wrong by reversing the impugned acts by directing the cancellation of the MOU and reinstatement of the *status quo* as at the time of the Court order in Miscellaneous Cause No. 11 of 2013 ordering the Respondent to

award the Contract to the best evaluated bidder.

113. The Respondent's answer to the above submissions was this. First, with respect to the cancellation of the MoU, it was contended that the order sought was academic in nature as the MoU had been fully implemented and replaced with a Commercial EPC contract for the Karuma Dam. With respect to the direction to the GoU to comply with the Court order relied upon and a reinstatement of the *status quo* before the selection of Sinohydro, it was submitted that those orders were untenable in law and logics for the reasons that bids had been rejected and, at the time of the rejection, no award had been communicated to any of the bidders; the High Court order had been appealed against in the Court of Appeal of Uganda and the determination thereon was still pending; a Constitutional Petition on the same subject matter as the entire Reference was pending determination in the Ugandan Courts; and the Orders sought would also affect third parties, namely, the citizens of Uganda who seriously needed the important project, and Sinohydro who has been on site since 2013.
114. The Appellant's rejoinder was this. With respect to the MoU having been displaced by the EPC Contract, the Appellant contended that the EPC Contract ought not to have been signed as by dint of Article 38(2) of the Treaty, nothing further ought to have been done after the filing of the Reference in June, 2013, and anything done thereafter was an abuse of the Court Process and the Court should not allow itself to be used to deny justice on account of abuse of its process. With respect to compliance with Court orders, the Appellant contended that once it was found that the Karuma Dam was proceeding contrary to the Rule of Law, then the Respondent had to be ordered to adhere to the Rule of Law by stopping the construction of the dam. With respect to the contention that the orders would unfairly affect third parties, the Appellant argued that apart from the impossibility of Sinohydro being a party under Article 30 of the Treaty, the court orders relied upon were orders in *rem* and not in *personam* and, accordingly, bound all persons whether they were parties to the Reference or not. Furthermore, Counsel contended, the rule of law and good governance were so sacred that they could not be allowed to be breached to satisfy third parties.
115. The Trial Court gave short shrift to the Appellant's submissions. With respect to the order for cancellation of the MoU, it merely found no merit in such an action. In addition, it noted that the same issue was live before the Courts in Uganda and advised the Appellant to pursue the pending matters in Uganda to their logical conclusion. With regard to the direction to comply with Court orders and the reinstatement of the *status quo* before the selection of Sino hydro, the Trial Court reiterated that it had no jurisdiction to entertain them before Courts in Uganda had made a finding of contempt of their orders.
116. We have now reflected on the above weighty submissions and the Trial Court's determination on prayer (b). Having done so, we have come to the following conclusion.
117. Prayer (b) is in substance seeking a Mandatory Injunction against the Government of Uganda directing it to comply with its Treaty obligations to observe the principle of the rule of law by reversing all the actions taken by its various agencies after the Court order of 22nd April, 2013 which maintained

the *status quo* before the cancellation of the initial procurement process for the Karuma Dam and restrained any conduct contrary thereto.

118. We agree with the submission of Counsel for the Appellant that the jurisdiction of this Court is not limited to the making and granting of declaratory relief only. On the authority of Article 23, this Court has the Jurisdiction and duty to make such other relief as may be congruent with adherence to law in the interpretation and application of the Treaty. As seen in paragraph 104, such relief may in appropriate cases, include cessation (usually known as Injunction in Internal law), or reparation (which usually takes the form of Damages), or similar, or other relief. And, of course, Injunctions may be mandatory or prohibitory. Thus the only real issue is whether the relief sought by the Appellant was for granting in the circumstances of the matter before us.
119. With respect to the order to cancel the MoU between the GoU and Sinohydro, we are persuaded that such an order would be academic and futile. There is no dispute that as at the time of the Reference, the MoU had been implemented and mutated into an EPC Contract for the Karuma Dam. There was no more left of the MoU. We must say that when we don our gowns, step out of our chambers, and enter the temple of justice to do our sacred duty of dispensing justice, we never ever leave our common sense outside. As a Court of Law, we cannot act in vain and we, accordingly, decline to order the Respondent to cancel the MoU between the GoU and Sinohydro. To the Appellant's argument that the EPC Contract ought not to have been signed after the filing of the Reference by dint of Article 38(2) of the Treaty, our answer is that we have found that Article 38(2) did not constitute a statutory injunction against a Partner State whose actions were the subject of a complaint before either the Council or the Court and, accordingly, the Government of Uganda was within the law to sign the EPC Contract.
120. With regard to the Direction to comply with the Court order and reinstate the *status quo*, we reject the Respondent's objections thereto and wholly disagree with the Trial Court's reasoning on the issue. We have elsewhere found and held that the Trial Court's conclusion that it could not make a finding on whether the actions of the Respondent were in contempt of Court and were made in disobedience or disregard or dishonor of Court Orders, without a finding to that effect by the Courts of Uganda, was an abdication of that Court's duty to interpret the Treaty. Such an abdication of duty cannot obviously be sustained as a good ground to decline the relief sought. And the proposition by Counsel for the Respondent, and the conclusion by the Trial Court, that the orders sought could not be granted because they would unfairly affect third parties to the Reference are also flawed. Decisions of this Court under Article 30 of the Treaty are decisions *in rem* (binding as against both the parties and non parties alike) and not *in personam* (binding only on the parties before the court). The Court cannot shirk its duty to make such decisions because third parties who have not been afforded an opportunity to be heard are thereby affected. In any event, we wonder how Sinohydro which was not alleged to be either an Organ or Institution of the Community, or the Citizens of Uganda in their collective self, who cannot be enjoined as a Party, would have been enjoined in the Reference, and by whom, in order that they could be granted an opportunity to be heard.

The issue of who may be an Applicant or Respondent under Article 30 of the Treaty is determined by the Treaty itself and no party could seek to add thereto, and the Court could not direct otherwise. We also do not accept that it was a good reason not to grant the relief prayed for because there were live proceedings in the form of an Appeal and a Constitutional Petition in the Courts of Uganda concerning the self-same matters in the Reference. The Trial Court having been seized with a matter over which it had jurisdiction, it was bound to dispose it without deference to the Courts of Uganda.

121. Despite our disagreement with the Trial Court's reasoning we have, without any hesitation, come to the conclusion that this relief was not, and is now not, for granting. The reason is simple. Remedies are only to be granted to the extent possible. Here, the court is faced with the sheer impracticability of the orders sought. The record reveals that too many actions, which ought not to have been done, have been done, and it is now impractical to reverse the construction of the Karuma Dam by Sinohydro. It is, from the stand point of fidelity to the law, an unfortunate *fait accompli*. The remedy sought by the Appellant was, thus, inappropriate in the circumstances and the same was, albeit for the wrong reasons, rightfully refused.

(c). Order for Costs.

122. The Trial Court denied the successful Respondent costs on the ground that the Reference was brought for personal reasons and in the public interest.

123. In this Court, the fortunes of the Parties are mixed. The Appellant has succeeded in

Issue No. 1 but failed in Issue No. 2. The honours are thus evenly divided. For that reason, we think the just order as to costs is that each party should bear its own costs here and below.

124. To summarize our consideration of prayer (b) in the Reference, the Appellant is entitled to an order for a Declaration of breach of the Treaty by the Respondent. He is not however entitled to the enforcement orders sought including a restoration of the *status quo*. With regard to costs, each party shall bear its own cost.

D. Summary and Conclusion.

125. We have held in Paragraph 84 that the Trial Court erred in law in finding that the selection and subsequent signing of the MoU between the Government of Uganda and Sinohydro was not inconsistent with and was not an infringement of Articles 6(c), and 7(2) and 8(1) (c) of the Treaty. In Paragraph 97, we have held that the Trial Court did not err in law in finding that the acts of the Government of Uganda in implementing the MoU between itself and Sinohydro after the filing of the Reference was not inconsistent with and was not an infringement of Article 38(2) of the Treaty. And in Paragraph 124, we held that the Appellant was entitled to the Declaration sought in Prayer (a) in the Reference, that he was not entitled to the enforcement orders sought in Prayer (b), and that each party should bear their own costs of the Reference and the Appeal.

126. In the result, the appeal is partially allowed and the Cross-Appeal is dismissed with Orders that:

- (a). That part of the Judgment of the Trial Court refusing to issue a Declaration that the selection and subsequent signing of a Memorandum of Understanding between the Government of Uganda and Sinohydro was inconsistent with and an infringement of Articles 6(c), 7(2), and 8(1) be, and is hereby, set aside.
- (b). A Declaration be, and is hereby, issued that the selection and subsequent signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro was inconsistent with and an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.
- (c). That part of the Judgment of the Trial Court issuing an order of Declaration that the acts of the Government of Uganda in implementing the Memorandum of Understanding between itself and Sinohydro after the filing of the Reference was not inconsistent with or an infringement of Article 38(2) of the Treaty be, and is hereby, upheld.
- (d). Each party shall bear their own costs here and below.

It is so ordered.

M. Mbabazi, Counsel for the Respondent

E. Bafirawala, R. Adrole and S. Akello for the Appellants

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First Instance Division

Application No. 1 of 2015
(Arising from Reference No. 6 of 2014)

Dr. Ally Possi, Centre for Human Rights, University of Pretoria

v

**Human Rights Awareness and Promotion Forum (HRAPF), The Attorney
General of the Republic of Uganda**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo; F. Jundu, & A. Ngiye, JJ
November 25, 2015

Amicus curiae - Judicial discretion- Special duty to provide new relevant cogent helpful information - Academic intervention - No power of attorney to institute application on behalf of an institution

Rule 36, East African Court of Justice Rules of Procedure, 2013

The Applicants sought leave to be joined as *Amici Curiae* in the Reference filed by the first Respondent challenging the validity of certain sections of the now repealed Uganda's Anti-Homosexuality Act, 2014. They claimed to have knowledge of the functioning of EACJ and would assist the Court to make a definitive pronouncement as to what constitutes a human rights jurisdiction as distinct from the interpretative jurisdiction of the Court. The 1st Applicant, a lawyer and concerned citizen of East Africa, deposed an affidavit on behalf of the 2nd Applicant alleging that he had a power of attorney that was lodged at the EACJ Sub-Registry in Dar es Salaam, Tanzania, but it was not in the Court records.

The Respondent opposed the application stating that an *amicus curiae*, must bring new and useful information or evidence which would add value to the Court's determination of the issues in contest and the 1st Applicant did not meet certain standards set for a party that wishes to be joined as an *amicus curiae*.

Held

1. There was no proof that the 1st Applicant was authorized institute this application and to file an affidavit on behalf of the 2nd Applicant. Therefore, the 2nd Applicant is not properly before the Court and is struck off the instant Application.
2. Admission as *amicus curiae* is within the discretion of the Court and it must be satisfied that the application is justified. And that they will draw the attention of the court to relevant matters of law and fact that would not otherwise not be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus curiae* has a special duty to the Court to provide new cogent contentions helpful to the Court. There should be no repetition of arguments already made by the parties.
3. The 1st Applicant did not provide any publications or others documents in support of his averment that he had expertise in the subject matter. Nor did he

- show how he intended to assist the Court in interpreting and applying the Treaty or enriching the Court's jurisprudence with respect to the subject matter at hand.
4. Mere statements were not persuasive on the relevance and usefulness of the intended *amicus curiae's* contribution towards determination of the Reference. The 1st Applicant's intervention would be academic, very remote from the issues and thus, would not be helpful to the Court.

Cases cited

Avocats sans Frontieres v Mbugua Mureithi [2012-2015] EACJLR, 387, Application 2 of 2013
 Ministry of Health & Ors v Treatment Action Campaign & Ors 2002(5) SA 713(CC)
 Mumo Matemu & Ors v International Commission of Jurists (K) & Anor, Petition No. 12 of 2013
 Ntandazele Pose v Minister of Safety & Security, 1997(3) SA 786 (CC); 1997(7) BCLR 851

RULING

Introduction

1. This is a Notice of Motion dated 13th April 2015, filed jointly by Dr Ally Possi, a lawyer, member of the Tanganyika Law Society and a lecturer at Ardhi University in Dar es Salam (hereinafter referred to as the "1st Applicant") as well the Centre for Human Rights, University of Pretoria, which is described as being both an academic department and a non-governmental organisation (NGO) (hereinafter referred to as the "2nd Applicant").
2. By their Notice of Motion, the Applicants have sought leave, pursuant to the provisions of Articles 23(1) & (3) and 40 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") and Rule 36 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as "the Rules") to be joined as *Amici curiae* in *Reference No. 6 of 2014 Human Rights Awareness and Promotion Forum (HRAPF) vs. Attorney General of the Republic of Uganda*.
3. In *Reference No. 6 of 2014*, HRAPF (hereinafter referred to as the "1st Respondent") had contested the validity of certain sections of the now repealed Uganda's Anti-Homosexuality Act, 2014 in so far as they allegedly violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty.
4. The 2nd Respondent is the Attorney General of the Republic of Uganda.

A. Case for the intended *Amicus Curiae* /Applicants

5. In support of the Motion, the 1st Applicant filed an Affidavit sworn on 13th April 2015 by himself and on behalf of the 2nd Respondent. The Application is premised on the following grounds:
 - i) The Reference raises important questions on the distinction between human rights jurisdiction and the interpretative jurisdiction of the Court with regards to the rule of law and good governance, norms provided in the Treaty;
 - ii) The Applicants wish to contribute to defining what would constitute human rights jurisdiction as against the general interpretative jurisdiction of the Court with regards to the rule of law and good governance;
 - iii) The Applicants also wish to contribute to clarifying the circumstances under which the Court should exercise its discretion to hear a matter where considerations of public interest so demand,

notwithstanding that part of the matter may be considered moot;

vi) The Applicants are able to make unique contributions to the

Reference without usurping the role of the parties thereto.

6. Dr Possi, the 1st Applicant and representing the 2nd Applicant, stated that he had a significant knowledge of the functioning of this Court, having extensively researched on the matter for his doctoral degree and would therefore assist the Court in its duty to reach a fair conclusion based on sound interpretation of the law.
7. In his affidavit in support of the Motion, he stated *inter alia* that: “As a concerned citizen of the East African Community (EAC), I wish to intervene in the interest of constitutionalism and the rule of law, more specifically that Member States of the Community should, in their adoption of national policies and legal instruments always act in conformity to the fundamental and operational principles of the EAC Treaty.”
8. It was his further submission that issues that fall for determination by the Court in *Reference No. 6 of 2014* are significant in the East African Community specifically the question of what constitutes human rights jurisdiction and the extent of this Court’s jurisdiction to determine the obligations of Partner States and the institutions of the Community, as well as the extent of the discretion of the Court to hear “a seemingly moot case, where considerations of public interest so demand.”
9. He further submitted that although the current jurisprudence of the Court has clarified the extent of the Court’s jurisdiction to interpret the Treaty generally under the principles of rule of law and good governance, even where human rights are implicated in the process, there was, however, no clarity as to what constitutes human rights jurisdiction.
10. In this regard, he contended that while the Court has indicated that it has broad jurisdictional powers when it comes to interpretation of the Treaty, and that it will exercise jurisdiction where there are alleged breaches of the fundamental and operational principles of the Treaty, it has so far not defined what exactly would constitute human rights jurisdiction. Moreover, he submitted that while the Treaty prescribes the exercise of human rights jurisdiction by this Court, the Treaty does not define what human rights jurisdiction is as against the general interpretative jurisdiction of the Court.
11. Based on the foregoing, Dr Possi submitted that the Applicants seek to assist the Court to make a definitive pronouncement as to what will constitute a human rights jurisdiction as distinct from the interpretative jurisdiction of the Court. It was also the Applicants’ contention that “the Court may exercise its discretion to hear a seemingly moot case where considerations of public interest so demand.”
12. As regards the 2nd Applicant, i.e. the Centre for Human Rights (University of Pretoria), the 1st Applicant was asked to prove that he had the authority to depone to the affidavit on its behalf as stated in his Affidavit. Dr Possi, in answer, said that he had a power of attorney in that regard and that it had been lodged at the Dar es Salaam Court sub-registry, but it later transpired that the Court did not have it on its record at all.
13. For the above reasons, the 1st Applicant submitted that both he and the 2nd Applicant were proper parties to be granted leave to be enjoined in Reference

No. 06 of 2014 as *amici curiae*.

B. Case for the Human Rights Awareness and Promotion Forum (HRAPF)

14. Mr. Ladislaus Rwakafuzi, Counsel for HRAPF, stated that he had no objection to the Applicants being admitted as *amicus curiae*. He submitted in this regard, that since one of the issues settled upon in the Scheduling Conference as arising for determination in the Reference was whether the matter raised in it was not justiciable on account that it was a human rights matter, it was therefore pertinent that the Applicant helps this Court with his own expertise to have that matter resolved.

C. Case for the Attorney General of Uganda/2nd Respondent

15. The 2nd Respondent was represented by Ms. Patricia Mutesi, Ms. Josephine Kiyingi and Mr. Kosia Kasibayo. No affidavit in reply was filed on his behalf, but Ms. Mutesi stated from the outset that the 2nd Respondent opposed the Motion.
16. In this regard, she submitted that they do not oppose the Application on account of bias or prejudice, but on the grounds that the Applicant did not meet certain standards set for a party that wishes to be joined as an *amicus curiae*, to wit, a certain level of interest, expertise and relevance.
17. Asserting that there is an issue of mootness pertaining to what is stated in paragraph 15 of the Applicant's affidavit, learned Counsel submitted that the proposed *amici* should not be enjoined as such because both, especially the 1st Applicant, had already taken a position in contested matters within the Reference.
18. Ms. Mutesi further challenged the 1st Applicant's submission that he intended to assist the Court owing to his significant knowledge on the functioning of the Court. She contended that such a ground is not relevant and it was her further argument that it is not sufficient to state that one has a significant knowledge on the functioning of the Court and its jurisdiction to be admitted as an *amicus curiae*, because standards set by this Court require that such a party must bring new and useful information or evidence which will add value to the Court's determination of the issues in contest.
19. Regarding the 2nd Applicant, learned Counsel submitted that the Application in respect of that Applicant was incompetent on the ground that no Affidavit in support of its Application to be *amicus curiae* was filed. She thus urged the Court to dismiss it because it was not properly before the Court as provided by Rule 36 of the Court's Rules.

Court's Determination

20. The only issue for determination in this Application is whether Dr Ally Possi and the Centre for Human Rights (University of Pretoria) should be admitted to these proceedings as *amici curiae*. Before addressing this substantive issue, we propose to dispose of the question raised by the 2nd Respondent as to whether the 2nd Applicant is properly before the Court.
21. It is worth recalling that an application for leave to appear as *amicus curiae* before this Court is governed by Rule 36 of the Court's Rules. Sub-rule (1) of this Rule provides that an application for leave to appear as *amicus curiae* shall be by Notice of Motion. In this regard, Counsel for the 2nd Respondent submitted that

there was no such application in respect of the 2nd Applicant, since it did not file any affidavit.

22. We heard the 1st Applicant, stating from the Bar, that he had a power of attorney to file an affidavit on behalf of the 2nd Applicant and that the proof of that power was filed with the Dar-es-Salam Court's sub-registry. After verification, it was evident that the said document was neither on the Court record nor at the said sub-registry.
23. Given the foregoing, the Court finds that the 2nd Applicant is not properly before the Court since there is no proof that Dr Possi had the authority to institute the Application on its behalf. The 2nd Applicant is therefore struck off the instant Application.
24. Other requirements for admission as *amicus curiae* are set out in Rule 36(2). It reads: "An Application under sub-rule (1) shall contain-
 - (a) A description of the parties;
 - (b) The name and address of the intervener;
 - (c) A description of the claim or reference;
 - (d) The order in respect of which the *amicus curiae* is applying for leave to intervene
 - (e)a statement of *amicus curiae*'s interest in the result of the case."
25. This Court has previously had opportunity to consider applications seeking admission to join the proceedings as *amicus curiae* in terms of Rule 36 as is the case in the instant Application.
26. It is trite law that admission as *amicus curiae* is in the discretion of the Court which has to be satisfied that the *amicus* application is justified. In *Avocats Sans Frontieres vs. Mbugua Mureithi, EACJ No. 2 of 2013*, this Court stated that "... Rule 36(4) of this Court's Rules of Procedure 2013, with regard to an application to join existing proceedings as *amicus curiae* provides that: 'If the application is justified, then it shall be allowed which is also an expression of discretion on the part of the Court. Like all discretions, however, it must be exercised judiciously.'"
27. It should be pointed out that in the exercise of that discretion, the jurisprudence has defined some guidelines that a Court should look at in relation to the role of *amicus curiae*. The South African Constitutional Court, for example, with regard to the requirements for admission as an *amicus* as set out in Rule 9 of the Constitutional Court Rules of 1995 pointed out in *Ntandazele Fose vs. Minister of Safety and Security, 1997(3)SA 786 (CC); 1997(7) BCLR 851 (CC) para 9*: "It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an *amicus* in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the *amicus* are relevant to the proceedings and raise new contentions which may be useful to the Court."
28. In the same vein, the Supreme Court of Kenya in *Mumo Matemu & Others vs. Kenya Section of the International Commission of Jurists Anor, Petition No. 12 of 13, para 33*, has clarified the duty of *amicus* to the Court citing with approval the decision of the South African Constitutional Court in *Re: Certain Amicus Curiae Applications: Ministry of Health and Others vs. Treatment Action Campaign and Others 2002(5) SA 713(CC) at para 5*) as follows: "The role of an *amicus* is to draw the attention of the court to relevant matters of law and fact to which attention

would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.”

29. Moreover, in the fore-cited Petition, the Supreme Court of Kenya, drawing on earlier decisions, as well as on comparative jurisprudence, set out a number of guidelines in relation to the role of *amicus curiae*. Those relevant for the instant Application are that:
- (i) An *amicus* brief should be limited to legal arguments.
 - (ii) The relationship between *amicus curiae*, the principal parties and the principal arguments in an appeal, and the direction of *amicus* intervention, ought to be governed by the principle of neutrality, and fidelity to the law.
 - (iii) An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution’s call for resolution of disputes without undue delay. The Court may therefore, and on a case-by-case reject amicus briefs that do not comply with this principle.
 - (iv) An *amicus* brief should address point(s) of law not already addressed by the parties to the suit or by other *amici*, so as to introduce only novel aspects of the legal issue in question that aid development of the law.
 - (v) The Court will regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.
 - (vi) The applicant ought to raise any perception of bias or partisanship by documents filed or by his submissions.
 - (vii) The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.
 - (viii) The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.
 - (ix) The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.
30. We find the above guidelines pertinent and useful in addressing the main issue in the instant Application, to wit, whether the 1st Applicant has sufficient interest in the matter and whether he has relevant expertise that can help the Court in determining *Reference No. 06 of 2014*.
31. During the hearing of this Application, the 1st Applicant was asked to justify his interest in appearing as *amicus curiae* in the Reference and more, importantly, how his submissions would assist the Court in reaching a fair and just decision.
32. Dr Possi stated that he intended to provide materials and analysis making the

distinction between what would constitute the Court's human rights jurisdiction and what would not. He further submitted that in that regard, his contribution would even be more useful to future cases and reduce the backlog of cases pending before the Court.

33. Pressed to show how, based on his expertise, his proposed *amicus* brief would help in determining the Reference aforesaid, the 1st Applicant reiterated his previous submissions asserting that he wanted to help the Court in drawing a distinction between its human rights jurisdiction and rule of law jurisdiction, without any indication on how his participation will help the Court to resolve the issues in the Reference.
34. It is worth noting, at this juncture, that the 1st Applicant did not provide any materials, such as publications or others documents in support of his averment that he had expertise in the matter. Moreover, apart from mere statements, the 1st Applicant did not show how he intended to assist the Court in interpreting and applying the Treaty or enriching the Court's jurisprudence with respect to the subject matter at hand, specifically.
35. In light of the foregoing, some doubt arose on the relevance and usefulness of the intended *amicus* contribution to the Reference. There was indeed concern that the 1st Applicant's intervention would be purely academic, very remote from the issues at hand and thus, would not be helpful to the Court. That concern became even more evident when it appeared that the 1st Applicant was not even aware that the issues for determination in the Reference had been changed and narrowed down by the Applicant in the Reference given that the impugned law (i.e. the Anti-Homosexuality Act, 2014) had since been struck out by Uganda's Constitutional Court.
36. From all the above findings, it is clear to us that the 1st Applicant has neither shown a sufficient interest in the results of the Reference as required by Rule 36(1) (e) of the Court's Rules nor demonstrated that he has a particular expertise or specialization related to the issues so as to demonstrate to the Court that, if admitted, he would be capable of making a valuable contribution to the proceedings.
37. In the result, while we appreciate Dr. Possi's initiative to institute an application for appearance in the Court's proceedings, we, however, for the reasons stated hereinabove, find that it does not meet the conditions required for its admission.

D. Conclusion

38. For the above reasons, the Court finds no merit in *Application No. 1 of 2015* seeking leave to intervene as *amicus curiae* in *Reference No. 6 of 2014*. The Application is therefore disallowed with no order as to costs.
39. It is so ordered.

L. Rwakafuzi Counsel for the 1st Respondent

P. Mutesi, J. Kiyingi & K. Kasibayo for the 2nd Respondent

First Instance Division

Application No.3 of 2015
Arising from Reference No. 6 of 2014

Secretariat of the Joint United Nations Programme on HIV/Aids
v
Human Rights Awareness & Promotion Forum And Attorney General of Uganda

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo, J; F. Jundu & A. Ngiye, JJ
November 25, 2015

Amicus curiae's role - Novel legal aspects - New contentions based on fresh evidence are inappropriate - Compliance with principles of neutrality & fidelity to law - Consent of Parties not required - Impartiality

Rule 36(4), East African Court of Justice Rules of Procedure, 2013

In Reference 6 of 2014, certain provisions in Uganda's Anti-Homosexuality Act 2014 were challenged as violating the principles of human rights and rule of law. The Applicants applied for leave to intervene as *amicus curiae* in Reference No. 6 of 2014 averring that: its core mandate was the impact on public health and human rights of criminalisation of the work of organizations and individuals working on the rights of persons who engage in same-sex sexual relations and other related conduct. It had conducted research, drafted policy papers and publications on HIV, public health, human rights and same-sex sexual relations.

The 2nd Respondent opposed the application stating that Applicant's website and public statements could not be termed as a neutral or unbiased for instance: the Applicant had urged Ugandan authorities to reject the Anti-Homosexuality Bill on 18th February, 2014; and on 1st August, 2014 the Applicant hailed the annulment of the Act as a victory for the rule of law and social justice.

Held

1. The role of an *amicus curiae* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. The *amicus curiae* must not repeat arguments already made but it must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily, it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.
2. The consent of the substantive Parties in the making a decision to admit *amicus* while not necessary as a matter of right, is nonetheless important as a matter of discretion of the Court. The relationship between *amicus curiae*, the principal parties and the direction of *amicus* intervention, ought to be governed by the principle of neutrality and fidelity to the law.
3. The Applicant is an expert in HIV related service provision and questions of human rights attendant to the said services and has an interest in the subject

matter of the Reference. Its knowledge of the subject, which is partly an issue in the Reference, is therefore necessary for the Court to get a wholesome understanding of the same and leave to join the Reference is granted.

4. So far, there has been no sign that the Applicant has taken sides in regard to any issue directly in contention before the Court, its general public pronouncements notwithstanding. If the Applicant's Brief exhibits partiality in the brief, it risks being ignored by this Court.

Cases cited

Avocats Sans Frontieres v Mbugua Mureithi [2012-2015] EACJLR, Application No.2 of 2013

Dritoo v Nik Distributors Administration [1968] E.A. 428

Mumo Matemu & Others v Kenya Section of ICJ & Anor, Supreme Court of Kenya Petition No. 12 of 2013

Raila Odinga & Ors v Independent Election & Boundaries Commission & Ors, SCK Petition No. 5 of 2013

Minister of Health & Others v Treatment Action Campaign & Ors, CCT 8/02 [2002]

Republic of South Africa & Ors v Groot boom (Others 20(1) SA 46 (CC)

RULING

A. Introduction

1. Rule 36 of the East African Court of Justice Rules of Procedure, 2013 ('The Rules') provides for the procedure to be invoked when a party wishes to be granted leave to appear as *amicus curiae* in proceedings pending before the Court.
2. Pursuant to the above Rule, the Secretariat of the Joint United Nations Programme on HIV/AIDS ('The Applicant') by a Notice of Motion dated 26th May, 2015, has now applied to be granted leave to intervene as *amicus curiae* in Reference No. 6 of 2014, Human Rights Awareness and Promotion Forum (HRAPF) and The Attorney General of Uganda.
3. The above Reference was filed by HRAPF, a human rights organization registered as a company limited by guarantee in the Republic of Uganda, and principally challenges certain provisions in Uganda's Anti-Homosexuality Act 2014 and is further seeking a declaratory order that the challenged provisions are allegedly in violation of the principles of human rights and rule of law in Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community ('The Treaty').

B. Case For The Intended *Amicus Curiae* /Applicant

4. The Applicant in the body of its Motion, the Supporting Affidavit of its Executive Director, Dr. Mariangela Batista Galvao Sinao and in Submissions by its Learned Counsel, Mr. Donald Omondi Deya, stated that because of its objectives and mandate since it was established in 1994, if granted leave to join Reference No. 6 of 2014 as *amicus curiae*, it would offer this Court the benefit of being fully appraised of the international perspectives relating to the issues under consideration in the said Reference.
5. Specifically, the Applicant stated that it has an extensive history of conducting research, collecting data and drafting policy papers and publications on issues relating to HIV, public health, human rights and same-sex sexual relations. Further, that the Reference concerns a subject at the core of its mandate, namely the impact on public health and human rights of criminalisation of the work of organizations and individuals working on the rights of persons who engage in same-sex sexual relations and various other conducts relating to it.

6. The Applicant, in addition, submitted that it has participated as *amicus curiae* in judicial proceedings in Malawi, the United States of America and the European Court of Human Rights and in the spirit of the United Nations it has remained impartial in all those proceedings.
7. Lastly, it submitted that it will accept the Reference as it is and would only file written Submissions and not even participate at the oral hearing of the Reference.

C. Case For The Human Rights Awareness and Promotion Forum (HRAPF) /1st Respondent

8. The Human Rights Awareness and Promotion Forum (HRAPF) took the view that the Motion is merited and does not object to the Applicant being granted leave to join the Reference as *amicus curiae*.

D. Case For The Attorney General of Uganda / 2nd Respondent

9. The Attorney General of Uganda representing the Republic of Uganda filed an Affidavit sworn on 20th July, 2015 by one Oburu Odoi Jimmy, Principal State Attorney, in opposition to the Motion.
10. First, he stated that, he was aware that in the Reference, it is alleged that Sections 7 and 13(1) and (2) of the Anti-Homosexuality Act 2014 impede HIV related services' promotion and access to health services by members of the Lesbian Gay Bi-sexual Transgender and Inter-sexual (LGBTI) Community.
11. Second, that in the Applicant's website and public statements, it has expressed itself on the issues forming the subject of the Reference and that it cannot be termed as a neutral/impartial party deserving the title of *amicus curiae*. At paragraph 5 of the Affidavit of Oburu Odoi Jimmy, the Attorney General has therefore set out the statements attributed to the Applicant and which, in his view, indicate open bias.
12. That paragraph, for avoidance of doubt, reads as follows:-
 - a. The Applicant in a press statement dated 10th May 2011 stated that it was concerned over the renewed consideration by the Ugandan Parliament of an Anti-Homosexuality Bill. It stated that the criminalization of people based on their sexual orientation is a denial of human rights and a threat to public health in the context of the HIV response. The Applicant further urged countries which criminalise same-sex behaviour to repeal such laws;
 - b. The Applicant's Executive Director on 18th February, 2014 stated that 'I strongly urge the Ugandan authorities to reject the Bill and ensure the human rights dignity of all people of Uganda.' The Applicant further stated that the Bill had public health implications, citing studies which show that when gay people feel discrimination including prosecution, they are less likely to seek HIV testing, prevention and treatment services. It urged all governments to protect the human rights of lesbian, gay, bisexual and trans gender people through repealing criminal laws against adult consensual to same sex conduct;
 - c. The Applicant's Executive Director on 1st August, 2014 hailed the annulment of the Anti-Homosexuality Act as a victory for the rule of law and social justice. The Applicant also noted that while homosexuality

remains illegal in Uganda, annulling the law could have positive public health implications.

13. Third, that since there is apparent bias on the part of the Applicant, its intervention in the proceedings would prejudice the case for the Attorney General and to allow the Motion would not be in the interests of Justice.
14. Fourth, that since the Anti-Homosexuality Act has been struck down by the Constitutional Court of Uganda, both the Reference and the Motion have been overtaken by events and no purpose would be served in allowing the said Motion.
15. Fifth, Ms. Patricia Mutesi, Principal State Attorney, added that if the Applicant is an expert in the matters to be determined in the Reference, then it should seek to be called as such expert or as an intervener and not as *amicus curiae* because of its obvious bias.

E. Court's Determination

16. From the outset, it cannot be denied that the Applicant has an interest in the subject matter of the Reference and as correctly stated by Oburu Odoi Jimmy in his Affidavit, Sections 7 and 13(1) and (2) of the Anti-Homosexuality Act 2014 have been challenged as allegedly "criminalising, aiding, abetting, counselling, procuring and promotion of homosexuality, create offences that are overly broad, hampers professional counsel and impedes legitimate debate, HIV related service provision and access to health services." These complaints, if read with the mandate of the Applicant, in our considered view, create sufficient interest for it to have filed the instant Motion (see - *Avocats Sans Frontieres vs. Mbugua Mureithi, EACJ No.2 of 2013*). In the circumstances, should it be granted leave to be enjoined as an *amicus curiae*?
17. Before addressing that issue, we must dispose of the question whether the Reference and the Motion have been overtaken by events and whether the Applicant is best suited to be enjoined as an intervener or be called as an expert witness.
18. With tremendous respect to Ms. Mutesi, both issues require not more than the following answers:-
 - i) We have perused the Reference and we note that on 6th November, 2014, Ms. Mutesi was party to a Scheduling Conference called under Rule 53 of the Rules. On that day, the issue of amendment of the Reference was raised and indeed by leave of Court, the Reference was amended and an Amended Reference was filed on 7th January, 2015. The issues for determination in it are therefore still live and we cannot in this Ruling determine whether it has or has not been overtaken by events; and
 - ii) As to whether the Applicant should have come in as an intervener or expert witness, the matter is irrelevant. It has applied to be granted leave to join as an *amicus curiae* and that is the matter to be determined and no other. The Attorney General's preference is not an issue for us to determine save that it is obvious that the Applicant is indeed an expert in HIV/AIDS related issues, a matter we shall touch on later in this Ruling.
19. Having said so and turning back to the single issue to be determined, what considerations should a Court take into account when faced with an application such as the one before us?

20. In *Avocats Sans Frontieres* (supra), this Court stated that “.....Rule 36(4) of this Court’s Rules of Procedure 2013, with regard to an application to join existing proceedings as *amicus curiae* provides that: ‘If the application is justified, then it shall be allowed which is also an expression of discretion on the part of the Court. Like all discretions, however, it must be exercised judiciously.’”
21. We restate that holding and would also repeat the words of Fuad J. in *Dritoo vs. Nik Distributors Administration [1968] E.A. 428* where he stated that :-
‘The Court has wide discretion to ask for assistance of a *curiae* if it considers that the interests of justice would be served.’
22. In exercising discretion as above, what guidelines should the Court look at in relation to the role of *amicus curiae*? In *Mumo Matemu & Others vs. Kenya Section of the International Commission of Jurists & Anor, Petition No. 12 of 2013*, the Supreme Court of Kenya set out a number of such guidelines and of relevance to the present matter, they include the following:
- i) An *amicus* brief should be limited to legal argument;
 - ii) The relationship between *amicus curiae*, the principal parties and the direction of *amicus* intervention, ought to be governed by the principle of neutrality, and fidelity to the law;
 - iii) An *amicus* brief should address point(s) of law not already addressed by the Parties to the suit or by other *amici*, so as to introduce only novel aspects of the legal issue in question that aid the development of the law;
 - iv) Where, in adversarial proceedings, Parties allege that a proposed *amicus curiae* is biased, or hostile towards one or more of the parties, or where the Applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective Parties to be heard on the issue (see *Raila Odinga & Others vs. IEBC & Others; S. C. Petition No. 5 of 2013 – Katiba Institute’s Application to appear as amicus*);
 - v) The Court will regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role;
 - vi) In appropriate cases and at its discretion the Court may assign questions for *amicus* research and presentation;
 - vii) The Applicant ought to be neutral in the dispute, where the dispute is adversarial in nature;
 - viii) The Applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The Applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the Applicant ought to show that there is no intention of repeating arguments already made by the Parties. And such new matter as the Applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence;
 - ix) The Applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice;
 - x) Whereas consent of the Parties, to proposed *amicus* role, is a factor to be taken into consideration, it is not the determining factor.
23. We are persuaded that the above guidelines are useful in determining the

present Motion and we further deem it necessary to address the issue whether the Applicant by fact of past pronouncements is biased, has taken a position on the matters to be adjudicated in the Reference, and whether its participation as *amicus curiae* would prejudice the Attorney General's case.

24. On that issue, the Constitutional Court of South Africa in *Re: Certain Amicus Curiae Applications; Minister of Health and Others vs. Treatment Action Campaign and Others* (CCT 8/02)[2002] had this to say:

'The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but it must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily, it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence.'

25. Further, in *Mumo Matemu* (supra), the Court stated that :

'it is not for the *amicus* to suggest to the Court whether a decision was wrong or right, nor to advise on which resolution to arrive at. The pursuit of a particular outcome is reserved to the parties to the controversy, including the interested Parties or interveners.'

26. In the above context, we have seen a press statement issued by the Applicant on 10th May, 2011 as well as print outs from the internet dated 18th February, 2014 and 10th August, 2014 in which the Applicant's Executive Director is quoted as faulting the Anti-Homosexuality law upon its enactment and later lauding its annulment. It has been submitted that these statements are an expression of bias and lack of partiality but in our considered view, the undenied statements were made as part of the Applicant's mandate, generally, and not necessarily in the context of the Reference before this Court. The statements were also made generally as regards the impugned law and were not targetted at the various sections of the law placed before us for scrutiny. More fundamentally, the Amended Reference has narrowed down the issues in contention and we have seen evidence that the Applicant has not addressed itself specifically to those issues which have more to do with specific actions of the Government of Uganda in implementing the impugned law as opposed to the enactment of the law *per se* which was the direction the Applicant's initial statements took.

27. In addition to the above findings, it has not been denied by the Attorney General that the Applicant is an expert in HIV related service provision and questions of human rights attendant to the said services and that is why he proposed that the Applicant could indeed join the Reference as an expert. Its knowledge of the subject, which is partly an issue in the Reference, is therefore necessary for the Court to get a wholesome understanding of the same.

28. It is also our considered view that an *amicus* brief is limited in the terms set out in *Mumo Matemu* (supra) and it is up to the Court to distill from such a brief what is useful in the determination of the matter before it. While therefore the Court is not seized of the Applicant's brief, by this Ruling, it has been and shall be made aware, of its limited participation in the proceedings and to avoid any sign

of partiality or lack of fidelity to its role as *amicus curiae*. The converse is that if it exhibits partiality in the brief, the same risks being ignored by this Court. So far as we are concerned, however, we have seen no sign that it has taken sides specifically in regard to any issue directly in contention before us, its general public pronouncements notwithstanding.

29. In concluding, we have seen and have had the benefit of useful submissions by *amicus curiae* in the past and like Sachs J. in *Republic of South Africa & Others vs Groot boom (Others 20(1) SA 46 (CC)* where an *amicus curiae* can help the Court ‘in a most considerable way’ by participating in novel proceedings, the Court should not shut it out. The consent of the substantive Parties in the making of such a decision, while not necessary as a matter of right, is nonetheless important as a matter of discretion, which we exercised in the present Reference (see M. Ssekaana and S.Ssekaana, *Civil Procedure and Practice in Uganda, (2010)*).

F. Disposition

30. Having decided that there is merit in the Notice of Motion dated 26th May, 2015, it follows that the final orders to be made are that:
- i) The Secretariat of the Joint United Nations Programme on HIV/AIDS the Applicant is hereby granted leave to join Reference No. 6 of 2014, as *amicus curiae*;
 - ii) The said *amicus curiae* is also hereby granted leave to make written Submissions at the hearing of Reference No. 6 of 2014 limited to issues within its mandate and of specific relevance to the Reference aforesaid; and
 - iii) There shall be no order as to costs.
31. Ordered accordingly.

D. Deya, Counsel for the Applicant

P. Mutesi for the 2nd Respondent

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First Instance Division

Application No. 4 of 2015
(Arising from Reference No. 16 of 2014)**Media Legal Defence Initiative (MLDI) & 19 Others v Ronald Ssemuusi
(Deceased),
The Attorney General of the Republic of Uganda**

M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo; F. Jundu & A. Ngiye, JJ
June 28, 2016

Amici curiae - Biased briefs to be disregarded - Brief restricted to one joint submission - Matters of law within the amicus mandate - Scholarly, specialized contribution - Court's discretion

Rules: 21, 36(2) (e) (4), 53 of the East African Court of Justice Rules of Procedure, 2013

The Applicants applied for leave to appear as *amici curiae* in Reference No. 16 of 2014 which *inter alia* challenged the offence of criminal defamation in sections 179 and 180 of the Uganda's Penal Code Act (Cap 120). They claimed to be organisations engaged promoting respect for and observance of the right to freedom of expression, including freedom of the Press and the right to access to information and sought to clarify permissible limits on the right of freedom of expression.

In opposing the application, the Second Respondent averred that the Applicants' public statements and associations depicted in the Affidavit of Mr. Jimmy O. Odoi, exhibited a bias for the decriminalization of defamation so they were incapable of being neutral and they shared the same goal as the First Respondent.

Held

1. On the one hand, a friend of court assists the court by providing information so that the court will not fall into error; but does not seek to influence the final outcome or attempt to persuade the court to adopt a particular view. While an *amicus curiae* must have some semblance of interest in a matter that would motivate it to apply to be joined therein, courts are at liberty to disregard *amicus* briefs that seek to influence the final outcome or attempt to persuade the court one way or another.
2. The Applicants' public statements provide insight into their mandate, explain their interest in the outcome of the substantive Reference. Such scholarly interest in the subject of criminal defamation would inform the substance of an *amicus* brief provided by the Applicants. However, the inference that the Applicants' mandate is skewed to the abolition of criminal defamation should be weighed against the legal questions posed by the restricted press freedoms highlighted in the material on record, as well as the Applicants' scholarly and specialized contribution to possible legal reform in the area of freedom of expression generally.

3. The *Amicus* Brief shall be restricted to a joint submission on issues within the *amici curiae's* mandate and of specific relevance to the Reference. Should this Court deduce a biased, irrational and unresearched premise for the positions advanced by the Applicants, it would be at liberty to sever its friendship with them and disregard their *amicus* brief.

Cases cited

Avocats Sans Frontieres v Mbugua M. Wanyambura & Ors [2012-2015] EACJLR 387, Appl. No. 2 of 2013
 Dr. Ally Possi & Anor v Human Rights Awareness Promotion Forum & Anor, EACJ Application No. 1 of 2015
 FORSC & Ors v Burundi Journalists Union & Anor [2012-2015] EACJLR 510, Appl. No. 2 of 2014
 Secretariat of the Joint UN Programme on HIV/AIDS v HRAPF & Anor, EACJ Appl. No. 3 of 2015
 UHAI EASHRI & Anor v HRAPF & Anor [2012-2015] EACJLR 547, Applications No. 20 & 21 of 2014

Editorial Note: In Appeal Applications 4&6 of 2018, it was held that the Trial Court had exercised its discretion judiciously, hence the appeal was, dismissed as misconceived on 18 May 2019.

RULING

A. Introduction

1. This Application was brought under Articles 23, 27, 40 and 127 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”), as well as Rules 21, 36 and 53 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as “the Rules”).
2. Media Legal Defence Initiative (MLDI) and 19 other organisations (hereinafter referred to as “the Applicants”) sought to be granted leave to appear as *amici curiae* in Reference N° 16 of 2014, *Ronald Ssemuusi vs. The Attorney General of the Republic of Uganda*.
3. The above Reference challenges sections 179 and 180 of the Uganda’s Penal Code Act (cap 120), which provide for the offence of criminal defamation, on the premise that the challenged provisions place unjustifiable restrictions on the right to freedom of expression, freedom of the press and the right to access to information contrary to Articles 6(d) and 7(2) of the Treaty. It also challenges the 1st Respondent’s conviction and sentencing under the said provisions, asserting that it constituted a violation of Article 8(1)(a) and (c) of the Treaty.
4. At the hearing, the Applicants were represented by Mr. Francis Gimara, the First Respondent (suing through his legal representative) was represented by Mr. Nicholas Opiyo, while the Second Respondent was represented by, Ms. Patricia Mutesi, Mr. Geoffrey Atwine and Mr. Ojiambo Bichachi.

B. Applicants’ Case

5. It was the Applicants’ case that they possess a strong commitment to the promotion of the right to freedom of expression, including freedom of the press and the right to access to information; have significant experience in the promotion of the right to freedom of expression, and have valuable expertise in that area of the law, which they sought to share with the Court. It did transpire at the hearing that some of the Applicant entities had previously provided this Court with relevant information on the right to freedom of expression in the case of *Burundian Journalist’ Union vs. the Attorney General of the Republic of Burundi*, EACJ, No 7 of 2013.

6. It was Mr. Gimara's contention that the Applicants sought to bring clarity to questions of permissible limits on the right of freedom of expression and how these freedoms relate to the Treaty on protected principles of democracy, rule of law, accountability, transparency, justice and protection of human rights. Learned counsel argued that this right had been duly acknowledged by this Court in the case of *Burundian Journalist' Union* (supra), and maintained that the Applicants were non-partisan neither did they have a special interest in the matter, and their sole motivation was fidelity to the law and the Treaty. To this end, according to him, the Applicants were only keen to aid the Court in the interpretation and application of Treaty principles articulated in *Reference No. 16 of 2014* by proposing a comparative and international law approach.

C. First Respondent's Case

7. The First Respondent did not object to the Application, contending that it satisfied the requirements for an *amicus* brief given the Applicants' expertise and extensive experience in handling issues of freedom of expression.

D. Second Respondent's Case

8. The Second Respondent opposed the Application, and contended that the Affidavit in support of the Application was incompetent, having been premised on unsubstantiated statements that were not within the deponent's knowledge. The Second Respondent further asserted that the Applicants' public statements and associations, as depicted in the Affidavit of Mr. Jimmy Oburu Odoi, exhibited a bias for the decriminalization of defamation, rendering them incapable of being neutral in the present proceedings to the extent that they share the same goal with the First Respondent herein.
9. Mr. Atwine referred this Court to the case of *Attorney General vs. Silver Springs Hotel Civil Appeal No. 1 of 1989*, where the Supreme Court of Uganda held that one of the fundamental considerations for an *amicus curiae* to be admitted was that such a party was independent of the dispute between the parties. According to him, therefore, a party that sought to be joined as *amicus curiae* was required to demonstrate its neutrality and objectivity on the matter before a court, and show that it was not an interested party therein.

E. Applicants' Rejoinder

10. In an Affidavit in Rejoinder, the Applicants' respective mandates in the area of freedom of expression was reiterated as the basis for their expertise in the issues before this Court; their intricate participation in the promotion of the right to designated press freedoms was an expression of this mandate rather than alleged bias and, if granted leave to appear as *amicii curiae*, they would restrict their *amicus* brief to matters of law that were instrumental to the Court's analysis of Uganda's criminal defamation laws.
11. In the same vein, Mr. Gimara maintained that the Applicants' only interest was to share their vast knowledge and expertise in this matter with the Court. He cited *Forum pour le Renforcement de la Societe Civile (FORSC) & 8 Others vs Burundi Journalists Union & Another EACJ Application No. 2 of 2014* in support of this proposition.

F. Court's Determination

12. Rule 36(2) (e) and (4) of the Rules highlights the parameters against which an application for leave to appear as *amicus curiae* may be considered. Whereas Rule 36(2) (e) requires the demonstration of an interest in the outcome of the case in which an applicant seeks to appear, Rule 36(4) prescribes the additional test of justification as a basis for the grant of leave to appear as *amicus curiae*. For ease of reference, we reproduce the cited Rules below:

“Rule 36(2) (e)

(2) An application under sub-rule (1) shall contain –

(a)

(b)

(c)

(e) a statement of the intervener's or *amicus curiae*'s interest in the result of the case.

Rule 36(4)

If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time within which the intervener or *amicus curiae* may submit a statement of intervention.”

13. As this Court held in *UHAI EASHRI & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another EACJ Applications No. 20 & 21 of 2014*, Rule 36(2) (e) places a duty upon an applicant for joinder as *amicus curiae* to demonstrate the nature of its interest in the outcome of the substantive proceedings. Indeed, faced with a similar Application in *FORSC& 8 Others* (supra), this Court did hold that an *amicus curiae* must have an interest in the proceedings it seeks to join. In *UHAI EASHRI & Another* (supra), this Court also held that Rule 36(4) imposed a duty upon such an applicant to establish to the satisfaction of the Court circumstances that *prima facie* justify its appearance as *amicus curiae*.

14. As quite correctly averred in the present Application, sections 179 and 180 of the Uganda Penal Code Act were challenged in *Reference No. 16 of 2014* for violating the right to freedom of expression, including freedom of the press and the right to access to information. The Applicants' interest therein is captured in paragraphs 23 – 27 of the Affidavit of one Yakare-Oule Jansen. Paragraph 23 describes the Applicants as organisations whose area of focus includes ‘promoting respect for and observance of the right to freedom of expression, including freedom of the Press and the right to access to information.’ It thus establishes their expertise in the matters raised in *Reference No. 16 of 2014*, from which the present Application arises.

15. Against that background, it seems to us that paragraph 25 of the same Affidavit clearly demarcates the Applicants' interest in the outcome of the Reference in the following terms :

“These issues are central to the mandate of each of the (NGO) organisations, thus they seek to utilize their expertise towards assisting the Court in its interpretation and application of the Treaty.”

16. We are, therefore, satisfied that the Applicants have aptly demonstrated their

- interest in the outcome of *Reference No. 16 of 2014*, as required by Rule 36(2) (e).
17. Having so found, we revert to a consideration of whether the Applicants have satisfactorily demonstrated circumstances that would justify their joinder in the Reference as *amici curiae* as provided by Rule 36(4). Stated differently, what considerations should a court take into account when faced with an application such as the one before us? This Court has had occasion to pronounce itself on the parameters to be considered in determining this question.
 18. In *Avocats Sans Frontieres vs. Mbugua Mureithi Wanyambura & 2 Others EACJ Application No. 2 of 2013*, it was held that a court may consider joinder of an applicant as *amicus curiae* if it considered it to be in the interest of justice to do so, provided that such prospective *amicus curiae* was independent of the dispute between the Parties. Indeed, in *FORSC & 8 Others* (supra) this Court held that an *amicus curiae* was under a duty to restrict its brief to ‘the most cogent and impartial information.’
 19. In the latter case of *UHAI EASHRI & Another* (supra), citing with approval Mohan, S. Chandra, ‘*The Amicus Curiae: Friends No More?*’, 2010, Singapore Journal of Legal Studies, 352 – 371 ,p .14, it was held:

“An *amicus* is normally appointed if the court is of the view that a case involves important questions of law of public interest; if a party that is unrepresented would not be able to assist the court; or if the points of law do not concern the parties involved but is nevertheless a matter of concern to the court.”
 20. In the more recent cases of *Dr. Ally Possi & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another EACJ Application No. 1 of 2015* and *Secretariat of the joint United Nations Programme on HIV/AIDS vs. HRAPF & Another EACJ Application No. 3 of 2015*, this Court did uphold the principle of neutrality, whereby the relationship between a prospective *amicus curiae* and the parties to a dispute should be neutral, independent of the dispute and governed by fidelity to the law.
 21. Therefore, in our considered view, the parameters for consideration in determining the joinder of an applicant as *amicus curiae*, and within which courts’ judicial discretion may be exercised are as follows:
 - a. Principle of neutrality – a prospective *amicus curiae* should be neutral, impartial, and independent of the parties to an adversarial dispute.
 - b. A prospective *amicus curiae* should demonstrate reasonable expertise in the subject matter for adjudication, as well as its fidelity to the law.
 - c. An *amicus curiae* shall normally be appointed if the court is of the view that a case involves important questions of law in an area of public interest.
 - d. Whether the questions of law posed do not concern the parties involved but are nevertheless a matter of concern to the court.
 - e. Whether it is, otherwise, in the interest of justice to admit a prospective *amicus curiae* to a dispute.
 22. We have carefully scrutinised all the material on record in the present Application, and dutifully considered the rival arguments of all Parties. We have seen press statements, as well as print outs from the different Applicants’ websites dated 20th July 2015 in which the Applicants display a series of activities conducted particularly in their campaign to end criminalization of defamation, including

- legal representation of journalists and organization of seminars.
23. It was submitted that the foregoing statements are an expression of bias and lack of partiality. With respect, we take a contrary view. It seems to us that the impugned statements provide insight into the Applicants' mandate and, as we have held earlier herein, explain their interest in the outcome of the substantive Reference. Such scholarly interest in the subject of criminal defamation would inform the substance of an *amicus* brief provided by the Applicants, and is to be distinguished from the unprincipled, often unresearched advocacy that is typified by pressure groups.
24. In the instant case, we have Applicants that have undeniably engaged in the extensive study of selected laws and their impact on freedom of the press and related rights. They seek to share the knowledge garnered thereby with a view to contributing to legal jurisprudence in that area. The inference that the Applicants' mandate is skewed to the abolition of criminal defamation should be weighed against the legal questions posed by the restricted press freedoms highlighted in the material on record, as well as the Applicants' scholarly and specialized contribution to possible legal reform in the area of freedom of expression generally.
25. We are fortified in this position by the role of an *amicus curiae* viz a viz the Court's discretion as to the usefulness of an *amicus* brief. On the one hand, a 'friend of court' assists the court by providing information so that the court will not fall into error, but does not seek to influence the final outcome or attempt to persuade the court to adopt a particular view, whether or not he has a direct interest in the outcome. See Mohan, S. Chandra, '*The Amicus Curiae: Friends no more?*', *Ibid.*, p. 3. On the other hand, it is the duty of a court that has been successfully courted by an *amicus curiae* to judiciously determine the neutrality of the positions advanced in an *amicus* brief and distill therefrom such data as is demonstrably useful in the determination of the matter before it.
26. It seems to us, therefore, that whereas an *amicus curiae* must of necessity have some semblance of interest in a matter that would motivate it to apply to be joined therein in the first place, courts are at liberty to disregard *amicus* briefs that seek to influence the final outcome or attempt to persuade the court one way or another. For present purposes therefore, should this Court deduce a biased, irrational and unresearched premise for the positions advanced by the Applicants, it would be at liberty to sever its friendship with them and disregard their *amicus* brief.
27. In the result, we take the view that the justice of this matter dictates that the Court do benefit from the Applicants' apparent expertise in the issues under scrutiny in the substantive Reference. We do, therefore, allow this Application and hereby grant the Applicants leave to be joined as *amici curiae* in Reference No. 16 of 2014.

G. Disposition

28. Having so held, we make the following final orders:
- i) Medical Legal Defence Initiative (MLDI) & Others are hereby granted leave to join Reference N° 16 of 2014, as *amici curiae*;
 - ii) The said *amici curiae* are hereby granted leave to submit a joint *Amicus*

Brief in writing in Reference N° 16 of 2014 within such time frame as shall be directed by the Court.

iii) The *Amicus* Brief shall be restricted to issues within the *amici curiae's* mandate and of specific relevance to the Reference aforesaid; and

iii) We make no order to costs.

F. Gimara Counsel for the Applicant

N. Opiyo, Representative of the First Respondent

P. Mutesi, G. Atwine & O. Bichachi, for the Second Respondent

^^*

First Instance Division

Application No. 4 of 2015
(Arising from Reference No. 16 of 2014)

Media Legal Defence Initiative (MLDI) & 19 Others

v

Ronald Ssemuusi (Deceased), The Attorney General of the Republic of Uganda

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo; F. Jundu, & A. Ngiye, JJ
September 20, 2017

Preliminary objection – Amici curiae- Deponents affidavit must disclose sources of information – Whether parts of an affidavit – were defective to be expunged - Scholarly interest to be distinguished from unresearched, rights-based agitation- Brief restricted to matters within Applicants mandate

Articles: 23, 27, 40 of the Treaty- Rules: 21 (5), 36 (2), (e), Form 3, Second Schedule 53 EACJ Rules of Procedure, 2013

The Applicants sought leave to appear as *amici curiae* in Reference No. 16 of 2014 which challenged the offence of criminal defamation, in Uganda's Penal Code Act (Cap 120), as an unjustifiable restriction on the right to freedom of expression, freedom of the press and the right to access to information contrary to Articles 6(d) and 7(2) of the Treaty. In the Reference it was averred that the 1st Respondent's conviction and sentencing for criminal defamation violated Article 8(1) (a) and (c) of the Treaty. In the current application, the Applicants claimed that their expertise and experience in the promotion of the right to freedom of expression would valuably assist the Court in its interpretation and application of the Treaty and that they would be non-partisan.

The 2nd Respondent raised a preliminary objection claiming that the Affidavit accompanying the Application was incompetent, based on hearsay and did not disclose the source of information and should therefore be struck out as incurably defective. Additionally, the Applicants' public statements and associations, as shown in their affidavit, exhibited a bias towards the decriminalization of defamation thus raising doubts about their neutrality.

In their rejoinder, the Applicants claimed that disclosure of the sources of information was not provided for in the Court's Rules of Procedure.

Held

1. An affidavit must confine itself to matters within its deponent's knowledge; and where a deponent attest to facts not within his or her knowledge, they must their source of information and the grounds of their belief. This is so even though Rule 21(5) and Form 3 in the Second Schedule of the Court's Rules of Procedure do not categorically require that sources of information and grounds of belief to be disclosed in an affidavit. Nevertheless, it is a well-established practice of the

Court.

2. An affidavit which does not disclose sources of information and grounds of belief becomes incurably defective, incompetent and may be struck out or defective parts or paragraphs expunged from the record. However, it is not always the case that an application will be struck out because it is supported by a defective affidavit. In a fit case, there is always room for an amendment of the affidavit.
3. The alleged defects in the Affidavit appear in paragraphs 4 to 22 and the verification clause after paragraph 28 which states ‘That what is stated in paragraph 1-28 is true to the best of my knowledge.’ is in direct conflict with deponent’s own averment in paragraphs 4 to 22 which only describe the proposed *amici curie* and therefore they are expunged. Their deletion does not negate the Applicants’ interest in Reference. No. 16 of 2014.
4. The Applicants press statements provide insight into their mandate and explain their interest in the outcome of the substantive Reference. Such scholarly interest in the subject of criminal defamation would inform the substance of an *amicus* brief provided by the Applicants, and is to be distinguished from the unprincipled, often unresearched, rights-based agitation that is typified by pressure groups and lobbyist organizations. The Applicants that have undeniably engaged in the extensive study of selected laws and their impact on freedom of the press and related rights. They seek to share this knowledge with a view to contributing to legal jurisprudence on this subject.
5. The inference that their mandate is skewed to the abolition of criminal defamation should be weighed against the legal questions posed by criminal defamation as shown in the material on record, as well as the Applicants’ scholarly and specialized contribution to possible legal reform in the area of press freedoms generally. The Court is satisfied that the application for admission as *Amici curies* is justified as the Applicants have demonstrated the nature of their interests in the outcome of the substantive proceedings. However, the brief will be restricted to issues within the *amici curiae’s* mandate and of specific relevance to the Reference.

Cases cited

Advocats San Frontiers v Mbugua M. Wanyambura & Ors, Application No. 2 of 2013[2012-2015] EACJLR, 387
 Dr. Ally Possi & Anor v HRAPF & Anor, EACJ Application No. 1 of 2015
 Phantom Modern Transport (1985) Ltd. V D. T. Dobie (T) Ltd, CAT Civil Ref. No. 15 of 2001 & 3 of 2005,
 Secretariat of the joint UN Programme on HIV/AIDS v HRAPF & Anor, EACJ Application No. 3 of 2015
 Samuel Kimaro v Hidaya Didas, CAT Civil Application No. 20 of 2012
 UHAI EASHRI & Anor v HRAPF & Anor [2012-2015] EACJLR 547, Applications No. 20 & 21 of 2014

RULING

A. Introduction

1. On 28th June, 2016, we delivered a Ruling in this Application in favour of the Applicants. However, the 2nd Respondent, thereafter successfully appealed to the Appellate Division in *Appeal No. 3 of 2016* whereby it quashed and set aside the said Ruling as it found it to be a nullity. It reasoned that in the said Ruling we had inadvertently failed to make a determination within the said Ruling on the preliminary objection raised by the 2nd Respondent on the competency of the Application.
2. Having quashed and set aside the said Ruling in its Judgment delivered on 26th

May, 2017, it directed as follows:

“As a way forward, since the Parties were heard in full on the undetermined point of preliminary object, we direct the Trial Court to re-constitute itself in order to compose a fresh ruling which should contain a clear determination of the pleaded point of preliminary objection before considering the merits or otherwise of the Application, if that need will arise”

3. Therefore, this Ruling is a fresh ruling in compliance with the said direction of the Appellate Division, having reconstituted ourselves as may be depicted in the Coram above shown.
4. This Application was brought under Articles 23, 27, 40 and 127 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”), as well as Rules 21, 36 and 53 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as “the Rules”).
5. Media Legal Defence Initiative (MLDI) and 19 other organizations (hereinafter referred to as “the Applicants”) sought to be granted leave to appear as *amici curiae* in *Reference No. 16 of 2014, Ronald Ssemuusi vs. The Attorney General of the Republic of Uganda*.
6. The above Reference challenges sections 179 and 180 of the Uganda’s Penal Code Act (cap 120), which provide for the offence of criminal defamation, on the premise that the challenged provisions place unjustifiable restrictions on the right to freedom of expression, freedom of the press and the right to access to information contrary to Articles 6(d) and 7(2) of the Treaty. It also challenges the 1st Respondent’s conviction and sentencing under the said provisions, asserting that it constituted a violation of Article 8(1)(a) and (c) of the Treaty.
7. At the hearing, the Applicants were represented by Mr. Francis Gimara, the First Respondent (suing through his legal representative) was represented by Mr. Nicholas Opiyo, while the Second Respondent was represented by, Ms. Patricia Mutesi, Mr. Geoffrey Atwine and Mr. Ojiambo Bichachi.

B. Applicants’ Case

8. It was the Applicants’ case that they possess a strong commitment to the promotion of the right to freedom of expression, including freedom of the press and the right to access to information; have significant experience in the promotion of the right to freedom of expression, and had valuable expertise in this area that they sought to share with the Court. It did transpire that some of the Applicants’ entities had previously provided the Court with relevant information on the right to freedom of expression in the case of *Burundian Journalists Union vs. the Attorney General of the Republic of Burundi, EACJ, No. 7 of 2013*.
9. It was Mr. Gimara’s contention that the Applicants sought to bring clarity to questions of permissible limits on the right of freedom of expression and how these freedoms relate to the Treaty on protected principles of democracy, rule of law, accountability, transparency, justice and protection of human rights. Learned counsel argued that this right had been duly acknowledged by this Court in the case of *Burundian Journalists Union* (supra). He maintained that the Applicants were non-partisan neither did they have a special interest in the matter, and their sole motivation was fidelity to the law and the Treaty. To this

end, according to him, the Applicants were only keen to aid the Court in the interpretation and application of Treaty principles articulated in *Reference No. 16 of 2014* by proposing a comparative and international law approach.

C. First Respondent's Case

10. The 1st Respondent did not object to the Application, contending that it satisfied the requirements therefor given the Applicants' expertise and extensive experience in handling issues of freedom of expression.

D. Second Respondent's Case

11. The 2nd Respondent in his Affidavit in Reply filed on 24th July, 2015 in Para. 3 resisted, objected and opposed the Application as follows:
 "That the Affidavit accompanying the Application is incompetent based on hearsay and does not disclose the source of information contained therein."
12. At the hearing of the Application, the 2nd Respondent vide Mr. Atwine, Learned Senior State Attorney, stressed that the Affidavit deponed by one Yakare Oule Jansen in support of the Application is incurably defective and ought to be struck out for being hearsay and offending Rule 21(5) of the Rules. He further stressed that the said Affidavit did not disclose the source of information contained therein or how the deponent got to know the said information.
13. The 2nd Respondent further asserted that the Applicants' public statements and associations, as depicted in the Affidavit of Mr. Jimmy Oburu Odoi, exhibited a bias for the decriminalization of defamation, rendering them incapable of being neutral to the Parties in the proceedings to the extent that they share the same goal with the First Respondent herein.
14. Mr. Atwine referred this Court to the case of *Attorney General vs. Silver Springs Hotel Civil Appeal No.1 of 1989*, where the Supreme Court of Uganda held that one of the fundamental considerations for *amicus curiae* to be admitted was that such party was independent of the dispute between the parties. According to him, therefore, a party that sought to be joined as *amicus curiae* was required to demonstrate its neutrality and objectivity on the matter before a court, as well as show that it was not an interested party therein.

E. Applicants' Rejoinder

15. The Applicants in their Affidavit in Rejoinder and at the hearing resisted the preliminary objection raised by the 2nd Respondent maintaining that the Affidavit in support of the Application is competent. In Para. 3 of the said Affidavit deponed by one Annet Namugosa, in reply to the 2nd Respondent's Affidavit in Reply she states as follows:
 "That in reply to Para. 3 of the Affidavit, I am hereby informed by Yakare Oule Jansen that the facts deponed by her are well within her knowledge and from information availed by each of the organizations. Therefore, the Affidavit accompanying the Application is competent"
16. At the hearing, the Applicants vide Mr. Gimara, Learned Counsel, contended that the Affidavit in support of the Application conforms to the relevant Rule and the Form provided for in the Third Schedule therein and that the alleged issue of disclosing source of information in the Affidavit is not provided for in

the Rules nor has the 2nd Respondent cited any authorities to support his asserted position.

17. In an Affidavit in Rejoinder, the Applicants' respective mandates in the area of freedom of expression was reiterated as the basis for their expertise in the issues before this Court; their intricate participation in the promotion of the right to designated press freedoms was an expression of this mandate rather than alleged bias and, if granted leave to appear as *amicus curiae*, they would restrict their *amicus* brief to matters of law that were instrumental to the Court's analysis of Uganda's criminal defamation laws.
18. In the same vein, Mr. Gimara maintained that the Applicants' only interest was to share their vast knowledge and expertise in this matter with the Court. He cited *Forum pour Renforcement de la Societe Civile (FORSC) & 8 Others vs Burundi Journalists Union & Another EACJ Application No. 2 of 2014* in support of this proposition.

F. Court's Determination

19. We shall first consider and determine the preliminary objection raised by the 2nd Respondent in Para. 3 of his Affidavit in Reply that the Affidavit in support of the Application deponed by Yakare Oule Jansen is hearsay and does not disclose sources of information stated therein, hence, is incurably defective and incompetent. We have stated the arguments and submissions of the Second Respondent in support of the said preliminary objection in Para 11 – 13 above and those of the Applicants opposing the preliminary objection in Para 15 – 16 above.
20. In our considered view, the matter under scrutiny raises the issue of the veracity of facts deponed in an affidavit. It is settled law that an affidavit must confine itself to matters within its deponent's knowledge; and where a deponent attest to facts not within his or her knowledge, he or she is required to disclose the source of his or her information and the grounds of his or she belief. (see: *Law of Affidavits*, Second Edition, by P.M. Bakshi at pages 20 -24; (See also *Mulla on Code of Civil Procedure*, Sixteenth Edition, at Page 2348 discussing Order 19 of the Code of Civil Procedure Act V of 1908 of India; see also Order 19 of Civil Procedure Codes of Kenya, Uganda and Tanzania).
21. It is also settled law that an affidavit deponed on information and belief which does not disclose sources of information and grounds of belief becomes incurably defective, incompetent and may be struck out by a court of law. However, we hasten to point out that "it is not always the case that an application will be struck out because it is supported by a defective affidavit. In a fit case, there is always room for an amendment of the affidavit" (See: *Samuel Kimaro vs Hidaya Didas, Civil Application No. 20 of 2012, Court of Appeal of Tanzania*) and for expunging defective parts or paragraphs "where defects in an affidavit are inconsequential" (See: *Phantom Modern Transport (1985) Ltd. versus D. T. Dobie (Tanzania) Ltd, Civil Reference No. 15 of 2001 and 3 of 2005, Court of Appeal of Tanzania*).
22. In the present matter, although the 2nd Respondent in the preliminary objection contends that the Affidavit in support of the Application is hearsay and does not disclose sources of information stated therein, he has not shown or demonstrated which paragraphs or parts in the said Affidavit suffer the said defect(s). Apart

from mentioning Rule 21(5) of the Rules, he has not cited any authorities to support his case. Our own reading of the impugned Affidavit reveals two issues. First, the deponent used the following words in paras 4 to 22:

“.....I have been informed and do believe that...”

Then in the “Verification” Clause immediately after Para. 28 she states:

“That what is stated in paragraph 1-28 is true to the best of my knowledge.”

23. The 2nd Respondent did not address us at all on the said “Verification.” However, quite clearly it is in direct conflict with deponent’s own averment in paras 4 to 22. Does the said defect(s) offend Rule 21(5) of the Rules of this Court as alleged by the 2nd Respondent? Rule 21(5) provides as follows:

“Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts, in accordance with Form 3 of the Second Schedule.”

24. Form 3 in the Second Schedule prescribes a “VERIFICATION” paragraph or clause in the following manner or wording:

“I do hereby verify that what is stated above is true to the best of my knowledge, information and belief.”

25. It is clear to us that Rule 21(5) and Form 3 in the Second Schedule require a deponent of an affidavit in support of a formal application to confine himself or herself to the facts within his or her knowledge, information and belief. Though Rule 21(5) and Form 3 in the Second Schedule do not categorically require that in case of deposing an affidavit on information and belief, sources of information and grounds of belief should be disclosed, as we have endeavoured to illustrate herein above, such disclosure is now well-established procedure. Does it then necessarily follow, as argued by Mr. Atwine that since the impugned Affidavit did not disclose sources of information stated therein it is incurably defective and should therefore be struck out?

26. We do not think so. The entire impugned Affidavit has 28 paragraphs but the alleged defects appear in some of the paragraphs only (Para 4 to 22). The offending words as we have seen above are

“.. I have been informed and do believe that ...” Our reading of Para. 4 to 22 shows that the statements deposed therein only state the “Description of the Proposed Amici Curae” in this Application.

27. In *Phantom Modern Transport (1985) Ltd versus D.T. Dobbie (Tanzania) Ltd.* (*supra*) (unreported), the Court of Appeal of Tanzania held:

“Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked leaving the substantive part of it intact so that the Court can proceed to act on it.”

This authority was applied in *Samuel Kimaro* (*supra*) where the same Court held:

“The above authorities are of assistance in highlighting one major point. That it is not always the case that an application will be struck out because it is supported by a defective affidavit. In a fit case, there is always room for an amendment of the affidavit as the above authorities clearly show.”

28. We are most persuaded by the Judicial approach adopted in the foregoing cases, and would similarly expunge the offending paragraphs (4 – 22) from the

impugned Affidavit as we hereby do.

29. Nonetheless, the striking out of the offending paragraphs notwithstanding, we do find the present Application properly before us. It seems quite clear to us that the expunged paragraphs pertain merely to a description of the proposed *amici curiae*. Their deletion does not negate the Applicants' interest in *Reference No. 16 of 2014*. As we endeavour to demonstrate below such interest is a prerequisite for an application for leave to appear as *amicus curiae* in this Court.
30. In conclusion, having expunged the defective paragraphs in the impugned Affidavit, we hereby overrule the preliminary objection raised by the 2nd Respondent. We proceed to determine the Application on merits as hereunder.
31. Rule 36(2) (e) and (4) highlights the parameters against which an application for leave to appear as *amicus curiae* may be considered. Whereas Rule 36(2) (e) requires the demonstration of an interest in the outcome of the case in which an applicant seeks to appear, Rule 36(4) prescribes the additional test of justification as a basis for the grant of leave to appear as *amicus curiae*. For ease of reference, we reproduce the cited Rules below:

“Rule 36(2) (e)

(2) An application under sub-rule (1) shall contain –

(a)

(b)

(c)

(d)

(e) a statement of the intervener's or *amicus curiae*'s interest in the result of the case.

Rule 36(4)

If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time within which the intervener or *amicus curiae* may submit a statement of intervention.”

32. As this Court held in *UHAI EASHRI & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another, EACJ Applications No. 20 & 21 of 2014*, Rule 36(2)(e) places a duty upon an applicant for joinder as *amicus curiae* to demonstrate the nature of its interests in the outcome of the substantive proceedings. Indeed, faced with a similar Application in *FORSC & 8 Others* (supra), this Court did hold that an *amicus curia* must have an interest in the proceedings it seeks to join. In *UHAI EASHRI & Another* (supra), this Court also held that Rule 36(4) imposed a duty upon such applicant to establish to the satisfaction of the Court circumstances that *prima facie* justifies its appearance as *amicus curiae*.
33. As quite correctly averred in the present Application, the legality of sections 179 and 180 of the Uganda Penal Code Act, which provide for the offence of criminal defamation, were challenged in *Reference No. 16 of 2014* for violating the right to freedom of expression, including freedom of the press and the right to access to information. The Applicants' interest therein is captured in paragraphs 23 - 27 of the Affidavit of one Yakare-Oule Jansen. Paragraph 23 describes the Applicants as organizations whose area of focus includes 'promoting respect for and observance of the right to freedom of expression, including freedom of the Press and the right to access to information.' It thus establishes their expertise in the

matters raised in *Reference No. 16 of 2014*, from which the present Application arises.

34. Against that background, it seems to us that paragraph 25 of the same Affidavit clearly demarcates the Applicants interest in the outcome of the Reference in the following terms:

“These issues are central to the mandate of each of the (NGO) organizations, thus they seek to utilize their expertise towards assisting the Court in its interpretation and application of the Treaty.”

35. We are, therefore, satisfied that the Applicants have aptly demonstrated their interest in the outcome of *Reference No. 16 of 2014* as required by Rule 36(2) (e).

36. Having so found, we revert to a consideration of whether the Applicants have satisfactorily demonstrated circumstances that would justify their joinder in the Reference as *amici curiae* as provided by Rule 36(4). Stated differently, what considerations should a court take into account when faced with an application such as the one before us? This Court has had occasion to pronounce itself on the parameters to be considered in determining this question.

37. In *Advocats San Frontiers vs. Mbugua Mureithi Wanyambura & 2 Others EACJ Application No. 2 of 2013*, it was held that a court may consider joinder of an applicant as *amicus curiae* if it considered it to be in the interests of justice to do so, provided that such prospective *amicus curiae* was independent of the dispute between the Parties. Indeed, in *FORSC & 8 Others* (supra) this Court held that an *amicus curia* was under a duty to restrict its brief to ‘the most cogent and impartial information.

38. In the latter case of *UHAI EASHRI & Another* (supra), citing with approval Mohan, S. Chandra, *‘The Amicus Curiae: Friends No More?’* 2010, Singapore Journal of Legal Studies, 352 – 371, p. 14, it was held:

“An *amicus* is normally appointed if the court is of the view that a case involves important questions of law of public interest; if a party that is unrepresented would not be able to assist the court; or if the points of law do not concern the parties involved but is nevertheless a matter of concern to the Court.”

39. In the more recent cases of *Dr. Ally Possi & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another EACJ Application No. 1 of 2015 and Secretariat of the joint United Nations Programme on HIV/AIDS vs. HRAPF & Another EACJ Application No. 3 of 2015*, this Court did uphold the principle of neutrality, whereby the relationship between a prospective *amicus curiae* and the parties to a dispute should be neutral, independent of the dispute and governed by fidelity to the law.

40. Therefore, in our considered view, the parameters for consideration in determining the joinder of an applicant as *amicus curiae*, and within which courts’ judicial discretion may be exercised are as follows:

- a. Principle of neutrality – a prospective *amicus curiae* should be neutral, impartial, and independent of the parties to an adversarial dispute.
- b. A prospective *amicus curia* should demonstrate reasonable expertise in the subject matter for adjudication and fidelity to the law.
- c. An *amicus curia* shall normally be appointed if the court is of the view that a case involves important questions of law in an area of public interest.

- d. If the questions of law posed do not concern the parties involved but are nevertheless a matter of concern to the court.
- e. If it is, otherwise, in the interests of justice to admit a prospective *amicus curia* to a dispute.

41. We have carefully scrutinized all the material on record in the present Application, and dutifully considered the rival arguments of all Parties. We have seen press statements, as well as print outs from the different Applicants' websites dated 20th July 2015 in which the Applicants display a series of activities conducted particularly in their campaign to end criminalization of defamation, including legal representation of journalists and organization of seminars.
42. It was submitted that the foregoing statements are an expression of bias and lack of partiality. With respect, we take a contrary view. It seems to us that the impugned statements provide insight into the Applicants' mandate and, as we have held earlier herein, explain their interest in the outcome of the substantive Reference. Such scholarly interest in the subject of criminal defamation would inform the substance of an *amicus* brief provided by the Applicants, and is to be distinguished from the unprincipled, often unresearched, 'rights-based' agitation that is typified by pressure groups and lobbyist organizations.
43. In the instant case, we have Applicants that have undeniably engaged in the extensive study of selected laws and their impact on freedom of the press and related rights. They seek to share the knowledge garnered with a view to contributing to legal jurisprudence in that area. We take the view that the inference that their mandate is skewed to the abolition of criminal defamation should be weighed against the legal questions posed by criminal defamation as intimated in the material on record, as well as the Applicants' scholarly and specialized contribution to possible legal reform in the area of press freedoms generally.
44. We are fortified in this position by the role of an *amicus curiae* viz a viz the Court's discretion as to the usefulness of an *amicus* brief. On the one hand, a 'friend of court' assists the court by providing information so that the court will not fall into error, but does not seek to influence the final outcome or attempt to persuade the court to adopt a particular view, whether or not he has a direct interest in the outcome. See Mohan, S. Chandra, *The Amicus Curiae: Friends no more? Ibid. p. 3*. On the other hand, it is the duty of a court that has been successfully courted by an *amicus curia* to judiciously determine the neutrality of the positions advanced in an *amicus* brief and distill therefrom such data as is demonstrably useful in the determination of the matter before it.
45. It seems to us, therefore, that whereas an *amicus curiae* must of necessity have some semblance of interest in a matter that would motivate it to apply to be joined therein in the first place, courts are at liberty to disregard *amicus* briefs that seek to influence the final outcome or attempt to persuade the court one way or another. For present purposes therefore, should this Court deduce a biased, irrational, unresearched premise for the positions advanced by the Applicants it would be at liberty to sever its friendship with them and disregard their *amicus* brief.
46. In the result, we take the view that the justice of this matter dictates that the Court do benefit from the Applicants' apparent expertise in the issues under

scrutiny in the substantive Reference. We do, therefore, allow this Application and hereby grant the Applicants leave to be joined as *amici curiae* in Reference No. 16 of 2014.

G. Disposition

47. Having so held, we make the following final orders:

- i) Medical Legal Defence Initiative (MLDI) & Others are hereby granted leave to join Reference No. 16 of 2014, as *amici curiae*;
- ii) The said *amici curiae* are hereby granted leave to submit a joint *Amicus* Brief in writing in Reference No. 16 of 2014 within such time frame as shall be directed by the Court.
- iii) The *Amicus* Brief shall be restricted to issues within the *amici curiae*'s mandate and of specific relevance to the Reference aforesaid; and
- iv) We make no order to costs.

F. Gimara, Counsel for the Applicants

N. Opiyo, Counsel for 1st Respondent (suing through his legal representative)

P. Mutesi, G. Atwine & O. Bichachi, Counsel for 2nd Respondent

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First Instance Division

Application No. 8 of 2015
Arising from Reference No. 5 of 2015**Rwenga Etienne & Another v Secretary General, East African Community**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo; F. Jundu & A. Ngiye JJ
November 24, 2015

Interim orders - Triable issues - Whether applicants would suffer irreparable injury - Balance of convenience weighing costs to the Community and compensation of Applicants - Registrar's recruitment process

Articles: 14(3) (a) & (5), 27, 30(1), 39, 45(1), (3) of the Treaty - Rules: 21, 68(3) & 73 EACJ Rules of Procedure, 2013

The Applicants, citizens of the Republic of Rwanda and the United Republic of Tanzania, respectively filed Reference No. 5 of 2015 on 9th September 2015, challenging the legality of the process of recruiting a Registrar of this Court claiming that it was carried out on the basis of requirements other than those set out in Article 45(1) of the Treaty. They alleged *inter alia* that: the process was not transparent or fair as the Respondent selectively applied the quota system and denied citizens of Rwanda and Tanzania the opportunity to competitively participate; the Respondent failed to abide with the directive of the Council of Ministers and EAC Staff Rules and Regulations and amended the qualifications to a 15 years' experience, beyond those set out in Article 45. This undermined the spirit of integration enshrined in Article 6(d). The Applicants sought interim orders restraining the Respondent from continuing with the process of the recruitment contending potential applicants would be discriminated if the process was allowed to continue.

The Respondent submitted that there is no *prima facie* case with probability of success the Applicants' prayers were based on flawed misinterpretation of the Treaty and the Staff Rules and Regulations. Furthermore, the Applicants would not suffer irreparable injury that could not be compensated by an award of damages; and they would not obtain quotas which had already been already exhausted and the recruitment process was at its final stage.

Held:

1. The Reference raised triable issues touching on an alleged breach of Article 45(1) of the Treaty. The Applicants bore the burden of demonstrating that the grant of the injunction was necessary to protect them against irreparable injury. However, they did not sufficiently demonstrate the irreparable injury they stood to suffer if Application was disallowed or whether the said injury could not be compensated by damages.
2. Weighing the likely inconvenience or damage that would be suffered by the Applicants if the interim orders were not granted against the likely inconvenience or cost to the Respondent or the Community, the Respondent stood to suffer inconvenience with far reaching repercussions to the Community if the interim

orders were granted.

Cases cited

EACSO v AG of Burundi & Ors [2012-2015] EACJLR 623, Appl. No. 5 of 2015

Mbidde Foundation Ltd & Anor v Secretary General EAC & Anor [2012-2015] EACJLR 521, Consolidated Applications No. 5&10 of 2014

Prof. Anyang' Nyong'o & Ors v AG of Kenya & Ors [2005-2011] EACJLR 16, Ref. No. 1 of 2006

Sergent v Patel 1972 16 EACA 63

Editorial Note: On 12 February 2016, Appeal 6 of 2015 was struck out as incompetent for no-compliance with the EACJ Rules of Procedure

REASONED RULING

A. Introduction

1. The Applicants, Mr. Rwenga Etienne and Mr. Moses Marumbo, are natural persons, adult citizens of the Republic of Rwanda, and the United Republic of Tanzania, respectively. The Respondent is self defining and sued as such under Article 4(3) of the Treaty for the Establishment of the East African Community (“The Treaty”).
2. On 9th September 2015, the Applicants filed *Reference No. 5 of 2015 Rwenga Etienne and Moses Marumbo vs. the Secretary General, East African Community*, as well as the present Application before this Court.
3. The Applicants by the said application sought interim orders pending the hearing of Reference No. 5 of 2015 and specifically sought orders restraining the Respondent, his agents, assignees, servants or any other persons drawing orders from the Respondent from continuing with the process of the recruitment of the Registrar of the East African Court of Justice (“The Court”).
4. The Application is premised on the following grounds:-
 - a) That Article 45 (1) of the Treaty provides for requirements for the appointment of the Registrar of the East African Court of Justice;
 - b) That a reference has been made to the East African Court of Justice challenging the act of the Secretary General to recruit the Registrar of the East African Court of Justice on the basis of requirements other than the ones set out by Article 45(1) of the Treaty;
 - c) That the matter presented to this Court for determination is a matter of infringement of the Treaty;
 - d) That the Respondent should not be allowed to infringe on the provisions of the Treaty but should instead be guided on how to comply with its provisions in the process of the recruitment of the Registrar and on ward appointment by the Council of Ministers;
 - e) That unless the orders prayed for are herein granted, the Applicants stand to suffer irreparable injury;
 - f) That this matter ought to be dispensed with in a timely manner as it is a matter of urgency, there solution of which is important to guide the recruitment of the Registrar of the Court.
5. At the hearing of the Application, the Applicants were represented by Mr. Paul Ng’arua, while the Respondent was represented by Dr. Anthony L. Kafumbe. Upon hearing the Parties, this Court did, on 30th October 2015, deliver a summary Ruling disallowing the Application and reserved reasons thereof to be

given on notice to the parties. This course of action is duly provided for in Rule 68(3) of the East African Court of Justice Rules of Procedure (“The Rules”). We hereby deliver our reasoning.

B. Case for the Applicant

6. Reference No. 5 of 2015 principally challenges the process of recruitment of the Registrar of this Court on the grounds *inter alia* that it was not transparent nor fair because the Respondent:-
 - i) Selectively applied the quota system and denied citizens of Rwanda and Tanzania the opportunity to competitively participate in the said process. Such an action, they argue, undermines the spirit of integration enshrined in Article 6 (d) of the Treaty; and
 - ii) Declined to abide by the directive of the Council of Ministers which directed him to recruit the Registrar in accordance with Article 45 of the Treaty as well as the EAC Staff Rules and Regulations. Instead, he purported to amend the directive by demanding qualifications for the office of Registrar beyond what is set out in Article 45.
7. Further, the Applicants have argued that unless the interim orders are granted, qualified potential applicants will stand to suffer discrimination in the process of recruitment.
8. The Applicants argued that their Application for interim orders stands the test of *prima facie case*, irreparable prejudice to the Treaty and the Decision Making Protocol which only a grant of interim orders can cure in so far as the impugned requirement that the Registrar should have an LL.M degree and 15 years of relevant service, qualified as extraneous qualifications, is in essence an amendment to Article 45(1) without due process, and therefore a breach of the Treaty. On that point, the Applicants contended that there is a substantial question to be determined, and as such, a *prima facie case* that has prospects of success on the merits had been established. They added that the impugned action to exclude citizens of Tanzania and Rwanda from running for the post is not backed up by any decision of Council.
9. On the expectations that an applicant seeking interim orders must establish that, on the balance of convenience it is so entitled, learned Counsel for the Applicants contended that public interest is at stake in this Application in so far as the injustices meted out by the Respondent are going to affect the integrity of the Treaty and Protocols of the East African Community, the citizens (including the Applicants) and the integrity of the office of the Registrar. He argued also that in the event, the recruitment of the Registrar has not been concluded and as such no inconvenience whatsoever will be occasioned to the Respondent if the process is stayed to remedy the error and to uphold the integrity of the Treaty.

C. Case for the Respondent

10. On its part, the Respondent, in opposing the prayer for interim orders pleads that, in the instant case, there is no *prima facie case* with probability of success that has been established against him and that the entire Applicants’ prayers are based on flawed misinterpretation of the Treaty and the East African

Community Staff Rules and Regulations. Dr. Kafumbe, the learned Counsel for the Respondent, did also argue that it has not been shown how granting an injunction against the Respondent will enable Applicants get the quota that they have already exhausted in any event. He added that the Applicants had failed to show how, if the injunction was not granted, they will suffer irreparable injury that cannot be compensated by award of damages. Finally, he stated that the balance of convenience favors the Respondent the recruitment of the Registrar being at its final stage and the successful candidate is awaiting his appointment. He referred to the decision in *Sergeant vs. Patel* 1972 16 EACA 63 in support of his view that interim orders should not be based on speculation and reliance on misinformation as the Applicants are doing in this case.

D. Court's Determination

11. The grant of interim orders before this Court is governed by Article 39 of the Treaty as read together with Rules 21 and 73 of the Court's Rules. Article 39 reads:-

“The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable”
12. It is also trite law within this Court, that an applicant who seeks an interim injunction must show; firstly, a *prima facie* case with a probability of success; secondly, that non-grant of the temporary injunction would expose such an applicant to irreparable injury that would not be justly compensated by an award of damages, and, thirdly, that where a court is in doubt, it would decide the application on balance of convenience. This position is reflected in cases such as *Prof. Peter Anyang' Nyong'o & 10 others vs The Attorney General of the Republic of Kenya & 3 others*, EACJ Ref. No.1 of 2005; *Mbidde Foundation Ltd & Rt. Hon. Margaret Zziwa vs. Secretary General of the East African Community & The Attorney General of the Republic of Uganda*, EACJ consolidated Applications No. 5 & 10 of 2014, and *East African Civil Society Organisations Forum (EACSOFF) vs The Attorney General of the Republic of Burundi and 2 others*, EACJ Application No. 5 of 2015.
13. In the instant Application, it was strongly argued by the Applicants that the act of the Respondent to recruit the Registrar of the East African Court of Justice on the basis of requirements other than the ones set out by Article 45(1) of the Treaty, as well as the Decision Making Protocol and the East African Community Staff Rules and Regulations was in contravention of the said legal instruments. It was also the said Applicants' contention that the Respondent's action of adding extraneous qualifications to Article 45(1) of the Treaty as contained in the impugned selection process without due process has illegally amended and undermined Article 45(1) in violation of Article 14 of the Treaty.
14. The Applicants also took issue with the legality of the said process of the recruitment of the Registrar of the East African Court of Justice and invited this Court to stop the Respondent from continuing with the process.
15. Conversely, Dr. Kafumbe strongly opposed this Application. He argued that at the time of running the advert for Registrar, the staffing of the Court did in fact show that the Republic of Rwanda and the United Republic of Tanzania had exhausted their quota points. The advert did not therefore allow Rwandan and

Tanzanian citizens to apply for the said position knowing that they would not be selected.

- 16 The Respondent also pleaded that Article 45(1) should not be cited in isolation but must be read together with Article 45 (3) in so far as the conditions of service for executive staff justify the requirement of a higher degree and minimum years of experience asset out in the East African Community Job Description Manual. It is in the same vein that the Council exercising its mandate under the Treaty, specifically Article 14(3) (a), set a 15 years' experience for the position of Registrar (Grade DI) given the senior nature of the appointment.
17. He finally contended that the claim that the Treaty or the Staff Rules and Regulations of 2006 were breached does not arise and added that there are no Partner States or East Africans citizens that have been favored or discriminated in the recruitment exercise.
18. We have read the pleadings and documentary annexures so far filed in Court both in the Motion and the Reference. We also benefited tremendously from the very able submissions by all learned Counsel who addressed us.
19. Article 30(1) of the Treaty explicitly prescribes the jurisdiction of this Court. It reads:-

“Subject to the provisions of Article 27 of this Treaty, any person who is residential Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, Decision or action of a Partner State or an Institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.”
20. Therefore, for a matter to be justiciable before this Court, the subject matter in question must be an Actor statute, or a regulation, directive, decision or action of a Partner State or an Institution of the East African Community. Further, it must be one, the legality of which is in issue vis-à-vis the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty.
21. In the present case, the Reference raises issues of due process in the appointment of the Registrar of the East African Court of Justice. The action or decision giving rise to a cause of action in that conflict would be the decision to recruit the Registrar on the basis of a job advertisement that purportedly flouts the cited provisions of the Treaty and related EAC instruments.
22. Applying the above cited principles for the grant of an interim injunction, we are satisfied that the Applicants have shown that Reference No. 5 of 2015 raises a triable issue, because the matter before this Court touches upon an alleged breach of Article 45(1)of the Treaty. Another issue for determination by this Court is whether the Respondent has taken steps to amend and/or to augment article 45(1) by creative, illegal and erroneous reasoning that the Council of Ministers had, by operation of Article 45(3) of the Treaty, amended and/or augmented the Registrar's qualifications without due process. The Applicants also alleged that Article 14 of the Treaty was breached in so far as the directive to change the qualifications of the Registrar by whatever means were not communicated in a gazette as contemplated by Article 14(5).
Taking into account all the above issues and without pre- determining any of

them, we are satisfied that there is a valid question for Treaty interpretation, and we find, therefore, that a *prima facie* case has been established.

23. With regard to the second criterion for the grant of an interim injunction, there is no material before us that indicates that the Applicants are likely to suffer irreparable injury that cannot be compensated by an award of damages. The Applicants, with respect, failed to demonstrate that they had the requisite skills and qualifications for the job of Registrar and that they are people who should have been considered if the door had been opened for them. Mr. Ng'aru, learned Counsel for the Applicants, strenuously argued that the fact that Article 45(1) of the Treaty has been misinterpreted, misconceived and passed through as similar to Article 45(3) is a big prejudice towards the Applicants as observant citizens. And, for him, such an action cannot be cured by damages.

With due respect to Counsel for the Applicants, it appears to us that he was not able to address us satisfactorily (despite repeated questioning by the Court) on what would bring the Applicants into the category of people that would be injured if the interim orders were not granted. In any event, we were not also satisfactorily addressed on the issue of whether or not whatever injury the Applicants were likely to suffer if at all, could not be adequately compensated by damages. Consequently, we find that the Applicants have not sufficiently demonstrated the irreparable injury they stood to suffer if this Application was disallowed or that the said injury could not be compensated by damages. Having so found, we do not deem it necessary to consider the balance of convenience in this matter.

24. Having so said, had we considered the balance of convenience in this matter, an important consideration in this balancing exercise would be whether any potential injustice to either party could be adequately compensated by damages. If the injury likely to be suffered by either Party could be qualified financially, we would be inclined to grant or refuse the injunction accordingly. For instance, if the injury to the Applicants may be adequately compensated by damages, this Court would be inclined not to grant the injunction; and similarly if the injury likely to be suffered by the Respondent may be compensated in damages, this Court would be inclined to grant the injunction. The Applicants bore the burden of demonstrating that the grant of the injunction was necessary to protect them against irreparable injury. With respect, we are not satisfied that the Applicants demonstrated any injury they were to suffer should the injunction not be granted. In their affidavit, the Applicants stated that they seek to protect The Republic of Rwanda and the United Republic of Tanzania interests and their citizens, as well as the rights of the Applicants but they did not provide material that demonstrates the injury that any such party is likely to suffer if the injunction is refused. Further, there is no reference or application on this matter tabled before this Court by the Attorney General of the Republic of Rwanda or the United Republic of Tanzania who are entitled to protect their Partner States and citizens' interests before this Court.

25. Further, weighing the likely inconvenience or damage that would be suffered by the Applicants if the interim orders were not granted against the likely inconvenience or costs to the Respondent or the Community if it is granted, we take the view that the Respondent in his representative capacity as enshrined in

Article 4(3) of the Treaty stands to suffer in convenience with more far reaching repercussions to the Community should we grant the interim orders prayed for than the Applicants would suffer should we refuse the same.

27. The costs thereof shall abide the outcome of the Reference.

28. We further direct that the Reference be fixed for hearing as a matter of priority.

29. It is so ordered.

P. Ng'arua Counsel for the Applicants

A. Kafumbe for the Respondent

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First Instance Division

Application No. 10 of 2015
(Arising from Reference No. 1 of 2015)**Attorney General of Uganda v Johnson Akol Omunyokol**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ, F. Ntezilyayo, F. Jundu & A. Ngiye JJ
June 29, 2016

Amendment of reference out of time without leave - Inherent powers of Court exercised to prevent abuse of Court process - Costs

Rules: 1(2), 4, 45, 46, 47(1) (c) (2), 48 (a) (b) (c), 49, 50 & 111, EACJ Court Rules of Procedure, 2013

The Applicant contended that the Respondent amended Reference No. 1 of 2015 out of time and without leave of the Court contrary to Rules 4, 46, 48, 49 and 50 of the Court's Procedures. The original Reference was Reference on 8th June, 2015 and served on the Applicant on 29th June, 2015; subsequently, the Applicant filed a Response on 7th August, 2015 and served the Respondent on 17th August, 2015. In terms of Rule 45 of the Rules, the pleadings closed on 1st September, 2015. The Applicant prayed that the Amended Reference be struck out with costs.

The Respondent invoked the inherent powers of the Court in Rule 1(2) arguing that although the Amended Reference was filed 24 days out of time, the failure to seek and obtain leave was an oversight and not an abuse of court process. The amended was not prejudicial to the Applicant and would resolve all the controversies between the Parties. Filing of a formal application thus causing unnecessary delay.

Held:

1. Rules of Procedure must be meticulously adhered to so as to entrench their intended purpose of the seamless administration of justice by fostering the integrity, rationality and objectivity of the judicial process. The rules are intended to guard against anarchy and indiscipline in the courts, which is tantamount to abuse of court process.
2. It is trite law that the inherent powers of a court may only be invoked where there is no express provision that addresses a matter for adjudication. Inherent powers cannot be exercised in contravention of, conflict with or ignoring express legal provisions. Therefore, the Respondent could not invoke Rule 1(2) to justify his filing of the Amended Reference without leave of the Court given the express provisions of Rule 48(b) and (c) on the power to amend. Rule 1(2) enjoins this Court to exercise its inherent power to prevent the abuse of the process of the Court.
3. The Amended Reference was filed without leave of the Court and was improperly on the Court record and was therefore struck out the under Rule 47 (1) (c) with costs to the Applicant.

Cases cited

Ram P. Agarwal & Anor v Gopi Krishan (Dead) & Ors, SCI, Civil Appeal No. 2798 of 2013

Saldanha & Ors v Bhailand & Co. & Ors [1968] EA 28

The Secretary General of the EAC v Margaret Zziwa, EACJ Application No. 12 of 2015

RULING

Introduction

1. This Application arose from *Reference No.1 of 2015* and has been brought under Rules 1(2), 45, 46, 47(1)(c), (2) and 48 of the East African Court of Justice Rules of Procedure, 2013 (“the Rules”).
2. The Application is supported by an Affidavit deposed by one Bafirawala Elisha, a Senior State Attorney in the Applicant’s Chambers.
3. At the hearing thereof, the Applicant was represented by Ms. Goretti Arinaitwe and Ms. Charity Nabaasa, both of whom are Attorneys in the Applicant’s Chambers, while the Respondent was represented by Mr. Fitz Patrick Furah.

Applicant’s case

4. The main thrust of the Applicant’s Notice of Motion, Supporting Affidavit and Submissions is that the Respondent amended the above Reference .out of time and without leave of this Court contrary to Rules 4, 46, 48, 49 and 50 of this Court’s Rules.
5. The Applicant contended that the Respondent had filed his original Reference on 8th June, 2015 and notification of the same was served on the Applicant on 29th June, 2015. The Applicant filed a Response thereto on 7th August, 2015 and served the same on the Respondent on 17th August, 2015. In terms of Rule 45 of the Rules, the pleadings thus closed on 1st September, 2015.
6. The Applicant therefore seeks to have the Amended Reference struck out with costs.

Respondent’s case

7. Conversely, it was the Respondent’s contention that in filing the Amended Reference, he relied on Rule 1(2) of the Rules, which mandates the Court to invoke its inherent powers to make necessary orders for the ends of justice. It was argued on his behalf that although the Amended Reference had been filed 24 days out of time, the failure to seek and obtain leave as required under Rules 4 and 48 of the Rules was a mere oversight on his part.
8. Mr. Furah strongly denied that the Amended Reference was an abuse of court process and/or prejudicial to the Applicant, arguing that nowhere in the Notice of Motion or Supporting Affidavit did the Applicant .allege prejudice in relation thereto. He insisted that the amendments in the Amended Reference sought to resolve all the controversi.es between the Parties once and for all. He further argued that the filing of an Amended Reference in the manner adopted by the Respondent was in the interest of speedy trial and if struck out by this Court, would necessitate the filing of a formal application thus causing unnecessary delay in the matter.
9. Mr. Furah denied any scandalous drafting in the Amended Reference, contending that the highlighted paragraphs depicted new and amended averments as by law required. He reiterated his prayer for This Court to invoke its inherent powers

under Rule 1(2) of the Rules to allow the Amended Reference and disallow the Application with costs.

Court's determination

10. In our view, the Application raises the following issues:

- I. Whether the Amended Reference filed without leave of the Court and out of the prescribed time is properly on the court record; and
- II. Whether the Applicant is entitled to the Orders sought from this Court.

Issue No. i: Whether the Amended Reference filed without leave of the Court and out of the prescribed time is properly on the court record

11. The amendment of pleadings before this court is governed by Rules 48, 49 and 50 of the Rules, while applications for extension of time are addressed by Rule 4 thereof. Parties are at liberty to amend their

Pleadings without the leave of court 'before the close of pleadings.' See Rule 48(a). That option was not available to the present Respondent as the Amended Reference was filed after closure of pleadings. Indeed, that fact is not contested herein.

12. Consequently, the only legal avenues that were available to the Respondent were such as are provided in Rule 48(b) or (c) of the Rules. We reproduce the said Rule below for ease of reference:

Rule 48

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in the pleading, a party may amend its pleading-

(a)

(b) With the consent of all parties, and where a person is to be added or substituted as a party, that person's consent; or

(c) With leave of the Court.”

13. The Respondent explored neither options but simply purported to file an Amended Reference. He did not move the Court in any application whatsoever, but when arguing the present Application, sought to invoke the inherent powers of the Court under Rule 1(2) of the Rules after the event.

14. It is trite law that the inherent powers of a court may only be invoked where there is no express provision that addresses a matter for adjudication. Inherent powers certainly cannot be exercised in contravention of, conflict with or ignoring express legal provisions. See *Saldanha and Others vs. Bhailand & Co. and Others 119681 EA 28* and *Ram Prakash Agarwal & Anor vs. Gopi Krishan (Dead through LRSJ & Ors Civil Appeal No. 2798 of 2013, (Supreme Court of India).*

15. In our considered view, therefore, the Respondent could not invoke the provisions of Rule 1(2) of the Rules to justify his filing of the Amended Reference without leave of the Court given the express provisions of Rule 48 (b) and (c).

16. The question then would be whether or not such course of action amounts to an abuse of court process within the precincts of Rule 47(1) (c), upon which this Application is premised. That Rule 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-

(a)

(b).....

(c) Is an abuse of the process of the Court?"

17. This Court has had occasion to address the function of rules of procedure in due court process in *The Secretary General of the East African Community vs. Margaret Zziwa EACJ Application No. 12 of 2015*, where it was held:

“Rules of Procedure must be meticulously adhered to so as to entrench their intended purpose the seamless administration of justice by fostering the integrity, rationality and objectivity of the judicial process. ... We are also cognizant of the role of courts as stewards of the judicial processes that deliver justice. These processes operate most justly and judiciously when rules of procedure are applied with the seriousness, conscientiousness and dignity that is due to them.”

18. We reiterate our holding above, and take the view that procedural rules are intended to guard against anarchy and indiscipline in the courts, which is tantamount to abuse of court process. Indeed, Rule 1(2) of the Rules, which the Respondent would have us invoke in the present Application, enjoins this Court to exercise its inherent power in such a manner as would ‘prevent the abuse of the process of the Court’.

19. We do, therefore, answer the first issue in the negative and find that the Amended Reference is improperly on the Court record, having been filed without leave of the Court as prescribed by Rule 48(c) of the Rules.

20. In the result, we do hereby allow the Application.

Issue No. ii: Whether the Applicant is entitled to the Orders sought

21. The Applicant sought the following orders from this Court:

I. An Order to strike out or expunge all the pleadings in the Reference amended without leave of this Honorable Court; and

II. An Order that the costs incidental to this Application awarded to the Applicant.

22. Having allowed the Application, we do hereby strike out the Amended Reference under Rule 47(1) (c) of the Rules.

23. On the question of costs, on the other hand, we are guided by the provisions of Rule 111, which postulate that costs should follow the event unless the Court for good reasons orders otherwise. We find no reason to deny the Applicant costs in a matter where the rules of procedure were as clear and unambiguous as this. We do, therefore, grant the costs of this application to the Applicant.

24. It is so ordered.

G. Aribaitwe & C. Nabaasa Counsel for Applicant

F. Furah for the Respondent

First Instance Division

Application No. 11 of 2015
(Arising from Reference No. 7 of 2015)**Alice Nijimbere v East African Community Secretariat**

Coram: M. Mugenyi PJ, I. Lenaola DPJ, F. Ntezilyayo, F. Jundu J & A. Ngiye JJ
November 24, 2015

Interim orders - Secretariat's legal capacity to be addressed at full hearing - Prima facie case - Suspension of recruitment process - Whether irreparable injury was proved - Balance of convenience - Damages

Articles: 2(1), 4(3), 6(d), (e), (f), 9(1) (g), 27(1), 30(1), 39, 45(1) of the Treaty - Rules: 21, 68(3), 73 EACJ Rules of Procedure, 2013

The Applicant was short listed for interviews for the position of Registrar of the Court. Thereafter, the Applicant claimed *inter alia* that the Respondents' agent, Deloitte & Touche Ltd, gave her only two days to travel to Bujumbura, Burundi for the interview. Subsequently, the Applicant requested the Respondent, to permit her to take the interview in Arusha, Tanzania as her daughter was ill, however, the Respondent's decision concerning her request for dispensation to only communicated one hour prior to the interview. The Applicant sought interim orders pending the hearing of Reference No 7 of 2015 specifically for; a nullification of the Respondent's decision rejecting the Applicant's request; suspension of the recruitment process; and relaunch of the interview process with different panellists. The Applicant averred further that the recruitment and appointment of a Registrar was due to be concluded by the end of November 2015, and in the absence of interim orders, she would suffer irreparable injury and her Reference would be rendered academic.

The Respondent submitted that the Applicant: had sued the wrong party contrary to Article 4(3) of the Treaty; had there was no *prima facie* case with probability of success; nor did the Applicant demonstrate the injury she stood to suffer if the interim orders were not granted and she could not be adequately compensated by damages. Additionally, it would be superfluous for the Court to restrain the Respondent as the interviews for the position had already been concluded.

Held

1. The Treaty draws a distinction between the 'Community' established by Article 2(1) thereof and the Respondent Secretariat, an entity established by Article 9(1) (g). However, it is not part of the Court's function while considering an interlocutory application to delve into the merits of a Reference and determine intrinsic questions of law which call for detailed legal arguments and considerations. Those are matters to be dealt with at the hearing of the substantive Reference. Therefore, the question as to whether or not the present Respondent has recourse to the provisions of Article 4(3) of the Treaty (legal

capacity of the Community) calls for detailed legal arguments and cannot be entertained at this stage.

2. An applicant for interim orders must demonstrate a *prima facie* case with a probability of success, but the interim orders sought would not normally be granted unless such an applicant might otherwise suffer irreparable injury that could not be adequately compensated by an award of damages. The Applicant's pleadings, on the face of it, establish a *prima facie* case within the ambit of Article 27(1) of the Treaty.
3. The Applicant did not demonstrate that whatever injury she might suffer, if the *status quo* is not be preserved, could not be adequately compensated by an award of damages. Moreover, the Applicant's prospects of success in the interviews could not be determined, this would have provided a guide as to the magnitude of her injury should the recruitment process not be halted.
4. The recruitment process seemed to be at an advanced stage and involved the engagement of consultants and other costs and logistics. Considering the totality of the circumstances of this case, halting the recruitment process in the absence of satisfactory proof of injury to be suffered by the Applicant would occasion greater injury to the Respondent that had discharged its duty as far as the said recruitment process is concerned

Cases cited

American Cyanamid v Ethicon Ltd (1975) AC 396

E. A. Industries v Trufoods [1972] EA 420

East African Law Society & Ors v AG of Kenya & Ors [2005-2011] EACJLR 92, Appl. No. 9 of 2007

Giella v Cassman Brown & Co. Ltd (1973) EA 358

Mbidde Foundation & Anor v Secretary General of EAC & Anor [2012-2015] EACJLR 521, Consolidated Applications No. 5 & 10 of 2014

Prof. Anyang' Nyong'o & Ors v AG of Kenya & Ors [2005-2011] EACJLR 40, Appl. 1 of 2006

Venant Masenge v Attorney General of Burundi, EACJ Appl. No. 5 of 2013

REASONED RULING

1. In June 2015, the process for the recruitment of a Registrar for the East African Court of Justice commenced with the publication of an advertisement Ref. EAC/HR/2014-2015/033. The Applicant, a citizen of the Republic of Burundi, was one of the shortlisted candidates in that recruitment process. On the other hand, we understood the Respondent to have been the office responsible for oversight of the recruitment process.
2. On 28th October 2015, the Applicant filed *Alice Nijimbere vs. The East African Community Secretariat EACJ Reference No. 7 of 2015*, as well as the present Application before this Court. The Application sought purportedly interim orders pending the hearing of the Reference. It specifically sought the following Orders:
 - a. The nullification of the Respondent's decision of 28th September 2015 rejecting the Applicant's request of dispensation to be interviewed at the EAC Headquarters in Arusha rather than in Bujumbura, Burundi.
 - b. The suspension of the recruitment process in reference above until pleadings were closed.
 - c. The relaunch of the interview process as well as 'organization' (sic) of a different interview panel in accordance with the East African Community Staff Rules and Regulations, 2006.

3. The Application was *inter alia* premised on the following grounds:
 - a. Article 45(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty') provided the requirements for the appointment of a Registrar of the East African Court of Justice (EACJ)
 - b. A Reference had been filed before the said Court challenging the Secretary General to the Community for organizing the interviews for the position in reference above in contravention of Articles 6(d), (e) and (f) of the Treaty, as well as Regulations 20(8) and 21(1) of the East African Community Staff Rules and Regulations, 2006(hereinafter referred to as 'the Staff Rules and Regulations'). We hasten to point out here that it is the presumption herein that these are the Regulations in issue herein as the cited 'East African Court Rules and Regulations 2006' are not known to exist.
 - c. The matter presented to the Court for determination was a matter of Treaty infringement.
 - d. Rather than be allowed to infringe Treaty provisions, the Respondent should be guided on how to comply with the Treaty in the recruitment process in issue presently, as well as the appointment of the Registrar by the Council of Ministers.
 - e. Unless the Orders sought were granted, the Applicant stood to suffer irreparable injury.
4. The Applicant represented herself at the hearing of the Application, while the Respondent was represented by Dr. Anthony Kafumbe. Upon hearing the Parties, this Court did, on 11th November 2015, deliver a summary Ruling disallowing the Application and reserved reasons therefor to be given on notice to the Parties. This course of action is duly provided for in Rule 68(3) of the East African Court of Justice Rules of Procedure (hereinafter referred to as 'the Rules'). We do hereby deliver our reasoned Ruling in this matter.
5. In a nutshell, Ms. Nijimbere argued that the need for interim orders was premised on the fact that the recruitment and appointment of a registrar was due to be concluded by the end of November 2015, therefore closure of the recruitment process in the absence of interim orders by the Court would render her Reference academic. In her opinion, she thus stood to suffer irreparable damage and injury. The Applicant, in what amounted to evidence from the Bar, enumerated her extensive work experience that, in her submission, formed the basis for her being shortlisted as a candidate for the position of Registrar. She questioned the Respondent's decision not to grant her request for dispensation despite having presented what, according to her, was a genuine reason to wit the sickness of her 7 year old daughter. Ms. Nijimbere did also take issue with the reasons advanced for rejection of her request, as well as the untimely manner in which the said decision was communicated to her. We have deduced from the documentation on record in *Ref. No. 7 of 2015* that the reasons advanced for the Respondent's decision were twofold: first, that the medical documents availed to it indicated that the child was not admitted in hospital but simply under observation therefore the Applicant could have made alternative plans for the child's care and, secondly, for purposes of a level playing field, all candidates

were required to be interviewed in their respective home countries.

6. Responding to questions from the Bench, it was the Applicant's unsubstantiated submission from the Bar that the said decision was communicated to her on the very day of the interview. In addition, the Applicant clarified that her Reference was premised on Articles 6(d), (e) and (f), as well as 30 and 31 of the Treaty. She further clarified that she had sued EAC Secretariat and not the Secretary General to the Community, as prescribed in Article 4(3) of the Treaty, on the assumption that upon suing the latter entity the Secretary General would be directly involved in the case. Ms. Nijimbere intimated that the crux of her case was, first, that she was given only 2 days to travel to Bujumbura for the interview; secondly, that the communication of the Respondent's decision with regard to her request for dispensation was communicated only one (1) hour to the interview and, finally, that she had been requested to meet the cost of travel to and accommodation in Bujumbura, regardless of her ability to do so.
7. Conversely, the Respondent premised its case on the principles governing the grant or refusal of interim orders as stated in the cases of *Giella vs. Cassman Brown & Co. Ltd (1973) EA 358* and *East African Law Society & 4 Others vs. Attorney General of Kenya & 3 Others EACJ Application No. 9 of 2007*. The principles advanced in the foregoing cases include the demonstration by the Applicant of a *prima facie* case with probability of success; occasioning irreparable injury to the Applicant that cannot be adequately compensated by damages should the interim orders not be granted, and a determination of the balance of convenience of the matter in the event that the Court had doubts about the first 2 principles.
8. We understood it to be the Respondent's contention that the Applicant had, in bringing *Reference No. 7 of 2015* against the EAC Secretariat, sued the wrong party contrary to Article 4(3) of the Treaty. Dr. Kafumbe argued that by suing the wrong party, the Applicant fell short of establishing a *prima facie* case with a probability of success. Without further elaboration, learned Counsel did also argue that neither the Treaty nor the Staff Rules and Regulations had been breached by the Respondent therefore no *prima facie* case had been established in that regard. On the question of irreparable injury, it was the Respondent's submission that the Applicant had not demonstrated what injury she stood to suffer should the interim orders she sought not be granted that could not be adequately compensated by damages. In oral submission highlights, Dr. Kafumbe argued that whatever injury she had suffered could be compensated by damages. Finally, on the balance of convenience, it was Dr. Kafumbe's submission that it would be superfluous for the Court to restrain the Respondent at this stage as interviews for the position in contention had already been concluded. In oral highlights, learned Counsel argued that the recruitment process had been concluded on 28th September 2015, therefore a suspension or repetition of the process would be a terrible inconvenience to the Respondent.
9. In reply, Ms. Nijimbere questioned Dr. Kafumbe's submission that all candidates had to be interviewed in their home country in order for the Respondent to verify their nationalities. She argued that this would have been the role of M/s Deloitte & Touche Limited, the recruitment consultants; that argument by the Respondent was not cited in its decision rejecting her application for the dispensation of some recruitment rules and, in any event, the Respondent would

have been aware of her nationality given that she was married to an employee thereof. Ms. Nijimbere agreed with learned Respondent Counsel that the grant or refusal of an application for interim orders was a matter for judicial discretion, but challenged the Respondent to demonstrate to the Court how her issue had been administratively addressed. Finally, with regard to the requirement of a *prima facie* case, we understood the Applicant to contend that, having been shortlisted for the position in question, she did have the requisite experience for the position applied for and the Respondent was not at liberty to doubt her prospects of success in the interview. She further argued that she had suffered moral injury having been denied the opportunity to be interviewed yet she had a sick child.

10. The grant of interim orders before this Court is governed by Article 39 of the Treaty as read together with Rules 21 and 73 of the Court's Rules of Procedure. Article 39 reads:

“The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable.”

11. This Court does recognise the principles governing the grant or refusal of interim orders as cited by learned Counsel for the Respondent. An applicant for interim orders must demonstrate a *prima facie* case with a probability of success, but the interim orders sought would not normally be granted unless such an applicant might otherwise suffer irreparable injury that could not be adequately compensated by an award of damages. If a court faced with such an application was in doubt as to whether or not a *prima facie* case had been established and/or the injury the applicant was liable to suffer could not be adequately compensated by an award of damages, the court was enjoined to determine the application on a balance of convenience. See *Prof. Peter Anyang' Nyong'o & 10 others vs. The Attorney General of the Republic of Kenya & 3 others EACJ Ref. No. 1 of 2006*.

12. This Court has also adopted the principles governing an application of this nature as stated in the case of *American Cyanamid vs. Ethicon Ltd (1975) AC 396*, where it was held that a court considering an application for temporary relief had to be satisfied that the claim was not frivolous or vexatious but, rather, presented a serious question to be tried; without necessarily delving into questions of law and/or fact upon which the substantive suit hinges. See *Mbidde Foundation & Another vs. Secretary General of the East African Community & Another EACJ Consolidated Application No. 5 & 10 of 2014*.

13. We must state from the onset that we do not find the Applicant's recourse to Article 31 of the Treaty tenable. That legal provision pertains to employees of the East African Community, not prospective employees thereof such as the Applicant. Nonetheless, her claim against the Respondent is premised on Article 30 as well. We do, therefore, revert to that aspect of her claim.

14. As stated hereinabove, it was argued for the Respondent that the wrong Party had been sued by the Applicant therefore *Ref. No. 7 of 2015*, from which the present Application arises, therefore the present Application did not establish a *prima facie* case. Learned Counsel for the Respondent cited Article 4(3) of the Treaty in support of his submission. It reads:

“The Community shall, as a body corporate, be represented by the Secretary General.”

15. This Court has had occasion to pronounce itself on what would amount to a *prima facie* case within the context of the East African Community jurisdiction. In that regard, the Court has found a *prima facie* case to have been established where an issue for Treaty interpretation has been raised on the face of an Applicant's pleadings as required by Article 27(1) of the Treaty. See *Venant Masenge vs. Attorney General of Burundi EACJ Application No. 5 of 2013*. In the present case, the Applicant does in paragraph 30 (page 4) of the Reference seek this Court's determination as to whether or not the rejection of her request for dispensation of the interview rules by the Respondent constitutes a breach of Article 6(d), (e) and (f) of the Treaty. On the face of the Applicant's pleadings, therefore, a *prima facie* case would appear to have been established within the ambit of Article 27(1) of the Treaty.
16. However, the issue of a wrongful Party as raised by the Respondent invokes the question as to whether the Reference does raise a serious triable issue. Quite clearly, should the wrong Party have been sued, the Reference cannot be said to present any legal claim whatsoever against the Respondent. Without delving into the merits of the Reference, it seems to us that the Treaty draws a distinction between the 'Community' established by Article 2(1) thereof and the Respondent entity as established by Article 9(1) (g). We do recognize that it is no part of this Court's function while considering an interlocutory application to determine intrinsic questions of law which call for detailed legal arguments and considerations; those are matters to be dealt with at the hearing of the substantive Reference. See *American Cyanamid vs. Ethicon Ltd* (supra). For present purposes, the question as to whether or not the present Respondent has recourse to the provisions of Article 4(3) of the Treaty is one such question of law that calls for detailed legal arguments and cannot be entertained at this stage. Consequently, subject to more intrinsic arguments at the hearing thereof, we are unable to agree with learned Counsel for the Respondent that the wrong Party has been sued in *Ref. No. 7 of 2015*. We do, therefore, deem it necessary to determine the questions of irreparable injury and balance of convenience.
17. The decision in *E. A. Industries vs. Trufoods [1972] EA 420* that was referred to in *Giella vs. Casman Brown* (supra) is quite instructive in this regard. In that case, it was held (Spry VP):
- “There is, I think, no difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a *prima facie* case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.”
18. Learned Counsel for the Respondent questioned the injury the Applicant stood to suffer in the event that this Application was disallowed. The Applicant did not address this issue satisfactorily, simply alluding to the injury she had suffered by virtue of the Respondent's actions. That is not the sort of injury envisaged in an application for interim orders. The injury envisaged in such an application is to do with whether or not the preservation of the pre-application *status quo* would avert injury to an applicant that cannot be compensated by damages. The

Applicant did not satisfy us that whatever injury she might suffer should the present *status quo* not be preserved could not be adequately compensated by an award of damages. Consequently, we find that the Applicant has not sufficiently demonstrated the irreparable injury she stood to suffer if this Application were disallowed or that the said injury could not be compensated by damages.

19. In *American Cyanamid vs. Ethicon Ltd (supra)*, the objective of interlocutory reliefs was aptly stated as follows (Lord Diplock):

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages if the uncertainty were resolved in the defendant’s favour at trial. The court must weigh one need against another and determine where ‘the balance of convenience’ lies.”

20. In the present Application, the Applicant sought to protect her right to employment from violation by halting the appointment of a substantive Registrar for the Court prior to a determination of *Ref. No. 7 of 2015*. Learned Counsel for the Respondent, on the other hand, intimated that the recruitment process commenced in June 2015 and had since been concluded in accordance with a directive to the Respondent by the Council of Ministers to conclude the recruitment of the Registrar by 31st October 2015.

21. We have already found above that the Applicant has not established the injury she stood to suffer or whether such alleged injury could not be adequately compensated by an award of damages. Yet, she seeks the nullification of the Respondent’s decision of 28th September 2015, the suspension of the recruitment process and the relaunch of the interview process under a different panel of interviewers. As aptly stated in *American Cyanamid vs. Ethicon Ltd (supra)*, a court faced with an application for interim orders must weigh the protection of an applicant that is likely to suffer irreparable injury against the corresponding protection of the respondent from irreparable injury as a result of foregoing his/her own legal right. The court must determine where the balance of convenience in the matter lies.

22. In the instant case, we are unable to determine the Applicant’s prospects of success in the interviews from the pleadings presented. This would have provided a guide as to the magnitude of her injury should the recruitment process not be halted. Save for her submissions on the subject, no documentary proof was furnished in support of her claims. On the other hand, we are faced with a recruitment process that seems to be at an advanced stage and only awaits appointment of the successful candidate by the appointing authority to wit the Council of Ministers. It is apparent from the record that the recruitment process involved the engagement of consultants, M/s Deloitte & Touche Ltd, as well as other costs and logistics attendant to the interview of the candidates in their home countries by teleconference. In that regard, Dr. Kafumbe did allude to time as having been

of essence following a directive by the Council of Ministers that the recruitment process be concluded by 31st October 2015.

23. We find that the totality of the circumstances of this case are such that halting the recruitment process in the absence of satisfactory proof of injury to be suffered by the Applicant would occasion greater injury to the Respondent that has discharged its duty as far as the said recruitment process is concerned. It is for the foregoing reason that this Court respectfully disallowed the present Application with no order as to costs.

Applicant appeared in person

A. Kafumbe Counsel for the Respondent

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First Instance Division

Reference No. 2 of 2015**The East African Civil Society Organizations' Forum**

v

The Attorney General of the Republic of Burundi, Commission Electorale Nationale Independante & The Secretary General of the East African Community (EAC)

Coram: M. Mugenyi, PJ, I. Lenaola, DPJ and F. Jundu J
September 29, 2016

Jurisdiction – Rule of law- Consideration of internal laws- Independence of national courts -Whether the Court could revise, review, quash decisions of national courts -Unlawfulness - Cause of action - Time fixed for filing cases

Articles 5(3) (f), 6(d), 7(2), 8(1) (a), 8(5), 9(4), 27(1), 29, 30, 38, 39, 47,124(1), 143, 146 of the Treaty –
Article 7(3) Protocol II, the Arusha Peace & Reconciliation Agreement for Burundi - Article 281, Constitution of Burundi 2005 - Rules: 1 (2), 3(1), 24 EACJ Rules of Procedure, 2013

The Applicant non-governmental organisation alleged that following the signing of Arusha Peace and Reconciliation Agreement on 28th August 2000, it was domesticated in Burundian as Law No.1/017 of 1st December 2000 and recognised in the new Constitution of Burundi, 2005. On 2nd March 2014, the Parliament of Burundi rejected a proposal to amend the Constitution of Burundi to enable the incumbent President, Mr. Pierre Nkurunziza to vie for third term. Nonetheless, Mr. Nkurunziza was nominated by CNDD -FDD on 25th April, 2015 as its Presidential candidate. Subsequently, Senators of the Burundi Senate filed a motion on 17th April, 2015 in the Constitutional Court of Burundi seeking an interpretation of Articles 96 and 302 of the Constitution of Burundi on the election of a President. On 5th May, 2015, the Constitutional Court declared Mr. Nkurunziza eligible for election for a third term. Following the announcement of the election date by the 2nd Respondent, Mr. Nkurunziza changed and this allegedly triggered unrest and demonstrations. The Applicants filed this case claiming based on the illegality of the nomination claiming that election for a third term was unlawful. It sought declarations *inter alia* that: the decision of Constitutional Court violated the Arusha Accord, the Constitution of Burundi and Articles 5(3)(f),6(d), 7(2),8(1)(a),(c), 8(5) of the Treaty and should be quashed; the 2nd Respondent's action of organizing elections were incompatible with the Arusha Accord and the Constitution of Burundi; and directions should be given requiring the 3rd Respondent to advise the EAC Summit of Heads of State and Government on whether or not the Republic of Burundi should be suspended or expelled from the Community. The 1st Respondent opposed the case averring that nominations for presidential candidate happened in April 2015 so any challenge to the nomination ought to have been filed in this Court on or before 25th June, 2015, since the Reference was filed on

6th July, 2015, it was time barred. Also, according to Article 281 of the Constitution of Burundi, the Constitutional court's decision was final thus, this Court lacked jurisdiction to quash it or to interpret the Arusha Accord.

In his reply, the 3rd Respondent averred that the claim was time barred and that it was incompetent and an abuse of the process of the court as EACJ lacked jurisdiction. On the question of time, the Applicant submitted that the cause of action giving rise to the Reference was not the nomination of Mr. Nkurunziza but the decision of the Constitutional Court delivered on 5th May, 2015 meaning. Therefore, the Reference ought to have been filed on or before 4th May, 2015 which was a Saturday and applying Rule 3 of the Rules, the next working day when the Reference ought to have been filed would have been Monday.

Held

1. The Treaty limits the filing of References to two months after the action or decision was first taken or made or when the Claimant first became aware of it. Rule 3(1) of the Court's Rules specifies that a period fixed by the Rules is to be calculated from the moment at which an event occurs or an action takes place. If that period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following day. The first working day after 4th July 2015 was 6th July, 2015 and that was the day the Reference was filed and was within time.
2. The Court's mandate in Articles 23(1), 27(1) and 30(2) of the Treaty expressly grant it jurisdiction to interpret the Treaty, therefore, the question whether Mr. Pierre Nkurunziza could run for the position of President of Burundi as decided and whether it was a violation of the Treaty, is a valid issue determinable by the Court.
3. Moreover, when the Court has to consider whether the actions or decisions of a Partner State are unlawful or an infringement of the Treaty, this can only be resolved by reference to municipal law of a Partner State. This Court has jurisdiction and a duty to consider the internal laws of the Partner States as was held in the *Henry Kyarimpa* appeal. Where a Partner State is said to have breached its own law and obligations, such conduct would be a breach of the principles of the rule.
4. The mandate to interpret the Treaty does not extend to the interrogation of decisions of other Courts in a judicial manner. An interrogation of the reasons, *ratio decidendi* and contents of such decisions would require an exercise of appellate jurisdiction over the said decisions. This court has no jurisdiction to reopen decisions of Courts of Partner States and decide whether such decisions are or are not in line with either the Constitution of Burundi or the Arusha Agreement or the Treaty.
5. The independence of the Courts of Partner States is a paramount principle of the rule of law as envisaged in Articles 6(d) and 7(2) of the Treaty. Thus, this Court cannot, in upholding those principles, interfere with that independence by revising, reviewing or quashing the decision of the Constitutional Court.
6. Only Partner States and Institutions of the EAC can be sued for violations of the Treaty as per Articles 30(1) and 9(4) of the Treaty. It cannot also be said that merely because the 2nd Respondent is such an Institution of a Partner State then it

can be equated to the Republic of Burundi, a Partner State... The 2nd Respondent was improperly enjoined to this Reference and is struck off the proceedings.

Cases cited

Attorney General of Rwanda v Plaxeda Rugumba [2012-2015] EACJLR 204, Appeal No.1 of 2012
 A G of Kenya v Independent Medical Legal Unit [2005-2011] EACJLR, Appeal No.1 of 2011
 Burundi Journalists' Union v AG of Burundi [2012-2015] EACJLR 299, Ref. 7 of 2013
 Democratic Party v Secretary General of EAC [2012-2015] EACJLR 559, Appeal No.1 of 2014
 East African Law Society v AG of Burundi & Anor EACJ Ref. No.1 of 2014
 Henry Kyarimpa v AG of Uganda, EACJ Appeal No. 6 of 2014
 Hon. Sitenda Ssebalu v Secretary General of EAC [2005-2011] EACJLR 160, Ref. 1 of 2010
 James Katabazi & Ors v Secretary General of EAC [2005-2011] EACJLR 51, Ref. 1 of 2007
 Modern Holdings Ltd v Kenya Ports Authority [2005-2011] EACJLR, Ref. 1 of 2008
 R. v Secretary of the State for Transport ex-parte Factorame (No.2) [1991] AC 603

Editorial Note: In Appeal 4 of 2016 the case was remitted to the Trial Court for determination on its merits. Subsequently, the Trial Court delivered its judgment on December 3, 2019 (see page 260 of this report)

JUDGMENT

Introduction

1. This Reference is premised on Articles 5(3)(f), 6(d), 7(2), 8(1)(a), 8(5), 27(1), 29, 30, 38, 39, 124(1), 143, 146 and 47 of the Treaty for the Establishment of the East African Community (“the Treaty”) and Rules 1 (2) and 24 of the East African Court of Justice Rules of Procedure (“the Rules”).
2. The Applicant states that it is an all-inclusive platform for Civil Society Organizations in East Africa, with the primary objective of building a critical mass of knowledgeable and empowered civil society in the region, in order to foster their confidence in articulating grassroots needs and interests for the East African Community and its various organs, institutions and agencies. It is registered as a Non- Governmental Organization in the United Republic of Tanzania.
3. In the present reference, it is represented by Mr. Donald Omondi Deya, Advocate of No.3 Jandu Road, Corridor Area, P.O. Box 6065, Arusha, Tanzania.
4. The 1st Respondent is the Attorney General of the Republic of Burundi, a Partner State in the EAC and has been sued as the Principal Legal Advisor to the Government of Burundi. His address for purposes of this Reference is Ministry of Justice, Office of the Minister and Holder of the Seal, P.O. Box 1880, Bujumbura Burundi.
5. The 2nd Respondent, the Commission Electorale Nationale Independante, (CENI) is the body charged with the mandate to organize national and communal elections in the Republic of Burundi and its address is Commune Ngagara, Q. Industriel, B/v de L'OUA, Rue Nyankoni, Parelle No.690/C; B.P. 1128 Bujumbura, Burundi.
6. The 3rd Respondent is the Secretary General of the East African Community appointed under Article 67 of the Treaty and has been sued on behalf of the EAC. His address is EAC Headquarters, Afrika Mashariki Road, EAC Close, P.O. Box 1096, Arusha, Tanzania

Factual Background

7. In the Reference, it is contended that on 28th August, 2000, the Arusha Peace

- and Reconciliation Agreement (“the Arusha Agreement”) under the facilitation of the late President Nelson Mandela, was executed between the Government of Burundi as the principal party and all the principal political parties in Burundi as the other parties. The said Agreement was guaranteed by several international institutions including the African Union and the European Union as well as the Presidents of Kenya, Rwanda, Tanzania and Uganda, all Partner States in the EAC. On 1st December 2000, the Parliament of Burundi domesticated it as ordinary *Law. No.1/017 of 1st December,2000*. On 1st March 2005, the People of Burundi adopted a new Constitution and in the preamble thereto, they confirmed their faith in the said Arusha Agreement.
8. On 2nd March 2014, the Parliament of Burundi rejected a proposal to amend the Constitution of Burundi to enable the incumbent President, Mr. Pierre Nkurunziza to vie for a contested “third term” as President of Burundi. Nonetheless, on 25th April, 2015, the political party, CNDD-FDD, announced the nomination of Mr. Pierre Nkurunziza as its candidate for election to the office of President of Burundi.
 9. On 28th April, 2015, 14 Senators of the Burundi Senate filed a motion dated 17th April, 2015 in the Constitutional Court of Burundi seeking an interpretation of Articles 96 and 302 of the Constitution of Burundi on the election of a President for Burundi. The Court delivered its decision on 5th May, 2015, a day after the Vice-President of the Court had fled the country (alleging intimidation) and determined that Mr. Pierre Nkurunziza was eligible to run for the Presidency.
 10. On the 8th June, 2015, the Chairman of the 2nd Respondent, CENI, announced new dates for the general elections but on 9th June, 2015, Mr. President Nkurunziza announced different dates for the said elections. Thereafter public demonstrations started in Burundi and many leaders and other Burundians fled the country while many others were killed during the violent and chaotic demonstrations.
 11. It is the eligibility or otherwise of Mr. Pierre Nkurunziza to run for the Presidency of Burundi the aforesaid decision of the Constitutional Court, the conduct of the 2nd Respondent with regard to the Burundi general elections of 2015 and the alleged failure of the 3rd Respondent to properly advise the Heads of Partner States to take decisive steps against alleged violation of the Arusha Agreement and the Treaty by the Republic of Burundi, that is at the heart of this Reference.
 12. It is now the Applicant’s prayers that in the above context the following declarations and Orders ought to be granted against the Respondents:-
 - (a) A declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case number RCCB 303 delivered on 5 May 2015 violates the letters and spirit of the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (the Arusha Accord) and in particular Article 7(3) of Protocol II to the Arusha Accord and the Constitution of Burundi;
 - (b) A declaration that by reason of the aforesaid breach of the Arusha Accord, the decision of the Constitutional Court of the Republic of Burundi in Case number RCCB 303 delivered on 5 May 2015 equally violates Articles 5(3)(f),6(d), 7(2),8(1)(a)

- & (c), 8(5) of the Treaty for the Establishment of the East African Community (the EAC Treaty);
- (c) A declaration that the decision of the CNDD-FDD to nominate or put forward the President of Burundi as a candidate for election to the office of the Presidency in the Republic of Burundi violates the Arusha Accord aforesaid and is unlawful;
 - (d) A declaration that any decrees, decision or orders of the 2nd Respondent or the CENI of the Republic of Burundi for the purpose of organizing or supervising Presidential elections in which the 2nd Respondent is or may be considered a candidate for the office of the President of Burundi are and shall be considered incompatible with the Arusha Accord and the Constitution of Burundi and, therefore, unlawful;
 - (e) An order setting to quash and set aside the decision of the Constitutional Court of the Republic of Burundi in case number RCCB 303 delivered on 5 May, 2015;
 - (f) An order directing the 3rd Respondent to constitute and give immediate effect to the judgment of this Honourable Court in Reference No.1 of 2014 and to advise the Summit of Heads of State and Government of the East African Community (EAC) on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29, 67, 71, 143, 146, and 147 of the Treaty for the Establishment of the East African Community;
 - (g) An order directing the 1st and 3rd Respondents to appear and file before this Honourable court not later than 14 days from the date of the present decision and orders a progress report on remedial mechanisms and steps taken towards the implementation for the Orders issued by this Honourable Court; and
 - (h) An order that the costs of and incidental to this Reference be met by the Respondents.

Applicant's Case

13. In the Reference, the supporting Affidavit of Mr. Dieudonne' Bashirahishize, a member of the Burundi Bar Association and Vice President of the East African Law Society and in Submissions dated 11th April 2016, the Applicant's case is as hereunder.
14. Firstly, that the Arusha Agreement is binding on the Respondents and is enforceable by this Court and that the nomination of a person who had been elected twice as the President of the Republic of Burundi to stand for a third term is unlawful and also a violation of the letter, spirit and objectives of the said Agreement and the Constitution of Burundi. In addition, that the decision of the Constitutional Court of Burundi in Case No. RCCB 303 of 5th May, 2015 is unlawful and incompatible with the obligations of the Government of the Republic of Burundi under the Agreement and the said Constitution.
15. As regards, the Treaty, it is the Applicant's case that the actions of the Government of the Republic of Burundi as outlined above are a violation of

the principles of good governance, rule of law and respect for democratic principles as enshrined in Articles 5(3) (f), 6(d), 7(2), 8(1) (a) and (c), as well as Article 8(5) of the Treaty. Further, that this Court is justified in exercising its jurisdiction under Articles 27(1) and 30 thereof and in ordering for the measures under Articles 29, 38, 143, 146 and 147 of the same Treaty to be taken. Further, that the 3rd Respondent is under an obligation to verify that Partner States actually adhere to their obligations and commitments under the Treaty and to advise organs of the EAC on remedial actions that may be taken to enforce Partner States' compliance thereof under Articles 11, 29, 67, 71, 143, 146 and 147 of the Treaty.

16. Finally, the Applicant for the above reasons claims that it is entitled to the prayers elsewhere set out above.

1st Respondent's Case

17. In its response dated 11th September, 2015 and supported by the Affidavit of Sylvestre Nyandwi, Permanent Secretary, Ministry of Justice of Burundi, it is the 1st Respondent's case that while it is admitted that Mr. Pierre Nkurunziza was nominated by CNDD -FDD on 25th April, 2015 as its Presidential candidate in the 2015 General Elections in Burundi, any challenge to that nomination ought to have been filed in this Court on or before 25th June, 2015 and since the Reference was filed on 6th July, 2015, the same is time-barred by dint of Article 30(2) of the Treaty.
18. Secondly, that under Article 281 of the Constitution of Burundi, the Constitutional Court of Burundi is the final and conclusive forum for resolution of any questions regarding the interpretation of the said Constitution and this Court does not have the Jurisdiction to revise, review or quash the decisions of that Court. Further, that this Court similarly has no Jurisdiction to interpret and/or apply the Agreement as is prayed by the Applicant.
19. Lastly, that the Reference is therefore misguided and ought to be struck off with costs.

2nd Respondent's Case

20. The 2nd Respondent did not appear, upon being served with the Reference, and has not filed any pleadings nor participated in these proceedings at all.

3rd Respondent's Case

21. The 3rd Respondent filed a response dated 18th August, 2015 and also filed a supporting Affidavit deposed to by Ms. Jessica Eriyo, Deputy Secretary General of the EAC in-charge of Productive and Social Sectors and his case is that the Reference is time-barred and this Court, in any event, lacks jurisdiction to determine the issues in context. Further, that no cause of action has been established against him and consequently, the Reference is incompetent and an abuse of Court process.
22. Lastly, the 3rd Respondent avers that upon the 2015 General Election being held in Burundi, the Reference was largely rendered moot and there is nothing substantive left to be determined and it should therefore be

struck off.

Scheduling Conference

23 On 7th March, 2016, Parties appeared for a Scheduling Conference under Rule 53 of the Rules and it was agreed that the following issues fall for determination:-

- i) Whether or not the Reference is time-barred;
- ii) Whether or not this Honourable Court has jurisdiction over the interpretation and application of the Constitution of the Republic of Burundi and the Arusha Peace and Reconciliation Agreement of Burundi, 2000;
- iii) Whether or not this Honourable Court has jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi in *Case Number RCCB 303* delivered on 5th May, 2015;
- iv) Whether or not the 2nd Respondent has legal personality to be sued before the East African Court of Justice under Article 30(1) of the EAC Treaty;
- v) Whether or not the Reference discloses any cause of action against the 3rd Respondent; and
- vi) Whether the Applicant is entitled to the remedies sought.

24. Having reproduced the respective positions taken by the Parties in respect of the Reference and there being no preliminary issue to address, we now turn to the substantive issue falling for determination as above.

Determination by the Court

Issue No.1: Whether or not the Reference is time-barred

25. Both the 1st and 3rd Respondents in their responses and submissions have argued that the Reference is predicated upon the alleged illegality of the nomination of Mr. Pierre Nkurunziza as the CNDD -FDD Presidential candidate on 25th April, 2015. That being the case and invoking Article 30(2) of the Treaty, it is their common Submission that the two months' period envisaged by that Article between the date when a cause of action arises and the date a Reference is filed before this Court ran out on 25th June, 2015 while the Reference was filed on 6th July, 2015. That the Reference is therefore time-barred.
26. In answer thereto, the Applicant has submitted that the cause of action giving rise to the Reference is not the nomination of Pierre Nkurunziza by his political party, CNDD - FDD but the decision of the Constitutional Court handed down on 5th May, 2015 meaning that the Reference ought to have been filed on or before 4th May, 2015 which was a Saturday and applying Rule 3 of the Rules, the next working day when the Reference ought to have been filed would have been Monday 6th July, 2015 when the Reference was duly filed. That the Reference is therefore within time and cannot be time-barred as alleged.

Determination of issue No 1

27. It is agreed by all parties that Article 30(2) creates the time limit for filing all References before this Court. For avoidance of doubt it provides as follows:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication,

directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”

28. In interpreting the above sub-Article, the Appellate Division of this Court in *Republic of Kenya vs. Independent Medical Legal Unit (IMLU), Appeal No.1 of 2011* stated as follows:-
- “It is clear that the Treaty limits Reference over such matters like these to two months after the action or decision was first taken or made or when the Claimant first became aware of it. In our view, the Treaty does not grant this Court express or implied jurisdiction to extend time set in the Article mentioned above. Equally so, the Court could not rule otherwise on the fact of explicit limitation in Article 9(4) to the effect that the Court must act within its powers.”
29. The import of the above Article is therefore clear and in that regard, when exactly did the cause of action in this matter arise? We have noted the rival positions taken by the Parties and in our view, a resolution of the question of time bar must begin from a re-look at the Reference. Elsewhere above, we deliberately reproduced the prayers as set out in the Reference and it is clear that Prayers (a), (b) and (e) make specific reference to the decision of the Constitutional Court of Burundi made on 5th May, 2015 as being the main basis for the Reference. Prayers (d) and (f) are consequential orders upon the substantive prayers being granted and are predicated upon these substantive prayers. In effect, we have no difficulty in finding that the cause of action is the decision of the Constitutional Court issued on 5th May, 2015. If that be the case, then the two months envisaged by Article 30(2) would end on 4th July, 2015 which as was correctly stated by the Applicant, fell on a Saturday.
30. Rule 3(1) of the Rules states as follows:-
- “Any period of time fixed by these rules or by any order of the Court for doing any act shall be reckoned as follows:
- (a) Where a period is to be calculated from the moment at which an event occurs or an action takes place, the day during which that even occurs or that action takes place shall not be counted as falling within the period in question; and the period shall end with the expiry of the last day of the period;
 - (b) Periods shall include official holidays, Sundays and Saturdays;
 - (c) Periods shall not be suspended during the Court vacations; and
 - (d) If a period would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following day.”
31. Applying the above Rule to the issue before us, it follows that the first working day after 4th July 2015 was 6th July, 2015 and that was the day the Reference was filed. Without belabouring the point, the Reference was filed within time and we so hold.

32. Having so said however, prayer (c) is misplaced and is time-barred in the context of our findings above because it is to the effect that “the decision of the CNDD - FDD to nominate or put forward the President of Burundi as a candidate for election to the office of the Presidency in the Republic of Burundi violates the Arusha Accord aforesaid and is unlawful.” That decision was made on 25th April, 2015 and therefore any challenge to it pursuant to Article 30(2) of the Treaty ought to have been filed before this Court on or before 3rd June, 2015. Since the Reference was filed on 6th July, 2015, it follows that Prayer (c) of the Reference is clearly time-barred and we so find.

Issue no 2: Whether or not this Honourable Court has jurisdiction over the interpretation and application of the Constitution of the Republic of Burundi and the Arusha Peace and Reconciliation Agreement of Burundi, 2000;

33. On this issue, the 1st and 3rd Respondents, while acknowledging that this Court has jurisdiction to interpret and apply the Treaty under Article 27(1) as read with Articles 23 and 30(1) of the Treaty, have also urged the point that this Court can only review National Laws with a view to determining compliance with the Treaty but it cannot interpret the provisions of the specific Constitutions such as that of Burundi and/or specifically the Agreement aforesaid.
34. The 3rd Respondent on his part, relies on the decision in *Siyanda Ssebalu vs. Secretary General of the East African Community, EACJ Ref. No.1 of 2010* to make the point that where a court has no jurisdiction as granted by a statute, charter or commission, it cannot assume any such jurisdiction.
35. In response to the above Submissions, the Applicant submitted that the jurisdiction conferred on this Court by Article 30(1) of the Treaty includes the determination of the question whether an “Act, regulation, directive, decision or action is unlawful or is an infringement of the Treaty.” That the nuanced distinction between “unlawfulness” and “infringement” of the Treaty would therefore indicate that “unlawfulness” can only be resolved by reference to municipal or national Law and not any part of the Treaty alone. Relying on the decision in *Henry Kyarimpa vs. Attorney General of Uganda, EACJ Appeal No. 6 of 2014*, the Applicant made the further point that where an internal law of a Partner State is being impugned, this Court need not await the determination of a municipal court on the same issue before it can render itself on the said issue. Further reliance has been placed on this Court’s decisions in *James Katabazi &. 4 Others vs. Secretary General of EAC, Ref. No.1 of 2007*, *Attorney General of Rwanda vs. Plaxeda Rugumba, EACJ Appeal No.1 of 2006* as well as *R. vs. Secretary of the State for Transport ex-parte Factorame (No.2) [1991] AC 603* and *East African Law Society vs. Attorney General of Burundi and Secretary General of the East African Community, EACJ Reference No.1 of 2014* where in the latter case, this Court found that where certain laws enacted by the Parliament of Burundi were in violation of the Treaty, it had the Jurisdiction to declare them so irrespective of the decision of the Constitutional Court of Burundi on the same issue.

Determination of issue No 2

36. All Parties have aptly captured this Court’s approach to questions regarding

its jurisdiction which was well articulated in *Katabazi (supra)* where the Court expressed itself thus on its human rights' jurisdiction:-

“While the Court will not assume jurisdiction to adjudicate Human Rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violation. Similarly, in this Reference, the Court will not abdicate duty to interpret the Treaty merely because Human Rights violations are mention in the Reference”.

37. The *Katabazi (supra)* holding was later followed in *Anyang' Nyong'o (supra)* and *Rugumba (supra)* among other cases all which expressed the Court's view that its Jurisdiction must flow from the Treaty and nothing else. The said decisions were therefore predicated on Articles 23(1) and 27(1) of the Treaty which provide as follows:-

“ARTICLE 23(1)

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

2...

3....

And

“ARTICLE 27(1)

1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”

2.....

38. The question that arises flows from the above is, what is “jurisdiction”? In *Setandu Ssebalu (supra)*, the Court defined jurisdiction as: -

“The authority which a court has to determine matters that are litigated before it or to take the cognizance of matters presented in a formal way for its decisions. The limits of this authority are imposed by the Statute, by the Charter or commission under which the Court is constituted.”

39. In that context, it must be remembered that the present Reference raises the issue whether the decision of the Constitutional Court in determining that Mr. Pierre Nkurunziza could run for the position of President of Burundi was *inter alia* a violation of Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and 8(c) of the Treaty. Other issues raised are attendant to that central question as we have previously stated and in that regard, it cannot be denied therefore that taking into account the definition of Jurisdiction above and the provisions of the Treaty that grant this Court the express Jurisdiction to interpret the Treaty, then that is the valid issue to determine without doing so outside the lawful mandate of the Court. Further, the merit of such an issue is not a question of Jurisdiction and later in this Judgment we shall address the merits of the Applicant's claims within our Jurisdiction aforesaid.

40. In that context we shall now turn to address the question whether this Court

has Jurisdiction to interpret and apply the Constitution of the Republic of Burundi and the Arusha Agreement aforesaid.

41. In that regard, it cannot be denied that the Agreement became domestic law in Burundi and is now known as Law No. 1107 promulgated on 1st December, 2000. It is therefore no longer an Agreement between the named Parties to it. Further, this Court has previously stated as follows with regard to interpretation of domestic laws and Constitutions in *Kyarimpa vs. Attorney General of Uganda, EACJ Appeal No. 6 of 2014*: -

“When the Court has to consider whether particular actions of a Partner State are unlawful and contravene the Principle of the rule of Law under the Treaty, the Court has jurisdiction and indeed a duty to consider the internal laws of the Partner States and apply its own appreciation thereof to the provisions of the Treaty. The Court does not and should not abide the determination of the import of such internal law by the National Courts.”

42. In addition to the above in the case of *Burundian Journalists Union vs. Attorney General of Burundi & Others, Reference No. 7 of 2013*, this Court, upon interrogating the provisions of Burundian Law No. 1111 of 4th June, 2013 reached the conclusion that some of its provisions were enacted in violation of the principles in Articles 6(d) and 7(2) of the Treaty and made specific declarations in that regard. This Court’s Jurisprudence would therefore point to the fact that where a Partner State enacts Laws that contravene, in their normative content or effect, the Treaty, then this Court can lawfully interrogate such Laws within its mandate. That position can only by extension mean that where a Partner State is said to have breached its own Laws and obligations, such conduct, if found to be true, would certainly be a breach of the principles of the Rule of Law as enshrined in Articles 6(d) and 7(2) aforesaid - see also *Democratic Party vs. Secretary General of the EAC, Appeal No.1 of 2014* and *R Vs. Secretary of State ex-parte Factortorme (supra)*. In stating so, we reiterate that the mandate of this Court is that granted to it by Articles 23(1), 27(1) and 30(2) of the Treaty and no more.

43. For the above reasons, we are unable to agree with the 1st and 3rd Respondents that this Court has no jurisdiction to interpret the Constitution of Burundi or the Arusha Agreement and if any action purportedly undertaken in furtherance of the said Constitution and Agreement are in any way found to amount to an infringement of or violation of the Treaty, this Court has Jurisdiction to determine such an issue and we so find.

Issue No 3: Whether or not this Honourable Court has jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi in *Case Number RCCB 303* delivered on 5th May, 2015;

44. The 1st and 3rd Respondents have argued in this regard that this Court has no jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi because by dint of Article 231 of the Constitution of Burundi “the decisions of the Constitution Court are not susceptible to any recourse.”
45. On its part, the Applicant has submitted that under Article 8 of the Treaty, as read with Article 31 thereof, EAC organs, institutions and law as well as decisions of this Court shall have precedence over decisions of national organs and

institutions as far as the interpretation and application of the Treaty is concerned. That therefore the act of seeking a revision, review or quashing of the decision of the Constitutional Court of Burundi is within the lawful mandate of this Court. Reliance in that regard was placed on the *Burundian Journalists' Case* (supra) and *Anyang' Nyong'o* (supra).

Determination of Issue No 3

46. As we have stated elsewhere above, this Court has primacy in the interpretation of the Treaty but that mandate in our considered view does not extend to the interrogation of decisions of other Courts in a Judicial manner such as is being asked of us in the present Reference. An interrogation of the reasons, *ratio decidendi* and contents of such decisions would necessarily require that we exercise an appellate Jurisdiction over the said decisions which jurisdiction we certainly do not have. The independence of the Courts of Partner States is a paramount principle of the Rule of Law as envisaged in Articles 6(d) and 7(2) of the Treaty and we cannot in upholding those principles, interfere willy nilly with that independence.
47. What of the Jurisdiction to interpret the aforesaid decision of that Court in the context of the Treaty and whether it was made in violation of the said Treaty? The Applicant has submitted in that regard that we should assume jurisdiction to do so in the context of Article 30(1) of the Treaty. Try as we have, we are unable to see any Jurisdiction to reopen decisions of Courts of Partner States and decide whether such decisions are or are not in line with either the Constitution of Burundi or the Agreement or even the Treaty - *See East African Law Society vs. Attorney General of Burundi & Secretary General of the EAC Ref. No.1 of 2014*.
48. In doing so, we reiterate that what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation of the Constitution of the Republic of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the *Burundian Journalists case* (supra).
49. For the above reasons, we can only determine Issue No. 3 in the negative.

Issue No. 4: Whether or not the 2nd Respondent has legal personality to be sued before the East African Court of Justice under Article 30(1) of the EAC Treaty

50. The 1st Respondent has questioned the joinder of the 2nd Respondent as a party to this Reference maintaining that it has no legal personality to be sued as such.
51. The Applicant on the other hand has submitted that the action of the 2nd Respondent in accepting the nomination of Mr. Pierre Nkurunziza is amenable to interrogation by this Court and therefore it is a proper party to this Reference.

Determination of Issue No. 4

52. In that context, Article 30(1) of the Treaty provides as follows:-

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

53. Without belabouring the point, only Partner States and Institutions of the EAC can be sued for violations of the Treaty. The term Partner State needs no explanations but Institutions of the EAC are defined in Article 9(3) of the Treaty in the following terms:-

“Upon the entry into force of this Treaty, the East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such.”

54. There cannot be any contestation of the fact that the 2nd Respondent is an Institution of a Partner State namely the Republic of Burundi and not of EAC. It cannot also be said that merely because it is such an Institution of a Partner State then it can be equated to the Republic of Burundi, a Partner State. We say so because, as was stated in *Modern Holdings Ltd. vs. Kenya Ports Authority*, EACJ Reference No.1 of 2008, where an entity is created by a Partner State and not the Summit of the EAC, such an entity, whatever its functions, is not a proper party to be sued before this Court. The foregoing must then lead us to an alternative submission by the Applicant; that the 1st Respondent should be held liable for the actions of the 2nd Respondent which are allegedly in violation of the Treaty.

55. On that issue, with tremendous respect to the Applicant, joinder of a party to any litigation is a substantive question not to be treated lightly or flippantly. We say so because nowhere in pleadings was such a plea made and yet, Prayer (d) of the Reference is directed at the 2nd Respondent and not the 1st Respondent as representing the 2nd Respondent. By submissions, a specific pleading cannot be amended nor can alternative prayers be so introduced.

56. Our findings above would therefore lead to the inevitable conclusion that the 2nd Respondent, notwithstanding that it has never entered appearance, was improperly enjoined to this Reference and is struck off the proceedings.

Issue No. 5: Whether or not the Reference discloses any cause of action against the 3rd Respondent

57. The 3rd Respondent, in its response to the Reference and Submissions, has argued that no cause of action is apparent against him and that it ought not

to have been enjoined to the Reference at all.

58. In response, the Applicant submitted that as the custodian of the Treaty and EAC Law, the 3rd Respondent should be held accountable for any failures on his part to discharge that duty as was held in *Sitenda Ssebalu vs. Secretary General of EAC*, Reference No.1 of 2010 as well as *East African Law Society vs. Attorney General of Burundi & Anor* Reference No.1 of 2014.

Determination of Issue No. 5

59. On our part, while indeed the above decisions point to the fact that this Court has been unhesitant to hold the Secretary General accountable, for any action on his part and which would in specific circumstances call for such accountability, we are unable to say so in the present Reference - see *Ssebalu and East African Law Society* cases cited above. In addition, whereas the Secretary General's powers and functions are clearly spelt out in Articles 67 and 71 of the Treaty, we have seen no evidence that he has breached any of his duties in the context of this Reference.
60. We reiterate that the Reference is predicated upon a specific decision of the Constitutional Court of Burundi issued on 5th May, 2015 with attendant events. What was the role of the Secretary General in that matter? None whatsoever and which also explains the fact that in the prayers as set out in the Reference, no substantive prayer is sought against the 3rd Respondent save for an order of implementation of any orders to be issued by this Court should the Reference succeed.
61. Without belabouring the point, there was no plausible reason why the 3rd Respondent was enjoined to this Reference and we so find.

Issue No 6: Whether the Applicant is entitled to the remedies sought.

62. We now return to the Prayers sought in the Reference in light of our findings above and in that regard, we note that Prayers (a), (b) and (e) relate to the decision of the Constitutional Court of Burundi and we have held that we decline the invitation to interrogate such a decision in content and effect.
63. Prayer (c) relates to the decision of CNND-FDD to nominate Mr. Pierre Nkurunziza as its Presidential candidate. We have stated that the said issue is time-barred.
64. Prayer (d) relates to the conduct of the 2nd Respondent and we have said that the said Respondent was improperly enjoined to this Reference and having struck it off the proceedings, no order can be issued against it.
65. Prayers (f) and (g) are directed at the 1st and 3rd Respondents and we have held that the prayers cannot stand on their own without prayers (a) (b) and (e) being granted. In any event, there is no evidence that the 3rd Respondent has failed to comply with the directives issued in *EACJ Reference No.1 of 2014* which Reference was decided on its merits which have nothing to do with this Reference and or its substratum. Its invocation in these proceedings is in any event most baffling to us. That being the case, the said prayers cannot be granted.
66. On costs we shall make the necessary orders at the end of this Judgment.

Conclusion

67. This Reference has brought to the fore the continuing and emerging questions regarding the rule of law in Partner States within the EAC. This Court, faithful to its mandate, has found that the present Reference does not meet the muster of the Treaty and the same has to fail.

Disposition

- 68. For the above reasons, the present Reference is dismissed.
- 69. Regarding costs, Rule 111 of the Court’s Rules grants this discretion to determine whether any party is entitled to costs. In the circumstances our decision is that each party should bear its own costs noting the nature of the dispute before us and the fact that the Applicant filed the Reference in Public Interest.
- 70. Orders accordingly

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First Instance Division

Reference No. 2 of 2015

The East African Civil Society Organizations' Forum

v

**The Attorney General of the Republic of Burundi, Commission Electorale
Nationale Independante &
The Secretary General of the East African Community (EAC)**

Coram: M. Mugenyi, PJ, Ntezilyayo, DPJ; F. Jundu*, C. Nyawello & C. Nyachae, JJ
December 3, 2019

Rule of law –Good governance - International review of domestic courts' decisions distinguished from national appellate review- Cause of action- Interface between international and domestic judicial organs- Decisions of apex national courts- Whether the Constitutional Court's decision violated the Treaty -- Onus of proof- Whether the impugned decision depicted outrage, bad faith or willful dereliction of judicial duty- Entrenching a harmonized judicial approach to EAC Treaty obligations

Articles 5(3)(f), 6(d), 7(2), 8(1)(a), 8(5), 27(1), 29, 30, 38, 124(1), 143, 146, 147 of the Treaty- Articles: 96, 302 the Constitution of Burundi 2005 - Article 190 Electoral Code, Burundi - Article 7(3) of Protocol II of the Arusha Peace Accord - Article 4(1) Articles on State Responsibilities (ILC)

On 28th August 2000, the Republic of Burundi voluntarily endorsed the Arusha Accord, Article 7(3) of Protocol II of which restricted the Presidential term to five years renewable once. More than two presidential terms were explicitly prohibited. The Arusha Peace Accord was subsequently domesticated into Burundi national law vide Law No 1/07 of 1st December 2000. On 18th March 2005, Burundi promulgated a new Constitution, which re-affirmed the ideals of the Arusha Peace Accord and the two-term limit of the Presidential term. On 22nd March 2014, the Parliament of Burundi rejected an amendment to the Constitution making President Nkurunziza eligible to run for another presidential term. When President Nkurunziza was nominated as a presidential candidate, fourteen Senators of the Burundi Senate filed *Case No. RCCB 303* in the Constitutional Court of Burundi seeking the interpretation of Articles 96 and 302 of the Constitution. The Court validated President Nkurunziza's nomination for the presidential election on 5th May 2014.

The Applicant civil society organisation complained that the decision of Burundi's Constitutional Court endorsing Mr. Nkurunziza's candidacy violated Burundi domestic law and the EAC Treaty. They sought declarations *inter alia* that the decisions of the Constitutional Court breached Article 7(3) of Protocol II of the Arusha Peace Accord, the Constitution of Burundi and the Articles 6(d), 7(2), 8(1) (a) & (c), 8(5) of the Treaty. They also sought orders quashing setting aside or quashing the decision of the Constitutional Court; and giving effect to the Court's

judgment through the suspension of the Republic of Burundi as a member of the EAC; and filing of progress reports on remedial mechanisms taken to towards the implementation of the Court's orders.

The 1st Respondent averred that the Reference was filed well over that two-month limitation period; and given the finality of a decision of the Constitutional Court, this Court lacked jurisdiction.

Held

1. The EAC Partner States obligated themselves to achieve the objectives of the Community with due regard to the principles outlined in Articles 6 and 7 of the Treaty and other international treaties and conventions to which they are parties. Therefore, the Constitutional Court of Burundi, as a judicial organ of the Republic of Burundi, was expected to apply and enforce domestic laws in such a manner as would ensure compliance by themselves, as well as State parties, with the principles of rule of law and good governance.
2. International review of national courts' decisions by international courts is to be distinguished from the typical hierarchical appellate review that occurs in national judiciaries. An international review is a trial *de novo* in the context of the international or treaty obligations that the international court seeks to enforce. It is not binding upon the national courts as would be the case of a typical appeal, neither does it form *stare decisis* in domestic jurisdictions as would a decision of national states' apex courts. The ultimate purpose of such judicial intervention would be to increasingly entrench a harmonized judicial approach to EAC Treaty obligations within the EAC Partner States the proof of attribution for such acts. The party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decisions in its favour might be given (*Henry Kyarimpa*).
3. A cause of action against a States party for the international review of a wrongful judicial act would only accrue in respect of such purportedly outrageous judicial acts by a judicial organ (*BE Chattin*). However, taking into account the importance of the doctrine of separation of powers to judicial efficiency as held in the *Baranzira* case, the proposition that 'manifestly insufficient governmental action' can constitute a wrongful judicial act is not accepted as governmental action *per se* cannot be equated to judicial action. The face of the judicial must be depict outrage, bad faith and willful dereliction of judicial duty. Where no or manifestly insufficient action has been taken by the appropriate judicial disciplinary body to redress such judicial outrage.
4. The international court is restricted to an interrogation of a domestic decision's adherence to domestic laws only to the extent that such compliance would underscore the domestic court's compliance with the responsible state's international law obligations in this instance the Treaty. The Court then States makes declarations as to the decisions compliance with the EAC Treaty (*EACSOFF*)

Due respect should be accorded to judicial decisions emanating from the nation states' apex courts, and such decisions can only be set aside and a re-evaluation of their issues of fact and law undertaken where they reflect 'a clear and notorious injustice, visible at a mere glance furnishing grounds for an international

- arbitral tribunal to put aside a national decision and to scrutinize its grounds of fact and law (*Ida Putnam*).
5. The Burundi Constitutional Court was of the view that whereas the Arusha Accord, was the bedrock of the Burundi Constitution, without attaining supra-constitutional status, the framers of the 2005 Constitution 'did not strictly follow the recommendations of the Arusha Accord. Article 302 of the Constitution created a special presidential mandate by indirect suffrage that was an exception to the direct universal suffrage espoused in Article 96 and reflected in Article 190 of the Electoral Code that which is identical to Article 302 of the Constitution which is an exception to Article 186 thereof and akin to Article 96 of the Constitution. The court observed that the decision reflected a compromise position that was intended to stabilize the political situation that prevailed in Burundi.
 6. The Constitutional Court clearly applied its mind to the background to the Constitution's promulgation; duly acknowledged and tested the Arusha Accord against related foundational laws such as the Electoral Code; took due cognizance of the political situation that prevailed in Burundi at the time in its determination of what emphasis to place on the Arusha Accord, and drew its conclusions on that basis.
 7. The decision and legal reasoning cannot be categorized as an outrageous judicial decision, or depicting outrage, bad faith or willful dereliction of judicial duty so as to invoke state responsibility therefor by the Respondent State. Nor did it warrant the intervention of the Respondent State to address a non-existent judicial outrage. It does follow, therefore, that this Court's international judicial review mandate is improperly invoked.

Cases cited

Baranzira Raphael & Anor v The AG of Burundi, EACJ Ref. 15 of 2014
 Bosnia & Herzegovina v Serbia & Montenegro, Judgment, ICJ Reports 2007
 British American Tobacco Ltd (BAT) v AG of Uganda, EACJ Ref. No 7
 B. E. Chattin (USA) v United Mexican States, 1927, UNRIAA, vol. IV
 Corfu Channel (United Kingdom v Albania), Judgment, ICJ Reports 1949
 EACSOFF v The AG of Burundi & Ors, EACJ Appeal No.4 of 2016
 Henry Kyarimpa v The AG of Uganda, EACJ Appeal No. 6 of 2014
 Ida R.S. Putnam (USA) v United Mexican States, 1927, UNRIAA, vol. IV, p. 151
 James Katabazi & Ors v The Secretary General of EAC & Anor, EACJ Ref. No.1 of 2007
 Nicaragua v USA, Judgment, ICJ Reports 1984

Editorial Note: Appeal 1 of 2020 is pending in the Appellate Division

JUDGMENT

A. Introduction

1. This Reference was brought under Articles 5(3)(f), 6(d), 7(2), 8(1)(a), 8(5), 27(1), 29, 30, 38, 124(1), 143, 146 and 147 of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 1 and 24 of the East African Court of Justice Rules of Procedure, 2013 ('the Rules'). It sought to challenge the decision of the Constitutional Court of the Republic of Burundi in Case No. RCCB 303 in so far as it endorsed the legality of Mr. Pierre Nkurunziza's participation as a candidate in that Partner State's 2015 presidential

election.

2. The East African Civil Society Organisations Forum ('the Applicant'), a platform for civil society organisations in East Africa, faulted the impugned decision for purportedly violating the Arusha Peace and Reconciliation Agreement for Burundi, 2000 ('the Arusha Accord'), as well as the Constitution of the Republic of Burundi and, consequently, the Treaty.
3. The First and Third Respondents are self-defining offices that were sued in a representative capacity on behalf of the Republic of Burundi and the East African Community respectively. On the other hand, the Second Respondent, Commission Electorale Nationale Independante (CENI), is the body that is responsible for conducting national elections in the Republic of Burundi and was sued for its role in the presidential election under scrutiny herein.
4. At the hearing, the Applicant was represented by Mr. Nelson Ndeki, while Messrs Nestor Kayobera and Diomedé Vizikiyo appeared for the First Respondent.

B. Factual Background

5. On 28th August 2000, the Government of the Republic of Burundi voluntarily endorsed the Arusha Accord, Article 7(3) of Protocol II of which restricts the President of Burundi to election for a term of five (5) years that is renewable only once, and explicitly prohibits more than two (2) presidential terms. The Arusha Peace Accord was subsequently domesticated into Burundi national law vide Law No 1/07 of 1st December 2000. On 18th March 2005, Burundi promulgated a new Constitution, the Preamble to which re-affirms the ideals of peace, reconciliation and national unity as spelt out in the Arusha Peace Accord while Article 96 re-echoes the provision for the President to be eligible for election for a 5-year mandate that is renewable only once. On 28th August 2000, the Government of the Republic of Burundi voluntarily endorsed the Arusha Accord, Article 7(3) of Protocol II of which restricts the President of Burundi to election for a term of five (5) years that is renewable only once, and explicitly prohibits more than two (2) presidential terms. The Arusha Peace Accord was subsequently domesticated into Burundi national law vide Law No 1/07 of 1st December 2000. On 18th March 2005, Burundi promulgated a new Constitution, the Preamble to which re-affirms the ideals of peace, reconciliation and national unity as spelt out in the Arusha Peace Accord while Article 96 re-echoes the provision for the President to be eligible for election for a 5-year mandate that is renewable only once.
6. On 22nd March 2014, the Parliament of Burundi rejected an amendment to the Constitution that would have made President Nkurunziza eligible to run for another presidential term. Nonetheless, President Nkurunziza was subsequently nominated as a presidential candidate whereupon 14 Senators of the Burundi Senate filed *Case No.RCCB 303* in the Constitutional Court of Burundi seeking the interpretation of Articles 96 and 302 of the Burundi Constitution. On 5th May 2014, the said Court delivered its decision in that matter, validating President Nkurunziza's nomination for the presidential election and thereby sanctioning his inclusion by the Second Respondent on the list of presidential candidates, whereupon the Applicant filed this Reference. As it transpired, Mr Nkurunziza did participate in the now concluded 2015 Burundi presidential

election and was subsequently declared the successful candidate.

7. This Court did render its judgment on the matter, acknowledging that it did have jurisdiction to determine the legality of any action taken under the Arusha Peace Accord and Burundi Constitution viz the Treaty but that jurisdiction did not extend to the judicial interrogation of decisions from Partner States' (domestic) courts, such as the impugned decision in *Case No. RCCB 303*. The Court did also strike out the Second and Third Respondents from the proceedings. On Appeal, however, the Appellate Division of this Court held a contrary view with regard to the question of jurisdiction and re-directed the Reference back to this Division for determination on its merits. On the other hand, the decision to strike out the Second Respondent was not challenged therefore CENI is no longer a party to the Reference. In the same vein, the Appellate Division having upheld the decision to strike out the Third Respondent, the EAC Secretary General is no longer a party in this matter. On that premise, it is to the merits of the Reference that we now revert.

C. Applicant's Case

8. The gravamen of this Reference is that the nomination and participation of Mr. Nkurunziza in the 2015 Burundi presidential election, despite his having been twice elected as the President of that Partner State, contravened the Arusha Accord, the Burundi Constitution and in turn, the Treaty. The Applicant faulted the decision of the Burundi Constitutional Court that endorsed Mr. Nkurunziza's candidacy in that election for violating Burundi domestic law as well as the Treaty. This position was re-echoed in an affidavit deposed by Dieudone Bashirahishize that essentially reiterates the illegality of Mr. Nkurunziza's participation in the then impending presidential election viz the Arusha Accord, Burundi Constitution and EAC Treaty.
9. The Applicant sought the following Declarations and Orders:
 - a. A Declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5 May 2015 violates the letters and spirit of the Arusha Peace and Reconciliation Agreement, 2000 (the Arusha Accord) and in particular Article 7(3) of Protocol II of the Arusha Accord and the Constitution of Burundi;
 - b. A Declaration that by reason of the aforesaid breach of the Arusha Accord, the decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5 May 2015 equally violates Articles 5(3)(f), 6(d), 7(2), 8(1)(a) & (c), 8(5) of the Treaty;
 - c. A Declaration that the decision of the CNND-FDD to nominate or put forward the President of Burundi as candidate for the election to the office of the Presidency in the Republic of Burundi violates the Arusha Accord aforesaid and is unlawful; A Declaration that any decrees, decision or orders of the 2nd Respondent or the CENI of the Republic of Burundi for the purpose of organizing or supervising presidential elections in which the 2nd Respondent is or may be considered a candidate for the office of the President

- of Burundi are and shall be considered incompatible with the Arusha Accord and the Constitution of Burundi and, therefore, unlawful.
- d. An Order setting to quash and set aside the decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5 May 2015;
 - e. An Order directing the 3rd Respondent to constitute and give immediate effect to the judgment of this Honourable Court in Reference No.1 of 2014, and to advise the Summit of Heads of State and Government of the East African Community (EAC) on whether the Republic of Burundi should be suspended or expelled from the EAC under Articles 29, 67, 71, 143, 146 and 147 of the Treaty.
 - f. An Order directing the 1st and 3rd Respondents to appear and file before this Court not later than 14 days from the date of the present decision a progress report on remedial mechanisms and steps taken towards the implementation of the Orders issued by this Honourable Court.

D. First Respondent's Case

10. The First Respondent did not contest the factual basis of this Reference; rather, its case hinges on two (2) points of law. First, it is the contention that the Burundi ruling party (CNDD-FDD) having nominated Mr. Nkurunziza as its candidate for the 2015 presidential election, the Reference should have been filed within 2 months thereafter in order to comply with the 2-month limitation period prescribed by Article 30(2) of the Treaty. It is the First Respondent's case that to the extent that the Reference was filed well over that 2- month period, it was filed out of time. Secondly, it was propounded by the same Party that the finality of a decision of the Constitutional Court of Burundi ousted the jurisdiction of this Court, which is neither adorned with jurisdiction to interpret the Arusha Accord nor the mandate to revise, review or quash a decision of the said Constitutional Court. These legal questions were re-echoed in a supporting affidavit deposited by Sylvestre Nyandwi, the Permanent Secretary of Burundi's Ministry of Justice. The first Respondent thus seeks to have the Reference dismissed with costs.

E. Issues for Determination

11. At a Scheduling Conference held on 7th March 2016, the following issues were framed for determination:
 - a. Whether or not the Reference is time-barred.
 - b. Whether or not this Honourable Court has jurisdiction over the interpretation and application of the Constitution of the Republic of Burundi and the Arusha Peace and Reconciliation Agreement on Burundi, 2000.
 - c. Whether or not this Honourable Court has jurisdiction to revise, review or quash the decision of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on 5th May 2015.

- d. Whether or not the 2nd Respondent has legal personality to be sued before the East African Court of Justice under Article 30(1) of the EAC Treaty.
 - e. Whether or not the Reference discloses any cause of action against the 2nd Respondent.
 - f. Whether the Applicant is entitled to the remedies sought.
12. It would suffice to note that the question of limitation was conclusively determined by this Court, was never in issue on appeal and is therefore settled. In the same vein, the Second and Third Respondents were conclusively adjudged (by this Division and the Appellate Division respectively) to have been improperly enjoined as parties to this Reference and are, to that extent, no longer in issue before us. However, it having been held on Appeal that this Court does have jurisdiction over the issues raised therein, the Reference was directed back to this Division for determination on its merits on the question as to ‘whether or not the impugned decision of the Constitutional Court of Burundi was in violation of Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c), and 8(5) of the Treaty.’ Needless to say, the remedies sought do also remain in contention.
13. Consequently, the only subsisting issues for determination presently are:
- I. Whether or not the impugned decision of the Constitutional Court of Burundi was in violation of Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c), and 8(5) of the Treaty, and
 - II. Whether the Applicant is entitled to the remedies sought.

F. Court’s Determination

Issue No. 01: Whether or not the impugned decision of the Constitutional Court of Burundi was in violation of Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c), and 8(5) of the Treaty

14. In submissions, it was argued for the Applicant that any violation of national laws by an organ of EAC Partner States, as well as the contravention of the EAC Treaty or other Community Law by such organ, would amount to a violation of the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty. Citing a definition of rule of law *by* the office of the United Nations Secretary General, it was the Applicant’s contention that by violating its own laws through the impugned decision of the Burundi Constitutional Court, the Respondent State had violated the principle of supremacy of the law that is inherent in the notion of rule of law. The rule of law was defined as follows therein:

The principle of governance (according) to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, separation of powers, participation in decision-making,

legal certainty, avoidance of arbitrariness, and procedural and legal transparency. (See Report of the (UN) Secretary General on the Rule of Law and Transitional *Justice in Conflict and Post-Conflict Societies*)¹⁵

15. To underscore his emphasis on the supremacy of the law, learned Counsel for the Applicant did also refer us to the decision in *James Katabazi & 21 Others vs. The Secretary General of the East African Community & Another*. EACJ Ref. No.1 of 2007 where the rule of law was defined in its most basic form as “the principle that no one is above the law”
16. Mr. Deya cited the Constitutional Court’s allegedly erroneous interpretation of Articles 96 and 302 of the Burundi Constitution to buttress his contention that the resultant decision was flawed and violated the domestic laws of Burundi, as well as that Partner State’s international obligations. He opined that whereas Article 96 of the Burundi Constitution was clear and unambiguous on the election of the President for a term of five (5) years renewable once, the Burundi Constitutional Court had interpreted the term ‘exceptionally’ in Article 302 of the Constitution to erroneously denote ambiguity as to the actual intention of the framers of the Constitution in that regard.
17. It was his submission that the Constitutional Court’s interpretation offended general rules of constitutional interpretation which advocate for a plain reading of a Constitution with regard to precise and unambiguous text;¹⁶ the interpretation of a constitution as a whole where all the provisions have a bearing on the subject matter, and the application of the rule of harmony such that constitutional provisions would not be viewed in contrast but rather as sustaining each other, such interpretation directed at enhancing the application of the constitution rather than defeating its very purpose. Mr. Deya further advanced the view that a constitution must be considered as a living organic entity and construed in a manner that caters for the social and political changes in the environment.¹⁷ He argued that the Burundi Constitutional Court had correctly acknowledged that the intention of the framers of the Constitution was to be discerned from legal instruments that inspired its promulgation, specifically citing the Arusha Accord as the bedrock to the Burundi Constitution, the intention of which (the Accord) was to limit the number of presidential terms to 2 terms. He faulted that court for ignoring the intention of the Arusha Accord in its interpretation of the Constitution, its acknowledgment of its critical role notwithstanding thus arriving at what in his view was a wrong conclusion.
18. On its part, in very brief submissions, the Respondent State underscored the fine distinction between the appellate jurisdiction prescribed in Article 35(3) of the Treaty and Rule 72(2) of the EACJ Rules of Procedure, on the one hand; and the duty upon this Court to test the impugned decision’s compliance with Treaty, on the other hand. Learned Counsel for the

¹⁵ UN Doc S/2004/616 (2004), para. 6

¹⁶ PLO Lumumba & Louis G. Franchesci, *The Constitution of Kenya 2010: An Introductory Commentary*. p.70

¹⁷ Alexander Ssensikombi, *The rules followed in Constitutional Interpretation: A case of Uganda*, p.2

First Respondent sought to remind his counterpart for the opposite party that this Court is not at liberty to revise, review and quash the decision of the Constitutional Court of Burundi as would typically ensue under an appeal. He maintained that the impugned decision neither violated the Burundi Constitution nor the Treaty.

19. We carefully listened to the Parties in this Reference. We do also respectfully acknowledge that the question as to the Court's jurisdiction to entertain this matter was quite conclusively settled in the decision giving rise to the present retrial, *The East African Civil Society Organizations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others, EACJ Appeal No.4 of 2016*. In that case, it was held:

The reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on the Republic of Burundi's international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this international responsibility and in so doing, it had a further duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty.

20. The above decision does resonate with Article 4(1) of the International Law Commission (ILC) Articles on State Responsibility, which provides for the attribution of judicial organs' internationally wrongful actions to their respective states. Article 4(1) reads:

The Conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

21. Article 4(1) of the foregoing Articles was reinforced by the legal advisory opinion advanced by the International Court of Justice (ICJ) in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999*, p. 62 at pp. 87-88, paras. 62, 63, where it was held:

According to a well-established rule of international law, the conduct of an organ of a State must be regarded as an act of that State the conduct of an organ of a State - even an organ independent of the executive power - must be regarded as an act of that State.

22. The foregoing legal antecedents unequivocally hold States responsible for the conduct of their judicial organs under international law. Nonetheless, we are mindful of the lingering question as to whether State responsibility for the wrongful conduct of judicial organs or courts would in itself confer *locus standi* upon litigants to challenge the judicial decisions of domestic courts before international courts and tribunals. Embedded within that question is the interface between international and domestic judicial organs for purposes

of state responsibility. The issue of state responsibility for the internationally wrongful acts of judicial organs poses the additional question as to how, within the context of international adjudication, a determination may be made that an impugned judicial decision is, in fact, internationally wrong.

23. The first limb to the questions posed above was persuasively addressed in Antonios Tzanakopoulos, *'Domestic Courts in International Law: The International Judicial Function of National Courts'*, 34 *Loyola of Los Angeles (Loy. L.A.) International & Comparative Law Review*, 133 (2011) at 153, 154. In that Article, international courts were posited as the arbiters over domestic courts' interrogation of international law in the following terms:

But the question remains: who decides authoritatively, with binding force, whether the domestic court has - in any given case - lived up to the expectation of being the 'natural judge' of international law? Who decides whether in the instance the domestic court settled the dispute/ enforced the law, or rather created a dispute by not enforcing the law? The answer would have to be: States themselves do... through the introduction of a third-party instance at the international level to 'supervise' the domestic court.

24. In the same Article (at p. 167), it was further opined:

This means that the international law question can effectively be raised and answered at the domestic level. When the outcome is deemed unsatisfactory, international procedures will be called upon to review the 'facts' (including potential decisions of the domestic court) and determine whether a breach of an international obligation has taken place or whether the law has moved on. The process then at the international stage is merely subsidiary or supervisory; intervention will be limited to when the domestic process fails to address the issues appropriately and conform to the international obligation.

25. We construe the foregoing narrative to suggest that nation states purposively create courts at international and regional level that would play a complimentary role to national courts with specific regard to their international or regional obligations. Within the EAC, this Court was set up to specifically ensure adherence to the law in Treaty interpretation, application of and compliance with the Treaty.¹⁸ It is well recognized herein that disputes before national courts are primarily determined on the basis of applicable domestic laws rather than related rules of international law. However, the States within which they operate are concurrently bound by international obligations that derive from international treaties and conventions to which they are party. Thus, the EAC Partner States do obligate themselves to achieve the objectives of the EAC with due regard to the principles outlined in Articles 6 and 7 of the Treaty. To that extent, therefore, it is incumbent upon national courts to apply and enforce domestic laws in such a manner as would ensure compliance by themselves, as well as State parties, with these international obligations.

- 26 In the matter before us, the specific obligations in issue are the principles of

¹⁸ See Article 23(1) of the Treaty

rule of law and good governance. The Constitutional Court of Burundi, as a judicial organ of the Republic of Burundi, was expected to comply with those principles in performance of its adjudication function in *Case No. RCCB 303*. In the event then, as is the contention before us, that a national court is alleged to have violated its domestic law, as well as related Treaty obligations; Antonio's Tzanakopoulos (*supra*) postulates that an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international (Treaty) obligations. Accordingly, we are respectfully persuaded that in the present case, this Court is rightly seized with the duty to interrogate the Burundi Constitutional Court's rule of law and good governance compliance credentials viz its decision in *Case No. RCCB 303* and the Applicant is properly before us in that regard.

27. We now turn to the question as to whether or not the impugned decision in the matter before us is, in fact, wrong and the duty upon an international court (such as this Court) in making such a determination. Stated differently, how would an international court that is faced with an impugned act or decision by a domestic court make the determination that such act or decision is indeed internationally wrongful?
28. It is now well settled law that where an action complained of is alleged to be inconsistent with municipal law and, to that extent, a breach of a Partner State's Treaty obligation to observe the rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in its determination as to whether the action complained of amounts to a Treaty violation. See *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others (supra)* and *Henry Kyarimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014*. The question is what parameters would guide and inform such an interrogation by an international court.
29. First and foremost, to allay the legitimate concern of learned Counsel for the Respondent, we state from the onset that the international review of national courts' decisions that is being adopted presently is to be distinguished from the typical hierarchical appellate review that pertains in national judiciaries. An exposition of the salient features of each of these judicial interventions is pertinent.
30. In Robert D. Adie, '*Between Dialogue and Decree: International Review of National Courts*', 2004, *New York University (N.Y.U) Law Review*, p. 2029 at 2045, 2046, the appellate review of a subordinate court's decision was summed up as follows:

Identify four core characteristics of "appellate" review. First, and perhaps foremost, is the authority of an appellate court to undo the determinations of law, and sometimes even the findings of fact, reached by the court subject to review. Following naturally from this phenomenon is the binding nature of that review. Minimally, the judgment of an appellate court binds the trial court in the case at bar. More expansively, decisions on appeal consequently have some formal or informal *stare decisis* effect, binding lower courts in future cases as well. The pattern of review characteristic of the appellate interaction of courts, moreover, is largely unidirectional. With notable exceptions,

appellate judgments are not, in the ordinary case, subject to substantive critique in a trial court. Finally, appellate review is constrained in its reach yet expansive in its depth. Appellate review is rarely *de novo*. Factual findings are subject to an exceedingly deferential standard of review, if they are subject to review at all. As to questions of law, however, courts of appeal possess relatively plenary powers of review and reversal.

31. For the avoidance of doubt, the foregoing definition highlights the following characteristics of appellate review:

I. Authority to undo the determinations of law (and sometimes of fact too) of the lower court.

II. The binding nature of that review on the lower courts.

III. The review is largely unidirectional i.e. whereas the Appellate Court can critique the Lower Court, the reverse is not usually tenable.

IV. The constrained reach of appellate review i.e. It is rarely *de novo*.

32. In contrast, the international review of domestic courts' decisions was expounded in the same literature as follows:

If there is to be some occasion for international review of national courts - some transnational judicial engagement with some dimension of both review and power - what should be its precise character? ... How might those ends be achieved without unnecessarily challenging values of national sovereignty, and thereby risking a backlash against relevant international regimes? one can identify three essential features of an effective pattern of international engagement with national courts: (1) the operation of a bipolar power dynamic, in which both judicial participants possess some capacity for control, and hence power, but neither can assert complete authority over the other; (2) the presence of alternative, and perhaps competing, legal and institutional perspectives; and (3) the existence of structures designed to encourage and facilitate adjudicatory continuity.

33. It becomes abundantly clear, then, that the international review of national courts does not necessarily subjugate the decisions of the latter courts to the former. Rather, it is characterized by the application of distinct legal perspectives whereby national courts enforce domestic laws while international courts approach the same set of circumstances from the perspective of states' international obligations. Further, an international review is a trial *de novo* in the context of the international or treaty obligations the international court seeks to enforce. It is not binding upon the national courts as would be the case of a typical appeal; neither does it form *stare decisis* in domestic jurisdictions as would a decision of national states' apex courts. Nonetheless, it is intended to ferment the international legal issues inherent in domestic adjudication with a view to engendering a harmonized legal approach to member states' international obligations. For purposes of the EAC, the ultimate purpose of such judicial intervention would be to increasingly entrench a harmonized judicial approach to EAC Treaty obligations within the EAC Partner States.

34. Secondly, and perhaps more importantly, are the evidential rules applicable to the interrogation of national courts' decisions by international courts and/ or tribunals. We do appreciate the onus upon us as

aptly propagated in *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others* (supra), to interrogate the decision of the Constitutional Court of Burundi to determine that Partner State's international responsibility, as well as evaluate every act or omission made in respect of that decision so as to deduce its compliance with the EAC Treaty (or the lack of it). To that end, we turn to established international adjudication practice for apposite direction as to the burden and standard of proof applicable to international courts, such as ours.

35. As this Court observed in *British American Tobacco Ltd (BAT) vs. the Attorney General of the Republic of Uganda*, EACJ Ref. No 7, the burden of proof in international claims was most ably articulated in the case of Application of the *Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)*, Judgment, ICJ Reports 2007, p. 43 as follows:

On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America)*,¹⁹ "it is the litigant seeking to establish a fact who bears the burden of proving it.

36. The foregoing proposition does reflect the reasoning of this Court in the earlier case of *Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi*, EACJ Ref. No. 15 of 2015, where the cardinal procedural rule that s/he who asserts must prove their case was propounded. In so doing (in both the *BAT* and *Baranzira* cases), this Court relied upon the following exposition of that rule in Shabtai Rosenne, *The Law and Practice of the International Court*²⁰, as cited with approval in *Henry Kyarimpa vs. Attorney General of Uganda (supra)*²¹:

Generally, in application of the principle of *actori incumbit probatio* the court will require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decisions in its favour might be given.

37. In *Bosnia & Herzegovina vs. Serbia & Montenegro (supra)*, the International Court of Justice (ICJ) did also re-assert the standard of proof in international claims involving state responsibility in the following terms:

The Court has long recognized that claims against a State involving charge of exceptional gravity must be proved by evidence that is fully conclusive²².... The same standard applies to the proof of attribution for such acts.

38. Be that as it may, we are also mindful of the principle advanced in the case of *B. E. Chattin (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 282 at 288*, where state responsibility for wrongful judicial acts was limited to

¹⁹ Judgment, ICJ Reports 1984, p.437, para 101

²⁰ 1920-2005, Vol III, Procedure, p.1040

²¹ See para.29 hereof

²² See *Corfu Channel (United Kingdom vs. Albania) Judgement, ICJ 1949, p.17*

‘judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient governmental action.’ In like vein, in the case of *Ida Robinson Smith Putnam (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 151 at 153*, it was held:

The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.²³ A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.

39. From the pleadings in this matter, as well as the extensive submissions of both Parties, we deduce the act in issue in the present Reference to be the decision of the Constitutional Court of Burundi in Case No. RCCB 303. Going by Mr. Deva’s submissions, it seems to us that the Applicant disagrees with the Constitutional Court’s opinion that the term ‘exceptionally’ in Article 302 of the Burundi Constitution is ambiguous as to the intention of the framers of the Constitution. The gist of the Applicant’s complaint is that notwithstanding the Court’s acknowledgment that the constitutional principles in the Arusha Accord were the bedrock to the Burundi Constitution; it nonetheless went ahead to render an allegedly erroneous judgment, purporting to adjudge Article 302 of the Burundi Constitution as an exception to the unambiguous provisions of Article 96 of the same Constitution. We reproduce both constitutional provisions below.

Article 96

The President of the Republic shall be elected by direct universal adult suffrage for a term of five years renewable once.

Article 302

Exceptionally, the first President for the post-transition period shall be elected by the (elected) National Assembly and the Senate sitting in Congress, with a majority of two-thirds of the members.

If this majority is not obtained on the first two ballots, it immediately proceeds with other ballots until a candidate obtains votes of two-thirds of the members of the Parliament.

In the case of vacancy of the first President of the Republic of the post-transition period, his successor is elected according to the same modalities specified in the preceding paragraph.

The President elected for the post-transition period may not dissolve the Parliament

40. We do also deem it necessary to reproduce the provisions of Articles 231 and 237 of the Burundi Constitution (as amended) in so far as they demarcate the Constitutional Court of Burundi as the apex court of that Partner State

²³ See case of *Margaret Roper*, Docket No. 183, paragraph 8

for purposes of constitutional matters.

Article 231

The Constitutional Court is the jurisdiction the State for constitutional matters. It is the judge of the law's constitutionality and the interpretation of the Constitution.

Article 237

A provision declared unconstitutional may not be promulgated or implemented.

The decisions of the Constitutional Court are not susceptible to any recourse.

41. Before progressing further with this case, we are constrained to clarify the procedural basis for our determination of this case. In the *B.E. Chattin (USA) vs. United Mexican States* case, it was proposed that states parties can only be held responsible for the most outrageous judicial acts that depict outrage, bad faith, willful dereliction of judicial duty and manifestly insufficient governmental action. Stated differently, a cause of action against a states party for the international review of a wrongful judicial act would only accrue in respect of such purportedly outrageous judicial acts by a judicial organ. It does follow that a judicial decision by a domestic court would be one such judicial act envisaged under that rule. We do respectfully stand most persuaded by that decision to the extent that it inter alia delineates outrageous judicial acts by a judicial organ of the State although, admittedly, that list is by no means exhaustive.
42. However, taking into account the importance of the doctrine of separation of powers to judicial efficiency, we are disinclined to accept the proposition therein that 'manifestly insufficient governmental action' can constitute a wrongful judicial act. Quite clearly, governmental action *per se cannot* be equated to judicial action. Even more significantly, as this Court did observe in *Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi (supra)*. The principle of separation of powers is indispensable to an independent, impartial and effective judiciary. For clarity, we reproduce our observation:

The principle of separation of powers is the cornerstone of an independent judiciary. It is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of separation of powers is sine qua non for a democratic country.²⁴ Indeed, under international law, nation states are obliged to organize their state apparatus in such a manner as would be compatible with their international obligations. It is incumbent upon them to ensure that the structure and operation of state power is founded on the true separation of its executive, legislative and judicial branches, as well as the existence of an independent and impartial judiciary.²⁵

²⁴ See *Report of the Special Rapporteur on the independence of Judges and Lawyers*, UN document E/CN.4/1995/39. para. 55

²⁵ See *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners Guide No. 1, International Commission of Jurists, 2004, p. 19

43. We find no reason to depart from this position. Consequently, we take the view that a judicial decision of a domestic court would only give rise to a cause of action, first, where it is established on the face of the record as depicting outrage, bad faith and willful dereliction of judicial duty; and, secondly, where no or manifestly insufficient action has been taken by the appropriate judicial disciplinary body to redress such judicial outrage. We so hold!
44. The *Ida Robinson Smith Putnam* case, on the other hand, sheds some light on the duty upon an international court or tribunal faced with the international review of a domestic judicial decision. In that case it was opined that due respect should be accorded to judicial decisions emanating from the nation states' apex courts, such decisions to only be set aside and a re-evaluation of their issues of fact and law undertaken. Where they reflect 'a clear and notorious injustice, visible, to put it thus, at a mere glance' We are respectfully persuaded by the approach advanced therein to the extent that it takes due cognizance of the fundamental role of apex domestic courts in the development of municipal jurisprudence, which role cannot and should not be usurped by an international court or tribunal. For present purposes, a clear illustration of the pivotal function of the Burundi Supreme Court in the development of the law in Burundi is reflected in Article 227 of the Burundi Constitution, which holds that court 'responsible for the proper application of the law by the courts and tribunals' in Burundi
45. However, we are hard pressed to appreciate the circumstances under which an international court can 'put aside a national decision presented before it and (to) scrutinize its grounds of fact and law. It seems to us that such an eventuality would run contrary to the counter-exigencies of the international review of domestic decisions viz the appellate function of domestic apex courts. A distinct feature of the international review of domestic judicial decisions is that the international court or tribunal approaches the set of facts that were before a domestic court from the perspective of international law (as opposed to domestic laws) and the state party's international obligations thereunder. That, clearly, is far-removed from the mandate of an appellate court that tests the correctness of a subordinate court's decision with a view to possibly quashing or setting it aside if it offends the applicable legal regime. Needless to state, such legal regime would be common to both the trial and appellate courts, unlike the scenario under the international review of domestic decisions. Indeed, it would scarcely be the prerogative of an international court sitting in exercise of its international review mandate to scrutinize the grounds of fact and law stipulated in a domestic judicial decision given that the 2 courts primarily apply 2 different legal regimes. The international court is restricted to an interrogation of a domestic decision's adherence to domestic laws only to the extent that such compliance would underscore the domestic court's compliance with the responsible state's international law obligations.
46. It then becomes abundantly clear that this Court cannot set aside the impugned decision. It can only scrutinize it to ascertain its compliance with the Respondent State's international obligations under the Treaty and make consequential orders. The obligations in question would include the adherence to the rule of law principle encapsulated in Articles 6(d) and 7(2) of

the Treaty. This point is explicitly made in *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others (supra)* where, expounding its decision that this Court does have jurisdiction to review the impugned judgment (and dispelling the notion that such a review would be tantamount to a disguised appeal), by the Appellate Division of this Court held:

The Trial Court is not expected to review the impugned decision as is the case under Article 35(3) and Rule 72(2) of the Rules of this Court looking for new evidence or some mistake! fraud or error apparent on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate it critically with a view of testing its compliance with the EAC Treaty and then make a determination. In so making the said determination, the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers as known in municipal laws of Partner States but rather makes declarations as to the decisions compliance with the EAC Treaty.

47. Turning to the matter before us presently, we have carefully considered the impugned judgment of the Burundi Constitutional Court. We find the *ratio decidendi* and the decision thereof in paragraphs 4 and 5 of the judgment respectively. They read:

4. STATES that Article 96 means that the number of terms by direct universal suffrage is limited to two only and that Article 302 creates a special mandate by indirect universal suffrage which has nothing in common with the terms of office under Article 96.

5. RULES that the renewal once and for the last time of the current presidential mandate by direct universal suffrage for five years is not at variance with the Burundian Constitution of 18 March 2005.

48. The reasoning that informs the foregoing decision is reflected in pages 4 - 7 of the judgment. In a nutshell, it was the Constitutional Court's view that whereas the Arusha Accord (without attaining supra-constitutional status) was the bedrock of the Burundi Constitution, the framers of the 2005 Constitution 'did not strictly follow the recommendations of the Arusha Accord.' The court further reasoned that Article 302 created a special presidential mandate by indirect suffrage that was an exception to the direct universal suffrage espoused in Article 96, *inter alia* observing that such exceptional mandate is similarly reflected in the Burundi Electoral Code that was enacted one (1) month after the promulgation of the Constitution Article 190 of the Electoral Code, which is identical to Article 302 of the Constitution, was noted to be expressly designated in the Code as an exception to Article 186 thereof that, in turn, is akin to Article 96 of the Constitution. The court did also observe that the foregoing interpretation reflects a compromise position that was intended to stabilize the political situation that prevailed in Burundi at the time.²⁶

49 We take the considered view that the foregoing decision, as well as the legal reason that underpins it, cannot be categorized as an outrageous judicial decision, let alone one that depicts outrage, bad faith or wilful dereliction of judicial duty so

²⁶ see p. 5 para.5 of the judgment

as to invoke state responsibility therefor by the Respondent State, as espoused in the *BE Chattin (USA)* case. The Constitutional Court clearly applied its mind to the background to the Constitution's promulgation; duly acknowledged and tested the Arusha Accord against related foundational laws such as the Electoral Code; took due cognizance of the political situation that prevailed in Burundi at the time in its determination of what emphasis to place on the Arusha Accord, and drew its conclusions on that basis. We find no plausible reason to fault that judicial reasoning or result. Consequently, the impugned decision would not invoke state responsibility therefor given that it neither amounts to an outrageous judicial act nor did it warrant the intervention of the Respondent State to address a non-existent judicial outrage. It does follow, therefore, that this Court's international judicial review mandate is improperly invoked and we do hereby decline the invitation extended to us to improperly exercise that mandate. In the result, we would answer the present issue in the negative.

ISSUE No. 2: Whether the Applicant is entitled to the remedies sought

50. The remedies sought by the Applicant in this matter are delineated verbatim in paragraph 9 hereof. We do not deem it necessary to reproduce them here. Be that as it may, having held as we have in the preceding issue that this Reference is improperly before us, the remedies sought herein are untenable, save for the order on costs sought in paragraph 52(h) of the Reference, to which we revert forthwith.
51. Rule 111(1) of this Court's Rules postulates that costs should follow the event unless the Court, for good reason, decides otherwise. In the instant case the Reference has not succeeded so ordinarily the costs thereof would be to the Respondent. However, we take the view that the Reference did raise issues of public interest on the international review of domestic judicial decisions. Accordingly, we deem it just in the circumstances to order each Party to bear its own costs.

Conclusion

52. In the final result, the Reference is hereby dismissed. Each Party to bear its own costs. It is so ordered.

*[Hon. Justice F. Jundu, retired from the Court with effect from 30th June 2019 but signed the Judgment in terms of Article 25(3) of the Treaty.]

N. Ndeki, D. Deya Counsel for the Applicant

N. Kayobera & D. Vizikiyo for the 1st Respondent

First Instance Division

Reference No. 3 of 2015

**Steven Deniss v The Attorney General of the Republic of Burundi,
The Attorney General of the Republic of Kenya, the Attorney General of the
Republic of Uganda,
The Attorney General of the United Republic of Tanzania,
The Secretary General of the East African Community**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ & F. Ntezilyayo J

March 31, 2017

Jurisdiction – Treaty amendments - Whether the principle of res judicata barred the reference- Whether individuals are denied access to justice by time limitations - Unequal access to justice -Realization of the East African Community’s objectives

Articles 4(3), 5, 6, 7, 8, 30, 67, 71,127, 150 of the Treaty - Rules: 1(2), 24 EACJ Rules of Procedure, 2013

The Applicant was forcefully expelled from the Kagera Region of Tanzania to Rwanda by agents of the Government of Tanzania. In the process, he was shot and lost his property. Through a letter dated 7th May, 2014 he sought legal advice from the East African Law Society on possible remedies, however, he was informed that based on Article 30(2) of the Treaty his claim was time-barred. The Applicant challenged the legality of two month limitation period in Article 30(2) of the Treaty averring that: it was a hindrance in citizens’ access to justice as it left victims of Treaty violations without redress; was unjust; discriminatory; and did not provide aggrieved parties with ample time to obtain legal assistance, conduct research and collect relevant evidence and secure relevant witnesses. He argued that the said provision was contrary to inclusivity and equity and conflicted with Articles 6(d) and 7(i) (a) of the Treaty and the fundamental and operational principles of the Community.

In response, the Respondents submitted *inter alia* that: the Court had no jurisdiction to hear the case or to order any amendment to the Treaty; the issue of the amendment of the Treaty was determined by this Court in the case of *East African Law Society, 2007*; furthermore, the right to sign, ratify or amend any treaty is a sovereign right enjoyed by States; the introduction of Article 30(2) through a treaty amendment was lawful; and the Court had no power to extend, waive or modify the prescribed time limit for initiating proceedings; furthermore, Article 30(2) was designed to balance the interests of individual complainants against the collective interests of all the other citizens of the Community.

Held

1. The Court can properly interrogate the legality of an amendment to the Treaty as it did in the *East African Law Society, 2007* case and determine the questions whether any action of a Partner State or an Institution of the Community violated the Treaty. However, this Court cannot, by judicial fiat, order that an amendment

ought to be effected in enlarging the time limit under Article 30(2) nor can it order that it should be vested with jurisdiction to enlarge time. As the Appellate Division stated in the case of *Anthony Calist Komu*, whatever the concerns of the Court may be regarding an amendment to the Treaty, it can only interpret and apply such a provision and address jurisdictional objections based *inter alia* on the *ratione temporis* or *personae* inapplicability. Amendments to the Treaty are therefore matters outside the Jurisdiction of this Court.

2. The question of the legality of the contents of Article 30(2) was not *res judicata* as it was never in issue in the *East African Law Society, 2007* case which focused on the totality of the process of Treaty amendment. To the extent that the Reference *inter alia* seeks to invalidate Article 30(2) on the premise that its contents are an impediment to access to justice or makes disproportionate access to justice, that issue, was never before the Court in that case and was therefore never conclusively determined. In the context in which judgment was given, the principle of *res judicata*, could not be properly applied to the challenge the substance of Article 30(2).
3. Whereas the expulsion of the Applicant from the United Republic of Tanzania would be time-barred under Article 30(2) of the Treaty, a challenge to the legality of the said Treaty provision could not be said to be time-barred.
4. There is no conflict between Articles 6(d) and 7(2) *vis-à-vis* Article 30(2) of the Treaty because a harmonized construction of the said Articles suggests that whereas Articles 6(d) and 7(2) prescribe the fundamental principles, such as rule of law, that should be adhered to in the realization of the treaty's objectives, a case that is premised on the principles enshrined therein should be promptly instituted within the time period prescribed in Article 30(2) of the Treaty. Thus Article 30(2) does not negate the said principles but rather regulates the procedural framework- specifically, the time frame - within which the said principles may be litigated. The time frame within which litigants may access justice is neither arbitrary nor capricious or unreasonable.
5. The Court cannot close eyes to the connotations of unequal or disproportionate access to justice that is *prima facie* inherent in the Treaty. There is no time limitation within which the Partner States or the Secretary General of the EAC may access the Court (Articles 28 and 29), as is the case with natural persons under Article 30(2). It cannot have been envisaged by the framers of the Treaty that access to justice would include unequal or disproportionate.
6. It seems that the time limitation in Article 30(2) is intended to facilitate the expeditious realization of the Community's objectives as detailed in Article 5(2) of the Treaty by forestalling open-ended avenues for litigation that could derail the integration process. In the same vein and for the same reasons, the spirit and letter of the Treaty would be well served if such an expedient approach were equally applied to the Partner States and the Secretary General of the EAC.
7. This a matter should receive the attention of the relevant organs of the Community because a people-centred and market driven co-operation espoused in Article 7(1), (a), as well as the rule of law as articulated in Article 6(d) and 7(2) of the Treaty must of necessity include the notion of equal access to justice by all parties.

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 Timothy Kahoho v Secretary General of EAC [2012-2015] EACJLR, 412, Appeal No.2 of 2013

JUDGMENT

Introduction

1. The present Reference is principally premised on Articles 6(d) and 7(1) (a) of the Treaty for the Establishment of the East African Community (hereinafter the Treaty). Articles 4(3), 5, 8, 30, 67, 71, 127 and 150 of the Treaty have also been cited as have Rules 1(2) and 24 of this Court's Rules of Procedure.
2. The Applicant is a citizen of the United Republic of Tanzania whose address is c/o the East African Law Society, P.O. Box 6240, Arusha, Tanzania.
3. The 1st to 5th Respondents are the Attorneys General of the Republics of Burundi, Kenya, Rwanda, United Republic of Tanzania and Uganda, respectively, who appeared through their designated representatives in the present proceedings.
4. The 6th Respondent is the Secretary General of the East African Community (hereinafter EAC) and is sued as the Principal Executive Officer of the EAC as well as in his capacity as Head of the EAC Secretariat, the Secretary of its Summit and the custodian of the Legal Instruments of the said Community.
5. The Reference arises from allegations that the Applicant was shot his property lost and he was then forcefully expelled to Rwanda from the Kagera Region of Tanzania by agents of the Government of Tanzania but was unable to challenge those actions because of the limitation imposed on him by Article 30(2) of the Treaty.

Applicant's Case

6. According to the Applicant, although he was certain that the above alleged actions amounted to a breach of and violation of the Treaty, when he sought legal advice from the East African Law Society, by letter dated 7th May, 2014 on possible remedies, he was informed that by fact of the express and mandatory provisions of Article 30(2) of the Treaty, his claim was time-barred. He was further informed that the process by which Article 30(2) of the Treaty was introduced was unlawful and that the 6th Respondent had failed in his duty to advise Partner States to rectify the anomaly.
7. It is also the Applicant's case that the existence of Article 30(2) is a hindrance to citizens' access to justice; leaves victims of Treaty violations without redress and relief at the altar of convenience and technicalities; fosters lack of confidence by stakeholders and creates uncertainty. That it also limits this Court's ability to interpret the Treaty which is not in tandem with international and regional instruments of similar nature and it is unjust, discriminatory and does not provide aggrieved parties ample time to obtain legal assistance, conduct research and collect relevant evidence including securing of relevant witnesses. That therefore the said provision is in sum contrary to the inclusivity and equity

fundamentals of the Treaty.

8. The Applicant for the above reasons prays for a declaration that the sixty days' limitation period for filing references before this Court imposed by Article 30(2) of the Treaty is contrary to the fundamental and operational principles of the EAC as set out in Articles 6(d) and 7(1) (a) of the Treaty and that the said provision should consequently be declared null and void.
9. In the alternative, he prays for an order that the Treaty ought to be amended enlarging the limitation period to not less than six months and also clothe this Court with the discretion to extend or enlarge the said period. Costs are also sought by the Applicant.

1st Respondent's Case

10. In a concise response, the 1st Respondent states that the Reference is misguided; that the introduction of Article 30(2) to the Treaty was lawful and that the Applicant must bear the consequences thereof and in any event, that the 60 days' limitation period is sufficient for any party to access this Court and also ensures certainty in proceedings before the Court.
11. Lastly, that this Court has no Jurisdiction whatsoever to grant the Orders sought as to do so would in itself be in violation of Articles 9(4), 27(1), 150 and 151 of the Treaty. That therefore the Reference ought to be dismissed with costs.

2nd Respondent's Case

12. In his response, the 2nd Respondent urges that the Reference is inadmissible, unsubstantiated and flagrantly wrong and is motivated by bad faith. That this court in any event has no Jurisdiction to grant any of the Orders sought because under Articles 150 and 151 of the Treaty, the Court has no role in the enactment of amendments to the Treaty and it must only act within the powers conferred by Article 27 of the Treaty; and that the Court cannot breathe life into a cause of action that is already time-barred. He, therefore, prays that the Reference be dismissed with costs.

3rd Respondent's Case

13. In opposing the Reference, the 3rd Respondent states that the issue of the amendment of the Treaty in general was determined by this Court in the case of the *East African Law Society & 5 Others vs. Attorney General of Kenya & 3 Others, Reference No.3 of 2007* and therefore the present Reference is barred by the principle of *res Judicata*.
14. Secondly, it states that this Court has no Jurisdiction to order any amendment to the Treaty as the right to sign, ratify or amend any treaty is a sovereign right enjoyed by States. That therefore the Applicant has the right to seek such an amendment through his State and not directly by an act of this Court.
15. Thirdly, that this Court, in previous decisions such as *Independent Medical Legal Unit (IMLU) vs. AG of Kenya & Others, Appeal No.1 of 2011* decision has been categorical that nowhere does the Treaty grant it power to extend, waive or modify the prescribed time limit for initiating proceedings before it. That therefore, the overall framework of Article 30(2) was designed to balance the interests of an individual complainant against the collective interests of all the

other citizens of the EAC.

16. In conclusion, the 3rd Respondent urges this Court to dismiss the Reference with costs.

4th Respondent's Case

17. The Attorney General of the United Republic of Tanzania began by raising a Preliminary Objection to the Reference on the following grounds:

- i) that it offends the Provisions of Article 6(a) of the Treaty on the sovereign equality of Partner States;
- ii) that it is time-barred;
- iii) that the Applicant has not exhausted the alternative remedies available in the National Courts of the United Republic of Tanzania; and
- iv) that this Court lacks the Jurisdiction to entertain the Reference by dint of Articles 27 and 30(2) of the Treaty.

18. In the alternative, it is the 6th Respondent's case that while it admits that in an operation dubbed "*Kimbunga*", the Government of the United Republic of Tanzania evicted and deported all illegal immigrants from the Kagera Region to their home countries, in doing so, it did not breach or violate any part of the Treaty.

19. Further, that the mandate of passing, signing and amending the Treaty was validly exercised by Partner States and that it was prepared to call oral evidence and rely on the Constitution of Tanzania, Statutes and Case Law to show that the Reference is one fit for dismissal with costs.

5th Respondent's Case

20. On his part, the 5th Respondent's answer to the Reference is that it does not disclose any cause of action in terms of Article 30(2) of the Treaty and is therefore frivolous, vexatious, and scandalous and an abuse of the Court powers.

21. The Attorney General of Uganda also contends that the issue of the legality of amendments to the Treaty including the introduction of Article 30(2) was substantially determined within *Reference No. 3 of 2007* aforesaid and cannot be reopened in the present proceedings.

22. Further, that Article 30(2) creates legal certainty among the diverse members of the EAC; grants proportionate access to justice by citizens and Partner States; creates confidence among stakeholders and is in tandem with other international and regional instruments of like purpose.

23. In addition, the 5th Respondent contends that the 60 days' limitation period is neither restrictive, unjust nor discriminatory as alleged by the Applicant and is also not a hindrance to access to this Court by natural and legal persons. That therefore the Reference is devoid of merit and should be dismissed with costs.

6th Respondent's Case

24. The Secretary General of the EAC urges the point that the Applicant is solely to blame for his inability to meet the expectations of Article 30(2) of the Treaty. That he therefore sat on his rights and since there was nothing illegal in the enactment of Article 30(2), there was no reason for the 6th Respondent to request the Partner States to do anything regarding it.

25. In addition to the above, it is the 6th Respondent's case that no known violations of the Treaty have ever gone unattended hence the increasing litigation before this Court in that context. That there is also no disproportionate access to justice against individual citizens and in favour of Partner States and there is no lack of confidence in the Treaty by stakeholders as alleged.
26. On this Court's interpretative mandate under the Treaty, the 6th Respondent contends that the said mandate is in tandem with international legal instruments including the African Charter on Human and People's Rights contrary to the Applicant's assertion to the contrary.
27. Lastly, the 6th Respondent pleads that because there is no cause of action established against him and since he has not acted irresponsibly or failed to take action on any matter complained of in the Reference, the same ought to be dismissed with costs.

Scheduling Conference

28. On 9th March, 2016, all Parties attended a Scheduling Conference in the Court and settled on the following as issues falling for determination:
- i) Whether the Court is vested with the Jurisdiction to entertain the Reference;
 - ii) Whether the dispute is admissible;
 - iii) Whether the process of introducing Article 30(2) of the Treaty was illegal and as such, the 6th Respondent should require the Partner States to rectify it;
 - iv) Whether Article 30(2) denies access to Justice, or renders disproportionate access to justice against individuals in favour of Partner States;
 - v) Whether Article 30(2) of the Treaty clogs the jurisdiction of this Honourable Court;
 - vi) Whether the 6th Respondent has failed in his responsibility to ensure the achievement of any of the objectives of the Treaty including those implicit in Articles 6, 8(1), 27, 29, 71(1)(c), 129 and 150 of the Treaty; and
 - vii) Whether the Applicant is entitled to the remedies sought.

Court's Determination

29. It must be noted from the onset that looking at the Reference, Responses to it and Submissions on record, it is not the Applicant's alleged shooting, loss of property and eviction from Kagera Region of Tanzania that is at the centre of the present proceeding. What is in issue instead is his inability to challenge those actions in this Court by dint of the Provisions of Article 30(2) of the Treaty which provides as follows:

“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”

30. The challenge to the above Article would also be seen to be limited to the sixty days' limitation period imposed for instituting Court proceedings and not the latter provision on time starting to run from the date the matter complained of came to the knowledge of the complainant. It is therefore in that context that we shall address all the issues set for determination and in doing so, we shall address

Issues Nos. 1 and 2 together as they are inter-related and Parties largely addressed them as such.

Issue No.1: Whether the Court is vested with the Jurisdiction to entertain the Reference and Issue No.2: Whether the Dispute is Admissible

Submissions by Parties

31. On the above issues, it was submitted by the Respondents that this Court has no Jurisdiction to determine the Reference on two grounds:
 - i) that Article 30(2) was properly and lawfully enacted by Partner States and therefore no person can, by entreaties to this Court, question its legality; and
 - ii) that the issue of amendment of the Treaty to introduce *inter alia* Article 30(2), was the subject of conclusive determination by this Court in among other cases, *Reference No. 3 of 2007, EALS & Others vs. AG of Kenya & Others* and so this Court's hands are tied by the principle of *res judicata*.
32. They also submitted that since the Court has no Jurisdiction to entertain the Reference, then for the same reasons, the Reference is inadmissible.
33. In response to the above contentions, the Applicant submitted that this Court has Jurisdiction to test the validity of Article 30(2) of the Treaty as against the objectives, principles, intendment and spirit of the Treaty as it has done in previous decisions such as in *Reference No. 1 of 2007, Katabazi & Others vs. Secretary General of the East African Community*. That in doing so, it would only be exercising its interpretative mandate and no other Judicial body has that responsibility.
34. On the invocation of the principle of *res judicata*, the Applicant has dismissed the Respondents' submissions in that regard by arguing that in the *East African Law Society* (supra) case, the issue before the Court was the validity of the process of amending the Treaty as a whole and not the substance of the resultant amendments such as is the case presently. That therefore the Reference is properly before the Court and is also admissible.

Determination on Issue No. 1

35. On our part, having considered the oral Submissions on the two issues above and noting the caveat we placed above regarding the real issue in controversy, we must begin by reiterating that this Court's Jurisdiction is well set out in Articles 23, 27(1) and 30(1) of the Treaty. In sum, those Articles provide that the Court shall have the Jurisdiction to "*interpret*" and "*apply*" the Treaty and to determine whether "*any Act, regulation, directive, decision or action of a Partner State or an institution of the Community is unlawful or is an infringement of the Provisions of the Treaty.*" In undertaking that duty, the Court is enjoined to adhere to the Law at all times. The provisions of Article 27(1) are irrelevant to the matter at hand.
36. In that context, in a recent decision of the Appellate Division of this Court viz. *Appeal No.2 of 2015, the Attorney General of the United Republic of Tanzania & Anthony Calist Komu*, the Learned Judges stated as follows:
 - "To succeed on a claim for lack of Jurisdiction of this Court, a party must demonstrate that there is absence of any of the three Jurisdictions – *ratione personae/locus standi*, *ratione materiae*, and *ratione temporis* – See *Alcon International Ltd and the Standard Chartered Bank & Others*,

Appeal No.3 of 2013 para. 58 (unreported).”

37. Taking all the above matters into consideration and the issue at the heart of this Reference, can it be said that this Court has no Jurisdiction to determine the Reference?
38. There is no doubt that this Court can properly interrogate the legality an amendment to the Treaty as it did in the *East African Law Society Case*. There is also no doubt that this Court can determine the questions whether any action of a Partner State or an Institution of the Community is a violation of the Treaty. Having so said, however, this Court cannot as is the alternative prayer by the Applicant, by judicial fiat, order that an amendment ought to be effected in enlarging the time limit under Article 30(2) nor can it order that it should be vested with jurisdiction to enlarge time under that Article. We say so because as was stated in the *Anthony Calist Komu*, whatever the concerns of the Court may be regarding an amendment to the Treaty, it can only interpret and apply such a provision and address jurisdictional objections based *inter alia* on the *ratione temporis* or *personae* inapplicability. Amendments to the Treaty are matters outside the Jurisdiction of this Court. See Article 150 of the Treaty.
39. Be that as it may, Article 30(1) of the Treaty grants *locus standi* to ‘any person who is resident in a Partner State’ to refer a matter to the Court for adjudication. In the instant case, the Applicant is a resident of citizen of the United Republic of Tanzania who is apparently resident in the Republic of Rwanda. We are therefore satisfied that he does meet the jurisdictional test of *ratione persona*.
40. Article 30(1) does also designate the *ratione material* or subject matter that would constitute a cause of action in this Court to include ‘the legality of any Act or regulation’. In the present Reference, the Applicant *inter alia* challenges the legality of Article 30(2) of the Treaty for conflicting with the principles and objectives outlined in Articles 6(d) and 7(2) thereof. It seems to us that the thrust of the Applicant’s case is that the amendment of the Treaty yielded an Article 30(2) that apparently conflicts with the express provisions of previously existing provisions thereof, to wit, Articles 6(d) and 7(2) of the Treaty.
41. Against that backdrop, we take the view that the Applicant’s case clearly raises a matter for Treaty interpretation, the purpose of which would be to interrogate the alleged inconsistencies therein. It thus invokes the Court’s interpretative mandate as summed up in Article 27(1) of the Treaty and duly satisfies the jurisdictional ingredient of *ratione material*. It does therefore raise a cause of action, contrary to the assertions of the Fifth and Sixth Respondents.
42. Finally, contrary to the Second and Fourth Respondents’ submissions, quite clearly the present Reference has been lodged within the limitation period prescribed under Article 30(2) given that the Treaty provision it challenges is still in the Treaty. The Reference therefore meets the jurisdictional ingredient of *ratione temporis*.
43. Having met all the above jurisdictional ingredients outlined in *Anthony Calist Komu* (supra), we are satisfied that this Court does have jurisdiction to entertain this matter.
44. On the question of applicability of the principle of *res judicata*, as we understand it, the doctrine is meant to ensure that parties and courts are not burdened with multiple resolutions of the same dispute, between the same parties on the same

subject matter, before the same Court and which issue has previously been conclusively determined. Case Law on the subject would therefore show that *res judicata* is recognized as a binding rule, which precludes the re-litigation of a settled dispute.

45. In that regard, in the *International Court of Justice's Application for Revision of the Judgment of 11th July 1996: In the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Yugoslavia)*, the Court, in its decision of 26th February 2007, stated *inter alia* that, in its view, “two purposes underlie the principle of *res judicata*: first, the stability of legal relations that requires that litigation come to an end; and secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.”
46. The Court then went further to state that *res judicata* should always be “determined in each case having regard to the context in which Judgment was given” including whether it was determined upon the upholding of a preliminary objection or on its merits.
47. Further, In *Black's Law Dictionary*²⁷, *res judicata* is defined as being:
 “An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been – but was not – raised in the first suit. The three essential ingredients are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”
48. The *Oxford Dictionary of Law*²⁸ further clarifies the gist of *res judicata* as:
 “The principle that when a matter has been finally adjudicated upon by a court of competent jurisdiction it may not be re-opened or challenged by the original parties or their successors in interest. It is also known as action estoppel. It does not preclude an appeal or a challenge to the jurisdiction of the court. Its justification is the need for finality in litigation.”
49. In that context, we note that the question of the legality of Article 30(2) was never in issue in *Ref. No. 3 of 2007*. This is most succinctly evident at pages 16 and 35 of the judgment in respect thereof as at page 16 the Court clarified the matter in contention between the parties therein as follows:
 “The alleged infringement is the totality of the process of the Treaty amendment, which amendment was, and can only be made by the parties to the Treaty, namely the Partner States, acting together through the organs of the Community.”
50. In the same vein, at page 35 it observed:
 “The reference was not for determination whether the amendments were made in bad faith, but rather whether the amendment process did not comply with specific provisions of the Treaty, and therefore infringed them.”
51. Indeed, whereas the Court in *Ref. No. 3 of 2007* went ahead to make specific findings on the validity of the amendment process, nowhere in that judgment

²⁷ 8th Edition, 2004, pp. 1336, 1337

²⁸ Oxford University Press, 7th Edition, 2009, p. 476

is any finding made as to the legality of the specific legal provisions introduced pursuant to the said amendment process. An amendment process can be unassailable and in full compliance with designated due process but yield substantive amendments that appear to derogate from the substance of pre-existing Treaty provisions. It is with one such substantive provision that the present Reference takes issue. That legal question was not settled by *Ref. No. 3 of 2007*.

52. Per chance, even if the question of legality were remotely opined to have been implicit in Issue No. 5 of that Reference (alongside the other amendments that were introduced to the Treaty), that issue was not resolved by the Court. The Court in fact addressed that issue as follows at p. 41:

“The last two framed issues were also not part of the subject matter of the reference for the Court’s determination under Article 30, and we allude to them briefly only because we allowed argument on them.”

53. It then concluded thus at p. 42:

“We reiterate that the last framed issue, namely “Whether the amendments will strengthen the Community”, is also not part of the reference on the legality of the impugned amendments. Be that as it may, it was not seriously canvassed that the impugned amendments were unlawful or infringed the Treaty because they did not strengthen the Community or vice versa. Besides, with all due respect to learned counsel, neither party was able to show definitively to what measure and in what way the amendments strengthened or weakened the Community. In essence their submissions were in the nature of speculation. In the circumstances, we make no findings on this issue.”

54. In the above context, is this Reference therefore barred by the principle of *res judicata*?

55. First and foremost, it is quite apparent that the question of the amendment process that the Applicant sought to discount was in fact framed as the third issue for determination herein, albeit with the additional question as to the Sixth Respondent’s duty to ensure its rectification by the Partner States, if the process was indeed found to have been flouted. Admittedly, as we have demonstrated above, the amendment process leading to the introduction of Article 30(2) to the Treaty was indeed conclusively determined by this Court on its merits in *Ref. No. 3 of 2007*. That issue is *res judicata* and cannot, therefore, be re-litigated before this Court.

56. The secondary question under Issue No. 3 pertains to the alleged duty upon the Sixth Respondent to cause the rectification of any procedural anomalies in the amendment process. We take the view that the Court in *Ref. No. 3 of 2007* having found the said process to have duly complied with the relevant Treaty provisions, the secondary issue inherent in Issue No. 3 hereof is superfluous and the purported duty upon the Sixth Respondent is redundant. In any event, the Applicant could have raised the question of the Sixth Respondent’s duty to rectify the alleged procedural anomaly under *Ref. No. 3 of 2007* so as to render finality to all attendant issues in that matter, but it seemingly omitted to do so. Given the exposition of *res judicata* in *Black’s Law Dictionary* (supra), such an eventuality would also run afoul of the defence of *res judicata*.

57. However, the same cannot be said of Issues 4 and 5 as framed for determination in the present Reference. Issue No. 4 questions the extent to which Article 30(2) denies access to justice, or renders disproportionate access to justice against individuals in favour of Partner States; while Issue No. 5 specifically imputes the denial of speedy justice by the alleged clogging of the jurisdiction of this Court by Article the same legal provision. In our considered view, the Applicant does raise the issue of the legality of Article 30(2) viz the objectives and principles enshrined in Articles 6(d) and 7(2). The question of the legality of Article 30(2) in that regard was never in issue in *Ref. No. 3 of 2007*.
58. In our collective mind, to the extent that the Reference *inter alia* seeks to invalidate Article 30(2) on the premise that its contents are an impediment to access to Justice, that issue, we reiterate was never before the Court in that case and was therefore never conclusively determined. It is therefore our finding that the principle of *res judicata*, as understood in law cannot be properly applied to the challenge of the substance of Article 30(2) which matter is in issue presently.
59. On the question of admissibility, and as was correctly pointed out by the Applicant in submissions, this issue, although crafted as one to be determined separately, was actually misplaced and parties made submissions on it as part of Issue No.1. In any event, admissibility is a matter of evidence and has been defined to be “the quality or state of being allowed to be entered into evidence in a hearing, trial or other official proceeding.” - See *Black’s Law Dictionary*. Admissibility of a dispute in a general sense would however also refer to many things including Jurisdiction and existence of a cause of action and in the context of the present Reference our findings on Issue No.1 are sufficient to dispose of Issue No.2.
60. One other issue was peripherally raised by the 2nd and 4th Respondents: that this Court has no Jurisdiction to determine the Reference because it is time-barred under the impugned Article 30(2). Beyond pleading the issue, little more was said of the matter and we shall not delve into it for lack of sufficient material on the point. Suffice to note, however, that whereas the expulsion of the Applicant from the United Republic of Tanzania would be time-barred under Article 30(2) of the Treaty, a challenge to the legality of the said Treaty provision cannot be said to be time-barred as well.
61. In conclusion, it is our finding therefore that this Court does have Jurisdiction to adjudicate the present Reference in so far as the legality of Article 30(2) is concerned, and would accordingly answer Issue No. 1 in the affirmative. On the question of *res judicata* that was argued together with the issue of jurisdiction, we find that the Reference is not barred by the principle of *res judicata*. We do therefore answer Issue No. 2 in the negative.
- Issue No.3:** Whether the process of introducing Article 30(2) of the Treaty was illegal and as such, the 6th Respondent should require the Partner States to rectify it
62. Having found as we have in the preceding issues that the validity of the amendment process was conclusively addressed in *Ref. No. 3 of 2007*, we do find the principle of *res judicata* specifically applicable to Issue No.3 and therefore decline to re-adjudicate that issue in this judgment. In the premises, it would also be a superfluous venture to determine whether the 6th Respondent had any role in instigating the amendment of any part of the Treaty. Nonetheless, we do

revert to the role of the 6th Respondent viz the legality of Article 30(2) in our determination of Issue No. 6.

Issue No.4: Whether Article 30(2) denies access to justice, or renders disproportionate access to justice against individuals in favour of Partner States Submissions by Parties

63. The Submission by the Applicant on this point was that because Article 30(2) is cast in stone, with no flexibility, it becomes debilitating and a genuine cause of action cannot be addressed and is also an assault to integration and attainment of the objectives of the Treaty.
64. In addition, it was the Applicant's Submission that the 60 days' limitation period is too short and is not in tandem with the latitude given to parties approaching, say, the African Court on Human and Peoples Rights or the ECOWAS Court of Justice.
65. On the allegation that the above period is disproportionate, the Applicant submitted that whereas references by Partner States under Article 28 of the Treaty have no limitation, Article 30(2) targets individuals unfairly and is thus oppressive.
66. The Respondents in answer to the above contentions submitted uniformly that the limitation imposed by Article 30 (2) is reasonable and was so imposed to create legal certainty, good administration and procedural economy. Further, that this Court has previously addressed the issue in cases such as:
- *AG of Uganda & Anor vs. Omar Awadh & 6 Others, Appeal No.2 of 2012;*
 - *The Secretary General of the EAC vs. Angella Amudo, Application No. 15 of 2012; and*
 - *IMLU vs AG of Kenya & 4 Others, Appeal No. 1 of 2011.*
67. The 6th Respondent however made another Submission on this issue; that no injustice has been occasioned to the Applicant by fact of his inability to file his complaint within time because the issue of the alleged deportation of illegal immigrants from Kagera Region of Tanzania was receiving this Court's attention in *Reference No. 7 of 2014, East African Law Society vs. Secretary General of the EAC.*

Determination of the Court on Issue No.4

68. Our understanding of this issue as garnered from the Applicant's submissions, as well as his pleadings is trifold. First, paragraph 14(b) and (c) of the Reference seem to suggest a challenge to the disproportionate or discriminatory treatment of individual persons accessing the Court viz Partner States and the Office of the Secretary General. Second, the 60-day limitation period is challenged in paragraph 16 of the Reference for impeding the course of justice owing to its purportedly limited time-span. Thirdly, on the foregoing premise, the said limitation period is alleged to contravene Articles 6(d) and 7(2) of the Treaty. Indeed in Submissions the Applicant expounds on his contention that the inflexibility of Article 30(2) – presumably given the absence of latitude for extension of time – is debilitating to Community citizens seeking to access the Court, and does also take issue with the length of the limitation period, as well as the disproportionality of its application.

69. The present issue thus raises the question of an alleged incompatibility between two (2) provisions of the same legal instrument, in this case the Treaty; as well as challenges the merits of the impugned Article 30(2) for impeding the course of justice (and implicitly, access to justice) owing to its allegedly restrictive limitation period. We reproduce the Treaty provisions in issue for ease of reference.

Article 6(d)

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality

Article 7(2)

The Partner States shall undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

Article 30(2)

The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.

70. In its report, Koskenniemi, Martti, *'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'*, Report of the Study Group of the International Law Commission (ILC), 2006, the ILC acknowledges the possibility of conflicting provisions either of the same Treaty or across different treaties, legal instruments and legal regimes, and postulates the approach to be adopted by dispute-resolution bodies faced with such scenarios. See *Beagle Channel Arbitration (Argentina vs. Chile) ILR vol. 52 (1979) p. 141* where a conflict of provisions within a single treaty arose.

71. Paragraph 43 of the said Report reads:

When normative conflicts come to be settled by third parties the pull of harmonization remains strong though perhaps not as compelling as between the parties themselves. Because already the ascertainment of the presence of a conflict requires interpretation, it may often be possible to deal with potential conflicts by simply ignoring them, especially if none of the parties have raised the question. But when a party raises a point about conflict and about the precedence of one obligation over another, then a stand must be taken. Of course in such case, it is still possible to reach the conclusion that although the two norms seemed to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no overlap or conflict will remain. This may sometimes call for the application of the kinds of conflict-solution rules which the bulk of this Report will deal with. (*i.e.* interpretative maxims and conflict-solution techniques such as the *lex specialis*, *lex posterior* or *lex superior*). But it may also take place through an attempt to reach a resolution that integrates the conflicting obligations in some optimal way in the general context of international law.

72. Consequently, this Court would be required to either render such construction

of Articles 6(d), 7(1)(a) and 30(2) of the Treaty as would negate any conflict between them or defer to renowned rules of international law to resolve the alleged inconsistency between the said Articles. The harmonisation of purportedly conflicting legal provisions would require an understanding thereof through interpretation.

73. The import of Article 30(2) was expounded as follows in *AG of Uganda & Anor vs. Omar Awadh & 6 Others* (supra), where the Appellate Division rendered itself thus:

“The solution that was designed to balance the interest of the individual complainant against the collective interests of the other Community citizens, is the overall framework of Article 30 in which the collective interest of legal certainty is secured under Article 30(2), but without compromising the individual complainant’s right to judicial redress [if promptly lodged within two months under Article 30(2)], including the grace period afforded the complainant to acquire knowledge of the particular act). That grace period can be as long as it takes for the complainant to be possessed of the requisite knowledge. Only after the complainant has the knowledge, will the period of the two months’ limitation begin to balance the competing interests. We find nothing arbitrary, capricious, or unreasonable concerning this comprehensive solution of Article 30 especially in a treaty which governs not Human Rights matters, but Trade and Social Interests within and between the Partner States.”

74. The above decision suggests that whereas Articles 6(d) and 7(2) do promote the fundamental principle of rule of law, a limitation period that prescribes the time frame within which litigants may access justice is neither arbitrary nor capricious or unreasonable. We are bound by that position and respectfully agree with it.

75. We find no conflict between Articles 6(d) and 7(2) viz Article 30(2) and of the Treaty. A harmonized construction of the said Articles would suggest that whereas Articles 6(d) and 7(2) prescribe the fundamental principles that should be adhered to in the realization of the treaty’s objectives, a case that is premised on the principles enshrined therein should be promptly instituted within the time period prescribed in Article 30(2) of the Treaty. Thus Article 30(2) does not negate the said principles but rather regulates the procedural framework – specifically, the time frame – within which the said principles may be litigated.

76. Similarly, the allegation that Article 30(2) is not in tandem with other International Legal Instruments is not entirely sustainable. First and foremost, we find that it is almost identical to the provisions of Article 230 of the Treaty Establishing the European Community. In the same vein, Article 35 of the European Convention on Human Rights prescribes a 6-month limitation period from the date of a final domestic court’s decision within which a case may be filed.

77. Secondly, even in legal regimes where no limitation period is prescribed, other procedural provisions are incorporated to guide litigation. Thus:

- i) The Caribbean Court of Justice has no limitation period at all, but Article 222 of the Treaty for Chaguaramas Establishing the Caribbean Community and invoking the *ratione personae* principle subjects private entities to the hurdle of “special leave of the Court” before they can be

allowed access to the Court;

- ii) The Protocol on the Establishment of the African Court on Human and Peoples' rights has no time limit but subjects complaints to exhaustion of local remedies with exceptions where there is undue or prolonged delay;
- iii) The COMESA Treaty has no time limit but subjects' individuals in Article 26 to exhaustion of local remedies;
- iv) The Protocol on the ECOWAS Court has no time limit but in Article 9 it provides for competence of the Court where attempts to settle a dispute amicably have failed; and

78. It therefore follows from the above that, contrary to the Applicant's assertions, the limitation period in Article 30(2) is neither strange nor outlandish, but does operate harmoniously with the principles in Articles 6(d) and 7(2) to provide a procedural framework for the promotion of the principles enshrined therein. We so hold.

79. Having so held, however, what should be said of the specific claim that Article 30(2) hinders access to Justice or promotes disproportionate access to justice?

80. The *Canadian Forum of Civil Justice* website posits the following most persuasive definition of the notion of access to justice:

"While not easily defined, access to justice refers broadly to the access that citizens have to dispute resolution tools of justice including but not limited to courts. Effective access to justice does not only refer to reductions in costs, access to lawyers and access to courts; but rather, it is a broad term that refers more generally to the efficaciousness of a justice system in meeting the dispute resolution needs of its citizens."

81. Further, in *Farrow, Trevor C. W., 'What is access to justice?', Osgoode Hall Law Journal* 51.3 (2014), 957 at 973, 974 it was stated thus:

"The notion that not all people experience justice equally, or put differently, not all inaccessibility is created equally, was a very common, forceful and troubling opinion expressed by many respondents. For justice to be effective, the citizenry needs to have confidence and trust in it. As questioned by the Chief Justice McLachlin, 'Public confidence in the system of justice is essential. How can there be confidence in a system that shuts people out, that does not give them access?' The system's tendency to alienate those for whom it was created needs to be taken very seriously and, ultimately, eliminated."

82. In the same vein, disproportionate access to justice or the outright inaccessibility of justice is encompassed in 'the wider social context of our court system and the systemic barriers faced by different members of the community.'²⁹ Similarly, a more comprehensive understanding of the notion of access to justice would go beyond the legal system to encompass 'efforts to assess and respond to ways in which law impedes or promotes economic or social justice In short, access to justice may involve steps to diminish substantive injustice in society at large.'³⁰

83. In the above context, there is no doubt that there is no time limitation within which the Partner States or the Secretary General of the EAC may access the

²⁹ See Alberta Civil Liberties Research Centre website

³⁰ See '*Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity: Final Report*, Law Commission of Ontario, February 2013.

Court, as is in the case with natural persons under Article 30(2). *See Articles 28 and 29.* We cannot also close our eyes to the connotations of unequal or disproportionate access to justice that is *prima facie* inherent therein.

84. In Koskenniemi, Martti, *'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'* (supra), the ILC posits that the harmonisation of purportedly conflicting treaty provisions may be achieved by 'a resolution that integrates the conflicting obligations in some optimal way in the general context of international law'. In paragraph 427 of the same report, Article 31 of the Vienna Convention on the Law of Treaties is acknowledged as customary international law. Article 31(1) thereof is therefore extremely pertinent to this Court's resolution of the disproportionate access to justice implicit herein. It reads:

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

85. In this case, the overriding purpose of the Treaty can be deduced from its long title, namely, the establishment of the East African Community. However, the objectives of the Community so established by the Treaty are set out in detail in Article 5 thereof. The principles governing the achievement of the said objectives are then laid out in Articles 6 and 7 of the Treaty. This Court is a pivotal organ in the attainment of the Treaty objectives. It is thus required to exercise its mandate under Article 23(1) with due cognisance of the fundamental principles enshrined in Articles 6 and 7. It cannot have been envisaged by the framers of the Treaty that access to justice would include unequal or disproportionate access thereto.

86. Whatever our concerns, nevertheless, we would not go so far as to declare Article 30(2) a violation of Article 6(d) and 7(1) of the Treaty. As we have held earlier herein, Article 30(2) simply clarifies the procedural context within which the substantive provisions of Articles 6(d) and 7(2) should be applied. No evidence was adduced before this Court as sufficiently establishes the rationale for the contradictions it poses viz Articles 28 and 29, or the irrationality of the said considerations.

87. In the premises, this is a matter that, we propose, should receive the attention of the relevant organs of the EAC. We say so because a *people-centred* and market driven co-operation as espoused in Article 7(1)(a), as well as the rule of law as articulated in Article 6(d) of the Treaty must of necessity include the notion of equal access to justice by all parties. Indeed, it seems to us that the time limitation in Article 30(2) is intended to facilitate the expeditious realization of the Community's objectives as detailed in Article 5(2) of the Treaty by forestalling open-ended avenues for litigation that could derail the integration process. In the same vein and for the same reasons, the spirit and letter of the Treaty would be well served if such an expedient approach were equally applied to the Partner States and the Secretary General of the EAC.

Issue No. 5: Whether Article 30(2) of the Treaty clogs the jurisdiction of this Honourable Court

88. It would appear that the Parties inexplicably merged their submissions on this issue with the preceding issue. We do not appreciate that approach as we interpret

the two (2) issues to pertain to different matters. Whereas we have exhaustively rendered our decision on Issue No. 4, we are hard-pressed to appreciate how our findings therein relate to the clogging of this Court's jurisdiction. In the absence of elaborate submissions from the Parties on this issue, however, we decline to speculate on what informed its framing as an issue for determination. We therefore make no finding on it.

Issue No. 6: Whether the 6th Respondent has failed in his responsibility to ensure the achievement of any of the objectives of the Treaty including that implicit in Article 6, 8(1), 27, 29, 71(1)(c), 129 and 150 of the Treaty Submissions by Parties

89. While the above issue as framed would seem to be all-encompassing in terms of alleged failures by the 6th Respondent, in his Submissions, the Applicant narrowed down his complaints to Article 71 of the Treaty on the functions of the Secretariat generally and specifically on its duty to conduct investigations, collect information or verify of matters that affect EAC.
90. In addition, two decisions of this Court were cited as evidence that the 6th Respondent has failed in the above obligations. These are *East African Law Society vs. Secretary General of EAC Reference No .7 of 2015* and the *East African Centre for Trade, Policy and Law Reference No. 9 of 2011*.
91. In response, the position by the 6th Respondent is that he has not failed in the discharge of his mandate under the Treaty and specifically in the context of the present Reference. Further, that in *Reference No .7 of 2015* aforesaid, he demonstrated to Court that he had ably discharged his mandate with regard to the expulsion of illegal immigrants, such as the Applicant, from the Kagera Region and the decision of the Court is being implemented including addressing the challenges that the 6th Respondent had with regard to that matter.

Determination on Issue No. 6

92. With tremendous respect to the Applicant, this issue should have been addressed in the context of the issue at hand and we note that in the Reference, no specific complaint was made that the 6th Respondent had failed to discharge his mandate in any manner relevant to the Applicant's chief complaint. The nearest plea on that issue is the blanket statement at paragraph 15 of the Reference that "the Respondents who are charged with the responsibility of ensuring achievement of the objectives of the Treaty have failed in their responsibility under Articles 4(3), 5, 6, 7, 8, 27, 29, 30, 67, 71, 127 and 150." No specific complaint was made with regard to any Respondent and not a single statement was made in the Supporting Affidavit of the Applicant sworn on 24th June, 2015 as to how the 6th Respondent specifically failed in his mandate under Article 71 of the Treaty.
93. Further evidence or even a complaint against a respondent can never be introduced in Submissions as the Applicant has done. It must first be properly pleaded then proved at the hearing hence the statement by the Appellate Division of this Court in *Timothy Alvin Kahoho EACJ Appeal No.2 of 2013* that an applicant need to "provide all the meat, necessary to cover the mere skeletal bones of his various allegations" and also needs to "prove each and every particular of his allegation."
94. Even if however, the Applicant had met the above test, it is not enough to import decided cases of this Court such as the two cited above (*References Nos. 9 of 2011*

and 7 of 2015) to show failure by the 6th Respondent in the context of the present Reference. Those References were determined on their merits and cannot be generally used as evidence of failure in other circumstances.

95. We reiterate therefore that the generalized invocation of Article 71 of the Treaty and imputation of failure by the 6th Respondent in his mandate is a misguided approach to litigation and so Issue No. 6 must be answered in negative.

Issue No. 7: Whether the Applicant is entitled to the Remedies Sought

96. In the Reference, the Applicant prayed for the following declarations and Orders:

a) That the 60 days' limitation introduced by Article 30(2) is discriminatory, restrictive and hinders access to this honorable Court contrary to fundamental and operation principles of the Treaty as set out in Articles 6(d) and 7(1)(a). That Article 30(2) should therefore be declared as null and void;

b) Alternatively, the Claimant prays for an order that:

i. An amendment be effected enlarging the time of emulation to not less than six months; and

ii. The court be vested with jurisdiction to enlarge time as may be necessary in the circumstance.

97. Having held as we have under paragraph 75 above that Article 30(2) does not negate the said principles but rather regulates the time frame within which the said principles may be litigated, we decline to grant a Declaration that the 60 days' limitation period is restrictive or hinders access to this court contrary to the principles set out in Articles 6(d) and 7(1) (a) of the Treaty. We similarly decline to grant a Declaration that Article 30(2) is null and void.

98. Similarly, having held as we have under paragraphs 86 and 87 above, it is proposed herein that the Summit and Council of Ministers do consider amending the Treaty to harmonize the applicability of a limitation period for all parties that access the Court.

99. Regarding the alternative prayers for Orders to effect an amendment to Article 30(2) of the Treaty for the 2-month limitation period be increased to 6 months, or to clothe this Court with the discretion to enlarge the said limitation period; we have firmly held that this Court has no Jurisdiction to make orders, the effect of which would be to amend the Treaty. The two Prayers in that regard must therefore fail.

100. On costs, under Rule 111, costs follow the event unless the Court for good reason orders otherwise. In the present Reference, while it is true that the Applicant has not succeeded in this Reference, it is also true that the issues raised by him transcended his personal situation and this decision has settled matters that are perennially raised by Parties appearing before this Court specifically on the limitation of time to access this Court. In the circumstances, we deem it fit to order that each Party ought to bear its own costs.

101. Regarding Prayer (v) on any other Order that this Court may deem fit we can only suggest that the relevant organs of the EAC should relook at Article 30(2) and in their wisdom and within their mandates remove any apparent disparities on the time limit within which to access this Court.

Disposition

102. In the result, the Reference is hereby dismissed and each Party shall bear its own costs.

103. We so Order.

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First Instance Division

Reference No. 5 of 2015**Rwenga Etienne & Moses R. Marumbo v Secretary General, East African Community**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo, F. Jundu & A. Ngiye JJ
March 23, 2016

Recruitment of Registrar - Whether recruitment process wrongly eliminated potential candidates- Council's consensus decision on qualifications not for gazetting - Computation of quota points not equivalent to unequal distribution of opportunities- Transparency - Extension of time

Articles: 6(d),14, 45 (1),(3) of the Treaty - Articles: 2(1)(g)(h)(i) & 2(2) EAC Protocol on Decision Making by the Council - Regulation: 23(8) EAC Staff Rules & Regulations, 2006 - Clauses: 3.5, 4.6, 7.1 Operational Manual for the Implementation of the Quota System in Recruitment of Staff in the EAC 2012- Rules: 1(2),4,53(4), 111(1) EACJ Rules of Procedure, 2013

On 3rd August 2015 the Respondent published an advertisement for the recruitment of the Registrar of the East African Court of Justice on the website of the East African Community (EAC). The advertisement expressly restricted eligibility to citizens of the Republics of Burundi, Kenya and Uganda owing to a quota points system applied in the EAC recruitment process. It also enumerated requirements for academic qualifications and professional experience that were purportedly over and above the requirements stipulated in Article 45(1) of the Treaty. The Applicants alleged that the EAC Council of Ministers breached the Treaty by omitting to publish its decision in regard to qualifications in the official Gazette of the Community.

Aggrieved with the alleged irregularities in the recruitment process, the Applicants filed the present Reference contending that Article 45(1) of the Treaty explicitly provides for the appointment of the Registrar of the Court and, indeed, the Council of Ministers directed the Respondent to comply with the said legal provision in the recruitment of a Registrar. Allegedly, the Respondent contravened the Treaty by setting out work experience terms that did not take into account the requirements for office holders in each Partner State; and applied the quota system wrongly thus pre-disqualifying potential candidates from Rwanda and Tanzania, yet none of the Partner States possessed the 12 quota points required for eligibility to compete for the position of Registrar. The Applicants claimed that the recruitment process was neither transparent nor fair as it favoured some Partner States against others, and the selective application of quota system undermined the spirit of integration and violated the rights of potential candidates from the eliminated countries.

The Respondent disagreed submitting that the recruitment process was conducted in accordance with the Treaty and Staff Rules and Regulations of 2006. At the time the impugned advert was run, the staffing of the Court showed that Rwanda and Tanzania had exhausted their quota points, and the status of the quota points was

duly circulated to all Partner States before the said advert was published and they all accepted it as valid. The Respondent questioned the authenticity of quota points presented by the Applicant contending that it was a misrepresentation. Furthermore, the terms and conditions determined by the Council under Article 45(3) had been set as 15 years' experience given the demanding nature of the position of Registrar, the seniority of the office and that no preferential treatment was given to any Partner State.

Held:

1. There was no contradiction in either the interpretation or application of the Treaty by the Council's decision to prescribe specific qualifications for the position of Registrar. The advertisement for the position published on 3rd August 2015 did not contravene Articles 14 or Article 45(1) of the Treaty. Article 45(3) did not apply to the recruitment exercise.
2. Council's decisions under Article 14(3) of the Treaty are subject to the principle of consensus, Article 2(1) (g) of the Protocol on Decision Making. The Treaty does not require the Council to publish its decisions in the EAC Gazette, or to translate any or all of the decisions into regulations for purposes of publication therein. It was not obligated to publish its decision on the Registrar's qualifications in the EAC Gazette.
3. The Operational Manual for the Implementation of the Quota System in Recruitment of Staff in the EAC vests the implementation and interpretation of the Manual with the Respondent. The mandate must be exercised with transparency, objectivity and professionalism. In Clause 4.6 a citizen of a Partner State can only be considered eligible to submit to the recruitment process if their Partner State possesses the requisite quota points for that position. No discriminatory practice was deduced in the Respondent's computation of the quota points available, neither can lack of transparency be attributed as the quota points available to each Partner State were circulated. The computation could not therefore be equated to unequal distribution of opportunities within the Community.
4. The Republics of Burundi, Kenya and Uganda possessed the requisite quota points to have their citizens compete for the position of Registrar and the elimination of potential candidates from the Republics of Rwanda and United Republic of Tanzania was neither discrimination nor a violation of Article 6(d) of the Treaty. The Respondent's implementation of the quota system could not be faulted thus the case was dismissed.

Case cited

Henry Kyarimpa v Attorney General of Uganda, EACJ Appeal No. 6 of 2014

JUDGMENT

A. Introduction

1. The Applicants herein are allegedly natural persons adult citizens of the Republic of Rwanda and United Republic of Tanzania respectfully (hereinafter referred to as 'Rwanda' and 'Tanzania' respectively), and purportedly resident in their respective countries. They did not appear in Court at all throughout the hearing

of the Reference.

2. The Respondent is the Secretary General of the East African Community (EAC), who issued in a representative capacity for an on behalf of the EAC Secretariat.
3. At the hearing of the Reference, the Applicants were represented by Mr. Paul Ng'arua, while Dr. Anthony Kafumbe, Counsel to The Community, appeared on behalf of the Respondent.

B. Background

4. On 3rd August 2015 the Respondent published an advertisement for the recruitment of the Registrar of the East African Court of Justice (EACJ), Ref. EAC/HR/2014-2015/033, on the website of the EAC.
5. The advertisement expressly restricted eligibility for application to citizens of the Republics of Burundi, Kenya and Uganda owing to a quota points system applied in the EAC recruitment process.
6. The advertisement did also enumerate requirements for academic qualifications and professional experience that were purportedly over and above the requirements stipulated in Article 45(1) of the Treaty for the Establishment of the East African Community (herein after referred to as 'the Treaty').
7. Aggrieved with alleged irregularities in the recruitment process, the Applicants filed the present Reference.

C. Applicants Case

8. It is the Applicants' case herein that Article 45(1) of the Treaty for the Establishment of the East African Community (herein after referred to as 'the Treaty') makes explicit provision for the appointment of the Registrar of the Court and, indeed, the Council of Ministers (herein after referred to as 'the Council') directed the Respondent to comply with the said legal provision in the recruitment of a Registrar.
9. The Applicants contend that the Respondent contravened the Treaty by setting work experience terms in the advert under scrutiny herein that did not take into account the requirements in each Partner State for one to hold the office of Registrar. The Applicants further contend that the Respondent applied the quota system wrongly to pre-disqualify potential candidates from Rwanda and Tanzania, yet none of the Partner States possessed the 12 quota points required for eligibility to compete for the position of Registrar. They thus conclude that the recruitment process was neither transparent nor fair in so far as it favoured some Partner States against others, and the selective application of the quota system undermined the spirit of integration and violated the rights of potential candidates from the eliminated countries.
10. The Applicants sought the following Prayers:
 - a. A Declaration that the act of the Respondent to recruit the Registrar in contravention of Article 45 (1) of the Treaty was an infringement and violation of the said Treaty.
 - b. A Declaration that the ongoing process of recruitment of the Registrar was null and void.
 - c. The Respondent best stopped from continuing with the recruitment process until all irregularities were dealt with.

- d. The Respondent be directed to recruit a Registrar in accordance with Article 45 (1) of the Treaty.
 - e. A Declaration that the elimination of Rwanda and Tanzania yet none of the Partner States had the requisite quota points was a violation of the spirit of integration under the Treaty, as well as the quota system that guides recruitment in the Community.
 - f. The Respondent be directed to implement the guidelines of the Quota Manual in accordance with Article 6(d) of the Treaty.
 - g. The Respondent be directed to invite potential candidates from all 5 Partner States and the Quota points be considered only at the time of appointment of the successful candidate.
 - h. Costs and all incidentals be allowed.
11. The Reference was supported by an Affidavit deposed by the First Applicant and filed on 4th December 2015, the gist of which was as follows:
- a. Whereas the position of Registrar carries 12 points in the Quota system, the quota points held by each Partner State as at 4th December 2015 was as follows: - Kenya (4.8); Uganda (4.8); Burundi (11.8); Rwanda (-1.20), and Tanzania (2.8); but the Respondent did not advise the Council meeting of 14th August 2015 that none of the Partner States possessed the requisite 12 quota points.
 - b. The First Applicant had wanted to apply for the position of Registrar but the impugned advert imposed extraneous conditions in contravention of Article 45(1) of the Treaty, and ousted him from the application process.
 - c. As a person qualified to hold such high judicial office in Rwanda as provided by Article 45 (1) of the Treaty, the First Applicant stood to suffer irreparable injuries and his rights as a potential applicant for the position of Registrar would be permanently violated if the orders sought from this Court were not granted. Similarly, the legitimacy of the office of the Registrar and the Court would be greatly hampered by the irregularities in the recruitment process if the orders sought from the Court were not granted.
 - d. The recruitment of EAC staff was premised on the principle of citizens from all the Partner States enjoying equal right to employment opportunities accruing from the integration process, and the spirit of integration would be frustrated unless the Respondent was restrained from continuing with the recruitment process for the position of Registrar.

D. Respondent's Case

12. The Respondent contends that the recruitment process in issue presently was conducted in accordance with the Treaty and Staff Rules and Regulations of 2006; at the time the impugned advert in respect thereof was run, the staffing of the Court showed
- That Rwanda and Tanzania had exhausted their quota points, and the status of the quota points was duly circulated to all Partner States before the said advert was published and they all accepted it as valid. The Respondent questioned the authenticity of the quota points presented by the Applicant, contending that it was a misrepresentation of the quota points that had formed the basis of the

recruitment process in issue presently.

13. It is also the Respondent's case that Article 45(1) of the Treaty should not be cited in isolation of Article 45(3) thereof; rather, the terms and conditions as determined by the Council under the latter provision had been set at 15 years' experience given the demanding nature of the position of Registrar at regional level, as well as the seniority of that office. The Respondent denied extending preferential treatment to any of the Partner States.
14. The Respondent relied on an Affidavit of the Director of Human Resources and Administration at the EAC Secretariat, Mr. Joseph E. Ochwada that was filed on 29th September 2015, and stated that:
 - a. The quota points that had been annexed to the Reference as at 3rd August 2015 were inaccurate and a misrepresentation of the correct points.
 - b. The terms and conditions for the position of Registrar as determined by the Council acting within its mandate under the Treaty were set at 15 years' experience given the demanding nature of the job at regional level.
 - c. At the time of running the advertisement in respect of the position of Registrar, the staffing of the Court revealed that Rwanda and Tanzania had exhausted their quota points and this fact was duly communicated to all Partner States.
 - d. The recruitment process in issue presently was done in compliance with Treaty provisions and all other enabling instruments issued by the Council.
15. An additional affidavit in support of the Respondent's case and deposed by the same deponent was lodged out of time and no attempt was made by learned Counsel for the Respondent to have it properly placed on record. We shall revert to this matter of procedure later in this judgment. However, for present purposes, the deponent therein *inter alia* stated that:
 - a. The advert was in compliance with Article 45 (1) of the Treaty as read together with Article 45 (3) thereof, and was therefore consistent with Article 31 of the Vienna Convention on The Law of Treaties.
 - b. The Council was mandated to appoint a Registrar by Regulation 23(8) of the EAC Staff Rules and Regulations, 2006; and it did, under Article 14 of the Treaty, prescribe the experience required for that position.
 - c. Article 3.5 of the Operational Manual for the Implementation of the Quota System in Recruitment of Staff in the East African Community (herein after referred to as 'the Operational Manual') did provide for rounding off of quota points and, after such computation, only candidates from Burundi, Kenya and Uganda were eligible to compete for the advertised position. There was, therefore, no discrimination against any Partner State, neither had any of them opposed the recruitment process despite their being informed of the available quota points prior to the publication of the advert.
 - d. Rwanda had -1.20 quota points therefore, ~~being~~ over represented in the Court, it could not bring more staff thereto. The introduction of the quota points enabled citizens from all the Partner States to enjoy equal opportunities to employment in the Community.
 - e. The First Applicant's qualifications notwithstanding, his averment that his

employment opportunities had been ruined was speculative as there was no guarantee that he would have emerged the best candidate had he been interviewed.

E. Scheduling Conference

16. Pursuant to a Scheduling Conference held under Rule 53 of the Court's Rules, the Parties framed the following issues for determination:-
- i) Whether the Respondent's advertisement for the position of the Registrar of the EACJ published on 3rd August 2015 referenced EAC/HR/2014-2015/033 was contrary to Articles 14, 45(1) and 45(3) of the Treaty.
 - ii) Whether the decision of the Council taken under Articles 14(3) and 45(3) are subject to Article 2 of the Protocol on Decision Making by the Council of the East African Community.
 - iii) Whether the recruitment process for the Registrar of EACJ wrongly eliminated potential candidates from Tanzania and Rwanda contrary to Article 6(d) of the Treaty.
17. Rather than address each issue as framed above, learned Counsel for the Applicants opted to collectively address all the issues under what he termed 'heads of argument'.
Applicants' Submissions:
18. Under the first two heads of argument, it was Counsel's contention that the Reference was premised on the breach of Article 45(1) of the Treaty, which the Respondent had undermined and/ or amended by its purported application of Article 45(3) thereof, thus adding extraneous requirements to Article 45(1) of the Treaty without due process. In the same vein, under his third head of argument, Mr. Ng'arua argued that the Treaty had been breached by the Council, which sought to enhance the qualifications for the position of Registrar but omitted to publish its decision in that regard in the Gazette as prescribed by Article 14(5) of the Treaty.
19. Advancing the principle of *generalia specialibus non- derogant* under his fifth head of argument, learned Counsel argued that the general provisions of Article 45(3) could not override the specific provisions of Article 45(1) of the Treaty. It was his contention that the requirement for a Registrar to hold an LL.M Degree and have 15 years' experience amounted to an amendment to Article 45 (1) that, if left to stand, would be manifestly arbitrary, illegal and a violation of the Treaty.
20. We did also understand Mr. Ng'arua to argue, under the fourth head of his submissions, that in augmenting the qualifications for the position of Registrar, the Council contravened Article 2(1) (h) (i) of the Protocol on Decision Making by the Council of the East African Community (hereinafter referred to as 'the Protocol on Decision Making') in so far as it omitted to refer the alleged Treaty amendment to the Summit.
21. Under his sixth head of argument, he reiterated his earlier argument on the absence of due process in the Council's decision given that the matter was never referred to the Summit as prescribed by Article 2(2) of the Protocol on Decision Making. In that regard, Mr. Ng'arua argued that to the extent that Article 2(2) of the said Protocol required a decision taken under Article 45 to be in writing, by

simple majority and recommended to the Summit, such a decision should have been demonstrated by the Respondent to have had the following features: a meeting of the Council; record of quorum; an agenda under Article 45 (1) and (3); a physical tally and record of votes to reflect the simple majority; a declaration or resolution, and record of the proceedings; publication in the Gazette, and it should have been recommended to the Summit.

22. Finally, it was Mr. Ng'arua's submission that none of the Partner States had the requisite 12 quota points but that fact was not brought to the Council's attention by the Respondent; this raises questions as to whether the Council's decision under Article 45(3) was properly taken, and consequently the decision to exclude citizens of Rwanda and Tanzania from competing for the advertised position under such circumstances, was not backed by a decision of Council.
23. Aside from the foregoing heads of argument, Mr. Ng'arua did take issue with the documentary evidence filed in support of the Respondent's case. He opined that the Report of the Council Meeting of 8th - 13th January 2001, as well as the Report of the 30th Council of Ministers Meeting of 20th - 28th November 2014 were irrelevant to the present case; the East African Community Output Based Job Descriptions of August 2006 appeared to be an incomplete proposal document, and Annexure B to Mr. Ochuada's Affidavit - Distribution of Points for EAC Organs as at 1st June 2015 had been applied out of context.
24. Mr. Ng'arua also questioned the Respondent's application of the Vienna Convention on the Law of Treaties, arguing that a single act would not constitute a practice, nor would what in his view amounted to a multiplicity of errors constitute a practice. It was his contention that the documents presented by the Respondent did not amount to an instrument that would assist in deducing the intention of the framers of the Treaty given that they arose in the course of the implementation of the Treaty and not before its formulation.
25. Finally, it was strongly submitted for the Applicants that, given the dynamic nature of the quota points system, the quota points applicable to a recruitment process should be as at the time of selection rather than advertisement, as had been done by the Respondent.

Respondent's Submissions:

26. By way of rebuttal of the first and second heads of arguments above, Dr. Kafumbe contended that Article 45(1) of the Treaty was never amended in the recruitment process under scrutiny; rather, it was rightly applied together with Article 45 (3) that provides for salary and other conditions of service of staff to be determined by the Council. We understood it to be the submission for the Respondent that the term 'conditions of service' under Article 45(3) of the Treaty was broad enough to include qualifications for a job, as well as provisions, requirements, rules, specifications and standards that form an integral part of a contract.
27. Indeed, in response to the third head of argument, Dr. Kafumbe argued that it was under the provisions of Article 45 (3) that the qualifications for the position of Registrar, as well as the terms and conditions of service of all court staff had been set by the Council. He submitted that the said terms of service were stipulated in the Final Report of the Structural Review of the East African Community Report of Eminent Persons (herein after referred to as 'the Report

of the Structural Review’), which had been duly published in the Gazette on 30th April 2005 as prescribed by Article 14(5) of the Treaty.

28. In response to the fifth head of argument, Dr. Kafumbe contended that the decision to standardize the qualifications for the position of Registrar through a study had been informed by the Council’s realization that there were disparities in the respective Partner States with regard to the qualifications and experience required of persons holding such high judicial office.
29. On the other hand, contrary to the position advanced in the fourth and sixth heads of arguments on the absence of due process in the foregoing decision by Council, Dr. Kafumbe argued that the applicable legal provision in that regard was Article 2(1) (g) of the Protocol on Decision Making, which provides for consensus on policy decisions made pursuant to Article 14(3) (a) of the Treaty. He questioned the applicability of Article 2(1) (h) (i) of the said Protocol, contending that the decision was not tantamount to an amendment of the Treaty. It was his submission that decisions taken by consensus did not require a voting process.
30. It was argued for the Respondent that the application of clauses 3.5 and 7 of the Operational Manual was such that some of the Partner States did have the requisite quota points for the position of Registrar, and the Secretary General’s office was vested with the mandate to interpret and implement the said Manual, therefore the Applicants’ interpretation thereof was untenable. It was further submitted that the history of recruitment within the EAC was pertinent for purposes of illustrating the Community’s practices and procedures; clause 4.6 of the Operational Manual provides for the Respondent to inform each Partner State of its outstanding quota points at the beginning of each recruitment, which was duly done in recruitment process in issue presently, and the implementation of the said Manual was transparent, predictable and efficient.
31. Finally, Dr. Kafumbe addressed this Court on the issues as framed, arguing that the Respondent duly conducted the present recruitment process in accordance with Article 45(1) and (3) of the Treaty; the Council rightly took the decision under Article 45 (3) by consensus as prescribed by Article 2 of the Protocol on Decision Making; the Respondent rightly eliminated candidates from Rwanda and Tanzania, and that the correct application of the Operational Manual yielded some qualifying Partner States with the requisite quota points to participate in the recruitment process under scrutiny herein.

Submissions in Reply:

1. In reply, we understood Mr. Ng’arua to maintain his position that the qualifications of the position of Registrar were not published in the Gazette, and any purported amendment to the Protocol on Decision Making should have been referred to the Summit. He drew a distinction between the formula for the assignment of quota points for each position and that which is applicable for purposes of the redemption of a post by a Partner State, and reiterated his earlier position that no one Partner State had the requisite quota points for the position of Registrar.

G. Court’s Determination:

33. We have carefully considered the pleadings of both Parties, as well as their respective arguments in submissions. We note that the Respondent's additional Affidavit was lodged out of time, having been filed on 15th December 2015 rather than 9th December 2015 as had been scheduled. Similarly, the Respondent's written submissions were lodged 2 days after the designated date and, in turn, the Applicants' submissions in reply were lodged 10 days after the scheduled date. Mr. Ng'arua did not take any issue with the late filing of either the Respondent's additional Affidavit or written submissions, but simply filed his own submissions in reply late as well.
34. The timelines that were violated by the Parties were fixed by the Court in accordance with the provisions of Rule 53 (4) of the Court's Rules of Procedure. We do recognize that it is a civil contempt of court for any party to neglect to comply with a court order within the time specified there for. See *Halsbury's Laws of England, 2001 Reissue, and Vol 9 (1), para. 458, p. 55*. However, we are also cognizant of the maxim of equity, *vigilantibus non dormientibus aequitas subvenit*- equity aids the vigilant, not those who slumber on their rights. The import of that maxim is that a party who has been wronged must act relatively swiftly to preserve their rights, failure of which such party would run afoul of the defence of /aches- an equitable principle barring a stale claim owing to passage of time or lack of diligence that unreasonably prejudices the opposite party, its own mischief notwithstanding. See *Ibrahim, Ashraf Ray, The Doctrine of Laches in International Law, Virginia Law Review, Vol 83, No.3, 1997, pp. 647- 692*.
35. Furthermore, Rule 4 of the Court's Rules of Procedure provides:
"A Division of the Court may, for sufficient reason, extend the time limited by any decision of itself for the doing of any act authorized or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act..."
36. We take the view that the silence or inaction of learned Counsel for the Applicants with regard to the late filing of the pleadings cited here in above, while not absolving Counsel for the Respondent of his duty to comply with court orders, is none the less sufficient reason not to reject the said documentation. The circumstances of this case are such that the acquiescence of learned Counsel for the Applicants would lend credence to his having accepted their late filing. The justice of the matter therefore dictates that the pleadings filed out of time be deemed to have been filed within the timelines prescribed in the Scheduling Conference Notes of 24th November 2015. We do, therefore, invoke our judicial discretion and inherent powers under Rules 1(2) and 4 of the Court's Rules to extend the time prescribed for the filing of the Respondent's additional affidavit and written submissions, as well as the Applicant's submission in reply, and do hereby admit them on the Court Record.
37. We now revert to the merits of the Reference. It seems to us that it essentially gravitates around two (2) broad issues: first, whether or not the specification of additional qualifications for the position of Registrar, beyond the requirements stipulated in Article 45(1) of the Treaty constituted a contravention of the Treaty, and secondly, whether or not the quota system was correctly applied by the Respondent in the impugned recruitment process. These 2 broad issues are reflected in the first and second issues framed at the Scheduling Conference, as

well as the third and fourth issues respectively. Therefore, the strange approach to submissions adopted herein notwithstanding, we propose to address Issues 1 and 2 together, Issues 3 and 4 together and conclude with a determination of the fifth issue.

Issues 1 & 2: Whether the Respondent's advertisement for the position of the Registrar of the EACJ published on 3rd August 2015 referenced EAC/HR/2014-2015/033 was contrary to Articles 14, 45(1) and 45(3) of the Treaty, AND Whether the decision of the Council of Ministers taken under Articles 14 (3) and 45(3) are subject to Article 2 of the Protocol on Decision Making by the Council of the East African Community.

38. The Applicants' case with regard to the present issues is essentially three-pronged. First, they contend that by purporting to augment the qualifications for the position of Registrar under Articles 14(3) and 45(3) of the Treaty, the Council (and by extension, the Respondent) contravened the provisions of Article 45(1) thereof. Secondly, the Applicants argue that the purported augmentation of the qualifications stipulated in Article 45(1) of the Treaty amounted to an amendment hereof. Finally, it is their case that the said augmentation/amendment did not follow due process as outlined in Article 14(5) of the Treaty, and Articles 2(1) (h) (i) and 2(2) of the Protocol on Decision Making.
39. We are constrained to observe that the Applicants did, at the Scheduling Conference, concede that the policy decision taken by the Council under Article 14(3) of the Treaty did not amend the provisions of Article 45(1) thereof. This position is reflected in Clause 3(iii) of the Scheduling Conference Notes as a point of agreement. An agreed fact cannot be deemed to be in issue. Consequently, any legal arguments made on the question of the purported amendment of Article 45(1) of the Treaty shall not be considered in this judgment.
40. On the other hand, it was the Respondent's contention that the recruitment process in issue presently was duly conducted in accordance with Article 45 (1) and (3) of the Treaty; the Council was mandated to specify the qualifications for the position of Registrar under Articles 14 and 45 (3) of the Treaty, and, finally, the Council rightly took the decision with regard to the said qualifications by consensus as prescribed by Article 2(1)(g) of the Protocol on Decision Making.
41. For ease of reference, we reproduce the pertinent Treaty provisions below. Article 14(1)
- “The Council shall be the policy organ of the Community.”
- Article 14(3)
- “For purposes of paragraph 1 of this Article, the Council shall:
- (a) Make policy decisions for the efficient and harmonious functioning and development of the Community.”
- Article 45(1)
- “The Council shall appoint a Registrar of the Court from among citizens of the Partner States qualified to hold such high judicial office in their respective Partner States.”
- Article 45(3)
- “The salary and other conditions of service of the Registrar and other

staff of the Court shall be determined by the Council.”

42. We must categorically state that we find Article 45 (3) of the Treaty in applicable to the recruitment process that is under scrutiny presently. That legal provision pertains specifically to ‘salary and other conditions of service.’ In the Interpretation section of the Treaty the terms ‘salary’ and ‘terms and conditions of service’ are defined to include ‘wages overtime pay, salary and wage structures leave, passages, transport for leave purposes, pensions and other retirement benefits, redundancy and severance payments, hours of duty, grading of posts, medical arrangements, housing, arrangements for transport and travelling on duty, and allowances.’
- 43 Whereas we do appreciate that the foregoing employment parameters are typically pre-determined prior to the commencement of a recruitment process, as would the qualifications for any vacant position; it seems to us that the items listed in that interpretation clause entail emoluments, benefits and rules of engagement that would accrue to a holder of a staff position post-recruitment; one that has met the minimum requirements for a staff position and is either duly employed as such or has been given an offer of employment. The term ‘terms and conditions of service’ cannot be stretched to include criteria against which a candidate would be evaluated in the course of the recruitment process. With respect, we are unable to appreciate how criteria or requirements that would pre-qualify a candidate for admission to the recruitment process can be equated to terms and conditions of service that pertain to the post-recruitment, post-appointment phase. The former are pertinent to the recruitment process, while the latter would accrue to the employment phase. We do, therefore, find that any purported prescription of the qualifications for the post of Registrar under Article 45(3) of the Treaty was erroneous and misconceived.
44. Be that as it may, whereas Article 45(3) limits the mandate of the Council to the formulation of staff terms and conditions of service as defined above, Article 14(3) does mandate it to take policy decisions that would engender ‘the efficient and harmonious functioning and development of the Community. ‘The question would be whether or not the setting of qualifications for the position of Registrar, the requirements set out in Article 45(1) notwithstanding, legally fell within the ambit of Article 14(3)(a) of the Treaty, and if so, whether the criteria the Council set there under contravened Article 45(1) of the Treaty.
45. It is a well-recognized rule of procedure that s/he who asserts must prove their case. Courts require the party that raises a claim or advances a particular contention to establish the elements of fact and of law on which the decision in its favour might be given. Ultimately, it is the litigant that seeks to establish a fact who bears the burden of proving it. See *Henry Kyarimpa vs. Attorney General of Uganda EACJ Appeal No .6 of 2014 and Shabtai Rosenne: The Law and Practice of the International Court, 1920-2005, Vol. Ill, and Procedure. p. 1040*. We hasten to add that this evidential burden up on a party that seeks to rely on a specific fact does not negate the overall burden of proof up on a claimant to prove his/her case against the respondent.
46. In the instant case, the Respondent pleaded its compliance with the Treaty in the process for the recruitment of a Registrar for the Court The evidential burden on the issue of compliance thus rests with that Party. In that regard, the Respondent

did adduce evidence that the qualifications for the position of Registrar were determined by the Council acting within its mandate under Article 14 of the Treaty, and were set at 15 years 'experience in view of the demanding nature of the position at regional level. See paragraphs 5(iii) and 10 of the additional affidavit and affidavit in support of the Respondent's case respectively. Quite clearly, the rationale behind the 15-year experience requirement was to underpin the efficiency of the office of the Registrar. The veracity of this evidence was not rebutted by the Applicants; rather their affidavit evidence simply questioned adherence of those requirements with the provisions of Article 45(1) of the Treaty.

47. It did also emerge in submissions that there were disparities in the qualifications for the holder of such high judicial office in the respective Partner States. Against that back ground, it seems quite logical to us that there would be need to standardize the qualifications for the position of Registrar within the EAC in order to underscore the efficacy of the Court, an organ with a pivotal function in the development of the Community. Therefore, we take the view that policy decisions taken to entrench efficiency and efficacy in the office of the Registrar of the EACJ, as illustrated above, would squarely fall within the mandate of the Council under Article 14(3) (a) of the Treaty.
48. We are unable to agree with the Applicants that such standardization amounted to a breach of Article 45(1) or indeed of the Treaty. Article 45(1) does place an obligation upon the Council to consider for appointment to the position of Registrar a citizen of any of the Partner States that qualifies to hold such high judicial office therein. The requirements of Article 45(1) set the minimum pre-qualification criteria for a candidate to be admitted to the recruitment process, while the standardized qualifications adopted by the Council prescribe such standards as would engender the development of the Court and, by extension, the Community. As we have held herein above, this was the prerogative of the Council under Article 14(1) and (3) of the Treaty.
49. In the instant case, given that the standardized qualifications have not been proven to have fallen below the qualifications applicable to such high judicial office in any of the Partner States, it cannot be suggested that the provisions of Article 45(1) have been breached. Rather, the requirements prescribed by Article 45(1) have been duly embedded within the standardized criteria set by the Council pursuant to Article 14(1) and (3) (a) of the Treaty. Indeed, we find no evidence in the Reference that a candidate that would have met the criteria set by the Council and is duly recommended for appointment under Article 45(1) of the Treaty, would not meet the minimum qualifications stipulated in that Article.
50. In the result, with utmost respect, we do not find any contradictions in either the interpretation or application of the Treaty by the Council's decision to prescribe specific qualifications for the position of Registrar. We are satisfied that the advertisement for the position of Registrar that was published on 3rd August 2015 did not contravene either Article 14 or Article 45(1) of the Treaty. As we have held herein above, we do not find Article 45(3) applicable to the said recruitment exercise. We would, therefore, answer Issue No.1 in the negative.
51. The next question then would be whether due process was observed in taking the said policy decision. It was the Applicants' case that the Council's

augmentation of the qualifications for the position of Registrar violated Article 2(1) (h) (i) of the Protocol on Decision Making for not being taken by simple majority, as well as Article 2 (2) of the same Protocol for not being referred to the Summit. Conversely, we understood learned Respondent Counsel to argue that the applicable legal provision in that regard was Article 2(1) (g) of the Protocol on Decision Making, which provides for consensus on policy decisions made pursuant to Article 14(3) (a) of the Treaty.

52. We have carefully considered Article 2(1) of the Protocol on Decision Making. Clauses (g) and (h) (i) thereof read as follows:

“The decisions of the Council on the following matters shall be by consensus:

(g) Policy decisions made pursuant to Article 14 (3) (a) of the Treaty.

(h) Decisions on what should be recommended to the Summit on:
i. Amendment of the Treaty.”

53. First and foremost, we do agree with Dr. Kafumbe that the Council’s decision, having been a policy decision taken pursuant to Article 14(3) (a), did fall within the ambit of Article 2(1) (g) of the Protocol on Decision Making. Secondly, as held earlier in this judgment, the question of the policy decision amounting to an amendment of Article 45(1) was conceded by the Applicants during the Scheduling Conference. We have not been addressed on any other Treaty provision that might have been amended by the said decision. In any event, it is abundantly clear from a reading of Article 2(1) that even a decision under Article 2(1) (h) (i) would have been taken by consensus and not simple majority as argued by Mr. Ng’arua. In the result, we would answer Issue No.2 in the affirmative, and do find that the Council’s decision under Article 14(3) of the Treaty was subject to Article 2(1) (g) of the Protocol on Decision Making.
54. Before we take leave of this issue, we are constrained to address the question of the publication of the foregoing policy decision in the Gazette, as posited by Mr. Ng’arua. He argued that the Council’s decision was not published in the Gazette as purportedly required by Article 14(5). On the other hand, the Respondent contended that the said decision was published in the Gazette of 30th April 2005.
55. With due respect to learned Counsel for the Respondent, we find that the Gazette copy in question offends established rules of procedure and evidence for the following reasons. First, the Gazette was annexed to the Respondent’s submissions, thus defeating the rule of procedure that enjoins parties to avail all evidence in support of their case to opposite party in time to enable the other party prepare its case in rebuttal. Secondly, it did not reflect the specific decisions purportedly taken by the Council. Item 1(a) (ii) at page 31 of the Gazette referred to a Report on the Organizational Structure and Terms and Conditions of Service in respect of the EACJ, but the details adopted or a summary thereof were not availed to the Court. On the other hand, item 1(b) simply reflected the Council as having taken note of the Community’s Staff Requirements. That would hardly be tantamount to a decision. It would have been useful for the Respondent to avail the Court with the report referred to in the Gazette, but this was not done. We therefore find no evidence of the Council’s policy decision having been published in the Gazette as had been argued by Counsel for the Respondent.

56. Perhaps more importantly, nonetheless, is the question as to whether there is, in fact, a legal requirement for decisions of the Council to be published in the Gazette at all. As can be gleaned from the wording of Article 14(5), what the Treaty requires to be published in the Gazette are ‘regulations and directives’ of the Council. The provision reads:

Article 14(5) of the Treaty

“The Council shall cause all regulations and directives made or given by it under this Treaty to be published in the Gazette; and such regulations and directives shall come into force on the date of publication unless otherwise provided.”

57. We do not find any provision in the Treaty that imposes upon the Council the duty to publish its decisions in the Gazette, or Translate any or all of them into regulations for purposes of publication therein. Therefore, strictly speaking, there was no Treaty obligation upon the Council to publish its decision with regard to the Registrar’s qualifications in the Gazette. We so hold.

Issues 3 & 4: Whether the recruitment process for the Registrar of the EACJ wrongly eliminated potential candidates from Tanzania and Rwanda contrary to Article 6 (d) of the Treaty, AND Whether in the absence of any one Member qualifying to attain the requisite quota, it was discriminatory to exclude the said Partner States from contesting contrary to Article 6(d) of the Treaty.

58. There is contention between the Parties as to whether the quota system should have been applied as at the date of the advert, as was done, or as at the date of selection of the successful candidate. It is, however, not disputed that the position of Registrar attracts 12 quota points. What is in contention herein is which of the quota computations should have formed the basis of the recruitment process under scrutiny. The Applicants propose the correct computation as being that reflected in Annexure V to the Reference as follows: Rwanda (-1.2), Burundi(11.8), Uganda (4.8), Kenya (4.8) and Tanzania (2.8). On the other hand, the Respondent maintains that the applicable quota points are reflected in Annexure I to the Response to the Reference as follows: Rwanda (-1.2), Burundi (11.8), Uganda (11.8), Kenya (11.8) and Tanzania (2.8).

59. Furthermore, whereas the Respondent made a case for rounding off the quota points held by each country as at the date of the advert to the nearest whole number on the basis of Clause 3.5 of the Operational Manual; the Applicant maintained that, given the dynamic nature of the quota points system, the quota points applicable to a recruitment process should be as at the time of selection rather than advertisement. In the event, the Applicants attributed what they termed ‘the selective application of the quota system’ to favouritism that undermined the spirit of integration, and discriminated against the rights of potential candidates from the eliminated countries.

60. We have carefully considered the submissions of both Parties on the question of quota points. The Operational Manual that regulates the operation of the quota system in the Community appears to have been formulated to give effect to the provisions of Article 6 (e) of the Treaty, which enumerates the ‘equal distribution of benefits’ as a fundamental principle of the Community. Indeed, Clause 2.0 of

the Operational Manual explicitly expounds its legal basis as being grounded in Article 6 (e) of the Treaty.

61. Article 31(3) (a) of the Vienna Convention on the Law of Treaties does take due cognizance of ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’. The Operational Manual was enacted on the recommendation of the Council to operationalize the quota system now applicable in the EAC. See clause 2.0 thereof it does, therefore, represent an agreement of the Partner States with regard to recruitment in the Community. It is, therefore, absolutely pertinent to the application of the Treaty as provided in Article 23 thereof.
62. We deem it necessary to reproduce the pertinent provisions of the Treaty and Manual for ease of reference:
- Article 6(d) of the Treaty
 “The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:
 (d) good governance including adherence to the principles of...
 transparency,...equal opportunities...”
- Clause(s) 4.6 of the Manual
 “A Partner State must have points in order for its citizens to be considered as eligible candidates.
 At the beginning of each recruitment exercise, the Secretariat shall inform each Partner State about her balance of weighted points.”
- Clause 7.1 of the Manual
 “Interpretation and implementation of these guidelines is vested in the Secretary General.”
63. The first component of Clause 4.6 is couched in terms that make it abundantly clear that a citizen of a Partner State can only be considered eligible to submit to the recruitment process if such Partner State possesses the requisite quota points for that position. It would appear, therefore, that the possession of the requisite quota points by a Partner State is a pre-qualification requirement that must be met before EAC citizens can be eligible to apply for a staff position. In the same vein, the second component of the same provision enjoins the Secretariat to inform each Partner State of the points available to them at the onset of any recruitment. It seems to us that this practice was intended to foster the transparency and integrity of the points system, and give an opportunity to Partner States to put the record straight right from the onset, if the circumstances so warranted.
64. Our interpretation of these two provisions read together is that the issue of quota points did accrue at the commencement of the recruitment exercise and not at the point of selection of the winning candidate, as suggested by the Applicants. It does follow, then, that the Respondent rightly computed the quota points available to each Partner State at the beginning of the recruitment process so as to determine which, if any, of them was eligible to present candidates for the position of Registrar.
65. The question would be whether any of the Countries possessed the requisite quota points. As depicted hereinabove, Burundi, Kenya and Uganda each held 11.8 quota points as at the date of the advertisement, which points were rounded off

to the nearest whole number to give the three (3) countries 12 quota points each. The Applicants fault the Respondent for ‘rounding off’ the said quota points. We do appreciate Mr. Ng’aru’s argument that Clause 3.5 pertains to the computation of quota points applicable to each staff position, rather than the computation of points held by each Partner State. It simply included a note that ‘when one uses an excel worksheet, the computer corrects to the nearest point’ which is what appears to have informed the Respondent’s decision to round off the Partner States ‘quota points to the nearest whole number.

66. Be that as it may, we have carefully considered the provisions of Clause 7.1 of the Operational Manual. We agree with Dr. Kafumbe that it vests the implementation and interpretation of the Manual with the Respondent. That mandate must, nonetheless, be exercised with demonstrable transparency, objectivity and professionalism. With that yardstick in mind, we are unable to fault the Respondent’s implementation of the quota system in the matter before us. It seems quite logical, rational and objective to us that if the quota points applicable to staff positions can be rounded off to the nearest whole number, similarly, the points available to Partner States would be computed on like basis.
67. We do not deduce any discriminatory practice in the Respondent’s computation of the quota points available to the Partner States, neither can lack of transparency be attributed to a Party that duly circulated the quota points available to each Partner State as required by Clause 4.6. Most certainly the said computation cannot be equated to unequal distribution of opportunities within the EAC. Indeed, the Respondent’s additional Affidavit evidence did explicitly expound the rationale behind the quota system as a measure to enable citizens from all the Partner States to enjoy equal opportunities to employment in the Community. See paragraph 5 (xi) of the additional affidavit. We do, therefore, disallow the Applicants’ claims in that regard.
68. In the result, we are satisfied that the Republics of Burundi, Kenya and Uganda did possess the requisite quota points to have their citizens compete for the position of Registrar in the EACJ, and the elimination of potential candidates from the Republic of Rwanda and United Republic of Tanzania was neither discriminatory nor a violation of Article 6(d) of the Treaty. We do, therefore, answer Issues 3 and 4 in the negative.

Issue 5: Whether the Applicants are entitled to the prayers sought

69. In a nutshell, the Applicants sought Declarations that the present recruitment process was a violation of the Treaty; the said recruitment process was null and void, and the elimination of Rwanda and Tanzania was a violation of the spirit of integration under the Treaty, as well as the quota system that guides recruitment in the Community. They did also seek the following Orders against the Respondent: the halting of the recruitment process until all the alleged irregularities ensuing there from had been addressed; compliance with Article 45(1) of the Treaty in the recruitment of a Registrar; implementation of the Operational Manual in accordance with Article 6 (d) of the Treaty, and inclusion of candidates of all Partner States in the recruitment exercise, with application of quota points at the time of appointment of the successful candidate. Quite clearly, given our findings on the substantive issues, neither the Declarations nor Orders

sought against the Respondent are tenable. They are accordingly disallowed.

70. With regard to the Applicants' prayer for costs, on the other hand, Rule 111(1) of the Court's Rules of Procedure provides that Costs shall follow the event 'unless the court, for good reason, decides otherwise.'
71. In the instant case, whereas the First Applicant represented himself as a person that was personally aggrieved by the recruitment process, the Second Applicant appeared to have been a person that was purely interested in the proper implementation of the Treaty.
72. The Reference has, indeed, procured the clarification of significant aspects of the Community's recruitment process. To that extent, it seems to have been litigation that was instituted in the public interest. We deem that to be sufficient reason to depart from the general rule on costs.
73. In the final result therefore, we hereby dismiss this Reference and order each Party to bear its own costs.

We so order.

P. Ng'arua Counsel for the Applicants

A. Kafumbe for the Respondent

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Reference No. 6 of 2015**Malcom Lukwiya v The Attorney General of the Republic of Uganda,
The Attorney General of the Republic of Kenya**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ & F. Jundu, J
November 27, 2018

*Jurisdiction -Exhaustion of domestic remedies not a condition precedent for claims-
Locus standi- Whether the Reference was time barred - No continuing breach of the
Treaty outside two months*

Articles: 6(d), 7(2), 23(1), 27(1), 30(1), (2) of the EAC Treaty

The Applicant filed this Reference alleging that his liberty and freedom not to be tortured had been violated when he was arrested on 1st July 2015 by Kenyan Police and held incommunicado. His mother's house in Nairobi was also searched without a warrant and his laptop, mobile phone and birth certificates were taken. Together with his brother, the Applicant was on 2nd July 2015 charged at Milimani Law Court, Kenya of with being a member of terrorist groups: ISIS, Allied Democratic Forces and Al-Shabaab ; recruiting Kenyans into terrorism; killing Sheikh Hassan Kirya on 30th June 2015 in Kampala; and being in communication with a terrorist recruiter Ssenabulya Rajab. On 3rd July 2015, he was hooded by the officers of the Kenya Anti-Terrorist Police (ATPU), cast into the boot of a motor vehicle, handcuffed and tied with a rope and renditioned to Nalufenya Police Station, Jinja, Uganda. Following interrogation about his connections with terrorists operating in South Sudan, Somalia, and Northern Tanzania, he was detained in Uganda until 19th July 2015, when he was renditioned back to Kenya. An application for his release filed on 20th July 2015 was denied. On 4th August 2015, the Applicant was released and bonded to appear at the ATPU headquarters weekly until he was released unconditionally 11th September 2015.

The Applicant sought declarations that his stealthy removal from Kenya to Uganda and back amounted to extra judicial rendition, and violated the fundamental principles of the EAC Treaty stipulated in Articles 6(d) and 7(2) that bind Partner States to abide by the principles of good governance, rule of law, democracy and universally accepted human rights standards. The Applicant also filed *Civil Suit No. 302 of 2015* in the High Court of Uganda on 3rd December 2015 seeking damages and similar declarations as those sought in *Reference No. 6 of 2015* relying on Article 50 of Uganda's Constitution that allows anyone who feels their right under the Constitution had been violated to move the High Court for the enforcement of such rights.

Both Respondents challenged the jurisdiction of the Court contending that domestic courts in the two Partner States were the right forum to determine the Applicant's case. The 1st Respondent also averred that following a joint investigation into terrorism related activities in East Africa by the ATPU, the Applicant was arrested for suspected links to terrorism related activities. He was kept in safe custody in

Uganda to ensure non-interference with Police investigations. The Applicant was not interrogated at Nalufenya Police Station nor was he charged with any offence under the laws of Uganda. He was treated humanely and released unconditionally after completion of investigations on 11th September 2015.

The 2nd Respondent averred that following investigations, a suspect Ssenabulya Rajab was arrested while attempting to cross the Ugandan border to Kenya to meet the Applicant. Subsequently, the Applicant and his brother were apprehended and detained for 30 days following a court order. Investigations continued in Uganda in adherence to the Community's principle of mutual legal assistance in combating terrorism and fighting all crimes.

Additionally, the Applicant ought to have exhausted the available domestic remedies before seizing this Court.

Held

1. This case falls within the jurisdiction of the Court as provided in Articles 23 and 27(1) of the Treaty. The Treaty also recognizes the capacity of individuals to seek redress for a breach of their rights enshrined therein against any Partner State or an institution of the Community as per Article 30(1) of the Treaty. Any person has *locus standi* to access to this Court.
2. The exhaustion of domestic remedies rule is widely upheld by international courts and tribunals having direct jurisdiction over individuals as a treaty requirement and as a rule of customary international law. It is a condition precedent for the assumption of jurisdiction over suits brought in an international court against a State by an individual from a Member State. Nonetheless, Article 30(1) of the Treaty has not provided for the exhaustion of domestic remedies as a condition for the admissibility of cases brought by individuals. Therefore, the Applicant need not have exhausted local remedies before filing this Reference.
3. The actions complained of occurred from the time the Applicant was arrested on 1st July 2015 up to when he was conditionally released on 4th August 2015. This means that the Applicant ought to have instituted his case not later than 4th October 2015, but his case was filed on 27th October 2015. It is an undisputed fact that on 4th August 2015, the Applicant was released and bonded to appear at the Anti-Terrorism Police Unit Kenya headquarters weekly and that on 11th September 2015, he was released unconditionally.
4. This Court held in *The Attorney General of the Republic of Kenya v Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011* that the Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the complainant. Thus, the Applicant ought to have instituted his case not later than 4th October 2015. The Reference was filed on 27th October 2015 and therefore was time-barred.

Cases cited

Etim M.Essien v The Republic of the Gambia & Anor, ECOWAS Court of Justice Suit No. FCN/CCJ/05/05
 Kenneth Lehtinen v Finland, Application No. 39076/97, ECHR 1999-VII;
 Plaxeda Rugumba v The AG of Rwanda [2005-2011] EACJLR 226, Ref. No. 8 of 2010
 Selmouni v France, Application No. 25803/94 ECHR
 The AG of Kenya v Independent Medical Legal Unit [2005-2011] EACJLR 377, Appeal No. 1 of 2011

The AG of Rwanda v Plaxeda Rugumba [2012-2015] EACJLR 204, Appeal No. 1 of 2012

JUDGMENT

A. Introduction

1. This is a Reference filed on 27th October 2015 by Mr. Malcom Lukwiya (hereinafter referred to as “the Applicant”), a male minor Ugandan³¹ at the time, who, initially filed the Reference in his own names. Later, the Court ordered that the Reference be amended to provide that the same was filed through the Applicant’s father and next friend and the amendment was duly filed on 15th November 2016. On 10th February 2017, the Applicant filed an Affidavit in which he stated that as he had attained majority, he was seeking the leave of the Court to proceed on his own and therefore to discharge the next friend. The Reference is premised on Articles 6(d), 7(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”) and Rules 24(1) of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as “the Rules”). The Applicant’s address of service is C/O Rwakafuuzi & Co. Advocates, Plot 8-10 Kampala Road, Apartment 14 Uganda House, P.O. Box 26003, Kampala, Tel.: +256-414-258136/+256-772-706906, E-mail: keyzarat50@gmail.com, kalr@utlonline.co.ug.
2. The 1st Respondent is the Attorney General of the Republic of Uganda who is sued in his capacity as the Principal Legal Advisor of the Republic of Uganda. His address of service for the purposes of this Reference is given as Attorney General’s Chambers, Baumann House, Plot 7, Parliament Avenue, P. O. Box 7183 Kampala, Uganda.
3. The 2nd Respondent is the Attorney General of the Republic of Kenya who is sued in his capacity as the Principal Legal Advisor of the Republic of Kenya. His address of service for the purposes of this Reference is Office of the Attorney General and Department of Justice, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100 Nairobi, Telephone: +254 020 2227461/2251355; Mobile: +254 700072929/+254 732529995; Fax: +254 020 213956; Email: info@ag.go.ke.
4. The Applicant alleged that, while in Nairobi residing at his mother’s home, he was arrested on 1st July 2015 and on 2nd July 2015, he was charged with terrorism and the murder of one Sheikh Hassan Kiirya on 30th June 2015. The Applicant was eventually released on 11th September 2015.
5. He contended that his arrest and detention under painful and inhuman conditions violated his rights enshrined in the Constitutions of the Respondents’ countries and breached the fundamental principles of the Community stipulated in Articles 6(d) and 7(2) of the Treaty.

B. Representation

6. At the hearing of the Reference, the Applicant was represented by Mr. Ladislaus Rwakafuuzi; Mr. Oburu Adoi, Moreen Ijang and Ms. Jackie Amsugut appeared for the 1st Respondent, while Mr. Thande Kuria represented the 2nd Respondent.

C. The Applicant’s Case

7. The Applicant’s case is set out in his Statement of Reference filed on 27th October

³¹ The Applicant stated that his natural mother is Kenyan by birth and his natural father is Ugandan by birth and he resided in Kazo-Angola in Kampala at his father’s home while in Uganda and while in Kenya he resided at Lower Kabete, a suburb of Nairobi at his mother’s home.

- 2015, an Affidavit in support of the Reference sworn on even date by the Applicant, an Amended Statement of Reference filed on 15th November 2016, an Affidavit in support of the Amended Reference sworn on even date by the Applicant, his testimony during the hearing of 6th March 2017, written submissions filed on 15th May 2017 and submission highlights made on 12th June 2018.
8. The Applicant averred that about September 2014, while he was in Betsurfers Internet Café at Wandegeya, in Kampala, Uganda, he was accosted by one Mr. Ssenabulya Sadat who requested him for guidance on how to find gold buyers online.
 9. On 10th May 2015, he allegedly travelled to Nairobi via Malaba from Uganda and was residing at his mother's home in Lower Kabete, Nairobi. While in Nairobi at the aforesaid residence, on 1st July 2015, he was called by the said Ssenabulya Sadat and they agreed to meet at Wangigi taxi stand. It is the Applicant's contention that upon meeting his counterpart, he was arrested by a contingent of 8 security officers who grabbed him, fell him to the ground, cuffed him and threw him into a vehicle without being told the reasons for his arrest.
 10. The Applicant further alleged that the armed men escorted him to his mother's house where, without presenting a search warrant, they searched the house taking with them his lap top, mobile phone and birth certificates. He also contended that thereafter the search, he and his brother were driven to the Anti-Terrorism Police Unit at Muthaiga Police Station in Nairobi.
 11. The Applicant further contended that on 2nd July 2015, he was taken to Milimani Law Court where the Prosecution read charges to the effect that the Applicant and his brother were members of terrorist groups, namely ISIS, Allied Democratic Forces, Al-Shabaab); were recruiting Kenyans into terrorism; were involved in the killing of Sheikh Hassan Kirya on 30th June 2015 in Kampala; they had been in constant communication with a known terrorist recruiter called Ssenabulya Rajab; that the Applicant entered Kenya illegally and he and his brother were a security threat to Kenya.
 12. The Applicant also alleged that on 3rd July 2015, he was hooded by the officers of the Kenya Anti-Terrorist Police, cast into the boot of a motor vehicle, handcuffed and tied with a rope and renditioned to Nalufenya Police Station, Jinja, Uganda in very painful conditions.
 13. The Applicant further contended that while he was in detention at Nalufenya Police Station under very inhuman conditions, he was interrogated as to whether he had connections with terrorists operating in South Sudan, Somalia, and Northern Tanzania, which he denied. He added that he remained in the said detention until 19th July 2015, when he was again cast into the boot of a motor vehicle, handcuffed and tied with a rope; and renditioned back to Kenya. He asserted that his application to be released that was filed on 20th July 2015 was denied by a court in Kenya, which ordered that he remained in detention until 3rd August 2015 to enable the Police conclude their investigations, but that he was eventually released unconditionally on 11th September 2015.
 14. The Applicant thus contended that his arrest and detention without affording him an opportunity to explain himself, the failure of the Respondents' agents to allow him to inform his next of kin of his arrest and detention, his detention in police cells without any bedding, his feeding on very little and poorly cooked

food, his detention in police cells 24 hours daily without allowing him to see the sun, his transportation in distressful conditions from Nairobi to Jinja and back, his assault in police custody, were:

- (i) A violation of his liberty guaranteed in the Constitutions of the Respondents' countries;
- (ii) A violation of his freedom from torture guaranteed in the Constitutions of the Respondents' countries;
- (iii) A breach of the fundamental principles of the Treaty in Articles 6(d) and 7(2) that bind Partner States to govern their populace on the principles of good governance, rule of law, democracy and universally accepted human rights standards.

15. He also contended that his "stealthy removal" from Kenya to Uganda and back amounted to extra judicial rendition, a breach of the cited laws of the Partner States, and a violation of the fundamental principles of the Community stipulated in Articles 6(d) and 7(2) that bind the Partner States to abide by the principles of good governance, rule of law, democracy and universally accepted human rights standards.

16. The Applicant therefore prayed for the following declarations and orders:

- (i) That the actions of the agents of the Respondents were highhanded, illegal and unconstitutional and were in violation of the fundamental principles of the Community stipulated in Articles 6(d) and 7(2) of the Treaty for the establishment of the East African Community that bind the Partner States to abide by the principles of good governance, rule of law, democracy and universally acceptable standards of human rights.
- (ii) That the Respondents pay the costs of this Reference.

D. 1st Respondent's Case

17. The 1st Respondent's case is set out in his Response to the Reference filed on 21st December 2015, an Affidavit in support of the Response to the Reference sworn by Mr. Richard Adrole on even date, an amended response to the Reference filed on 13th July 2016, together with an Affidavit in support of the amended response to the Reference sworn by Mr. Omoding Wilson Otuna, a supplementary Affidavit sworn by Mrs Adongo Emelda sworn on 12th February 2018, written submissions filed on 4th April 2018 and submission highlights made on 12th June 2018.

18. The 1st Respondent averred that following a joint investigation into terrorism related activities in East Africa by the Anti-Terrorism Police Unit (ATPU) of the Republic of Kenya, the Applicant was arrested for suspected links to terrorism related activities.

19. He contended that the Applicant was brought to Uganda by the Kenya ATPU on 4th July 2015 and detained at Nalufenya Police Station in Jinja pursuant to a court order which was issued by a Kenyan Court the effect of which was to allow the Kenyan Police ATPU to detain the Applicant for 30 days for the purpose of furthering the said investigations.

20. The 1st Respondent also averred that the Applicant was kept in "safe custody" in Uganda in order to ensure that he did not interfere with the Police investigations.

21. In support of the 1st Respondent's case, Mr. Omoding Otuna also stated that

- the Applicant was not interrogated and neither did he record any statement at Nalufenya Police Station as he was not charged with any offence under the laws of Uganda. It was the 1st Respondent's contention that the Applicant was never tortured by its agents as stated in paragraph 4(m) of the Reference and refuted the Applicant's allegations that he was denied the opportunity to explain himself as he was produced before a competent court of law in Kenya and added that there was no torture and assault to the Applicant by the 1st Respondent's agents.
22. The 1st Respondent also contended that there was no violation of the Applicant's freedom from torture under the Constitution of the Republic of Uganda and denied that there was a breach of the fundamental principles of the Treaty as enshrined in Articles 6(d) and 7(2) of the Treaty as alleged.
 23. Furthermore, in her supplementary Affidavit, Mrs. Adongo Emelda averred that the Applicant had filed *Civil Suit No. 302 of 2015* in the High Court of Uganda on 3rd December 2015, which sought declarations in regard to violation of fundamental principles of the Treaty, extra judicial rendition being in violation of the 1995 Uganda Constitution and general, punitive damages and costs. She also stated that the said suit sought the same declarations being sought in *Reference No. 6 of 2015* before this Court and that the Applicant had not exhausted the local remedies in the High Court of Uganda having filed the present Reference in the same year.
 24. Finally, the 1st Respondent denied that the removal of the Applicant from Kenya to Uganda and back amounted to extra judicial rendition, breach of the Treaty, rule of law or democracy.
 25. The 1st Respondent, therefore, prayed that the Reference be dismissed with costs.

E. The 2nd Respondent's Case

26. The 2nd Respondent's case is set out in his Response to the Reference filed together with a Replying Affidavit in opposition of the Statement of Reference sworn on 10th June 2016 by Sergeant Ezekiel Luley, a Police Officer attached to the Kenya's Anti-Terrorism Police Unit, both filed on 13th June 2016, written submissions filed on 20th June 2017 and submission highlights made on 12th June 2018.
27. The 2nd Respondent denied the allegations set out in the Applicant's Reference and averred that following the terror attacks in the East Africa region, the Anti-Terrorism Police Unit of the Kenyan Criminal Investigation Department had commenced joint operations together with Criminal Investigation Departments of Uganda and South Sudan, to tackle terror-related activities.
28. He also asserted that following investigations, a suspect called Ssenabulya Rajab aka David, aka Sadat, 20 years of age and a Ugandan national, was found to be involved in the recruitment of youth to join Al Shabaab and ISIS terror groups and had admitted to having recruited 20 youth who were already in Somalia. He added that on or about 30th June 2015, the said Ssenabulya Rajab was arrested while attempting to cross the Ugandan border to Kenya to meet with one, Malcom Lukwiya Okempee (the Applicant).
29. The 2nd Respondent further averred that following continued investigations by the Kenyan and Ugandan teams conducted in Nairobi, the Applicant and his brother Emmanuel Oneka were apprehended by the Anti-Terrorism Police Unit and detained for a period of 30 days after obtaining a court order in *Miscellaneous*

Criminal Application No. 1169 of 2015 Anti-Terrorism Police Unit Vs. Lukwiya Malcom & Emmanuel Oneka made before the Milimani Law Courts.

30. He also stated that the police continued investigations by crossing to Uganda's Nalufenya Police Station in Jinja, where they were received by some of the police officers who had participated in the Applicant's arrest and proceeded with the investigations and thereafter, they returned to Nairobi. The 2nd Respondent added that during that time, contrary to the Applicant's allegations, the Applicant was treated in a humane manner and was held in comfortable conditions by transporting him in a comfortable police vehicle and provision of basic meals. Sergeant Ezekiel Luley also deponed that the Police through the collaboration of Kenya, Uganda and South Sudan were able to establish a network of key suspects in the human trafficking business and terrorism related recruitment for both Al Shabaab and ISIS, but the Applicant was unconditionally released after completion of investigations on 11th September 2015.
31. Finally, the 2nd Respondent contended that during the time that the Applicant was in police custody, the fundamental principles stipulated in Articles 6 and 7 of the Treaty, and more particularly the provisions of the Kenya's Constitution and laws, were adhered to at all times in that the removal of the Applicant from Kenya to Uganda and back was not an exercise amounting to extra judicial rendition but rather adherence to the Community's principle of mutual legal assistance in combating terrorism and fighting all crimes.

F. Issues For Determination

32. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 6th June 2017 at which the following were framed as issues for determination:
 - (a) Whether the East African Court of Justice has jurisdiction to determine this matter before the exhaustion of remedies in the municipal courts;
 - (b) Whether the arrest and detention of the Applicant was justified, legal and regular under the applicable Kenyan and Ugandan laws and/or the fundamental principles of the Community stipulated under Articles 6(d) and 7(2) of the East African Community Treaty;
 - (c) Whether the act of arresting and moving the Applicant across Kenyan and Ugandan borders amounted to extra judicial rendition;
 - (d) What remedies are available to the parties?

Issue No. 1: Whether the East African Court of Justice has jurisdiction to determine this matter before the exhaustion of remedies in the municipal courts:

33. The jurisdiction of the Court to determine this matter was challenged by both Respondents.
34. The 1st Respondent started his submissions by recalling the provisions of Article 27(1) of the Treaty which provides that this Court has jurisdiction over the interpretation and application of the Treaty, where such jurisdiction is not conferred by the Treaty on organs of Partner States. Then referring to the case of *Samuel Mukira Mohochi vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 15 of 2011* where this Court held that "this Court does have jurisdiction to interpret and apply any and all provisions of the Treaty save those excepted by the proviso to Article 27," he contended that domestic courts

in the two Partner States were the right forum to determine the Applicant's case. In support of his contention, he cited the case of *Makaruduze & anor Vs. Bungu & Ors HH-8-15* Zimbabwe Court (Mafusire, J.) where it was held that a litigant should be discouraged from rushing to courts before he had exhausted such domestic procedures or remedies as may be available to his situation in any given case; that he is expected to obtain relief through the available domestic channels unless there are good reasons for not doing so; and the domestic remedies must however be able to provide effective redress to the complaint, and the unlawfulness complained of must not be such as would have undermined the domestic remedies themselves.

35. In this regard, the Respondent averred that the Applicant had filed a case in Uganda on 3rd December 2015 under *Civil Suit No. 302 of 2015*, which suit sought the same declarations as those sought in *Reference No. 6 of 2015* instituted while that claim was still on-going. He opined that Article 50 of Uganda's Constitution allows anyone who feels their right under the Constitution had been violated to move the High Court for the enforcement of such right. It was the 1st Respondent's submission therefore that the Applicant ought to have exhausted the available domestic remedies before seizing this Court, and that the alleged violation of Articles 6 and 7(2) of the Treaty did not arise.
36. In the same vein, the 2nd Respondent submitted that the Applicant should have approached the municipal courts in Kenya as opposed to this Court. In this regard, he contended that Article 23 of the Constitution of Kenya grants the High Court of Kenya exclusive jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights.
37. The 2nd Respondent also relied on the *Inter-handle Case 1959* ICJ report p. 27 to submit that the Reference was not admissible before this Court on account of the rule of exhaustion of local remedies since, under international law, a State Party must be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility is called into question at the level of regional and international organs. Further, it was the 2nd Respondent's submission in this respect that the Applicant had not presented any reason as to why he did not pursue his claim before the High Court of Kenya as provided for under Articles 22 and 23 of the Constitution of Kenya. He reiterated his submission that the Applicant should not be allowed to institute a case before this Court which, according to him, is a court of last resort, before exhausting local remedies. For that reason, he argued that the Reference was premature before this Court.
38. Conversely, it was submitted for the Applicant that this Court had held in several cases including the one of *Plaxeda Rugumba Vs. The Secretary General of the EAC and the Attorney General of the Republic of Rwanda* that the Treaty does not have express provisions requiring the exhaustion of domestic remedies prior to filing a case before it. The Applicant also argued that his case was different from the situation presented by the Respondents since the case instituted before the High Court of Uganda sought to obtain damages for violation of his constitutional rights, whereas the case before this Court requested it to interpret the Treaty so as to issue a declaration that his arrest and detention under painful and inhuman

conditions constituted a violation of the Respondents' obligations under Articles 6 (d) and 7 (2) of the Treaty. Thus, he submitted that this Court is competent to interpret the Treaty and declare that indeed the Treaty was violated or not. It was his final submission that municipal courts have jurisdiction to apply the provisions of the Treaty in determining disputes within Partner States but this does not oust the original jurisdiction of this Court in interpreting the Treaty.

Court's Determination of Issue No. 1

39. Having carefully considered the pleadings and the submissions of both Parties on this issue, in our understanding, the contention between the Parties is straightforward. In a nutshell, the Respondents contend that this Court is not clothed with the jurisdiction to entertain the Reference because the Applicant did not exhaust domestic remedies which is, in their view, a condition of admissibility of the said Reference. On his part, the Applicant argues that he has direct access to this Court because the Treaty does not provide any requirement for the exhaustion of domestic remedies.
40. The jurisdiction of this Court is set out in Articles 23(1) and 27(1) of the Treaty. Article 23(1) provides that "the Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty." As for Article 27(1), it states that "the Court shall initially have jurisdiction over the interpretation and application of this Treaty:
 "Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States."
41. Also relevant for this case is Article 30(1) of the Treaty which provides that "subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."
42. Before considering how the afore-cited Treaty provisions apply to the present case, we find it apposite to shed some light on what the exhaustion of domestic remedies rule entails. It can be garnered from the provisions of treaties and decisions of international courts and tribunals that the exhaustion of domestic remedies requires that before an individual's claim alleging a violation of his rights is heard by an international court, the court must be satisfied that domestic remedies provided by the municipal law of the Respondent State have been attempted and exhausted. It is admitted that local remedies are only national domestic judicial or legal mechanisms that ensure the settlement of disputes and protection of rights. Domestic remedies refer to remedies sought from judicial courts and they are considered exhausted if all levels of national courts have been petitioned and non-judicial remedies are not considered an exhaustion of domestic remedies.³²

³² See *Kenneth Lehtinen Vs. Finland*, Application No. 39076/97, ECHR 1999-VII; *Selmouni Vs. France*, Application No. 25803/94 judgment of 28 July 1999, ECHR at para 74 cited in *Amos O Enabulele, "Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice,"* Journal of African Law, Vol. 56, No. 2 (2012), p. 271. See also Hugh Thirlway, *The Law and the Procedure of the International Court of Justice. Fifty Years of Jurisprudence*, Vol. 1,

43. The exhaustion of domestic remedies rule is widely upheld by international courts having direct jurisdiction over individuals as a treaty requirement and as a rule of customary international law. In that regard, the exhaustion of local remedies rule is considered as a condition precedent for the assumption of jurisdiction over suits brought in an international court against a State by an individual from a Member State.³³
44. The EAC Treaty recognizes the capacity of individuals to seek redress for a breach of their rights enshrined therein against any Partner State or an institution of the Community. Article 30(1) of the Treaty reproduced herein above gives *locus standi* to any person to have direct access to the Court and the Treaty has not provided the exhaustion of domestic remedies as a condition for the admissibility of petitions brought by individuals before this Court. This is reflected in the decision of the Court in *Plaxeda Rugumba Vs. The Attorney General of Rwanda, EACJ Reference No. 8 of 2010*, where one issue for determination was whether the Applicant should have exhausted local remedies before filing the Reference. The Court held that “it is not in doubt that there is no express provision barring this Court from determining any matter that is otherwise properly before it, merely because the Applicant has not exhausted local remedies.”(para 30). The Court went on to clarify its interpretative mandate of the Treaty pointing out that the EACJ is the only court mandated to determine whether the EAC Treaty has been breached or violated, that it has primacy in interpreting the Treaty and in the said case, it held that “the remedy the Applicant was seeking could not be granted by any court in Rwanda because the East African Court of Justice is the only Court with jurisdiction to hear a claim that alleges a violation of the EAC Treaty.”
45. That decision was appealed before the Appellate Division of this Court in *The Attorney General of the Republic of Rwanda Vs. Plaxeda Rugumba, EACJ Appeal No. 1 of 2012*, where the Appellant also argued that the Applicant should have exhausted local remedies before filing the Reference in this Court and that that was a requirement of customary international law. The Appellate Division opined that “the obligation to exhaust domestic remedies forms part of customary international law, recognized as such in the case law of the International Court of Justice.³⁴ It is also to be found in other international human rights treaties; for example the International Covenant on Civil and Political Rights (Article 41(1) (c) and the Optional Protocol (Articles 2 and 5) thereto and the African Charter on Human and Peoples’ Rights (Article 50). However, the EAC Treaty does not have any provision requiring exhaustion of local remedies. In our view, though the Court could be flexible and purposeful in the interpretation of the principle of the local remedies rule, it must be careful not to distort the express intent of the EAC Treaty.” [sic]
46. This position of the East African Court of Justice as regards the exhaustion of local remedies rule is similar to the one of the Economic Community of West African States (ECOWAS) Court of Justice. In at least two cases,³⁵ the exhaustion

Oxford University Press, 2013, pp. 611-621

³³ Hugh Thirlway, *Op. Cit.*, p. 612 citing *ICJ Reports* 1959, p. 46.

³⁴ See *The International case (Switzerland v United States)* judgment of 21st March 1959.

³⁵ See *Etim Moses Essien v The Republic of the Gambia and the University of the Gambia* (Unreported) suit No. FCN/CCJ/05/05 delivered on 14th March 2007, at par 27, cited by Amos O. Enabulele, *Op. Cit.*, p. 270

of domestic remedies has been raised as a bar to the jurisdiction of the ECOWAS Court of Justice. In both instances, the Court held that the rule of exhaustion of domestic remedies, as mentioned in Article 50 of the African Charter on Human and Peoples' Rights has no bearing with Article 10(d) of the Supplementary Protocol. The absence of the rule from the court's Protocol means that the rule is not applicable before the court.³⁶

47. Given the case law above and turning to the case at hand, we are mindful of the provisions of Article 30(1) of the Treaty that give the right to any person resident in any Partner State to bring a direct claim for the vindication of breaches committed by a Partner State. In this regard, the Applicant has approached the Court praying for a declaration that his arrest and detention under painful and inhuman conditions by the two Partner States (Respondents) violates their obligations under Articles 6(d) and 7(2) of the Treaty. He also stated that the suit filed before the High Court of Uganda is different from the present one since in the former, he is claiming damages against the 1st Respondent for violation of his constitutional rights. No such suit has been filed against the 2nd Respondent.
48. In the circumstances therefore, we find that the present case falls squarely within the jurisdiction of this Court as provided by Article 27(1) of the Treaty and that the Applicant need not exhaust local remedies before filing his Reference before this Court because Article 30(1) of the Treaty gives him direct access to the Court. Consequently, Issue No. 1 is answered in the affirmative.
49. During his submissions on this issue, the 2nd Respondent did raise the issue that the Reference was time-barred. The Applicant pressed the point that the Court should not include that issue among the ones retained for determination arguing that it should have been raised in the pleadings. We are however mindful that it is trite law that the allegation that a case is time-barred is a point of law that can be raised at any stage of the proceedings. We therefore deem it necessary to address it as an issue for determination. Indeed, the said issue was canvassed extensively in questions from the Bench during oral highlights of submissions.

Whether the Reference is Time-Barred

50. The act complained of by the Applicant is the alleged way he was arrested, held incommunicado, transported in inhuman manner when he was subjected to irregular rendition to Uganda and back to Kenya. It was argued on behalf of the Applicant that during that time when he was subjected to those illegal acts by the Respondents, he was unable to file his case against the Respondents. It was further contended that it was only after being released that he was able to institute his case.
51. It is an undisputed fact that on 4th August 2015, the Applicant was released and bonded to appear at the Anti-Terrorism Police Unit Kenya headquarters weekly and that on 11th September 2015, he was released unconditionally.
52. During the hearing of the Reference held on 12th June 2018, the Applicant's Counsel was asked to explain why the Applicant did not file the Reference after his conditional release on 4th August 2015, and the learned Counsel only reiterated the contention that the Applicant was under incapacity to do so

³⁶ See Article 4 of the Supplementary Protocol amending the Protocol relating to the Community Court of Justice, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf

without elaborating on such incapacity. In any event, the same had not been pleaded by the Applicant.

53. In the premise therefore, we are not satisfied by the Applicant's contention that he was unable to file his Reference until the time he filed it on 27th October 2015. It is our considered view that even if we agree with the Applicant that during his detention and alleged irregular rendition to Uganda and back to Kenya up to his conditional release on 4th August 2015, he could not have filed his case, it was possible for him to file the same after the conditional release. It is worth recalling that the actions complained of occurred from the time the Applicant was arrested on 1st July 2015 up to when he was conditionally released on 4th August 2015. This means that the Applicant ought to have instituted his case not later than 4th October 2015, but his case was filed on 27th October 2015.
54. In light of the foregoing and guided by this Court's decision in the case of *The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011*, where it held that the Treaty does not contain any provision enabling the Court to disregard the time limit of two (2) months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the complainant, we find that the Applicant's Reference filed on 27th October 2015 was time-barred.
55. Since the allegation of time-bar is a point of law if successfully pleaded disposes of the entire case, we find that it would be a futile exercise to determine the Reference in its merits as the same is no longer live before the Court.

G. Conclusion

56. The Reference is dismissed for having been filed out of the two-month period prescribed by Article 30(2) of the Treaty.
57. Each Party to bear its costs.

It is so ordered.

L. Rwakafuuzi, Counsel for the Applicant
O. Adoi, M. Ijang & J. Amsugut for 1st Respondent
T. Kuria Counsel for 2nd Respondent.

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First Instance Division

Reference No. 7 of 2015**Alice Nijimbere v East African Community Secretariat**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ, F. Ntezilyayo, F. Jundu & A. Ngiye JJ

March 23, 2016

Recruitment process - Wrong party sued - Fair hearing - Whether there was discrimination or gender inequality - Whether the EAC Staff Rules and Regulations, 2006 were breached

Articles: 6(d), (e) & (f), 9(1) (g), (4), 14(g), 30(1), 66, 67(3), (a), 71(h) of the Treaty - Regulation: 20(7) & (8) EAC Staff Rules & Regulations, 2006 - Rules: 19(2), 17(5), 24, 111 EACJ Rules of Procedure, 2013

Sometime in June 2015 the East African Community advertised the vacant position of Registrar of East African Court of Justice. The Applicant applied and was shortlisted for an interview on 28th September 2015 at 14:15 hours at the office of the Ministry of EAC Affairs in Bujumbura, Burundi. The Respondent's agent Deloitte Consulting Ltd of Dar es Salaam, Tanzania advised the Applicant to make her own travel and accommodation arrangements prior to the interview and that expenses would be reimbursed. On 24th September 2015 the Applicant emailed Deloitte indicting her inability to travel to Bujumbura and seeking a 'special dispensation' to attend the interview in Arusha, Tanzania. On 25th September 2015 at 10:22 the Applicant was informed that all shortlisted candidates would only be interviewed in their country of origin. On the same day, the Applicant wrote stating and that her daughter was ill and she could not leave her in Arusha as she had no one assistant care-giver. She submitted documentary proof on 26th September 2015, from AAR Health Services showing that her daughter had been treated and was due for further observation a week later. On morning of the interview day, 28th September 2015, the Applicant sent a reminder for dispensation and at 11:07 am, the Applicant received an email reiterating that: all candidates would only be interview via video conference in their country of origin and the Applicant ought to have travelled to Bujumbura for the interview. The Applicant's request for reconsideration was to no avail.

In this Reference the Applicant alleged *inter alia* that: she had suffered discrimination; lost the right to employment and opportunity to advance herself professionally and financially. By refusing to interview her in Arusha, the Respondent breached Articles 6(d), (e), (f) and 71(h) of the Treaty and Regulation 20(7) and (8) of the EAC Staff Rules and Regulations 2006. The Applicant sought an annulment of the decision taken by the Respondent on 28th September 2015; suspension of the recruitment process; and a -launch of the interviews with different panellists; and costs.

The Respondent submitted *inter alia* that, the Reference was misguided since the Applicant: sued the EAC Secretariat which has no legal personality; was given an opportunity to participate in the interview but failed to seize it; and the Reference did not raise a cause of action against the Respondent as there was no statutory or other duty of care to ensure that Applicant was interviewed at the EAC Secretariat

as requested. Moreover, accommodating the Applicant's request would have created an uneven playing field as would have unlawfully treated the Applicant differently from all other candidates.

Held:

1. The EAC Secretariat is created by Treaty Article, 66 read with Article 70. Its functions are set out in Article 71 thereof. Article 9(1) (g) specifies that the Secretariat is an organ of the EAC and the Secretary General, as head of the Secretariat, Article 67(3)(a), is enjoined to act on its behalf as per Article 71(2). Thus, the Secretariat can only be sued through the Secretary General and not directly. Where a wrong party in law is sued, no orders should be issued against it.
2. The Respondent's decision to have a level playing field and that each candidate should be treated equally in all aspects of the interview process was logical, reasonable and lawful. The converse where one candidate faces interviews in the seat of the EAC while all others are in their Partner States would have been unreasonable as allegations of bias and favourable treatment of the Applicant, real or perceived, would have discredited the entire exercise *ab initio*.
3. The Respondent is under an obligation to conduct of its administrative affairs in a manner that observes the rules of natural justice. One of these rules is fair hearing. The Applicant's plea for dispensation was not casually dismissed but interrogated based on the documents supplied. After hearing the Applicant, the Respondent made a determination that was fair and reasonable in the circumstances.
4. Discrimination occurs where there is any distinction, exclusion, restriction or preference based grounds such as race, sex, national or social origin, and which has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms. However, not every differential treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose. Direct discrimination happens when "a person with an attribute is treated less favorably than another person without the attribute". It is trite law that he who alleges must prove. In this case, the Applicant failed to prove any allegations of discrimination.
5. The Applicant applied for the position in her professional capacity and the fact that her motherhood responsibilities may have interfered with a professional pursuit could not convert the issue into a matter of gender inequality. The decisions of the Respondent do not amount to a violation of Article, 6(d), (e) and (f) of the Treaty.

Cases cited

East African Law Society v AG of Kenya & Ors [2005-2011] EACJ LR 68, Ref. No.3 of 2007

Editorial Note: Appeal 1 of 2016 was disallowed on 2 December 2016 (see page 703 of this report).

JUDGMENT

Introduction

1. The Reference dated 28th October, 2015 is premised on Article 30 of the Treaty for the Establishment of the East African Community (hereinafter “the Treaty”) and Rule 24 of this Court’s Rules of Procedure, 2013. It seeks order to be reproduced shortly.
2. The Applicant has described herself as an advocate of P.O. Box 1096 Arusha, Tanzania and the Respondent is the East African Community Secretariat of the same address.

Representation

3. The Applicant appeared in person while the Respondent was represented by Dr. Anthony Kafumbe, Counsel for the East African Community.

Background

4. The Reference was prompted by the Respondent’s decision not to grant what the Applicant calls “dispensation” in interviewing her for the position of Registrar of this Court in Arusha and not Bujumbura in the Republic of Burundi. She alleges that the said decision was an infringement of *inter alia* Article 6(d), (e) and (f) of the Treaty.
5. She now seeks the following orders in that regard:
 - I. An annulment of the decision taken by the East African Community Secretariat (hereinafter ‘the Respondent’) in the meeting held on 28th September 2015 regarding her request for a dispensation to be interviewed at the Headquarters of the EAC for the position of Registrar due to a genuine reason;
 - II. An interim order suspending the process of recruitment of the Registrar until the pleadings are closed;
 - III. The Court to declare the decision made by the EAC Secretariat in that regard to be null and void;
 - IV. The Court to re-launch the process of interviews and organize a different interview panel in accordance with the East African Community Rules and Regulations, 2016; and
 - V. The Court to award the costs of this Reference to the Applicant.

The Applicant’s Case

6. The Applicant’s case is contained in her Reference aforesaid, her Affidavit of 1st December, 2015, and Rejoinder to the Respondent’s Affidavit in reply and written submissions filed on 15th December, 2015.
7. In summary, her case is that, sometime in June, 2015, the Respondent advertised for interested persons to apply for the position of Registrar of this Court. She duly applied for the position on 6th July, 2015, was shortlisted and invited for an interview on 28th September, 2015 at 14:15 hours at the offices of the Ministry of East African Community Affairs in Bujumbura. The invitation aforesaid was dated 23rd September, 2015.
8. She was also directed by an email of the same date sent by the Respondent’s agent, MIS Deloitte Consulting Ltd. of Dares Salaam, Tanzania (hereinafter “Deloitte”)

that she was to make her own travel and accommodation arrangements prior to the interview and that her expenses would be reimbursed, if need be.

9. The Applicant then wrote an email to Deloitte on 24th September, 2015 at 10:37 a.m. and stated inter alia as follows:
 - I. That she was unable to travel to Bujumbura as requested;
 - II. That she should be granted a “special dispensation” to attend the interview in Arusha since she had been “informed that the interview panel will be seated at the EAC Headquarters using teleconference services.”
10. On 25th September, 2015 at 10:22 a.m., Deloitte wrote to her and stated that the directive of the relevant authority was that each shortlisted candidate would be interviewed in their country of origin. Further, since no reason had been given why she wanted a special dispensation, she was requested to give such reasons. At 11:36 a.m. the same day, she responded and stated thus:

“Please be informed that my daughter is sick and her health status does not allow me neither to travel with her nor to leave Arusha because I have no one to assist her during my absence. Even now, I am at the Hospital.”
(sic)
11. At 13:56 hrs the same day, she was requested to give documentary proof that the “child is hospitalized before the relevant decision makers seek consideration in regard to your request.” She sent a single document from AAR Health Services at 9:02 a.m. on 26th September, 2015 in answer thereto and on 28th September, 2015, (the day of the interview), she sent a reminder at 8:23 a.m. Deloitte responded at 9:17 a.m. and stated that the relevant decision makers had not yet communicated their decision to it.
12. At 11:07 a.m. on 28th September, 2015, an email was sent to her forwarding the decision of the Deputy Secretary General in-charge of Finance and Administration, the Counsel to the EAC and the Director of Human Resource and Administration at the EAC Secretariat to the effect that:
 - a) A candidate for the aforesaid interview can only be interviewed by video conference at his or her country of origin;
 - b) The Applicant’s child was not admitted in any hospital and that the document presented indicated that the child was to return to hospital after one week from 25th September, 2015 for observation. The Applicant ought therefore, to have left the child with the father and travelled to Bujumbura for the interview; and
 - c) To grant all candidates a level playing field, all of them ought to be interviewed via video conferencing at the Ministries responsible for EAC Affairs in their respective Partner States, hence the decision in (a) above.
13. At 14:14 hours, five minutes before her interview was to start, the Applicant protested at the above decision and reiterated that she was unable to travel to Bujumbura on account of having a sick child. She added that the “EAC Management’ knew that her husband, an EAC employee, was on an EAC mission in Kampala and could not therefore take care of the child; and that by sitting for the interview in Arusha, the playing ground would still remain level for all candidates. Such an action in any event, she added, would save the EAC expenses related to her air ticket and accommodation. She concluded by “advising” the EAC to reconsider its position, “otherwise [she would] take other available legal

recourse. "She was never interviewed, hence the present Reference.

14. It is her further case in any event that her situation ought to have been understood by the EAC decision makers and that the doctrine of force majeure should have been applied in her favor. She has added that she has suffered discrimination, has lost the right to employment and opportunity to advance herself professionally and financially as a result of the Respondent's actions.
15. For the above reasons therefore, the Applicant seeks the orders elsewhere set out.

Respondent's Case

16. The Respondent, in answer to the Reference filed a Response dated 9th November, 2015, an Affidavit in reply sworn on in December, 2015 by Mr. Joseph Ochwada, Director, Human Resources and Administration at the EAC as well as written Submission dated 12th January, 2016.
17. His case is that the Reference is misguided as the Applicant was given an opportunity to participate in the interview aforesaid but she failed to seize it. In any event that the Reference cannot stand for the following other reasons:
 - a) The Statement of the Reference should be rejected because the Applicant sued the EAC Secretariat as opposed to suing the Secretary General, knowing that the Secretariat of the EAC has no legal personality to be sued as a Respondent before this Court;
 - b) Service of the Court documents and hearing with a Certificate of Urgency when Court was not in vacation was erroneous and inconsistent with Rule 19(2) of the EACJ Rules of Procedure 2013;
 - c) The Applicant who says she is an advocate has not complied with Rule 17(5) of the EACJ Rules of Procedure 2013 by not attaching evidence to show she is entitled to appear before a superior Court in a Partner State; and
 - d) The matter does not raise a cause of action against the Respondent because it did not owe the Applicant any statutory or other duty of care to ensure that she must be interviewed at the EAC Secretariat as she had requested.
18. Without prejudice to the above, the Respondent's case is also that the decision to interview all candidates in their respective Partner States was prudent and a policy of the Council of Ministers under Article 14 of the Treaty.
19. Further, that to bend that policy to accommodate the Applicant would have created an uneven playing field, more so, where the reasons given by the Applicant for alleged inability to travel to Bujumbura were unacceptable. In that regard, it is also its contention that the medical records of the Applicant's child, supplied by the Applicant herself, indicated that the child had not been admitted in any hospital and therefore the Applicant could have made arrangements for the child's care while she attended the interview.
20. The Respondent also adds that all other candidates for the interview complied faithfully with the directive regarding the place and manner of the interview and they should not be punished by restarting the process afresh to accommodate the Applicant. That the requirements for attendance of interviews in Partner states was meant to ensure verification of the Applicant's qualification and nationality and since all other interviewees had complied with the requirement, it would

have been unlawful to treat the present Applicant differently .

21. Lastly, that neither force majeure, discrimination, nor breach of any Article of the Treaty had been proved and the Reference ought to be dismissed with costs.

Applicant's Case in Rejoinder

22. The Applicant, in a rejoinder to the Respondent's contentions states, and of relevance to the Reference, that the Respondent had the means to verify the Applicant's qualifications and nationality without her being required to be interviewed in Bujumbura.

23. Further, that her experience as a former Judge and now as a senior advocate in Burundi gave her very high chances of being appointed the Registrar of this Court but the Respondent denied her that chance and even tarnished her reputation thereby.

Scheduling Conference

24. On 24th November, 2015, at a Scheduling Conference attended by the Applicant and Counsel for EAC, the Parties and the Court decided that the following issues were uncontested:

- i. That the Applicant applied for the position of Registrar and was shortlisted by Deloitte and Touch Consulting Tanzania Limited based in Dar-es-Salaam, Tanzania;
- ii. That the notification of her shortlisting was done by Deloitte Consulting Limited by email dated 23rd September , 2015;
- iii. That the candidate requested a special dispensation to be interviewed at the Headquarter of the EAC on 25/09/2015;
- iv. That the Applicant's request was rejected and communicated to her on 28th September , 2015, the date of the interview, at exactly at 12:04 (Tanzania Time) ;
- v. That the candidate reacted to the decision the same day at 14:10 hours by seeking a re-consideration of the decision by EAC decision makers; and
- vi. That the Applicant filed an Administrative Appeal on 06th October 2015 and received on 7th October 2015 by the Secretary General of EAC but the appeal remained without a response.

25. The following issues were contested and are therefore falling for our determination:

- i. Whether the conduct of the Respondent in refusing to interview the Applicant in Arusha as she had requested breached Articles 6(d), (e), (f) and 71(h) of the Treaty and Regulation 20(7) and (8) of the EAC Staff Rules and Regulations 2006;
- ii. Whether the Respondent abused his administrative powers by communicating the decision rejecting the request of dispensation, which he received on a Saturday and responded just one hour before the interview time on the following Monday contrary to Article, 71(h) of the Treaty;
- iii. Whether the Respondent breached provisions of Regulation 20(7) of the EAC Staff Rules and Regulations, 2006 by requesting the Applicant to arrange her own means of travel and accommodation expenses contrary to Article 6(d) of the Treaty; and

I. Whether the Applicant is entitled to the prayers sought.

26. We propose to deal with each issue separately after summarizing the submissions made by the Parties. Before doing so however, one issue partly arose in the Respondent's response to the Reference but was not followed up at the hearing: Whether the Respondent can properly be sued - in its own name. In that regard, the EAC Secretariat is created under Article, 66 as read with Article 70 of the Treaty and its functions are then set out in Article 71 thereof. Under Article 71(2), the Secretary General is enjoined to act on behalf of the Secretariat and in Article 67(3) (a), he is the Head of the Secretariat.
27. Article 4 of the Treaty grants the EAC legal capacity and under Article 4(3), it is represented in Court proceedings as a body corporate, by the Secretary General.
28. Under Article, 30(1) of the Treaty, a natural person, such as the Applicant, can challenge "any Act, regulation, directive, decision, an action of a Partner state or an institution of the Community on grounds of unlawfulness or infringement of the Treaty."
29. Partner States require no definition but institutions of the Community are defined in Article 9(3) of the Treaty so as to be the East African Development Bank and the Lake Victoria Fisheries Organization.
30. The Secretariat is an Organ of the EAC under Article 1(g) of the Treaty and it seems to us that it can only be sued through the Secretary General and not directly as a Respondent. As we know it, where a wrong party in Law has been sued, no orders should be issued against it. That is all we should say on that issue- See also *Ref. No.3 of 2007, East African Law Society vs AG of Kenya & 3 others*

Issue No.(i): Whether the Conduct of the Respondent in Refusing to Interview the Applicant in Arusha as she had requested Breached Articles, 6(d), (e), (f) and 71(h) of the Treaty and Regulation, 20(7) and (8) of the EAC Staff Rules and Regulations, 2006.

31. On this issue, the Applicant submitted that by its actions aforesaid, the Respondent breached the principles of social justice, gender equality, as well as the promotion of Human and People's Rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. They also breached the Anti-Discrimination Act, 1991 because she was denied special dispensation merely because she was a mother of a sick infant and the only shortlisted candidate from the Republic of Burundi. She was also denied such dispensation while the Respondent knew or ought to have known that she was resident in Arusha and not Bujumbura.
32. It was her other submission on this issue that the principle of gender equality would only have been guaranteed if, as the only other woman in the interview, she had been granted the special dispensation that she had sought.
33. On the issue of payment and refund of the cost of travel and accommodation, she submitted that although that issue was provided for in Regulation 20(7) of the EAC Staff Rules and Regulations the two days' notice for her to make such an arrangement was unfair and stressful to her.
34. The Respondent on the other hand submitted on this issue that the principle of good governance enshrined in Article 6(d) of the Treaty was properly applied when the Respondent treated all interviewees equally and also acted accountably

when it decided to reimburse any costs incurred by the candidates who had been invited for the interview aforesaid. That therefore, the inability of one candidate to participate in the interview process because her child was sick cannot amount to a violation of Article 6(d) of the Treaty.

- 35. On the allegations of discrimination, the Respondent’s submission was that the Anti-Discrimination Act, 1991 referred to by the Applicant is an Australian domestic statute with only persuasive value to this Court. In any event, that the other women who had been shortlisted to attend the interview did so, and were interviewed in their Partner States.
- 36. Regarding the principle of equal opportunity and gender equality, the Respondent argued in part that the said principles are embedded in the recruitment and interview process as evidenced by the fact that both genders are given equal opportunities in the EAC.
- 37. On the complaint that the Applicant was not given a response to the request for special dispensation the Respondent stated that the Applicant had made the request on 26th September , 2015 which was a Friday and a response could only conceivably be done the following Monday, 28th September, 2015. In the circumstances, no injustice was thereby occasioned to the Applicant.

Determination on Issue No. (I)

- 38. In determining the above issue in the context of the submissions above, we deem it appropriate at this stage to reproduce Articles 6(d), and (f), Article 71(h) of the Treaty as well as Regulation 20(7) and (8) of the EAC Staff Rules and Regulations which the Applicant relies on as the legal basis for her Reference.
- 39. Article 6(d), (e) and (f) and Article 71(h) provide as follows:

Article 6(d):

“The fundamental principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:

- a)
- b)
- c)

d) Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples ‘ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.

- (c) Equitable distribution of benefits; and
- (f) Co-operation for mutual benefits”

Article 71(h):

“The Secretariat shall be responsible for:

- a)
- b)
- c)
- d)
- e)

f) The general administration and financial management of the Community.”

40. Regulation 20(7) and (8) then provide as follows:
- “7. The Community shall pay travel and accommodation expenses for the short listed candidates for the posts advertised; and
8. Recruitment of staff of the Community shall as far as possible, be reflective of equal representation of the Partner States.”
41. In the specific circumstances of this Reference, the issues arising for analysis on the issue at hand are therefore:
- I. Whether the Respondent’s decision not to grant the Applicant a special dispensation regarding the place of interview was a breach of the principles of social justice, equal opportunities and gender equality ; and
 - II. Whether the Applicant was discriminated against on account of her gender and fact of being a mother. Further, whether any of the provisions of the African Charter on Human and Peoples’ Rights were thereby violated.
42. As Regulation 20(7) is to be substantively determined in Issue No.3, we shall not address it at this stage but we shall address Regulation 20(8) which is on equal representation of Partner States in appointments within the Respondent Secretariat.
43. Rule 71(h) on the other hand requires no interpretation as it is a general provision on the functions of the Secretariat.

Social Justice, Equal Opportunities, Gender Equality and Equal Representation

44. Social justice as we understand it is the principle that all individuals and groups are entitled to fair and impartial treatment and have equal opportunities. It is also premised on the natural Law that covers all people regardless of gender, origin, possession or religion - see *Black’s Law Dictionary*. 9th Edition and Online Dictionary, 2nd Edition.
45. In that context, we note that the Applicant has claimed that her status as a mother and woman was what triggered the Respondent’s actions; that therefore, she was unlawfully treated and denied the above rights. To address that contention, we must revisit the facts leading to the offending action.
46. In her initial email of 24th September, 2015, at 10:37 a.m. (and we have deliberately stated the times that the emails were exchanged), she gave no reason why she wanted to be interviewed in Arusha and not Bujumbura. When pressed to explain her reasons, she responded on 25th September at 11:36 a.m. to say that her daughter was sick and at that very moment, she was in hospital.
47. We have in that regard seen an AAR Insurance Claim Form dated 25th September, 2015 which indicates that the child had been suffering from periodical fever, nausea and vomiting for the previous five days and was treated on that day and required to return for observation after one week. On 24th September 2015, the child was therefore not in hospital and had not been treated and that explains
48. The Applicant’s email of 25th September 2015; that she was in hospital at the time she sent the email. She has not however explained why on 24th September 2014 she never gave any reason for her plea to be interviewed in Arusha but we presume that it was on account of the sick child. The Respondent, having seen that form, took the view that since the child was not admitted in hospital, and

then the Applicant was in a position to travel to Bujumbura for her interview. Is that an unreasonable decision in breach of the right to social justice, equal opportunity and gender equality? We think not.

49. Granted, the Applicant was placed in a situation where in her judgment she could not travel to Bujumbura. What options were open to the Respondent in the circumstances? The Applicant offered the option of an interview at the EAC Headquarters because she had knowledge that the interviews were being conducted there. The Respondent's decision on the other hand to have a level playing field, and that each candidate should be treated equally in all aspects of the interview process was, in our view, logical, reasonable and lawful. The converse would in fact have been unreasonable i.e. that is where one candidate faces interviewers in the seat of the EAC while all others are in their Partner States probably having travelled there from elsewhere. Allegations of bias and favorable treatment of the Applicant, real or perceived, would have discredited the entire exercise ab initio. Equality would not only be applicable where the Applicant is concerned but also where other interviewees are concerned.
50. In addition to the above, the Respondent did not casually dismiss the Applicant's plea for dispensation but interrogated it and decided that the interview had to take place as scheduled. Had the plea been summarily dismissed, we may have frowned upon such an action but not in the present circumstances. We have reached that conclusion because; there is an obligation that in the conduct of its affairs and specifically where an administrative decision has to be reached, there is a necessary implication that the Respondent is required to observe the rules of natural justice. One of these rules is that of fair hearing (*Audi alteram partem*) -See *Administrative Law*. Eight Edition by H.W.R. Wade and C.F. Forsyth at page 469).
51. We are satisfied therefore, that having heard the Applicant and made a determination that was fair and reasonable in the circumstances; we cannot find any serious fault on the part of the Respondent.
52. In addition to the above, we also do not see where her gender comes in because she was an applicant in her professional capacity and the fact that her motherhood may have interfered with a professional pursuit cannot convert the issue into one of gender inequality.
53. What of the principle of force majeure that the Applicant alluded to in her Reference and raised in submissions? That principle, as we understand it, and as explained in Chitty on Contracts, Vol. 1 at para. 14-148 is that 'force Majeure' in English Law is wider than that of 'Act of God' or 'vis major'. The latter refers to a natural cause that makes the performance of a legal obligation impossible without human intervention. Assuming therefore that the Applicant's child's sickness was a natural occurrence, can it be said that the child's sickness was beyond the Applicant's control? One of the expectations of the principle of force majeure is that the one pleading it had no options available in performing any legal obligation. In that context and as regards her attendance at the interview, like the Respondent, we are unable to find that she had no other way of mitigating her circumstances and we are satisfied that neither vis major nor force majeure are applicable to her circumstances and we so find.
54. Turning to Regulation 20(8) above, the Applicant argued that because she was

the only candidate from the Republic of Burundi shortlisted for the interview, the fact that she missed the said interview means that the principle of equal representation of staff from Partner States was flouted.

55. With respect, the reason why the interview was not conducted had all to do with the Applicant's unfortunate circumstances and not simply because she was from Burundi. She was also shortlisted for the interview because she was qualified for the job subject to the interview and not principally because she was from Burundi. The fact that she was the only one from Burundi only attests to these Credentials and not her nationality per se.

Discrimination

56. On allegations of discrimination, as we understand it, discrimination occurs where there is any distinction, exclusion, restriction or preference based on any ground such as race, sex, national or social origin, and which has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms - (*see: UN Human Rights Committee General Comment 18.7*)
57. We also note that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose- (*See: General Comment No. 18.13 (supra)*).
58. We have also read excerpts from the Australian Anti-Discrimination Act, 1991 where some of the outlined grounds for discrimination are parental status, gender identity and family responsibilities. In the same Act, which we agree is only persuasive to this Court; direct discrimination is defined as to happen when "a person with an attribute is treated less favorably than another person without the attribute".
59. In that regard, which other interviewee with a sick child was treated differently from the Applicant? Which other woman interviewee demanded or requested to be interviewed at the EAC Headquarters in Arusha and was so interviewed unlike the Applicant? Against what other person's treatment shall we measure the Applicant's treatment by the Respondent to enable us determine whether there was discrimination? With respect, none, and we do not see how discrimination can be proved without answers to the above questions. It is trite that he who alleges must prove and in this case, the Applicant has failed to prove any allegations of discrimination.
60. Regarding the African Charter on Human and Peoples' Rights, the Parties made no reference to any specific provisions thereto as applicable to the present Reference and we shall therefore not speculate and apply any of its provisions to the Applicant's circumstances.
61. In the end and for the above reasons, we must answer Issue No.1 in the negative.

Issue No. (ii): Whether the Respondent Abused his Administrative Powers by Communicating the Decision Rejecting the Request of Dispensation, which he Received on a Saturday and Responded to just One Hour Before the Interview Time on the Following Monday Contrary to Article, 71(h) of the Treaty.

62. This issue speaks for itself and while we have alluded to it earlier, our answer

to it is simple; elsewhere above, we deliberately reproduced the chain of communication between the Applicant, Deloitte and the Respondent. At no time did the Applicant protest about the short notice given (if at all it was short). She sought dispensation for a wholly different reason; that her child was sick.

63. In fact in the totality of this Reference, one would have expected the Applicant to seek to have the Respondent move the interview date to enable her sort out the issue of the sick child but she did nothing like that. She stuck to her preferred position of an interview in Arusha on 28th September, 2015 and not any other date, a matter we have said was not an option she could legitimately demand without the acquiescence of the Respondent.
64. We also note that the communication between the Applicant, Deloitte and the Respondent took place between 24th September 2015 and 28th September 2015. Two of those days fell on a weekend and it was impractical to expect that a concise answer on any question arising would be given to the Applicant prior to Monday, 28th September 2015 which happened to have been the day of the interview. We are unable to fault the Respondent in such circumstances.
65. In any event, this issue was an afterthought, has no basis in either the Reference itself nor in the events prior to the filing of the Reference and we must answer it in the negative.

Issue No.(iii) Whether the Respondent Breached the Provision of Regulation 20(7) of the EAC Staff Rules and Regulations, 2006 by Requesting the Applicant to find her Own Means of Travel and Accommodation Expenses Contrary to Article, 6(d) of the Treaty.

66. Elsewhere above, we reproduced Regulation 20(7) and in the context of the Reference, with tremendous respect to the Applicant, this issue was also introduced as an afterthought. We say so because, in her email of 24th September, 2015 to Deloitte, she stated thus:
 “Thank you also for having expressed Deloitte’s willingness to reimburse the costs of my travel and accommodation in Bujumbura.”
67. By so stating, she did not demand advance payment for travel and accommodation even if she had, the Respondent’s response to the issue is reasonable. We say so because if some shortlisted candidates receive air tickets and monies for accommodation but do not show up for interviews, what assurance of a refund can the Respondent have?
68. Regulation 20(7) does not also state that the payment must be in advance of the interview and since the EAC is a membership organization ran on funds from Partner States, to put such monies at risk of loss cannot be an accountable way of managing resources .
69. In any event, what is the issue all about? It is academic because the Applicant did not turn up for the interview and the question of payments, refunds etc. cannot now arise.
70. Without saying more, issue No. (iii) is answered in the negative.

Issue No. (iv) Whether the Applicant is entitled to the Prayers Sought:

71. Turning back to the prayers in the Reference:

a) Prayer (i) seeks annulment of the decision refusing to grant the Applicant

“dispensation to be interviewed at the Headquarters of the EAC for the position of Registrar due to a genuine reason.”

We have held that although the Applicant’s child was sick hence her inability to attend the interview, she could have managed her situation, reasonably, to enable her do so hence our finding above that the decision of the Respondent cannot amount to a violation of the Treaty in Article, 6(d), (e) and (f) as claimed and therefore, that prayer must and is hereby dismissed.

- b) Prayer (ii) seeks an interim order that the process of recruitment of the Registrar for this Court should be suspended until the pleadings are closed.

It is obvious that at this stage, this Court cannot grant interim reliefs and whatever the merits or otherwise of that Prayer, it is denied and is therefore, dismissed.

- c) Prayer (iii) is to the effect that the aforesaid decision should be declared null and void but once we have found no violation of the Treaty, the same cannot be granted and is instead dismissed

- d) Prayer (IV) seeks a re-launch of the interview process but it is obvious that we see no need to grant such a prayer and the same is similarly dismissed.

72. Before we conclude however, in the cause of Submissions, the Applicant introduced one other remedy; compensation for her alleged losses. In that regard, we can only state that such a claim cannot be introduced to pleadings in such a manner and we shall not delve into it at all. We say so because, where a matter is not pleaded and the other Party has no opportunity to respond to it, the ends of Justice would not be met if a court were to determine it.

73. Lastly, on the issue of costs, under Rule 111 of this Court’s Rules of Procedure, 2013, costs follow the event unless the Court “for good reasons otherwise orders.” In our view, the Applicant was unable to attend the interview for reasons she thought entitled her to special dispensation. We have said that the Respondent nonetheless acted reasonably despite the Applicant’s circumstances and that we see no breach or violation of the Treaty on its part. In the end, we deem fit that each Party should bear its own costs.

Disposition

74. Having held as we have done above, the Reference herein is dismissed but each Party shall bear its own costs

75. Orders accordingly.

A. Nijimbere appeared in person

A. Kafumbe Counsel for the Respondent

First Instance Division

Reference No. 8 of 2015
Manariyo Désiré v The Attorney General of Burundi

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ and A. Ngiye, J

December 2, 2016

State responsibility for conduct of judicial organs - Whether the Court had jurisdiction to consider decisions of Supreme Courts of Partner States - Appellate review distinguished from international review of the decisions of national courts - Principles of judicial independence & impartiality - Disregard for due process - Property rights - Limitation period

Articles: 6(d), 7(2), 33(1), (2) of the Treaty - Article 15(1) EAC Common Market Protocol - Article 14 African Charter on Human and Peoples' Rights - Article 4(1) Draft Article on State Responsibility for Internationally Wrongful Acts, 2001- Value 1(1.1) & 2 Bangalore Principles of Judicial Conduct, 2002 - Rules: 1(2), 24 EACJ Rules of Procedure, 2013

In 1997 the Applicant purchased three parcels of land in Bujumbura, Burundi, one of which was bought from Mr. Simon Nzophabarushé. Thereafter Applicant and the three sellers executed a single Attested Affidavit (*Acte de Notoriété*) No. 356/99 of 27th July 1999 outlining the parties to the sale agreement and the purchase price. Upon obtaining a certificate of title for the consolidated parcels of land, the Applicant sub-divided and sold the land to other buyers. In 2010, Mr. Nzophabarushé filed a case against the Applicant in respect of the piece of land he had sold to him and the Tribunal of First Instance (*Tribunale de grande instance*) ruled in favour of Mr. Nzophabarushé without allegedly: giving the Applicant an opportunity to cross examine witnesses; present oral submissions and by disregarding the Applicant's written submissions. On appeal, the Court of Appeal (*Cour d'appel*) upheld the Tribunal's decision in 2013 and upon a second appeal before the Cassation Chamber of the Supreme Court, the Applicant was similarly unsuccessful. The judgment was delivered in June 2015 and the Applicant received it on 21st September 2015.

Dissatisfied with the Supreme Court's decision, the Applicant filed this Reference claiming that the Respondent had failed to acknowledge the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999, despite its execution by State organs. This allegedly violated the principles of rule of law, good governance and the recognition of property rights and peaceful enjoyment thereof. The Applicant relied on principles of State responsibility for the conduct of its organs.

In reply, the Respondent averred that since the Supreme Court's judgment was delivered on 21st June 2015, the Reference was time barred by Article 30(2) of the Treaty. Furthermore, the Court lacked jurisdiction over decisions of the Supreme Court of Partner States.

Held

1. Whereas the judgment in issue was dated and delivered on 24th June 2015, it

was received on behalf of the Applicant on 21st September 2015. Article 30(2) of the Treaty provides a limitation period for instituting proceedings within two months of the day in which the decision complained of came to the knowledge of the complainant. Therefore, the Reference was filed within the prescribed time line.

2. In international law, the conduct of an organ of a State, even an organ independent of the executive power, must be regarded as an act of that State. Judicial decisions of national courts, particularly those emanating from the apex court of a country, may only be categorized as wrongful acts for purposes of state responsibility where they reflect blatant, notorious and gross miscarriages of justice. The Republic of Burundi would be responsible for the allegedly wrongful conduct of the Burundi Supreme Court
3. The ultimate call of duty upon courts is to uphold the due process of law. Litigants expect reasonable assurance that courts will determine their disputes objectively, independently and with unassailable integrity: judicial expertise; efficiency; and capacity of judicial officers to deliver coherent and logical decisions.
4. The judgment of the Cassation Chamber of the Supreme Court depicts an unreasoned judgment that is quite dismissive of the issues raised on Appeal. It does not explain the court's deference to one position as against another; neither does it clarify the scope of the subject matter in issue before it. While the Court was mindful of the possibility that judgments from countries of a civil law background might take on a different form from those originating from common law jurisdictions, the Bangalore Principles provide minimum standards of judicial office holders that are universal in outreach and application and are applicable to both civil and common law jurisdictions.
5. The impugned judgment depicts a cavalier approach to an extremely serious judicial function and would suggest a blatant disregard for due process of the law; as well as an apparent indifference to the universal standards of judicial practice embodied in the Bangalore Principles of Judicial Conduct. This is a clear injustice to the parties to the dispute and *prima facie* amounts to wrongful practice that is attributable to the Republic of Burundi under Article 4(1) of the ILC Articles on State Responsibility.
6. Article 33(1) of the Treaty entails a tacit recognition of the inherent jurisdiction of national courts to try all matters that fall within the ambit of their locally designated jurisdiction, including the mandate to determine disputes to which the Community is a party *per se*. Whereas Article 33(2) acknowledges the inherent jurisdiction of national courts to try any matter brought before them, it subordinates their decisions on matters of Treaty interpretation to decisions by this Court. Article 34, in turn, underscores this Court's precedence on matters of Treaty interpretation by making provision for such questions to be subjected to a preliminary ruling by it. Although the Treaty does not expressly confer or reserve national courts' jurisdiction, it does in fact recognize their inherent jurisdiction within locally designated parameters.
7. There is a clear distinction between what constitutes an appellate review of a subordinate court's decision, and the dialectical judicial approach that is synonymous with the international review of domestic judgments. The characteristics of appellate review include: authority to undo the determinations

of law (and sometimes of fact) of the lower court; the binding nature of that review on the lower courts; the review is largely unidirectional i.e. whereas the appellate court can critique the lower court, the reverse is not usually tenable; and the constrained reach of appellate review i.e. it is rarely *de novo*. This Court would not be invoking an appellate jurisdiction over the Burundi Supreme Court.

8. Articles 6 and 7 of the Treaty require adherence to the principles of good governance and rule of law. Where a party alleges that a domestic adjudication process was unsatisfactory, an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international obligations. This Court has jurisdiction to consider the said proceedings and judgment with a view to determining whether they contravene Burundi's obligations under Articles 6(d) and 7(2) of the Treaty.
9. The international review of national courts entails the non-subjugation of national courts to international courts or tribunals, as would be the case in a typical appellate review. It is characterized by the application of distinct legal perspectives; international courts approach the same set of circumstances from the perspective of states' international obligations.
10. An international review is a trial *de novo* in the context of the international or treaty obligations the international court seeks to enforce. It is not binding upon the national courts as would be the case of a typical appeal, neither does it form *stare decisis* in domestic jurisdictions as would a decision of national states' apex courts. It is intended to highlight the international legal issues inherent therein with a view to engendering a harmonized legal position in respect thereof. As stated in the *East African Civil Society Organisations* case, this Court lacks jurisdiction to reopen the decisions of national courts to determine their compliance with either domestic laws or the Treaty. Its jurisdiction is limited to such international review of national courts' decisions viz a viz Partner States' Treaty obligations as would engender the Court's function under Article 27(1) of the Treaty.
11. There was insufficient proof of material on record that would support a finding that the Bench that adjudicated the matter and delivered the said judgment contravened the principle of rule of law on account of absence of judicial independence. The record of proceedings of the Supreme Court would have been pivotal in proving the incidence of unfairness, bias or arbitrariness in the application of the law as an indication of lack of independence or procedural impropriety.
12. The Applicant did not avail the record of proceedings so the Court was unable to determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime therefore, the Applicant did not prove violation of the principle of rule of law.
13. Without the benefit of Burundian property law that might have established the nexus between authentic notarized deeds and attested affidavits, the Court was unable to fault the legality of the Supreme Court's decision on that issue. The Applicant fell short of the standard of proof that was required to establish this nexus and to prove he had relinquished all legal title to the disputed property to new buyers, his claim was unproven.

14. In the absence of proof of and infringement of either Articles 6(d) or 7(2) of the Treaty, or Articles 15(1) and 14 of the Protocol and African Charter respectively; and the failure to establish any purported property rights attributable to the Applicant, the Reference was dismissed.

Cases cited

B. E. Chattin (USA) v United Mexican States, 1927, UNRIAA, vol. IV, p. 282

Baranzira Raphael & Anor v AG of Burundi, EACJ Ref. No. 15 of 2014

East African Civil Society Organisations Forum v AG of Burundi & Ors, EACJ Ref. No. 2 of 2015

Henry Kyarimpa v AG of Uganda, EACJ Appeal No. 6 of 2014

Hon. Sitenda Sebalu v Secretary General, EAC & Ors [2005-2011] EACJLR 160, Ref. No. 1 of 2010

Ida R. S. Putnam (USA) v United Mexican States, 1927, UNRIAA, Vol. IV, p. 151

Prof. P. Anyang' Nyong'o & Ors v AG of Kenya & Ors [2005-2011] EACJLR 16, Ref. No. 1 of 2006

Editorial Note: Appeal No 1 of 2017 was determined on 28 November 2018 (see page 978 of this report).

JUDGMENT

A. Introduction

1. This Reference was brought under Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty'); Article 15(1) of the Protocol on the Establishment of the East African Community Common Market (hereinafter referred to as 'the Protocol'), and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as 'the Rules').
2. The Applicant is a citizen of the Republic of Burundi, aggrieved by the handling of matters in respect of his land by the Judiciary of the Republic of Burundi, and seeks to enforce the said Partner State's obligations under the legal provisions cited hereinabove.
3. The Respondent is the Attorney General of the Republic of Burundi, and is sued as the legal representative of the Government of the Republic of Burundi.
4. At the trial the Applicant was represented by Mr. Donald Deya, while Msrs. Nestor Kayobera and Elisha Mwansasu appeared severally for the Respondent.

B. Background

5. In 1997, the Applicant bought three (3) parcels of land in Bujumbura, Burundi, including a piece of land that was sold to him by a one Simon Nzophabarushu. The Applicant allegedly complied with all the land conveyance procedures by law required with regard to agreements for the sale of land in Burundi. Specifically, the Applicant and the 3 sellers did execute a single Attested Affidavit (*Acte de Notoriete*) that outlined the parties to the sale agreement; size of the land, as well as the purchase price paid therefor. The Applicant thereupon secured a certificate of title in respect of the consolidated parcel of land, which he subsequently subdivided and sold to other buyers.
6. In 2010, vide Case No. R.C 16.839, Mr. Simon Nzophabarushu filed a case against the Applicant in respect of the piece of land he had sold the latter in 1997. In 2012, the Tribunal of First Instance (*Tribunale de grande instance*) ruled in favour of Mr. Nzophabarushu without availing the Applicant the opportunity to cross examine the said claimant's witnesses or present oral submissions before the Tribunal, and allegedly disregarded the Applicant's written submissions on

record.

7. In 2013, despite confirming the authenticity of the Attested Affidavit availed to it by the Applicant that formed the basis of his proprietorship over the disputed piece of land, the Court of Appeal (*Cour d'appel*) upheld the decision of the Tribunal of First Instance. A subsequent appeal to the Cassation Chamber of the Supreme Court was similarly unsuccessful. The Applicant received a copy of the said judgment on 21st September 2015.
8. Aggrieved by the purported violation of his property rights, the Applicant instituted the present Reference in this Court seeking orders obliging the Republic of Burundi to comply with its obligations under Articles 6(d) and 7(2) of the Treaty, as well as Article 15(1) of the Protocol.

C. The Applicant's Case

9. The Reference is premised on the failure of the cited courts in the Republic of Burundi to acknowledge the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999, despite it having been executed by State organs.
10. The Applicant challenges the failure by the Republic of Burundi to abide by its commitment under the Treaty to the principles of rule of law, good governance and the recognition of his human rights, specifically, the right to property and peaceful enjoyment thereof.
11. The Applicant sought Declarations and Orders to which we do revert later in this Judgment.

D. The Respondent's Case

12. The Respondent's rebuttal is premised on two (2) points of law. First, it is Respondent's case that the Supreme Court decision that is in contention in the Reference was delivered on 21st June 2015, therefore any challenge in respect thereof should have been filed within two (2) months of that date so as to comply with the provisions of Article 30(2) of the Treaty. The Reference was filed on 20th November 2015.
13. Secondly, it is the Respondent's contention that this Court is not clothed with jurisdiction to determine matters decided by the Supreme Court of Burundi, its jurisdiction being restricted by Article 27(1) of the Treaty to the interpretation and application of the Treaty. The Respondent further contends that the Court does not have appellate jurisdiction over decisions of the Supreme Court of a Partner State.
14. The Respondent does, therefore, seek to have the Reference dismissed with costs.

E. Issues for Determination

15. The parties framed the following issues for determination:
 - a. Whether the Reference is time barred.
 - b. Whether this Honourable Court has jurisdiction to determine the Reference.
 - c. Whether the Respondent violated Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the Common Market Protocol, and/ or Article 14 of the African Charter.
 - d. Whether the Respondent's failure to recognize the legal and probative

value of the Attested Affidavit No. 356/99 of 27th July 199 is unlawful and violates the Applicant's rights.

- e. Whether the Applicant's right to peaceful enjoyment of property was violated.
- f. Whether the Applicant is entitled to the Remedies sought.

F. Court's Determination

Issue No. 1: Whether the Reference is time barred

16. It is not disputed by either Party herein that the specific act or decision in issue in this Reference is the judgment of the Cassation Chamber of the Supreme Court of Burundi dated 24th June 2015. This is borne out by the Parties' pleadings and submissions. What does appear to be in contention is whether the time within which the Reference should have been filed accrued on the date of delivery of the judgment or on the date it was received by the Applicant.
17. Article 30(2) of the Treaty, which prescribes the limitation period within which References may be filed in this Court, reads:

"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."
18. It was pleaded in paragraph 28 of the Reference that learned Counsel for the Applicant was served a 'Notification' of the Supreme Court judgment on 21st September 2015. The same averment was repeated in paragraph 28 of the Applicant's affidavit in support of the Reference. A translated copy of the 'Notification of Judgment' was attached to the said Reference as Annexure 2 and does confirm that, at the Applicant's request, a bailiff named Claudette Ndayiragije did on 21st September 2015 serve an advocate named Bosco Sindayigaya with a copy of the Supreme Court judgment that had been delivered on 24th June 2015. The judgment in reference was annexed to the Reference as Annexure 3.
19. We did not hear learned Counsel for the Respondent to question the authenticity of the annexed judgment, or otherwise challenge its applicability to the matter before us. Neither have we seen any rebuttal to the averment by the Applicant that he only received the said judgment on 21st September 2015. In fact, the Applicant's affidavit of 18th November 2015 does indicate that he is ordinarily resident in the United States of America thus lending credence to his request for notification of the judgment upon delivery thereof, as stated in the 'Notification of Judgment'. We are, therefore, satisfied that whereas the judgment in issue presently was dated and delivered on 24th June 2015, it was conveyed to and received on behalf of the Applicant on 21st September 2015.
20. Article 30(2) of the Treaty does address such an eventuality by providing for a limitation period within two(2) months 'of the day in which it came to the knowledge of the complainant'. Quite clearly, the foregoing provisions of Article 30(2) of the Treaty would require proceedings in respect of a cause of action that accrued on 21st September 2015 to be filed by or on 20th November 2015. It is a well-established fact herein that the Reference was filed on 20th November 2015. This is borne out by the Court Registry's stamp endorsed thereon.
21. We therefore find that the Reference was filed within the time by law prescribed,

and do hereby answer Issue No. 1 in the negative.

Issue No. 2: Whether this Honourable Court has jurisdiction to determine the Reference.

22. The Respondent contests the jurisdiction of this court to determine a matter that is premised on a decision of the Supreme Court of Burundi. In submissions, it was argued for the Respondent that the Treaty does not vest this Court with the jurisdiction to ‘revise, review or quash the decision of the Supreme Court of Burundi.’ Rather, it was opined, the Court is restricted to such jurisdiction as is encapsulated in Articles 23, 27 and 30 of the Treaty.
23. By way of rebuttal, it was the Applicant’s contention that the Reference seeks to draw to this Court’s attention the alleged violation by the Respondent State of its international obligations under the EAC Treaty ‘and other relevant international legal instruments.’ The Applicant cited the provisions of Articles 6(d) and 7(2) of the Treaty as the international obligations that had been violated by the Republic of Burundi, and sought to hold the said Partner State responsible for the decision of the Supreme Court. We understood the Applicant to contend that the Reference sought a determination by the Court of the legality of the Supreme Court’s impugned decision.
24. The Applicant did concede that the Court’s jurisdiction is spelt out in Articles 27(1) and 30 of the Treaty but, with regard to the latter provision, argued that no jurisdiction had been ‘reserved under the Treaty’ to the Partner States’ institutions or organs as stipulated in Article 30(3). Mr. Deya strongly argued that under international law the wrongful actions of State organs – including decisions of judicial organs – were attributable to the State. He cited Article 4(1) of the International Law Commission’s *Articles on the Responsibility of States for Internationally Wrongful Acts*, as well as case law from the International Court of Justice (ICJ) and African Court on Human and Peoples’ Rights in support of this preposition.
25. We have carefully considered the arguments of both Parties. As quite rightly opined by both Counsel, this Court’s jurisdiction is spelt out in Articles 27(1) and 30 of the Treaty. We reproduce the pertinent provisions thereof for ease of reference.

Article 27(1)

The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Article 30(1)

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner

State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

Article 30(3)

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

26. Whereas Article 27(1) categorically designates the jurisdiction of this Court as the interpretation and application of the Treaty, Article 30(1) provides the context within which such jurisdiction would be exercised. This Court has had occasion to address the question of its jurisdiction in numerous decided cases. It has consistently found its jurisdiction to have been sufficiently established where it was averred on the face of the pleadings that the matter complained of constituted an infringement of the Treaty. See *Hon. Sitenda Sebalu vs. The Secretary General, East African Community & Others EACJ Ref. No. 1 of 2010* and *Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 2 Others EACJ Ref. No. 1 of 2006*.
27. However, in the present Reference a judicial decision is in issue. As stated hereinabove, there is contention between the Parties as to the interplay between the locally designated jurisdiction of national courts viz this Court's jurisdiction as outlined in the Treaty. Furthermore, there is the question as to whether or not the conduct of a judicial organ can be attributable to the State, the principle of judicial independence notwithstanding.
28. On the question of state responsibility, it was argued at length by Mr. Deya that judicial organs of the State are not exempt from Article 4(1) of the Articles on State Responsibility, which provides for the attribution of their internationally wrongful actions to their respective states. Article 4(1) reads:
- “The Conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”
29. Mr. Deya did refer us to a number of decisions by international tribunals, as well as an advisory opinion by the ICJ, all of which categorically held that the conduct of any organ of the State must be regarded as an act of the State. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p. 62 at pp. 87- 88, paras. 62, 63 and Salvador Commercial Company, 1902, UNRIAA, vol. XV, p. 455 at p. 477*.
30. We have carefully considered the foregoing legal antecedents. For ease of reference, we reproduce the pertinent aspect of the advisory opinion in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (supra)*:
- “According to a well-established rule of international law, the conduct of an organ of a State must be regarded as an act of that State. ... the conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State.”
31. The foregoing legal position unequivocally holds States responsible for the conduct of their judicial organs. It follows then that we cannot fault the Applicant on the proposition that the Republic of Burundi would be responsible for the

allegedly wrongful conduct of the Burundi Supreme Court. This principle would appear to be well settled law. We do respectfully uphold it.

32. Be that as it may, we are mindful of the principle advanced in the case of *B. E. Chattin (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 282 at 288*, where state responsibility for wrongful judicial acts was limited to ‘judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient governmental action.’”
33. Thus, in the case of *Ida Robinson Smith Putnam (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.151 at 153*, it was held:
- “The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.³⁷ A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.”
34. A common thread in the *Ida Robinson Smith Putnam* case and *B. E. Chattin (USA) vs. United Mexican States* (supra) is that judicial decisions of national courts, particularly those emanating from the apex court of a country, may only be categorized as wrongful acts for purposes of state responsibility where they reflect blatant, notorious and gross miscarriages of justice.
35. Indeed, in the case of *Henry Kyarimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014*, this Court’s adjudication duty when faced with allegations of wrongful conduct attributable to a national state was espoused in the following terms:
- “In short, in adjudging an impugned state action as being internationally wrongful this Court asks itself the question not whether such action is in conformity with internal law, but rather whether it is in conformity with the Treaty. Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State’s obligation under the Treaty to observe the rule of law, it is the Court’s inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.”
36. Consequently, having found that the actions of a judicial organ are attributable to a Partner State, albeit only where they constitute blatant miscarriage of justice, we do proceed to determine whether in fact the actions of the Burundi Supreme Court can be categorized as wrongful conduct.
37. In the instant case, the Reference is substantially premised on the alleged failure by courts in Burundi to acknowledge the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999, despite its execution by State organs. The Applicant does also fault the said courts on the procedure adopted during the trial. In that regarded, it is the contention that the First Instance Tribunal ignored his written submissions; did not avail him the opportunity to

cross examine the opposite party's witnesses, and did not inform him of the date of the court proceedings, thus curtailing his right to be heard. On the other hand, it is alleged that the Court of Appeal ignored the proprietary rights conferred by the Attested Affidavit despite having duly confirmed its authenticity. The Applicant did also fault the Supreme Court's application of the law in Burundi when it affirmed the lower courts' decisions. In a nutshell, the Applicant faults the Supreme Court decision that is in issue presently for misapplying the law of Burundi; not providing the reasons that underscored its conclusions; depriving him and possibly other Burundi and EAC nationals of their land, and for creating legal uncertainty by not providing adequate guidance on the legal and probative value of Attested Affidavits.

38. The ultimate call of duty upon courts is to uphold the due process of law. Indeed, in the case of *Baranzira & Another vs. Attorney General of Burundi EACJ Ref. No. 15 of 2014*, this court did cite with approval the following definition of due process from Black's Law Dictionary:³⁸

“The notion of due process advances the conduct of legal proceedings according to established rules and principles for the protection and promotion of private rights.”

39. Litigants do expect reasonable assurance that courts and judges will determine their disputes objectively, independently and with unassailable integrity. Integrity in this context would include judicial expertise and efficiency or, stated differently, the capacity of judicial officers to deliver coherent and logical decisions to parties. Indeed, the principle of independence in the *Bangalore Principles of Judicial Conduct* requires that the judicial function be exercised ‘independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law.’³⁹ In the same vein, the principle of impartiality in the Bangalore Principles ‘applies not only to the decision itself but also to the process by which the decision is made.’⁴⁰

40. We have carefully considered the impugned judgment, as well as the rival submissions of the Parties in this matter. Without delving into intrinsic considerations of the merits of the said judgment viz a viz the principles of good governance and rule of law, at its face value we observe that the judgment depicts a cavalier approach to an extremely serious judicial function. As a basic requirement and in accordance with the principles of judicial conduct enumerated above, judgments should depict the laws or legal arguments that underscore their conclusions, stated in a coherent and logical manner. However, the judgment in issue presently depicts an unreasoned judgment that is quite dismissive of the issues raised on Appeal. It does not explain the court's deference to one position as against another; neither does it clarify the scope of the subject matter in issue before it.

41. We are mindful of the possibility that judgments from countries of a civil law background might take on a different form from those originating from common law jurisdictions. However, we take the view that the Bangalore Principles that provide minimum standards of judicial office holders are universal in outreach

³⁸ *Black's Law Dictionary (8th Ed.)* pp. 538, 539

³⁹ Value 1(1.1)

⁴⁰ Value 2

and application and are applicable to both civil and common law jurisdictions. On that premise, in the absence of coherent legal justification for the conclusions arrived at, a cursory glance at the impugned judgment would suggest a blatant disregard for due process of the law; as well as an apparent indifference to the universal standards of judicial practice embodied in the Bangalore Principles of Judicial Conduct. In our view, this is a clear injustice to the parties to the dispute.

42. We are, therefore, satisfied that the impugned decision of the Burundi Supreme Court would *prima facie* amount to wrongful practice that is attributable to the Republic of Burundi under Article 4(1) of the ILC Articles on State Responsibility. We so hold.
43. Having so found, we revert to the question as to whether or not this Court has jurisdiction to review the decisions of national courts in the East African Community (EAC), such wrongful judicial practice notwithstanding. Stated differently, is this Court appropriately adorned with the jurisdiction to review the decisions of national courts *per se*? Two issues emerge from the foregoing question: whether the Treaty acknowledges the jurisdiction of national courts at all, and if so, whether the said courts' jurisdiction would oust the jurisdiction of this court in a matter such as is before us presently.
44. On the question of domestic jurisdiction, whereas the proviso to Article 27(1) and the provisions of Article 30(3) do make reference to the reservation of certain matters to national courts 'under the Treaty', we do agree with Mr. Deya that to date no such reservation has been explicitly legislated.
45. The only reference to the jurisdiction of national courts in the Treaty is found in Article 33(1) thereof. It reads:
- Article 33(1)
Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of Partner States.
46. Our construction of that legal provision is that it entails a tacit recognition of the inherent jurisdiction of national courts to try all matters that fall within the ambit of their locally designated jurisdiction, including the mandate to determine disputes to which the Community is a party *per se*. We deduce the phrase 'disputes to which the Community is a party shall not on that ground alone be excluded from the jurisdiction of the national courts...,' when juxtaposed with the express provisions of Article 27(1), to mean that such disputes would only be excluded from the domain of national courts where there is a matter for Treaty interpretation. That would be the exclusive jurisdiction of this Court.
47. This interpretation is buttressed by the provisions of Articles 33(2) and 34 of the Treaty read together. They read as follows:
- Article 33(2)
Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.
- Article 34
Where a question is raised before any court or tribunal of a Partner State concerning the interpretation ..., that court or tribunal shall, if it

- considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.
48. Thus, whereas Article 33(2) acknowledges the inherent jurisdiction of national courts to try any matter brought before them, it subordinates their decisions on matters of Treaty interpretation to decisions by this Court. Article 34, in turn, underscores this Court's precedence on matters of Treaty interpretation by making provision for such questions to be subjected to a preliminary ruling by it.
49. We therefore find that, although the Treaty does not expressly confer or reserve national courts' jurisdiction, it does in fact recognize their inherent jurisdiction within locally designated parameters. We now revert to a determination of whether the duly acknowledged jurisdiction of national courts would oust the jurisdiction of this Court.
50. It is well recognized herein that disputes before national courts are primarily determined on the basis of applicable domestic laws rather than related rules of international law. However, the States within which they operate are often bound by international obligations that derive from international treaties and conventions to which they are party. To that extent, therefore, it is incumbent upon national courts to apply and enforce domestic laws in such a manner as would ensure compliance by the State with its international obligations. This would be their judicial function in the international legal order.
51. The question is what happens when national courts fall short of this judicial responsibility, thus engendering a breach of its international obligations by the State. This question was posed in an Article, Antonios Tzanakopoulos, *'Domestic Courts in International Law: The International Judicial Function of National Courts'*, 34 *Loyola of Los Angeles (Loy. L.A.) International & Comparative Law Review*, 133 (2011) at 153, 154, in the following terms:
- “But the question remains: who decides authoritatively, with binding force, whether the domestic court has – in any given case – lived up to the expectation of being the ‘natural judge’ of international law? Who decides whether in the instance the domestic court settled the dispute/ enforced the law, or rather created a dispute by not enforcing the law? The answer would have to be: States themselves do through the introduction of a third-party instance at the international level to ‘supervise’ the domestic court.”
52. In the same Article (at p. 167), it was opined:
- “This means that the international law question can effectively be raised and answered at the domestic level. When the outcome is deemed unsatisfactory, international procedures will be called upon to review the ‘facts’ (including potential decisions of the domestic court) and determine whether a breach of an international obligation has taken place or whether the law has moved on. The process then at the international stage is merely subsidiary or supervisory; intervention will be limited to when the domestic process fails to address the issues appropriately and conform to the international obligation.”
53. It does seem to us that States purposively create courts at international and regional level that would play a complimentary role to national courts with specific regard to their international obligations. Within the EAC, this Court

was set up to specifically ensure adherence to the law in Treaty interpretation, application of and compliance with the Treaty.⁴¹ The Partner States do, in turn, obligate themselves to achieve the objectives of the EAC with due regard to the principles outlined in Articles 6 and 7 of the Treaty. The principles in context presently include adherence to the rule of law and good governance.

54. In the event then, as in the present case, that a national court that is mandated to enforce the law in a Partner State is alleged to have violated the domestic law of such State, as well as related Treaty obligations; would a court that is mandated to ensure adherence with the law in matters of Treaty compliance be exempted from determining the respective Partner State's compliance with its Treaty obligations? Would such a matter be ousted from the jurisdiction of this Court? We think not. Quite clearly, the foregoing Article postulates that where a domestic adjudication process is alleged by any of the parties thereto to have been unsatisfactory, an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international obligations.
55. In the instant case, the Supreme Court's adjudication process and the resultant judgment have been alleged to violate Articles 6(d) and 7(2) of the Treaty, as well as Articles 15(1) and 14 of the Protocol and African Charter respectively. Quite clearly, this Court does have jurisdiction to consider the said proceedings and judgment with a view to determining whether they contravene Burundi's obligations under Articles 6(d) and 7(2) of the Treaty.
56. That is not at all to suggest, as has been intimated by the Respondent herein, that this Court would be invoking an appellate jurisdiction over the Burundi Supreme Court. There is a clear distinction between what constitutes an appellate review of a subordinate court's decision, and the dialectical judicial approach that is synonymous with the international review of domestic judgments. Thus, in an Article, Robert D. Ahdieh, *'Between Dialogue and Decree: International Review of National Courts'*, 2004, New York University (N.Y.U) Law Review, p. 2029 at 2045, 2046, appellate review was defined in the following terms:
- "I identify four core characteristics of "appellate" review. First, and perhaps foremost, is the authority of an appellate court to undo the determinations of law, and sometimes even the findings of fact, reached by the court subject to review. Following naturally from this phenomenon is the binding nature of that review. Minimally, the judgment of an appellate court binds the trial court in the case at bar. More expansively, decisions on appeal consequently have some formal or informal *stare decisis* effect, binding lower courts in future cases as well. The pattern of review characteristic of the appellate interaction of courts, moreover, is largely unidirectional. With notable exceptions, appellate judgments are not, in the ordinary case, subject to substantive critique in a trial court. Finally, appellate review is constrained in its reach yet expansive in its depth. Appellate review is rarely *de novo*. Factual findings are subject to an exceedingly deferential standard of review, if they are subject to review at all. As to questions of law, however, courts of appeal possess relatively plenary powers of review and reversal."

⁴¹ See Article 23(1) of the Treaty.

57. For the avoidance of doubt, the foregoing definition highlights the following characteristics of appellate review:
- i. Authority to undo the determinations of law (and sometimes of fact too) of the lower court.
 - ii. The binding nature of that review on the lower courts.
 - iii. The review is largely unidirectional i.e. whereas the appellate court can critique the lower court, the reverse is not usually tenable.
 - iv. The constrained reach of appellate review i.e. it is rarely *de novo*.
58. This, most certainly, is not the approach being adopted in the instant case. On the contrary, the international review of national courts' decisions that is in issue presently was explained in the same Article⁴² explained as follows:
- “If there is to be some occasion for international review of national courts - some transnational judicial engagement with some dimension of both review and power - what should be its precise character? ... How might those ends be achieved without unnecessarily challenging values of national sovereignty, and thereby risking a backlash against relevant international regimes? one can identify three essential features of an effective pattern of international engagement with national courts: (1) the operation of a bipolar power dynamic, in which both judicial participants possess some capacity for control, and hence power, but neither can assert complete authority over the other; (2) the presence of alternative, and perhaps competing, legal and institutional perspectives; and (3) the existence of structures designed to encourage and facilitate adjudicatory continuity.”
59. From the foregoing literature, it becomes apparent that the international review of national courts entails the non-subjugation of national courts to international courts or tribunals, as would be the case in a typical appellate review. Rather, it is characterized by the application of distinct legal perspectives: whereas national courts enforce domestic laws, international courts approach the same set of circumstances from the perspective of states' international obligations. Perhaps, most importantly, an international review is a trial *de novo* in the context of the international or treaty obligations the international court seeks to enforce. It is not binding upon the national courts as would be the case of a typical appeal, neither does it form *stare decisis* in domestic jurisdictions as would a decision of national states' apex courts. Simply stated, the international review of national courts' decisions is intended to highlight the international legal issues inherent therein with a view to engendering a harmonized legal position in respect thereof.
60. Before we take leave of this issue, we also wish to address ourselves to the decision of this Court in the case of *East African Civil Society Organisations Forum vs. The Attorney General of Burundi & 2 Others EACJ Ref. No. 2 of 2015*, where it was held that the court did not have jurisdiction to reopen the decisions of national courts to determine their compliance with either domestic laws or the Treaty. We are constrained to observe that what was sought in that Reference was the revision, review and quashing of the decision of the Constitutional Court

⁴² Ahdieh, Robert D, 'Between Dialogue and Decree: International Review of National Courts', 2004, N.Y.U Law Review, p. 2029 at 2087, 2088

of Burundi. That, to our minds, sought to attribute to this Court an appellate jurisdiction characterized by the authority to undo the determinations of law of the Constitutional Court. For the avoidance of doubt, we do reiterate here that this Court has not been granted appellate jurisdiction as envisaged in Article 27(2) of the Treaty. Its jurisdiction in this matter is limited to such international review of national courts' decisions viz a viz Partner States' Treaty obligations as would engender the Court's function under Article 27(1) of the Treaty.

61. We would, therefore, disallow the Respondent's contention that by determining the present Reference, this Court would be usurping or undermining the appellate jurisdiction of the Burundi Supreme Court. We are satisfied that this is a matter that is justiciable before us under Articles 23(1), 27(1) and 30(1) of the Treaty. We do, therefore, answer Issue No. 2 in the affirmative.

Issues 3, 4 & 5:

62. In this Reference it is not readily apparent from the pleadings whether the Applicant questions the inconsistency of the impugned judgment with Burundi internal laws, as an indication of the Respondent State's contravention of the said Partner State's Treaty obligations, or rather, contests the legality of the said decision purely in relation to Burundi's internal law. Whereas, in submissions, the Applicant addresses this Court at length on the alleged non-compliance of the said judgment with Burundian Law No. 1/004; our construction of paragraphs 30, 33 and 34 of the Reference is that the Applicant purports not to challenge the impugned judgment's inconsistency with the internal law of Burundi *per se*, but rather, faults the Respondent State for non-compliance with its international obligations under the Treaty, the Protocol and the African Charter.

63. Given the lack of clarity highlighted above, for completeness, we propose to address both eventualities, that is, the property rights drawn from Burundi's international obligations or Community law, as well as those derived from her internal laws. We propose to address the first scenario under Issue No. 3, and the second under Issues 4 and 5.

Issue No. 3: Whether the Respondent violated Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the Common Market Protocol, and/ or Article 14 of the African Charter.

64. In *B. E. Chattin (USA) vs. United Mexican States* (supra)⁴³, it was opined that, for an international claim to be sustainable, a court or tribunal was required to determine '*whether there exists an injury and whether the act which causes it violates any rule of international law*'. With specific regard to impugned judicial acts, as is the case presently, there was the additional prerequisite for a finding as to whether such act involved bad faith, willful neglect of duty, or very defective administration of justice. Thus, in principle, an injury arising from a decision that contravenes the Treaty would constitute a sustainable claim or cause of action before this Court.

65. Therefore, to the extent that the Applicant herein contends that his property rights have been violated as a result of a Supreme Court decision that allegedly contravenes Articles 6(d) and 7(2) of the Treaty; we are satisfied that the Applicant has established a cause of action or sustainable international claim

⁴³ At p. 310

against the Respondent State. Whether this claim is, in fact, duly proven by the Applicant is an entirely different matter.

66. The burden of proof applicable to international claims was stated in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)*, *Judgment, ICJ Reports 2007, p.43, para. 203* as follows:

“On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*⁴⁴, “it is the litigant seeking to establish a fact who bears the burden of proving it”.

67. Indeed, the Appellate Division of this Court has addressed the question of burden of proof in like vein. Thus, in *Henry Kyarimpa* (supra), the following proposition in Shabtai Rosenne, *The Law and Practice of the International Court*, 1920 – 2005, Vol. III, Procedure, p.1040 was cited with approval:

“Generally ... the court will formally require the Party putting forward a claim or particular contention to establish the elements of fact and of law on which the decision in its favour is given.”

68. Relatedly, in *Bosnia & Herzegovina vs. Serbia & Montenegro* (supra), the International Court of Justice (ICJ) re-asserted the standard of proof in international claims as follows:

“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.⁴⁵ The same standard applies to the proof of attribution for such acts.”

69. Before progressing further with this issue, we deem it necessary to underscore the gist of the principles against which the Applicant would have us determine the Republic of Burundi’s alleged non-compliance with its Treaty obligations. We reproduce the specific provisions he purports to invoke for ease of reference:

Article 6 of the Treaty

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(d) good governance including adherence to the principles of democracy, rule of law ... as well as the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and People’s Rights.

Article 7(2) of the Treaty

The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law ... and the maintenance of universally accepted standards of human rights.

70. With regard to Articles 6(d) and 7(2) of the Treaty, the Applicant did specify the obligations that have been violated as the principles of rule of law and good governance; while the provisions of the Protocol and African Charter invoked

⁴⁴ *Judgment, ICJ Reports 1984, p. 437, para. 101*

⁴⁵ See *Corfu Channel (United Kingdom vs. Albania)*, *Judgment, ICJ Reports 1949, p. 17*

herein clearly point to the Applicant's purported property rights. We deem it necessary to re-assert our understanding of the principles enumerated above for purposes of clarity.

71. In *Baranzira Raphael & Another* (supra), the definition of the principle of rule of law encapsulated in a *Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*⁴⁶ was cited with approval by this Court. It reads:

“It refers to the principle of governance to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.”

72. Similarly, in the *Baranzira Raphael* case, the following definition of ‘good governance’ by the United Nations Development Program (UNDP)⁴⁷ was cited with approval:

“The existence of effective mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.”

73. We must state forthwith that we find nothing in the Reference to suggest that effective mechanisms, processes and institutions through which the citizens may exercise their legal rights are non-existent in Burundi, so as to impute lack of good governance. The complaint herein is premised on the allegedly wrongful adjudication of a dispute by the Burundi Supreme Court. This would suggest that the Applicant did have the opportunity to submit a dispute to the right institution – the judiciary – for determination. The existence of the necessary governance framework for the resolution of disputes in Burundi cannot therefore be questioned, neither can we fault the Respondent State in that regard. The improper discharge of the said institution's function is an entirely different matter. We would, therefore, disallow the assertion that the Republic of Burundi contravened the principle of good governance as enshrined in Articles 6(d) and 7(2) of the treaty. We so hold.

74. With regard to the principle of rule of law, on the other hand, the Applicant did dwell at length on the shortfalls of the impugned judgment. He did also allude to the failure by the Respondent State to redress the violation of his property rights and comply with its international obligations.⁴⁸ He thus imputes absence of the rule of law from these circumstances. The question that lingers in our minds, however, is whether he furnished this Court with sufficient proof of his allegations.

75. It seems to us that the elements of rule of law that are in issue before us are, first,

⁴⁶ UN Doc S/2004/616 (2004), para. 6

⁴⁷ Cited in an Article published by the International Fund for Agricultural Development (IFAD), ‘*Good Governance: An Overview*’, IFAD Executive Board – 67th Session, September 1999, p.6.

⁴⁸ See paragraph 29 of the Reference.

the equal enforcement and independent adjudication of laws that are consistent with international human rights norms and standards; and secondly, measures that underscore the supremacy of the law, equality before the law, fairness in the application of the law, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

76. No evidence whatsoever was availed to the Court as to the inconsistency of the property laws in Burundi viz a viz international human rights standards and norms. The property laws were not availed to us at all so as to enable the Court make that determination. Consequently, any inferences of unequal enforcement of the law, non-supremacy of the law or inequality before the law remain unproven and are, therefore, unsustainable.

77. With regard to the residual elements of rule of law highlighted above, we find the following approaches by international tribunals most instructive. In the case of *L. F. H. Neer & Pauline Neer (USA) vs. United Mexican States, 1926, UNRIAA, Vol. IV, p. 60 at 62*, it was held with regard to the scope of an international tribunal's inquiry:

“It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities of Guanacevi might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering Mexican law acted in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree to improper action, or (2) that Mexican law rendered it impossible for them properly to fulfill their task.”

78. In the case of *Cotesworth and Powell, 1875, British Columbia Commission*, it was observed that ‘a plain violation of the substance of natural justice, as for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice.’

79. Finally, in the *B. E. Chattin* case, it was persuasively opined:

“There are certain defects in procedure that ... are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not engender international liability; the latter do, since such liability arises from the *decision* which is iniquitous because of such defects.”

80. In the present Reference, although we did find that a cavalier judicial approach was depicted in the impugned judgment, we do not find sufficient proof of material on record that would support a finding that the Bench that adjudicated the matter and delivered the said judgment contravened the principle of rule of law on account of absence of judicial independence. The record of proceedings of the Supreme Court would have been pivotal in proving the incidence of unfairness, bias or arbitrariness in the application of the law as an indication of lack of independence or procedural impropriety. The Applicant did not avail the court with the record of proceedings. Such record would have also been useful to evaluate the conduct of the proceedings against Burundi's substantive and procedural laws so as to enable this Court determine the Supreme Court's adherence to the rule of law. The laws that the Applicant sought to invoke in that context were not availed either.

81. Even more specifically, the record of proceedings would have informed this Court's findings as to whether the Supreme Court administered Burundian law in an outrageous way, in bad faith, with willful neglect of their duties; or conducted the proceedings in blatant violation of the substance of natural justice, such as would engender international liability. Whereas the abuse of the Applicant's right to be heard and be availed an opportunity for cross examination of witnesses was indeed raised in pleadings, we find that insufficient evidence was adduced in proof thereof. In the same vein, whereas we do share the Applicant's concern about the uncertainty surrounding the property law regime in Burundi given the absence of clarity in the impugned judgment, we would not go so far as to conclusively state that it violated the element of legal certainty in the absence of proof of the property laws that provided the legal framework within which the decision was made, on the one hand, or legal antecedents from Burundi that reveal what the position of the law had been previously.
82. The onus lay with the Applicant to present 'evidence that was fully conclusive' in proof of the elements of the rule of law principle highlighted above. As it is, beyond the impugned judgment itself, no such evidence was adduced. We would, therefore, disallow any liability in rule of law in that regard.
83. With regard to the impugned judgment itself, we do find that the refusal or omission by any court to provide the legal reasoning and justifications that underscore its conclusions does constitute unacceptable judicial conduct and willful neglect of the court's duty. Where such court is the apex court of the land, such an unconventional approach to adjudication entails an unacceptable affront to recognized standards of judicial conduct in so far as it negates the opportunity to coherently lay down *stare decisis* to guide the lower courts. Nonetheless, we do recognize that a decision may only be rendered iniquitous and, therefore, susceptible to international liability where it is the culmination of such procedural defects as would make it impossible for it to be just. *See B. E. Chattin (supra)*.
84. In the instant case, in the absence of the record of proceedings, we are unable to determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether or not the resultant decision was iniquitous and thus engendered the Respondent State's legal liability. We do, therefore, find that the Applicant has not satisfactorily proved the violation of the principle of rule of law enshrined in Articles 6(d) and 7(2) of the Treaty. We so hold.
85. On the other hand, Article 15(1) of the Protocol and Article 14 of the African Charter relate to the Applicant's purported property rights. They read:
- Article 15(1) of the Protocol
The Partner States hereby agree that access to and use of land and premises shall be governed by the national policies and laws of the Partner States.
- Article 14 of the African Charter
The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.
86. Both legal provisions allude to the property rights encapsulated therein being premised on Partner States' national laws and policies. The question of the legal

status of Attested Affidavits in Burundi raised in Issues 4 and 5 hereof does also relate to the property rights of the Applicant as stipulated in Burundi's internal laws. We do, therefore, propose to address the Respondent State's compliance with Article 15(1) of the Protocol and Article 14 of the African Charter when considering the ensuing issues.

Issues 4 & 5: Whether the Respondent's failure to recognize the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999 is unlawful and violates the Applicant's rights & Whether the Applicant's right to peaceful enjoyment of property was violated.

87. The impugned judgment herein is faulted by the Applicant for not equating an Attested Affidavit to a notarized deed under Article 46 of Burundi Law No.1/004; for not giving clarity on legality of Tribunals of Residence (*Tribunax de residence*) that hitherto executed Attested Affidavits, and for not clarifying the law applicable to Attested Affidavit. Mr. Deya opined that the impugned judgment had created a lacuna in Burundian property law and violated his client's property rights, including the right to peaceful enjoyment of his property.
88. However, the Applicant does not detail with specificity which property laws he considers to have been contravened by the impugned judgment, or indeed avail any such laws to the Court for scrutiny. In submissions, learned Counsel for the Applicant simply makes reference to 'the Burundian legal system' and 'the law and practice applicable in the Respondent State at the time', but does not refer the Court to the specific laws he alludes to or the manner in which the impugned judgment violates them.
89. The only internal law that is specifically referred to in submissions is Law No.1/004 of Burundi. Reference to it in the impugned judgment arises at p. 3 thereof. The Supreme Court addressed the Appellant's complaint as follows:

"It follows from this provision (Article 46 of Law No. 1/004) that the notarized deed has evidential value that confers undisputed character on the facts evoked and established by the notary except where the authenticity is challenged for forgery. This argument (ground of appeal) is baseless because Law No. 1/004 of 9 July 1996 on the organization and functioning of the Notary profession and Notaries Statute does not confer authenticity to the attested affidavits established by Tribunals of residence (*Tribunax de residence*)."
90. Without the benefit of other internal laws that might have established the nexus between authentic notarized deeds and attested affidavits, we are unable to fault the legality of the Supreme Court's decision on that issue. Needless to say, the onus was on the Applicant to establish this nexus and prove its case to the required standard. In our considered view, he fell short of the standard of proof that was required of him. We would, therefore, answer Issue No. 4 in the negative.
91. Having so found, it follows that the Applicant's alleged property rights remain unproven. Given that we were not referred to any Burundian property law that would engender the Applicant's proprietary interest in the disputed property, his claims to the said property remain unproven.
92. Even more importantly, we are constrained to observe that it was averred in

paragraph 14 of the Reference that the Applicant ‘sub-divided the consolidated parcel of land and sold them out to new buyers.’ In paragraph 15, it is further averred that following the said sale, the Registrar of Lands (*Conservateur des Titres Franciers*) annulled the Applicant’s certificate of title to the property and issued new certificates of title to the new buyers. It would appear then that the Applicant had relinquished all legal title to the disputed property to new buyers. What then are the property rights he purports to reserve for himself and alleges were violated?

93. We did not find any evidence whatsoever of any subsisting proprietary interest vested in the Applicant. Consequently, we do not find any rights vested in the Applicant either with regard to either the disputed property or to the purported peaceful enjoyment thereof; neither do we find any violation herein of Article 15(1) of the Protocol and Article 14 of the African Charter. We so hold.

Issue No. 6: Whether the Applicant is entitled to the Remedies sought.

94. The remedies sought by the Applicant include Declarations, Orders, costs of and incidental to the Reference and any further Orders as deemed necessary by the Court. He sought Declarations that:

- a. The Respondent’s actions and omissions are unlawful and an infringement of Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol, and Article 14 of the African Charter.
- b. The Respondent violated the property rights of the Applicant, and his heirs and assigns, and in so doing violated the commitments that it made under the Treaty, the Protocol and the African Charter.

95. We did not find any proof of infringement of either Articles 6(d) or 7(2) of the Treaty, or Articles 15(1) and 14 of the Protocol and African Charter respectively; neither were any purported property rights attributable to the Applicant established before us.

96. The Applicant did also seek Orders directing that:

- a. The Respondent restores the property rights of the Applicant and his heirs or assigns.
- b. The Respondent files before this Court not later than 60 days from the date hereof, a progress report on remedial mechanisms and steps taken towards the implementation of the Orders of this Court.
- c. The costs of and incidental to this Reference be met by the Respondent.

97. Having held as we have with regard to non-proof of the Applicant’s purported property rights; we decline to grant Orders for the restoration of unproven rights or a progress report in respect thereof.

98. With regard to the question of costs, we are mindful of Rule 111(1) of this Court’s Rules that postulates that costs should follow the event unless the Court, for good reason, decides otherwise. In the instant case the Reference has not succeeded so ordinarily the costs thereof would be to the Respondent. However, we find that the matters that were canvassed herein were of grave importance to the advancement of Community law. We therefore deem it just to order each Party to bear its own costs.

Conclusion

99. In the result, the Reference is hereby dismissed. Each Party shall bear its own costs. We so Order.

D. Deya, Counsel for the Applicant

N. Kayobera & E. Mwansasu for the Respondent

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First Instance Division

Reference No. 12 of 2015

**James Alfred Koroso v The Attorney General of the Republic of Kenya,
The Principal Secretary, Ministry of State for Provincial Administration and
Internal Security of the Republic of Kenya**

Coram: I. Lenaola, DPJ; F. Ntezilyayo & F. Jundu, JJ
March 24, 2016

Rule of law - Good governance - Whether the Court had jurisdiction - Whether the Reference was time barred- Principle of non-retroactivity not applicable - Non-compliance with lawful court orders of national courts- Damages- Pecuniary obligations

Articles 6(d), 7(2), 23(1), 27(1), 30(1), 44,111 of the East African Community Treaty

In 1993, the Applicant was arrested by Kenyan police, beaten physically, sexually assaulted and charged with the offence of robbery with violence. Upon his acquittal in 1996, he filed *Civil Case No. 2966 of 1996* in the High Court of Kenya for false imprisonment, malicious prosecution and violation of constitutional rights seeking general and exemplary damages. On 22nd February, 2008 an award of Ksh. 31,576,584/= was granted in favour of the Applicant. When the 1st Respondent's failed to pay the decretal sum, the Applicant filed *Judicial Review Application No. 44 of 2012* on 20th February, 2012 and an order for mandamus was issued on 19th March, 2013 compelling the 1st Respondent to pay to the Applicant Ksh. 21,000,000/= plus interest. A Decree and Certificate of Order for Ksh. 28,475,737/= was issued on 25th March, 2013. Consequently, repeated demands for payment were made and warrants of arrest issued between May 2013 and July 2014.

The Applicant filed this Reference averring that the failure to pay the decretal sum had caused him irreparable losses and damages to him, his immediate family and business partners. He sought *inter alia*: a declaration that the Respondents had violated Articles 6(d) and 7(2) of the Treaty; liquidated damages in the sum of US\$ 86,465,402,256/=; plus, the outstanding decretal sum with interests and costs. With regard to damages, the Applicant averred that the Court was empowered to impose pecuniary obligations in execution of its judgment

In their response, the Respondents submitted that: the Applicants complaint was in the nature of torts, which was the preserve of the jurisdiction of the National Courts in Kenya: they were aggrieved by all the judicial decisions, had appealed and a stay of execution of all orders issued by the High Court had been granted by the Court of Appeal of Kenya on 22nd July, 2014. Furthermore, the damages and losses claimed by the Applicant were too remote as the acts and decretal amount complained of arose from events that occurred between 1993 and 1996 before the entry into force of the Treaty. Pursuant to the principle of non-retroactivity, the Court had no jurisdiction to determine this Reference.

Held

1. Non-compliance by the Respondent of a Judgment, Decree and Certificate of Order issued by the High Court of Kenya on 22nd February, 2008, 17th April, 2008 and 8th December, 2011 respectively all occurred when the EAC Treaty had entered into force. The Applicant's claim is also based on the Judgment, Decree and Certificate of Order in *Judicial Review of Application No. 44 of 2012* issued on 19th March, 2013 and Decree and Certificate of Order on 25th March, 2013 as well as the various Court Orders by way of Notices to Show Cause and Warrants of Arrest to the 2nd Respondents from 2013 to 2014. The principle of non-retroactivity does not therefore apply. However, some actions imputed to the Respondents which were time barred and could not be entertained.
2. Whereas the initial claim before the High Court of Kenya relate to events between 1993 and 1996, any orders issued by the Courts of Kenya prior to 21st May, 2014 are out of time. However, the defiance by the Respondents of the Notice to Show Cause of 3rd July 2014 and the Warrant of Arrest dated 9th July, 2014 were within the time prescribed in Article 30(2) of the Treaty as the Reference was filed on 21st July, 2014.
3. The fact that the matter of non-compliance with a Notice to Show Cause dated 3rd July 2014 and a Warrant of Arrest dated 9th July 2014 are currently before the Court of Appeal of Kenya does not bar the Applicant from accessing this Court under Article 30(1) of the Treaty. This Court has jurisdiction to entertain and determine the Reference given that the Applicant's allegation is that there is violation of Article 6(d) and 7(2) of the Treaty. The Respondents actions and conduct were not in pursuance with the principles of good governance and rule of law stipulated in the Treaty.
4. Whereas *Civil Case No. 2966 of 1996* concerned false imprisonment, malicious prosecution, loss of business and damages *inter alia*, the cause of action in the current Reference is centred on violation of Articles 6(d) and 7(2) of the Treaty. Therefore, the issues for determination in the two matters are completely different although based on the same set of facts.
5. The judgment in *Civil Case No. 2966 of 1996* was rendered by a competent court and there was an expectation that in a country governed under the rule of law, all court orders, however painful and whatever the views of the Respondents, ought to have been respected and complied with unless overturned by an appeal or otherwise reviewed.
6. The imposition of "pecuniary obligation" in Article 44 refers to matters in pursuance of an interpretation and application of the provisions of the Treaty and nothing else. Pecuniary obligations include costs a "judgment of the Court" mentioned in Article 44 and takes the import of Articles 23, 27 and 30 of the Treaty, that it is limited to interpretation and application of the provisions of the Treaty and their compliance thereof. Pecuniary obligations include costs. The Applicant is entitled to a ¼ of the costs.

Cases cited

Emmanuel M. Mjawasi & Ors v Attorney General of Kenya, [2005-2015] EACJLR 409 Appeal No.4 of 2011 (Distinguished)

JUDGMENT

A. Introduction

1. This Reference has been filed by the Applicant in this Court on 21st July, 2014 under Rule 24(1) and (2) (a), (b), (c), (d) and (e) of this Court's Rules of Procedure (hereafter "the Rules").
2. The Applicant is a natural person, a Tanzanian citizen and a resident of Moshi in the United Republic of Tanzania. His address for service for the purpose of this Reference is care of Mr. Selemani Likavage Kinyunyuu, Advocate and Mr. Rashid Salim Rashid, Advocate, both of KNR Legal, Tanzania, Plot No. 7, Block B, Sokoine Road (Corner of Jacaranda Street above Blue Financial Services), P.O. Box 249, Arusha, Tanzania.
3. The 1st Respondent is the Attorney General of the Republic of Kenya and he is sued in his capacity as the principal legal advisor of the said Government. His address for service of this Reference is care of the Attorney General's Chambers, Sheria House, Harambee Avenue, P.O. Box 30112-00100 Nairobi, Kenya.
4. The 2nd Respondent is the Principal Secretary, Ministry of State for Provincial Administration and Internal Security of the Government of the Republic of Kenya. His address for service for the purpose of this Reference is Harambee House, P.O. Box, 30510, Nairobi, Kenya.

B. Representation

5. Mr. Rashid Salim Rashid, Learned Counsel represented the Applicant. On the other hand, the Respondents were represented by Mr. Charles Mutinda, Mr. Emmanuel Bitta and Ms. Wambui Ng'ang'a, Learned Counsel.

C. The Applicant's Case

6. The Applicant's Statement of Reference is supported by his own evidence and that of his two witnesses who adduced evidence before this Court.
7. It is his case that having been lured into Kenya by the Kenyan police in 1993, he was tortured, beaten physically and sexually assaulted in various Kenyan police stations. He had allegedly been arrested from Kenya-Tanzania border and thereafter charged with the offence of robbery with violence in *Criminal Case No. 73 of 1993* at Kiambu Resident Magistrate's Court in Kenya. The said Court, however, found that the Applicant had no case to answer and acquitted him.
8. Upon his acquittal and release from incarceration, the Applicant filed *Civil Case No. 2966 of 1996* at the High Court of Kenya against the 1st Respondent for false imprisonment and malicious prosecution, violation of constitutional rights, general and exemplary damages. During the entire hearing of the said suit, the 1st Respondent failed to bring his witnesses to defend him despite repeated adjournments to allow him to do so and Judgment was eventually entered in favour of the Applicant on 22nd February, 2008.
9. A Decree and a Certificate of Order thereon were issued by the said Court against the 1st Respondent on 17th April, 2008 and 8th December 2011 respectively, the latter ordering the 1st Respondent to pay the Applicant the sum of Ksh.31,576,584/= being the decretal sum plus interest thereon. Further, on 18th November, 2011, the said Court issued a Certificate of Taxation in favour of the Applicant in the sum of Ksh. 362, 007/= against the 1st Respondent.

10. Despite the Applicant's repeated demands for payment by the 1st Respondent, the latter has refused or failed to do so in respect of the mentioned Decree and Certificate of Order prompting the Applicant to file a *Judicial Review Application No. 44 of 2012* against the Respondents in the High Court of Kenya on 20th February, 2012. On 19th March, 2013, the said Court entered Judgment in favour of the Applicant and issued orders of mandamus compelling the 1st Respondent to pay to the Applicant Ksh. 21,000,000/= plus interest thereon. Further, the Applicant obtained a Decree and Certificate of Order in the sum of Ksh. 28,475,737/= in his favour against the Respondents from the said Court on 25th March, 2013.
11. Again, despite the Applicant's repeated demands for payment, the Respondents have refused and failed to pay him to date. Further, various Notices to Show Cause were issued by the said Court against the Respondents to wit on 7th May, 2013, 16th May, 2013, 8th August, 2013, 22nd October, 2013, 22nd January, 2014, 12th February, 2014, 24th February, 2014, 12th March, 2014, 8th April, 2014, 5th June, 2014, 3rd July, 2014 and 9th July, 2014 to no avail. The said Court had also issued Warrants of Arrest on 12th February, 2014 and 9th July, 2014 against the 2nd Respondent to no avail. The Applicant on 20th June, 2014 then wrote to the Hon. Chief Justice of Kenya complaining about non-compliance of the Court Orders by the Respondents. The said letter has not been acted upon to date.
12. The Applicant contends that, in his effort to seek for payment, he had also filed at the High Court of Tanzania, an Application of Enforcement of Foreign Judgment, which is *Application No. 251 of 2013*. However, the same was withdrawn on 15th February, 2014 following a decision of a Kenyan High Court Judge that payment would be made immediately, which was not done. He further contends that the Respondents are acting with bias and segregation towards him in refusing to pay him the decretal sum aforesaid and have threatened his liberty and safety as per his report to the police of Tanzania at Dar-es-Salaam.
13. The Applicant also alleges that the matter has caused suffering to him, his immediate family, clan, business partners, friends and religious institutions all of whom depended on him and will continue to cause him irreparable losses and damages thereto. In addition, the Applicant further alleges that, his second spouse, one Lightness Mary died, his first spouse's business went astray, his livelihood has been permanently derailed and that his properties are earmarked for auction for failure to repay a bank facility.
14. The Applicant furthermore contends that the acts and conduct of the Respondents are an infringement and violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (the "Treaty") in particular the principles of good governance, rule of law, accountability, transparency and social justice.
15. Based on all the aforesaid matters, the Applicant prays for Judgment and Decree as follows:
 - a) A declaration be issued that the Respondents have violated the Treaty for the Establishment of the East African Community;
 - b) The Respondents be ordered to pay liquidated damages in the sum of US\$ 86,465,402,256/=;
 - c) The Respondents be ordered to pay the Applicant US\$ 5,000,000/= as

- general damages;
- d) The Respondents be ordered to pay the Applicant the decretal sum in Civil Suit No. 2966 of 1996, Ksh. 28,475,737.11/=;
 - e) The Respondents be ordered to pay interest at commercial rate on the decretal sum from the date of Judgment to the date of satisfaction thereof;
 - f) The Respondents be ordered to pay costs; and
 - g) Any other relief deemed just and equitable.

D. The Respondents' Case

16. In their Reply, supporting Affidavits and evidence of their sole witness before this Court, the Respondents have vigorously contested and opposed the Reference. Notably, they maintain that the Court has no jurisdiction to entertain and determine the Reference and that the same in any event is time barred under Article 30(2) of the Treaty.
17. The above position notwithstanding, the Respondents admit that the Judgment, Decree and Certificate of Order were in favour of the Applicant in *Civil Case No. 2966 of 1996* by the High Court of Kenya at Nairobi for false imprisonment, malicious prosecution, general and exemplary damages and violation of constitutional rights. Being aggrieved thereby, the Respondents issued a notice of appeal on 4/3/2008 to the Court of Appeal of Kenya and filed *Civil Appeal No. 163 of 2014* on 1st July, 2014 thereto.
18. The Respondents further admit that the Applicant had filed *Judicial Review Application No. 44 of 2012* in the High Court of Kenya at Nairobi and the said Court in its Judgment issued an Order compelling the Respondent to pay the Applicant the decretal amount in *Civil Case No. 2966 of 1996* within 30 days. In addition to the said Judgment, the said Court also issued a Decree and Certificate of Order thereto. The Respondents are aggrieved by all these decisions and are pursuing the appeal process. The Respondents also applied to the Court of Appeal of Kenya for stay of execution of all Orders issued by the High Court of Kenya in *Civil Case No. 2966 of 1996* which order was granted on 22nd July, 2014. The Respondents contend therefore that they have at all times complied with the Notices to Show Cause and Warrants of Arrest issued by the High Court of Kenya in respect of *Civil Case No. 2966 of 1996*.
19. The Respondents in that context deny any violation of the provisions of the Treaty in particular Articles 6(d) and 7(2) thereof and in pursuing an appeal at the Court of Appeal of Kenya, they contend that the same is in furtherance of good governance and the rule of law under the Treaty. Further, the Respondents deny allegations of bias and segregation raised by the Applicant as a reason for not being paid to date.
20. The Respondents strongly contend that the damages and losses claimed by the Applicant in the Reference are too remote in this matter. In any event, they contend that the acts and resultant decretal amount complained of by the Applicant arose from events in 1993 to 1996 before the coming into force of the Treaty hence; this Court has no jurisdiction to determine this Reference based on the principle of non-retroactivity. The Respondents contend further that the Applicant' Reference was filed in bad faith as it has not disclosed some basic material facts which is an abuse of Court process and against the principles of

good governance and rule of law. Such matters include the appeal process and stay of execution order pursued by the Respondents.

21. Based on the aforesaid contentions, the Respondents pray for the dismissal of the Reference with costs.

E. Scheduling Conference

22. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 5th February, 2015 where all the Parties were present and agreed that:

1. There is Judgment and Decree in favour of the Applicant in Civil Case No. 2966 of 1996;
2. The Applicant has not been paid the decretal sum to date;

23. There were also issues of disagreements as follows:

- a) It is admitted that the High Court of Kenya issued a Certificate of Order in Civil Case No. 2966 of 1996, but the amount is disputed; and
- b) The judicial Review Judgment and the Certificate of Order were issued but their validity is disputed by the Respondents;

24. On the other hand, the following points were framed for determination by the Court:

1. Whether the Court has jurisdiction to entertain the Reference;
2. Whether the Reference is time-barred;
3. Whether the actions of the Respondents are in violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
4. Whether the issues in this Reference are similar to the issues in Nairobi *HCCC No. 2966 of 1996*; and
5. Whether the Applicant is entitled to the reliefs sought.

F. Determination of Issues by the Court

Issue No.1: Whether this Court has Jurisdiction to Entertain the Reference

25. The Applicant and the Respondents have each submitted on the above named issue as reflected below:

The Applicant's Submissions

26. The Applicant in his submission vigorously contends that this Court has jurisdiction to entertain the Reference.
27. Firstly, he contends that the Applicant as a natural person, a citizen of Tanzania and a resident of Moshi in the United Republic of Tanzania has right of access to this Court under Article 30(1) of the Treaty. He avers that in this Reference, he is also challenging the Respondents' acts and both are officials of the Republic of Kenya, a Partner State in the East African Community.
28. Secondly, the Applicant contends that he is seeking interpretation of Articles 6(d) and 7(2) of the Treaty which allegedly have been breached by the Respondents. He argues that the Court under Article 27 of the Treaty has jurisdiction over interpretation and application of the Articles of the Treaty and that the Court under Article 23 of the Treaty is required to ensure adherence to law in the interpretation of and compliance with the provisions of the Treaty. He further argues that the orders he is seeking from this Court are intended to ensure that the Respondents comply with the provisions of the Treaty.

29. Thirdly, the Applicant contends that this Court has previously dealt with interpretation and application of Articles 6 (d) and 7(2) of the Treaty in *Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No.1 of 2011* and stated as follows:

“The respective Partner States responsibilities to the actions and residents have through those States voluntary entered into the EAC Treaty, been scripted, transformed and fossilized into the several objectives, principles and objectives now stipulated in among others Articles 5, 6 and 7 of the Treaty, the breach of which by any Partner State gives rise to infringement of the Treaty. It is that alleged infringement which through interpretation of the Treaty under Article 27 (1) establishes the cause of action in a reference.”

30. The Applicant has also cited *Samuel Mukira Mohochi vs. the Attorney General of the Republic of Uganda; EACJ Reference No. 5 of 2011* which decision was to the effect that all the fundamental principles of the EAC under Article 6 are “*foundation, core, indispensable and enforceable,*”

The Respondents’ Submissions

31. The Respondents in their submission vigorously contend that the Court has no jurisdiction to entertain the Reference. Firstly, they contend that the acts complained of by the Applicant occurred in 1993 – 1996 hence, (citing: *Emmanuel Mwakisha Mjawasi and 28 Others vs. the Attorney General of the Republic of Kenya, EACJ Appeal No.4 of 2011*) were acts committed before the Treaty came into force in July, 2000. In this regard, they contend that, the Applicant’s complaints are not covered by the Treaty due to the principle of non-retroactivity referred to by the Court in the above cited case. They further contend that, the Applicant in the Reference only seeks for the interpretation of the Treaty as to whether failure to pay the decretal amount in *Civil Case No. 2966 of 1996* and the alleged failure by the Respondents to comply with the Notices to Show Cause and Warrants of Arrests are violation of Articles 6(d) and 7(2) of the Treaty.

32. Secondly, the Respondents contend that the claims which the Applicant is pursuing under this Reference are in the nature of torts, hence the preserve of the jurisdiction of the National Courts in Kenya and not this Court. They contend further that, the matter of the Applicant in *Civil Case No. 2966 of 1996* are now subject of a pending *Civil Appeal No. 163 of 2014* in the Court of Appeal of Kenya which in terms of Article 30(3) of the Treaty is an institution reserved with jurisdiction in the Republic of Kenya to deal with such matters and not this Court. They further argue that a reference under Article 30 of the Treaty only seeks to challenge the legality of an action of a Partner State or an institution thereof by a Partner State under the Treaty and not an action brought by a person injured by or through the misfeasance of another (citing: *Independent Medical Legal Unit vs. Attorney General and 4 Others* (supra)).

33. Thirdly, the Respondents contend that the Applicant has not exhausted local remedies in pursuance of his *Civil Case No. 2966 of 1996* and allege that they have filed an appeal at the Court of Appeal of Kenya against the decision of the High Court of Kenya in *Civil Case No. 2966 of 1996*. Therefore, it is their stand that the matter is still within the jurisdiction of the local judicial mechanism of the Court of Appeal of Kenya established under Article 164 of the Constitution

of Kenya and which has power to deal with appeals arising from the High Court of Kenya.

Decision of the Court on the Issue No. 1

34. We have carefully considered the submissions and arguments of the Parties on Issue No.1 mentioned above and our determination is as here under.
35. Firstly, the Applicant has contended, and we fully agree with him that this Court has jurisdiction under Articles 23, 27 and 30 of the Treaty to entertain and determine this Reference in particular the interpretation and application of Article 6(d) and 7(2) (See: *The Independent Medical Legal Unit* case (supra) and *Samuel Mukira Mohochi* case (supra). We are of the firm view that, the Applicant's accessibility to this Court is mandated under Article 30(1) of the Treaty. For avoidance of any doubt, the said Article provides as follows:
- “Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.”
36. We observe that, the Applicant has alleged that Articles 6(d) and 7(2) have been violated or infringed by the Respondents. In numerous decisions of this Court including *Samuel Mukira Mohochi* (supra) cited by the Applicant, the Court has held that once there is an allegation of infringement of the provisions of the Treaty, the Court has jurisdiction to interpret and apply the provisions alleged to be infringed under the powers conferred on it by Article 23(1) and 27(2) of the Treaty.
37. Secondly, we have carefully considered the Respondent's argument that the complaints of the Applicant arose during 1993 – 1996 hence, the same are not covered by the Treaty in view of , and by the principle of non-retroactivity and that therefore this Court lacks jurisdiction to entertain the Reference (See: *Emmanuel Mwakisha Mjwasi* Case (supra), However, our close reading of the Reference shows that the complaints of the Applicants are based on non-compliance by the Respondent of a Judgment, Decree and Certificate of Order by the High Court of Kenya issued on 22nd February, 2008, 17th April, 2008 and 8th December, 2011 respectively by which time or dates the Treaty had long been brought into force i.e. since 7th July 2000. They are further based on the Judgment, Decree and Certificate of Order in *Judicial Review of Application No. 44 of 2012* issued on 19th March, 2013 and Decree and Certificate of Order on 25th March, 2013 as well as the various Court Orders by way of Notices to Show Cause and Warrants of Arrest to the 2nd Respondents from 2013 to 2014. This assertion distinguishes this Reference from that of *Emmanuel Mwakisha Mjwasi* (supra) as the complaints of the Applicant therein were on matters that arose in 1977 before the Treaty had been passed. We therefore, disagree with the arguments of the Respondents as regards application of the principle of non-retroactivity.
38. Thirdly, we have also carefully considered the Respondents' argument that the Applicant has not exhausted local remedies and that the matter is subject of an appeal (*Civil No. 163 of 2014*) before the Court of Appeal of Kenya. In paragraph

20 of the Reference, the Applicant avers that “he has reasonably exhausted all available local remedies on his claims.” In our considered view, this issue of exhaustion of local remedies should not detain us because the Court has in its previous decisions stated that exhaustion of local remedies is not a pre-condition for accessing this Court (See: *Prof. Peter Anyang Nyong’o and 10 Others vs. the Attorney General of the Republic of Kenya and 5 Others, EACJ Ref. 1 of 2006*). Therefore, the argument by the Respondents that the matter is before the Court of Appeal of Kenya does not bar in our considered view, the Applicant from accessing this Court under Article 30(1) of the Treaty.

39. In conclusion on Issue No.1, we hold that this Court as per the provisions of Article 23(1), 27(1) read together with Article 30(1) of the Treaty and as per numerous previous decisions of this Court, has jurisdiction to entertain and determine this Reference given the Applicant’s allegation that there is violation or infringement of Article 6(d) and 7(2) of the Treaty.

Issue No.2: Whether the Reference is Time-Barred

40. The Applicant and the Respondents have each submitted on the above named issue as reflected hereunder:

The Applicant’s Submissions

41. The Applicant contends that the gist of this Reference is repeated failure of the Respondents to pay him what is due to him notwithstanding the issuance of Judgment, Decree, Certificate of Order, various Notices to Show Cause and the Warrants of Arrests in respect of *Civil Case No. 2966 of 1996 and Judicial review Application No. 44 of 2012*. To mention but a few, the Applicant states that the Respondents did not comply with a Notice to Show Cause issued on 9th July, 2014 and the Warrant of Arrest dated 4th July, 2014. The Applicant also submits that on 21st July, 2014, he filed this Reference before this Court and therefore, he argues that the Reference was filed well within the time limit of two months stipulated under Article 30(2) of the Treaty.

The Respondents’ Submissions

42. The Respondents in their Submissions strongly contend that the Reference is time barred and should not be entertained by this Court.
43. They contend that the Applicant in the Reference claims that the Respondents did not comply with the Judgment of the High Court of Kenya in *Judicial Review Application No. 44 of 2012* which had ordered them to pay him the decretal sum within 30 days from the date of the delivery of that Judgment that is 19th March, 2013. They argue in that regard that the said 30 days lapsed on 19th April 2013, and that if the Applicant wanted to file this Reference, the time of two months under Article 30(2) of the Treaty lapsed on 18th June, 2013. They contend that the Reference was filed on 21st July, 2014 and was therefore instituted out of time.

Decision of the Court on Issue No. 2

44. We have considered the Applicant’s contention that the Reference was filed well in time as per the requirements of Article 30(2) of the Treaty. We have also carefully considered the Respondents’ submission that the Reference is time barred under Article 30(2) of the Treaty because it is based on claims of the Applicant which occurred in 1993-1995 before the Treaty came into force and

orders of the High Court of Kenya issued prior to 2014. Is the argument of the Respondents tenable?

45. It is very clear in our minds that the Applicant in his Submissions has ably demonstrated that the Respondents have refused or failed to comply with the various orders of the High Court of Kenya to pay him his decretal amount in respect of *Civil Case No. 2966 of 1996* over a period of six years from the date of delivery of the Judgment in 2008 to the date of obtaining an order of stay of execution in 2014.
46. In that context, whereas we are in agreement that Article 30(2) limits the time within which a party can approach this Court to two months from the date of the action complained of (or from the date the Applicant came to know of an alleged violation), not all actions placed before us are time barred. Some of the actions of the Respondents are obviously time-barred but we have seen a number of actions in which they defied clear Court orders.
47. One such defied order is that of the Notice to Show Cause of 3rd July 2014 and the Warrant of Arrest dated 9th July, 2014. We are of the firm view that the filing of the Reference by the Applicant on 21st July, 2014, in that context, was well within the time limit of two months stipulated under Article 30(2) of the Treaty counted from the date the Respondents defied the Warrant of Arrest. While therefore the initial claim by the Applicant before the High Court of Kenya may relate to events between 1993 and 1996, the issues in context are the aforesaid orders issued between 2008 and 2014. It is also our view that whereas any orders issued prior to 21st May, 2014 are out of time but as we have shown above, some orders were issued as late as 9th July 2014 and certainly defiance of such orders fall within the time limit in challenging them before this Court.
48. To conclude Issue No.2, we hold that the Reference was filed by the Applicant partly within the time limit as required under Article 30(2) of the Treaty and we shall make necessary orders after addressing Issue No.3 below.

Issue No. 3: Whether the actions of the Respondents are in violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community

49. All the Parties in their written and oral Submissions before this Court have extensively dealt with the above mentioned issue as briefly reproduced hereunder:

The Applicant's Submissions

50. In the Reference, written Submissions and oral evidence, the Applicant explains how he obtained Judgment, Decree and Certificate of Order in *Civil Case No. 2966 of 1996* on 22nd February, 2008, 17th April, 2008 and 8th December, 2011, respectively. He also explains the various actions he took in seeking execution of the said Decree including filing *Judicial Review Application No. 44 of 2012* at the High Court of Kenya which issued Judgment on 23/3/2013, Decree and Certificate of Order on 5/3/2013. Thereafter, he explains in detail the various judicial actions in terms of Court Orders, that were taken against the Respondents including issuance of Notices to Show cause (7/5/2013, 16/5/2013, 5/6/2013, 8/8/2013, 22/10/2013, 22/1/2014, 2/2/2014, 12/3/2014, 8/4/2014, 5/6/2014, 3/7/2014 and 9/7/2014) and issuance of Warrants of Arrest (12/2/2014 and 9/7/2014) to no avail.

51. The Applicant contends that there has been non-compliance of the various Court Orders of the said Court from 2008 to 2014 by the Respondents towards the execution of the aforesaid Decrees including the 2nd Respondent presenting an Affidavit instead of appearing in Court in response to the Warrant of Arrest.
52. Even when it comes to the process of appeal by the Respondents, the Applicant contends that the Respondents did nothing substantial for a period of six years from 22nd February, 2008, the date of delivery of Judgment in *Civil Case No. 2966 of 1996* until 22nd July, 2014 when they obtained an order for stay of execution after the Applicant had filed the Reference on 21st July, 2014.
53. The Applicant contends further that, the aforesaid action of non-compliance with the various Court orders issued by the High Court of Kenya is a violation of Article 6(d) and 7(2) of the Treaty regarding principles of good governance, rule of law, accountability, transparency and social justice was as stated in *James Katabazi and 21 Others vs. Secretary General of the EAC and Others, EACJ Ref. No.1 of 2007*. He contends that this Court has on numerous decisions stated that the said principles are binding on the Partner States and their citizens (citing: *Henry Kyarimpa vs The Attorney General of the Republic of Uganda, EACJ Ref. No.1 of 2013*) and that what the Respondents have been doing in non-compliance with the various court orders is an abuse of the process of law. He contends further that this Court has previously stated that, due process of law is a cornerstone of the rule of law and its non-respect is a violation of Articles 6(d) and 7(2) of the Treaty (citing: *East African Law Society vs. The Attorney General of Burundi and the Secretary General of the East African Community, EACJ Ref. No.1 of 2014*),
54. The Applicant emphatically argues therefore that the aforesaid acts of the Respondents were an abuse of due process, lacked transparency and accountability and in disregard of rule of law and good governance principles which this Court has emphasized in a number of decisions (see *Samuel Mukira Mohochi* (supra)).

The Respondents' Submissions

55. The Respondents in their Submission vigorously deny violating Articles 6(d) and 7(2) of the Treaty. They contend that all the acts they have done or undertaken in *Civil Case No. 2966 of 1996* had been in furtherance of and in the upholding Articles 6(d) and 7(2) of the Treaty as far as the principles of good governance, rule of law transparency and accountability are concerned (citing: *James Katabazi* (supra) and *Godfrey Magezi vs. Attorney General of the Republic of Uganda, EACJ Re. No. 5 of 2013*. Having been aggrieved by the decision in the said case, the Respondents contend that, they filed a Notice of Appeal and requested for copies of typed proceedings on 4th March, 2008 which were supplied only on 14th May, 2014 hence, the Appeal (*Civil Appeal No. 163 of 2014*) was filed on 1st July, 2014. They contend further that although the Applicant has been complaining about the acts of the Respondents, he has not applied to the High Court of Kenya to strike out the Notice of Appeal filed by them.
56. The Respondents also contend that in pursuance of the principles of good governance and rule of law, they defended the *Judicial Review Application No. 44 of 2012* filed by the Applicant and have since filed a Notice of Appeal against its Judgment. On the same grounds, the Respondents argue that they filed

an application for stay of execution in *Civil Case No. 2966 of 1996* which was granted on 22nd July 2014. Again, the Respondents vigorously contend that they attended and complied with the Notices to Show Cause as well as the Warrants of Arrests issued by the High Court of Kenya. They contend further that with all the aforesaid lawful acts they have taken, seeking to challenge the decision of the said Court, the Applicant's contention that the Respondents are violating Articles 6(d) and 7(2) of the Treaty is baseless.

57. The Respondents instead accuse the Applicant of applying double standards by invoking the principles of good governance and rule of law only if decisions are made in his favour and not otherwise. They also accuse him of not disclosing pertinent matters in his Reference that had been acted upon by the Respondents in particular the appeal process against the decision of the High Court of Kenya in *Civil Case No .2966 of 1996* as well as the Application for Stay of Execution in *Judicial review Application No. 44 of 2012*. They argue that such conduct of the Applicant amounts to abuse of court process and is contrary to principles of good governance and rule of law.
58. They further argue that the Applicant, apart from the issue of non-compliance of payment of the decretal sum, has also raised issues of being segregated, his life and that of his subjects being threatened and that the Respondents have acted with bias in not listing his decretal amount as a debt for payment by the Government of Kenya and that in their opinion, these issues have not been proved hence, it does not follow that the Respondents have violated Article 6(d) and 7(2) as alleged by the Applicant.

Decision of the Court on Issue No. 3

59. We have carefully considered the rival arguments and submissions of the Parties on the above named issue, that is, whether the actions of the Respondents violate Articles 6(d) and 7(2) of the Treaty. Our decision thereto is as hereunder:
60. Firstly, from the pleadings, evidence, arguments and submissions of the Parties before this Court, we fully agree that, Judgment, Decree and Certificate of Order were issued in favour of the Applicant in *Civil Case No. 2966 of 1996* by the High Court of Kenya on 22/2/2008, 17/4/2008 and 8/12/2011, respectively.
61. Secondly, we also fully agree that since that time, the Applicant has embarked on various judicial actions with a view to be paid his decretal amounts to no avail. This includes the filing of *Judicial Review Application No. 44 of 2012* whereby Judgment, Decree and Certificate of Order were issued in favour of the Applicant on 19/8/2013 and 25/3/2013, respectively, culminating into various Notices to Show Cause and Warrants of Arrests against the 2nd Respondent.
62. Thirdly, as per our findings on Issue No. 2, there are some actions imputed to the Respondents which are time barred and therefore, in our considered opinion, cannot be entertained. In this regard, the only action which the Court can inquire into is the one pertaining to the non-compliance with the Warrant of Arrest dated 9th July 2014. The latter arose from the defiance of the 2nd Respondent to a Notice to Show Cause dated 3rd July 2014. It is our considered view that such actions and conduct of the Respondents, undoubtedly, were not in pursuance of the principles of good governance and rule of law stated in Articles 6(d) and 7(2) of the Treaty. We so hold.

Issue No.4: Whether the Issues in this Reference are similar to the Issues in Nairobi HCCC No. 2966 of 1996

63. The Applicant and the Respondents have each submitted on the above named issue as reflected hereunder:
The Applicant's Submissions
64. The Applicant contends that the issues in this Reference are quite different from the issues in *Civil Case No. 2966 of 1996* of the High Court of Kenya. He asserts that such difference is vivid if comparison is made from what is stated in the Judgment of the said case and the Scheduling Conference notes of this Reference dated 5th February, 2015. He contends that in *Civil Case No. 2966 of 1996*, he was seeking a remedy for false imprisonment and malicious prosecution inflicted by the agents of the Kenya Government while the issues framed in the Reference seek to show that the Respondents have violated Articles 6(d) and 7(2) of the Treaty. He asserts that none of the issues framed in *Civil Case No. 2966* has been framed as an issue in the Reference.
65. The Applicant further contends that the Parties in the two cases are different. In *Civil Case No. 2966 of 1996* the Respondent is the Attorney General of Kenya while in the current Reference, the Respondent is the Republic of Kenya as a Partner State represented by the Attorney General as its Chief Legal Advisor. He also asserts that the cause of action in the two cases is different. In *Civil Case No. 2966 of 1996*, the cause of action was based on false imprisonment, malicious prosecution and violation of the Applicant's constitutional rights while in the current Reference, it is violation of Articles 6(d) and 7(2) of the Treaty. He also contends that, there is no requirement of exhaustion of local remedies before filing any Reference before this Court (citing: *Prof. Peter Anyang Nyong'o* (supra).
The Respondents' Submissions
66. The Respondents in their submission vigorously contend that the issues in *Civil Case No. 2966 of 1996* and the present Reference are the same. They mention claims of false imprisonment and unlawful arrest, malicious prosecution, assault and battery, special damages, loss of income from business and legal expenses, collapse of the business of the Applicant and his wife, his children leaving school and some of them turning to drugs, and how the Applicant and his wife went astray, are all issues in this Reference.

Decision of the Court on Issue No.4

67. We have carefully considered the rival submissions of the Parties on Issue No.4. In short, the Applicant has vigorously argued that the issues in the present Reference are different from the issues in *Civil Case No. 2966 of 1996*. On the other hand, the Respondents in their Submissions have strongly argued that the issues are the same in the two cases.
68. In our considered view, it is a cardinal principle of law and practice that usually issues in civil cases emerge or are framed from what is contained in the pleadings filed by the Parties in court. We shall examine the issues framed in *Civil Case No. 2966 of 1996* and the issues framed in the present Reference in that context.
69. On pages 7-8 of the Judgment of *Civil Case No. 2966 of 1996*, the Trial Judge stated as follows:

“Counsel for the Parties themselves enumerated the issues for resolution

by this Court as follows:

- i) Was the Plaintiff arrested and incarcerated by the police officers from the Criminal Investigation Department on 17th December, 1993?
- ii) Upon his arrest, was the Plaintiff detained in custody, if at all?
- iii) Was the arrest and detention lawful or unlawful?
- iv) Was the Plaintiff subjected to inhuman and degrading treatment during the arrest and incarceration?
- v) Was the Plaintiff charged and arraigned in Kiambu Magistrates' Court Criminal Case No. 73 of 1993 with the offence of robbery with violence at all?
- vi) Was the Plaintiff acquitted of the said charge?
- vii) In what capacity did the said police officers arrest the Plaintiff and under whose authority?
- viii) Did the Plaintiff suffer injuries alleged, or at all?
- ix) Did the Plaintiff suffer loss and damage as alleged or at all?
- x) Is the Plaintiff entitled to the reliefs sought?"

70. On the other hand, issues for determination by this Court are normally framed during the Scheduling Conference. The Scheduling Conference notes of 5th February, 2015 for this Reference shows that such issues were:

- i) Whether the Court has jurisdiction to entertain the Reference;
- ii) Whether the Reference is time-barred;
- iii) Whether the actions of the Respondents are a violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
- iv) Whether the issues in this Reference are similar to the issues in Nairobi HCCC 2966 of 1996; and
- v) Whether the Applicant is entitled to the reliefs sought."

71. Indeed, comparison of the issues in the two cases as above demonstrated clearly shows that issues in these two cases are different because the cause of action in *Civil Case No. 2966 of 1996* was on false imprisonment, malicious prosecution, battery and assault, loss of business and damages *inter alia*, while in the present Reference, the Applicant's cause of action is centered on violation of Articles 6(d) and 7(2) of the Treaty. It is obvious from the foregoing that the issues for determination in the two matters are completely different although based on the same set of facts. We so hold.

Issue No. 5: Whether the Applicant is entitled to the Reliefs Sought.

72. The Parties have each submitted on Issue No. 5 as reflected in the following paragraphs hereunder:

The Applicant's Submissions

73. The Applicant in his submission prays for the following reliefs as sought in the Reference:

- a) A declaration be issued that the Respondents have violated the Treaty for the Establishment of the East African Community;
- b) The Respondents be ordered to pay liquidated damages in the sum of US\$ 86,465,402,256/=;
- c) The Respondents be ordered to pay the Applicant US\$ 5,000,000/= as general damages;

- d) The Respondents be ordered to pay the Applicant the decretal sum in Civil Suit No. 2966 of 1996, Ksh. 28,475,737.11/=;
 - e) The Respondents be ordered to pay interest at commercial rate on the decretal sum from the date of Judgment to the date of satisfaction on this;
 - f) The Respondents be ordered to pay costs; and
 - g) Any other relief deemed just and equitable.
74. The Applicant submits that there are sufficient authorities to support grant of prayers (a), and (f) above (citing: *East African Law Society vs. the Attorney General of the Republic of Burundi*, EACJ Ref. No.1 of 2014) where such declaration and costs were sought and the Court granted them to the Applicant therein (citing Rule 111(1) of the Court's Rules of Procedure as well as *James Katabazi's Case* (supra).
75. As regards Prayers (b), (c), and (d), the Applicant contends that the Court is conferred with authority to award such damages under Article 44 of the Treaty which allows the Court to impose pecuniary obligation or liability on the execution of a Judgment of the Court against a person in a Partner State. The Applicant has also submitted on the justification or legal basis for grant of each prayer and citing relevant authorities where necessary.
- The Respondents' Submissions
76. The Respondents in their submissions have vigorously argued that the Applicant is not entitled to any of the reliefs sought in the Reference. As to prayer (a), the Respondents contend that the relief (declaration) is not available to the Applicant because all along the Respondents have acted in accordance with the principles of good governance and rule of law and hence, they have not violated Articles 6(d) and 7(2) of the Treaty. They contend conversely that it is the Applicant who has violated the principles of good governance and rule of law. The Respondents, on prayers (b), (c) and (d) maintain that the reliefs sought therein are not available to the Applicant for various reasons including that the Court under Articles 23(1), 27(1) and 30(1) of the Treaty is not conferred with the power to grant such reliefs, and is conferred with power for interpretation and application of the provisions of the Treaty only.

Decision of the Court on Issue No. 5

77. We have carefully considered the rival submissions of the Parties on Issue No. 5 and our determination and decision is as follows:
78. Firstly, as far as prayer (a) is concerned, that is a declaration that the Respondents have violated Articles 6(d) and 7(2) of the Treaty, we revert to our findings and holding in Issue No.3 above. We held in the said Issue and we hold the same here that non-compliance with the Warrant of Arrest issued by the High Court of Kenya on 9th July 2014, following the defiance of the 2nd Respondent to a Notice to Show Cause dated 3rd July 2014 and before orders of stay of execution were issued by the Kenyan Court of Appeal on 22nd July 2014, amounts to a violation of the principles of good governance and rule of law enshrined in Articles 6(d) and 7(2) of the Treaty. Having said so, however, in the totality of the Reference before us, the conduct of the Respondents since the Applicant obtained his judgment on 22nd February 2008 is most unfortunate. The judgment was rendered by a competent Court in Kenya and there is an expectation that in

a country governed under the rule of law, all court orders, however painful and whatever the views of the Respondents, ought to be respected and complied with unless overturned by an appeal or otherwise reviewed. The Respondents in that regard filed a Notice of Appeal on 4th March 2008 and finally an appeal was filed on 1st July 2014, six years later. In our view, no justifiable reason has been given for that delay and yet the Applicant has constantly and persistently pursued the fruits of his judgment. Had our hands not been tied by the limitation provision in Article 30(2) of the Treaty, we would have certainly held the Respondents to account for their actions within their obligations under the Treaty. It matters not, however, because we are unable to do so and our final orders will be made here below only within our mandate under the Treaty.

79. Secondly, as regards prayers (b), (c), (d) and (e), we agree fully with the Respondents that the Court, under Articles 23, 27 and 30 is not conferred with powers to grant such orders. It only deals with interpretation and application of the provisions of the Treaty and ensuring its compliance thereon. That is why in *Independent Medical Legal Unit Case* (supra), this Court stated as follows:

“A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action brought to challenge the legality, under the Treaty of an action of a Partner State or of an institution of the Community. The alleged collusions and connivance of the Treaty is not actionable under Article 30.”

80. Thirdly, the Applicant referred us to Article 44 of the Treaty and alleged that the Court is empowered to impose pecuniary obligation in execution of a Judgment of the Court and argued that the said Article is an authority that the Court can grant a money award to an applicant hence, the Court has jurisdiction to grant prayers (b), (c), (d) and (e). In our considered view, “a judgment of the Court” mentioned in Article 44 takes the import of the provisions of Articles 23, 27 and 30 of the Treaty, that is, that it is limited to interpretation and application of the provisions of the Treaty and their compliance thereof. We take it that imposition of “pecuniary obligation’ in Article 44 refers to matters in pursuance of an interpretation and application of the provisions of the Treaty and nothing else. Pecuniary obligations include costs and have nothing to do with the awards and orders mentioned by the Applicant in prayers (b), (c), (d) and (e). We so hold.

81. Fourthly, in prayer (d), the Applicant prays to this Court to order the Respondent to pay the decretal amount granted in *Civil Case No. 2966 of 1996* by the High Court of Kenya. Likewise, in prayer (e), the Applicant prays to this Court to order the Respondents to pay interest at commercial rate on the decretal sum from the date of Judgment to the date of satisfaction. The Respondents have vigorously opposed the two reliefs in their Submissions. In our considered view, the two sought reliefs fall under the jurisdiction of the National Courts in Kenya. Indeed, the record shows that the Respondents have obtained an order of stay of execution at the Court of Appeal of Kenya, and that they are pursuing an Appeal before the said Court against the decision of the High Court in *Civil Case No. 2966 of 1996*. In that context, this Court cannot grant prayer (d).

82. Lastly, in prayer (f), the Applicant prays for costs. He has referred us to Rule

111(1) of this Court's Rules of Procedure which provide that "costs shall follow the event" and that there is an occasion the Court had ordered certain Respondents to pay costs (citing: *James Katabazi's Case* (supra)). The Respondents strongly oppose the said prayer. They argue that, it is the Applicant who should pay costs because the Reference lacks merit and that it is him who has violated the principles of good governance and rule of law.

83. In our considered view, it is true as argued by the Applicant, that usually "costs follow the event" as stated in Rule 111(1) of the Court's Rules. Indeed, it is also well known that the grant of costs is a discretionary exercise by a court. After due consideration of the matter, we think and resolve that the Applicant is only entitled to a $\frac{1}{4}$ of the costs. We so hold.

C. Conclusion

84. In conclusion, the final orders to be made are as follows:

- i) Prayer (a) of the Reference is granted in the following terms only: A declaration be and is hereby issued that by failing to effect the Warrant of Arrest issued by the High Court of Kenya on 9th July 2014, and before orders of stay of execution were issued by the Kenyan Court of Appeal on 22nd July 2014, the Respondents violated Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.
- ii) Prayers (b), (c), (d) and (e) of the Reference are denied and are therefore dismissed.
- iii) The Applicant shall have $\frac{1}{4}$ of the costs of the Reference.

It is so ordered.

R. Rashid, Counsel for the Applicant

C. Mutinda, E. Bitta & W. Ng'ang'a for the Respondents

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First Instance Division

Application No. 12 of 2015
(Arising from Reference No. 17 of 2014)**The Secretary General, East African Community v Rt. Hon. Margaret Zziwa**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo, F. Jundu & A. Ngiye JJ
January 29, 2016

Stay of proceedings pending interlocutory appeal - Whether citation of incorrect law is fatal - Distinction between a notice of appeal and an appeal - Remedies deduced from pleadings - Defective frivolous application - False affidavit evidence an abuse of court process

Article 35A of the Treaty- Rules: 1(2), 21, 47(1) (b), (2), 55(3) (d), 78(1), 81, 82, 86(1) (a), 110(1) EACJ Rules of Procedure, 2013

In 2014 the Respondent filed Reference No. 17 of 2014 challenging the legality of her intended removal from the office of Speaker of the East African Legislative Assembly. Subsequent to her removal in December 2014, the Reference was amended questioning the validity of her removal from office. On 8th the day September 2015 when the case scheduled for hearing of oral evidence, the Applicant raised a preliminary point of law claiming that the Respondent's witnesses as members or officers of EALA had not obtained special leave from the Assembly to adduce evidence before the Court as required in Section 20 of the East Africa Legislative Assembly (Powers and Privileges) Act, 2003. The objection was heard on 9th September 2015 and a Ruling delivered on 6th November 2015.

Being aggrieved, the Applicant sought to appeal the said decision and lodged the present Application seeking the stay of proceedings in Reference No. 17 of 2014 pending the determination of an appeal. He averred *inter alia* that if the hearing of the Reference proceeded, the Appeal would be rendered nugatory, and the stay of proceedings would not be prejudicial to the Respondent.

The Respondent submitted that was no proper appeal before the Court but only a 'Notice of Appeal' which denoted a frivolous appeal intended to delay the hearing of the Reference. Furthermore, the Application was wrongly instituted under Rule 21 rather than Rule 110 of the Court's Rules of Procedure. Furthermore, the Applicant's Supporting Affidavit contained false information.

Held

1. The present Application was wrongly brought under Rule 1(2) that invokes the inherent powers of the Court. Recourse may only be made to a general provision of the law where no specific provision addresses a given scenario. However, judicial practice dictates that such an order may be made by the Court either on its own motion or upon being so moved by any of the Parties.
2. The applicable law in an application for stay of proceedings that pertains to a decree or order appealed from is Rules 21, 86 and 110. However, the omission

by a party to cite the correct provision under which an Application is brought is not fatal thereto provided the gist of the Application and the remedies sought can be deduced from the pleadings.

3. Rule 110(1) applies only to applications for stay of proceedings in respect of which an Appeal has been lodged, and not stay of proceedings pending the determination of an appeal in respect of a different matter. The Applicant has an automatic right of appeal and it is apparent on the face of the record that the Applicant sought to stay the proceedings in *Reference No. 17 of 2014* pending the determination of an appeal against the interlocutory orders of this Court.
4. Rule 110 negates the incidence of an interlocutory appeal as an automatic basis for the stay of proceedings before this Court but Rule 110(1) does not prescribe the procedure or grounds upon which a court considering such an application may premise its decision. In such circumstances, a court would look to binding judicial precedent from within its jurisdiction; *stare decisis*, or persuasive precedent from other jurisdictions.
5. The falsehood in that Applicant's Supporting Affidavit derive from the mistaken equating by of an appeal with a notice of appeal. There is a distinction between a 'notice of appeal' and an 'appeal' and between an appeal and an intended appeal. An appeal is only deemed to have been duly instituted when a memorandum of appeal, as opposed to a notice of appeal, has been lodged. Rule 78(1) denotes a notice of appeal as being indicative of a 'desire to appeal'. On the other hand, Rule 86(1) expressly designates the manner in which an appeal is instituted; it is lodged by a memorandum of appeal and not a notice of appeal. Consequently, the lodging of a notice of appeal is not tantamount to the institution of an appeal within the EACJ's legal regime. It simply represents a party's desire or intention to appeal as stated in Rule 78(1).
6. The core value of an affidavit as a document made on oath presupposes the veracity and truthfulness that should underscore the statements contained therein. And it would undermine the importance of affidavit evidence to leave intact on the record a document purportedly made on oath that contains apparent falsehoods, even if such falsehoods were made on an innocent but mistaken application of the law as is the case in the present application. A false affidavit or false affidavit evidence is rendered redundant, scandalous and vexatious, an apparent manifestation of abuse of court process.
7. One of the principles governing stay of proceedings pending an appeal, is that the appeal has reasonable chances of success. This cannot be demonstrated in the absence of a memorandum of appeal. The Notice of Appeal was lodged on 10th November 2015, while the Memorandum of Appeal, instituting the appeal, was lodged on 17th November 2015. Therefore, when the present application for leave to stay the proceedings was filed, there was no valid, pending appeal before the Appellate Division. This Application was defective, misconceived, incompetent and not properly before the Court and was therefore struck out under Rules 1(2) and 47(1).

Cases cited

AG Uganda v East African Law Society [2012-2015] EACJLR 189, Appl. No. 7 of 2012, (Distinguished)
Captain Harry Gandy v Caspair Air Charter Ltd (1956) 23 EACA 139
Mobile Producing Nigeria Unlimited v His Royal Highness Oba Yinusa A. Ayeni & Ors CA/L/255/5

M/s Kasirye Byaruhanga & Co. Advocates v Uganda Development Bank, SCU, Civil Appl No. 2 of 1997
Silverstein v Chesoni (2002) 1 EA 296
Simon Peter Ochieng & Anor v AG of Uganda [2012-2015] EACJLR 361, Ref. No. 11 of 2013
Owar A. Omar & Ors v AG of Kenya & Ors EACJLR 361, App No. 4 of 2011 (Distinguished)
Utex Industries Ltd v Attorney General of Uganda, SCU, Civil Appl No. 52 of 1995

RULING

Introduction

1. The Applicant herein is self-defining and instituted the present proceedings in a representative capacity as provided in Article 4 of the Treaty for the Establishment of the East African Community (hereinafter referred to as ‘the Treaty’). On the other hand, the Respondent is the former Speaker of the East African Legislative Assembly (EALA), a Member of Parliament (MP) in the said Assembly, and the Applicant in *Margaret N. Zziwa vs. Secretary General of the East African Community Reference No. 17 of 2014*.
2. By way of background, *Reference No. 17 of 2014* was instituted by Ms. Zziwa in 2014 challenging the legality of her then intended removal from the office of Speaker of EALA. Following Ms. Zziwa’s subsequent removal from the said office in December 2014, the Reference has since been amended to question the validity of her removal from that office. It had been scheduled for hearing of oral evidence by the Applicant therein on 8th and 9th September 2015. However, on 8th September 2015, the Respondent therein raised a preliminary point of law premised on Section 20 of the East Africa Legislative Assembly (Powers and Privileges) Act, 2003; the gist of which was that the Applicant and her witnesses were members and/ or officers of EALA but had not secured special leave from the Assembly to adduce evidence before this Court, as prescribed by section 20 of the EALA (Powers and Privileges) Act. Given that this Preliminary Objection was raised orally without due notice to opposite party as prescribed by Rule 41(2) of the East African Court of Justice Rules of Procedure (hereinafter referred to as ‘the Rules’), this Court did order the Applicant herein to file a formal Notice of Preliminary Objection in this matter. The said Objection was duly heard on 9th September 2015 and a Ruling in respect thereof was delivered on 6th November 2015. The gist of the Ruling was that whereas section 20 of the EALA (Powers and Privileges) Act did prohibit sitting members of the House such as the present Respondent from adducing evidence on the Assembly’s Minutes and Proceedings, given that she intended to adduce oral evidence this Court was unable to pre-determine the nature of evidence she intended to present, and could not therefore prohibit her from testifying before it on the premise of the provisions of section 20 of the said Act.
3. The Applicant sought to appeal the said decision and lodged the present Application seeking the stay of proceedings in *Reference No. 17 of 2014* pending the determination thereof. The Application was brought under Rules 1(2) and 21(1) of the Court’s Rules and was premised on the following grounds:
 - a. If the hearing of the Reference proceeds, the Appeal would be rendered nugatory.
 - b. The Appeal was very pertinent as it touches on a question of law, the outcome of which would set a clear precedent.
 - c. The Appeal had high chances of success.
 - d. The stay (of proceedings) would not be prejudicial to the Respondent.

4. It was supported by an Affidavit deponed by Dr. Anthony Kafumbe dated 10th November 2015, the gist of which was that:
 - a. The Appeal filed dealt substantively with a matter of law which required clarification with finality by the Appellate Division before the determination of the Reference.
 - b. The Respondent did not stand to suffer any prejudice should the Application be allowed, rather both parties stood to lose should an issue of law be left unresolved by the Appellate Division.
 - c. The Appeal stood high chances of success considering the merits of the matter.
5. The Respondent herein, Ms. Zziwa, did depone an Affidavit in Reply dated 16th November 2015 in which we understood her to *inter alia* state that:
 - a. The Application and supporting Affidavit did not raise any justifiable cause for the grant of an order for stay of proceedings.
 - b. No substantive Appeal had been filed by the Applicant, who had also failed to demonstrate that any intended Appeal dealt with a matter of law that required clarification with finality by the EACJ Appellate Division, before *Ref. No. 17 of 2014* could be entertained by the Court's First Instance Division.
 - c. The Applicant had not demonstrated that the intended Appeal had high chances of success.
 - d. Hardship was one of the considerations in an application for stay of proceedings, the Respondent was suffering the expenses of travel and accommodation for advocates and witnesses, and the grant of the Application would cause greater hardship to her than to the Applicant that is resident in Arusha.
 - e. This Court has discretion to grant or refuse a stay of proceedings.
 - f. *Ref. No. 17 of 2014* should be determined in a timely manner as it was a matter of urgency, the resolution of which was essential to the efficient management of EALA and EAC affairs.
6. At the hearing of the Application, the Applicant was represented by Mr. Stephen Agaba, while the Respondent was represented by Messrs. Justin Semuyaba and Jet Tumwebaze.

Applicant's Submissions:

7. Mr. Agaba cited the cases of *Attorney General of Uganda vs. East African Law Society EACJ Application No. 7 of 2012*, *Owar Awadh Omar & others vs. Attorney General of Kenya & Others EACJ Application No. 4 of 2011* and *Mobile Producing Nigeria Unlimited vs. His Royal Highness Oba Yinusa A. Ayeni & Others CA/L/255/5* in preposition of the principles to be considered in an application for stay of proceedings.
8. Advancing what he termed as 'the principle of balance of convenience' and in support of his argument that it was in the interest of justice that the outcome of the Appeal was awaited, learned Counsel referred us to the case of *Attorney General of Uganda vs. East African Law Society* (supra), where the following dictum in *Mobile Producing Nigeria Unlimited vs. His Royal Highness Oba Yinusa A. Ayeni & Others* (supra) was cited with approval by this Court:

“... It will be futile to allow the proceedings at the lower Court to continue while an appeal is before this court challenging its jurisdiction to hear and determine the suit against them at the lower court. At the end of the day, if their Appeal hereat succeeds, the whole proceedings of the lower court will be declared a nullity and be struck out however well conducted it might have been. It is therefore necessary to avoid this undesirable result by ordering a stay of proceedings in the present case pending the determination of the appeal against the trial court jurisdiction.”

9. Further, Mr. Agaba advanced ‘the principle of injury’ as another consideration in the grant or refusal of stay of proceedings, arguing that there was no injury to be suffered by the Respondent that could not be compensated. In that regard, he relied upon the following decision by this Court in *Attorney General of Uganda vs. East African Law Society* (supra):

“The final consideration is one of injury. We do not see any injury to the Respondent which cannot be adequately compensated if this Application is granted. If there is one, like the delay to dispose of the Reference as argued by the Respondent, it would be compensated later by the final disposal of the Reference after the outcome of the Appeal is known and taken into consideration.”

10. Learned Counsel did also argue that while considering an application for stay of proceedings, the Court was not required to delve into the merits of the pending appeal as that was in the sole domain of the Appellate Division. See *Owar Awadh Omar & others vs. Attorney General of Kenya & Others* (supra).
11. Finally, it was argued for the Applicant that in applications for stay of proceedings, it was important to establish from the onset that there existed a valid, pending Appeal before the application could be entertained. See *Mobile Producing Nigeria Unlimited* (supra).
12. Aside from the foregoing principles for the grant or rejection of an application for stay of proceedings, Mr. Agaba did take issue with some aspects of the Affidavit in Reply. He opined that the said Affidavit was false and misleading; did not respond to the issues raised in the Affidavit in support of the Application; offended the rules of affidavits, and thus offended Rule 23 of the Court’s Rules. In what appeared to be evidence from the Bar in the absence of an Affidavit in Rebuttal, Mr. Agaba sought to rebut some of the contents thereof; initially prayed that the offending paragraphs of the Affidavit in Reply be struck out but later sought to have the entire Affidavit struck out.

Respondent’s Submissions:

13. It was argued for the Respondent that there was no proper appeal before the Court but rather, the Notice of Appeal on record denoted a frivolous appeal intended to delay the hearing of the main Reference. Mr. Semuyaba contended that the Application had been wrongly instituted under Rule 21 of this Court’s Rules rather than Rule 110, and outlined what in his view were frivolous grounds of Appeal given that the evidence purportedly governed by section 20 of the EALA (Powers and Privileges) Act had not yet been adduced. He invited this Court to adopt the principles governing applications for stay of proceedings as

stipulated in the *Mobile Producing Nigeria Unlimited* case.

14. Learned Counsel did also refer this Court to the cases of *Attorney General of the Republic of Tanzania vs. Africa Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011* and *Attorney General of Kenya vs. Independent Medical Legal Unit EACJ Appeal No. 1 of 2011*, both of which addressed the question of what would amount to preliminary points of law.
15. In *Attorney General of the Republic of Tanzania vs. Africa Network for Animal Welfare (ANAW)* (supra) it was held that matters that entailed the clash of facts, production of evidence and assessment of testimony were not preliminary points of law. With regard to *Attorney General of Kenya vs. Independent Medical Legal Unit* (supra), the following dictum from the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696* was cited with approval as the test of what would amount to a preliminary objection:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop.”
16. We understood Mr. Semuyaba to have cited the two foregoing decisions in support of his proposition that were this Court to stay the present proceedings in order to await the determination of an Appeal that in his view had no merit given that the issues raised therein were not preliminary points of law in the first place, it would render meaningless the recognized maxim that justice delayed was justice denied.
17. Learned Counsel argued the point that his client was suffering a lot of hardship in prosecuting *Ref. No. 17 of 2014* owing to the manner in which the case was dragging on, yet a lot of time could be salvaged if the matters raised in the Appeal in issue presently were raised by way of an Appeal from the final decision of this Court in the matter. He did also contend that his client had attested to the impending expiration of the 3rd EALA's tenure of office which eventuality, he opined, could pose a difficulty to her with regard to securing witnesses to testify in the Reference. In this regard, Mr. Semuyaba referred this Court to the following principle in the *Mobile Producing Nigeria Unlimited* case:

“One important factor in an application for stay of proceedings is hardship. A court of law will be most reluctant to grant an application for stay of proceedings if it will cause greater hardship than if the application is refused. The question of hardship is a matter of fact which can be deduced from the competing affidavit evidence. The moment the court comes to the conclusion that the grant of the application would do more harm than good, it will be refused.”
18. In turn, Mr. Tumwebaze supplemented Mr. Semuyaba's submissions and disputed the existence of falsehoods in paragraphs 20 and 21 of the Respondent's Affidavit in Reply as had been opined by learned Counsel for the Applicant. Alluding to the length of time the hearing of *Ref. No. 17 of 2014* had taken, Mr. Tumwebaze invited this Court to find that not only would some of the prayers sought by the

Applicant therein be overtaken by events if the matter was delayed longer, the balance of convenience in this matter was such that whereas the Applicant was incurring individual expenses associated with the delayed hearing thereof, the Respondent (Applicant herein), being sued in official capacity, was cushioned from the costs thereof.

19. It was Mr. Tumwebaze's contention that, despite previous Rulings of this Court to the contrary, the correct position of the Court's Rules was that the existence of a substantive Appeal, as opposed to an intention to Appeal, was a precondition to the grant of a stay of proceedings pending Appeal. He submitted that a court considering such an application must, without delving into the merits of the appeal, satisfy itself that there were valid grounds of appeal. Learned Counsel pointed out that ideally the Memorandum of Appeal detailing the grounds thereof should have been availed to opposite Counsel but, given that this had not been done in the instant case, he invited this Court to carefully peruse the said Memorandum of Appeal and find that the grounds therein did not warrant the grant of the orders sought herein.
20. Finally, Mr. Tumwebaze argued that it was not true, as had been posited by learned Counsel for the Applicant, that the Respondent had not complied with the procedure for application for special leave from the Assembly to testify in Court. He maintained that whereas the procedure in Rule 26 of the Assembly's Rules of Procedure outlined the procedure where such Application was brought to the House in session, section 20(2) of the EALA (Powers and Privileges) Act made provision for situations where the House was on recess, expressly providing for such leave to be sought from the Rt. Hon. Speaker. It was Mr. Tumwebaze's contention that in the instant case, Ms. Zziwa had sought for special leave from the Speaker while the House was in recess and there was no specific procedure designated therefor, hence her letters to the Rt. Hon. Speaker. He intimated that had the leave so sought from the Rt. Hon. Speaker been granted, the Respondent would have been in a position to proceed with her evidence as had been scheduled. Learned Counsel gleaned bad faith from the foregoing course of events and invited this Court to consider the entirety of the present circumstances, allow the matter to proceed and have justice be seen to be done as much in the process as in the end result; in an open, fair and transparent manner.

Submissions in Reply:

21. In reply, Mr. Agaba reiterated his earlier position that the Notice of Appeal did demonstrate the existence of a valid Appeal before the Court when the present Application was filed. In what then appeared to be an alternative argument, he did also contend that the existence of a valid Appeal should be deduced as at the date when the Application was heard and not when it was filed. We understood it to be implicit within this argument that since the Memorandum of Appeal had been lodged on 17th November 2015, it followed that as at the hearing of the Application there was a valid, pending appeal in place. With regard to the veracity of the Affidavit in support of the Application that had erroneously attested to the existence of an Appeal at the time of filing the present Application, learned Counsel referred us to Rule 55(3) (d) of the Court's Rules which prescribes the need to administer substantive justice without undue reliance on technicalities.

In any event, it was Mr. Agaba's submission that disallowing the Application and proceeding with the hearing of the Reference before the Appellate Division had pronounced itself on the interlocutory Appeal would have an adverse effect on the Court's proceedings.

22. He maintained his position that letters to the Rt. Hon. Speaker did not constitute an application for special leave from the Assembly within the precincts of Rule 26 of the House's Rules of Procedure, and countered the Respondent's argument on the expenses she was incurring, with the argument that any serious litigant should be prepared to incur attendant expenses associated with the litigation. He questioned learned Respondent Counsel's attempt to link the issue of hardship with the life span of the 3rd Assembly, arguing first, that this was not pleaded and, secondly, that the life span of the Assembly could not affect the securing of witnesses in court proceedings and, in any event, the Assembly as an institution would always be in existence. It was his argument that the life span of the 3rd Assembly should not be a reason to flout rules of procedure as the Reference detailed 6 or 7 additional prayers that could be considered by this Court in the event that that Assembly's tenure of office expired.

Court's Determination:

23. We have carefully considered the arguments of both Parties. We propose to address the procedural aspects of the Application prior to a determination of the merits thereof. First and foremost, for avoidance of doubt, we must state that we do find Rule 110 of this Court's Rules of Procedure absolutely pertinent to the Application in so far as it expressly negates the incidence of an interlocutory appeal as an automatic basis for the stay of proceedings before this Court. It provides a legal avenue for the stay of proceedings only where the Court has so ordered. Rule 110(1) reads:

“An appeal shall not operate as a stay of proceedings under decree or order appealed from except so far as the Court may order ...”

24. In the instant case, the Application is brought under Rules 1(2) and 21(1). While clarifying the Applicant's deference to this course of action, Mr. Agaba argued that Rule 110 left the stay of proceedings pending appeal to the discretion of the Court hence the Applicant's recourse to Rule 1(2) that invokes the inherent powers thereof. With respect to learned Counsel, we are unable to appreciate this application of the Rules. We do recognize that Rule 110(1) does not prescribe the procedure by which a court order thereunder may be secured. Nonetheless, we take the view that standard judicial practice would dictate that such an order may be made by the Court either on its own motion or upon being so moved by any of the Parties.
25. In the instant case where the Applicant opted to move the Court, Rule 21(1) and (4) clearly provides the procedure that would have been available to that Party and thus gives procedural effect to the provisions of Rule 110(1). For ease of reference, Rule 21(1) and (4) reads:
- “(1) Subject to sub-rule (4) of this Rule, all applications to the First Instance Division shall be by motion, which shall state the grounds of the application.
- (4) A notice of motion shall be substantially in (the form prescribed

in) the Fourth Schedule.”

26. We do, therefore, find that the present Application was wrongly brought under Rule 1(2). It is a well recognized principle of legal interpretation that recourse may only be made to such a general provision of the law where no specific provision addresses a given scenario. That was not the case in the matter before us. In this case, as we have belaboured to demonstrate hereinabove, the applicable law would have been Rules 21(1) and (4), and 110 of the Court’s Rules. However, we would not go so far as to strike out the Application on that account because we do not consider the omission by a party to cite the correct provision under which an Application is brought to be fatal thereto provided the gist of the Application and the remedies sought can be deduced from the pleadings. In the instant case, it is apparent on the face of the record that the Applicant sought to stay the proceedings in *Ref. No. 17 of 2014* pending the determination of an appeal against the interlocutory orders of this Court. Both the Notice of Motion and the supporting Affidavit allude to this. We are satisfied, therefore, that we have sufficient material before us to determine that issue, the citation of the wrong procedural rule notwithstanding.
27. We now turn to the second procedural issue. The right of appeal in any matter is conferred by statute or equivalent legislative authority. Within the EACJ’s legal regime, Parties’ right of appeal is expressly conferred by Article 35A of the Treaty in the following terms:
- “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.”
28. An ‘order’ in this context is a decision of the court other than a judgment, which is the final decision of a court in relation to a claim before it. *See Oxford Dictionary of Law*, 7th Edition, Oxford University Press, p. 386. For present purposes, therefore, the Applicant does have an automatic right of appeal against the decision of this Court in respect of Preliminary Objections raised before it on 9th September 2015. The question then is whether or not the present Application does merit the grant of a stay of proceedings in *Ref. No. 17 of 2014* pending the determination of the Appeal.
29. Rule 110 of the Court’s Rules does not prescribe grounds upon which a court considering such an application may premise its decision. In such circumstances, a court would look to binding judicial precedent from within its jurisdiction; *stare decisis* (decisions made by itself), or persuasive precedent from other jurisdictions. In that regard, as stated earlier hereinabove, we were referred to this Court’s decisions in *Omar Awadh Omar & 6 Others vs. Attorney General of Kenya & 2 others* (supra) and *Attorney General of Uganda vs. East African Law Society & 2 Interested Parties* (supra) on the principles governing the grant of an application for stay of proceedings pending appeal. We were also referred to the decision in the Nigerian Court of Appeal case of *Mobile Producing Nigeria Unlimited* (supra), which was extensively cited by both sets of Counsel.
30. We have carefully considered the foregoing legal authorities. We must

categorically state that the *Attorney General of Uganda vs. East African Law Society* case is not applicable to the present Application because the matter that was under consideration therein was not an application for stay of proceedings pending an interlocutory appeal in the same matter, as is the case herein, but rather an application for stay of proceedings pending the determination of the appeal in another matter, *Appeal No. 2 of 2012*. The said Appeal had arisen from the Court's decision in *Omar Awadh Omar & 6 Others* (supra) to which we shall revert shortly. In a nutshell, it was argued by the Applicant in the *Attorney General of Uganda vs. East African Law Society & 2 Interested Parties* (supra) that since both cases arose from the same series of events, a decision by the Appellate Division that the *Omar Awadh Omar* case was time barred would, similarly, render the Reference from which *Attorney General of Uganda vs. East African Law Society* case arose, time barred. That scenario is not encompassed by Rule 110(1); clearly, Rule 110(1) applies only to applications for stay of proceedings in respect of which an Appeal has been lodged, and not stay of proceedings pending the determination of an appeal in respect of a different matter. Therefore, the Court in the *Attorney General of Uganda vs. East African Law Society* case quite rightly upheld recourse to Rule 1(2) in the absence of a more applicable legal provision to the circumstances thereof.

31. With regard to the *Omar Awadh Omar* case, on the other hand, it would appear that the Court invoked its inherent powers under Rule 1(2) to permit an oral application for stay of proceedings pending appeal. We cannot fault a decision made in exercise of a court's judicial discretion, particularly so when we are not seized of the circumstances that pertained before it. We do note that the circumstances in the case before us are different. In the instant case, the Applicant rightfully made a formal application for stay of proceedings under Rule 21(1) and was under a legal duty to apply the Court's Rules of Procedure correctly. Therefore, this Court's earlier decision in *the Omar Awadh Omar* case notwithstanding, as we have stated hereinabove, after the most careful and respectful consideration of this Court's Rules of Procedure we are satisfied that the applicable law in an application for stay of proceedings that pertain to a decree or order appealed from is Rules 21, 86 and 110 thereof. We so hold.
32. Be that as it may, in the *Omar Awadh Omar* case, the Court did state as follows with regard to the merits of an application for stay of proceedings pending appeal:
"We are of the candid view that in order for the Applicant to succeed in an application for stay of proceedings in a pending appeal, it is not required by this Court to go into the merits of the pending appeal as that is the sole domain of the Appellate Division."
33. In our considered view, the import of that position is that provided there is a pending appeal, a trial court need not delve into the merits thereof for an application for stay of proceedings pending such appeal to succeed. Indeed in that case, the court did observe that the filing of an intended appeal in itself was not sufficient. We do respectfully abide by this position of the law.
34. The above decision in the *Omar Awadh Omar* case resonates with the legal position advanced in *Mobile Producing Nigeria Unlimited* (supra) where it was held:
"It is however, important to establish from the onset that there exists a

valid pending appeal before an application for stay may be entertained.”

35. The foregoing legal position does portend that the existence of a ‘valid, pending appeal’ would be a condition precedent to the entertainment of any application for stay of proceedings pending appeal. We stand respectfully persuaded by this reasoning because quite clearly, if there is no appeal then there would be no reason whatsoever to purport to stay proceedings pending a non-existent appeal. The very foundation of the entire application would collapse.
36. The question of the non-existence of a valid appeal when the present Application was filed was raised by the Respondent herein in paragraph 9 of her Affidavit in Reply, and canvassed by both her lawyers in submissions. Counsel for the Applicant did also address us on this issue in his submissions in reply, initially maintaining that a notice of appeal would suffice for an application of this nature and subsequently stating that, in any event, when the Application came up for hearing, a memorandum of appeal had been filed.
37. We are acutely aware that there is judicial disparity as to whether or not an appeal in that context would be construed to include an intended appeal as typified by a notice of appeal. However, for reasons we shall elucidate forthwith, we take the view that within this Court’s legal regime, a statutory distinction has been drawn between an appeal and an intended appeal, and an appeal is only deemed to have been duly instituted when a memorandum of appeal, as opposed to a notice of appeal, has been lodged. In that regard, Rule 110 is couched in very clear and unambiguous terms. It makes reference to an ‘appeal’, rather than an ‘intended appeal’, not operating as an automatic stay of proceedings. Although the term ‘appeal’ is not defined either in the Treaty or in the Court’s Rules of Procedure, the meaning attributed to it within this Court’s legal regime can be deduced from the Court’s Rules. We do find appropriate instruction on what constitutes an appeal from Rules 78(1), 81, 82 and 86(1) thereof. We reproduce the said Rules for ease of reference:
- “Rule 78(1)
Any person who desires to appeal to the Appellate Division shall lodge a written notice in duplicate in the registry of the Appellate Division.
- Rule 81
A person on whom a notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.
- Rule 82
If a party who has lodged a notice of appeal fails to institute an appeal within the prescribed time ...
- Rule 86(1)
... an appeal shall be instituted by lodging in the appropriate registry, within thirty (30) days of the date when the notice of appeal was lodged –
(a) A memorandum of appeal, in quintuplicate”
38. It is quite apparent that the framers of the foregoing Rules deliberately drew a distinction between a ‘notice of appeal’ and an ‘appeal’. In fact, Rule 78(1) explicitly denotes a notice of appeal as being indicative of a ‘desire to appeal’. On

the other hand, Rule 86(1) expressly designates the manner in which an appeal is instituted; it is lodged by a memorandum of appeal and not a notice of appeal. Consequently, it seems abundantly clear to us that the lodging of a notice of appeal cannot be said to be tantamount to the institution of an appeal within the EACJ's legal regime. It simply represents a party's desire or intention to appeal as stated in Rule 78(1).

39. In the present Application, paragraph (a) of the Notice of Motion represents a prayer for this Court to stay the proceedings in *Ref. No. 17 of 2014* pending the determination of an Appeal against part of the Ruling of the Court dated 6th November 2015. All the grounds of that Application are premised on the existence of a valid, pending appeal. Indeed, paragraph 5 of the supporting Affidavit attests to an appeal having been filed. Both the Application, as well as the supporting Affidavit are dated 10th November 2015. The Notice of Appeal in this matter was lodged on 10th November 2015, while the Memorandum of Appeal, by which an appeal is instituted, was lodged on 17th November 2015. It is undoubtedly apparent from the foregoing facts that when the present application for leave to stay the proceedings in *Ref. No. 17 of 2014* was filed, there was no valid, pending appeal before the Appellate Division. We do, therefore, find that the Application before us is defective in that regard and improperly before this Court.
40. Two sub-issues emerge from this finding. First, as was held in the *Mobile Producing Nigeria Unlimited* case, having found that there was no valid, pending appeal before this Court when the present Application was filed, the Application cannot be entertained on its merits but rather should be struck out on that account. Tied to that is the fact that the Affidavit in support of the defective Application is false in so far as it untruthfully attests to an existent appeal.
41. With utmost respect, we find to be flawed and misleading the argument by learned Counsel for the Applicant that if there was no appeal at the time of filing the Application, the Court should consider the fact that at the time of the hearing thereof an appeal had been filed. It is a cardinal rule of judicial practice that all parties appearing before a court or tribunal must be accorded a fair trial. Parties' right to a fair trial by necessity includes their right to know in good time the nature of the case against them to enable them adequately prepare therefor. This principle was aptly addressed in the case of *Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139* and cited with approval by this Court in the case of *Simon Peter Ochieng & Another vs. Attorney General of Uganda EACJ Ref. No. 11 of 2013*. In that case (*Captain Harry Gandy*) it was observed:
- “The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.”
42. Secondly, one of the principles governing stay of proceedings pending an appeal, without delving into the merits thereof, is that the appeal has reasonable chances of success. Stated differently, the applicant must demonstrate a *prima facie* claim on appeal. See *Mobile Producing Nigeria Unlimited (supra)*. Such an appeal should be arguable and not frivolous. See *Silverstein vs. Chesoni (2002) 1 EA 296 (Court of Appeal, Kenya)*. We are unable to appreciate how such demonstration

can be established by an applicant in the absence of a memorandum of appeal, or indeed, how a respondent that has not been served with a memorandum of appeal can adequately prepare his/ her response to the *bona fides* of the appeal for purposes of the application.

43. In fact, in the instant case, the Respondent was served with the Memorandum of Appeal at the hearing of the Application. Under those circumstances, such a Party could hardly be expected to have known the issues raised therein in time, let alone have had the ability to meaningfully prepare its case in response thereto. With respect, we do not appreciate Mr. Tumwebaze's submission that this Court should look at the Memorandum of Appeal that was filed and determine whether it warranted the orders sought by the Applicant. We take the view that due process would dictate that the parties are given sufficient time to prepare their respective cases on a matter for adjudication, and thereafter a court would be addressed by them on the merits of their respective cases. That is the essence of pleadings and submissions. It is not the function of courts to second-guess parties' cases and determine matters before them on that basis. In the result, we find that there was no valid, pending Appeal before this Court at the time of the filing of the present Application, and do reiterate our earlier finding that the said Application is incurably defective.
44. With regard to the falsehood in the supporting Affidavit, Mr. Agaba did also argue that the Court should not give undue recourse to technicalities as prescribed by Rule 55(3) (d). We take the considered view that, having impugned the present Application, the supporting Affidavit thereof is rendered redundant. Nonetheless, for completion, we propose to address that issue forthwith. It seems to us that the falsehood in that Affidavit derived from the mistaken equating by the Applicant of an appeal with a notice of appeal. As we have endeavored to illustrate earlier in this Ruling, that is not the position under our Rules. The question would be, having so found, would this Court be at liberty to ignore the falsehood therein under the pretext of Rule 55(3) (d), as submitted by learned Counsel?
45. Rule 47(1) of our Rules provides:
- “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 –
- (a)
 - (b) Is scandalous, frivolous or vexatious; or
 - (c) Is an abuse of the process of the Court.”
46. In our considered view, the core value of an affidavit as a document made on oath presupposes the veracity and truthfulness that should underscore the statements contained therein. Indeed, while rejecting an Affidavit, the Supreme Court of Uganda upheld the decision of the Court of Appeal that had held the importance of affidavit evidence to be rooted in the fact that it is made on oath. See *Kakooza vs. Electoral Commission & Another Election Petition Appeal No. 11 of 2007 (Supreme Court, Uganda)*. We are respectfully persuaded by the reasoning in that case. Applying the same analogy to the present facts, we find that it would undermine the importance of affidavit evidence to leave intact on the record a document purportedly made on oath that contains apparent falsehoods, even if

such falsehoods were made on an innocent but mistaken application of the law. We take the view that a false affidavit or false affidavit evidence is scandalous and vexatious, an apparent manifestation of abuse of court process. We are aware that the options available to this Court under Rule 47(1) are hinged on an application therefor having been made by any of the parties to a case. There does not seem to be any room in that Rule for the Court to consider any of those courses of action on its own motion. However, that lacuna is addressed by the inherent powers of the Court under Rule 1(2) of its Rules.

47. Suffice to note that Rule 47(1) applies equally to any offending pleading as it would to an affidavit. Whereas in the present context it has been applied in respect of the falsehood in the supporting Affidavit, it would similarly be applicable to the present Application. In the legal context, the meaning attributed to the term ‘frivolous’ includes a claim that is ‘lacking of legal basis or legal merit; not serious; not reasonably purposeful.’ See *Black’s Law Dictionary*, 8th Edition, p. 692. It is our considered view that an application that does not comply with the legal regime governing its subject matter is most certainly lacking in legal basis, unserious and accordingly not purposeful.
48. Having found that the present Application is improperly before us in so far as it misdirected itself to the legal regime in respect thereof, it does follow that the said Application is frivolous within the foregoing definition. Furthermore, we have found the Affidavit in support of the defective Application to have been scandalous and vexatious on account of its falsehoods. The question would be what remedies are available to a court that is faced with such defective pleadings. Rule 47(1) (b) of this Court’s Rules prescribes ‘striking out of pleadings’ as one of the options available in respect of frivolous pleadings. In the same vein, Part 3 of the United Kingdom’s revised Civil Procedure Rules, 1999 does recognize ‘failure to comply with a rule, Practice Direction or court order’ as a ground for striking out pleadings. See *Oxford Dictionary of Law (supra)*, p. 531.
49. Be that as it may, before we take leave of this matter we are constrained to address the applicability of Rule 55(3) (d) of the Court’s Rules as raised by learned Counsel for the Applicant. It reads:
- “The Court shall, when fixing the date for the opening of the oral proceedings or postponing the opening or continuance of such proceedings, have regard to –
- (a)
 - (b)
 - (c)
 - (d) The need to administer substantive justice without undue regard to technicalities.”
50. This legal provision is akin to Article 126(2) (e) of the Constitution of the Republic of Uganda (as amended) and Article 159(2) (d) of the Constitution of Kenya, 2010. The former reads:
- “In adjudicating cases both of a criminal and civil nature, the courts shall subject to the law, apply the following principles:
- (a)
 - (b)
 - (c)

(d)

(e) Substantive justice shall be administered without undue regard to technicalities.”

51. The Supreme Court of Uganda did have occasion to address the issue of substantive justice viz rules of procedure in the cases of *Utex Industries Ltd vs. Attorney General Civil Application No. 52 of 1995* and *M/s Kasirye Byaruhanga & Co. Advocates vs. Uganda Development Bank Civil Application No. 2 of 1997*.
52. In *Utex Industries Ltd* (supra) the court was faced with a prayer for enlargement of time for failure by a party to take the right step at the right time under the provisions of the said court’s rules of procedure. The party sought to rely on Article 126(2) (e) in support of its case. In rejecting the party’s plea, the Court held:
- “Regarding Article 126(2) we are not persuaded that the Constituent Assembly Delegates (framers of the Constitution) intended to wipe out the rules of procedure of our courts by enacting Article 126(2) (e). Paragraph (e) contains a causation against undue regard to technicalities. We think that the Article appears to be a reflection of the saying that rules of procedure are handmaids of justice, meaning that they should be applied with due regard to the circumstances of each case.”
53. Similarly, in *M/s Kasirye Byaruhanga & Co. Advocates* (supra), an applicant for the enlargement of time sought to rely upon Article 126(2) (e). In rejecting the application, the court held:
- “A litigant who relies on the provisions of Article 126(2) (e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to pay undue regard to a relevant technicality. Article 126(2) (e) is not a magic wand in the hand of defaulting litigants.”
54. Turning to the matter before us, we are not persuaded that the Applicant herein has demonstrated satisfactory reasons as would compel us to waive the application of Rules 86(1)(a) and 110 of this Court’s Rules of Procedure, or disregard the provisions of Rule 47(1) as read together with Rule 1(2) thereof. We respectfully agree with the principle advanced in *M/s Kasirye Byaruhanga & Co. Advocates* (supra); Rule 55(3)(d) of our Rules is not a magic wand in the hand of a defaulting litigant that when invoked would in itself compel this Court to waive its Rules of Procedure. Rules of Procedure must be meticulously adhered to so as to entrench their intended purpose – the seamless administration of justice by fostering the integrity, rationality and objectivity of the judicial process.
55. Thus, for present purposes, whereas we are alive to and do respectfully appreciate the decision in the case of *Attorney General of Uganda vs. East African Law Society* (supra) that it would be futile to allow the proceedings before a trial court to continue in the event that an Appeal arising therefrom was allowed and the proceedings were rendered a nullity; we are also cognizant of the role of courts as stewards of the judicial processes that deliver justice. These processes operate most justly and judiciously when rules of procedure are applied with the seriousness, conscientiousness and dignity that is due to them.
56. As we have dutifully elucidated hereinabove, the Court in the *Attorney General of Uganda vs. East African Law Society* case was considering an Application that was properly before it on the question of staying the hearing of one case pending

the determination of an Appeal in another case. That is not the case in the matter before us presently, which is dogged by such serious procedural defects as would essentially invalidate it. We take the considered view, therefore, that it would be disingenuous and incongruous of this Court, having pronounced itself on the procedural deficiencies it has found herein, to nonetheless seemingly condone them and proceed to entertain the present Application.

57. In the final result, therefore, we find that the Application is misconceived, incompetent and improperly before this Court, and do hereby strike it out under Rules 1(2) and 47(1) of the Court's Rules.
58. It is trite law that costs in any action follow the event unless the court, for good reason, decides otherwise. In the instant case, given that the present application is interim in nature, we are of the considered view that it is just that the costs abide the determination of *Reference No. 17 of 2014*. We so order.

S. Agaba, Counsel for the Applicant

J. Semuyaba & J. Tumwebaze for the Respondent

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First Instance Division

Taxation Reference No. 1 of 2015**Godfrey Magezi v National Medical Stores**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo; F. Jundu & A. Ngiye, JJ
September 21, 2017

Taxing Officer's discretion - Whether there was sufficient reason to interfere with the award - Whether errors of law or principle caused injustice - Excessive or inadequate compensation - Fair notice of issues in pleadings before hearing

Rules: 84(1), (2), 114 Third Schedule, EACJ Rules of Procedure, 2013

On 19th June 2014, this Court delivered its ruling in Consolidated Applications No. 8 and 9 of 2014 filed by Respondent and Quality Chemical Industries Ltd wherein the Applicant was condemned to pay costs of the application for discontinuance of the claim against them. Thereafter, on 7th September 2015 a Bills of Costs filed by the Respondent in *Taxation Cause No.2 of 2014: National Medical Stores v Godfrey Magezi* was taxed to a total sum of US\$ 42,829.49; and *Taxation Cause No. 4 of 21014: Quality Chemical Industries Ltd v Godfrey Magezi* was tacked at US\$ 18,012. Aggrieved, the Applicant filed this Reference claiming that the bill of costs submitted by the Respondent was founded on an illegality and could not be entertained as the public procurement laws of Uganda prescribe the method of procuring legal services for lawyers. In the instant case, there was no evidence of compliance with the procurement rules and therefore the Respondent breached the rules when they instructed M/S. Kiwanuka & Karugire Advocates as counsel and instruction fee of US\$ 14,160 was erroneous. Moreover, the taxation award was manifestly excessive, punitive in nature and not compensatory; and the award of US\$ 28,669.49 for drawings, perusals, attendances and disbursements were inconsistent considering the fact that both the Respondent and Quality Chemical Industries Ltd did not prosecute *Reference No. 5 of 2013* and were struck off the record on the same day therefore the taxing officer's award. The Applicant prayed that the awards be set aside.

In response, the Respondent contended that the determination of procurement matters was not in issue in the current application before the Court and was raised in bad faith. Furthermore, since the taxation hearing was concluded on 13th May 2015, it was improper to make submissions or adduce evidence after conclusion of the hearing.

Held

1. A reference on review of taxation may be made on two grounds: an error of law or principle; or that the bill of costs as taxed is manifestly excessive or manifestly inadequate. Whereas the taxing officer has discretion in the matter of taxation, this must be exercised judicially. Save in exceptional cases, a court would not interfere with assessment of what a taxing officer considers to be a reasonable fee

as such questions, solely on quantum of costs, are matters for the taxing officer to deal with.

2. The Court will only interfere when an award is so high or so low as to amount to an injustice to one party; or where it is expressly or by inference shown that in arriving at the quantum of the fee, the taxing officer applied, a wrong principle. However, even if an error on principle occurred, a court should only interfere if satisfied that the error substantially affected the decision on quantum and that upholding the amount would cause injustice to one of the parties.
3. The issue of procurement of the Respondent's counsel's services was raised at the taxation hearing. If the Applicant's counsel had filed written pleadings to the Court as regards the issue, the Respondent would have been given fair notice of the disputed procurement and filed a response. Fair hearing must be upheld by a court of law. This matter ought to have been raised before the Court issued a costs order in favor of National Medical Stores for wrongly enjoining in *Reference No 5 of 2013*. Thus, the issue of the procurement of the Respondent's counsel's services could not be entertained.
4. The Taxing Officer was aware of the principal criterion for assessing such a case is the amount of work done. Thus, a comprehensive analysis of the authorities was done and it was shown how those cases were distinguishable from the case at hand. No evidence was provided showing an error in law or principle amounting to an injustice to the Applicant and warranting a review of the award of US\$ 14,160 on instruction fees.
5. With regard to the award of US\$ 28,669.49 for drawings, perusals, attendance, travelling and subsistence, the bill of costs was assessed per item and reasons given why amounts were taxed or taxed off. The Applicant did not show why the Taxing Officer should have awarded a different amount. Therefore, there was no reason to interfere with the decision of the Taxing Officer.

Cases cited

Attorney General v Uganda Blanket Manufacturers, SCC Civil Application No. 17/93
 Bank of Uganda v Banco Arabe Espanol, SCC, Application No. 23 of 1999
 Democratic Party & Anor v AG of Uganda, EACJ Ref. No. 3 of 2013
 Kenya Ports Authority v Modern Holdings Ltd, EACJ Ref. No. 4 of 2010
 The AG of Kenya v Prof. P. Anyang' Nyong'o & Ors, EACJ Ref. No. 5 of 2010
 The Inspector General of Government v Godfrey Magezi, EACJ Taxation Ref. No. 1 of 2016
 Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Ors (No. 3) [1972] EA 162

RULING

A. Introduction

1. This Taxation Reference, by Notice of Motion, was filed by Mr. Godfrey Magezi ("the Applicant"), a resident of the Republic of Uganda. His address for service, for the purpose of this Reference is C/O Nyanzi, Kiboneka & Mbabazi Advocates, Plot 103 Buganda Road, P.O. Box 7699 Kampala.
2. The Respondent is National Medical Stores, a corporation established in 1993 by an Act of Parliament, under Chapter 207 of the Laws of Uganda. Its address for service, for the purpose of this Reference is C/O Kiwanuka & Karugire Advocates, Plot 5A2 Acacia Avenue, Kololo, P. O. Box 6061, Kampala.
3. The Taxation Reference was filed following a Ruling against the Applicant rendered on 7th September 2015, in respect of taxation of Bills of Costs by National Medical Stores and Quality Chemical Industries Ltd vide *Consolidated Taxation Causes*

No.s 2 and 4 of 2014: National Medical Stores & Quality Chemicals Industries Ltd v Godfrey Magezi.

4. The Applicant moved this Court under Rules 114, 84(1) and (2) of the East African Court of Justice Rules of Procedure 2013 (“the Rules”) for orders as follows:
 - “(a) The Taxation Award made by the learned Taxing Officer on 7th September, 2015, of instruction fees inclusive of 18% VAT in the sum of USD plus drawings, perusals, attendances and disbursements in the sum of USD 28,699.49 making a total of 42,829.49 vide *Taxation Cause No. 2 of 2014: National Medical Stores V Godfrey Magezi*, be set aside.
 - (b) Costs of this taxation reference be paid by the respondent.”

B. Representation

5. The Applicant was represented by Mr. Mohamed Mbabazi, while Mr. Peter Kauma appeared for the Respondent.

C. Background

6. On 25th July 2013, the Applicant filed *Reference No. 5 of 2013* at this Court against the Attorney General of the Republic of Uganda. In the said Reference, the Applicant impleaded the Inspector General of Government, the Auditor General, the Public Procurement and Disposal of Public Assets Authority, National Medical Stores and Quality Chemical Industries Limited as “Interested Parties.”
7. After the “Interested Parties” had been served with the Reference and filed their Responses, the Applicant amended his Reference and served the “Interested Parties” with Notices of Withdrawal. The Respondent and Quality Chemical Industries Ltd then separately filed two applications before this Court that were consolidated as *Consolidated Applications No. 8 and 9 of 2014* stating that the withdrawal/discontinuance of the matter against them was without an agreement in writing as to the terms of such withdrawal and in particular with regard to terms as to costs incurred.
8. On 19th June 2014, this Court delivered its Ruling in *Consolidated Applications No. 8 and 9 of 2014* and held that National Medical Stores and Quality Chemical Industries Ltd were entitled to costs as prayed and also condemned the Respondent to pay costs of the application.
9. The Respondent then filed its bill of costs and a taxation hearing were held on 13th may 2015 wherein the bill of costs was taxed under *Consolidated Taxation Cause No. 2 and No. 4 of 2014*. A Taxation Ruling in the matter was thereafter delivered by the Deputy Registrar, as the Taxing Officer, on 7th September 2015.
10. Being dissatisfied with the aforesaid Taxation Ruling, the Applicant filed the present Taxation Reference on 22nd September 2015, seeking to set aside the said Ruling. The Taxation Reference having been filed out of the time prescribed by the Court’s Rules, the Applicant subsequently, on 2nd October 2015, filed *Application No. 9 of 2015* in this Court seeking for orders that: (a) Enlargement of time for lodging *Taxation Reference No. 1 of 2015: Godfrey Magezi v National Medical Stores* against the decision of the learned Deputy Registrar in *Consolidated Taxation Causes No.s 2 and 4 of 2014: Quality Chemical Industries Ltd v Godfrey Magezi* be granted; (b) The late filing of *Taxation Reference No. 1 of 2015: Godfrey*

Magezi v National Medical Stores be validated; and (c) Costs of the application be in the cause.

11. On 14th March 2016, when the Application for enlargement of time came for hearing, this Court, upon request by both Parties, directed that the Parties file written submissions in both *Application No. 9 of 2015* and the present Taxation Reference.
12. *Application No. 9 of 2015* for extension of time was dismissed with costs by this Court in its Ruling of 30th June 2016 and consequently, *Taxation Reference No. 1 of 2015* was struck out. Being dissatisfied by that Ruling, the Applicant filed an appeal before the Appellate Division of the Court and the latter, in its Judgment of 25th May 2017, set aside this Court's Order in *Application No. 9 of 2015*, validated the late filing of *Taxation Reference No. 1 of 2015* and ordered its hearing on the merits.

D. Case and Submissions for the Applicant

13. The Applicant's Notice of Motion is supported by the Applicant's Affidavit sworn on 20th September 2015. The Applicant also filed written submissions and submissions in rejoinder, on 21st March 2016 and 08th April 2016, respectively.
14. The grounds of the Reference are that:
 - "1) On 7th September 2015, the learned Taxing Officer made a ruling vide Taxation Causes Nos. 2 and 4 of 2014 taxing the bill of costs as follows:
 - a) Instruction fees inclusive of 18% VAT in the sum of USD 14,160 plus drawings, perusals, attendances and disbursements in the sum of USD 28,699.49 making a total of USD 42,829.49 vide *Taxation Cause No.2 of 2014: National Medical Stores V Godfrey Magezi*; and
 - b) Instruction fees inclusive of 18% VAT in the sum of USD 14,160 plus drawings, perusals, attendances and disbursements in the sum of USD 3,852 making a total of USD 18,012 vide *Taxation Cause No. 4 of 21014: Quality Chemical Industries Ltd v Godfrey Magezi*.
 - 2) The award amounts to an illegality as there was breach of the public procurement rules of the Republic of Uganda by the respondent in instructing M/S. Kiwanuka & Karugire Advocates as counsel.
 - 3) The aforementioned taxation award is manifestly excessive in the circumstances;
 - 4) There is no legal basis for the said taxation award;
 - 5) The taxation award is punitive in nature and not compensatory;
 - 6) The taxation award is not commensurate with any international practice in awarding fees;
 - 7) That there was inequality and discrimination by the learned Deputy Registrar in awarding a total of USD 28,669.49 to the respondent for disbursements in *Taxation Cause No. 2 of 2014: National Medical Stores v Godfrey Magezi* vis-a-vis USD 3,852 to Quality Chemical Industries Ltd in *Taxation Cause No. 4 of 2014* for disbursements.
 - 8) Justice requires that this taxation reference be granted."
15. The Applicant's submissions revolve around two issues, namely, (1) "whether the award amounts to an illegality as there was breach of the public procurement rules of the Republic of Uganda by the respondent in instructing M/S Kiwanuka &

Karugire Advocates as counsel”, and (2) “whether this Court has the justification to entertain a Taxation Reference and interfere with an award made by a taxing officer.”

16. With regard to the issue related to the procurement of services of the Respondent’s counsel, counsel for the Applicant took issue with the three documents (i.e. Best Evaluated Bidder Notice dated 13th May 2013; Letter dated 5th August 2013; and Service Level Agreement signed on the 5th September 2013) submitted by the Respondent’s counsel in order to show they were been procured in accordance with the law. He thus contended that the Best Evaluated Bidder Notice dated 13th May 2013 was in respect of pre-qualification for purpose of short listing and indicated names of four firms which qualified to be shortlisted; that for all intents and purposes, the letter dated 5th August 2013 did not convey a contract award decision of the entity’s Contracts committee; and further that, the Service Level Agreement signed on the 5th September 2013 was neither one of the types of contracts specified in Regulations 233(1), nor one of the types of contracts for services specified in Regulation 289 of the Procurement and Disposal of Public Assets Regulations.
17. Further, learned counsel, after indicating the steps in the Ugandan public procurement process from the pre-qualification until the request for approval of contract award recommendation and the request for approval of contract document, submitted that, since no such award of contract was ever made to the Respondent’s counsel having contracted on basis of pre-qualification, the executed contract was void *ab initio*.
18. Counsel also referred to the taxing master’s ruling awarding UDS 42,829.49 to the Respondent and contended that it was evident that issue of illegality of the procurement of the Respondent’s counsel was never dealt with by the taxing master even when she had the documents from the Respondent’s Advocate. He therefore urged this Court to deal with the issue of the illegal procurement of the Respondent’s advocate in light of the applicable provisions of the Public Procurement and Disposal of Public Assets (PPDA) Act, vide Sections 2, 3 & 79(3), Regulation 233(1) of PPDA Regulations No. 70 of 2003, Regulations 233(2).
19. To further support his arguments, counsel cited the authority of *Attorney General & Hon. Peter Nyombi V. Uganda Law Society: Misc. Application No. 32 of 2012* where Hon. Justice Stephen Musota had found that it was irregular for the Attorney General to have retained Kampala Associated Advocates as lawyers to provide professional services to the Attorney General without following the PPDA Act and Regulations as amended and the authority of *Makula International Ltd V. His Eminence cardinal Nsubuga & Others [1982] HCB*, where it was held that: “A court of law can’t sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleadings, including any admissions made thereon.” He hastened to add that Counsel for the Applicant had brought that illegality to the attention of the Court⁴⁹ as evidenced in the record of proceedings.
20. In summing up his submission on that issue, Counsel urged the Court to find

⁴⁹ The issue arose during the taxation hearing held on 13th May 2015 before the Deputy Registrar acting as the Taxing Officer

that the Respondent's instructions to their advocates, Kiwanuka & Karugire to provide professional services without following the PPDA Act and Regulations were contrary to the law.

21. In the case that the Court does not find the issue aforesaid in the affirmative, Counsel for the Applicant framed a second issue as to whether this Court has the justification to entertain this Reference and interfere with the Taxing Officer's Award.
22. On this issue, learned counsel, first of all, referred to the case of *Attorney General V. Uganda Blankets Manufacturers [1975]*, *Civil Appeal No. 17 of 1993 (SCU)* where it was held that "it is only in exceptional cases that a judge will interfere with an award of costs by a Taxing Officer. These exceptional cases include where the award is manifestly excessive, where there has been a misdirection and where the award has been arrived at on wrong principles." Then, he stated that the application of wrong principles was settled by the Supreme Court of Uganda in the case of *Paul Kawanga Ssemwogerere & Others V. Attorney General: Civil App. No. 5 of 2001*, where it was held that: "awarding a manifestly excessive instruction fee is a sufficient indication that the taxing officer in assessing that item applied or based the decision on wrong principles and would merit interference with the award by the Court."
23. Relying on the aforementioned authorities, the Applicant's counsel contended that the fact that the Respondent's advocates were struck off Reference No. 5 of 2013 at a preliminary stage and that they did not participate in the trial of the said Reference, the amount of USD 14,160 inclusive of 18% VAT awarded as instructions fee by the Taxing Officer, using her discretionary power, is excessive.
24. To further buttress his arguments, learned counsel also referred us to the case of *Lumweno & Co. Advocates V. TransAfrica Assurance Company Ltd: Court of Appeal, Civil Application No. 0095 of 2004* where it was held that "the entitlement under instruction fees grows as the matter proceeds. As case that ends on a technicality cannot attract the same fees as one that proceeds for trial. By the same logic an advocate who only files pleadings and makes a few appearances cannot be ruminated the same way as one who takes the case through a full down trial. At the end of the case a minimum fee may be reviewed upwards on downwards based on the advocate's involvement, complexity and other related matters."
25. Reference was also made to *Shumuk Investments Ltd V. Noble Builders (U) Ltd & Others – Civil Appeal No. 24 of 2012* in which it was stated that "an instruction fee is said to be excessive if it is out of the proportion with the value and importance of the suit and work involved" and where the Court opined that the Taxing Officer, in spite of awarding instruction fees as claimed by the receiving party's counsel, ought to have considered the volume of work and responsibility that was attributable to the advocates in the case, time spent on it and the importance of the matter to the litigants and then come to a reasonable instructions fees for each of them. Subsequently, the Court considered that the instruction awarded were excessive and had to be reduced.
26. Other cases referred to us and reflecting the Counsel's same line of arguments were: *Patrick Makumbi V. Sole Electricians (U) Ltd – S.C. Civil Appeal No. 11 of 1994*; *Primchand V. Quarry Services of East Africa Ltd No. 3 of 1872 EA 16 and Electoral*

Commission, Hon. Kirunda Kiveninja V. Hon. Abdu Katuntu.

27. Relying on the abovementioned authorities, counsel submitted that the Taxing Officer's award of the amount of USD 42,829.49 for instruction fees (i.e. USD 14, 160) and for drawings, perusals, attendances and disbursements (i.e. USD 28,697.49) was manifestly excessive and occasioned an injustice to the Applicant. He prayed therefore that items 2 to 48 of the Advocates bill had to be taxed off as the taxation award was manifestly excessive.
28. In the same vein, counsel invited the Court to consider the principles of taxation of costs below as set up in the case of *Premchand Ltd (supra)* in assessing whether the sum of \$USD 14,160 awarded as instruction fees was reasonable:
 - (a) Costs must not be allowed to rise to such a level as to confine access to the Courts only to the rich;
 - (b) The successful litigant ought to be fairly reimbursed for costs he or she has to incur;
 - (c) That the general level of remuneration of advocates must be such as to attract recruits to the profession.
29. Counsel thus submitted that, the Respondent having been struck off Reference No. 5 of 2013 at a preliminary stage before its hearing commenced, the award of a sum of USD 14,160 inclusive of 18% VAT as instruction fees to be awarded to the Respondent was not only prohibitive but also manifestly excessive in the circumstances. He subsequently proposed a sum of USD 550 inclusive of VAT 18% as the reasonable instruction fees to the Respondent.
30. Further, referring to the Applicant's affidavit and to the cases of *Attorney General V. Uganda Blanket Manufacturers (supra)* and *Paul Kawanga Ssemwogerere & Others (supra)*, learned counsel submitted that the Taxing Officer's award was premised on wrong principles.
31. Counsel went on to cite Rule 11 of the Third Schedule of the Court's Rules which provides that on taxation, the Taxing Officer shall allow such costs, charges and disbursements as shall appear to him or her to have been reasonably incurred for the attainment of justice but no costs shall be allowed which appear to the Taxing Officer to have been incurred through overpayment, extravagancy, over caution, negligence or mistake and then submitted that the award was unreasonable for attainment of justice as it was only being incurred through extravagancy, mistake and overpayment to the Respondent for minimal work done since his advocates did not prosecute Reference No. 5 of 2013.
32. Another bone of contention pertained to the dates of attendances by the Respondent and his advocates. In this regard, counsel contended that there were mistaken dates and that the Respondent was awarded costs for fictitious attendances since no explanation and or justification was given in awarding items 37,38,39,42,44 and 45. He thus contended that the Taxing Officer had awarded costs which were unreasonably incurred hence occasioning an injustice to the Applicant.
33. The Applicant's counsel also impugned the Taxing Officer's Ruling for lack of consistency in the awards of costs for drawings, perusals, attendances and disbursements considering the fact that both the Respondent and Quality Chemical Industries Ltd did not prosecute Reference No. 5 of 2013 and were struck off the record of that Reference on the same day.

34. Learned counsel further contended that the taxation award was punitive in nature and not compensatory and hence was in total disregard of Rule 111(1) [sic] of the 3rd Schedule [sic] of the Rules of this Court where it is provided that “costs in any proceedings shall follow the event unless the court shall for good reason otherwise order.” Counsel also referred to Rule 11(1) of the 3rd Schedule of the Court’s Rules reproduced elsewhere above in this Ruling. He prayed that, in regard to the reasonableness of the taxation award, the Court found it to be punitive and not compensatory and further, that the Court found that the said taxation award was not commensurate with any international practice in awarding costs.
35. It was the Applicant’s final submission that the taxation award in *Taxation Cause No. 2 of 2014: National Medical Stores V. Godfrey Magezi* be set aside.

E. Cases & Submissions for the Respondents

36. The Respondent opposed this Taxation Reference on different grounds contained in the Affidavit in reply sworn by Mr. Apollo Newton Mwesigye on 09th November 2015 and the Respondent’s written submissions filed on 01st April 2016.
37. In his Affidavit, Mr. Mwesigye, after recalling that this Court delivered a decision in *Consolidated Applications No. 8 and 9 of 2014* arising from *Reference No. 5 of 2013* where the Respondent was awarded costs for both the Reference and the Application for having been wrongly impleaded as a party, stated that the Applicant did not appeal against the said decision. He also deponed that during the hearing of the said Consolidated Applications, the Applicant did not raise any issue pertaining to the alleged non-compliance with the procurement laws in the instruction of the Respondent’s counsel. In addition, he stated that it was only when the matter came for taxation of the bill of costs under *Consolidated Taxation Causes No. 2 and 4 of 2014* before the Taxing Officer that the Applicant’s counsel made a statement from the bar alleging that the Respondent had not properly procured its counsel despite the fact that counsel had been conducting the matter since its inception on 13th September 2013 when a Response to the Reference was filed. He further averred that when the objection was raised, no evidence was presented in support of the allegations of lack of approval from the contracts committee or clearance from the Attorney General prior to the signature of a contract.
38. In light of the foregoing, learned counsel contended that the objection had been raised in bad faith and ought to be disregarded with contempt. He further pointed out that counsel for the Applicant was wrong to state that the Respondent’s counsel had been ordered by the Taxing Officer to submit to court relevant documents regarding the procurement of the Respondent’s counsel. 35. He maintained that the determination of procurement matters was not a matter in issue before the Court and could not be belatedly introduced at the taxing stage as it was not one for determination by the Registrar. In this regard, he submitted that, since the taxation hearing was concluded on 13th May 2015 and the ruling reserved for delivery on notice, it would be improper to make submissions or adduce evidence after conclusion of the taxation hearing.
39. Learned counsel also argued that by seeking for the Court to determine whether

the award of costs amounts to an illegality, the Applicant in effect sought to again determine the question of whether costs were payable. He thus contended that the issue of costs being payable to the Respondent was already determined by this Court in *Consolidated Applications Nos. 8 and 9 of 2014* and that as such could not be determined again.

40. Counsel further pointed out that in the affidavit of Mr. Apollo Newton Mwesigye, it was stated that the Application was an abuse of court process in as far as it was a disguised appeal against the award of costs to National Medical Stores and that the Applicant by way of the Application only sought to revive the issue albeit in a disguised form. He then referred us to the case of *Karia & Another V. The Attorney General & Others [2005] 1 EA 83* at page 94 where the Supreme Court of Uganda had held that:

“Once a decision has been given by a Court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to re-litigate the issue again or to deny that a decision had in fact been given, subject to certain conditions.”

41. Learned counsel also contended that the issue of procurement of the services of counsel was not one to be determined by the Registrar in her capacity as the Taxing Officer during taxation proceedings based upon a statement made at the bar without any supporting evidence. He further argued that instead, as provided by Rule 112(1) and Rule 113(1) of the Rules of the Court, what was to be dealt with by the Registrar as the Taxing Officer was the taxation of the costs since she could not act as an appellate court to reverse the earlier court ruling that had held that costs were payable. In the same vein, counsel posited that the issue that this Court was mandated to determine on appeal against the Taxing Officer’s decision was the quantum of costs payable and not whether costs are payable or not.

42. It was counsel’s further contention that given the manner in which the objection of non-procurement was raised, if the Court were to determine the matter as prayed by the Applicant, the Respondent would not have been afforded a chance to a fair hearing. In that regard, he stressed that the allegation of breach of procurement rules was a grave allegation that could not be taken lightly and would demand that a fair hearing against it is ensured. 41. He also contended that given the gravity of the allegation of breach of procurement laws, the Court could determine whether the contracts committee or the Attorney General was involved in the procurement process without having heard the full facts of the matter, the Respondent also having been afforded an opportunity to be heard. In support of those submissions, learned counsel relied on Article 28(1) of the Constitution of the Republic of Uganda, the case of *Charles Harry Twagira V. Uganda, SCAA No. 27 of 2003* at page 7 where the Supreme Court of Uganda had considered the meaning of the said article and the case of *Mohammed Mohammed Hamid V. Roko Construction Limited, SCCA No. 1 of 2013* where the Supreme Court of Uganda had reaffirmed the imperative requirement to allow parties to address the Court before its decision on the issue of alleged illegality brought to its attention.

43. Counsel went on to reiterate his earlier contention that given the gravity of the allegation, the proper way to raise the objection of breach of procurement

rules would have been through pleadings clearly setting out the alleged breach and giving a chance to the Respondent to answer the allegations. In that regard, the Respondent's counsel referred us to the case of *Bakaluba Peter Mukasa V. Nambooze Betty Bakireke, Supreme Court Election Appeal No. 4 of 2009* at page 8 where the Court reaffirmed the importance and value of pleadings.

44. Another issue on which the Respondent's counsel submitted on was in respect with the documents that the Respondent had submitted to the Taxing Officer but which were challenged by the Applicant's counsel for not being the proof that the Respondent's counsel was instructed in accordance with the Ugandan procurements laws and regulations. In that regard, the Respondent's counsel contended that it was wrong for counsel for the Applicant to contend that the Service Level Agreement signed on 5th September 2013 between the Respondent and Kiwanuka & Karugire Advocates was not one of the types of contracts for services specified in Regulation 233(1) and Regulation 289 and that that was an illegality. On that issue, relying on Regulation 233(1) of the PPDA Regulations No. 70 of 2003, he submitted that, considering the content of the contract rather than its title, there was no illegality for the contract to be titled "Service Level Agreement" and that the said contract could be categorized as a framework contract as per Regulation 233(1) (d) of the aforementioned Regulation 233(1). He further stated that framework contracts were provided for under Regulation 289(4) of the PPDA Regulation 70 of 2003 and that Section 58 of the PPDA Act No. 1 of 2003 provided for the use of framework contracts and that in the instant case, the agreement was the provision of legal services including but not limited to international law, commercial law, conveyancing and land law, civil litigation and practice, tax law, labour law and arbitration and alternative dispute resolution for a period of three years.
45. Continuing in that line of arguments, Counsel for the Respondent reasserted that, contrarily to the Applicant's counsel's submissions, the representation of the Respondent by Kiwanuka & Karugire Advocates was the result of a lawful procurement process under domestic bidding which involved the contracts committee as provided for by the law as well as all necessary approvals from the Attorney General.
46. Learned counsel also cited Sections 101 and Section 103 of the Evidence Act, Cap. 6, Laws of Uganda in support of his submission that the burden of proof required to prove illegality and breach of procurement rules would lie on the Applicant and in that case it had not been discharged by him.
47. Moreover, relying on the case of *R. V. Rowe, ex parte Mainwaring and others [1992] 4 All ER 821 and Campbell V. Hamlet [2005] All ER 1116*, counsel submitted that, considering that the allegations of illegality in fact not only pointed to some kind of criminality on the part of the Respondent and the advocates instructed, but also to professional misconduct in representing a client unlawfully, the standard of proof required to prove the allegations was one above the civil standard of balance of probabilities and that instead, the criminal standard of proof was what would be required, that is proof beyond reasonable doubt.
48. Turning to the Applicant's reference to *Misc. Cause No. 34 of 2013, Attorney General & Peter Nyombi V. Uganda Law Society* where the Court had held that it was irregular for the Attorney General to have retained Kampala Associated

Advocates as lawyers to provide professional services without following the PPDA Act and Regulations, counsel for the Respondent submitted that the above case was distinguishable on the ground, firstly, that there was in fact no procurement process at all, while in the instant case, it was clear that there was a procurement process. Secondly, learned counsel contended that in the aforesaid *Misc. Cause No. 321 of 2013*, the parties were given an opportunity to present their cause through pleadings and that the issues of non-compliance with the Public Procurement Act and Rules was directly an issue for determination by the Court which only had arrived at its decision after evaluating the evidence presented by both parties which, learned further argued, clearly showed that there had been no procurement process at all. Counsel hastened to add that the aforesaid Court's holding that "In fact the Attorney General ought to have a list of several prequalified legal service providers after due process from which it can choose when occasion demands..." defeated the Applicant's arguments in the instant case.

49. Learned counsel also contested the Applicant's reliance on the case of *Makula International Limited V. His Eminence Cardinal Nsubuza & Anor. [1992] HCB 11* and submitted that the said case was distinguishable with the instant case in as far as it was held that even when an illegality was pointed, the full facts must be before the Court and that the right to be heard could not be ignored.
50. In summing his submission on this issue, counsel for the respondent submitted that the reasons he had given, the first ground relied on by the Applicant relating to non-compliance with procurement laws should be dismissed.
51. Turning to the Applicant's contention that there was justification for the Court to interfere with the Taxing Officer's Ruling on the ground that the amounts awarded as costs were manifestly excessive, counsel for the Respondent referred to Mr. Apollo Newton Mwesigye's affidavit where he had deponed that the Taxing Officer's award was not illegal, excessive or punitive but rather, that it was consistent with the practice of the Court, that all the disbursements claimed were proved by production of original receipts and that all the items in the bill were taxed in accordance with the law.
52. With regard, specifically to the contention that the amount of USD 14,160 awarded as instruction fees was excessive, counsel contended that the said contention was misleading considering that that amount was not awarded under a single item. Then, examining item by item, he stated that the impugned amount comprised instruction fees for defending the main Reference (USD 8,000); instruction fees to present Miscellaneous Application No. 9 of 2014 by Notice of Motion and a Value Added Tax of USD 2,160.
53. On the issue of consistency in awards, Counsel for the Respondent submitted that the same was taken care of by the Taxing Officer by referring to two cases to wit: *Taxation Number 1 of 2013, Hon. Sam Njuba V. Hon. Sitenda Sebalu* where USD 15,000 was awarded as instruction fees inclusive of VAT in a matter where the Respondents were wrongly impleaded in a reference which proceeded to hearing whereupon the Respondent was struck off; and *Taxation Cause No. 3 of 2010, The Clerk of the National Assembly of Kenya V. Prof. Anyang Nyong'o & Others* where USD 40,000 was awarded as instruction fees where the Applicant had been sued as a Respondent and case proceeded to a preliminary hearing

where a ruling was delivered striking out the wrongly joined parties. As a further proof of consistency, learned counsel contended that the same amounts as above were awarded as instruction fees to Quality Chemical Industries Ltd whose bill was taxed jointly with the Respondent's bill and that the said amount was not appealed against.

54. In light of the foregoing, counsel for the Respondent contended that, since the Taxing Officer in awarding these two amounts of instruction fees had followed the principles of taxation and that the awards were consistent with the Court's previous awards, no exceptional case had been made out by the Applicant to warrant interference with the award under the above items.
55. As for the Applicant's contention that the award of drawings, perusals, attendances and disbursements in the sum of USD 28,697.49 were manifestly excessive, counsel for the Respondent stated that a close look into the bill of costs item by item showed that it was taxed in accordance with the provisions of the Third Schedule to the Court's Rules. He therefore contended that the Applicant had not shown any exceptional circumstances that would warrant the Court's interference with the Registrar's award.
56. On the issue of alleged mistaken dates for the Respondent's advocates' attendances and the alleged fictitious attendances by the Respondent, counsel for the Respondent contended that the Applicant's submission in that regard was a misleading falsehood. He then pointed out that the actual dates of attendances were indicated in the bill of costs under items 6,24,29,30 and 32 and that those dates were not 'fictitious' as contended by the Applicant, but actual dates when attendances were made. And for the other disputed items in the bill of costs, he stated that those items were explained as follows; item 37: disbursements for air tickets and hotel accommodation; item 38: disbursements for air tickets; item 39: disbursements incurred; item 42: disbursements for air tickets; item 44: disbursements for air tickets and hotel accommodation; and item 45: disbursements for hotel expenses.
57. He ended his submissions reiterating his position that there was no single item awarded in the bill of costs that had been shown to be excessive or exceptionally high as to warrant the Court's interference with the Registrar's decision.

F. Applicant's Submissions in Rejoinder

58. In rejoinder, counsel for the Applicant reiterated his earlier contention that the Taxing Officer had never dealt with the issue of the illegality of the procurement of the Respondent's counsel even when she had received aforementioned three documents (i.e. Best Evaluated Bidder Notice dated 13th May 2013; Letter dated 5th August 2013 and Service Level Agreement signed on 5th September 2013), forwarded to him by the Respondent's counsel in a bid to show that they were properly procured/instructed by the Respondent. Thus, he urged this Court to investigate and determine that issue.
59. As for the aforesaid documents submitted by the Respondent's counsel, the Applicant's counsel argued that upon successful pre-qualification process, the Respondent's duty was to merely notify in writing the four compliant providers that they had been short listed to provide legal services, but that in any event, the letter dated 5th August 2013 could not be construed as a bid acceptance letter

based on the contracts committee's decision to award a contract.

60. In this regard, it was counsel's submission that, as provided by Regulation 143(3) (6) and (7), in circumstances where selection of single or sole bidder was to be made from among a number who are able to meet the requirements of the procurement, reasons for the selection of a single source or reason why there was only a sole source would have to be provided and submitted to the contracts committee for approval prior to the issue of a solicitation document.
61. Further, counsel submitted that the Respondent during the taxation used the three abovementioned documents to prove that the services of his counsel were legally procured instead of attaching the following documents: Approval of procurement method; approval of the solicitation document and choice of provider; approval of evaluation report and recommendation; approval of contract award recommendation; and approval of contract document. In that respect, counsel contended that "the Contracts Committee could not have rendered approval in respect of solicitation document and choice of provider and selection of a single source or sole source after it had just approved pre-qualification recommendations that led to formalization of a short list for pre-qualified providers of legal services not approval of the contract document without a written approval of the Authority to the Respondent to use a service level agreement, a type of contract not specified in Regulation 233(1)."
62. He further submitted that since the Respondent had submitted that the process had involved the Contracts Committee as provided for by laws as well as all necessary approvals from the Attorney, it was incumbent upon the Respondent to prove it. And then relying on the case of *Henry Kyarimpa V. Attorney General of Uganda EACJ (Appellate Division) Appeal No. 6 of 2014*, where it was held that "the burden of proof is on the one who would fail if no proof was offered", counsel submitted that the Respondent had not substantiated its assertions made in its submissions as there was not documentary proof of a lawful procurement process for the provision of its advocate's services supported by the requisite approvals envisaged in the PPDA Act and Regulations of Uganda.

G. Determination

63. It can be gleaned from the Applicant's pleadings and submissions that this Court was requested to determine two issues, namely: (1) Whether the Taxation Ruling delivered by the Taxing Officer on 7th September 2015 amounts to an illegality for alleged breach of public procurement rules of the Republic of Uganda by the Respondent in instructing his counsel, M/S Kiwanuka & Karugire Advocates; and (2) Whether this Court has justification to interfere with the Taxing Officer's Ruling rendered on 7th September 2015.
64. Before proceeding to the resolution of these issues, it is worth mentioning that this Taxation Reference was brought under Rule 114 of the Court's Rules which provides that:
- "Any person who is dissatisfied with the decision of the taxing officer may within fourteen (14) days apply by way of a reference on taxation for any matter to be referred to a bench of three (3) Judges whose decision shall be final."
65. This Court has had opportunity to decide cases where applicants had challenged

orders issued by the Taxing Officer. In determining those cases, the Court has relied on well settled principles governing the taxation of costs as laid out by leading case law, such as *Premchand Raichand Ltd and Another V. Quarry Services of East Africa Ltd and Others (No.3)* [1972] EA 162, at 162 to 165. These principles as referred to us by the Applicant's counsel were also summarized by Richard Kuloba in his book entitled *Judicial Hints on Civil Procedure*, 2nd Edition, pages 118 to 119 as follows:

- (a) A successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- (b) That costs be not allowed to rise to such level as to confine access to justice to the wealthy;
- (c) That the general level of remuneration of advocates must be such as to attract recruits to the profession;
- (d) That as far as practicable, there should be consistency in the awards made;
- (e) That there is no mathematical formula to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its own merit and circumstances;
- (f) The taxing officer has discretion in the matter of taxation but he must exercise the discretion judicially, not whimsically;
- (g) The Court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

66. Regarding specifically the issues at hand, the afore-stated principles have been followed and reaffirmed by various courts when they were requested to reverse orders of Taxing Officers. In the case of *Bank of Uganda V. Banco Arabe Espanol, SCC, Application No. 23 of 1999*, for example, learned Justice Mulenga (JSC) laid out some of the principles on which a judge should interfere with a Taxing's assessment of a bill of costs. He stated that "Counsel would do well to have the principles in mind when deciding to make, and/or when framing grounds of a reference. The first is that save in exceptional cases, a judge does not interfere with assessment of what a taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters with which the taxing officer is particularly fitted to deal and in which he has more experience than a judge. Consequently, a judge will not alter a fee allowed by a taxing officer merely because in his opinion he should have allowed a higher or lower amount. Secondly, an exceptional case is where it is shown, expressly or by inference that in assessing and arriving of the quantum of the fee allowed, the taxing officer exercised, or applied, a wrong principle. In this regard, application of a wrong principle is capable of being inferred/referred from the award of an amount, which is manifestly excessive or manifestly low. Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount would cause injustice to one of the parties..." (See also *Paul Ssemogerere and Zachary Olum V. Attorney General, SCC Application No. 5 of 2001*).

67. On its part, this Court has relied on these principles in deciding the cases of *Kenya Ports Authority V. Modern Holdings Ltd, Reference No. 4 of 2010*; *The Attorney General of Kenya V. Prof. Peter Anyang' Nyong'o & Others, Reference*

No. 5 of 2010; Democratic Part & Mukasa Fred Mbidde V. The Attorney General of the Republic of Uganda, Reference No. 3 of 2013; and The Inspector General of Government V. Godfrey Magezi, Taxation Reference No. 1 of 2016, among others. We shall also be guided by the aforesaid principles in considering the issues raised by the Applicant in the instant Taxation Reference, especially in assessing whether there are sufficient reasons to justify an interference with the Taxing Officer's Ruling.

Whether the Taxing Officer's Ruling amounts to an illegality for breach of public procurement rules of the Republic of Uganda by the Respondent in instructing his counsel

68. A perusal of the Court record shows that the issue of illegality in the procurement of the Respondent's counsel's services was raised by the Applicant's counsel when the parties came for hearing in *Consolidated Taxation Cause No.s 2 & 4 of 2014*. The thrust of the objection was that the bill of costs submitted by the Respondent was founded on an illegality and could not be entertained for reason that in Uganda, public procurement laws provide the way they procure services for lawyers and that in that case, there was no evidence for procurement of legal services.
69. The Respondent' counsel strongly opposed the objection stating that it should be disregarded and dismissed. He argued that the objection was misconceived as the issue of representation had not been raised from the time the Respondent in the Reference had filed its response up to the time it has come for taxation. Counsel further stated that they were taken aback by the alleged illegality and that, in any event, the matter ought not to be entertained at the taxation hearing stage.
70. Court records further show that the Taxing Officer, on her part, was of the view that raising the objection at the day of the taxation hearing when from the very beginning, the same was not been pointed out in order to allow those advocates to provide proof of how they had been instructed, ran afoul of the Court's Rules of Procedure. She reminded the parties that her duty that day was to tax the bill of costs. In her ruling dated 7th September 2015, she opined that "the issue of representation cannot be raised now when in fact the Advocate representing the Applicant is the same advocate who represented the party in the Reference." And then, applying the provisions of Rule 17 of the Court's Rules to the disputed matter, she held that "... The applicable procedure required of representation in this Court as provided for in the East African Court of Procedure Rules of Procedure has been complied with and I therefore overrule the objection."
71. Turning back to the matter at hand, this Court is called to determine the issue of alleged illegality in the procurement of the Respondent's counsel while exercising its jurisdiction as provided by Rule 114 of the Court's Rules to determine a Taxation Reference challenging the Ruling of the Taxing Officer. At this juncture, we deem it appropriate to examine the jurisdiction of the Taxing Officer and the Court in a taxation of costs matter.
72. It is admitted that taxation is the process whereby the taxing master assesses the amount of costs payable under the costs order. In the taxation proceeding, the taxing master can only decide the amount of costs but cannot vary the costs order already made. Hence, if one party is not satisfied with the costs order, it

should appeal instead of raising objections to the costs order during taxation. (See http://rcul.judiciary.hk/documents/eng/Leaflet_11_Eng.pdf). As for taxation of costs, it is defined as the process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded.” (See *Black’s Law Dictionary, 10th Edition, p. 1689*). In this regard, the taxing officer is given the power to determine what costs, if any, a successful party is entitled to after a costs order had been issued by the Court.

73. It is also well established, as rightly pointed out by both counsel, that a reference on review of taxation may be made on two grounds: namely on a matter of law or principle or on the ground that the bill of costs as taxed is in all the circumstances manifestly excessive or manifestly inadequate. And an error of principle is inferred where an award is manifestly excessive. (See *Attorney General V. Uganda Blanket Manufacturers, Supreme Court of Uganda, Civil Application No. 17/93*).
74. In light of the foregoing, the holding of the Taxing Officer on the matter notwithstanding, it seems for us that the question that arises is to know whether at this stage, this Court has to determine whether the issue of the procurement of the Respondent’s counsel’s services as the Applicant’s counsel urged the Court to do or rather, whether taking such a direction would run afoul of the principle of fair hearing and due process as the Respondent’s counsel contended.
75. We have indicated above in this Ruling that the issue of the procurement of the Respondent’s counsel’s services was raised at the stage of the taxation hearing. Counsel for the Respondent, on his part, has stated that although he managed to submit three documents related to the said procurement, he would have expected that a matter of such an importance would have been raised in formal pleadings filed to the Court with relevant supporting evidence so as to give them a chance to file their own response thereto.
76. Furthermore, authorities referred to us by both parties (*see Misc. Cause No. 34 of 2013, Attorney General & Peter Nyombi V. Uganda Law Society and Makula International Limited V. His Eminence Cardinal Nsubuza & Anor. [1992] HCB 11*) point to the importance of pleadings and the right for a party to be heard before a Court of law takes a final decision on a disputed issue. Pleadings indeed inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue (See *Gajanan Krishnaji Bapat & Anr. v. Dattaji Raghobaji Meghe & Ors., AIR 1995 SC 2284*). Likewise, in the instant case, we are of the view that if the Applicant’s counsel had filed written pleadings to the Court as regards the issue of procurement of the Respondent, this would have given fair notice of the basis of the case and help to identify the real issue. Thus, the Respondent would have been allowed to see clearly what was disputed in the procurement of his counsel and file a response accordingly.
77. In light of the foregoing, and considering that the requirement of fair hearing is now a well settled principle that a court of law has to uphold, we agree with the Respondent’s counsel that the Applicant’s Counsel ought to have raised the issue of the procurement of the Respondent’s counsel’s services before the Court, at the best, before the Court that issued a costs order in favor of National Medical Stores for being wrongly joined to *Reference No 5 of 2013*. In these circumstances, therefore, we are of the view that this Court cannot entertain the issue of the procurement of the Respondent’s counsel’s services raised by counsel for the

Applicant, at this very stage when it is called to review a Taxing Officer's Ruling. We so hold.

Whether this Court has justification to interfere with the Taxing Officer's Ruling rendered on 7th September 2015.

78. The grounds on which the Applicant wants this Court to interfere with the Taxing Officer's Ruling delivered on 7th September 2015 and to set it aside were reproduced elsewhere above in this Ruling. We have also mentioned/indicated above the well-established principles for taxation of costs and reviewing a taxing master's decision on taxation of costs and will now apply them to resolve the issue at hand.

79. It can be gleaned from the Applicant's pleadings and submissions that his main complaint on this issue is that the bill of costs as taxed was manifestly excessive in the circumstances. It is worth noting that the Respondent had filed a bill of costs in relation of *Consolidated Applications Nos. 8 and 9 of 2014* in the sum of Two hundred fifty-seven thousand six hundred forty-three US dollars and ninety-seven cent (USD 257,643.97) and this claim was based on an amount of the subject matter to the tune of USD 17 million. The Taxing Officer awarded USD 42,829.49 representing USD 14,160 for instruction fees and USD 28,699.49 for drawings, perusals, attendances and disbursements.

80. With regard to the amount awarded as instruction fees, learned Deputy Registrar stated that in exercising her discretion under Rule 9.11 of the Court's Rules, she has taken into consideration the fact that although National Medical Stores and Quality Chemical Industries Ltd were served with a Notification of the Reference that requires a Respondent to file a response, they were not the actual Respondents in the Reference; the actual Respondent, as she pointed out, was the Attorney General of the Republic of Uganda, "who had a lot of research to do and conducted the proceedings in the reference to its conclusion." However, she further stated that, considering that the case did not go to trial and keeping the consistency in awards made especially those were parties had been wrongly impleaded, the volume of work, time spent and responsibility that was attributable to the advocates in preparing a response to the Reference and in arguing the Taxation case, she had come to reasonable instruction fees for each of the receiving parties. In this regard, she awarded the sum of USD 8,000 for instruction fees for each party in the Reference and USD 4,000 for instruction fees for each party in the Applications. (see Taxation Ruling in *Consolidated Taxation cause No. 2 & 4 of 2014*, pp. 13-15).

81. Having heard rival arguments of the parties on this issue and having scrutinized the Taxing Officer's Ruling and the way she had used her discretion under Rule 9 to arrive to the amount awarded as instruction fees, we are of the view that the Taxing Officer was aware of the principal criterion for assessing such a case, that is the amount of work done. In this respect, a comprehensive analysis of the authorities (see *Taxation No. 1 of 2014 (Arising from Reference 1 of 2010) Hon. Sam Njuba V. Hon. Sitenda Sebalu and Taxation cause No. 3 of 2010 (Arising from Reference No. 1 of 2006) The Clerk of the National Assembly of Kenya V. Prof. Anyang' Nyong'o & Others*) referred to her was done where she pertinently showed how those cases were distinguishable from the case at hand.

82. In light of the foregoing, it is our considered view that there is no evidence

which would show an error in law or principle by the Taxing Officer amounting to injustice to the Applicant to warrant a review of her decision awarding to the Respondent instruction fees inclusive of 18% VAT in the sum of USD 14,160.

83. With regard to the amount of USD 28,669.49 awarded for drawings, perusals, attendance, travelling and subsistence alleged to be excessive by the Applicant, a careful perusal of the submissions of the parties and the Taxing Officer's Ruling shows that learned Deputy Registrar has meticulously assessed the bill of costs item per item and given reasons for each of them why she had taxed it or taxed it off. On this matter, the Applicant did not show why the Taxing Officer should have awarded a different amount from what she did.
84. Concerning specifically the Applicant's contention that the dates of attendances by the Respondent and the Respondent's advocates were mistaken dates and that the respondent was awarded for fictitious attendances, highlighting especially items 37, 38, 39, 42, 44 and 45, it should be pointed that, on this issue, the Respondent's counsel has rebutted these averments contending that that was a "misleading falsehood." Learned counsel then submitted that the actual dates of attendances were indicated in the bill of costs under items 6, 24, 29, 30 and 32 and that those dates were not 'fictitious' as alleged by the Applicant but were actual dates when attendances were made. For the aforementioned disputed items, counsel further pointed out that items 37 dealt with disbursements for air tickets and hotel accommodation as shown in the bill; item 38 was also about disbursements for air tickets as shown in the bill; item 39 was about disbursements incurred; item 42 dealt with disbursements for air tickets as shown in the bill; item 44 dealt with disbursements for an air ticket and hotel accommodation as shown in the bill and item 45 dealt with disbursements for hotel expenses. These submissions have not been contradicted by the Applicant in his rejoinder.
85. In these circumstances, we see no reasons to review the amount of \$USD 28,669.49 awarded by the Taxing Officer to the Respondent for drawings, perusals, attendances, travelling and subsistence.
86. All in all, we are of the view that the Taxing Officer did not err in law or in principle in awarding to the Respondent the amount of USD 14,160 for instruction fees and the amount of \$28,669.49 for drawings, perusals, attendances and disbursements.

H. Conclusion

87. In light of the foregoing findings, we find no reason to interfere with the decision of the Taxing Officer. The Reference is accordingly dismissed. The Respondent shall be awarded costs to be borne by the Applicant.
88. It is so ordered.

M. Mbabazi, Counsel for the Applicant

P. Kauma for the Respondent

Appellate Division

Application No. 4 of 2015**Angella Amudo v The Secretary General of the East African Community**

An Application for Review arising from the Judgment of the Appellate Division: Ugirashebuja, P; Nkurunziza, VP; Ogoola, Rutakangwa, Ringera, JJA in Appeal No. 4 of 2014 dated 30th July 2015, [2012-2015] EACJLR 592

Coram: E. Ugirashebuja, P; L. Nkurunziza, VP; E. Rutakangwa, A. Ringera & G. Kiryabwire, JJA
May 25, 2016

Review jurisdiction on judgments - No rehearing of an appeal - Evident mistake or error on the face of the record- Finality of litigation and certainty of the law required

Article 35(3) of the Treaty - Rules: 72 (1) and (3) of the EACJ Rules of Procedure, 2013

The Applicant was appointed to a vacant position of Project Accountant by the EAC Council at its 16th Meeting of 13th September, 2008. The contract commenced on 1st November 2009 and upon expiry in June 2010, the Respondent gave the Appellant several periodic short-term contracts until 27th April 2012 when the Respondent informed her that the contract due to expire on 30th April, 2012 would not be renewed. Subsequently, the Appellant challenged the decision to terminate her employment maintaining that it was irregular and contrary to the Council's decision and that the contract ought to have run for five years and renewable once like that of professional EAC staff and her predecessor.

In her Claim against the Community filed in the First Instance Division in 2012, the Applicant averred that the Respondent's decision to recruit her as a Project Accountant was *ultra vires* the Respondent's power and inconsistent with the Community's Staff Rules and Regulations. She sought damages and a declaration that she was entitled to a renewable contract of employment for 5 years. The Respondent contested the competence of the claim stating that it was instituting beyond the two month limitation period required in Article 30. On 26th September 2014, the Trial Court held that the claim was not based on Article 30 of the Treaty and was not time barred and damages were awarded to the Appellant.

Being aggrieved by the decision, the Applicant lodged an Appeal in 2015 alleging that the award of damages was insufficient. The Appellate Division dismissed the Appeal in with costs on 30th July 2015 finding that by the time the claim was instituted, the Applicant had ceased to be and employee of the Community thus the entire proceedings were a nullity for want of jurisdiction. The orders given were quashed and the appeal was dismissed.

Subsequently, the Applicant then sought a review of the Appellate Division's judgment alleging that there were errors apparent on the face of the record and that through the fraudulent actions of the Respondent, the Trial Court had erroneously misapprehended the nature, substance and quality of the Respondent's evidence.

Held:

1. The power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law. This is because no judgment, however elaborate, can satisfy each of the parties involved to the full extent. Mere disagreement with the view of a judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.
2. Review of judgement is not granted as a matter of absolute right upon mere assertions of mistake or error apparent on the face of the record. The re-appraisal of the entire evidence on record for finding the error, would amount to the exercise of appellate jurisdiction which is not permissible. The Applicant was trying to use the review jurisdiction as a back door method to re-argue the appeal, which is not legally permissible. In dismissing the Appeal, the Appellate Division's decision was not based on the merits or demerits Appellant/Applicant's Claim.
3. A mistake or error on the face of the record by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elaboration either of the facts or the legal position. It must be an error which is "so apparent that without further investigation or enquiry, only one conclusion can be drawn in favour of the applicant. An error which has to be fished out and searched will not suffice. If an error is not self-evident and detection thereof requires a long debate and process of reasoning, it cannot be treated as an error on the face of the record. An error on the face of the record justifies a review, however an erroneous view justifies an appeal. While no judgment can attain perfection, the most that the courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review. As was held by the Supreme Court of India in *Thungabhadra Industries Ltd v. State of Andhra Pradesh [1964] SC 1372*, 'a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.'
4. Public policy demands finality of litigation and certainty of the law. The judgment of a final court is final and a review is an exception. Hence a court will not sit as a court of appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. This Court cannot sit as an appellate court over our own decision. Neither can the Court invoke its review jurisdiction because the Applicant conceives herself aggrieved by the decision, otherwise were this permissible "litigation would have no end except when legal ingenuity is exhausted." That would be totally "intolerable and prejudicial to public interest," which demands an end to litigation. Having failed to establish any error on the face of the record, the application was dismissed with costs as misconceived.

Cases cited

Autodesk Inc. v Dyason (No.2) [1993] HCA 6

Attilio v Mbowe (1970) HCD.n.3 (TzHC)

Blueline Enterprises Ltd. v The East African Development Bank, CAT, Civil Appl. No. 21 of 2012

The East African Law Society & Ors v AG of Kenya & Ors, EACJ Appeal No. 3 of 2011
 Haystead v Commissioner for Taxation [1920] A.C.
 Independent Medical Legal Unit v AG Kenya [2012-2015] EACJLR 164, Appl. No. 2 of 2012,
 Meera Bhanja v Nirmala K. Choudury (1955) ISCC (India)
 National Bank of Kenya Ltd. v. Njau [1995-98] 2 E.A. 231
 Peter Ng'homango v Gerson A. K. Mwanga & Anor, CAT, Civil Appl. No. 33 of 2002
 Tanzania Transcontinental Co. Ltd v Design Partnership Ltd, CAT Civil Appl. No. 62 of 1996
 Thungabhadra Industries Ltd v State of Andra Pradesh [1964] SC 1372

JUDGMENT

1. We cannot do better than preface our judgment in this Review Application by a quotation from the exceedingly instructive and able judgment of Lord Shaw in *Haystead v. Commissioner for Taxation [1920] A.C. 155* at page 166. He said:-

“Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension, by the court of the result... If this were permitted, litigation would have no end except when legal ingenuity is exhausted.”
2. Similar sentiments were succinctly echoed by the Federal Court of India, thus:

“This Court will not sit as a court of appeal from its own decisions nor will it entertain applications for review on the ground only that one of the parties in the case conceives himself aggrieved by the decision. It would, in our opinion, be intolerable and most prejudicial to the public interest if the cases once decided by the court could be re-opened and re-heard: There is a salutary maxim which ought to be observed by all courts of last resort...It concerns the State, that there be an end of law suits...its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this:” in *Raja Prithwi Chand Lall Chaudhary v Sukhraj Rai (AIR 1941 SC1)*.
3. We totally subscribe to these salutary holdings because public policy demands finality of litigation and certainty of the law as declared by the highest court (see, *Tanzania Transcontinental Co. Ltd v Design Partnership Ltd.*) [CAT], Civil Application No. 62 of 1996 (unreported)). They have now crystallized into a principle of law which is religiously followed by the courts in all jurisdictions, in the determination of applications for review. We will accordingly abide by this principle in determining this Application for Review (“the Application”) by Ms. Angella Amudo (“the Applicant”).
4. In this Application, the Applicant seeks a review of the Judgment of this Division of the East African Court of Justice (“the Court”) dated 30th July, 2015 (“the Judgment”) in Appeal No. 4 of 2014 (“the Appeal”).
5. The Applicant was, evidently, dissatisfied with the Judgment in which her appeal against this Court’s First Instance Division (“the Trial Court”) decision in Claim No. 1 of 2012 (“the Claim”) was dismissed in its entirety with costs.
6. For an informed appreciation of our ultimate decision, we believe that the following background would be instructive.
7. The Applicant is an Accountant by profession and resides in Arusha, Tanzania. Following the resignation of one Mr. Ponziano Nyeko from his employment as Project Accountant in the East African Community (“the Community”),

the Community's Council of Ministers ("the Council") at its 14th Ordinary Meeting (24th – 28th September, 2007), approved the immediate recruitment of his replacement. Mr. Nyeko, who had been employed for a five-year period in the Community's RISP Project, whose life span was five years, was handling a "specialized one-man" section. The Applicant was appointed to fill the said vacant post by the Council at its 16th Meeting of 13th September, 2008. The Applicant's Letter of Appointment dated 29th September, 2008, partly reads as follows:-

"1. Post

You will be employed as Project Accountant attached to the EAC Secretariat, funded under RISP Project. You shall not be considered as a regular staff member under the EAC Staff Rules and Regulations except where it is specified in this contract.

6. Tenure

This contract will run from the date of assumption of duty up to June, 2010.

15. Acceptance

If the terms and conditions spelt out in this contract are acceptable, please sign the attached slip and return it to the Secretary General for further processing."

8. We categorically pointed out in our now impugned Judgment that:-

"22. The Appellant assumed duty on 1st November, 2008. She served the full term of her contract without a word of complaint enjoying all the benefits of the contract.

23. Upon expiry of her formal contract of Employment, the Appellant was given periodic "Short-Term Employment contracts", in the same position which she apparently gladly accepted. On 27th April 2012, the Respondent informed her by letter (Exh. P20) that her "short-term contract as Project Accountant which expires on 30th April, 2012 will not be renewed." She was formally thanked for the services she had rendered to the Community and wished success in her future endeavours.

24. She reacted instantly. By her letter dated 30th April, 2012 (Exh. P21), she expressed her dissatisfaction with the decision to terminate her employment as it was contrary to the Council decision of 13/09/2008. She maintained that the contract ought to have "been running for five years renewable once." She sent another letter to the Respondent dated 8th May, 2010 (sic) (Exh. P22), for the first time registering her grievances on her "irregular appointment terms." When the Respondent failed to act favourably she forsook the arbitration route and accessed the Trial Court."

9. In the Claim, the Applicant was challenging the decision of the Community's Secretary General ("the Respondent") to recruit her as a Project Accountant under the RISP Project. She was accordingly seeking a declaration to the effect that that decision was *ultra vires* the Respondent's power and inconsistent with the Community's Staff Rules and Regulations. In addition, apart from claiming damages, she was claiming a declaration that "the Respondent (sic)" was entitled to a renewable contract of employment for a period of 5 years.

10. The Claim's competence was challenged from the outset by the Respondent. The latter contended before the Trial Court that the Claim was incompetent as it had been instituted beyond the period of two months prescribed in Article 30(2) of the Treaty for the Establishment of the East African Community ("the Treaty").
11. In its ruling, the Trial Court held that the claim was not based on Article 30 is the Respondent would have it, but rather on Article 31 of the Treaty and accordingly not time barred. A full trial ensued, at the end of which the Trial Court partly found in favour of the Applicant.
12. The Applicant was partly aggrieved by the Judgment of the Trial Court. She wanted more than what was awarded to her, hence the Appeal which resulted in the impugned Judgment.
13. In our Judgment, we dismissed the Appeal in its entirety with costs. That was on 30th July, 2015.
14. The Applicant, as the Application amply shows, was not happy with the outcome of the Appeal. Fortunately, she had one last avenue through which to demonstrate her dissatisfaction. It was the review route created by Article 35 (3) of the Treaty read together with Rule 72 of the East African Court of Justice Rules of Procedure, 2013 ("the Rules").
15. Article 35(3) of the Treaty reads thus:-

"An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given but which fact at that time, was unknown to both the Court and the party making the application, and which could not with reasonable diligence, have been discovered by that party before the judgment was made, or on account of some mistake, fraud or error on the face of the record or because an injustice has been caused."
16. Rule 72 of the Rules provides in sub-rules (1) and (3) that:

"1. An Application for review of a judgment under Article 35 of the Treaty shall be made in accordance with this Rule.

3. The Court shall grant an application for review only where the party making the application under sub-rule (2) proves the allegations relied upon to the satisfaction of the Court."
17. In pursuit of her right to have the Judgment against her reviewed, the Applicant duly lodged the Application on 4th December, 2015, by Notice of Motion supported by an affidavit deposed by herself.
18. The grounds for review as articulated in the Notice of Motion are:-
 1. This honourable Court omitted to take account of the fact that the Council is the only Organ vested with powers to determine officers and staff in the services of the Community.
 2. This honourable Court omitted to take account of the fact that the Respondent's communication that informed the Appellant/Applicant of renewals and non-renewal of her contract on whether they were preceded by Council Decisions.
 3. This honourable court on an error apparent of (sic) the face of the record

that Ponziano Nyeko was employed for a period of five years in the RISP project when he was employed as Professional Staff for the Secretariat on a 5 year contract renewable once for another 5 years by the Council.

4. This honourable court on an error apparent on the face of the record that the Established structure (Exh.RE.1) is the one approved by the Council in its Meeting of August 25th, 2006 while it was not.
5. This honourable court on an error apparent on the face of the record that the Appellant/Applicant's cause of action against the Respondent was illegal decision of the Respondent to appoint the Appellant/Applicant as a Project Accountant under RISP funding, and the Claim governed by Article 30(2) instead of Article 31 of the Treaty when the Appellant's/Applicants cause of action against the Respondent is illegal decision of the Respondent to limit tenure of Appellant/Applicant's appointment in the service of the Community contrary to the tenure fixed by the staff rules and regulations without express directives from the Council whereby the Claim is governed by Article 31 instead of Article 30(2).
6. This honourable court on an error apparent on the face of the record that the Appellant was not a staff member of the Community governed by the staff rules and regulations which "uncontested facts" relied on by the Trial Court Justices are laid down procedures in appointment of professions (sic) spelt out in the staff rules and regulations and are Council's established procedures used in appointments of such category of staff.
7. This honourable Court on an error apparent on the face of the record that the Respondent had not acted *ultra vires* in issuing Exh. P2 but rather that the Learned Justice of the Trial Court had misapprehended the nature, substance and quality of Respondent's evidence before them."
19. The Respondent, through an Affidavit in Reply sworn by Mr. Liberat Mfumukeko, Deputy Secretary General (Finance and Administration) strongly resisted the Application.
20. At the Scheduling Conference held on 11th November, 2015, two issues were agreed upon. These were:
 - (a) Whether the Court should exercise its jurisdiction to review its Judgment dated 30th July, 2015 on the grounds stated in the Notice of Motion, and
 - (b) Whether on account of fraud practised upon it by the Court Respondent, the Court erroneously found that the Learned Justices of the First Instance Division had misapprehended the nature, substance and quality of the Respondent's evidence.
21. Furthermore, the Parties were ordered to lodge Written Submissions in support of their respective positions in the matter, a duty they duly fulfilled. The Parties, the Applicant in person and Mr. Stephen Agaba, learned Advocate for the Respondent, appeared before us on 8th February, 2016 to highlight on their written submissions.
22. Before canvassing the able submissions of the Applicant and Mr. Agaba, we find ourselves constrained to elaborate on what we alluded to in paragraph 13 above.
23. In dismissing the Appeal, we did not base our decision on the merit or otherwise of the Applicant's Claim. All that was said in the Judgment on this aspect were

merely *obiter dicta*. The *ratio decidendi* of the case was that the Trial Court wrongly assumed jurisdiction over the matter which was patently predicated on Article 30 of the Treaty and having been instituted beyond the stipulated two-month period, the Claim was indisputably time barred.

24. This is what we said in paragraph 57 of the Judgment:

“All said and done, we hold without any demur that the entire proceedings in the Trial Court were a nullity on account of want of jurisdiction. We accordingly quash and set them aside.”

25. It does not stand to reason, therefore, that after nullifying and setting aside the proceedings, we would have proceeded to make a binding determination on the merits or demerits of the Claim.

26. Our definitive finding that the Applicant’s Claim was time barred was predicated not on the evidence adduced by the parties, after the Trial Court had wrongly assumed jurisdiction over the matter. As it is obvious in paragraphs 49, 50, 51 and 52 of the Judgment, it was based on the Parties’ Pleadings.

27. As a consequence, we thus held in paragraph 53:-

“Since the Claim was patently time barred, the Trial Court lacked *jurisdiction ratione temporis...*”

We accordingly nullified the entire trial and the Trial Court’s judgment.

28. For the avoidance of doubt, we categorically observed as follows in paragraph 58:

“Under normal circumstances, we would have rested the matter here. But for the purpose of completing the record and providing guidance for future actions, we shall go further and venture our opinion on the issue agreed on in this appeal.”

29. The above quotation, in our considered opinion, ought to have sent a clear message to every objective reader, let alone trained legal minds, that what we opined on in paragraphs 59 to 86 of the Judgment were mere *obiter dicta* (not essential for the decision) and not the *ratio decidendi*, that is, the reason or rationale for our decision.

30. That was why we thus tellingly concluded in paragraph 87:

“For the foregoing reasons, we hold that all things being equal, we would have answered both limbs of the issue framed for determination in this Appeal in the affirmative and allowed the Cross-Appeal with costs, had we been convinced that the Claim was competent.”

31. Given the above elucidated factual and legal positions, as the Court’s decision was premised solely on the legal issue of limitation which rendered the Claim incompetent, and not on the merits or otherwise of the Claim, we respectfully find ourselves with no flicker of doubt in our minds that grounds 1, 2, 4, 6 and 7 in the Notice of Motion, as well as the complaint on fraud, are not only frivolous but wholly misconceived in law. They are based on clear *obiter dicta* and not the *ratio decidendi* of the impugned Judgment. We find them to be legally unmaintainable in this review Application and we accordingly reject them outright, as our decision did not rest at all on the review of the evidence on record.

32. Our rejection of grounds, 1, 2, 4, 6, 7 and 8 (which was belatedly added at the Scheduling Conference), renders the second framed issue in the Application totally redundant. We shall, therefore, not give any opinion on it, lest we engage

ourselves in a fruitless academic exercise.

33. The only point for consideration then in the Application, is whether the Applicant has made out a case for reviewing the Judgment and satisfied the criteria for entertaining the same in our review jurisdiction.
34. At this stage, then, we have found it highly desirable to canvass first, the now firmly established principles governing the exercise of review jurisdiction by any court. The litany is long but not exhaustive either. As a matter of elaboration, we shall cite a few but pertinent ones, culled from a number of decided cases from various jurisdictions.
35. Some of these principles are:-
 - (a) The principle underlying a review is that the court would not have acted as it had, if all the circumstances had been known: *Attilio v Mbowe* (1970) HCD.n.3 (TzHC).
 - (b) There are definitive limits to the exercise of the power of review. The review jurisdiction is not by way of an appeal. The purpose of review is not to provide a back door method to unsuccessful litigants to re-argue their case. Seeking the re-appraisal of the entire evidence on record for finding the error, would amount to the exercise of appellate jurisdiction which is not permissible: *Meera Bhanja v Nirmala Kumari Choudury* (1955) ISCC (India), *Independent Medical Unit v Attorney General of Kenya, Application No. 2 of 2012* (EACJ).
 - (c) The power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law. This is because no judgment however elaborate it may be can satisfy each of the parties involved to the full extent: *Peter Ng'homango v. Gerson A. K. Mwangi & Another, [CAT] Civil Application No. 33 of 2002* (unreported), *Devender Pal Singh v. State, N.C.T. of New Delhi and Another, Review Petitions No. 497, 620 and 627 of 2002* (India Supreme Court), etc.
 - (d) A judgment of the final court is final and review of such judgment is an exception: *Devender v. State, N.C.T of New Delhi (supra)*, *Blueline Enterprises Ltd. v. The East African Development Bank (EADB) [CAT] Civil Application No. 21 of 2012* (unreported), etc.
 - (e) In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction: *Kamlesh Varma v. Mayawati & Others, Review Application No. 453 of 2012*.
 - (f) There is a clear distinction regarding the effect of an error on the face of the record and an erroneous view of the evidence or law. An error on the face of the record justifies a review. An erroneous view justifies an appeal. Therefore, the power of review may not be exercised on the ground that the decision was erroneous on merit: *Aribam Tuleshwar Sharma v. Ariban Pishak Sharma, 1979 (11) UJ 300 SC*.
 - (g) It will not be sufficient ground for review that another judge would have taken a different view. Nor can it be a ground for review that the court proceeded on incorrect exposition of the law. "Misconstruing a statute or

other provision of the law cannot be a ground for review”: *National Bank of Kenya Ltd. v. Njau* [CAK] [1995-98] 2 E.A. 231.

- (h) A court will not sit as a court of appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. It would be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard: *Raja Prithwi Chand Lall Chaudhary v. Sukhraj Rai* (*supra*); *Blueline Enterprises Ltd v. EADB* (*supra*), *Autodesk Inc. v. Dyason* (No.2) [1993] HCA 6 (Australia), *etc.*
- (i) The term ‘mistake or error on the face of the record’ by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elaboration either of the facts or the legal position. If an error is not self-evident and detection thereof requires a long debate and process of reasoning, it cannot be treated as an error on the face of the record. To put it differently, it must be such as can be seen by one who runs and reads: Mulla, *Commentary on the Indian Code of Civil Procedure*, 1908, 14th edition at pp 2335-6, *State of Gujarat v. Consumer Education and Research Centre* (1981) A. Guj. 233, *State of West Bengal and Others v. Kamal Sengupta and Another* (2008) 8 SCC 612.

36. With these firmly established legal principles in mind, which will guide us in our determination of the Application, it behoves us now to examine the grounds of complaint fronted by the Applicant in justification of this review Application.

37. We have indicated that the Applicant had premised her prayer for review of the Judgment on eight grounds. All the same, we found six of them to be unmaintainable given the character of the impugned Judgment. They were accordingly rejected leaving us with only two grounds of complaint to contend with (see paragraphs 32 and 33).

38. The remaining grounds forming the core of the review application are 3 and 5.

39. It is the contention of the Applicant in ground 5 that:

“This honourable court on an error apparent on the face of the record that the Appellant’s/Applicant’s cause of action against the Respondent was illegal decision of the Respondent to appoint the Appellant/Applicant as a Project Accountant under RISP funding, and the Claim governed by Article 30 (2) instead of Article 31 of the Treaty when the Appellant’s/Applicants cause of action against the Respondent is illegal decision of the Respondent to limit tenure (sic) of Appellant’s/Applicant’s appointment in the service of the Community contrary to the tenure fixed by the staff rules and regulations without express directive from the Council where the Claim is governed by Article 31 instead of Article 30 (2).”

40. Elaborating on this ground, both in her written and oral submissions before us, the Applicant relying on Article 70 (2) of the Treaty, impressed upon us, on what is otherwise obvious and undisputed: This is that the “Council is the Appointing Authority of Professional Staff.” She elucidated further that the Council, under the Regulations (“the Staff Rules”), at its 16th Meeting duly appointed her as a Professional Staff for the Secretariat. She also stressed that the tenure of

appointment of such professional staff is “5 years renewable once by the Council for another 5 years.” According to the Applicant, her “appointment in Council Decision EAC/CM16/Decision...is intact and in force.”

41. The above state of affairs notwithstanding, the Appellant vehemently argued before us that the Respondent issued her “an appointment letter with tenure of 21 months...instead of issuing her an appointment letter with tenure of 5 years renewable once for another 5 years.” She tellingly emphasized that “Article 9(4) of the Treaty terms this action of the Secretary General Ultra Vires”.
42. The Applicant concluded her otherwise brief submission on this ground asserting:

“Thus the cause of action in this dispute:

is the illegal decision of the Respondent to limit tenure of Appellant’s/ Applicant’s appointment in the service of the Community contrary to the fixed tenure of 5 years renewable once by the Council stipulated under Regulation 22(1) (c) of the staff rules and regulations whereby the Claim is governed by Article 31 of the Treaty.”

She accordingly invited us to sustain ground five in the notice of motion and grant the reliefs sought in the Application.

43. In response to the Applicant’s submissions, Mr. Agaba found it imperative to point out from the outset that as the Court had found the proceedings in the Trial Court to be a nullity on account of want of jurisdiction, the Applicant ought to appreciate that the Appeal was determined not on the basis of the evidence, but on the basis of the Claim having been preferred out of time.
44. Addressing his mind to ground five in the notice of motion, Mr. Agaba was of the view that the holding of the Court that the Claim was barred under Article 30(2) of the Treaty was one of law and “not an error on the face of the record at all”. He associated himself fully, without more, with the “reasoning of the Court as reflected in the Judgment from paragraphs 21 – 52”. He accordingly pressed us to dismiss this ground of complaint as it does not demonstrate “any errors apparent on the face of the record” to justify a review of the Judgment.
45. From the notice of motion and the submissions before us, it is clear that the Applicant is seeking a review of the Judgment on the ground of an error apparent on the face of the record. Surely, this is one of the permissible grounds for review under Article 35 (3) of the Treaty and Rule 72 (2) of the Rules. But we wish to make it absolutely clear, as we articulated in para. 36 above, that a review of judgement is not granted as a matter of absolute right upon mere assertions of “mistake or error apparent on the face of the record”. On this we find it very instructive to return to the illuminating judgment of the Court of Appeal of Tanzania in the case of *Chandrakant Joshubhai Patel V. R. [2004] T. L. R. 218*.
46. In the above cited case it was succinctly held as follows:-

“It is, we think, apparent that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this, lest disguised appeals pass off for applications for review. We say so for the well-known reason that no judgment can attain perfection, but the most that the courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism. Yet

while an appeal may be attempted on the pretext of any error, not every error will justify a review. As was held by the Supreme Court of India in *Thungabhadra Industries Ltd v. State of Andhra Pradesh [1964] SC 1372*, a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.”

We subscribe entirely to this reasoning and we find ourselves in short of better words, to improve on the clarity of its language and strong message.

47. We have already indicated on what amounts to an error or mistake apparent on the face of the record in paragraph 36 while canvassing the legal principles governing review jurisdictions. From those principles, it is crystal clear that indeed not every error or mistake in a judgment will justify a review. An error which has to be fished out and searched will not suffice. It should be something more than a mere error. It must be an error which is “so apparent that without further investigation or enquiry, only one conclusion can be drawn in favour of the applicant” : *S. Baghirathi Ammal vs. Palani Roman Catholic Church (2009) 10 SCC 464*, in paragraphs 12 and 26. Can this be said of the alleged error fronted by the Applicant in ground five of the notice of motion?
48. After revisiting the pleadings in the Claim, the ruling on the issue of limitation and Judgment of the Trial Court, the impugned Judgment, and the Applicant’s submissions before us in support of the ground under scrutiny, we have found ourselves constrained to provide a negative answer to the above posed question. Indeed, in our respectful view, the Applicant is trying to build a mountain out of a dung hill. We shall demonstrate.
49. In the Judgment under review, we found it as an undisputed fact, going by the pleadings, that the Council, which we recognized and still recognize as the only Community Organ with powers to determine the Community’s officers and staff, at its 16th Meeting appointed the Applicant as Project Accountant in the place of Mr. Ponziano Nyeko, who had resigned from his services. The Applicant does not dispute this: see, for instance, paragraphs 3, 4, 5 and 8 of Annexure AA2 to the affidavit in support of the notice of motion.
50. As shown in paragraphs 22 and 23 of the Judgment, the Applicant accepted the offer, assumed duty on 1st November, 2008, served the full term of the contract of service, which ended on 30th June, 2010 and gladly accepted periodic short-term Employment contracts offered to her thereafter which, too, came to an end on 30th April, 2012. It was on 27th September, 2012 that the Applicant lodged her Claim in the Trial Court challenging the decision of the Respondent in appointing her “initially for a period of 21 months and the subsequent periodical extensions of the appointment up to 30th April, 2012” dubbing the decision “ultra vires the powers of the Secretary General and his deputies.”
51. The Respondent challenged the competence of the Claim in the Trial Court for being time barred. It was after this challenge on the competence of her claim, that the Applicant belatedly claimed that the Claim was based on Article 31. The Trial Court accepted her assertion and assumed jurisdiction over the matter.
52. In our impugned Judgment, we faulted the Trial Court in so holding. In paragraph 47 we held as follows: –
47. We are also mindful of the fact that in determining its jurisdiction at the threshold, a court must be guided by the relevant law(s), treaties inclusive, and

the parties' pleadings and not by the parties' allegations or assertions of facts from the bar."

53. In holding that the Claim was based on Article 31 and not Article 30, the Trial Court had said:

"Further, the office of Secretary General, the Respondent in the claim, is neither a Partner State nor an institution of the Community under Article 9 of the Treaty read together with Article 30 above. The import of both provisions is that no proper claim can be made by an employee qua employee against the Secretary General by the invocation of Article 30."

54. We found this holding to be strange, if not made *per incuriam*. Prior to that, this Court in the case of *The East African Law Society and Four Others v. The Attorney General of Kenya and Three Others [EACJ] Appeal No. 3 of 2011* had categorically held that a Claim against the Secretary General of the Community by any resident of the Partner States of the Community, is maintainable under Article 30 of the Treaty. It is unfortunate that in determining this issue, the Trial Court did not make even a fleeting reference to this decision. Whether the Trial Court would have held as it did, had it directed its mind to this decision, is now anybody's guess.

55. For this reason, we held as follows in paragraphs 34 – 38 of the Judgment:

"34. We take it to be settled law that there can be no suit, without a cause of action having accrued to the claimant or plaintiff. It is equally settled that a cause of action should always be gleaned from the plaint or statement of claim and not from the claimant's assertions from the bar or submissions. In this particular case, the Appellant's cause of action could only be traced in her Statement of Claim, particularly paragraphs 12, 15, 16, 19, 20, 22 and 23.

35. We have had the advantage of reading the Appellant's Statement of Claim and its annexures. It was obvious, even to the naked eye, that the Appellant's sole basis (cause of action) of her claim against the Respondent was the alleged illegal decision of the Respondent of appointing her as a Project Accountant under the RISP funding for a period running from 1st October, 2008 to 30th June, 2010. To her, the Respondent acted in excess of his mandate and in bad faith (that is, ultra vires his powers), as the appointment was contrary to the directives of the Council. This decision led her to suffer general and specific damages as indicated therein. She was accordingly challenging the legality of the Respondent's decision and seeking the Court's declaration to that effect. This pleading, therefore, took the Appellant's claim out of the ambit of Article 31.

36. As we have already sufficiently demonstrated, a claim under Article 31 is strictly confined to disputes between the Community and its employees under the situations stipulated therein. It is glaringly clear to us that this was not the case here, for two self-evident reasons. One, by the time the Appellant instituted the Claim, in December, 2012, she had long ceased to be an employee of the Community, even under RISP funding Project. As per paragraph 13 of her contract of employment (Exh.P5), she was effectively "separated from the service" of the Community on 30th April, 2012. It is totally inconceivable, under the circumstances, that

she would have maintained an action under Article 31. It is unfortunate that the Trial Court took it for granted that she was still an employee of the Community. We are saying so deliberately because in its Ruling concerning the competence of the Claim, the learned trial Justices never addressed themselves to the Parties' pleadings having in mind this specific issue.

37. Two, what was being challenged was the legality of the Respondent's decision, which fell squarely within the four corners of Article 30. The Appellant, being a resident of one of the Partner States, and in view of our decision, in *The East African Law Society & Four Others v. The Attorney General of Kenya & Three Others, (EACJ) Appeal No. 3 of 2011*, had *locus standi* to institute such a claim against the Respondent.

38. From the above discourse, it is our conclusive finding that the Claim was based on and governed by Article 30 of the Treaty and not Article 31 as the Trial Court irregularly held. Since the Claim was instituted about 27 months after the expiry of the initial tenure and nearly five (5) months after the expiry of the last short-term contract, it was unarguably time barred. It ought to have been dismissed with costs. The Trial Court did not do so, but proceeded to determine it on merit with no voice of dissent from the Respondent. Was that proper? We have no flicker of doubt in our minds that it was not. We shall endeavor to elaborate why."

56. That the Claim was based on the alleged illegal decision of the Respondent, apart from Statement of Claim, is confirmed by the contents of ground five itself in the notice of motion and paragraph 54 of her affidavit in support of the same, which reads thus:

"54. That the cause of action in this dispute, is the decision of the Secretary General – an Authority with no powers – to shorten the tenure of my appointment by issuing me an appointment letter with tenure of 21 months instead of one with 5 years renewable once by the Council fixed by law, purport to renew my contract and purport to pronounce himself on expiry of my contract without preceding decision of the Council – knowing very well that I was a professional staff governed by the Staff Rules and Regulations and decision EAC/CM16/Decision 41, is still in force and has never been invalidated by the Council itself."

A similar assertion is repeated in paragraph 5.9 of her written submission (see paragraph 42 above).

57. Since the Applicant was challenging the legality of Respondent's decision to employ her as a Project Accountant under RISP funding thereby limiting, what she believes up to this moment, her appointment tenure in the Community contrary to the one fixed by the Staff Rules without express directives from the Council, we unequivocally held in paragraph 52 that:

"52. From all the above, it is our finding that the Claim had its basis in Article 30 of the Treaty, and ought to have been instituted within two months' of the Respondent's decision."

58. After giving due consideration to all the material before us in the Application, we have found ourselves still of the same firm view. We are now increasingly of the view that the Applicant has failed to prove the allegation in ground five of the

- Notice of Motion, to our satisfaction as required under Rule 72 (3) of the Rules.
59. Instead, it has occurred to us that the Applicant believing that we were wrong in our decision, wants to have a second bite, through rehearing of the Appeal. In other words, instead of seeking the correction of a mistake or an error on the face of the record, which she has failed to demonstrate, she is looking for a substitute view. The fronted 5th ground of complaint was adequately dealt with and answered in the Judgment and she has no right to challenge our finding on this point in the guise of an error apparent on the face of the record.
 60. As we believe we have already sufficiently demonstrated, we cannot sit as an appellate court over our own decision. Neither can we invoke our review jurisdiction because the Applicant conceives herself aggrieved by the decision, otherwise were this permissible “litigation would have no end except when legal ingenuity is exhausted.” That would be totally “intolerable and prejudicial to public interest,” which demands an end to litigation.
 61. In view of the above discussion, we dismiss the fifth ground of complaint in the Notice of Motion for being frivolous and misconceived.
 62. Coming to the third ground, (see para 18.3 [supra]) we should quickly point out that, on full reflection, we have found it seriously wanting in merit. Our holding that the Claim was time barred had nothing to do with terms of employment of Mr. Ponziano Nyeko. If anything was said about him in the course of dealing with that issue, it was on account of the undisputed fact that the Applicant was employed as a Project Accountant to replace Mr. Nyeko who had resigned. We have gleaned nothing from the submissions of the Applicant establishing even an error in our alluding to this fact in our Judgment. This unsubstantiated ground, therefore, stands dismissed.
 63. In concluding our discussion, we wish to reiterate that the only point or issue for consideration and determination in this Application is whether the Applicant has managed to make out a case justifying the review of the impugned Judgment under the provisions of Article 35 of the Treaty.
 64. While canvassing this issue we found out that six out of the eight grounds relied on by the Applicant in seeking the review of the Judgment were totally misconceived. We rejected them. The remaining two grounds were apparently pegged on two perceived errors apparent on the face of record. After re-visiting the Judgment, the entire Notice of Motion and considering the submissions of both parties in the Application, we are satisfied that the Applicant has abysmally failed to establish any error on the face of the record worth of any consideration. The Applicant, we are convinced, is trying to use the review jurisdiction as a back door method to re-argue the appeal, which is not legally permissible.
 65. In fine, we are of the settled opinion that the Judgment passed by the Court dated 30th July, 2015, does not suffer from any patent defect. As such, it does not warrant any interference by way of review as no error on the face of the record has been proved. The Application, therefore, is misconceived and bereft of any substance or merit. It is accordingly dismissed with costs.

Applicant appeared in person

S. Agaba Counsel for the Respondent

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Appellate Division

Advisory Opinion No. 1 of 2015

Request for an Advisory Opinion No. 1 of 2015 in the matter of: a request by the Council of Ministers of the East African Community for an advisory opinion made pursuant to Articles 14 (4) and 36 of the Treaty for the establishment of the East African Community and Rule 75 (4) of the EACJ Rules of Procedure, 2013

Coram: E. Ugirashebuja, P.; L. Nkurunziza, V.P; J. Ogoola, E. Rutakangwa & A. Ringera, JJA
November 19, 2015

Community employees are international civil servants - Pacta sunt servanda - Whether forfeiture of the position of Deputy Secretary General is equivalent to withdrawal - Compensation for unexpired contractual term - Inconsistencies between Staff Rules and Regulations and the Treaty - Whether State Practice is established

Articles, 14 (4), 36, 67 (2), 14(3) (g), 70(3) of the EAC Treaty – Rules: 75 (4), 96 (3) of the EAC Staff Rules and Regulations, 2006 - Article 31, Vienna Convention on the Law of Treaties, 1969

In 2009, the Republic of Rwanda, nominated its national Mr. Alloys Mutabingwa, for appointment in the position of East African Community Deputy Secretary General for a three-year term. However, before the expiry his contract, Rwanda nominated Ambassador Dr. Richard Sezibera for appointment as Secretary General of the Community for a term of five years pursuant to Article 67 (2) of the Treaty. In the light of this appointment, Mr. Mutabingwa's contract ended twelve months before its due date so the Community compensated him for the unexpired period of his contract. Subsequently, the Community Secretariat requested reimbursement from the Republic of Rwanda averring that this was the practice as the Republics of Uganda and Tanzania had previously compensated the Secretariat when the contracts of their nationals had been terminated prematurely in similar circumstances. Rwanda declined to pay stating that the matter was beyond the ambit of Rule 96(3) of the EAC Staff Rules and Regulations and there was no clear established State practice in regard to compensation.

After deliberations, the EAC Council of Ministers were unable to resolve this matter, thus they sought an advisory opinion on the interpretation and application of Article 67(2) of the Treaty and Rule 96(3) of the Staff Rules. The query was whether 'forfeiture' of the position of Deputy Secretary General under Article 67 (2) of the Treaty paving the way for an incoming Secretary General from the same Partner State was in effect a 'withdrawal' of such Deputy Secretary General from their position.

Counsel for the Community and counsels from all Partner States made varied submissions vis-à-vis the issue of: jurisdiction; treaty interpretation, established and developing state practice.

Held:

1. In the EAC, a contract of employment is strictly between the Employer (the Community), on the one hand, and the Employee (in this case the Deputy Secretary General), on the other. Upon appointment, office bearers acquire the status and character of international civil servants, beholden to no single Partner State. They owe all their loyalty and fidelity to the Community which is their Employer.
2. The EAC Partner States are not privy to the benefits of that contract; nor are they party to its obligations. They are not bound by the terms of that contract on account of the international law principles of *Pacta Sunt Servanda*, a pact or contract binds or its parties. Therefore, no Partner State has any employment rights over or employment relationship with staff members of the Community as set out in Article 72 of the Treaty.
3. For a practice to qualify as State practice in international law, the practice in question needs to be active, consistent, uniform, to occur with a certain frequency and be widespread among the great majority of the group of States involved. The practice necessary to establish a rule of customary international law must have been pursued over a certain length of time (*North Sea Continental Shelf case, Sorenson J*) Occurred over an appreciable duration or vintage age in terms of its continuity and longevity.
4. The act of forfeiture of the position of Deputy Secretary General is not a choice of any Partner State. It occurs when the confluence of events force a Partner State to either nominate a new Secretary General or sacrifice an existing position of Deputy Secretary General. It is a consequence imposed by automatic operation of the law – without the free will or choice of the Partner State concerned due to in principle of rotation in the Treaty.
5. The withdrawal of Deputy Secretaries General from their positions by a Partner State, to make way for an in-coming Secretary General of the same Partner State, though contemplated in Rule 96(3) of the Staff Rules and Regulations, would be a consequence of the free will and choice of the particular Partner State and would be inconsistent with and contrary to the objectives and purpose of the Treaty concerning the principle of rotation in Article 67(1) and (2) of the Treaty.
6. The practice whereby two Partner States refunded to the Secretariat of the Community the compensation paid to two former Deputy Secretaries General of their nationality for premature termination of their tenure in order to give way to the in-coming Secretaries General of the same nationality, has not as yet sufficiently developed to trigger objective recognition under international law as an “established State practice”. It is at best a developing practice. Compensation made by Uganda took place prior to the 2006 Staff Rules and, therefore, lacked any legal basis hence leaving Tanzania’s compensation as the lone “practice”. There is therefore, no legitimate basis to hold this as a valid “practice” of the Partner States of the East African Community. Accordingly, it cannot be taken into account for purposes of interpreting or applying Article 67(2) of the EAC Treaty, and Rule 96(3) of the EAC Staff Rules and Regulations.
7. The Republic of Rwanda is under no legal obligation to refund the compensation that was paid in 2011 by the Secretariat of the Community to the outgoing Deputy Secretary General.

8. Given the inconsistency between the Treaty and the Staff Rules, which are made pursuant to Articles 14(3) (g) and 70(3) of the Treaty, the Staff Rules must, to the extent of the inconsistency, yield to the primacy of the provisions of the Treaty. To avoid the friction between Article 67(2) of the Treaty and Rule 96(3) of the Staff Rules and Regulations, the two need appropriate harmonization by the competent organs and authorities of the Community.

Cases cited

Commission v France, ECR 1979, p 2729

Legal Brains Trust (LBT) Ltd. v AG of Uganda [2012-2015] EACJLR 237, Appeal No. 4 of 2012

Loizidou v Turkey, 1975, Golder, Series A, no. 99, paras 79-80, w

Hon. Theodore Ssekikubo & Ors v AG of Uganda & Ors, SCt Constitutional Appeal No. 1 of 2015

Pinner v Everett [1969] 1WLR, 1273

The Federal Republic of Germany v Denmark & The Netherland, ICJ Reports 1969, 3

ADVISORY OPINION

I. Introduction

1. This Advisory Opinion addresses the question of the application and interpretation of the words “forfeit” and “withdraw” as they are used, respectively, in Article 67 (2) of the Treaty for the Establishment of the East African Community (“EAC Treaty”), and in Rule 96 (3) of the EAC Staff Rules and Regulations (“the Staff Rules”).
2. The instant Advisory Opinion is the second such Opinion given by the East African Court of Justice (“the Court”) in the course of its approximately 15 years of existence. The first Advisory Opinion, concerning the interpretation of the principle of “Variable Geometry” articulated in Article 7 (1) (e) of the EAC Treaty, was given by the First Instance Division of this Court pursuant to Articles 14(4) and 36 of the Treaty and Rule 75 of the former Rules of Procedure of this Court. With the amendment of the Court’s Rules of Procedure in 2013, the jurisdiction to entertain requests for Advisory Opinions was transferred from the Court’s First Instance Division, and was conferred, instead, on the Appellate Division of the Court – as the final arbiter of disputes involving the Community and the EAC Treaty.
3. On the face of it the first Advisory Opinion appeared to call for prying into the intricacies of the calculus and geometry of the Community’s quest for Integration. Similarly, on the surface of it, this second Advisory Opinion would appear to offer a whimsical play on the semantics and linguistics of that Integration Effort. But outside appearances are not what they always seem to be. Deep inside, the Court in these two Advisory Opinions delves into fundamental operational principles that govern and guide the destiny of the Community. The first Opinion addressed the speed at which some Partner States would sprint (while others merely march marathon-like) on their mutual expedition to the destination of Integration. This second Opinion addresses the extent to which Partner States may be called upon to shoulder the financial responsibility for the Community’s Employment Contracts.

II. Background:

4. This instant Advisory Opinion arises from a Request filed on 15th April, 2015, by the Secretary General of the EAC Community (“the Community”) on behalf of

the Council of Ministers of the Community. The Request was filed pursuant to Articles 14(4) and 36 of the EAC Treaty and Rule 75 (4) of the EACJ Court Rules. It seeks this Court's Opinion on the interpretation and application of Article 67(2) of the Treaty, as read together with Rule 96(3) of the Staff Rules, 2006. In particular, the Request seeks an opinion as to whether or not the words "forfeit" and "withdraw", appearing respectively in Article 67 (2) of the Treaty and Rule 96(3) of the Staff Rules do, in effect amount to the same thing.

5. The facts giving rise to the inquiry are relatively straight forward. The Republic of Rwanda, as a Partner State of the Community, nominated its national (Mr. Alloys Mutabingwa), for appointment as EAC Deputy Secretary General by the Summit of Heads of State ("the Summit"). Mr. Mutabingwa was duly appointed in that position on 29th April, 2009, for a term of three (3) years. However, on 29th April 2011, well before the expiry of Mr. Mutabingwa's 3-year term, the Republic of Rwanda nominated Amb. Dr. Richard Sezibera (another Rwandan national) for appointment by the Summit as Secretary General of the Community for a term of five (5) years. By virtue of Article 67 (2) of the Treaty:

"Upon appointment of the Secretary General the Partner State from which he or she is appointed shall forfeit the post of Deputy Secretary General".

6. With that forfeiture, Mr. Mutabingwa's contract was brought to an end, exactly 12 months before the due date of its expiry. Upon that premature end of Mr. Mutabingwa's contract of employment, the Community, as Employer, compensated him in an amount equivalent to his full remuneration package for the 12-month balance of his contract. In doing so, the Community based itself on the authority of:

- (i) Rule 96 (3) of the Staff Rules – which provides that:

"Where a Partner State withdraws one of its executive staff before the expiry of contract, the individual shall be compensated the full remuneration package he or she would have received if he or she had served the entire period of the running contract. The funds paid by the Community shall be reimbursed by the concerned Partner State."

- (ii) State practice of the Community regarding similar "withdrawals" in the past – notably in 2001 and 2006, when Uganda and Tanzania, respectively, reimbursed the Community upon "withdrawals" of their respective Deputy Secretaries General.

7. Consequent upon its payment of the above full compensation to Mr. Mutabingwa, the Community Secretariat requested the Republic of Rwanda to reimburse to the Community the amount of that compensation. Rwanda declined to make the requested reimbursement; on the basis that the matter did not fall within the ambit of Rule 96 (3). Additionally, Rwanda contended that there is no clear "established State practice" in this regard.

8. Confronted with this impasse, the Council of Ministers took a decision at its 29th Extra-Ordinary Meeting of 23-28 April, 2014, to seek this Court's Advisory Opinion on the matter. Specifically, the Council sought an opinion on the following framed issue:

"Whether 'forfeiture' of the position of Deputy Secretary General under Article 67 (2) of the Treaty for purposes of making way for an incoming

Secretary General from the same Partner State is in effect a ‘withdrawal’ of such Deputy Secretary General?”

III. Representation:

9. The Secretary General, acting on behalf of the Council of Ministers, was the formal “Applicant” in this matter – duly represented in the Court by the Counsel to the Community (pursuant to Articles 37(2) and 71(4) of the Treaty).
10. In response to the Registrar’s notification in that behalf (pursuant to Article 36 (1) and (3) of the Treaty and Rule 75 (2) of the Court’s Rules of Procedure), the Attorneys General of the Republics of Uganda, Kenya, Rwanda and the United Republic of Tanzania, as well as the Counsel to the Community filed their views on the question in issue by way of written submissions.

IV. Jurisdiction:

11. Both the Attorneys General of Uganda and of Kenya adverted to the issue of this Court’s Advisory jurisdiction. Both were of the considered view that, indeed, the Court has jurisdiction in the matter before us. Be that as it may, however, the Court – any court of law, derives its jurisdiction not from the consensus, nor the admission, nor indeed the consent of the representatives of the Parties (in this case, the Partner States).
- 12 Rather, jurisdiction is a function of the constitutive Instrument of the particular court – in this case the EAC Treaty; of which this Court is a constituent part. In this connection, Article 36 of the Treaty is clearly apposite. It will suffice, for the purposes of the record, to merely quote (without much elaboration) the relevant contents of that Article – thus:

“36 (1) The Summit, the Council or a Partner State may request the Court to give an advisory opinion regarding a question of law arising from this Treaty which affects the Community, and the Partner State, the Secretary General or any other Partner State shall in the case of every such request have the right to be represented and take part in the proceedings.

(2) ...

(3) ...

(4) In the exercise of its advisory function, the Court shall be governed by this Treaty and rules of the Court relating to references of disputes to the extent that the Court considers appropriate.”

13. We need only add that, for reasons of expedition of the process of giving the opinion, as well as for reasons of maximizing the clarity and finality of the Court’s opinion on the state of the Community law generally, the exercise of the Court’s advisory function has since 2013 been transferred from the First Instance Division (where all References to the Court originate), to the Appellate Division (where appeals are entertained and adjudicated with finality). In this regard, Rule 75 of the Court’s Rules of Procedure states, in relevant parts, as follows:

“(1) A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division...

(2)...

(3)...

- (4)...
- (5)...
- (6)...
- (7) Provisions of sub-rules (4) and (5) of Rule 68 [on Judgments of the Court] shall apply to advisory opinions under this Rule with necessary modifications.”
14. Before departing from this issue of jurisdiction, however, we wish to touch on what both the Treaty and the Court’s Rules of Procedure require as necessary preconditions for the rendering of a valid, credible and legitimate Advisory Opinion by this Court. The Court needs to be satisfied that all is done that needs to be done to validate the resulting Advisory Opinion. In this regard, we note that an Advisory Opinion carries the insignia and imprimatur of a “Judgment” of this Court – per Rule 75 (7), read with Rule 68 (4) and (5) of the Court’s Rules of Procedure.
15. First and foremost, the Court needs to be satisfied of its jurisdiction *ratione personae* – that is to say that the Request for the Advisory Opinion emanates from the right quarter (i.e. that the Request has been made by a person or entity as the Applicant having proper *locus standi*). In the instant case, we are entirely satisfied that such was the case. The Request was made by the Council of Ministers – one of the three entities (Summit, Council, Partner State) that are specifically and expressly entitled and authorized to do so under Article 36 (1) of the Treaty. That Article stipulates that:
- “The Summit, the Council or a Partner State may request the Court to give an Advisory Opinion...”
16. In this regard, we observe that at least once in the past, this Court has had occasion to address the issue of who lacks *locus standi* to request an Advisory Opinion from this Court. In *Appeal No. 4 of 2012: Legal Brains Trust (LBT) Ltd. V. The Attorney General of Uganda, Judgment of 19th May, 2012*, this Court held that:
- “legal and natural persons – such as the Applicant/Appellant (LBT) are excluded from requesting an Advisory Opinion.”
17. Second, with regard to jurisdiction *ratione materiae*, the subject matter of the Advisory Opinion prescribed under the same Article 36 (1) of the Treaty requires the requested opinion to be one:
- “regarding a question of law arising from this Treaty which affects the Community...”
18. We are satisfied that the question raised by the Request of the Council of Ministers in this instant case is comprehensive and does, indeed, encompass “a question of law” – namely, the interpretation and application of the EAC Treaty on a matter affecting the Community’s executive staff (more specifically, the tenure and remuneration of the Community’s Deputy Secretaries General, under Articles 67 and 68 of the Treaty). This matter arises directly from Article 67(2) of the Treaty, as read with Rule 96 (3) of the Staff Rules. Needless to say, the Staff Rules arise from the Council of Ministers’ rule-making power under Article 14 (3) (g), and Article 70 (3) of the Treaty and, as such, the Rules form an integral part of the same Treaty.
19. Third, the procedure prescribed under Article 36(1) of the Treaty and Rule

75(2), (4) and (5) confer on the Partner State directly concerned, as well as on all other Partner States, and the Secretary General of the Community, the right to be represented and to take part in the proceedings for the Advisory Opinion. Again, we are satisfied that this, indeed, has been the case. The Registrar of this Court, notified all the five Partner States and the Secretary General of the Community that the Council of Ministers had instituted a Request for an Advisory Opinion; and that they had a right to be represented in the proceedings, as well as to submit their views on the issue at hand. In response, all who were so notified through their Attorneys General and the Counsel to the Community, were duly represented at the oral hearings, except Burundi. All the respective representatives did highlight various aspects of the arguments and contentions contained in their written submissions.

20. Fourth, Article 36 (2) of the EAC Treaty requires the Request to be formulated as,

“an exact statement of the question upon which an opinion is required”.

Moreover, the statement must be:

“accompanied by all relevant documents likely to be of assistance to the Court.”

21. Here, again, we are satisfied that the “Statement” formulated by the Council of Ministers constituted an “exact” statement – both in its terms, its context, and its reach. We found no ambiguity in its formulation, no uncertainty in its meaning, no vagueness in its content, and no ambivalence in its intent. Altogether, the statement was both precise and concise. Additionally, the Request as required by Article 36 (2) of the Treaty, was suitably accompanied by Annexures of documents and case authorities offering useful explanations to the various aspects of the issue at hand.

22. In summary then, the Court is satisfied that all the preliminary conditions and statutory requirements for this Court to give a legitimate and valid Advisory Opinion, were duly met in the Request for this Advisory Opinion.

V. The Representatives’ Observations:

23. In their Submissions, both written and oral, the respective representatives of the Partner States and of the Secretary General of the Community expressed the following observations and views:-

(1) Secretary General (Submissions):

24. The Secretary General was, so to speak, the Applicant making the Request on behalf of the Council of Ministers. In this capacity, his advocate (the Counsel to the Community) contended that:

(i) The Republic of Rwanda sacrificed the position of Deputy Secretary General to get that of Secretary General. That “sacrifice” caused the holder of the Deputy Secretary General’s position to give way to the new Secretary General. Hence, Rwanda, “withdrew” the then Deputy Secretary General, Mr. Mutabingwa.

(ii) The Republic of Uganda in 2001, and the United Republic of Tanzania in 2006 set the precedent and practice whereby the Secretariat has been refunded the compensation paid to an outgoing Deputy Secretary General. That “established practice” has never been questioned by any

Partner State.

(2) The Republic of Kenya (Submissions):

25. Kenya asserted this Court's jurisdiction to entertain the matter, pursuant to Article 36 of the Treaty and Rule 75 of the Court's Rules of Procedure.
26. As to the substantive aspects of the Request, Kenya stated that:
 - (i) In the interpretation of Article 67 (2) of the Treaty and Rule 96(3) of the Staff Rules, the Court should take into account:
 - (a) the intention of the Partner States, in light of the interpretation principles (of "good faith" and "ordinary meaning") stipulated by the Vienna Convention on the Law of Treaties; and
 - (b) the subsequent state practice – in particular, the precedents set by Uganda and Tanzania to reimburse the amount of compensation paid by the Community to their withdrawing Deputy Secretaries General in 2001 and 2006, respectively.
 - (ii) In view of all these, the Republic of Kenya was of the view that employing the principles of "good faith" and of the "ordinary meaning" of words; coupled with the developing state practice, a deduction could be made that the words forfeiture and withdrawal (as applied in the Regulations), may be construed to have one and the same effect. The use of the word withdrawal in Regulation 96(3) is a matter of semantics, but it has a similar meaning with the word forfeiture in Article 67 (2) of the Treaty.

(3) The Republic of Uganda (Submissions):

27. The submission of Uganda delved at great length into the jurisprudence of Treaty law and international case law --- with the conclusion that: "the end result of forfeiture is withdrawal". They submitted that it follows that after forfeiting the position of Deputy Secretary General, the Partner State inevitably withdraws its national. Accordingly, the Republic of Rwanda is obliged to meet the consequences of withdrawal of its national to wit, compensation as provided for in Regulation 96(3) of the EAC Staff Rules and Regulations, 2006.
28. Furthermore, Uganda submitted that in the spirit of co-operation for mutual benefits – which is one of the fundamental principles of the Community under Article 6 of the Treaty, Rwanda should follow the precedent set by other Partner States and reimburse the Secretariat.
29. In the alternative, but without prejudice to her above submissions, Uganda advised the EAC Council of Ministers to take necessary measures "to specifically harmonise Regulation 96(3) of Staff Rules with the provisions of the Treaty".

(4) The United Republic of Tanzania (Submissions):

30. Tanzania adopted the stand taken by the Secretary General.
31. Like Kenya, Tanzania also affirmed this Court's jurisdiction to give an Advisory Opinion under Article 36 of the Treaty and Rule 75 of the Court's Rules of Procedure.
32. Tanzania pressed the point of its precedent (in 2006), and that of Uganda (in 2001) in reimbursing the Community's payment of compensation to their two nationals whose contracts as Deputy Secretaries General were terminated

- prematurely to give way to the appointment of new Secretaries General.
33. Moreover, Article 67 (1) and (2), read together, do portray the meaning that no two nationals from the same Partner State can serve as Secretary General and Deputy Secretary General during the same period. The Partner State concerned must forfeit the post of Deputy Secretary General. Regulation 96 (3) has a purposive character: namely, to compensate the outgoing Deputy Secretary General for the unexpired term of his or her contract in order to cover the loss of expected income.
 34. While Tanzania contended that “forfeiture” implies “withdrawal”, it also conceded explicitly that “Regulation 96(3) should not supersede and be seen as contravening Article 67(2) through the interchangeable use of the words ‘forfeit’ and ‘withdraw’.
 35. Furthermore, Tanzania contended that the Republic of Rwanda could have upgraded Mr. Mutabingwa from the post of Deputy Secretary General, to that of Secretary General. The failure to do so implied that Rwanda had “constructively withdrawn” the Deputy Secretary General and elevated another national instead. Therefore, Rwanda is under legal obligation to reimburse to the Community the funds used to compensate the former Deputy Secretary General.

(5) The Republic of Rwanda (Submissions):

36. Rwanda’s invocation of Article 67(1) of the Treaty was an exercise of a legal right to nominate a new Secretary General. The right based on the operation of a Treaty provision is anchored on the principle of rotation in the appointment of the Secretary General of the Community. To interpret all this as a “withdrawal” of Rwanda’s Deputy Secretary General, would be absurd. The services of that Deputy Secretary General were extinguished by the operation of the law. Forfeiture is a consequence triggered by the occurrence of an event provided by law. Once the event happens, the consequences are automatic and do not depend on the will of the Parties involved. Withdrawal, on the other hand, is an act entirely dependent on the will of the Party effecting the withdrawal. Indeed, under Rule 96 (1) (a), the Partner State effecting the withdrawal of an executive staff is:

“required to give six months written notice to the Summit through the Council...”

37. Accordingly, Rwanda is under no obligation to reimburse the amount USD \$128,891 that was paid by the Secretariat to compensate the Deputy Secretary General for the unexpired term of his contract.

VI. Analysis And Opinion of the Court on the Issues:

38. The decision whether to “forfeit” or not to “forfeit” the post of Deputy Secretary General upon a Partner State’s rotational turn to nominate a new Secretary General, may be said to be within that Partner State’s will or choice .
39. Indeed, as the United Republic of Tanzania contended in its written submissions, adverted to earlier in this opinion, Rwanda had the choice to elevate the then incumbent Deputy Secretary General (Mr Mutabingwa) to the position of Secretary General , or to nominate, as it did, a new person altogether as the Secretary General. But, looked at more critically, it would have been , at best,

only a mirage or a Hobsonian choice – for elevation of Mr Mutabingwa as Secretary General, would still leave his position of Deputy Secretary General vacant. At worst, Rwanda would have been forced to make a nomination it may not have necessarily preferred to make; thus, it would have been deprived of a real choice that is its right to make under the provisions of the Treaty. That would be no choice. That in our view, would, in effect, amount to undermining or debasing the Treaty provisions: a corrosion of the true intent of the principle of rotation of Article 67(1) in the appointment of the Community's Principal Executive Officer.

40. The act of "forfeiture" of the position of Deputy Secretary General is not a choice of any Partner State at any given time. It occurs when the confluence of events forces a Partner State to either nominate a new Secretary General or sacrifice an existing position of Deputy Secretary General.
41. Rather, it is an act of the application of law cast in the EAC Treaty's principle of rotation – by which no Partner State is permitted to hold the two top positions of Secretary General and Deputy Secretary General at the same time. By force of Article 67(2), a Partner State from which the Secretary General is appointed must, by law, forfeit the position of Deputy Secretary General. It is for this reason that the Republic of Rwanda contended that "forfeiture" is –
 - "A consequence triggered by the occurrence of an event provided for by the law. Once the event happens, the consequences are automatic and do not depend on the will of the parties involved.
 - If a country nominates a Secretary General, then through an automatic legal process it forfeits the position of Deputy Secretary General."
42. We agree. We need not add anything more. Both the law and the logic of that position are self-evident. The "decision", if decision it is, is a decision neither of the Summit of the Heads of State, nor of the Council of Ministers, nor of the Secretariat, nor of the Partner States acting collectively, nor indeed of the individual Partner State concerned acting solo. It is a function of the operation of the law: pure and simple.
43. We will now turn to another aspect of the requested Opinion: namely, the nature and status of the Employment Contract of the Deputy Secretary General.
44. Articles 66-70 of Chapter Ten of the EAC Treaty prescribe broad parameters of the employment contract in the EA Community. The Staff Rules and Regulations (including Rule 96(3) of those Rules) stipulate the more detailed aspects of the Community staff contracts.
45. Article 66 of the Treaty establishes the Secretariat as an executive organ of the Community, having the following offices:
 - (a) The Secretary General;
 - (b) The Deputy Secretaries General;
 - (c) The Counsel to the Community; and
 - (d) such other offices as may be deemed necessary by the Council."
46. Both the Secretary General and Deputy Secretaries General are appointed by the Community's Summit of Heads of State under Articles 67(1) and 68(2), respectively. Both are appointed on a rotational basis (although in more recent times each of the current five Partner States has nominated its own Deputy Secretary General). The Secretary General is appointed upon nomination by

the “relevant Head of State”; while Deputy Secretaries General are appointed from nominees of the Partner States and upon recommendation of the Council of Ministers. They are appointed for a fixed term of 5 years for the Secretary General (under Article 67(4) of the Treaty); and 3 years, renewable once, for the Deputy Secretary General (under Article 68(4) of the Treaty).

47. A consequence of the rotation and the non-uniform sequence of these appointments is the specter, from time to time, of a Partner State being faced with the choice of a Secretary General and a Deputy Secretary General, all at the same time. To obviate that eventuality of a dilemma, the framers of the Treaty included in the Treaty a provision which is tailor-made to address that specific conundrum – namely, Article 67(2) which states that:

“(2) Upon the appointment of the Secretary General the Partner State from which he or she is appointed shall forfeit the post of Deputy Secretary General.”

48. The framers of the Treaty drafted the above quoted provision with deliberate reflection. They did so in order to avoid the spectre of any Partner State ending up holding the two top executive positions of the Community at one and the same time. By fiat of law, the framers provided for a compulsory “forfeiture” of the second Executive position, upon the Partner State acquiring the first position.

49. Be that as it may, the Court is also alive to the fact that upon appointment, by the Summit, of both the Secretary General and the Deputy Secretary General, those appointees (just like all other officers and employees in the service of the Community) cease to be nominees of the particular Partner State of their nationality or nomination.

50. They cease to have any appointment relationship with their original or nominating Partner State. They become staff of the Community, holding their office in the Secretariat under Chapter Ten (Articles 66-72) of the Treaty.

51. By the nature of their employment, they acquire the status and character of international civil servants, beholden to no single Partner State, nor to any Head of State or member of the Council of Ministers. They owe all their loyalty and fidelity only to their Employer: the Community. Conversely, no single Partner State has (and none should have) any employment rights over or employment relationship with any such staff member of the Community.

52. In this connection, Article 72 of the Treaty is emphatic and categorical. It provides, in great detail, as follows:

“1. In the performance of their functions, the staff of the Community shall not seek or receive instructions from any Partner State or from any other authority external to the Community. They shall refrain from any actions which may adversely reflect on their position as international civil servants and shall be responsible only to the Community.

2. A Partner State shall not, by or under any law of that Partner State, confer any power or impose any duty upon an officer, organ or institution of the Community as such, except with the prior consent of the Council.

3. Each Partner State undertakes to respect the international character of the responsibilities of the institutions and staff of the Community and shall not seek to influence them in the discharge of their functions.

4. The Partner States agree to co-operate with and assist the Secretariat in

the performance of its functions as set out in Article 71 of this Treaty and agree in particular to provide any information which the Secretariat may request for the purpose of discharging its functions.

53. In view of all the above, therefore, it is difficult to envision how, when and why any Partner State could “withdraw” its national from the staff of the Community as contemplated in Rule 96(3) of the Staff Rules, without offending the solemn obligations and undertakings of the Partner States stipulated in each and every one of the above-quoted provisions of Article 72 of the Treaty. The Partner States are neither the Employer of the Community Staff; nor are they a party to any staff member’s contract of employment. They have no authority or mandate to deploy, supervise, promote, demote or discipline any staff member of the Community – all these functions being the preserve of the Community itself. In our view, the inclusion of Rule 96 (3) in the Staff Rules was patently misconceived, having regard to, especially, Article 72 (3) of the Treaty which obliges Partner States to respect the international character of the Community staff.
54. But even, for argument’s sake, in the event that a Partner State were to invoke the provisions of Rule 96(3) of the Staff Rules, the act of withdrawing a staff member (such as the Deputy Secretary General), would be a function exercised with the deliberate and free will of the particular Partner State. The act would be deliberate because, among others, Rule 96(1) (a) requires the Partner State intending to effect “withdrawal”:
- “ to give six (6) months written notice [of that intention] to the Summit through the Council.”
- And the act would be one of free will because, unlike “forfeiture” under Article 67(2) of the Treaty, “withdrawal” is not mandated nor is it dictated by fiat of law.
55. In all this misty regime of Rules, room for a Partner State to withdraw a Deputy Secretary General under Rule 96(3), is extremely difficult to contemplate or comprehend, let alone to establish or even envision. But in our view, one thing is crystal clear. Rule 96(3), in all its manifestations, defeats the tenor, the object, and the purpose of the international character of the Community’s civil service as conceived and duly recognized under the provisions of the EAC Treaty – in particular, Article 72(3). On this, the Court agrees wholly with the advice and sentiment expressed in the written submissions of the Republic of Uganda, to the effect that the Council of Ministers should take necessary measures to harmonise Regulation 96(3) of the Staff Rules with the provisions of the Treaty.
56. It is clear to us that the attempt to treat the Secretary General and Deputy Secretaries General under the same personnel regime as all other staff members of the Community; and, in particular, to apply to them the bulk and import of the Staff Rules and Regulations, is not a realistic proposition. It is, instead, an unfortunate misconception. It should be revisited to sort out the peculiar status of the “political” appointees among the Staff, from those of the regular professional (and other staff) – with each (for instance) having their own separate, independent, and well-defined administrative, regulatory, and disciplinary regime; the one, answerable only to the Summit through the Council; and the other, answerable to the Secretary General.
57. Accordingly, from all the above, under no stretch of construction, interpretation

or imagination can the two concepts “forfeiture” and “withdrawal” be said to mean the same thing or to cause the same effect.

58. In this connection, we find the principles of statutory interpretation even in a municipal setting, to be quite germane, helpful and wholly in accord with the international principles governing the interpretation of Treaties – such as the EAC Treaty. In our analysis that follows below, we will start with the former, and end with the latter.

59. We fully subscribe to the view of Maxwell on *The Interpretation of Statutes*, 12th Edition, (1976) by P. St.J. Langan, at p. 29, to the effect that:

“where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise.”

60. It was for this reason, no doubt, that in the English House of Lords case of *Pinner v Everett* [1969] 1 WLR, at p.1273, Lord Reid stated the following:

“In determining the meaning of any word or phrase in a statute the first question to ask is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.”

61. In the same way, Cross on *Statutory Interpretation*, 3rd Edition, at p. 32 [when quoting MacCormick and Summers’ *Interpreting Statutes*, pp 512-513], emphasizes that:

“The governing idea...is that if a statutory provision is intelligible in the context of ordinary language, it ought, without more, to be interpreted in accordance with the meaning an ordinary speaker of the language would ascribe to as its obvious meaning, unless there is sufficient reason for a different interpretation.

By enabling citizens (and their advisers) to rely on ordinary meanings unless notice is given to the contrary, the legislature contributes to the legal certainty and predictability for citizens and to the greater transparency in its own decisions, both of which are important values in a democratic society.”

62. While the above statutory approach to the issue is highly helpful and relevant, it is but a secondary and supplementary source for purposes of interpreting provisions of a Treaty. We, therefore, now turn our next tour of exploration to the realm of international Law and Conventions – more specifically, to the General Rules of Interpretation in Article 31 of the Vienna Convention on the Law of Treaties, 1969. That Article stipulates that:

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty.

3. There shall be taken into account , together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rule of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended”.

63. Pursuant to the above-quoted guidance of Article 31 of the Vienna Convention of 1969, a fair, good faith interpretation and construction of the word “withdraw”, means exactly what that word says, namely : to “remove”, to “take away” or similar cognate meanings. Therefore, to give the word “withdrawal” a meaning that encompasses the “ forfeiture” of Article 67(2) of the Treaty, is clearly to stretch the meaning unreasonably, unrealistically and unnaturally – in light of the context of both Article 67 of the Treaty, and of Rule 96 of the Staff Rules.
64. To “withdraw” requires the deliberate decision and voluntary action of the concerned Partner State to recall the Deputy Secretary General. To change the ordinary meaning would be to give that term a special meaning which (under Article 31(4) of the above-quoted Vienna Convention), requires one to “establish that the Partner States intended” such special meaning. In this instant case, no such special meaning has been established by the submissions of either the representatives of any Partner State, or those of the Secretary General of the Community. In this connection, Rwanda’s contention in her written submission is correct: the act of withdrawal is entirely dependent on the will of the Partner State effecting the withdrawal. On the other hand, to “forfeit” is an imposition of the law on the Partner State, forcing it to “surrender”, to “forego”, to “sacrifice” that to which the Partner State is otherwise entitled – namely, the position of Deputy Secretary General. In this sense, therefore, to “withdraw” and to “forfeit” stand two poles apart: the one, the polar opposite of the other; the one, standing aloft the pedestal of Volition; the other at the bottom of the valley of Compulsion.
65. Notwithstanding the above analysis, we are alive to the real reason for the effort and quest to equate the two words as amounting to the same thing. That effort is not simply to establish the true, linguistic meaning of each one of these words. Not at all. The effort is more subtle than that. It seeks to establish the capacity of both words to lead to the same effect, same result, and same consequence. To that extent, the effort seeks to have this Court ignore the context, deflect differences, divert nuances, and pervert the true connotation and signification of the ordinary meanings of these two words, in order to somehow establish that their effect is the same. It seeks to equate “forfeiture” to “ withdrawal”, with the aim to have both words attain the same result — namely , to obligate Partner States to bear the financial responsibility of compensating outgoing Deputy Secretaries General for the statutorily mandated premature expirations of their Employment Contracts.
66. We decline to do so. We decline for two related reasons: First, if the drafters of

the Staff Rules (coming, as they did, long after the drafters of the Treaty) had intended to give the same effect to the two words, nothing would have been easier or simpler than to use the same word “forfeit” in the Rules. But, No. The Rules opted for a different word altogether: namely, “withdraw”. And this was not for reasons of ignorance, lack of foresight or vision, nor indeed for lack of linguistic agility or verbal dexterity. Not all. On the contrary, the drafters were fully conscious of the word “forfeit” – for they used it in the next- door Rule of the same Staff Rules – namely, Rule 91(9) as follows:

“9. A member of Staff dismissed from the service shall forfeit all rights and benefits...”

67. Indeed, the same formulation was used some 10 years before, in Article 57 of the former Staff Rules and Regulations of 1996 – namely:

“a staff member...dismissed under a disciplinary measure shall forfeit all retirement benefits”.

68. Second, the two words stand for two different things in their substantive application. “Forfeiture” is an imposition by compulsory fiat of the law. “Withdrawal”, is a deliberate act and choice – made by the free will of the Partner State concerned.

69. The essence of this instant Advisory Opinion is on all fours with the recent Ugandan Supreme Court case of the “Rebel Members of Parliament”—namely, *Hon. Theodore Ssekikubo & 4 Others v The Attorney General of Uganda & 4 Others*, SCt Constitutional Appeal No. 1 of 2015, Judgment of October 2015. Ground No.4 of that Appeal, concerned the issue of whether “expulsion” of a Member of Parliament from his political party amounts to the same thing as “leaving” that party for purposes of vacating his seat in Parliament.

70. The Supreme Court reversed the holding of the Court of Appeal/Constitutional Court which had been to the effect that the word “expulsion” and the word “leave” mean the same thing. The Supreme Court considered the context in which the word “leave” occurred, namely Article 83(1)(g) of the Constitution of Uganda – which provides that:

“... if the person leaves [his or her] political party in order to join another party or to remain an independent Member...”

71. The Supreme Court held that, given the above- quoted context of the Constitution, the word “leave” could only mean leave voluntarily, and not by expulsion or compulsion – inasmuch as the context provides the purpose for “leaving” (i.e. to join another party). Expulsion from a party, on the other hand, does not connote any such purpose. Expulsion can be for other purposes or for no purpose at all. Therefore, in the particular context of the above Constitutional provision, the word “leave” and the word “expulsion” cannot mean the same thing.

72. We, too, after deep reflection, find that the context of Article 67(2) provides a definite, one-of- a-kind purpose for the “forfeiture” of the position of Deputy Secretary General – namely, to give way to an in-coming Secretary General. On the other hand, the “withdrawal” of a Deputy Secretary General in the context of Rule 96(3), provides no particular purpose for the contemplated withdrawal. Given these two different contexts, therefore, the two words cannot mean the same thing. They denote and signify two different and opposing concepts.

73. By using the word “withdraw”, in Rule 96(3), instead of the word “forfeit”, the

Staff Rules clearly intended to, and did, construct an altogether different concept, having an entirely different effect and consequence from that of the concept “forfeiture” contained in Article 67(2) of the Treaty. To ask us to reverse the semantic gears of these two terms at this late stage, therefore, is to ask us to do violence to the linguistic purity of the two words. Worse still, to do so would be to offend the clear intent and purpose of both the Treaty and the Staff Rules. We must, as we do, decline to do so, however attractive and however compelling the temptation is to do so.

74. Upon their nomination by a Partner State, and recommendation by the Council of Ministers, as well as appointment by the Summit of Heads of State, Deputy Secretaries General serve their term subject to a Contract of Employment. Under Article 68(5):

“The terms and conditions of service of the Deputy Secretaries General shall be determined by the Council and approved by the Summit”.

Article 70(3) of the Treaty is to the same effect as Article 68(5) above.

75. Those terms and conditions of service are contained in a Letter of Appointment which is given to each appointee after appointment. Additionally, the terms of employment as specified in each such Letter of Appointment are also contained in, among others, the Staff Rules and Regulations – including Rule 96(3). In this regard, Rule 1 of the same Staff Rules is emphatic. It states, without equivocation, that:

“1. These Staff Rules and Regulations, made in pursuance of Article 14(3) (g) and 70(3) of the Treaty embody and define the fundamental conditions of service, and basic rights, duties, and obligations of members of Staff of the Community”.

76. It is important to note, however, that the contract of employment – with all the terms and conditions included therein, is a contract strictly between the Employer (the Community), on the one hand, and the Employee (the Deputy Secretary General), on the other. It is only those two parties whom that contract binds. The Partner States are not privy to the benefits of that contract; nor are they party to its obligations. They are not bound by the terms of that contract – including the term emanating from the application of Rule 96(3) of the Staff Rules. This is so on account and authority of the international law principles of *Pacta Sunt Servanda* -- which, loosely rendered, translates as: a pact or contract binds or makes a slave of its parties.

77. Without being bound by Rule 96(3), the Partner States have no legal responsibility under the application of that Rule. All responsibility -- including the consequences of the breach or non-observance, and the financial obligations arising under that Rule (such as the payment of compensation for the premature cancellation or termination of a Deputy Secretary General’s contract), must be borne only by the party to the Contract of Employment, namely the Community; and not by a non-party (such as the Partner State). In all this, what binds the Partner States is Article 67(2) – by which the Partner State concerned willy nilly forfeits the position of Deputy Secretary General upon its national being appointed Secretary General. That result arises not from any Employment Contract relationship between the Partner States and the Community’s employees (for there is none); but purely from the sheer application of the law, namely Article

67(2) of the Treaty).

78. It would be gravely unfair and grossly unconscionable to force a Partner State to pay for a wrong or breach of an employment contract:
- to which the Partner State is neither privy, nor a party;
 - with regard to which the Partner State is not bound; and
 - under which the Partner State has not itself committed a wrong, a fault or a default.
79. To penalize a Partner State in these circumstances of non-culpability, would be blatantly wrong and patently inequitable. Far from committing any wrongdoing, the Partner State is only exercising her right to an entitlement under the Treaty: namely, the right under the principle of rotation, to have one of her nationals appointed as Secretary General of the Community. It is enough that in that process, the Partner State forfeits the position of Deputy Secretary General. She should not incur (especially gratuitously) an additional “forfeiture” of her finances to meet the expenses of the unexpired term of the Deputy Secretary General –an eventuality which is dictated, not by her own free will to “withdraw” the Deputy Secretary General; but, rather, one that is imposed on her at the behest of the automatic operation of the law (namely, Article 67(2) of the Treaty).
80. Accordingly, we find no logical or rational basis for holding responsible a Partner State (such as the Republic of Rwanda), or the ensuing automatic consequences of forfeiture under the prevailing law of the Community.

VII. The Issue of State Practice

81. That brings us to the last substantive issue, of the various aspects of our Analysis – namely , whether or not there is an established State Practice regarding State refund to the Community of compensation paid to Deputy Secretaries General for the pre-mature expiry of their contract of service ?
82. The facts of the matter as gleaned from the written and oral submissions of the representatives of the Republics of Uganda and Kenya, and of the United Republic of Tanzania, as well as of the Secretary General of the Community, are quite simple and uncontested. In 2001, Uganda made a refund to the Community for compensation paid by the latter in respect of the early exit of the Deputy Secretary General (Dr. Sam Nahamya) a national of Uganda, to give way to the in-coming Secretary General (Hon. Amana Mushega), another national of Uganda. Similarly, in 2006, Tanzania made the refund in respect of Deputy Secretary General (Amb. Ahmed Rweyemamu Ngemera) giving way to the new Secretary General (Amb. Juma Mwapachu) -- both nationals of Tanzania. In 2011, it was Rwanda’s turn to effect a change of guards: between outgoing Deputy Secretary General (Mr. Alloys Mutabingwa), and in-coming Secretary General (Amb. Dr. Richard Sezibera). However, this time around, when requested to refund the usual compensation, Rwanda declined to do so -- for all the reasons and contentions contained in her representative’s written and oral submissions, to which we adverted at the outset of this Advisory Opinion.
83. The question to answer, therefore, is: In view of the facts we have recounted above, is there an established State practice on the issue of Partner State refunds to the Community for compensation paid to outgoing Deputy Secretaries General?
84. To put the question differently and in a more detailed fashion, the inquiry is:

- (a) Has there, indeed been a practice?
- (b) Has the practice been followed for some time (i.e. not merely a one-off occurrence)?
- (c) Is it a practice whose antiquity or longevity could in good logic, good reason and good conscience be said to have been sufficiently accepted and recognized as an established State practice?
- (d) How does this practice, if any, stack up and measure up to the variety of tests and standards stipulated by the relevant jurisprudence, especially international jurisprudence, on that matter?

Analysis of a number of examples of international case law, from a number of different international judicial fora on this subject, will yield the appropriate answers to the above inquiry.

85. A well-known example of “subsequent practice” is in respect of Article 27(3) of the UN Charter ; R. KOLB: *La modification d'un traité par la pratique subsequent des parties.....Note l'affaire relative au régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France, sentence du 14 janvier 2003, Revue Suisse* 14 (2004) 9 ff.
86. To pass muster, the “practice” in question needs to be an “active” practice. That active practice should be consistent, rather than haphazard; and it should have occurred with a certain frequency – see Statement in Vienna by the Delegation of Argentina, OR 1968 COW 180, para 23; Waldock Rept.III, YBILC 1964 II 59, para 24; the *avis de droit* of the Swiss Federal Department for Foreign Affairs, SJIR 38 (1982) 86, according to which two *règlements* of the WHO were insufficient to establish a practice in this respect. Indeed, some jurists go even further to state that the practice in question must be “concordant and common to all parties” [emphasis added] – see, for example, Olivier Corten & Pierre Klein: *The Vienna Conventions on The Law of Treaties: A Commentary*, (Oxford University Press) 2011, Vol.I, p.826. Equally, some “practices” have been dismissed for not being “uniform”(hence, not “ relevant”) – see, *LAN Case : Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Report of the Appellate Body of 5 June 1998, para 96, see also the case of *Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207 /AB/R, Report of the Appellate Body of 23 September, 2002, para 272.
87. Other “practices” have been dismissed because their lapse of time (i.e. their longevity) was too short to observe a genuine relevant practice – see the “*Underwear Case*”: *Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT /DS24/AB/R, Report of the Appellate Body of 10 February 1997, pp16-17 (where the DSB refused to take into account the practice of the parties relating to WTO agreements judged to be too recent).
88. The European Court on Human Rights has been fairly flexible in taking into consideration “subsequent practice”. It has not demanded that the practice be followed “unanimously” by the Contracting Parties to the European Convention on Human Rights – but merely by “a great majority “of those parties – see the case of *Loizidou V. Turkey*, Judgment of 21 February, 1975, Golder, Series A, no. 99, paras 79-80, where the Court also speaks of “a practice denoting practically universal agreement amongst Contracting Parties”.

89. According to Olivier & Klein (*supra*) at p. 828, the Court of Justice of the European Union has, on the other hand, made only moderate use of the subsequent practice of parties – such as in Case 21-24/72, 12 December, 1972, ECR 1972, p.1219. More usually, however, that Court has tended to opt more for the teleological and ends-focused interpretation (in favour of the intention underlying Community treaties). Indeed, it has even dismissed this practice if it is contrary to its vision of the treaties – see, for example, Case 232/78, Judgment of 25 September, 1979, *Commission v France*, ECR 1979, p 2729 (in which the conduct of the States and the absence of application of secondary law by the States or institutions were not considered as an element of interpretation of the treaty).
90. The practice in the International Court of Justice (ICJ) is equally revealing- see, for example, the case of *North Sea Continental Shelf: The Federal Republic of Germany v Denmark & The Netherland*, ICJ Reports 1969, p 3 which concerned the “practice” for delimiting the continental shelf between Germany and Denmark; and between Germany and the Netherlands in the areas of the North Sea. As to the question when practice become recognises as established, the dissenting opinions of Judges Lachs, Tanaka, and Sorenson explained as follows:
- Lachs, J: “to become binding, a rule or principle of international law need not pass the test of universal acceptance..... Not all states have an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States” DJ Harris, *Cases and Materials in International Law*, 6th Edition, Sweet & Maxwell, 2004, at page 32.
 - Sorenson, J: “According to the classic doctrine.... the practice necessary to establish a rule of customary international law must have been pursued over a certain length of time. There have been those who have maintained the necessity of ‘immemorial usage’ ... However, the Court does not seem to have laid down strict requirements as to the duration of the usage or practice which may be accepted as law.”
- Quoting Sir Herchs Lauterpacht: *The Development of International Law by the International Court on opinio neccessitatis juris* Sorenson, J went on to state that:
- “ it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or in appropriate cases abstentions therefrom) as evidencing the *opinion neccessitates juris* except when it is shown that the conduct in question was not accompanied by such intention.”
91. As to the question what triggers State Practice? Is it the number of Countries or something more, Tanaka, J observed that:
- “When considering whether usage and opinion juris exist in the formative process of customary law... The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances ... what is important... is not the number or figure of

ratifications of accessions to the Convention or of examples of subsequent State practice, but the meaning which they would imply in the particular circumstances...”

92. From all the statements and sentiments carefully gleaned from the international jurisprudence we have discussed above, it is quite evident that each “subsequent practice” needs to fulfil a myriad array of preconditions and to meet a veritable maze of standards in order to pass the bar of recognition as an “established State practice”. The alleged compensation refund “practice” in the instant case requires no less rigorous scrutiny.
93. Even though there is no required magical number or specified mathematical calculus to trigger the recognition of a particular practice, it is clear that the practice needs to have been frequent, repetitive, consistent, uniform, widespread among the great majority of the group of States involved, and to have been of appreciable duration or vintage age in terms of its continuity and longevity. The instant ‘practice’ of compensation-refunds has lasted a bare 10 years, counting from 2001 (when Uganda first started it), to 2011 (when Rwanda challenged it giving rise to the request for the present Advisory Opinion). Indeed, with the 2006 Staff Rules as the only basis for Rule 96(3), the practice started in earnest (i.e. backed by the law of that Rule 96(3)) only with the Tanzanian refund of 2006. The earlier refund of 2001 by Uganda was effected some 5 years before the promulgation and commencement of the 2006 Staff Rules. In this regard, it is important to note that the pre-2006 Staff Rules – namely, the Staff Rules and Regulations of 1996, which existed at the time of Uganda’s refund, do not appear to have contained the equivalent of Rule 96(3) of the subsequent Staff Rules of 2006. Accordingly, Uganda’s refund pre-dates the Rules from which derive the word “ withdrawal”, a word which is at the very core of the present interpretation; and which is the very subject and object of the present Advisory Opinion.
94. Even more importantly, if this “ practice” is taken to have validly started only with the 2006 refund by Tanzania, its existence would have lasted for barely 5 years only (i.e. 2006 to 2011) before it was interrupted , disrupted directly contested, and openly challenged by Rwanda’s refusal to follow suit – thereby depriving it of the necessary ingredients of , among others, longevity, continuity, uniformity and general acceptability (including its having never been questioned) – which are clear requirements for recognition under international law and jurisprudence.
95. Thirdly, even with the best scenario, the refund “practice” has so far been adhered to by at most only 2 (if you include Uganda) – out of a possible 5 Partner States. The practice would, therefore, appear to lack the necessary consistency and frequency – let alone concordance and commonality, or near-universality amongst most of the Partner States of the East African Community – in order to trigger its recognition as an established State practice.
96. All in all then, we find the practice of Compensation-and- Reimbursement to be (at best) only “formative”, or merely “emerging; and (at worst) simply inchoate. At the material time of 2011, the “practice” had not as yet developed sufficiently to warrant recognition as an established State practice. We hesitate, therefore, “to take it into account” in interpreting the effect of Article 67(2) of the EAC Treaty, and of Rule 96(3) of the EAC Staff Rules and Regulations of 2006.

VIII. Conclusion

97. Before rendering our formal Opinion below, we wish to underline the following. The importance of the instant Advisory Opinion lies not so much in the resolution of the immediate issue of whether Rwanda (or other Partner State in similar circumstances) is or is not obliged to bear the financial burden of reimbursing the compensation paid to an out-going Deputy Secretary General for premature termination of tenure in order to give way to an in-coming Secretary General. That is important.
98. More fundamentally, however, the singular significance of the Advisory Opinion lies in the overarching role that the Treaty has carved out for the East African Court of Justice in the overall spectrum of the Integration Process of the Community. The Court's primary and cardinal role is to ensure that the Partner States, the Community, its Organs and its Institutions – all adhere to the law in the course of their expedition to the destiny of Integration (see, in particular, Article 23 of the Treaty).
99. In this role, the instrument of the Advisory Opinion is easily the most potent tool available in the armoury of the Court to fulfil its solemn duty under the Treaty. With the considered advice tendered by the Temple of Justice, by way of an Advisory Opinion, all are guided and instructed as to the status of Community law: past, present, and possibly prospective, on any given subject in the Treaty. It removes the fog from the face of the law. It shines the torch of clarity into the dark chambers of the legal edifice. It is the sober revelation of the law given in the absence of the passion of litigation.
100. The Advisory Opinion is an apt preventive tool to stay the hand of would-be violators and contraveners of the Treaty – just as it is an excellent hands-on Manual and Guide to those who are law-abiding. The instant Advisory Opinion does just that: it seeks to deter, in advance, the violation of Community law. At the same time it aims to ensure the Community's positive adherence to its law.
101. in conclusion, then, we reiterate the issue contained in the Request filed by the Council of Ministers, for this Advisory Opinion. That issue was:
- “Whether ‘forfeiture’ of the position of Deputy Secretary General under Article 67(2) of the EAC Treaty for purposes of making way for an in-coming Secretary General from the same Partner State is in effect a ‘withdrawal’ of such Deputy Secretary General ?”
102. Having regard to our above analysis of the issues, and to the observations and views of the representatives of the Partner States and of the Secretary General who participated in this Request for an Advisory Opinion, we are of the opinion that :
- (1) Forfeiture of the position of a Deputy Secretary General pursuant to Article 67(2) of the Treaty for the Establishment of the East African Community, is a function and consequence imposed by automatic operation of the law – without the free will or choice of the Partner State concerned.
 - (2) Withdrawal of Deputy Secretaries General from their position by a Partner State, for purposes of making way for an in-coming Secretary General of the same Partner State, though contemplated under Rule 96(3) of the Staff Rules and Regulations, 2006 of the Community, would in its

- application be a function and a consequence of the free will and choice of the particular Partner State involved. To that extent that function would offend and would clearly be inconsistent with and contrary to the objectives and purpose of the Treaty, in particular concerning the principle of rotation in Article 67(1) and (2) of the Treaty.
- (3) Given the above inconsistency between the Treaty and the Staff Rules, which are made pursuant to the provisions of Articles 14(3) (g) and 70(3) of the same Treaty, the Staff Rules must – to the extent of the inconsistency – yield to the primacy of the provisions of the Treaty.
 - (4) The “practice” whereby two Partner States have in the past refunded to the Secretariat of the Community the compensation paid to two former Deputy Secretaries General of their nationality for premature termination of their tenure (in order to give way to the in-coming Secretaries General of the same nationality), has not as yet sufficiently developed to trigger objective recognition under international law as an “established State practice”. It is, at best, only a developing practice. At worst, any emerging “practice” from the past two precedents of Uganda and Tanzania, has been fatally wounded and may well be on its way to becoming inchoate, if not, comatose.
 - (5) Of the three precedents signifying the alleged “practice” , the first (Uganda’s) was effected prior to the 2006 Staff Rules and, therefore, lacked any legal basis at all ; the third (Rwanda’s) has been plainly challenged and openly disputed by the Partner State concerned. That leaves only the second (Tanzania’s) as the lone “practice”. There is therefore, no legitimate basis to hold this as a valid “practice” of the Partner States of the East African Community. Accordingly, it is quite evident that this so called “practice” cannot be taken into account for purposes of interpreting or applying Article 67(2) of the EAC Treaty, and Rule 96(3) of the EAC Staff Rules and Regulations.
 - (6) To avoid the latent friction between Article 67(2) of the Treaty and Rule 96(3) of the Staff Rules and Regulations, the two need formal, adequate, and appropriate harmonization by the competent organs and authorities of the Community.
 - (7) In the result, the Republic of Rwanda is under no legal obligation to refund the compensation that was paid in 2011 by the Secretariat of the Community to the outgoing Deputy Secretary General (Mr. Alloys Mutabingwa).

We advise accordingly.

*Counsel to the Community, Representing EAC Council of Ministers
State Counsels / Attorneys representing five Partner States*

Appellate Division

Appeal No. 1 of 2015**Union Trade Centre Limited (UTC) v The Attorney General of Rwanda**

Appeal from the Judgment of the First Instance Division - Butasi, PJ., Lenaola DPJ and Mugenyi, J.-Dated 27th November, 2014 in Reference No. 10 of 2013, [2012-2015] EACJLR, 344

Coram: E. Ugirashebuja, P., L. Nkurunziza, VP, J. Ogoola, E. Rutakangwa and A. Ringera, JJ.A
November 20, 2015

Procedural irregularities - Whether factual evidence was presented to the Trial Court - Affidavits without annexures - Pleadings and submissions distinguished from evidence - Court's inherent power exercised to prevent grave injustice

Articles: 5 (3) (g), 6 (d), 8 (1) (a), (b), (c), 27, 30 of the Treaty - Rules: 1 (2), 24 (d), 30 (c), 94(4) EACJ Rules of Procedure, 2013

The Appellant sued the Respondent for the actions of the Kigali City Abandoned Property Management Commission which in 2013 demanded that tenants in the Appellant's premises, UTC Mall, remit their monthly rentals to the Commission. This forceful diversion of rent payments affected the Appellant's ability to meet its mortgage obligations with the Bank of Kigali resulting in financial loss. Despite complaints made to the National Ombudsman, the Prosecutor General, the Governor of Kigali City, the Mayor of Nyarugenge, and the President of the Commission, no corrective action was taken. In its Reference, the Appellant averred that the appropriation of UTC Mall contravened the EAC Treaty and sought orders restraining the Respondent from interfering with the management of the property, damages incurred and costs.

In their preliminary objection, the Respondent alleged that: the claim was filed out of time; the Court lacked jurisdiction to adjudicate the case; and that the Respondent was wrongly sued for the actions of the Commission which had distinct legal personality under Rwandan law. They annexed a letter from the Commission to tenants of the Appellant dated 21st October, 2013 to their submissions and not to and not to the Reference or to the Replying Affidavit.

The Trial Court found that: the Reference was properly instituted; the case was not time barred; and that the Respondent was responsible for the Commission's misconduct. However, the Trial Court further states that: it had no jurisdiction to determine whether the Commission's actions contravened Rwanda's internal laws; and since this had not been proven, it could not draw a conclusion that due process had been violated, or whether the principles enshrined in Articles 6 (d) and 7 (2) had been breached. The Appellant had not established a Treaty violation attributable to the Respondent;

On appeal, the Appellant submitted that the Trial Court erred in law by holding

that: the Abandoned Property Management Commission was not a *de jure* organ of the State of Rwanda; that its actions could not be attributed to the State of Rwanda; and that no Treaty violation had been established. The Appellant averred that the internationally wrongful actions of the State of Rwanda gave rise to new legal consequences/relations as between it and the Appellant.

In their Cross- Appeal, the Respondent claimed that: they were not liable of the actions of the Kigali City Abandoned Property Management Commission and the takeover of UTC mall complied with Rwandan law. They sought a reversal of the Trial Court's findings.

During the appeal, the Appellate Division observed procedural anomalies in the Record of Appeal and addressed these in its judgment without delving into the merits of the appeal.

Held:

1. It is trite law that pleadings in Court, whether in the form of Reference, Response to the Reference, Motion on Notice, Statement of Claim or by whatever other name called, are not evidence. They are averments the proof of which is submitted to the trier of fact. Submissions are not evidence and any annexures to a document, unless the document is an affidavit and they are annexed thereto, or the same are produced at the trial as exhibits, are not evidence.
2. Evidence is the means by which averments are proved or disproved. Proof is essential unless the matter is admitted, or judicial notice is to be taken, or an applicable presumption (rebuttable or irrebuttable) in favour of the matter averred, or if the burden of proof by law shifted to the adverse party; or an estoppel operates to exclude proof of such matter.
3. The proof of a matter may take the form of testimonial evidence (oral or affidavit), documents produced in Court, or things (real evidence). Neither the Reference nor the Response were substantiated by evidence as to matters of fact averred. Whereas both Counsel for the parties and the Trial Court expected the Reference to be determined on the basis of application of affidavit evidence, the Appellant did not comply with Rule 24 (d) of the Court's Rules which requires that a Statement of Reference specify the nature of evidence in support of the claim. There was no affidavit in support of the Reference.
4. Although the Respondent's Response was supported by an affidavit of the Attorney General of Rwanda, the affidavit contained no annexures thus the Respondent did not comply with Rule 30 (c) of the Rules which requires a response to state the nature of the evidence in support. Hence the Trial Court proceeded with the trial on the basis of written submissions which were not founded on any admissible evidence.
5. The trial and adjudication of the Reference without factual evidence occasioned a grave injustice to both parties. Hence the Court remitted the Reference back to the Trial Court for consideration *de novo* by invoking its inherent power in Rule 1(2) of the Rules of the Court.

JUDGMENT

A. Introduction

1. This is an Appeal against the Judgment of this Court's First Instance Division

(“the Trial Court”) dated 27th November, 2014 in Reference No. 10 of 2013 by which the Trial Court dismissed the Reference and ordered the parties to bear their own costs.

2. Union Trade Centre Ltd (“the Appellant”) is a Company Limited by Shares legally registered under the Rwanda Companies Act.
3. The Respondent is the Attorney-General and Minister of Justice of Rwanda and was sued in a representative capacity for and on behalf of the Republic of Rwanda.

B. The Reference to the Trial Court

4. On 22nd November, 2013, the Appellant lodged a Reference before the East African Court of Justice (EACJ) under Articles 5 (3) (g), 6 (d), 8 (1) (a), (b) and (c), 27 and 30 of the Treaty for the Establishment of the East African Community (“The Treaty”); Rules 1 (2) and 24 of the East African Court of Justice Rules of Procedure (“the Rules”) and the inherent powers of the Court. In the Reference, the Appellant sued the Attorney General of the Republic of Rwanda (“the Respondent”) on behalf of the Government of Rwanda for the actions of the Kigali City Abandoned Property Management Commission (“the Commission”), a government body.
5. The Appellant pleaded in the Reference that it was incorporated by its current shareholders principally to run and manage the Union Trade Centre Mall (“UTC Mall”) in Kigali.
6. The Appellant further pleaded:
 - (a) That on or about the 21st day of October, 2013, the Commission, a body belonging to the Respondent, ordered it to present to the Commission:-
 - (i) The building’s land title.
 - (ii) A list of its shareholders and their respective shares.
 - (iii) The Applicant’s loan and/or mortgage agreements/contracts with all its creditors.
 - (iv) Loans and/or Mortgage payment schedule(s).
 - (v) The details of how it manages its personnel.
 - (vi) Details of how it spends its money.
 - (b) That it obliged and presented the said documents to the Commission.
 - (c) That after submitting the said documents to the Commission, the Appellant did not receive any formal response from the Commission or any Government institution indicating whether it was in breach of any statutory obligations under any law.
7. The Appellant further pleaded that on the 2nd day of October, 2013, it was surprised to see a copy of a letter written to its tenants by the Commission ordering them to pay their monthly rentals into the Commission’s Account No. 011 1000 407 held with FINA Bank with effect from the 1st October, 2013.
8. The Appellant further pleaded that:
 - (a) The actions of the Respondent had caused some tenants to remit their monthly rentals into the Commission’s account to the detriment of the Appellant who at all times was the lawful landlord and proprietor of UTC mall.
 - (b) Since the said demand was issued, there had been disorganization in its

business and some tenants had opted not to pay but seek for guidance from the Respondent.

- (c) The actions of the Respondent have caused the Appellant great difficulty and distress in meeting its obligations towards a mortgage with the Bank of Kigali because it has forcefully diverted her income from the monthly rentals paid by its tenants.
 - (d) Through its lawyers, the Appellant wrote to the National Ombudsman, the Prosecutor General, the Governor of Kigali City, the Mayor of Nyarugenge, and the President of the Commission both at National level and Nyarugenge District level informing them of the grave injustice and seeking their intervention but all in vain.
9. The Appellant stated that the above actions of the Respondent were a blatant contravention of Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2), 8 (1) (a) (b) and (c) of the Treaty and also contrary to the Respondent/Partner State's obligations, duty, or undertakings under the Treaty to do or abstain from doing or engaging in certain acts or to observe certain standards of behavior that may have the effect of defeating the objects and purposes for which the Community was established, such as the mandatory obligation to enhance and strengthen partnership with the Private Sector and Civil Society in order to achieve sustainable socio-economic and political development.
10. Attached to the Reference were annexures "A" to "K" which consisted of the Appellant's incorporation particulars, list of its Directors and Shareholders, copy of its title deeds, a photograph of its mall, correspondence between the Commission and the Appellant, a tenancy agreement between itself and a corporate tenant, a letter from Nakumatt Rwanda Ltd. to the Commission, a mortgage deed, and a letter to various Rwandan Authorities. All the annexures were certified true copies of the original by Miriam Zacharia Matinda, Advocate, Notary Public and Commissioner for oaths, on 22nd November, 2013.
11. In the Premises, the Appellant sought against the Respondent:-
- (i). A Declaration that the actions of the Respondent in taking over the Appellant's property contravene Articles 5 (3) (g), 6 (d), 7 (1) (a) and (2), and 8 (1) (a), (b) and (c) of the Treaty;
 - (ii). An Order that the Respondent be restrained from further interference with the business and management of the Appellant's property, UTC Mall;
 - (iii). An Order that the Respondent pays general damages to the Appellant and costs of and incidental to the Reference;
 - (iv). Such further or other orders as may be just and necessary in the circumstances.
12. On the 20th March, 2014, the Respondent lodged a Response to the Reference and contemporaneously therewith a Notice of Preliminary Objections to the Reference.
13. In the Response, the Respondent generally traversed the averments in the Reference and pleaded that:-
- (i) The Court had no jurisdiction to entertain the Reference because the acts complained of by the Appellant were not acts of a Partner State or an Institution of the Community contrary to the Provisions of Article 30 of the Treaty.

- (ii) The Respondent was wrongly sued in the Trial Court as the acts complained of by the Appellant were committed by the Commission which under Rwandan law has a distinct legal personality and can sue and be sued in the name of the Mayor of Kigali.
- (iii) The Reference was filed out of time and it should be struck out for the reason that the acts complained of by the Appellant took place on 1st August, 2013, while the Reference was filed on 22nd November, 2013- one month and 21 days outside the time set by Article 30 (2) of the Treaty.

The Response was supported by the affidavit of Johnston Busingye, Minister of Justice and Attorney General of the Republic of Rwanda, sworn on 18th March, 2014, at Kigali. In that affidavit, the deponent deposed to various provisions of Rwandan internal laws and the fact that the Appellant was neither a Partner State nor an Institution of the community, and concluded that, on the basis thereof, the Respondent could not be sued for acts or omissions of the Commission. He also deposed that he had read from the Reference that the acts complained of took place on 1st August, 2013 while the Reference was filed on 22nd November, 2013, one month and 21 days outside the limitation period prescribed by the Treaty.

14. The Respondent prayed the Court to:

- (a). Find that-
 - (i) The Court had no jurisdiction to hear and determine the Reference.
 - (ii) The Respondent was wrongly sued.
 - (iii) The Reference was filed out of time.
- (b). Declare that the Reference was an abuse of the Court process, frivolous, vexatious and unwarranted.
- (c). Dismiss the Reference with costs.

15. The points of Preliminary objection stated in the Notice thereof were to the same effect as the pleadings summarized in Paragraph (13) above.

16. (a) In a joint Scheduling Memorandum filed with the Court at the Scheduling Conference of the Trial Court on 12th June, 2014, the parties framed the issues for trial as-

- (i). Whether the acts complained of were acts of a Partner State or Institution of the Community or whether the Attorney General of Rwanda was properly sued before the Court.
 - (ii). Whether the Reference was time barred and should be struck off the record.
 - (iii). Whether the action of taking over the Applicant's mall by the Commission was inconsistent with and/or in contravention of Articles 5, 6, 7 and 8 of the Treaty.
 - (iv). Whether the parties were entitled to the remedies sought.
- (b) The parties had only one agreed fact, namely, that the Appellant was a Company Limited by shares and legally registered under the Rwandan Companies Act.
- (c) As regards the nature of the evidence to be adduced at the trial of the Reference, the parties agreed that it shall be by way of affidavits.

The Trial Court's Determination

17. Upon considering the pleadings, the annexures thereof, and Counsel's written and oral submissions the trial Court found and held –

- (i). The Respondent's responsibility for the alleged misconduct of the Commission was duly established, and, accordingly, the Reference was properly instituted against the Respondent.
- (ii). The Reference was filed within the two (2) months' time frame prescribed by Article 30 (2) of the Treaty, and was, accordingly, not time barred.
- (iii). The Commission's actions in question had not been proven to have contravened Rwanda's internal laws (which issue the Court had no jurisdiction to determine), and, therefore, the Court was unable to draw a conclusion that due process had been violated, or the principles enshrined in Articles 6 (d) and 7 (2) had been breached. In the result, the Appellant had not established a Treaty violation attributable to the Respondent;
- (iv). The Appellant was not entitled to prayers (a) and (b) in the Reference, or to general damages as sought in prayer (c).
- (v). As the issues in the Reference were novel and of great importance to the Community and Partner States, each party would bear its own costs.

C. The Appeal to the Appellate Division

18. Dissatisfied with the above Judgment, the "Appellant" (who was the Applicant in the Reference), appealed to this Division. It proffered the following three grounds of Appeal, namely:

- (1). That the Learned Justices of the First Instance Division erred in law when they held that the Court's jurisdiction was restricted to the interpretation of the Treaty, but declined to interpret the provisions of Articles 5 and 8 of the same Treaty on the grounds that those provisions deal with the internal policy of the State of Rwanda.
- (2). That the Learned Justices of the First Instance Division erred in law in holding that the Abandoned Property Management Commission was not a *de jure* organ of the State of Rwanda and neither are its acts attributable to the State of Rwanda.
- (3). That the Learned Justices of the First Instance Division erred when they held that the Applicant had not established a Treaty violation attributable to the Respondent.

19. The Appellant asked the Court:

- (a). To set aside that part of the Judgment of the First Instance Division complained of.
- (b). To declare that:
 - (i). The Kigali City Abandoned Property Management Commission is an organ of the State of Rwanda;
 - (ii). The actions of the Commission are attributable to the State of Rwanda;
 - (iii). The actions of the Commission of taking over the Applicant's property contravened Articles 5(3) (g), 6 (d), 7(1) (a) and (2) and 8 (1) (a), (b) and (c) of the Treaty and constitute an internationally wrongful act of the State of Rwanda under international law, namely, a breach of Rwanda's international obligations under the

said Articles of the Treaty;

(iv). The internationally wrongful actions of the State of Rwanda entail its international responsibility and this in turn gives rise to new legal consequences/relations as between it and the Applicant.

(c). To make such further orders as may be just and necessary in the circumstances.

20. The Attorney General of the Republic of Rwanda (“the Respondent”) was also aggrieved by parts of the said Judgment. He consequently gave a notice of Cross-Appeal under Rule 94(4). In the said notice, the Respondent indicated that at the hearing of the Appeal, he will contend that part of the Decision of the First Instance Division should be varied or reversed and that part of that decision should be affirmed on grounds other than or in addition to those relied upon by the First Instance Division, namely-

(a). The acts complained of by the Applicant are not attributable to the Respondent as they are not acts of a Partner State.

(b). The Respondent is not properly sued before this Court as Kigali City has a legal personality to sue and be sued in the name of its Mayor.

(c). That Reference No. 10 of 2013 was filed out of time in breach of Article 30 (2) of the Treaty for the establishment of the East African Community.

(d). The taking over of management of UTC mall by Kigali City Abandoned Property Management Commission does not breach Articles 5,6,7,8 (1) of the EAC Treaty as it was done in accordance with Rwandan law.

21. The Respondent proposed to ask the Court for Orders that:-

(1) The acts complained of by the Applicant are not acts of a Partner State or an Institution of the Community and thus the Court has no jurisdiction to entertain the Appeal.

(2) The Respondent is not properly sued before this Court.

(3) The Reference is time barred and should be dismissed.

(4) The taking over of management of UTC mall by Kigali City Abandoned Property Management Commission does not breach Articles 5,6,7,8 (1) of the EAC Treaty.

22. At the scheduling conference of the Appeal, the above grounds of Appeal and the Cross-Appeal were consolidated into the following issues:

(1) Whether the Trial Court erred in law in finding that the Respondent was properly sued.

(2) Whether the Trial Court erred in law in determining whether the cause of action was time barred.

(3) Whether the Trial Court declined to interpret and apply the provisions of the Treaty.

23. After the scheduling conference, the parties in compliance with this Court’s Directions filed their written submissions.

24. On the 20th July, 2015, both parties appeared before the Court and highlighted those written submissions at considerable length.

The Appellant’s Case

25. Mr. Francis Gimara, learned Counsel for the Appellant, prayed the Court to uphold the Trial Court’s finding that the Respondent was responsible for the

Commission's act of wrongfully and illegally taking over the Appellant's mall, but rectify what he contended were anomalies inherent in the Trial Court's analysis and conclusions on the status of the Commission as an organ of the Respondent State. He also prayed that the Trial Court's finding that the Reference was not time barred be upheld.

26. On the merits of the Reference, namely, whether in finding that there was no proven Treaty violation by the Respondent, the Trial Court declined to interpret and apply the provisions of the Treaty, Counsel for the Appellant submitted that the Trial Court adopted the wrong approach in determining whether the Respondent's actions violated the Articles of the Treaty under which the Appellant's complaint was grounded, with the result that it erred in its findings. According to Counsel, the proper approach would have been first, to establish whether the Commission was an organ of the Respondent state; second, to establish whether the conduct of the Commission was attributable to the Respondent State; thirdly, to determine whether the Commission's conduct constituted a breach of the Respondent State's international obligations under the Treaty, and, if so, whether it engaged the international responsibility of the Respondent State; and fourthly, to determine what legal consequences of the Respondent State were flowing from its international responsibility.
27. Counsel submitted that "to answer those questions or address the legal dispute before it, "the Court would have to objectively interpret and apply the provisions of the Treaty in relation to the facts and evidence before it. It would, however, have to make its own determination of the facts and evidence and then apply the relevant rules of international law to the facts which it finds to have existed".

The Respondent's Case

28. Mr. Malaala Aimable, Learned Counsel for the Respondent, urged us to find that as a matter of international law, the municipal law of Rwanda, and the Treaty, the Respondent was not properly sued. On whether the cause of action was time barred, Counsel submitted that the Trial Court reached an erroneous conclusion as a result of ignoring the Respondent's material evidence (minutes of a meeting between the Appellant and the Commission on 29th July 2013) which clearly established that the cause of action occurred on that particular date. Counsel admitted that those minutes were annexed to the Respondent's written submissions but contended that those submissions and the annexures thereto have never been expunged from the Court records, and, in the circumstances, it was disturbing to hear the Court say that they were not part of the Court record. Counsel urged this Court to rely on the said minutes and find that the Reference was filed out of time.
29. On the merits of the Reference, Counsel prayed the Court to uphold the findings of the Trial Court that there was no Treaty violation by the Respondent.

The Court's Determination

30. After considering the written submissions and the highlights thereof by Counsel for the parties, this Court was perturbed. We were perturbed by the emphasis on facts and evidence in this Appellate Division which is not a trier of fact. Mr. Gimara recognized that the substantive dispute between the parties could not be

resolved except by the application of facts found by the Court to the provisions of the Treaty. And Mr. Malaala decried the Court's refusal to consider the Respondent's evidence which, he believed, was part of the Court record.

31. The above situation impelled us to scrutinize the entire Record of Appeal, and, in particular, the Reference, the Response to the Reference, the proceedings at the scheduling conference of the Trial Court, and the Judgement appealed against, with especial care.
32. What we found out from the above confounded us all the more as will soon be evident.
33. From the pleadings, we noted that whereas the Appellant stated that the cause of action arose on 2nd October, 2013, the Respondent averred that it arose on 29th July, 2013. We also noted that the Appellant did not comply with Rule 24 (d) of the Court's Rules which requires that a Statement of Reference shall state the nature of any evidence in support. The Respondent too did not comply with Rule 30 (c) of the Rules which similarly requires that the Response to the Reference shall state the nature of the evidence in support where appropriate. We also noted that although the annexures to the Reference were notarized before a Notary Public on 22nd November, 2013, they were not deposed to in an affidavit in support of the Reference. Indeed there was no affidavit in support of the Reference. We further noted that although the Response to the Reference was supported by the affidavit of the Attorney General of Rwanda, that affidavit contained no annexures, not even on the contentious issue of when the cause of action arose. On that point, the deponent contented himself by merely swearing that;

“I have read from the Reference that the acts complained of by the Applicant took place on 1st August, 2013, while the Reference was filed on 22nd November, 2013, one month and 21 days outside the limit set by Article 30 (2) of the Treaty. That I believe therefore that it was filed out of time and should be dismissed with costs”.

We note in passing that in fact, there was no such averment in the Reference.

34. From the Judgment of the Trial Court, a number of things were noted. First, the Court very correctly recognized that limitation was a matter of fact. It found that the Appellant's contention on the point was substantiated by annexures “G” to the Reference – a letter from the Commission to tenants of the Appellant dated 21st October, 2013 asking them to remit rents to a specified bank account of the Commission. The Court held that the Respondent's evidence in support of its contention (the letter dated 29th July, 2013 from the Commission to the Appellant referred to in Paragraph 33 above) could not be relied on in determining the issue of limitation, for it was not properly before the Court, as it was annexed to the Respondent's submissions in the case, and not to the Reference itself, or to the Replying Affidavit. Secondly, the Court recognized that in the pleadings there was a contention between the parties as to whether the Commission took over the management of the UTC Mall or simply assumed the management of a shareholders 'abandoned' equity therein. Thirdly, the Court found that the Applicant had not established a Treaty violation attributable to the Respondent.
35. From the Record of the Scheduling Conference, there was an all-round acknowledgment that evidence shall be produced at the trial. The following

dialogue at P. 321 of the Memorandum and Record of Appeal illustrates the point:

The Principal Judge (Hon. Justice Butasi):

“We are going to give you the time frame under which you are going to file your written submissions. First of all, the Applicant, how many days do you want? You are going to file affidavits”

The Deputy Principal Judge (Hon. Justice Lenaola):

“First of all, had you filed your affidavits or you intend to file others?”

Mr. Gimara:

“My Lords, I seek this Court’s guidance. It is my view that under Rule 24, I must not file an affidavit. So, if that is the understanding of the Court, I need not to file”.

36. The Trial Court did not dignify Counsel Gimara’s interjection with a response. The joint scheduling memorandum filed by the parties’ Advocates at the end of the Scheduling Conference was however clear on the matter: Evidence shall be by Affidavits.
37. From the above recorded observations, it is clear beyond per adventure that both Counsel for the parties and the Trial Court expected the Reference to be determined on the basis of application of affidavit evidence to the law.
38. We next ask ourselves whether there was evidence placed before the Trial Court to aid it in the determination of the pertinent issues.
39. We start from the point that it is trite law that pleadings in Court (whether in the form of Reference, Response to the Reference, Motion on Notice, Statement of Claim or by whatever other name called) are not evidence. They are averments the proof of which is submitted to the trier of fact. Evidence on the other hand is the means by which those averments are proved or disproved. Proof is essential unless the matter is admitted, or is one of which judicial notice may be taken, or there is an applicable presumption (rebuttable or irrebuttable) in favour of the matter averred, or the burden of proving such a matter is by law shifted to the adverse party; or an estoppel operates to exclude proof of such matter. The proof may take the form of testimonial evidence (oral or affidavit), documents produced in Court, or things (real evidence). Needless to state, submissions are not evidence.
40. In the matter before us, apart from the admitted fact that the Appellant is a Company Limited by shares and incorporated in Rwanda, every other averment in the Reference and the annexures thereto (including the Appellant’s averment that it discovered the fact of the takeover of its mall by the Respondent on 2nd October, 2013) were matters of which proof was essential. But the record discloses that there was no affidavit from the Appellant or anyone else with knowledge of the matter in support of any of the averments in the body of the Reference. And the annexures to the Reference, though notarized, were neither annexed to an affidavit nor produced orally at the hearing in the Trial Court as exhibits. We state categorically that any annexures to a document unless the document is an affidavit and they are annexed thereto, or the same are produced at the trial as exhibits, are not evidence. With respect to the Response to the Reference, the affidavit in support thereof did not annex any documents that

the Respondent relied on. We have seen in Paragraph 13 herein that the said affidavit did only two things: first, the deponent thereof deposed as to matters of law and affirmed on the basis thereof that the Respondent was wrongly sued; and, secondly, the deponent swore that from his reading of the Reference, the cause of action arose on 29th July, 2013.

41. In short, neither the Reference nor the Response thereto as they stood before, during and after the Scheduling Conference was substantiated by any evidence as to matters of fact averred in them.
42. We have seen in Paragraph 35 that at the Scheduling Conference, it was agreed and minuted that the case would be tried on the basis of affidavit evidence. Be that as it may, an ill wind appears to have blown over both the Trial Court and the learned Advocates for the parties with the result that no directions were sought, or given, with respect to the time frame for filing the affidavit evidence. The only directions given were on the time table for filing written submissions. This is the point where the locomotive of justice derailed and crashed into the thick thicket of injustice.
43. The unfortunate consequence of the procedural failure to give directions on when the affidavit evidence would be filed was three fold: First, the Appellant did not file any affidavit; secondly, the Respondent filed together with its submissions an affidavit in purported support of the Response and annexed to its aforesaid submissions laws and documents in proof of its case; and third, and most grievously, the Trial Court proceeded with the Trial on the basis of written submissions which were not founded on any admissible evidence.
44. The irregularity of proceeding to trial and judging the case without evidence, in a situation where factual evidence was clearly called for, and recognized as imperative, by both the Court and Counsel appearing, naturally occasioned a most grave injustice to both parties – none of them could prove or disprove, their cases before the Court as required by law.
45. We have considered whether to proceed and dispose of the Appeal despite the above irregularity. We have come to the conclusion that to do so would be to condone and perpetuate, nay, participate in an irregularity which has occasioned an irreparable injustice to the parties. That is not a path which a Court of Justice should tread, and we unequivocally decline to do so.
46. In the circumstances, we think this is an appropriate case for the invocation of the Court's inherent power under Rule 1 (2) which provides–

“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.”

In the exercise of that power, we now remit the Reference back to the Trial Court for consideration *de novo* in accordance with the applicable law and the Rules of the Court.
47. As regards the costs of the Appeal, we have said enough to show that the lapse on the part of the Trial Court itself apart, Counsel appearing were not virtuous virgins either. They failed in their duty to seek and press for appropriate procedural directions. In those circumstances, we think that the just order to make is that each party should bear its own costs of the appeal.
48. This Appeal illustrates the aphorism that although speed is good, justice is even

better. And, oftentimes, justice hurried is justice buried.

49. The upshot of our consideration of this matter is that-

- (a). The Reference subject matter of the Appeal is remitted back to the Trial Court for hearing *de novo* after the parties have been afforded an opportunity for due presentation of such relevant evidence as they may have in support of their respective cases, in accordance with such Directions as the Court may give.
- (b). Each party shall bear its own costs of the Appeal.

It is so ordered.

F. Gimara, Counsel for the Appellant

A. Malaala, Counsel for the Respondent

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Appellate Division

Appeal No.2 of 2015**The Attorney General of the United Republic of Tanzania v Anthony Calist Komu**

Appeal from the Judgment of the First Instance Division, Butasi, PJ; Lenaola, DPJ; and Ntezilyayo, J; Dated 26th Day of September 2014, in Reference No. 7 of 2012, [2012-2015] EACJLR, 101

Coram: E. Ugirashebuja, P; L. Nkurunziza, VP. E. Rutakangwa; A. Ringera; & G. Kiryabwire, JJ.A

November 25, 2016

Jurisdiction - Effects of Treaty amendment - Whether the Respondent had locus-standi- Court's exclusive jurisdiction in Treaty interpretation and invalidation of Community Acts, directives, regulations, actions - Election of members reserved for National Assemblies - Proceedings before national courts – Admission of late submissions

Articles: 8(4), 23 (1), 27 (1), 30 (1), (3),34, 50(1) of the EAC Treaty - Rule 5(5), The East African Legislative Assembly Election Rules, Tanzania, Third Schedule to the Parliamentary Standing Orders, 2007, Tanzania

The Respondent(the Applicant in the Reference), a member of *Chama Cha Demokrasia na Maendeleo* (CHADEMA), had in 2012 unsuccessfully sought election as a representative of Tanzania to the East African Legislative Assembly (EALA). He filed an election petition in the High Court of Dodoma and a Reference at EACJ First Instance Division claiming that the elections conducted by the National Assembly of Tanzania violated Article 50 of the Treaty. He also averred that to the extent that Rule 5(5) of Tanzania's East African Legislative Assembly Election Rules, Third Schedule to the Parliamentary Standing Order created a singular criteria of representation of political parties and the creation of other groups of categories for contestants, such as Opposition Political Parties and Tanzania Mainland contravened the Treaty. Furthermore, by allowing a party without no representation in the Assembly to field a candidate, the Appellant breached the Treaty. In response, the Appellant averred that the Reference had no merit and was *res sub-judice*.

In its decisions, the Trial Court found *inter alia* that: the doctrine of *res-judicata* did not apply; that the creation of groups of categories for contestants such as: 'Opposition Political Parties' and 'Tanzania Mainland' in Rule 5(5) was a violation of the Treaty; and that allowing TADEA, a political party without representation in the National Assembly, to field a candidate was a breach of the Treaty. Subsequently, the Respondent/ Applicant was awarded a quarter costs of the Reference.

On appeal, the Appellant averred *inter alia* that the Trial Court erred when it issued a declaratory order to the effect that, the election of members of EALA on 17th April, 2012 violated Article 50 (1) of the Treaty. And that the Court misdirected itself by holding that, the National Assembly of the United Republic of Tanzania violated Article 50 (1) of the Treaty by formulating Parliamentary Standing Order No. 12 and Rule 5 (5) of the East African Legislative Assembly Election Rules (i.e.

Third Schedule to the Parliamentary Standing Order). Furthermore, the Trial Court erred in law by failing to interpret Article 50 (1) of the Treaty for future guidance on the conduct of elections of members of the EALA. The Appellant filed their Supplementary Submissions one day beyond the deadline set by the Court.

Held:

1. The Court may under Rule 1 (2) of the Rules of the Court, exceptionally consider late written submissions in the interest of substantive justice especially in cases of interest to the Community such as the present case, or where substantial matters such as the question of jurisdiction was to be determined.
2. In order to succeed on a claim for lack of jurisdiction, a party must demonstrate that there is absence of either *jurisdiction ratione personae*, *locus standi*, *jurisdiction ratione materiae*, or *jurisdiction ratione temporis*. Even though the Respondent had no *locus standi* to institute this case, it did into translate to the Court not having the jurisdiction over the subject matter. The architecture of the Treaty allows individuals to institute proceedings of the nature of the present case before national courts (Article 34 of the Treaty). The Respondent rightly filed proceedings in the High Court of Tanzania.
3. The question of the Respondent's *locus standi* was triggered by Articles 23 (1), 27 (1), 30 (1) and (3) and 50 (1). Amendments to Articles 23, 27 and 30 in the original EAC Treaty were widely believed to have been the Partner States' response to the outcome of the *Anyang' Nyong'o* case. These amendments eroded the Court's jurisdiction where cases are introduced by legal and natural persons. The legality of these amendments was addressed by the Court in 2007 in the *East African Law Society* case and this Court declined to invalidate the amendments.
4. The Respondent's reliance on the *Anyang' Nyong'o* case did not resuscitate his case as treaty amendments limited the standing of legal and natural persons to file certain cases. The wording of Article 30 (3) that "the Court shall have no jurisdiction under this Article..." barred any references by both legal and natural persons where an "Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State". Therefore, the Respondent lacked *locus standi* to file a Reference.
5. Nevertheless, this Court has not departed from the determination in the *Anyang' Nyong'o* case and National courts in Partner States have no choice but to abide by the ruling of the *Anyang' Nyong'o* on the sole mode of procuring EALA members which is "elections" by National Parliaments. The election of Members of EALA under Article 50 (1) is to be carried out by the National Parliament and any other mode of appointing members of EALA is a breach of the Treaty. As long as the ruling in the *Anyang' Nyong'o* case has not been departed from by this Court, it would supersede any decision of any National Court to the contrary.
6. Where a case such as this is before a national Court of a Partner State, and a question of interpretation of the Treaty arises, then the national court must refer the question to this Court for interpretation as was held in the *Kyahurwenda* case, this Court has exclusive jurisdiction on the interpretation of the Treaty and invalidation of Community Acts, directives, regulations or actions.

Cases cited

Alcon International Ltd v The Standard Chartered Bank & Ors [2012-2015] EACJLR 430, Appeal No. 3 of 2013
 AG of Tanzania v African Network for Animal Welfare [2005-2011] EACJLR, 395, Appeal No. 3 of 2011
 East African Law Society & Ors v AG of Kenya & Ors [2005-2011] EACJLR 68, Ref.3 of 2007
 Factory at Chorzow (Germany v Poland), 1928 P.C. I. J. (ser. A) No. 17 (Sept. 13)
 Islamic Republic of Iran v United States of America, 1996, ICJ Rep
 Oil Platforms, Iran v United States [1996] ICJ Rep 803
 Prof. Anyang' Nyong'o v AG of Kenya [2005-2011] EACJLR 16, Appl. No. 1 of 2006
 The AG of Uganda v Tom Kyahurwenda [2012-2015] EACJLR 450, Case Stated 1 of 2014

JUDGMENT

Introduction

1. The United Republic of Tanzania, the Appellant in this matter, appeals certain issues of law and legal interpretations developed in the First Instance Division of the East African Court of Justice (hereinafter the “Trial Court”) in their Judgment dated the 26th day of September, 2014 in Reference No. 07 of 2012.
2. The dispute before the Trial Court arose in connection with the application of Article 50 of the Treaty for the Establishment of the East African Community (hereinafter the “Treaty”) by the Parliament of the United Republic of Tanzania (hereinafter “Tanzania”) in conducting the impugned elections of members of the East African Legislative Assembly (hereinafter “EALA”).
3. To properly appreciate this Appeal, it is necessary to refer to the relevant provision of the Treaty.
4. The Treaty in its Article 50 provides:

“Election of Members of the Assembly

 1. The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of Each Partner State may determine.
 2. A person shall be qualified to be elected a member of the Assembly by the National Assembly of a Partner State in accordance with paragraph 1 of this Article if such a person:
 - a.;
 - b. is qualified to be elected a member of the National Assembly of that Partner State under its Constitution;
 - c. ...
 - d. ...
 - e. ...”

Background to the dispute

5. The background leading to the present controversy is discernible in the Supplementary Record of the Appeal especially in the “Extract of the Translated Official Records of the Proceedings of the National Assembly (*Hansard*) of its Seventh Meeting held at Dodoma, Tanzania, on 17th April, 2012 (Election of Members of the East African Legislative Assembly, Guidance of the Speaker).
6. For the purpose of this Judgment it may be summarized as follows:
7. On 17th April 2012, the Tanzania National Assembly held elections aimed at electing Members of the EALA.

8. On the same day, prior to the elections, the Hon. Speaker of the National Assembly issued Guidance on the voting procedures for electing the Members of EALA, as per Rule 11(4) of the East African Legislative Assembly Election Rules (Third Schedule to Parliamentary Standing Orders, 2007 Edition).
9. In the Guidance, the Speaker explained to the Members of the National Assembly that the elections of members of EALA is conducted in accordance with the requirements of Article 50(1) of the EAC Treaty, which was domesticated by Act No. 4 of 2001 (The Treaty for Establishment of the East African Community Act, 2001, No. 4 of 2001, as well as with the Parliamentary Standing Orders.
10. The Speaker further explained, in the Guidance cited in para. 6 above, that:

“For the purpose of realizing the representation required under Article 50(1), that is; various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups, under the political environment of the United Republic of Tanzania, Rule 5(5) and 11(3) of the East African Legislative Assembly Election Rules (Third Schedule to the Parliament Standing Orders), provides the interpretation of that representation to be representation by groups as follows:

 - (a) Group A: Women;
 - (b) Group B: Zanzibar;
 - (c) Group C: Opposition Parties;
 - (d) Group D: Tanzania Mainland”.
11. The Speaker further elaborated that in the light of the threshold of representation provided for under Article 50 (1) of the EAC Treaty which provides “as much as possible” as well as the “political environment of the United Republic of Tanzania”: Group A would be reserved for women candidates “from the ruling party and the opposition parties and also other political parties with permanent registration from both parts of the Union”; Group B would be reserved “for candidates from Zanzibar (men and women) from the ruling party and opposition parties and also other political parties with permanent registration”; Group C would be reserved for “candidates from opposition parties in the National Assembly (men and women) from both sides of the Union”; and, finally, Group D would be reserved for “candidates from Tanzania Mainland (men and women), from the ruling party, opposition parties and other political parties with permanent registration”.
12. In the midst of the Guidance from the Speaker, one Hon. John Mnyika, Member of Parliament for Ubungo Constituency presented certain proposals.
13. The proposals by Hon. Mnyika were as follows:
 - (a) “ Rule 12 be amended by deleting the phrase, “proportionality of the number of Members of the Parliament from various political parties represented in the National Assembly” and substituting for them the phrase “shades of opinion and special groups in the society”, between the words “gender “and “representation, from both sides of the Union”.
 - (b) The third Schedule to the Parliamentary Standing Orders be amended deleting rules 5(5) and 11(3)”.
14. In responding to the proposals, the Hon. Speaker stated:

“The Standing Rules Committee observed that, there is a wrong conception that the nine vacant seats in the East African Legislative Assembly are

supposed to be filled by way of distribution amongst political parties represented in the National Assembly, in consideration of the number of Members of Parliament of each political party in the National Assembly is the basis of the share of each Political Party, and due to that wrong perception, political parties represented in the National Assembly have already predetermined their share of representation amongst themselves even before the election. This perception is contrary to Article 50(1) of the Treaty for the Establishment of the East African Community, which insists that, the Members of the East African Legislative Assembly to be elected by each Partner State, to represent, as much as it is possible, political parties represented in the National Assembly, shades of opinion, gender and other special interest groups”.

On that basis, the Standing Orders Committee resolved that there is no need for making the amendments which were proposed by Hon. Mnyika, and instead, the Committee decided that, the elections have to be conducted in accordance with the to (sic) existing Parliamentary Standing Orders. The decision as to (sic) from which party a candidate should be elected, remains in the hands of the voters in accordance with Article 51(1) of the Treaty for the Establishment of the East African Community, as translated by Rule 5(5) to the Parliamentary Standing Orders of the United Republic of Tanzania).

15. Following the above statement by the Speaker, Hon. Mnyika sought further guidance on the basis that Standing Order 12 “which is principal to the Third Schedule” provides: “the election of the Members of the East African Legislative Assembly will be conducted in accordance, with as much as it is possible, the proportionality of the number of Members of Parliament of various Political Parties in the National Assembly”.
16. He further inquired why the Guidance of the Speaker was not in consonant with the Standing Order, the former Speaker’s Ruling and the jurisprudence of the EACJ.
17. The Speaker responded that Order 12 of the Standing Order and the Ruling of the East African Court of Justice in the *Anyang’ Nyong’o Case (EACJ Application No. 1 of 2006)* provide that proportionality “may fit or it may not fit depending on the circumstances of a country” and that if it is considered that representation is only reserved for political parties represented in the House, it would be a contravention of Article 50(1) taking into consideration the circumstances of Tanzania.
18. After extended debates in the Parliament on the Guidance of the Speaker, elections were conducted.
19. The Respondent, Mr. Anthony Calist Komu unsuccessfully contested for the position of Member of EALA under Group C which was categorized “Opposition Parties Groups”.
20. Aggrieved by the outcome of the elections and the mode of elections employed by the National Assembly, which, according to him, did not adhere to the spirit of Article 50 of the EAC Treaty, Mr. Komu, on the 15th of June 2012, lodged a Reference in the Registry of the Court for determination by the First Instance Division of this Court.
21. Prior to lodging the abovementioned Reference, Mr. Komu had filed an election

petition in the High Court of Tanzania at Dodoma on the 12th of May, 2012 under the Treaty for the Establishment of the East African Community, The East African Legislative Assembly Election Rules, The Parliamentary Standing Orders, 2007 Edition, The National Elections Act (CAP 343) and The National Elections (Election Petitions) Rules 2010. The Petitioner sought the following prayers:

- (a) “A declaration that the election for all the members of the East African Legislative Assembly done on the 17/4/2012 is null and void.
- (b) A new and properly conducted election be ordered after proper electoral rules have been made establishing the formula to be used in allocating seats to the groups so established.
- (c) Costs for this petition”.

Actions before the Trial Court and the judgment under appeal

22. By a Reference lodged at the Registry of the Court on the 15th of June 2012, Mr. Komu pleaded for the following prayers and orders:

- i) Declaration that the election for members of the East African Legislative Assembly conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the Treaty for the Establishment of the East African Community.
- ii) Declaration that in obtaining the representatives from group C and D article 50 of the Treaty for the establishment of the East African Community envisages, *inter-alia*, the observance and compliance of the principle of promotional (sic) representation.
- iii) Order prohibiting the Parliament of Tanzania from (sic) further violation of Article 50 of the Treaty for the establishment of the East African Community by not complying which (sic) the principle of proportional representation and allowing candidates from political parties which are not represented in the national assembly.
- iv) Order that costs of this reference be met by the respondent.
- v) That this honourable court be pleased to make such further or further orders (sic) as may be necessary in the circumstance.

23. On 26th February 2013, invoking Rule 98 of the EACJ Rules of procedures (hereinafter, “Rules of the Court”), the Attorney General of Tanzania in turn submitted a Notice of Preliminary Objection advancing three distinct grounds: first, the Reference before the First Instance Division was “frivolous, vexatious, and an abuse of due process and court funds”; second, that the case was wrongfully before the First Instance Division and was contrary to the Rules of the Court; Finally, the Reference had no “merit and should be dismissed for being *res sub-judice*”.

24. As it appears from the Record of Appeal, the preliminary objection raised by the Appellant (who was then the Respondent) was not independently disposed of. The grounds raised in the Notice of Preliminary Objections were joined with other issues for determination at the trial during the Scheduling Conference.

25. At the Scheduling Conference in the Trial Court, eight issues were framed on which the Parties were at variance. The following were the issues:

- i. Whether or not the Reference before this Court is frivolous, vexatious and

- an abuse of the Court process;
- ii. Whether or not the Reference is wrongfully before the Court and is contrary to the Rules of Procedure of the Court;
 - iii. Whether or not, the Reference has no merit and should be dismissed for being *res sub-judice*;
 - iv. Whether or not, the Parliament of the United Republic of Tanzania violated Article 50 of the Treaty (sic) for the Establishment of the East African Community by formulating groups of categories for contestants, namely:
 - a) Group A- Gender
 - b) Group B- Tanzania Zanzibar
 - c) Group C- Opposition Political Parties
 - d) Group D- Tanzania mainland;
 - v. Whether or not, the election of Members of the East African Legislative Assembly on the basis of groups C and D categories violated the Principle of Proportional Representation as provided for under Article 50 of the Treaty for the Establishment of the East African Community;
 - vi. Whether or not, the failure of CHADEMA to get a single representative in the East African Legislative Assembly was caused by non-compliance with Article 50 of the Treaty for the Establishment of the East African Community;
 - vii. Whether or not, Article 50 of the Treaty for the Establishment of the East African Community provides a right for representatives of the Official Opposition Party in Parliament to an automatic chance of representation in the East African Legislative Assembly; and
 - viii. Whether or not, the Parties are entitled to the remedies sought.
26. The Trial Court delivered a comprehensive Judgment on the issues as framed in the Scheduling Conference. In particular, the First Instance Division found that:
1. The Reference as was framed and argued raised triable issues properly within the mandate and jurisdiction of the Court and was neither frivolous, vexatious nor an abuse of the Court process. Hence the first Preliminary Objection was overruled.
 2. The wider interests of justice necessitated the Court to accept and admit the Hansard Report of the National Assembly of Tanzania as part of the evidence for consideration by the Court.
 3. Even though the general subject matter before the Division and the High Court of Tanzania was the election of 17th April 2012, the competence of the two courts would exclude the principle of *res sub-judice*. Similarly, the doctrine of *res judicata*, would not apply as neither of the two courts has conclusively determined any aspect of the subject matter of the dispute. Hence, the third preliminary objection as framed was overruled.
 4. By formulating Standing Order No, 12 and Rule 5(5) whose effect was to predicate an election under Article 50 (1) of the Treaty on representation by political parties only and therefore creating categories as elsewhere set out, the National Assembly of Tanzania violated Article 50 (1) of the Treaty.
 5. To the extent only that Rule 5(5) creates the singular criteria as that of

representation of political parties, then the further creation of categories C (Opposition Political Parties) and D (Tanzania Mainland) was an act in violation of the Treaty. Further, it was a violation of the Treaty for TADEA, a party with no representation in the National Assembly of Tanzania to field a candidate.

6. No group under Article 50 (1), including any political party, is guaranteed automatic representation in the EALA. Hence CHADEMA had no such guarantee.
7. There was no guarantee of automatic representation of the official opposition party by Article 50 (1) of the Treaty.
8. Prayer (i) was granted; Prayer (ii) was dismissed; Prayer (iii) was granted; and the applicant was awarded a quarter costs of the Reference.

The Appeal

27. The Attorney General of Tanzania put forward eleven grounds of appeal which are:

- i) That the Honourable Lordships of the First Instance Division erred in law by failing to rule that the Respondent failed to comply with the provisions of Article 34 of the Treaty for the Establishment of the East African Community and therefore the reference was wrongly before the Court.
- ii) That the Court erred in law by failing to correctly interpret the Treaty for the Establishment of the East African Community by disregarding the provisions of the Treaty, with regard to Domestic Court in the State Party and National Assembly procedures and law, and by entertaining an unlawfully obtained records of Parliamentary proceedings (Hansard Report) which was annexed as evidence to the Treaty.
- iii) That the Court erred in fact and law in holding that the matter before it was not *res- sub judice*.
- iv) That the Court misdirected itself by holding that, the National Assembly of the United Republic of Tanzania violated Article 50 (1) of the Treaty by formulating Parliamentary Standing Order No. 12 and Rule 5 (5) of the East African Legislative Assembly Election Rules (i.e. Third Schedule to the Parliamentary Standing Order).
- v) That, the Court misdirected itself by holding that, Rule 5 (5) of the Third Schedule to the Parliamentary Standing Orders creates only one group as a basis for an election under Article 50 (1), and that the further creation of categories C (Opposition Political Parties) and D (Tanzania Mainland) was an act of violation of Article 50 (1) of the Treaty.
- vi) That, the Court erred in law by issuing a declaratory order to the effect that, the election of members of the East African Legislative Assembly of Tanzania on 17th April, 2012 was in violation of Article 50 (1) of the Treaty.
- vii) That, the Court erred in law by holding that, the election of members of the East African Legislative Assembly by the National Assembly of Tanzania was to be conducted by voting for candidates represented in the National Assembly only, in disregard of candidates from other group (sic) envisaged in Article 50 (1) of the Treaty.

- viii) That, the Court erred in law by issuing a declaration against the National Assembly of the United Republic of Tanzania that, by allowing a political party without representation in the National Assembly (TADEA) to file (sic) a candidate in the election for representatives to the EALA, it was in violation of Article 50 (1) of the Treaty.
 - ix) That, the Court erred in law by failing to give the interpretation of the representation envisaged in Article 50 (1) of the Treaty as contained in the words, “shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State”.
 - x) That, the Court erred in law by failing to give the interpretation of Article 50 (1) of the Treaty which was the (sic) issue and fundamental purpose of the Reference, for future guidance on the conduct of elections of members of the East African Legislative Assembly.
 - xi) That, the Court misdirected itself by ordering a quarter of the costs of the Reference.
28. At the Scheduling Conference which was held pursuant to Rule 99 of the Rules of the Court on the 22nd February 2016, the Appeal came down to five issues, namely:
- i) Whether or not, the National Assembly of the United Republic of Tanzania violated Article 50 (1) of the Treaty for the Establishment of the East African Community?
 - ii) Whether or not, the National Assembly of the United Republic of Tanzania was bound to follow the wording of Standing Order 12 of the Parliamentary Standing Orders with regard to proportional representation or the Wording of the Treaty for the Establishment of the East African Community which states “as much as feasible”?
 - iii) Whether or not the National Assembly of the United Republic of Tanzania adhered to the word, spirit and purport of Article 50 of the Treaty for the Establishment of the East African Community by formulating the groups envisaged in Rule 5(5) of the Third Schedule of the Parliamentary Orders, considering the nature of the Union between Tanganyika and Zanzibar?
 - iv) Whether or not, the Court had the mandate to give declaratory Orders against the National Assembly of the United Republic of Tanzania?
 - v) Whether or not the parties are entitled to costs?
29. In its written submissions, the Appellant elected to consolidate issues i, ii, and iii, for purposes of “convenience”. The Respondent, in his Written Submission pursued the same path.
30. In taking this approach, a broad spectrum of matters was brought to the fore by both parties, which will require our special attention in the proper resolution of this Appeal.
31. Prominent among the issues raised in the Written Submissions was the question as to whether this Court has jurisdiction to determine whether there was any breach whatsoever of Article 50 (1) of the Treaty by the National Assembly of Tanzania in the conduct of elections of EALA members of parliament.
32. The Attorney General of Tanzania brought to the fore the argument that it is “the national courts” which have “the competence and jurisdiction to determine

- the matter on interpretation and application of Article 50 (1) of the Treaty”. The argument of Tanzania was premised on the principle of *res sub-judice*.
33. The Respondent refuted the argument on the basis that this Court has Jurisdiction to entertain the matter, and that, the application of the principle of *res sub-judice* was misplaced in this matter as had been illustrated in the judgment of the Trial Court.
 34. Due to the importance of the question of Jurisdiction in the resolution of disputes (see, *Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) [EACJ Appeal No. 3 of 2011]*), and the way it was perfunctorily dealt with in the Parties’ Written Submissions, this Court directed the Parties to canvass the question deeply in Supplementary Written Submissions. In order to be properly addressed on this question, this Court framed the following issues:
 - (i) Whether in view of Article 30 (3) of the Treaty for the Establishment of the East African Community the Trial Court had jurisdiction to entertain the Reference?
 - (ii) What is the nexus between Article 30(3) and 50 (1) of the Treaty?
 - (iii) Whether in the light of Article 30 (1) of the Treaty the Respondent has standing in the Case?
 35. The above three issues can be summarized in one issue which is “whether in the light of Article 30(3) and 50 of the Treaty for the Establishment of the East African Community (in relation to Actions, Decisions, Regulations and Acts) the Court has Jurisdiction to entertain the Reference”.
 36. We propose to deal with the question of Jurisdiction first before examining the merits of the Appeal.

The Court’s Jurisdiction

The Appellant’s Submission

37. In his Supplementary Written Submissions, the Appellant’s primary argument is that reading Article 27 together with Article 30 and Article 50(1) the Respondent does not have *locus standi* in a claim of this nature.
38. The Appellant relies largely on the content of Article 30 (3) of the Treaty which provides that: “The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State”.
39. The Appellant further alleges that Article 50 (1) of the Treaty has reserved the action of election of EALA members to the National Assembly (ies) of Partner State(s) Institution(s) of the Partner State(s) - hence, this Court has no jurisdiction as per Article 30 (3) of the Treaty.

The Respondent’s Submission

40. On his part, the Respondent argued that the Appellant had foregone the opportunity to address the Court on the specific points of law which the Court sought further clarification on the basis that the Appellant’s Submissions were submitted late. The Respondent contends that as per the Court Order of 25th August 2016, the Appellant delayed in submitting his Submissions by one day without having been granted extension of time by this Court as is required by Rule 4 of the Rules of Procedure.

41. The Respondent further submits that Article 30 (3) should be read together with Articles 27 and 30 (1) which spells out the role of this Court “to ensure adherence of the law on the interpretation, application and compliance of the Treaty”.
42. The Respondent contends in paragraph 10 of his Supplementary Submissions:
“We are in agreement with the view of the Appellant as regards the nexus between Article 30(3) and Article 50(1) of the Treaty but we differ as to the resultant consequences of that nexus. In our view and hearing (sic) in mind that the jurisdiction of this court under the Treaty is threefold namely, interpretation, application and compliance which inevitably include the powers to query the legality of an Act, regulation, directive, decision or action of an institution of a partner state in the context and spirit of Article 50 (1) in the sense exemplified earlier herein above regarding *Prof. Anyang Nyong'o's* case. The said powers of this court may be referred to as inherent in its supervisory role in so far as interpretation, application and compliance of the Treaty is concerned.
43. The Respondent goes on to conclude that an individual has standing when an act complained of has been committed by an institution of a Partner State. In arriving at this conclusion, the Respondent heavily relies on the *Anyang' Nyong'o* case which was lodged by individuals.

Court Findings

Admissibility of late Written Submissions

44. Before we delve into the question of jurisdiction, we are going to address the issue raised by the Respondent with regards to the tardiness in submitting the Supplementary Written Submissions of the Appellant.
45. We do agree with the Respondent that the Supplementary Submissions were submitted one day beyond the deadline established in the above mentioned Court Order. It is not in the habit of this Court to condone the behaviour of breaching its Orders by Parties before it. As a Court we would have no difficulty whatsoever in striking out submissions which do not conform to deadlines established by our Orders. This rule is invoked with a near religious fervour. However, general rules generally have exceptions as is the case here.
46. We may exceptionally consider late Written Submissions in the interest of substantial justice especially in cases of interest to the Community such as the present one or where substantial matters such as the question of jurisdiction is to be determined. Rule 1 (2) of the Rules of the Court gives the Court the inherent power “to make such orders as may be necessary for the ends of justice...” without hiding behind the veil of the Rules at the expense of dispensing substantive justice.
47. The Appellant belated Submissions deal with the question of jurisdiction as directed by the Court and the resolution of this Case has far reaching ramifications to the Community beyond the United Republic of Tanzania since it involves elections of Members of EALA who are elected in each and every Partner State of the Community.
48. In the light of the above, the Court decides to admit retrospectively the Supplementary Submissions of the Appellant lodged a day beyond the prescribed date.

On Jurisdiction

49. To succeed on a claim for lack of jurisdiction of this Court, a party must demonstrate that there is absence of any of the three jurisdictions- *ratione personae/locus standi*, *ratione materiae*, and *ratione temporis*. See *Alcon International Ltd and the Standard Chartered Bank, The Attorney General of Uganda, The Registrar, High Court of Uganda*, [Appeal No. 3 of 2013, para.] 58.[unreported]

50. What is in question in the present case is the *locus standi* (*jurisdiction ratione personae*) of the Respondent in this particular case. The contention of the *locus standi* of the Respondent was triggered by the provisions of Articles 23 (1), 27 (1), 30 (1) and (3) and 50 (1) which we will restate here.

“Article 23: Role of the Court

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

Article 27: Jurisdiction of the Court

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

Article 30: Reference by Legal and Natural Persons

1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.
2. ...
3. The Court shall have no jurisdiction under this Article where an Act, Regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner States (underlining ours)

Article 50: Election of Members of the Assembly

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

51. We recall that the contraction of the jurisdiction of the Court in both Articles 27 and 30 came in the form of an amendment to the original Treaty. It is widely believed that the amendments were a prompt and considered Partner States’ response to the outcome of the *Anyang’ Nyong’o* Case. (see., *The East African Law Case*, 2007, p. 3-5; A. Possi, *The East African Court of Justice: Towards Effective Protection of Human Rights in East African Community*, Thesis, University of Pretoria, 2014 pp. 193- 209; Van der Mei, (2009), 69 Heidelberg Journal for

- International Law, 419; J. Gathii, “*Mission Creep or A search for Relevance: The East African Court of Justice’s Human Rights Strategy*” (2013), 24 *Duke Journal of Comparative and International Law* 249, at p. 268.).
52. It is also important to note at this juncture that the legality of the above-amendments to the Treaty was questioned before this Court in the *East African Law Society Case* (2007). This Court declined to invalidate the amendments.
53. The principles and procedures of treaty making are familiar to all who practice in the area of international law. When states submit to the jurisdiction of a court (such as this), they do so under a specified set of conditions and expectations of court’s power. In the case of this Court, the conditions are established by the Treaty. The Court is expected to restrict itself to boundaries prescribed by the Treaty.
54. The extent of the jurisdiction of any regional or international court is delineated by the constitutive agreement establishing the Court. By way of example, the International Court of Justice is an interstate court, meaning that natural persons have no *locus standi* before the Court. The *locus standi* of direct actions by persons in the Court of Justice of the European Union is restricted to persons who can show that a contested act has a direct and individual concern (Article 230 of the Treaty Establishing the European Community). The Southern African Development Community Tribunal was relegated to a Tribunal that settles disputes between member states and excluded the standing of persons in the 2012 SADC Summit of Heads of States. There is the requirement of exhaustion of local remedies by persons who wish to commence proceedings before the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA) (Article 26 of the Treaty Establishing COMESA). Individuals and Non-Governmental Organisations can only bring complaints to the African Court of Human and Peoples’ Rights where the State which the complaint is brought against has made a declaration under Article 5 (3) of that Court’s Protocol accepting the competence of the court to receive such complaints (only eight (8) of the thirty (30) States Parties to the Protocol have made the declaration recognizing the competence of that Court to receive cases from NGOs and individuals).
55. We noted a short while ago that the main rationale for the amendments was to erode the Court’s jurisdiction specifically where cases are introduced by persons (both legal and natural). Two restrictions were incorporated in Article 30- the time limitation restriction- and, lack of *locus standi* for natural and legal persons “where an Act, Regulation, Directive, Decision or Action has been reserved under this Treaty to an institution of a Partner State”.
56. It is axiomatic to note that when the Court such as ours finds the terms of the Treaty provision unambiguous then our role becomes that of application of the Treaty rather than its interpretation. This is anchored in the wording of Article 27 of the Treaty which provides that the jurisdiction of the Court is twofold; “interpretation and application. According to *Ehrlich*, interpretation constitutes the process of “determining the meaning of a rule” whereas application is the process of determining the consequences which the rule attaches to the occurrence of a given fact” (*Case Concerning the Factory at Chorzow [claim for indemnity- jurisdiction]* [*Dissenting Opinion of Judge Ehrlich*], *PCIJ Report Series*

A No. 9 [1927], 39). On his part, Arnold McNair states that:

[t]he words “interpret”, interpretation”; are often used loosely as if they include “apply, application”. Strictly speaking, when the meaning of the treaty is clear, it is “applied” not “interpreted”. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings.’ (see, A. McNair, *The Law of Treaties* [Clarendon Press, Oxford, 1961], 365). In other words, Treaty interpretation is a process of discovering the proper meaning of treaty terms through various interpreting methods; whereas treaty application is the process of identifying a source of law and applying it.

57. Admittedly, in most cases, we are likely to first determine what a treaty provision means and then proceed to apply it. Interpretation in a majority of the cases becomes part of the process of the application of a provision in contention. Judge Higgins succinctly opines that the phrase “application or interpretation” in a treaty ‘contains two distinct elements which may form the subject-matter of a reference to the Court. All too frequently, they are treated compendiously’ (*Oil Platforms [Islamic Republic of Iran v. United States of America] [Preliminary Objection] [Dissenting opinion of Judge Higgins], 1996, ICJ Rep. para. 3*).
58. However, in a case such as this, all that one has to question is whether there is a prohibition from accessing the Court, and who is prohibited to access the Court, and for what (the subject matter). This is a pretty straight forward exercise, which is subsequently followed by applying the requisite provision allowing the person (legal and/or natural) to either proceed with the merits of the matter or disqualify the person on the basis that their access to the Court is forbidden on a given subject matter. This exercise does not involve interpretation of the law, but rather, its application, and as a result judicial inquiry is complete. Judge Rosalyn Higgins eloquently remarked that a dispute over the “application” of a treaty, for purposes of jurisdiction, refers to grounds of jurisdictional objections based on among other things, *ratione temporis* inapplicability. We would also add *ratione personae* inapplicability to the list of jurisdictional objections. Judge Higgins further opines that where a treaty involves “non-applicability” of *ratione materiae* then the treaty will inevitably fall ‘for “interpretation” in a jurisdictional context...’ (*Oil Platforms [Islamic Republic of Iran v. United States of America] [Preliminary Objection] [Dissenting opinion of Judge Higgins], 1996, ICJ Rep. paras 4-6*).
59. A careful examination of Article 30 (3) makes it clear that persons access to this Court (*locus standi/jurisdiction ratione personae*) is prohibited “where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State”. Article 30 bears the title; Reference by Legal and Natural Persons. The first point of determination is whether a petitioner to this Court is a “legal or natural person”. The wording of Article 30 (3) that [t] he Court shall have no jurisdiction under this Article...” bars any references by persons (both legal and natural) on any of the abovementioned subject matter. It is incontrovertible that the present petition was filed by one Mr. Komu (a natural person).
60. The second point we have to determine is whether the determination of Mr.

Komu's Reference concerns "the legality of any Act, regulation, directive, decision or action of a Partner State... on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of this Treaty". The subject-matter of this case can be discerned from the prayers sought by the Applicant (now Respondent) in the First Instance Division of this Court as discussed below:

- (i) The first prayer sought a declaration from this Court that "the elections for members of the EALA conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the treaty for the establishment of the East African Community." By challenging the "elections" for members of EALA, the Claimant (as he was then) is challenging the "action" of "election" as was undertaken by the Parliament of Tanzania as an "infringement" of the Treaty.
 - (ii) The second prayer sought a declaration "that in obtaining the representatives from Group C and D Article 50 of the Community, envisages, *inter alia*, the observance and compliance of the principle of proportional representation". As we may recall, the categorization of groups for purposes of elections of Members of EALA by the Parliament of Tanzania was effected in the form of Standing Order No, 12 and Rule 5(5) of the East African Legislative Assembly Election Rules (i.e. Third Schedule to the Parliamentary Standing Order). It is clear here that the Claimant then (now Respondent) is advancing the argument that the "regulations" formulated for the purposes of conducting the elections for EALA members by the Parliament of Tanzania were an infringement of the provisions of Article 50 of the Treaty.
 - (iii) In a nutshell, it is crystal clear that the Claimant, all along challenged the legality and infringement of Article 50 of the Treaty in the election ("action") of the EALA members and "regulations" employed in undertaking the elections.
61. The third and final point of determination is whether the "action" and "regulations" discussed above have "been reserved" under the Treaty "to an institution of a Partner State". In order to determine this, it is imperative to review the provisions of Article 50 (1) of the Treaty which is at the centre of this contention. Article 50 (1) provides: "The National Assembly of each Partner State shall elect... nine members of the Assembly (EALA)...in accordance with such procedure as the National Assembly of each Partner State may determine". This Article clearly illustrates that the action of electing members of EALA and the enactment of an enabling regulation for the elections have been reserved for an institution of a Partner State which is the National Assembly of Tanzania in this case.
62. In light of the above, the Court comes to the conclusion that the Claimant (now Respondent) did not qualify to institute the proceedings in this Case. The Claimant (as he was then) was consequently devoid of *locus standi* before this Court. Hence, this Court had no jurisdiction *ratione personae* to entertain this matter as per Article 50 (1) read together with Article 30(3). The Court can exercise its judicial function only in respect of those parties who have lawful access to it in given matters. The reliance on the *Anyang' Nyong'o* case by the

Respondent does not resuscitate his case. Before the *Anyang' Nyong'o* case, persons had unlimited *locus standi* in matters such as this. It is the post-*Anyang' Nyong'o* case, that amendments introduced limit the standing of persons in this Court in matters such as the present one.

63. Where the Court such as ours finds a manifest lack of jurisdiction, considerations of sound administration of justice dictate that the case is inadmissible.
64. The Court concludes from all of the foregoing considerations that the Respondent does not possess the requisite *locus standi* of lodging a case of this nature before this Court. Since it has no jurisdiction to entertain the Reference, the Court is precluded to rule on the merits of the case.

Other important Questions Raised by the Respondent

65. The Respondent posed an important scenario which requires our attention. He ponders: "Now, suppose, as was in the case of *Anyang' Nyong'o* case,(sic) instead of "electing", those members as was entrenched under Article 50(1), they decided to "appoint" those members purporting to exercise powers conferred to them under Article 50(1) of the Treaty".
66. The Court will begin by reaffirming that the primary obligation of States in international law is to abide by obligations imposed upon them by an agreement they have freely entered into. However, it is one thing to determine the obligations imposed by a given agreement such as the EAC Treaty, and another to have a dispute settlement mechanism (such as a court) in place to determine whether that obligation has been violated. The Court observes that the violation of a treaty provision and possessing the jurisdiction to decide on the violation are two different things and that the mere fact that the breach of a treaty provision may be at issue in a dispute would not automatically give this Court the jurisdiction to entertain that dispute. The Court has jurisdiction in respect of disputes only to the extent that the Treaty has granted the jurisdiction. For instance, this Court cannot exercise jurisdiction over a dispute, however, manifest or gross the violation is, if the matter is time barred or where the person instituting the case has no *locus standi* as we have determined in this case.
67. In the scenario posed by the Respondent as illustrated in paragraph 65 above, it is important to note two things. First, the *Anyang' Nyong'o* case determined definitively that Article 50 (1) provides for an "election" by the National Parliament of Members of EALA. Any other mode of putting in place of members of EALA other than "election" is a breach of the Treaty. This Court has not departed from that determination. Hence, in the instance that a case challenging the mode of procuring members of EALA other than "elections" before the national courts of the Partner States, then the National courts have no choice but to abide by the ruling of the *Anyang' Nyong'o* on the sole mode of procuring EALA members which is "elections" by National Parliaments. We are fortified in this view by the provisions of Article 8 (4) of the Treaty which provides that "Community organs, institutions and laws shall take precedence over similar ones on matters pertaining to the implementation or the application of this Treaty" as well as Article 33(2) which provides that "Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter". Therefore, as long as the ruling in the *Anyang' Nyong'o*

case has not been departed from by this Court, it would supersede any decision of any National Court to the contrary.

68. Second, it is important to note that even though we have determined that Mr. Komu did not have the *locus standi* to institute the case, it does not translate to the Court not having the jurisdiction over the subject matter. The architecture of the Treaty allows individuals to institute proceedings of the nature of the present case before national courts (see Article 34 of the EAC Treaty). Indeed the Respondent brought proceedings in the High Court of Tanzania (see, *supra* para. 22). Where a case such as this is before a national Court of a Partner State, and a question of interpretation of the Treaty arises, as has arisen in this case, then it (the national court) must refer the question to this Court for interpretation. In the *Kyahurwenda* case, this Court held that "...once a national court or tribunal considers an interpretation to be necessary, then it has no option but to refer the question to this Court..." (*The Attorney General of the Republic of Uganda v. Tom Kyahurwenda*, Reference for a Preliminary Ruling Article 34 of the Treaty made by the High Court of the Republic of Uganda, *Case Stated No. 1 of 2014*, para. 56) Unreported. Reading Article Articles 27, 33 and 34 of the Treaty together leads to the conclusion that "this Court has exclusive (underlining ours) jurisdiction on the interpretation of the Treaty and invalidation of Community Acts, directives, regulations or actions" (*Kyahurwenda, supra*, at para. 61).

Costs

69. This Court has on numerous occasions followed the general rule that costs follow the event. However, 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 has exercised its jurisdiction not to award costs against this kind of litigant when he/she loses the reference.
70. It is the view of this Court therefore, that this Case was arguable and raised challenging issues pertinent to the proper interpretation and application of Articles 23, 27, 30 and 50 of the Treaty.
71. In the result, we order that each Party bears his own cost.

Operative Part

72. for the reasons we have set out above, the Court hereby rules that:
- (i) The Trial Court had no jurisdiction to entertain the Reference.
 - (ii) The Judgment of the First Instance Division is set aside.
 - (iii) Each Party shall bear its own costs here and below.

It is accordingly so ordered.

Appellate Division

Appeal No. 3 of 2015**Godfrey Magezi v The Attorney General of the Republic of Uganda**

Appeal from the Judgment of the First Instance Division: Butasi, PJ; Lenaola, DPJ; and Ntezilyayo, J dated the 14th day of May, 2015 in Reference No. 5 of 2013, [2102-2015] EACJLR, 281

Coram: E. Ugirashebuja, P; L. Nkurunziza, VP; E. Rutakangwa; A. Ringera and G. Kiryabwire JJ. A
May 26, 2016

Rule of law - Whistleblower- Natural justice in administration – The right to be heard- Domestic laws considered in the context of Treaty interpretation – Whether the doctrine of promissory estoppel applies - Taking appropriate action – The principle of functus officio- Nature of an appeal

Articles 6(d), 7 (2), 8 (1) (c), 35A, of the Treaty - Articles: 223,225, 226,227, 230 Constitution of Uganda 1995; Sections 2, 3, 8, 10, 12, 14, 29, 21, 25, 30, 34, 36 Inspectorate of Government Act, 2002, Uganda - Whistleblower Act, 2008, Uganda - Rules: 24, 35A, 77, 99,111(1) EACJ Rules of Procedure, 2013

In 2005, the Government of Uganda (GOU) and Quality Chemical Industries Ltd (QCIL) signed a Memorandum of Understanding (MOU) for the construction of a factory to manufacture drugs to treat HIV/ AIDS and malaria. The government guaranteed the purchase of anti-retro viral and anti- malaria drugs by until 2019. In 2007, the Appellant discovered that the GOU had procured drugs from QCIL from India through the National Medical Stores. These were imported and sold at a 15% mark-up above international prices agreed in the MOU causing financial loss of USD17,826,038.94 to the public.

The Appellant brought this malpractice to the attention of the Inspector General of Government of Uganda (IGG) as a whistle blower and investigations led to a confirmation of loss in a Report dated 20th December, 2011. The IGG recommended that GOU should recovery the payments made. However in a letter dated 8th July 2013, the IGG reviewed her conclusion relating to the recovery of the alleged loss stating that she was satisfied by the Report of the Attorney General of Uganda advising that the USD 17,826,038.94 could not be recovered.

As a whistleblower, the Applicant had expected a reward of 5% of the recovered money in accordance with Section 19 of Whistle blowers Protection Act, 2010. Aggrieved by the change in the IGG's letter, the Appellant filed the Reference in the Trial Court claiming *inter alia* that: the Government of Uganda's failure to recover the money paid to QCIL was an aberration and fundamental departure from the principles of good governance, accountability and a subversion of the principles of the rule of law contrary to Articles 6(d), 7 (2) and 8 (1) (c) of the Treaty.

While conceding that the alleged malpractices were investigated by the IGG and a report produced on 20th December 2011, the Respondent submitted that legal opinions given by the Attorney General on the matter were issued independently

and within his constitutional mandate and did not contravene the principles of good governance, democracy and rule of law. The Trial Court dismissed the Appellant's reference with costs after finding that the Respondent had not breached the Treaty. On Appeal, the Appellant submitted *inter alia* that the Trial Court erred in law: by finding that the content and the implications of the IGGs' letter of 8th July, 2013 did not breach the Treaty; and in finding that the Government of Uganda's inaction and or failure to recover US \$ 17,826,038.94 from QCIL infringed Articles 6(d), 7(2) and 8(1)(c) of the Treaty. He averred that that the IGG was estopped from going against her word in the 20th December 2011 Report because the Appellant had relied on the express representation therein that the USD 17,826,038.94 would be recovered and that the Appellant would as a result get a reward of 5% of the money recovered.

In reply, the Respondent submitted *inter alia* that: both the IGG and the Attorney General acted within their legal mandates under the law and final outcome was not a breach of the Treaty; the IGG's Report did not create an unchallengeable entitlement to a 5% reward in favour of the Appellant.

Held:

1. This Court has no limitation on the nature of inquiry it may carry out in determining an appeal. Whereas the Court's jurisdiction is limited to the interpretation and application of the Treaty, in respect of compliance by a Partner State, the Court will look at the domestic law of a Partner State, in the context of interpreting the Treaty. Both Article 230 of the Constitution of Uganda and Section 14 of the IGG Act give the IGG wide discretion to make such orders and give such directions as are necessary and appropriate in the circumstances of the case. Appropriate action means action that is befitting in the circumstances. This gives an authorised officer wide discretion to take such action as is befitting in the circumstances.
2. The right to be heard is a cardinal principle of the rule of law. Since there was no legal relationship between the IGG and the Appellant, no representation was made to him in the letter of the 20th December, 2011 that any sum of money would be recovered and that the Appellant would get a reward of 5% of the money recovered. The letter only contained a recommendation to the Government to consider recovery. The IGG and Attorney General could not guarantee the success of the recovery proceedings. The Appellant was misapplying the doctrine of promissory estoppel as a sword when it only applies as a shield.
3. There was no final order for the receipt of the 5% reward, so in effect there could be no turnabout on any such order. The 20th December 2011 Report did not create any finality in the investigation as the money was yet to be recovered thus the Appellant's claim for payment was premature and misconceived. The application of the principle of *functus officio* was also misconceived.
4. An investigation into an alleged impropriety may lead to a finding that there is no impropriety in fact. In this case, where there was a positive initial finding of an alleged impropriety, still further action may have been required to confirm or corroborate that initial finding before a recovery could be made. All this is part of the process of "taking appropriate" action. In this regard, the Whistleblowers Protection Act with regard to the powers of the IGG is in conformity with

Article 230 (2) of the Constitution and in *pari materia* with Section 14 (6) of the IGG Act to “make such orders and give directions as are appropriate in the circumstances”. Thus the Trial Court did not err in finding that the IGG as an authorised officer is still subject to Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act. The Whistleblowers Protection Act, therefore, did not bar the IGG from writing the impugned letter. The IGG had the legal right to do so and acted within the law, she did not violate Ugandan law nor the Treaty as alleged.

5. Since none of the grounds of Appeal were successful, the Appellant was not entitled to any of the reliefs and remedies sought.

Cases cited

Bank of Uganda v Banco Arabe Espano, USC, Civil Appeal No. 1 of 2001

Central London Property Ltd v High Trees Ltd (1947) KB 130

Combe v Combe [1951] 2 KB 215

Henry Kyarimpa v The Attorney General of Uganda, EACJ Appeal No. 6 of 2014

The Inspector General of Government v Gordon Sentiba & Ors, Misc App 659 of 2007

JUDGMENT

Introduction

1. This is an Appeal by Godfrey Magezi (hereinafter referred to as “the Appellant”) against the Judgment of the First Instance Division of this Court (hereinafter referred to as “the Trial Court”) dated 14th May, 2015 in Reference No. 4 of 2013 (hereinafter referred to as “the Reference”) in which the Trial Court dismissed the Appellant’s reference with costs to the Respondent.
2. The Appellant, who is a resident of Uganda, was the Applicant in the Trial Court. He described himself as a whistleblower. He sued the Attorney General of the Republic of Uganda for violation and/or infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.
3. The Respondent is the Attorney General of Uganda and was sued in the Reference as a representative for and on behalf of the Republic of Uganda.
4. The Appellant was, both in the Trial Court and in this Court represented by Mr. Mohammed Mbabazi, instructed by the firm of Nyanzi, Kiboneka and Mbabazi Advocates of Kampala Uganda and the Respondent was represented in this Court by Mr. George Karemera Principal State Attorney, Ms Goretti Arinaitwe, Senior State Attorney and Mr. Bichachi Ojambo, State Attorney.

Background.

5. The factual background to this Appeal as agreed to by the parties at the Scheduling Conference held on the 3rd June 2014 is as outlined below.
6. At a time in Uganda, when access to the treatment for HIV/ AIDS was almost impossible for the poor and malaria was at its peak, the Government of Uganda (hereinafter referred to as the “GOU”) conceived the idea of establishing a pharmaceutical factory to manufacture drugs to treat the aforesaid illnesses within Uganda. Pursuant to the foregoing, the GOU and Quality Chemical Industries Ltd (hereinafter referred to as “QCIL”), a private Limited Company incorporated in accordance with Ugandan Laws and Regulations, signed a Memorandum of Understanding (The “MOU”) on 14th December, 2005, under which the off-take purchase of anti-retroviral (“ARVs”) and anti-

malaria drugs by the GOU from QCIL was guaranteed until 2019. A formal guarantee to QCIL by GOU was issued on the same date. Both the MOU and Guarantee provided that QCIL would construct a pharmaceutical drugs and products factory in Uganda which would manufacture the said ARVs and Anti malaria drugs.

7. The MOU further provided, that GOU would purchase the drugs from QCIL plant in Uganda before the construction of the factory was completed and drugs manufactured. It was further agreed that the prices of those drugs would be equal to or less than the prices provided in a joint UNICEF – UNAID-WHO-MSF project.
8. Prior to the completion of the construction of the aforesaid factory in 2007, the Appellant alleged that he discovered that the GOU through the National Medical Stores had procured drugs from QCIL which had been imported from India and which were sold at an unjustified 15% mark-up above that of the international prices agreed upon in the MOU and that this act had caused financial loss of USD17,826,038.94 to the public in Uganda. The Appellant now acting as a whistleblower, brought the above malpractice to the attention of the Inspector General of Government of Uganda (hereinafter referred to as “the IGG”) who started investigations and produced a Report dated 20th December, 2011 that confirmed the said loss.
9. In her Report, the IGG recommended to the Government that it consider recovery of the payments made above the 15% mark-up for drugs purchased illegally from QCIL, which amounted to USD17,826,038.94.
10. As a whistleblower, the Applicant expected a reward of 5% of the recovered money, in accordance with Section 19 of Whistle blowers Protection Act, 2010. The IGG, however in a subsequent letter dated 8th July 2013, in an apparent turnabout, reviewed her conclusions related to the recovery of the alleged loss highlighted in the aforesaid Report and stated that she was satisfied by the Report of The Attorney General of Uganda that the USD 17,826,038.94 could not be recovered. The effect of this letter was that the Appellant would not be entitled to any reward hence the filing of the Reference in the Trial Court.

The Reference.

11. Aggrieved by the IGG’s alleged turnabout, the Appellant on the 25th July, 2013 filed the Reference in the Trial Court under Articles 6(d), 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African community (hereinafter referred to as “The Treaty”) and Rule 24 of the East African Court of Justice Rules of Procedure, 2013 (hereafter referred to as the “Rules of the Court”). The Appellant’s case was contained in his Amended Reference, his reply to the Respondent’s Response filed on 20th May, 2014, his Affidavit sworn on 17th June, 2014, his written submissions filed on 17th November, 2014 and his rejoinder to the Respondent’s submissions filed on the 12th January, 2015.
12. The Appellant in the Amended Reference pleaded that, the turnabout (detailed above) by the IGG is inconsistent with Articles 6(d), 7(2) and 8(1) (c) of the Treaty. He prayed for the following reliefs:-
 - “4.1 A declaration that the inaction, refusal or failure of and/or by the

Government of Uganda to recover USD 17,826,038.94 from Quality Chemicals Industries Limited as per the Inspectorate's recommendations and report of December 2011 is an aberration and fundamental departure from the principles of good governance, accountability and a subversion of the principles of the rule of law and is contrary to Articles 6(d), 7 (2) and 8 (1) (c) of the Treaty.

- 4.2 A declaration that the act of the inspectorate in deeming "the review and amendment of the original MOU and the execution of the amended MOU and Guarantee on the 16th April 2012" to be adequate implementation of all recommendations contained in the report and thereafter closed the matter, is breach and infringement of Articles 6(d), 7 (2) and 8 (1) (c) of the Treaty.
- 4.3 An order enforcing compliance with and adherence to the Treaty and directing the Government of Uganda to immediately adhere and comply with the treaty by taking measures to recover the USD 17,826,038.94 from M/S Quality Chemicals Industries Limited rather than deeming the same to have been recovered through the review and amendment of the original Memorandum of Understanding at the execution of the Amended Memorandum of Understanding and Guarantee.
- 4.4 Costs of the Reference be paid by the Respondent...."

The Response to the Reference.

13. The case for the Respondent was contained in the Response to the Amended Reference filed on 7th February, 2014 and supported by the Affidavit sworn by one, Richard Kiggundu, Finance Manager of the QCIL dated 11th July, 2014 and another Affidavit dated 29th July, 2014 sworn by one Ms. Jane Aceng, the Director General of Health Services in the Ministry of Health, in the Republic of Uganda. In brief the response stated as herein under.
14. The Respondent conceded that an MOU and a Guarantee Agreement between the GOU and QCIL Ltd was signed on 14th December, 2005 and that this was then amended on 16th April, 2012;
15. It was further conceded, that the Appellant made a disclosure of alleged malpractices that occurred between the National Medical Stores and QCIL Ltd. As a result of this disclosure the IGG carried out investigations and produced a Report on 20th December 2011.
16. As a follow-up to the recommendations made by the Inspectorate of Government Unit, the IGG sought an update on the implementation of the recommendations from the relevant Government departments. The Attorney General on 12th April, 2012 and 27th May, 2013 issued two legal opinions stating in particular, that there was no loss occasioned to the Government by the supply of ARVs, ACTs and other drugs by QCIL Ltd as had been alleged.
17. The Respondent, by issuing his legal opinion, acted within his constitutional powers and that could not be said to have contravened the principles of good governance, democracy and rule of law. It was the case for the Respondent that he independently and within his constitutional mandate analysed all relevant facts and recommendations in the Report and shared his conclusions with the IGG.

18. It was the further case of the Respondent that the IGG did not require any consent or approval of any authority to discontinue her investigations into the matter as provided under Section 14(8) of the Inspectorate of Government Act, 2002.
19. Furthermore, the Respondent in his response stated that he exercised his constitutional mandate in issuing the aforesaid legal opinion and in doing so, he neither altered the IGG's Report nor influenced the Inspectorate of Government.
20. The Respondent therefore prayed that the amended reference be struck out with costs.

The Issues for Determination.

21. At the Scheduling Conference held by the Trial Court the parties agreed to the following 6 issues for determination:-
- 1) Whether this is a matter of interpretation before this Honourable Court pursuant to Articles 27(1), 30(1) and (3) of the Treaty;
 - 2) Whether this Honourable Court can find against an entity that is not a Party to this Reference and specifically Quality Chemical Industries Ltd;
 - 3) Whether the content and the implications of the Inspectorate of Government's letter dated 8th July, 2013 was in breach of Principles of good governance, rule of law, accountability and transparency contrary to the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty;
 - 4) Whether there was any loss of USD 17, 826,038.94 by the Government of Uganda and Quality Chemicals Limited;
 - 5) Whether there was inaction, refusal/or failure by the Government of Uganda to recover USD 17, 826,038.94 from Quality Chemical Industries Limited; and
 - 6) What reliefs are available to the Parties?

The Trial Court's Determination.

22. After considering the pleadings of the parties and the affidavits in support thereof, as well as the submissions of counsel, the Trial Court in a Judgment delivered on 14th May 2015, found that the Respondent had not breached the Treaty and accordingly dismissed the Appellant's reference with costs to the Respondent.

The Appeal to the Appellate Division.

23. Dissatisfied with the entire Judgment of the Trial Court, the Appellant instituted this appeal by filing a Memorandum of Appeal filed on the 6th July 2015. The Appellant raised the following grounds of Appeal.
1. The Hon. Learned Justices of the First Instance erred in Law when they found and decided that the content and the implications of the Inspectorate of Government's letter dated 8th July, 2013 did not breach and were neither inconsistent nor an infringement of Articles 6(d), 7 (2) and 8(1)(c) of the Treaty.
 2. The Hon. Learned Justices of the Court of First Instance erred in Law when they declined to make a finding on and decide the issue of whether the inaction, refusal and or failure by Government of

Uganda to recover US\$ 17,826,038.94 Dollars from Quality Chemicals Industries Limited was a breach and an infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

3. The Hon. Justices of the Court of First Instance Division erred in Law when they decided that the Appellant is not entitled to the reliefs and remedies sought in the Reference against the Respondent.
 4. The Hon. Learned Justices of the Court of First Instance Division erred in Law when they failed to apply the principle of legitimate expectations in the context of the principles of good governance, rule of law, accountability and transparency in determining whether the contents and implication of the Inspector General of Government letter dated 8th July 2013 breached and infringed Articles 6(d), 7(2) and 8(1)(c) of the Treaty.
24. The Appellant by this Appeal seeks an Order that the Judgment of the Learned Justices of the First Instance Division dated 14th May, 2015 in Reference No. 5 of 2013 be set aside and the Appeal be allowed with costs to the Appellant here and in the lower Court. The Appellant further prays that this Court enter Judgement for the Appellant as prayed for in Reference No 5 of 2013. The Respondent opposes this Appeal and agrees with the decision of the Trial Court.

The Scheduling Conference

25. At the Scheduling Conference of the Appeal pursuant to Rule 99 (of the Rules of this Court) the parties with the guidance of this Court agreed that the grounds of the appeal could be resolved by the determination of the following issues: -
1. Whether or not Hon. Learned Justices of the First Instance Division erred in Law when they found and decided that the content and the implications of the Inspectorate of Governments' letter dated 8th July, 2013 did not breach and were neither inconsistent nor an infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.
 2. Whether or not the Hon. Learned Justices of the First Instance Division erred in Law when they failed to apply the principles of legitimate expectations in the context of the principle of good governance, rule of law, accountability and transparency in determining whether the contents and implication of inspector General of Government's letter dated 8th July 2013 breached and infringed Articles 6(d), 7(2) and 8(1)(c) of the Treaty.
 3. Whether or not the Hon. Learned Justices of First Instance Division erred in Law when they declined to make a finding on and decide the issue of whether the inaction, refusal and or failure by the Government of Uganda to recover US \$ 17,826,038.94 Dollars from Quality chemicals Limited was a breach and an infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.
 4. Whether or not the Learned Justices of the Court of First Instance Division erred in Law when they decided that the Appellant is not entitled to the reliefs and remedies sought in the Reference against the Respondent.
26. The Parties to this Appeal filed written submissions addressing the above issues. When the Appeal came up for hearing, the learned Counsel for the parties wholly

adopted those submissions and prayed that the Court makes its determination on the basis of the submissions filed.

The Role of The Appellate Division

27. The role of this Court in determining an Appeal is found in Article 35 A of the Treaty and Rule 77 of the Rules of this Court. Both provisions have the same wording and provide

“...An appeal from the Judgment or any order of the First Instance Division shall lie to the Appellate Division on:

- (a) Points of law;
- (b) Grounds of lack of jurisdiction; or
- (c) Procedural irregularity...”

28. Save for what is provided for under the above provisions, there is no limitation placed on this Court as the nature of inquiry it may carry out in determining the appeal on those grounds. This Court therefore in determining the appeal has the power to inquire into whether the trial Court erred on a point of law, lack of jurisdiction and/or on a procedural irregularity. Taking the above principles on appeals into consideration we shall proceed to determine the issues presented to us.

Issue No. 1: Whether or not Hon. Learned Justices of the First Instance Division erred in Law when they found and decided that the content and the implications of the Inspectorate of Governments’ letter dated 8th July, 2013 did not breach and were neither inconsistent nor an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

The Appellant’s submissions.

29. The Appellant’s submissions on this issue were quite long and overlapped in a number of areas. We shall try to align them as follows. Counsel for the Appellant submitted that the Appellant (Mr. Godfrey Magezi) was a whistleblower as defined under the Whistleblowers Act of Uganda (Act 6 of 2010). That the Appellant discovered that the GOU through the National Medical Stores had procured drugs from QCIL which had been imported from India and which were sold at an unjustified 15% mark-up, above that of the international prices agreed upon under the MOU signed between the GOU and QCIL. Furthermore, this act had caused a financial loss of USD17,826,038.94 to the Republic in Uganda. Counsel for the Appellant in his submissions, repeatedly referred to this loss of money as *“theft of Government money”*.

30. The Appellant as a whistleblower reported this alleged loss to the IGG who is an “authorised officer” under the Whistleblowers Act to receive such information and to take action on it. Counsel for the Appellant further submitted, that the IGG investigated the information provided by the Appellant and found the said disclosure to be correct. The IGG then made a Report dated 20th December, 2011 with recommendations that the lost money be recovered by the GOU. The Report’s recommendations are found at paragraph 17 which reads:-

“17.1 Recommendations

17.1 The Attorney General should as a matter of urgency cause the review

of the prices of drugs purchased under the MoU (Sic) with a view to ensuring that drugs purchased from CIPLA Ltd are purchased at prices not higher than CIPLA Ltd International prices, and drugs purchased from QCIL are not more than 15% higher than CIPLA international prices.

17.2 The Government of Uganda and QCIL should review the need for further importation of drugs as the QCIL plant in Uganda has already been commissioned.

17.3 The Government of Uganda should consider recovery of the payments made above the 15% mark up for drugs purchased from QCIL and payments for drugs purchased from CIPLA at prices above CIPLA international prices which amount to US 17,826,038.94 for drugs procured between December 2009 and October 2010 plus the subsequent procurements...”

31. Counsel for the Appellant submitted that the Attorney General and National Medical Stores instead of complying with the said recommendations vigorously resisted the recovery of the money which was stolen. The Attorney General in his letter dated 27th May 2013, after carrying out his own investigations and finding that there was no loss of Government money advised as follows:-

“...in light of the foregoing the office of the Attorney General is of the considered opinion that pursuit of recovery of US \$ 17,826,036.94 recommended by the IGG is without basis and will be an exercise in futility which will expose Government to protracted unnecessary litigation likely to result in Government paying heavy sums and costs...”

(a) Counsel for the Appellant argued, that the IGG caved in to the Attorney General of Uganda’s opinion and agreed that no loss had occurred as alleged. The IGG then in a turnabout on her earlier recommendations of 20th December, 2011 wrote a letter to the Minister of Health Uganda dated 8th July 2013 (the impugned letter) and deemed that the recovery had been done through other acts; as it was expensive to recover the money through legal means. The IGG’s impugned letter partly reads;

“The Hon. Minister of Health
Ministry of Health
KAMPALA

IMPLEMENTATION OF THE RECOMMENDATION OF THE
INSPECTORATE OF GOVERNMENT TO RECOVER MONEY
ALLEGED TO HAVE BEEN LOST THROUGH INFLATION OF
PRICES BY QUALITY CHEMICALS INDUSTRIES LTD

.....

The government has since carried out a review of the MoU , which review culminated in the execution of the Amended Memorandum of Understanding (A MoU) and Guarantee, between the Government of Uganda and QCIL , signed on 16th April 2012. This adequately addresses Recommendations 1 and 2 above.

The implementation of Recommendations 3 (recovery of funds) has been controversial, with NMS refusing to implement it as requested by

the Permanent Secretary, Ministry of Health, while the Permanent secretary insists that NMS must recover the said funds. The Attorney General upon requests by the Minister of Health has advised that the recovery of the money from QCIL is untenable, because the pricing was done in accordance with the MoU, and recovery would be an exercise in futility in view of the Government contractual obligations under the MOU and Guarantee, such recovery would render the Government liable for both breach of this contract, and also damages for failure to fulfil their obligations under the origin MoU, which QCIL had agreed to waive.

It is noted that the contracted relationship between the Government of Uganda and QCIL was reviewed to address the concerns raised by the Inspectorate of Government. Further that the Attorney General has advised that the recovery cannot be pursued as it would leave the Government vulnerable to liability for its own breaches of contract.

Therefore, the Inspectorate deems the review and amendment of the original MoU, and the execution of the Amended MoU and Guarantee on 16th April 2010 to be adequate for implementation of ALL recommendations contained in the report and deems the matter closed...”

32. Counsel for the Appellant submitted, that the result of the above turnabout was that the IGG in effect released “the thief” from liability to refund the stolen funds. This refusal and/ or inaction by the Respondent, to recover the stolen funds, argued Counsel for the Appellant, violated the Treaty to which Uganda is a Partner State and is bound by. The Respondent’s actions were therefore inconsistent with the Treaty’s principles of good governance, rule of law, transparency and accountability. He further argued that pertinent questions in the context of the Whistleblowers Protection Act arose as a result of this inaction, namely:

- i) How should the Government of Uganda treat a thief who is caught stealing public funds?
- ii) How does the Government of Uganda treat Whistleblowers who come out to disclose acts of impropriety leading to the discovery of the thief of Government funds?

33. Counsel for the Appellant submitted that the IGG’s impugned letter of the 8th July 2013 has two facets. The first facet, is the question what did the IGG do when she authored the impugned letter. The second facet, is what did the IGG decide in that letter? In answer to the first facet, Counsel for the Appellant, submitted that the impugned letter was written after the IGG’s Report of December, 2011 which, was a direction or order to recover stolen money. However the IGG by the impugned letter, reviewed her own Report and recommendations. He argued that, the impugned letter in law could not amount to a review, appeal or revision of the 20th December 2011 Report because it was written by the same person. On the second facet Counsel for the Appellant submitted that the IGG in her Report of December 2011 recommended recovery by GOU of the USD 17,826,038.94 that had been discovered as stolen. Counsel for the Appellant argued that by writing the impugned letter, the IGG had discharged “the thief” from liability

to repay the stolen money. He further argued that this amounted to a write off of a debt due to Government by a culpable party. Counsel for the Appellant also argued that the IGG had illegally varied her decision recommending the recovery of the money by deeming that the said money had been recovered.

34. Counsel for the Appellant, submitted that it was not in contention that the IGG, moved by the disclosure of the Appellant as a whistleblower investigated and found a loss of USD 17,826,038.94 to the GOU which finding has never been challenged nor quashed by any competent authority. This finding was therefore in his view still valid and binding until set aside by Court [he referred the Court to the authority of *Minister for Immigration & Multicultural Affairs V Bhardwa (2002) CLR 597*]. The IGG however deemed that the USD 17,826,038.94 had been recovered and this is what the Appellant was challenging.
35. Counsel questioned whether the IGG had the mandate and jurisdiction to deem that the money had been recovered and answered that question in the negative. He further questioned to whom the IGG was accountable under the Whistleblower's Protection Act and whether the IGG in so deeming the money as recovered had acted with integrity? Counsel further questioned whether there could be forgiveness of "thieves" under the Whistleblowers Protection Act when a loss had been discovered and confirmed through investigations?

Constitutional and statutory powers and mandate of the IGG to eliminate corruption

36. Counsel for the Appellant submitted that the office of the IGG had both Constitutional and Statutory powers to eliminate corruption. He referred to Articles 223 (1), (2), (3) and (5); 225, 226 and 227 of the Constitution of Uganda 1995 which sets up the Office of the IGG. He further submitted that these same provisions are re-enacted in the IGG Act in Sections 3, 8, 10, 12,14, 29,21, 25, 30, 34, and 36. He submitted that Section 2 of the IGG Act defined corruption as "...the abuse of public office for private gain and includes but is not limited to embezzlement, bribery, nepotism, influence peddling, theft of public funds or assets, fraud, causing financial or property loss and false accounting in public affairs..."
37. Counsel for the Appellant argued that in this case there was evidence of theft of public funds, fraud and loss which amounted to corruption which, the IGG is mandated to investigate and eliminate under Articles 225 of the Constitution of Uganda and Section 8 of the IGG Act. The evidence of corruption was that QCIL a purported "manufacturer" of drugs, was in fact not manufacturing drugs but "importing" them from M/s CIPLA India and labelling the imported products as if they were manufactured by the local factory. This led to the finding of a loss of USD 17,826,038.94 by the IGG which has never been reversed. He argued that to forgive QCIL was an antithesis of the IGG's key performance deliverable.
38. Counsel for the Appellant submitted that the IGG acted outside her constitutional and statutory mandate to eliminate corruption and instead did a diametrically different and opposite act of promoting corruption. These actions by the IGG therefore breached Articles 6, 7, and 8 of the Treaty. He further argued that this was contrary to previous practice of the IGG like in the case of *Attorney General & IGG V Afric Coop Society Ltd SCCA No. 5 of 2012 and American Procurement Co. Ltd V Attorney General & IGG SCCA No. 35 of 2009* where the IGG despite

pressure to do so, did not waver on or change her recommendations and saved the GOU a lot of money.

Ejusdem generis rule and the interpretation of Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act

39. Counsel for the Appellant submitted that the Trial Court erred when it held
 "...it is our obligation to determine whether the letter of the IGG and legal opinion of the Attorney General infringed Treaty provisions. Sadly, the Applicant did not elaborate enough on that issue..."
40. Counsel for the Appellant pointed out that the Appellant as Applicant in the Trial Court had exhaustively elaborated the breaches of the MOU in his written submissions in paragraphs 3.11-3.29 of the Applicant's written submissions at page 625-721 of the Record of Appeal and paragraphs 7:10-7:21 of the Applicant's response to the Respondent's submissions. He argued that it is the Appellant's case, that the IGG was complicit to the theft of public funds when she wrote the impugned letter. He further submitted that there was no evidence to justify the turnabout in the impugned letter, apart from Attorney General's advice (dated 29th May, 2013) which was attached. It is this letter from the Attorney General which the IGG quoted from, before she reached her decision to forgive, exonerate or write off the USD 17,826,038.94. He argued that there was no legal basis for the IGG to heed the Attorney General's advice.
41. He further submitted that the Trial Court had erred when it decided that the IGG had and applied special powers conferred on her by the Constitution and the IGG Act to act independently and write the impugned letter and deem that the stolen funds had been recovered. He submitted that the Trial Court wrongly interpreted and referred to Article 230 of the Constitution and Section 14 of the IGG Act in reaching their decision. Article 230 of the Constitution provides
 "Article 230: Special powers of Inspectorate
 (1) The inspectorate of government shall have the power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office.
 (2) The Inspector General of Government may, during the course of his or her duties as a consequence of his or her findings, make such orders and give directions as are necessary and appropriate in the circumstances."
- (b) Sections 14(5) and (6) of the IGG Act (Act 5 of 2002) provides;
 "(5) The inspectorate shall have the powers to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or public office.
 (6) The Inspector General of Government may, during the course of his or her duties as a consequence of his or her findings, make such orders and give directions as are necessary and appropriate in the circumstances..."
42. He argued that the orders and directions the IGG is empowered to make, ought only to be as a consequence of her own findings; which in this dispute were those of her Report of December, 2011. However in the case of the impugned letter no

new investigations had been carried out before it was written and therefore the said letter could not, as the Trial Court had found, be a consequence of the IGG's findings. The IGG's role therefore ended when she issued her first Report.

43. Counsel for the Appellant referred the Court to the case of *Attorney General and IGG V Afric Coop (supra)* where the IGG also wrote two letters after the completion of the investigations but the second letter unlike the situation in this case restated and reiterated the initial Report Findings and Recommendations which the Court then upheld.
44. He argued that the impugned letter could not vary the Report of December, 2011 and it at best was a mere correspondence between the IGG and Ministry of Health. The finding therefore by the Trial Court that the impugned letter was protected by Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act was fundamentally wrong and an error of law.
45. Counsel for the Appellant further submitted that the Trial Court misinterpreted Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act when it gave the impression, that the IGG had discretionary powers to do anything within and outside the law. He argued that the Trial Court interpreted the contents of the IGG's letter of 8th July, 2013 as "...any order and direction that is necessary and appropriate in the circumstances". This interpretation he submitted was a form of *carte blanche* (open cheque). Counsel disagreed that this could not have been the intention of the Parliament to grant the IGG such wide and unfettered discretionary powers to be exercised by a person or body, contrary to the intent and purpose of the law. He submitted that such an interpretation would mean that the IGG could do any of the following:-
 - (a) Recover the USD 17,826,038.94 and use it for her own purposes e.g. her salary, buy an official car or go for treatment abroad;
 - (b) Recover the USD 17,826,038.94 and donate it to charity;
 - (c) Recover a portion and leave the balance;
 - (d) Recall her report and declare that there was no loss;
 - (e) Quash her report;
 - (f) Revise the report and make fresh findings and recommendations implicating another person..."
46. Counsel for the Appellant submitted that the IGG being an administrative tribunal or body meant that its Report and recommendations are an administrative decision and therefore all the investigations of the IGG had to comply with the rules of natural justice as well as fair and just treatment. He consequently asked the question whether the IGG could invoke Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act to deny a person who is adversely affected by his/her investigation a right to be heard by revising, reviewing, quashing or shelving a Report by the mere stroke of a pen? This Counsel for the Appellant answered in the negative.
47. Counsel for the Appellant further submitted that the IGG is accountable to the Parliament of Uganda under Article 231 of the Constitution and Sections 29 and 30 of the IGG Act whereby the IGG has to lay before Parliament once every six months a Report of what it had done. He argued that this meant that the IGG hands over whatever it had done in the last six months without change to Parliament for further action.

48. Counsel for the Appellant submitted that all of the above showed that the IGG's powers are circumscribed and that Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act do not give the IGG an open cheque of full discretionary powers to act outside the law especially so to write off the loss of money and deem it recovered. He argued that there was no criteria or basis shown for forgiving or otherwise deeming a recovery of the lost money. He pointed out that this arbitrariness results in abuse of power and authority as the enforcer of the law becomes the violator and abuser of the law. He argued that the office of the IGG is a symbol of good governance, the rule of law, transparency and accountability under the law and therefore could not at the same time be the violator and abuser of the same principles.
49. Finally on the issue of misinterpretation of Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act, Counsel for the Appellant submitted that the law is settled that no provision or word in a statute is to be read in isolation, but rather a statute has to be read as a whole and in its entirety. For this proposition he referred us to the case of *Reserve Case of India V Peerless General Finance & Investment Co. Ltd (1987)*, SCC 424 where the Court held
- “33. Interpretation must depend on the text and context. They are the bases of interpretation. One may well say if the text is the texture, texture is what gives the color. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrases and word by word. If a statute is looked at in the context of its enactment, with the clauses of the statute marker, provided by such context, its scheme, the sections, clauses, phrases words may take color and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything in its place..”
50. Counsel for the Appellant also submitted that the IGG having made her Report and recommendations as a result of which the Appellant was a whistleblower was entitled to 5% of the amounts recovered.
51. On estoppel, Counsel for the Appellant submitted that by reason of the express representations the IGG made as a result of the investigation, she was estopped from going against her word. He submitted that, the Appellant having relied on the express representations of the IGG that the USD 17,826,038.94 would be recovered and consequently he would get a 5% reward, then the doctrine of promissory estoppel applied, as explained in the case of *Collars v P & MY Wright (Holdings Ltd 2007) EWCA liv 1329 and Central London Property Ltd V High Trees Ltd (1947) KB 130*. He pointed out that the Appellant had suffered a detriment by losing his reward, which he called a statutory entitlement. He emphasized that this entitlement was a right conferred by law and could not be

taken away by any person without due process.

52. Counsel for the Appellant also raised the principle of *functus officio* and wondered how the IGG could re-open the investigations she had concluded and decide that the inspectorate deems the review and amendment of the original Memorandum of Understanding to be adequate implementation of all the recommendations in her original Report? He pointed out that the Ministry of Health as the line Ministry in charge of the National Medical Stores, had already tasked the said National Medical Stores to recover the lost funds in their letter dated 11th March, 2013 (at pages 406-432 of the Record of Appeal). It reads;

“The Minister of Health

Ministry Of Health Headquarters

Kampala

AUDITOR GENERAL’S REPORT REGARDING FINANCIAL STATEMENT OF NATIONAL MEDICAL STORES FOR THE YEAR ENDED 30th JUNE 2011

The Inspectorate of Government received and reviewed the Auditor General reports on the financial statements of National Medical Stores (NMS). Among others, it was noted that NMS procured ARVS and ACTS drugs from Quality Chemicals Industries Ltd (QCIL).

You may recall that the same finding was contained in our report Ref. RT.128/2010 dated 20th December, 2011. The report was addressed to His Excellency the President and copied the Hon. Minister of Health. Among others, the report recommended recovery of 17,826,038.94 being overpayment to QCIL by NMS see copy of the report attached. Therefore, this is to ask you to give us an update on the recovery that was recommended by this office. In addition, we urge you take appropriate action on the concerned NMS officials and inform us of action taken...”

53. Counsel for the Appellant referred us to the South African case of *Retail Motor Industry Organisation V Minister of Water & Environmental Affairs (143/13) [2013] ZASCA 70* where it was held that:-

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.

According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as general rule, exercise those powers only once in relation to the same matter... the result is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive.. Such a decision cannot be revoked or varied by the decision-maker...”

54. He referred us to the further authorities of *Ridge V Baldwin [1964] AC 40* and Stephen J Moloney: *Finality of Administrative Decisions & Decision of Statutory Tribunals* in AIAL Forum No 61.
55. Counsel for the Appellant therefore submitted that the IGG became *functus officio* after she submitted the Report to the President with a copy to the Appellant and could as a result not deal any further with the matter thereafter.
56. It is also the Appellant’s submission that the turnabout by the IGG is not an “appropriate action” envisaged under the Whistleblowers Protection Act and

was therefore done outside the law. Counsel for the Appellant submitted that anything done outside the law is a breach of the principles of good governance and rule of law. It further depicts lack of accountability and transparency. He referred us to the salient provisions of the Whistleblowers Protection Act 2010 which provides;

“Long Title

An Act to provide for the procedures by which individuals in both the private and public sector may in the public interest disclose information that relates to irregular, illegal or corrupt practices; to provide for the protection against victimization of persons who make disclosure.

Interpretation

In this Act, unless the context otherwise requires-

“authorized officer” means the Speaker of Parliament or Deputy Speaker of Parliament, the Executive Director of National Environment Management Authority in case of environmental issue, Resident District Commissioner, a Senior Ethics Officer with the Directorate of Ethics and Integrity, a Human Rights Commissioner with Uganda Human Rights Commission, the Director of Public Prosecutions, an Inspectorate Officer of the Inspectorate of Government, a police officer not below the Rank of Assistant Inspector of Police.

“disclosure” means any declaration of information made by a whistleblower with regard to the conduct of one or more persons where the whistleblower has reason to believe that the information given shows or tends to show one or more of the following-

- (a) That a criminal offence or other unlawful act has been committed, is being committed or is likely to be committed;
- (b) That a miscarriage of justice has occurred, is occurring or likely to occur;
- (c) That a person has failed, is failing or likely to fail to comply with any legal obligation to which that person is subject;
- (d) That any matter referred to in paragraphs (a) to (c) has been, is being or likely to be deliberately concealed.

“impropriety” means conduct which falls within any of the categories of definition of disclosure referred to in paragraphs (a) to (d) irrespective of whether or not-

- (a) The impropriety occurs or occurred in the Republic of Uganda or outside the Republic of Uganda; or
- (b) The law applying to the impropriety is that of the Republic of Uganda or outside the Republic of Uganda.

“protected disclosure” means a disclosure made to-

- (a) An authorized officer;
- (b) An employer;
- (c) A nominated disclosure officer.”

“whistleblower” means a person who makes a disclosure of impropriety under this Act...”

57. Counsel for the Appellant pointed out that the IGG is an authorised officer under the Whistleblowers Protection Act. He further pointed that the Whistleblowers Protection Act does not have wording similar to those found in Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act. He contested the holding that the Trial Court found that the IGG as an authorised officer is subject to Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act whereas other authorised officers under the Whistleblowers Protection Act are not. This in effect gave the IGG a special status under the Whistleblowers Protection Act to forgive wrong doers and write off lost funds. He argued that such an interpretation defeats the purpose and intention of the Whistleblowers Protection Act. He further argued that Section 8 of the Whistleblowers Protection Act provides that an authorised officer has to investigate a matter and then take “appropriate action”. In his view, appropriate action under the Whistleblowers Protection Act means a deliberate action which would motivate individuals to disclose and report illegal and corrupt practices and then get a reward of 5% of the amounts recovered under Section 19 of the same Act. Counsel for the Appellant submitted that deeming recovery of money that is stolen is an antithesis of the meaning of taking appropriate action required of an authorised officer under the Whistleblowers Protection Act. He pointed out that the Trial Court failed to interpret the meaning of appropriate action under the Whistleblowers Protection Act and instead considered the powers of the IGG under the Constitution and the IGG Act, which is an error in interpreting and applying the law. This by extension the foregoing amounted to a breach of the fundamental and operational principles of the Treaty.
58. Counsel for the Appellant further faults the IGG, for evaluating evidence from one side only, namely the opinion of the Attorney General yet there is no mandate under the Whistleblowers Protection Act for an authorised officer to consider the merits and demerits of recovery of money that had been discovered as stolen. He wondered whether the impugned letter under the Whistleblowers Protection Act would not be subject to judicial review by Court and if so whether this was not a breach of the rules of natural justice against the Appellant? Counsel for the Appellant submitted that recovery is a process and can only be done through due process; the evaluation of the merits and demerits of the said recovery is for the Courts or a tribunal established for that purpose, not the IGG.
59. Counsel for the Appellant further wondered whether in light of the unfettered discretion to make such orders and give directions as the IGG pleases it would also be proper for the whistleblower to withdraw his or her disclosure. He argued that this interpretation would be absurd as it would mean that an authorised officer and whistleblower could agree to terminate investigations and share “the loot” thereby commencing another circle of corruption. Such an action would lead to the plunder and pilferage of public funds and resources which, depicts arbitrary or bad governance, lack of accountability and transparency. In effect this would defeat the purpose of the Whistleblowers Protection Act and infringe the rule of law and good governance in breach of Articles 6 (d), 7 (2) and 8 (1) of the Treaty.
60. The Appellant then prayed that we find that the Trial Court erred when it found and decided issue No. 3 (at the Trial Court) in the negative i.e. that the contents of the IGG letter of the 8th July, 2013 did not breach Articles 6 (d), 7 (2) and 8 (1)

(c) of the Treaty.

The Respondent's submissions.

61. Counsel for the Respondent, submitted that the Appellant sought to convince this Court that the IGG's impugned letter (of the 8th July), was an unlawful review and amendment of the original MOU and hence a breach of Articles 6(d), 7 (2) and 8 (1) (c) of the Treaty. He in reply submitted that there was no breach of the Treaty provisions as alleged. He further submitted that the Attorney General received the recommendations in the IGG's original Report of 20th December 2011 on behalf of the Government of Uganda. He pointed out that the Attorney General considered the IGG's Report and came to the conclusion that no loss of money had occurred as alleged, which was communicated in two letters dated 12th April, 2012 and 27th May, 2013. In the letter dated 12th April, 2012, the Attorney General's Chambers was in the process of clearing the amended MOU for signature to vary the original MOU but the IGG asked that the clearance be stayed because of her ongoing investigation. In response to the request by the IGG to stay the signing of the MOU the Attorney General wrote:-

"...the IGG informally requested the Solicitor General to stay the Clearance for it is stated there was an on-going inquiry.

If the enquiry referred to be the one compromised in the report forwarded, there is no bar to this office clearing the draft Memorandum of Understanding.....

As long as you have not formally brought to our notice any wrong doing on the part of M/s Quality Chemicals Industries Limited, the current Memorandum of Understanding is cleared with the comments.

Your office can still go ahead with the investigation if you so wish".

62. In the letter of the 27th May 2013 (supra) the Attorney General made it clear that recovery of the USD 17,826,036.94 by court action was without basis and would be an exercise in futility.

63. Counsel for the Respondent, submitted that the Attorney General found that a mistake had been made by the IGG in the interpretation of the pricing of the drugs, which had led to the erroneous Findings that there was loss occasioned to the Government of Uganda whereas there was none. It was therefore not possible to recover funds that were in fact, not lost in the first place.

64. Counsel for the Respondent submitted that, both the IGG and the Attorney General acted within their legal mandates under the law and that it did not mean that the final outcome, not being what the Appellant wanted, was a breach of the Treaty. He strongly disagreed with submissions by Counsel for the Appellant, that the IGG "caved in" to the Attorney General's advice when there was in reality no battle between the two Government institutions.

65. Counsel for the Respondent submitted that the Appellant's understanding of the different roles of the IGG and the Attorney General, was fundamentally flawed. He pointed out that the Attorney General's office is a creature of Article 119 of the Constitution of Uganda clause 3 of which provides;

"The Attorney General shall be the principal legal advisor of the Government"

66. He further referred us to Article 119 (4) which lays out the functions of the

Attorney General and provides; “

- a) To give legal advice and legal services to the Government on any subject;
- b) To draw and pursue agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest;
- c) To represent the Government in court or many other legal proceedings to which the Government is a party; and
- d) To perform such other functions as may be assigned to him or her by the President or by law...”

67. Counsel for the Respondent also referred us to the case of *James Katabazi & 21 Others V Secretary General of the East African Community and Attorney General of Uganda EACJ Reference No. 1 of 2007* where it was held that ;

“...perhaps the most important application of the rule of law is the principle that government authority is legitimately exercised only in accordance with written law, publically disclosed laws, adopted and enforced with established procedural steps that are referred to as due process...when a government official acts pursuant to an express provision of a written law, he acts within the rule of law...”

68. Counsel for the Respondent submitted that, in giving his advice, the Attorney General acted within the written laws of Uganda and so any allegations to the contrary are baseless.

69. He agreed with Counsel for the Appellant that the IGG under Article 230 of the Constitution has the power to investigate, cause investigation in respect of cases involving corruption and abuse of authority or public office. He further agreed that the IGG, may during the course of his or her duties, or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances. He submitted that the IGG in carrying out her duties, does so independently and in support of this he cited the Ugandan High Court case of *Prime Contractors Limited V IGG & UNRA High Court Misc Cause No. 301 of 2013*. The IGG under the law does his or her work independently even though directed by the President. In such a situation the IGG may in the exercise of his or her discretion choose whether or not to investigate. This was the finding of the Constitutional Court of Uganda in the matter of *Jim Muhwezi & 3 Others V Attorney General and Another Constitutional Petition No 10 of 2008* where the Court held

“...The President did all these things in the impugned letter to the IGG. He like anyone else has the right to make a complaint to the IGG. It is the absolute right of the IGG to investigate and determine how to do it. Whether the President “directs” or “instructs” the IGG is in my opinion of no consequence since the Office of the IGG is independent and the IGG must take the decision independently whether to investigate and how to investigate. Article 99 vests the Executive authority of Uganda in the President. It is unlike a Head of State to write to his junior “requesting or begging” for his junior to carry out his duty. He will most likely use the terms of command like “direct”, “order” or “instruct”, even where the officer ordered, directed or instructed has powers under the constitution to choose to act or not to act. If the President directs the IGG to investigate

anyone and the IGG does it, the report made by the IGG does not become void merely because such words were used as long as the President does not interfere with the IGG's power to decide whether to investigate or not and how to do so..."

70. He argued that in this case the IGG's Recommendations to the Attorney General in their ordinary meaning were not a directive because she wrote
- "The Government of Uganda should consider recovery of the payments made above the 15% mark-up for drugs purchased from QCIL and payments for drugs from CIPLA at prices above CIPLA international prices which amount to US\$ 17,826,038.94 for drugs procured between December 2009 and October 2010 and subsequent procurements which have not been calculated under this investigation"
71. Counsel for the Respondent submitted that the said recommendation required the Government of Uganda to apply its mind to the option of recovery and then reach an appropriate conclusion. He further submitted that the Government was given the option to choose whether or not to recover the money. In this case the Government chose not to recover the money because it established that there had been no loss of money.
72. Counsel referred us to the Ugandan case of *Lawrence G. Nuwagira V Public Service Commission and Another High Court Miscellaneous Application No. 55 of 2009* where a District Service Commission was "Advised to consider" rescinding the appointment of an officer and re-advertised his post. The Court in that case interpreted the words "Advised to Consider" and held that they did not amount to a directive. He further argued that the Attorney General in his letter to the IGG dated 27th May 2013 stated that "...your office can still go ahead with the investigations if you so wish..." thus did not interfere with the work of the IGG.
73. Counsel for the Respondent submitted that the above notwithstanding, the legal opinion of the Attorney General must be accorded the highest respect by government, public institutions and their agents. For this proposition he referred us to the Ugandan Supreme Court decisions of *Hon. Theodore Ssekikubo and 4 Others V The Attorney General and 4 Others, Supreme Court Civil Appeal No.1 of 2015; Bank of Uganda V Banco Arabe Espanol, Civil Appeal No. 1 of 2001 and Gordon Sentiba and Others V IGG Civil Appeal No 6 of 2008*. Counsel submitted that the IGG did not act unlawfully when she agreed with the position of the Attorney General and therefore it would be "preposterous for the Appellant to allege that the IGG was in breach of the principles of good governance, rule of law, accountability and transparency contrary to the provisions of Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty".
74. Counsel for the Respondent disagreed with the Appellant's submissions that in writing the impugned letter of the 8th July 2013, the IGG was *functus officio*. He referred us to the Decision of The Hon. Justice Bart Katureebe (Justice of the Supreme Court of Uganda as he then was) in the case of *A.K.P.M. Lutaaya V The Attorney General Civil Reference No 1 of 2007* where he cited with approval the definition of *functus officio* found in the *Black's Law Dictionary 5th Edition* (page 606) as;
- i. A task performed;
 - ii. Having fulfilled the function, discharged the office, or accomplished the

purpose, and therefore of no further force or authority...”

75. Counsel for the Respondent submitted that the Appellant premised his assertion that the IGG was *functus officio* when she made her Report of the 20th December 2011 that he was entitled to a 5% reward with finality under the Whistleblower’s Act. Counsel disagreed with this position and submitted that at no point did the IGG’s Report “...create an unchallengeable entitlement to a 5% reward as the Appellant would like this Court to believe...”
76. He further argued that in this case there was no final Order made by Court for the receipt of the 5% reward and so there could be no recanting of such an Order. Counsel submitted that the Appellant was just disgruntled that he was not able to realize the 5% reward as he had hoped.
77. Counsel for the Respondent prayed that Court determines the first issue in the negative.

The Appellant’s replying submissions.

78. Counsel for the Appellant submitted that while the Appellant directed its submissions to show that the Trial Court’s Decision was made in error the Respondent on the other had sought to justify the Attorney General’s opinion that informed the IGG turnabout.
79. He argued that the fact that the IGG relied on the Attorney General’s opinion means that the Attorney General overruled the IGG and so the IGG cannot be said to have acted independently. He further argued that what happened in reality, was a conflict between the Findings and Recommendations of the IGG and that of the legal opinion of the Attorney General. He submitted that Court is being asked to determine the action of the IGG turning around on her earlier recommendations in the context of the Treaty provisions.
80. Counsel for the Appellant submitted that under Articles 225 and 230 of the Constitution and Section 14 of the IGG Act, the recommendations cannot be equated to mere advice and guidance as this would be contrary to the objective of fighting corruption. He argued that what the Attorney General and IGG did in their respective legal opinion and turnabout letters’ was to foster and promote corruption which is contrary to the act of adherence and observance of the rule of law and good governance.
81. Counsel for the Respondent further submitted that the Respondent misapplied the principle of *functus officio*. He disagreed that the IGG’s letter of 8th July, 2013 was the final decision of the IGG because the Whistleblowers Act was clear that the results of an investigation after a disclosure leads to a finding and recommendations of the IGG which has to be presented to Parliament within 6 months. This shows that it is the original recommendations of the IGG that were final.
82. Counsel for the Appellant reiterated that this issue be determined in affirmative and/ or in favour of the Appellant.

The Determination of the Court.

83. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue for which we are grateful.
84. The Appellant argued this issue very broadly, but at the core of it all is the

argument that, the IGG did not legally have the legal right/authority to write the impugned letter of 8th July 2013.

85. The main argument of the Appellant under this ground, is that the IGG having investigated the alleged breach of the MOU by QCIL and made recommendations that the loss of USD 17,826,036.94 to the Government of Uganda be recovered, she could not thereafter legally make a turnabout and discharge QCIL on the basis of the advice from the Attorney General that in fact there was no loss as originally found. The Appellant argued that under the law of Uganda, the IGG was an independent institution, and once it had made its decision and / or recommendations it had no legal power to review, appeal or revise the decision and / or recommendation. The Appellant argued that in writing the impugned letter the IGG acted outside her constitutional and statutory mandate; which was to eliminate and not promote corruption. It is here that the Trial Court erred when it found that the IGG had the discretion to change her opinion under Article 230 (2) and Section 14 (6) of the IGG Act. Counsel for the Appellant gives 6 reasons for this argument.
86. The first reason is that the law of Uganda does not give the IGG that broad and unfettered discretion as this would be contrary to the very intent and purpose of the law. Counsel for the Appellant argued that any decision taken by the IGG must be as a result of ;
- a) her investigations and findings; and
 - b) must be necessary and appropriate in the circumstances.
87. Counsel for the Appellant submitted that the impugned letter did not meet the above test.
88. Save for acknowledging the IGG's powers under Article 230 of the Constitution and Section 14 of the IGG Act, Counsel for the Respondent did not address this matter of the IGG's discretion under the said provisions of the law.
89. For us to address our minds to the matter of the IGG's discretion, it will be necessary for us to analyse Uganda's internal/domestic law. We are alive to the fact that this Court's jurisdiction is limited under Article 27 (1) of the Treaty to the interpretation and application of the Treaty. However this Court, on a number of occasions has made it clear that where in interpreting and/ or applying the Treaty in respect of compliance by a Partner State, then this Court will look at the domestic law of a Partner State, in the context of interpreting the Treaty. In the case of *Henry Kyarimpa V The Attorney General of Uganda Appeal No. 06 of 2014* this Court held as follows;
- “...Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the rule of law, it is this Court's inescapable duty to consider the internal law of such a Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty...”
90. We shall exercise our inescapable duty in relation to this dispute to address our mind to the law of Uganda as to the legal power of the IGG under the laws of Uganda.
91. The Trial Court found that the IGG under Article 230 of the Constitution and Section 14 (6) of the IGG Act, have similar wording in their titles, “Special Powers”. The operative words in the two pieces of law are that the IGG may:- “...

during the course of his or her duties or as a consequence of his or her findings make such orders and give such directions as are necessary and appropriate in the circumstances...”

92. Our understanding is that, it is this reference to the “special powers” of the IGG given by the Trial Court that the Appellant has interpreted to mean unfettered discretion. The phrase “special powers” of the IGG is lifted from the title of Article 230 of the Constitution (i.e. “Special Powers of inspectorate”). So it is the Constitution that clothes the IGG with special powers. The IGG Act also uses the same title to Section 14 of the Act. So the IGG Act re-echoes special powers given to the IGG in the Constitution and makes them statutory powers as well. Nowhere in its judgment does the Trial Court (in our reading) interpret or find that these special powers, amount to or give the IGG an unfettered discretion in the performance of her duties. That challenge by the Appellant, in our finding is clearly unfounded.
93. Counsel for the Appellant further submitted that such orders and directions given by the IGG must be a result of:-
 - a) her investigations and findings; and
 - b) must be necessary and appropriate in the circumstances.
94. Whereas the above analysis is partially correct, a more thorough reading of Article 230 (2) of the Constitution of Uganda and Section 14 (6) of the IGG reveals that the Appellant understated the provisions of the Constitution and the Act on this matter because they also provides that the IGG Act may make orders and give directions “...during the course of his or his her duties...”
95. It is therefore our further finding that both Article 230 of the Constitution and Section 14 of the IGG Act give the IGG, during the course of his or her duties, wide discretion to make such orders and give such directions as are necessary and appropriate in the circumstances of the case. The IGG therefore has a wide though not unfettered discretion to make orders and give directions under the above provisions of the law of Uganda.
96. The second reason given by the Appellant why the IGG could not write the impugned letter, is that the IGG is an administrative tribunal or body that has to comply with the rules of natural justice, which in this case the IGG did not. Counsel for the Appellant submitted that the IGG instead reversed, reviewed, quashed or shelved her Report of 20th December 2011 with “a mere stroke of a pen” thus adversely affecting the rights of the Appellant without a hearing. This Counsel submitted was illegal. It was argued that the IGG is accountable for her actions and must lay before Parliament once every six months a Report of what she has done for further action. The IGG therefore could not reverse herself with respect to the 20th December 2011 Report before laying it before Parliament for further action. Counsel for the Respondent again did not specifically respond to this reason.
97. There is no gainsaying that the right to be heard is a cardinal principle of the rule of law. In the case of *The Inspector General of Government V Gordon Sentiba and 3 Others MA 659 of 2007* it was held that;

“The Inspectorate of Government is a new feature in the governance of the country, first introduced by the NRM Government for the main purposes of ensuring strict adherence to the rule of law and principles of

natural justice in administration as well as the elimination of corruption, abuse of authority and of public office, amongst others...”

98. The question therefore we ask ourselves is whether the principle of the right to be heard, was breached by the IGG in reversing her position on the Report of the 20th December, 2011. We answer this in the negative for the following reasons. First, the Appellant is a complainant in this matter and not the subject of this investigation. It is therefore the person complained against in the investigation and not the complainant, who should not be condemned unheard. Secondly, it is not the Appellant’s rights and duties that were under scrutiny here. *Black’s Law Dictionary 8th Edition* at page 2109 defines a “hearing under administrative law” as; “... [a] proceeding in which a person’s rights and duties are decided after notice and an opportunity to be heard...”
99. There is no doubt in this matter that it was QCIL, whose rights and duties were to be decided upon and not the Appellant’s. We find therefore, that this right to be heard was misconceived.
100. The third reason which Appellant gave why the impugned letter could not be written was based on the legal principle of estoppel. Counsel for the Appellant submitted that the IGG was estopped from going against her word in the 20th December 2011 Report because the Appellant had relied on the express representation therein that the USD 17,826,038.94 would be recovered and that the Appellant would as a result get a reward of 5% of the money recovered. Counsel further submitted that the Appellant suffered detriment because of the IGG’s turnabout. This he argued amounted to promissory estoppel.
101. This was yet another area of argument that the Respondent did not directly address us on.
102. The legal doctrine of promissory estoppel was well espoused in the famous case of *Combe V Combe [1951] 2 KB 215* (which is discussed in detail the *High Trees case [supra]* cited to us by Counsel for the Appellant) where Denning LJ held and defined it thus;
- “where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. He must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word...”
- He further held that estoppel could be used as a “shield” and not a “sword”.
103. In this case can it be said that the Appellant is applying the doctrine of promissory estoppel as a shield? Certainly not. He is applying it as a sword against the IGG and therefore again misapplying the law in his favour, which we reject.
104. We also find that there was no legal relationship between the IGG and the Appellant and therefore no representation was made to him. We further find that there was no representation in the letter of the 20th December, 2011 that any sum of money would be recovered and that the Appellant would get a reward of

5% of the money recovered. The letter had only contained a recommendation to the Government to consider recovery. The IGG and AG could not guarantee the success of the recovery proceedings.

105. The fourth reason raised by the Appellant as to why the IGG could not write the impugned letter was based on the legal doctrine of *functus officio*. The Appellant argued that the IGG having written her Report and submitted it to the Government of Uganda, could not thereafter make a turnabout on her Decision. He gave the following reasons why the IGG was *functus officio*. First, that when the Appellant wrote to the IGG on the 22nd October 2012 requesting for payment of his reward, she replied on the 14th December 2012 saying she has no further role to play after the submitting the Report. She wrote as follows;

“...the role of the inspectorate of Government ended upon the issuance of the report to Government. The Inspectorate of Government therefore has no obligation and indeed no capacity and/or the resources to satisfy your claim...”

106. Secondly, whereas the Trial Court relied heavily on Article 230 (2) Constitution and Section 14 (6) of the IGG Act to reach its decision, there was no equivalent section in the Whistleblowers Protection Act, to forgive a wrong doer as that would defeat the very purpose of the Act. Thirdly, the reference to “appropriate action” in the context of the Whistleblowers Protection Act (Sections 8 and 18), meant referring the matter to Court to be determined on its merits. However in this case, the IGG instead went on to re-evaluate the evidence and do a turnabout for which there was no legal mandate under that Act.

107. Counsel for the Respondent disagreed that the principle of *functus officio* was applicable to this matter, because the 20th December 2011, Report did not bring about finality in the matter. He argued that the said IGG Report did not create in favour of the Appellant an unchallengeable entitlement to a 5% reward. There was no final order for the receipt of the 5% reward, so in effect there could be no turnabout on any such order.

108. We agree with the concise response of the Respondent on the principle of *functus officio*. The 20th December 2011 Report did not create any finality in the investigation as the money was yet to be recovered. The IGG took enormous pains, to explain this to the Appellant in her letter to him dated 14th December 2012. The IGG in that letter made it clear to the Appellant, what the legal position is under the Whistleblowers Protection Act, namely that a whistleblower could only be paid six months after the recovery of the money. In this case there had been and still there is no recovery of the said money. The IGG added that the claim for payment by the Appellant was not only premature “but also most probably misconceived”. We agree. Not only was the claim for payment misconceived, but also was the application of the principle of *functus officio*.

109. The fifth reason why the Appellant submitted that the impugned letter could not be written, was that the IGG heeded the advice of the Attorney General and yet there was no law for her to do so. Counsel for the Appellant argued that the IGG failed to assert her independence against the Attorney General like she had previously done in the reported case of *Attorney General and IGG V Afric Coop (supra)*. In so doing the IGG abetted in an action of corruption.

110. Counsel for the Respondent strongly disagreed with this argument and

submitted that the Offices of the IGG and the Attorney General were not in conflict with one another. Counsel argued that both institutions had acted within their legal mandate under the law. There could therefore be no breach of the law if both institutions acted within their mandates. He emphasised that Article 119 (3) of the Constitution provided that the Attorney General was the principal legal adviser of the Government. Counsel for the Respondent submitted that the 20th December 2011 Report did not amount to a directive by the IGG to the Government and the Attorney General in particular to recover the money. This is because the IGG in her letter used the words “Should Consider” which gave the Government some latitude as to what to do. He also argued that there was nothing unlawful with the IGG agreeing with the legal advice of the Attorney General.

111. Here again we agree with the concise response of Counsel for the Respondent on the relationship between the IGG and the Attorney General. We find that it is incorrect to state and insinuate that the Attorney General interfered with the independence of the IGG. Actually the Attorney General in his letter dated 12th April 2012, stated that the IGG could go on with the investigations into the complained matter, if she so wished. This to us does not reflect interference with the work of the IGG. Counsel for the Respondent submitted that the Courts in the case of *Bank of Uganda V Banco Arabe Espanol (supra)* held that the advice of the Attorney General should be accorded the highest respect by Government public institutions and their agents and that it would be preposterous to find that Respondent breached the Treaty by accepting the said advice. We agree with that submission. In this case we find no evidence that the Attorney General had exceeded his Constitutional mandate with regard to advising on this dispute.
112. The sixth reason why the Appellant submitted that the impugned letter could not be written, was that the IGG as an authorised officer under the Whistleblowers Protection Act, could not under that Act make a turnabout on her decision in the manner in which she did. He pointed out that this was because the wording under the said Whistleblowers Protection Act was different from the wording found under the Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act. Counsel for the Appellant argued that the Trial Court erred when it held that the IGG could make a turnabout in her decision under the Act whereas other authorised officers listed under the Whistleblowers Protection Act could not.
113. Counsel for the Appellant submitted that Section 8 of the Whistleblowers Protection Act provided that an authorised officer had to investigate a complaint and then take “appropriate action”. In his view, appropriate action meant, taking such action as would lead to recovery of lost money and thereby entitle the Appellant to a 5% reward under Section 19 of the Whistleblowers Protection Act. In this case the IGG in making a turnabout on her decision to recover the money, created an antitheses to the meaning of “appropriate action” and therefore this amounted to a breach of the fundamental and operational principles of the Treaty. He argued again that the IGG had no business evaluating the merits or demerits of a successful recovery of the lost money (especially so by only considering the opinion of the Attorney General) and this should have been left to the Courts of law.

114. Once again, the Respondent did not directly address us on this argument.

Section 8 (1) of the Whistleblowers Protection Act provides;

“... Where a disclosure of impropriety is made to a person specified under section 4, the authorised person shall investigate or cause an investigation into the matter and take appropriate action...”

115. There is not much legal commentary on the phrase “appropriate action” but to our minds, this means action that is befitting in the circumstances. Clearly this gives an authorised officer wide discretion to take such action as is befitting in the circumstances. However, does this mean that the authorised officer is limited to only taking such action as would lead to recovery of money? This we answer in the negative. An investigation into a disclosure of impropriety in our understanding is an investigation into an alleged impropriety. Such an investigation may lead to a finding that there is or is not an impropriety in fact. Even in this case, where there was a positive initial finding of an alleged impropriety, still further action may be required to confirm or corroborate that initial finding before a recovery could be made. All this in our finding, is part of the process of “taking appropriate” action. In this regard we further find that the Whistleblowers Protection Act with regard to the powers of the IGG is in conformity with Article 230 (2) of the Constitution and in *pari materia* with Section 14 (6) of the IGG Act to “make such orders and give directions as are appropriate in the circumstances”. That being the case we find that the Trial Court did not err in finding that the IGG as an authorised officer is still subject to Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act. The Whistleblowers Protection Act, therefore, did not bar the IGG from writing the impugned letter.

116. Before we take leave of this matter we need to address the issue that Counsel for the Respondent took exception to, when Counsel for the Appellant kept referring to the QCIL as a “thief” or to the funds as “stolen funds”. He argued that it was misleading to refer or say that the IGG “caught and then forgave the thief”. We agree that these words and phrases are misleading as there was no final finding that there was theft or that there was a thief. One cannot refer to these words and phrases as figures of speech, they were sensational and unfair to parties who had not been adjudged as such. Counsels to parties should stick to professional presentation of their cases and avoid sensational outbursts or dramatisation of their cases as these do not sway the Court in the discharge of its duty.

117. All in all, we find that the Appellant must fail in the first issue because even though he has raised not less than six distinct arguments why the IGG could not write the impugned letter, we find that she had the legal right to do so. In so writing the impugned letter she was within the law, she did not violate Ugandan law and furthermore did not violate the Treaty as alleged.

Issue No. 2: Whether or not the Hon. Learned Justices of the First Instance Division erred in Law when they failed to apply the principles of legitimate expectations in the context of the principle of good governance, rule of law, accountability and transparency in determining whether the contents and implication of inspector General of Government’s letter dated 8th July 2013

breached and infringed Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

118. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue.

Both Parties put up spirited arguments on the principle of legitimate expectation which, the Appellant believed had been denied him. It is indeed an interesting proposition. However, before we delve into whether the Appellant is correct or not in his assertion, we have to address what is a preliminary matter raised by the Counsel for the Respondent, that this is a new ground being raised on appeal. Indeed a reading of the Judgement of the Trial Court does not reveal a finding on the subject of legitimate expectation. Mindful of our jurisdiction as an Appellate Division under Article 35A of the Treaty and Rule 77 of the Rules of this Court (supra) we can only determine an appeal from “the Judgment or Order” of the Trial Court. In this matter, the issue of legitimate expectation was not pleaded (as per the Amended Reference dated 22nd March 2013) nor was it argued before the Trial Court. Consequently there is no judgment or order to appeal from the issue of legitimate expectation as a point of law. It is a departure from the Appellant’s original pleadings, which we cannot allow. This has been the clear position of this Court that new matters in a dispute cannot be introduced on appeal (*see Attorney General of Tanzania V Network for Animal Welfare Appeal No 3 of 2014*).

119. Furthermore, appeals are creatures of the law and indeed there were no appeals to this Court until the introduction of Article 35A to the *Treaty in 2007*. *Black’s Law Dictionary 9th Edition* at page 112 defines an appeal as;

“A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower Court’s or agency’s decision to a higher court for review and possible reversal ...Also termed petition in error...”

120. Appeals are therefore correctional in nature and not an opportunity for a party to take “a second bite at the pie”.

121. This ground presents nothing for this Court to reconsider, review or reverse. So we answer it in the negative

Issue No. 3: Whether or not the Hon. Learned Justices of Court of First Instance Division erred in Law when they declined to make a finding on and decide the issue of whether the inaction, refusal and / or failure by the Government of Uganda to recover US \$ 17,826,038.94 Dollars from Quality Chemicals Limited was a breach and an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

The Appellant’s submissions.

122. Counsel for the Appellant submitted that this issue arises from issue No. 5 in the Trial Court where it found as follows:-

“...This issue is a corollary of the two foregoing issues in so far as it cannot be read and interpreted in isolation. Once we have determined that there has been no violation of Articles 6 (d), 7 (2) and 8 (1) (c), then Issue No 5 is untenable...”

123. Counsel for the Appellant disagreed with the finding of the Trial Court and

argued that the refusal and/or inaction by the Government to implement the IGG's Recommendations to recover the USD 17,826,038.94 was a breach of the rule of law and good governance.

124. He further argued that the law requires that the IGG's orders and directions in whatever form or however called should be complied with. In this case the government, in his view, refused to implement the IGG's recommendations and instead caved in and made a complete turnabout resulting in the impugned letter of the 8th July, 2013.

With specific reference to the Whistleblowers Protection Act Counsel for the Appellant submitted that the said refusal or inaction to recover the lost money amounted to a denial of the legitimate expectation of the Appellant to receive the 5% reward. This refusal to recover the money meant that Government had reneged on its statutory duty to the detriment of the Appellant who expected to receive the reward.

In support of his submissions Counsel for the Appellant referred the Court to Section 35 (c) of the IGG Act which provides;

“A person who:

- a) ...
- b) ...
- c) Without reasonable excuse refuses or fails to comply with any order or direction of the inspectorate; or
- d)

Commits an offence...”

125. He further referred us to Section 37 of the same Act which provides;

“Any person who does any act with intent to frustrate or obstruct the discharge of the functions of the inspectorate, commits an offence and is liable on conviction to a fine not exceeding fifty currency points or imprisonment not exceeding twelve months or both...”

126. Counsel for the Appellant wondered that if non compliance with the orders and directions of the IGG attracts criminal sanctions, then what happened to the people in Government who refused to implement the IGG's recommendations? He further argued that since the refusal to implement the IGG's recommendations is a criminal offence, it followed that the refusal to implement such recommendations by Government or a Government agency is a breach of law and good governance.

He further argued that such a breach of law and good governance has a systematic effect on the whole infrastructure of the law and leads to anarchy. In support of this assertion Counsel referred us to the words of the US Supreme Court Justice Felix Frankfurter in the case of *United States V United Mine Workers of America (1947)* where he stated

“ in our country law is not a body of technicalities in keeping of specialist or in the services of any special interest. There can be no free society without law administered through an independent Judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law.

In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate Judicial tribunal, this court, beyond any other organ of sociality, is the trustee of law and charged with the duty of securing obedience to it."

127. Counsel for the Appellant prayed that we consider these arguments together with his submissions in respect of legitimate expectations and uphold this issue.

Respondent's submissions.

128. Counsel for the Respondent submitted that the Trial Court found that the IGG's letter dated 8th July 2013 did not breach or infringe Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty. It therefore followed that the action under the said letter also did not breach the provisions of the Treaty. There could be no inaction if the IGG did not breach the Treaty.

He argued that it would have been superfluous for the Trial Court to determine whether the inaction, refusal and/ or failure by the Government of Uganda to recover the US \$ 17,826,038.94 was a breach of Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty when there was in fact no loss as alleged.

129. Counsel for the Respondent prayed that this Court uphold the finding of the Trial Court on this issue.

The Appellant's replying submissions.

130. Counsel for the Appellant insisted that the legal opinion of the Attorney General overriding the IGG's Report clearly proved that there was inaction, refusal and failure by Government to recover the USD 17,826,038.94.

131. He argued that a legal opinion of the Attorney General, cannot overturn a finding of fact by the IGG. He pointed out that the Attorney General did not have evidence from parallel investigations on record to justify his opinion "reviewing, revisiting or re-evaluating" the facts found by the IGG.

132. Counsel for the Appellant consequently reiterated his earlier submissions that issue No 3. be determined in the affirmative and/ or in favour of the Appellant.

The Determination of the Court.

133. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue for which we are grateful.

134. A reading of this issue, to our minds shows that it is connected to the first issue on which we have already pronounced ourselves that the IGG did not breach the Treaty by writing the impugned letter. This issue is therefore duplicitous. We agree with the finding of the Trial Court when it held that;

"...This issue is a corollary of the two foregoing issues in so far as it cannot be read and interpreted in isolation. Once we have determined that there has been no violation of Articles 6 (d), 7 (2) and 8 (1) (c), then Issue No 5 is untenable..."

That being the case we answer this issue in the negative.

Issue No. 4: Whether or not the Learned Justices of the First Instance Division erred in Law when they decided that the Appellant is not entitled to the relief's

and remedies sought in the Reference against the Respondent.

The Appellant's submissions.

135. Counsel for the Appellant submitted that the Appellant sought the reliefs as laid out in paragraphs 4.1, 4.2, 4.3 and 4.4 (reproduced in detail supra) of the Amended Statement of Reference. He submitted that this Court has the jurisdiction and mandate to interpret the provisions of the Treaty and also to enforce compliance of the Treaty against a Partner State as provided for under Article 23 (1) which states;
- “...The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty...”
136. He further argued that it is a State obligation to adhere to the principles of rule of law, good governance, democracy, accountability and transparency. Where a Partner State is found to have breached the aforesaid principles, the Court is empowered to ensure compliance by reversing them i.e. to right the wrong.
137. Counsel for the Appellant submitted that the Appellant has shown that he was personally aggrieved as a whistleblower when his disclosure of impropriety was initially upheld by the IGG entitling him to a reward of 5% but later the IGG deemed the lost money recovered thus denying him his reward.
138. The Appellant prayed that all his prayers for relief be granted and that he also be awarded costs for pursuing the appeal.

The Respondent's submissions.

139. Counsel for the Respondent submitted that the Appellant is not entitled to any of the remedies sought in his Reference as the Respondent has clearly demonstrated that all actions of the IGG and the Attorney General were within the provisions of the law.
140. Counsel for the Respondent agreed with the Trial Court that it could not make an adverse finding against QCIL to pay the USD 17,826,038.94 without hearing its side of the story as would go against the principles of natural justice.
141. As to costs, Counsel for the Respondent submitted that cost should be awarded to the Respondent because Rule 111 (1) of the East African Court of Justice Rules provides that;
- “...costs in any proceedings shall follow the event unless the Court shall for good reason otherwise order...”
- He finally submitted that this appeal be dismissed with costs.

The Appellant's replying submissions.

142. Counsel for the Appellant reiterated his earlier submissions that issue No 4. be determined in the affirmative and/ or in favour of the Appellant and he be granted all the reliefs prayed for.

The Determination of the Court.

143. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue for which we are grateful.
- None of the grounds in this Appeal have been successful and therefore the

Appellant is not entitled to any of the reliefs and remedies as prayed for under the Amended Reference. We cannot fault the Decision of the Trial Court and accordingly uphold it in its entirety.

Conclusion.

145. The foregoing being our findings and holdings, we accordingly dismiss this Appeal with costs to the Respondent.

We so Order.

M. Mbabazi Counsel for the Appellant

G. Karemera, G. Arinaitwe, B. Ojambo for the Respondent

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Appellate Division

Appeal No. 4 of 2015**Simon Peter Ochieng & John Tusiime v Attorney General of the Republic of Uganda**

Appeal from the Judgment of the First Instance Division: Mugenyi, PJ; Lenaola, DPJ and Jundu, J dated 7th August 2015 in Reference No. 11 of 2013, [2012-2015] EACJLR, 361

Coram: E. Ugirashebuja, P; L. Nkurunziza, VP; E. Rutakangwa, A. Ringera and G. Kiryabwire, JJA.

November 24, 2016

Requisite standard of an appeal - Appeal is not a de novo rehearing of facts and law - Errors of law must be explained - Whether submissions demonstrated how alleged errors resulted in miscarriage of justice

Article 35A of the Treaty - Rules 40 (1), 77 EACJ Rules of Procedure, 2013

The Appellants instituted a Reference in 2013 against the Attorney General of Uganda, as legal representative of the Republic of Uganda, complaining *inter alia* that there were long standing vacancies in the High Court, the Court of Appeal and the Supreme Court of Uganda that had not been filled due to the President of Uganda's refusal to appoint Judges as required by the laws of Uganda. This they averred was an illegality under the EAC Treaty.

While the Trial Court found that it had jurisdiction over the subject matter, it held that: no evidence had been adduced to prove that the President of Uganda had refused to effect the alleged judicial appointments; and that the attempt by the Appellants to depart from the content of the Reference by introducing new issues concerning the omissions of the Judicial Service Commission instead of focusing on the inactions of the President was contrary to Rule 40 (1) of the Court's Rules of Procedure, 2013. Hence the case was dismissed.

On appeal, the Appellant alleged that the Trial Court erred in law: by holding that the President had not arbitrarily refused to appoint judges in the High Court, the Court of Appeal and the Supreme Court of Uganda as required by law and in breach of the Treaty. The Respondents submitted that the issue of refusal by the Judicial Service Commission to forward names to the President as recommended was never raised in the Applicants' pleadings and that it amounted to a departure from Pleadings contrary to Rules 37(1) and 40(1) of the Rules of the Court.

Held:

1. This Court is not tasked to undertake a rehearing *de novo* of questions of fact and law examined by the First Instance Division. The right to appeal to the Appellate Division is restricted to the extent that the appeal falls within the scope of Article 35A. The said Article and Rule 77 of the Court's Rules of Procedure, 2013, set out the conditions precedent for an Appeal to be properly brought before this Court. The condition *sine qua non* in this provision is that a party bringing an

Appeal has to establish either: points of law; grounds of lack of jurisdiction; or procedural irregularity. An Appeal brought before this Court outside the scope created by these provisions is without merit and is untenable.

2. A Party alleging whatever error must explain what the alleged error is and how it leads to a miscarriage of justice. In the instant Appeal, it is up to the Appellants who are alleging an error of law occasioned by the Trial Court to identify, establish and explain what the alleged error of law is and how it invalidates the impugned decision.
3. The fact that a losing party does not like the verdict of the Trial Court is not in itself enough to sustain an appeal since the appeal is restricted to specific issues. To meet the standard required by Article 35A of the Treaty, Counsel for the Appellants had to demonstrate in his submissions that the Trial Court committed errors of law or procedural irregularities or lacked jurisdiction. The Appellant merely reiterated verbatim the submissions and arguments he made in the Trial Court. These had nothing to do with point of law involved nor was it shown what legally undermined the Judgment of the Trial Court. Counsel for the Appellant did not direct his mind to the legal conditions created by Article 35A of the Treaty. Counsel failed to meet the rigorous standards in presentation of his submissions due to many manifest insufficiencies. Therefore, the Court rejects the submissions and dismisses the Appeal.

Cases cited

Angella Amudo v The Secretary General of EAC [2012-2015] EACJLR 592, Appeal No. 4 of 2014

Bittamann v ASIC (No.2) [2006] FCA

The AG of URT v African Network for Animal Welfare [2012-2015] EACJLR 573, Appeal No. 3 of 2011

Trevor Price & Anor v Raymond Kelsal [1957] EA 752,

Wynn Jones Mbwambo v Waadoa Petro Aaron [1966] EA 241

JUDGMENT

A. Introduction

1. This is an Appeal against the Judgment of the First Instance Division of this Court (hereinafter referred to as “the Trial Court”) dated 7th August 2015 arising out of Reference No. 11 of 2013, by which the Trial Court dismissed the Reference and held that each Party shall bear his own costs.
2. The Appellants sued the Attorney General of Uganda in his capacity as legal representative of the Republic of Uganda (“Uganda”) before the Trial Court seeking for declarations that the Respondent contravened the Treaty for the Establishment of the East African Community (“the Treaty”), especially Articles 6(d) and 7 (2) of the Treaty that enjoins the Partner States to abide by the rule of law.
3. In bringing the suit before the Trial Court, the Appellant relied on the requirement dictated by the principle of separation of powers. In a democratic society, it is the function of the Judiciary, as separated from the other branches of the government, to interpret the legal rights and duties in accordance with the law. They [Appellants] contended that the executive arm of Uganda exceeded its powers in effecting appointment of judges of the High Court, Court of Appeal and the Supreme Court.
4. To put our input on the importance of the doctrine of separation of powers which is in play in this Appeal, let us quote Professor Hammond who said: “The

most insidious enemy of [the] doctrine [of separation of powers] is excess. The doctrine depends upon the three branches of government understanding their respective spheres, and not exceeding them, or at least not exceeding them in a gross or continuous way”: See “*The Judiciary and the Executive*” (1991) 1 Journal of Judicial Administration, p. 88 at p. 90.

5. The legal system in Uganda recognizes the content of the above quotation. In that regard, the Constitution of Uganda in Articles 130 (b) and 134 (1) makes it clear in providing that the number of justices shall be as by law established, on the strength of which, the Appellants believed that the President of Uganda had to expedite appointments in order to avoid undermining the day to day judicial and administrative functions of the Uganda Judiciary.
6. The Appellants were both in this Division and in the Trial Court represented by Mr. Ladislaus Rwakafuuzi, (Learned Counsel) and the Respondent by Ms. Christine Kaahwa, (Learned Principal State Attorney) assisted by Ms. Claire Kukunda, (State Attorney) and Mr. Jimmy Oburu (Principal State Attorney) from the Attorney General’s Chambers of Uganda.

B. Background

7. Before the filing of the Reference in the Trial Court on 23rd of December 2013, the Appellants were concerned with long standing vacancies in the Judiciary of Uganda especially in the High Court, the Court of Appeal and the Supreme Court of Uganda.
8. As a result, the Applicants [now the Appellants] instituted before the Trial Court a case against the Attorney General of Uganda in Reference No. 11 of 2013 complaining *inter alia* that the President of Uganda had refused to appoint Judges as required by the laws of Uganda.
9. At the Trial Court, 4 Issues for determination were raised namely:
 - Issue No. 1. Whether the Reference raised a matter for interpretation by this Court pursuant to Article 30 of the Treaty?
 - Issue No. 2. Whether the Parliament of Uganda has ever resolved to increase the number of High Court Judges to 82 and if so, whether the President of the Republic of Uganda, (“the President”) had refused to appoint Judges of the High Court as prescribed by the Parliament and recommended by the Judicial Service Commission?
 - Issue No. 3. Whether the President has declined to appoint Judges of the Court of Appeal and Supreme Court as prescribed by the laws of Uganda?
 - Issue No. 4. Whether the alleged refusal of the President to appoint Judges is a breach of Articles 6(d) and 7(2) of the Treaty?
10. The Trial Court determined all the four Issues as raised. On the first Issue, the Trial Court found that it had jurisdiction over the subject matter before it. The Trial Court was satisfied that the Reference did raise complaints of illegality and infringement of Treaty provisions by the Respondent, as well as matters for interpretation by this Court and finally, resolved Issue No. 1. in the affirmative. On Issue No 2, The Trial Court found that the Applicants, contrary to Rule 40 (1) of the East African Court Justice Rules of Procedure, 2013 (“the Rules”) which expressly prohibits the Parties’ departure from the pleadings, attempted to depart from the content of the Reference by introducing omissions by the Judicial

Service Commission instead of Inactions of the President that were pleaded. The Counsel for Applicants [now the Appellants] conceded that there had been a departure from the pleadings and as a result, the Trial Court answered Issue No.2 in the Negative.

On Issues No.3 and No.4, the Trial Court found that there was no evidence adduced to prove that the President had refused to effect the alleged judicial appointments. “The Trial Court did not deem it necessary to delve into the question as to whether or not the unproven refusal did in fact manifest the specific violations complained of therein” (sic).

Consequently, the Trial Court declined to grant all the Declarations sought by the Applicants.

11. As to costs, the Trial Court noted that although costs were prayed for by the Applicants, they were never in issue in the Joint Scheduling Memorandum agreed upon by both Parties. In addition, the Trial Court took the view that the Reference did clarify issues of public interest and resolved to be guided by the jurisprudence of this Court which is that each Party bears his own costs in a suit grounded on issues of broad public interest. In the end, the Trial Court dismissed the Reference and ordered each Party to bear his own costs.
12. Dissatisfied by the Judgment of the Trial Court, the Applicants [now the Appellants] appealed to this Appellate Division in this Appeal No.4 of 2015 (“the Appeal”).

C. The Appeal

13. The Appellants raised seven grounds of Appeal namely:
 1. That the learned Justices of the First Instance Division erred in law and fact when they found that there was no resolution of the Parliament of Uganda increasing the number of the High Court Judges from 50 to 82.
 2. That the learned Justices of the First Instance Division erred in law when they found that the Appellants had departed from their pleadings when (Appellant) submitted that Refusal or failure by the Judicial Service Commission to recommend to the President Judges for appointment to the High Court Bench amounted to refusal by the Government to appoint Judges and therefore a violation of the Treaty for the East African Community.
 3. That the learned Justices of the First Instance Division erred in law and fact when they found that the increase of the number of High Court Judges from 50 to 52 and proposed 68 was outside the law because no resolution of Parliament indeed existed.
 4. That the learned Justices of the First Instance Division erred in law when they failed to find that requirements of certificates of financial implications are legally provided and not mere administrative tools in the hands of government to regulate the internal functioning of the central administrative unit.
 5. That the learned Justices of the First Instance Division erred in law when they held that the omission to appoint the Judges provided for by law was due to financial constraints.
 6. That the learned Justices of the First Instance Division erred in law when

they held that the President's failure to appoint Judges by the date of the Judgment of the Court, was due to pre-appointment due diligence checks which was not limited in time by law.

7. That the learned Justices of the First Instance Division erred in law when they held that there was no evidence that the President had refused to appoint Judges of the Court of Appeal and Supreme Court as pleaded by the Applicants, and that violation of the Treaty had not been proved.
14. The Appellants further prayed that the Court grants the following orders:
1. To allow the Appeal,
 2. To set aside the Judgment of the First Instance Division,
 3. To give Judgment to the effect that the government of Uganda Refused to appoint judges as per the laws of Uganda and thereby violated the EAC Treaty in Art 6(d) and 7(2), and
 4. To award costs of both Courts to the Appellants.
15. At the Scheduling Conference of the Appeal held on 11th May 2016, the seven grounds of Appeal were consolidated into three substantive Issues namely:
- Issue No 1. Whether the Trial Court erred in law in finding that the President had not arbitrarily refused to appoint judges of the High Court, Court of Appeal and Supreme Court of Uganda as required by law and consequently the actions of the President were not arbitrary or in breach of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community?
- Issue No.2. Whether the First Instance Division erred in law in finding that the matter for refusal by the Judicial Service Commission of Uganda to recommend Judges for Appointment by the President was a departure from the Appellants' pleadings.
- Issue No. 3. What remedies are the Parties entitled to?
16. After the Scheduling Conference, the Parties filed their Written Submissions. On 17th August 2016, both Parties appeared before this Court and highlighted their Written Submissions. Mr. Rwakafuuzi, Counsel for the Appellants, informed the Court that after having consultation with the Respondent, he conceded on Issue No. 2, namely, "Whether the First Instance Division erred in law in finding that the matter for refusal by the Judicial Service Commission of Uganda to recommend Judges for Appointment by the President was a departure from the Appellants' pleadings" and accordingly abandoned this particular ground of complaint.

D. Court's Determination.

17. Having carefully read the Submissions of the Parties and after having taken cognizance of the concession by Counsel for the Appellants on Issue No. 2, the remaining substantive issues for our consideration are only two, namely:
- Issue No 1. Whether the Trial Court erred in law in finding that the President had not arbitrarily refused to appoint judges of the High Court, Court of Appeal and Supreme Court of Uganda as required by law and consequently the actions of the President were not arbitrary or in breach of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community? And Issue No. 2. What remedies the Parties are entitled to?

18. It is not the practice of this Court to cite verbatim the entirety of Written Submissions. However, the nature of the Appellants' Written Submissions necessitates the citation of them since the Court will review whether the Appeal fulfils the criteria established in Article 35A of the Treaty for instituting an appeal.

19. The Appellants' Submissions as presented by their Counsel in the instant Appeal are as follows:

“These Submissions shall be limited to traversing findings of law that the Appellant contend are misdirections. Otherwise, the Appellants reiterate their Submissions in the lower court.

Their Lordships in the Court below held that the requirement for financial implications is a tool by the Executive to regulate the internal functioning of the central administrative hierarchy. That where the Executive imposes a requirement for the certificate of financial implications, it is acting within the Ugandan legislative framework and therefore acting in accordance with the Law. It is posited there for the Appellant in relation to the appointment of Justices of the Court of Appeal and Supreme Court, Articles 134 (1) and 130(b) of the Constitution of the Republic of Uganda respectively provide that the number of the justices shall be as by law prescribed. The Judicature Act was amended to provide for the increase of the number of judges as pleaded. However, even before the Judicature Act could be amended, it was the requirement of the Budget Act, 2001 S.10 that:-

“Every Bill introduced in Parliament shall be accompanied by its indicative financial implications if any, on revenue and expenditure over the period of not less than two years after its coming into force.”

Therefore by the time the bill seeking to amend the Judicature Act to increase the number of Justices of the Court of Appeal and Supreme Court had been published the finances that would support the increased number of Judges had been provided. Therefore it should not be said that the Judges could not be appointed because of lack of finances.

Secondly, by the time the Reference was filed, as it was pleaded, the Supreme Court had only 6 Judges instead of 11. And the Chief Justice's place was vacant. Since the Chief Justice position had always existed, it was erroneous for the lower Court to hold that appointing a Chief Justice required extra resources.

The position of Chief Justice continued to be vacant even at the time of hearing of the Reference in April 2015, and yet the Judicial Service Commission had confirmed as early as November 2013 that the President had been forwarded names to appoint a Chief Justice inter alia. What does the presidential silence be token? Only refusal. The Court below erred to have found that the President did not refuse to appoint Judges of the Court of Appeal and Supreme Court.

Their Lordships in the lower Court also held that the President was entitled to make consultations before appointment. This holding is a misdirection. As it was pleaded, by the time the Reference was filed in December 2013, the Supreme Court and the Court of Appeal had 6 and

11 Judges respectively. This situation continued to obtain even on the date of hearing, more than a year later. How can consultation take so long, especially in light of the fact that the President is obliged to appoint only the names that are recommended to him. There was no evidence from the Judicial Service Commission that the President had referred the names back to them. It only means that he refused and therefore exercised a discretion he does not have thus acting arbitrarily in utter abuse of power, contrary to the dictates of Art. 6 (d) & 7 (2) of the Treaty.

Their Lordships cited the principle of legality enunciated in *Halsbury's Laws of England 4th Edn VOL 1 page 5* thus:

“the Executive does not enjoy a general or inherent rule-making or regulatory power except in relation to internal functioning of the central administration hierarchy... nor in general, can state necessity be relied on to support the existence of power or duty or justify deviations from lawful authority”.

Therefore the certificate of financial implication if made a requirement for appointment of a judge or judges of the Supreme Court would amount to imposing a duty so as to justify deviation from lawful Authority. Parliament can only pass any law after obtaining a certificate of financial implication from the Executive. Once the law, in this case the Judicature Act is in place requiring increased of the number of judges, of Supreme Court and Court of Appeal, further certificates of financial implications for appointment of individual Judges, amounts to imposing a duty to justify deviation from a statutory requirement.

Therefore their Lordships erred to have held that the executive was entitled to impose the requirement of certificate of financial implication before appointment of judges of the Supreme Court and Court of Appeal.

The Appellants adopt their arguments in the Court below.”

20. As if taking a cue from Counsel for the Appellants, Counsel for the Respondent reiterated her earlier Submissions in the Trial Court as well on the substantive Issue No. 1. On dropped Issue No. 2., Counsel for the Respondent had little to say and referred this Court to paragraphs 32- 37 of the Trial Court Judgment where the Trial Court found the Issue of refusal by the Judicial Service Commission to forward names to the President as recommendation was never raised in the Applicants’ [now Appellants] pleadings and that it amounted to a departure from Pleadings contrary to Rules 37(1) and 40(1) of the Rules of the Court. This was conceded by the Counsel for the Appellants.
21. The way Counsel for the Appellants has presented the submissions does not bring the Appellants’ Appeal within the scope of Article 35A of the Treaty read together with Rule 77 of the Rules of the Court which constitute the legal basis for an Appeal to be instituted before this Court. For sake of clarity, Article 35A reads 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;
- (c) procedural irregularity.”

Rule 77 of the Rules of the Court echoes the same by providing that:

“An Appeal from the judgment or any order of the First Instance Division shall lie to the Appellate Division on:

- (a) points of law;
- (b) grounds of lack of jurisdiction;
- (c) procedural irregularity.”

22. The above two provisions set conditions precedent for an Appeal to be properly brought before this Court. The condition *sine qua non* under the above provisions is that, a party bringing an Appeal has to establish either “points of law”, “grounds of lack of jurisdiction” or “procedural irregularity”.
23. An Appeal brought before this Court outside the scope created by the above relevant provisions is certainly without merit and is untenable.
24. In the instant Appeal, the Appellant has produced three pages of Written Submissions (see Para. 19 of this Judgment) supporting the Issues raised during the Scheduling Conference. In one way or another, the Counsel for the Appellants reiterated the Submissions and arguments he made in the lower Court (page 2 and 3 of his Written Submissions dated 5th June 2016, as reflected in paragraph 19 of this Judgment).
25. Under Article 35A of the Treaty above quoted, a Party alleging an error of law, a ground of lack of jurisdiction or a procedural irregularity, must advance argument in support of his allegations. This was also reiterated in the case of *Prosecutor v Mitar Vasiljvic, ICTY, App Ch. Case No. IT-98-32-A/ 25 Feb. 2004*. “ICTY case”: in which the Appeal Chamber of ICTY held that a party alleging that there is an error of law must advance argument in support of the contention and explain how the error invalidates the decision...
26. Litigants should bear in mind that this Court is not tasked to undertake a rehearing *de novo* of questions of fact and law examined by the First Instance Division. The right to appeal to the Appellate Division is restricted to the extent that the appeal falls within the scope of Article 35A. As per the Article, the Judgment of the Trial Court can be challenged on the following grounds: the Trial Court’s findings on question of law, grounds of lack of jurisdiction or procedural irregularity.
27. In *Bittamann V ASIC (No.2) [2006] FCA*, it was held that “the Court has power to strike out a notice of Appeal... where the notice does not state a question of law”.
28. Taking into account the above, the Submissions of Counsel for the Appellants premised on the arguments produced in the Trial Court, it is obvious, even on the basis of the introduction “these Submissions shall be limited to the findings of the law that the Appellants contend are misdirections. Otherwise, the Appellants reiterate their Submissions in the lower Court...”, that nothing in them meets the requirements of Article 35A of the Treaty or the standard of the jurisprudence of this Court in Appeal matters.
29. It is trite that “he who alleges must prove”. In that regard, a Party alleging whatever error must explain what the alleged error is and how it leads to a miscarriage of justice. Equally, in the instant Appeal, it is up to the Appellants who are alleging an error of law occasioned by the Trial Court to identify, establish and explain what the alleged error of law is and how it invalidates the impugned decision.

30. In light of the above, the Submissions of Mr. Rwakafuuzi, Counsel for the Appellants, allegedly produced to support the error occasioned by the Trial Court as per Issue No 1. have nothing to do with point of law involved nor did he legally show what can undermine the Judgment of the Trial Court. Instead of establishing the legal requirement enunciated above and which gives effect to the application of the provision of 35A of the Treaty, the Counsel for the Appellants gives a reproduction *in verbatim* of the facts as submitted in the Trial Court. That, as matter of principle, cannot be deemed to meet the legal requirement dictated by Article 35A of the Treaty. The rationale is simple. Counsel could not have known and made any Submissions on errors committed by the Trial Court before it rendered its Judgment.
31. Counsel for the Appellant did not direct his mind to the legal conditions created by Article 35A of the Treaty in order to avoid Submissions which are not compatible with the substantive requirements and the standards of our established jurisprudence on appeals.
32. It is not at the Appellate Division where the appellant establishes facts as if this Division is exercising original jurisdiction in this matter. Reproduction of facts as presented in Trial Court does not help the Appellants to make tenable an Appeal before this Division.
33. In light of the above, we recall that the Trial Court in its Judgment, made it clear that “...the Applicants [now the Appellants] did not adduce cogent and credible evidence to establish a refusal by the President in effecting judicial appointments...”
34. The basis of dismissal in the Trial Court was solely on matters of fact; therefore, this renders the Appeal incompetent and untenable pursuant to the provision of Article 35A of the Treaty read together with Rule 77 of the Rules of the Court and the established jurisprudence of this Court.
35. The fact that a losing party does not like the verdict of the Trial Court is not in itself enough to sustain an appeal since the Appeal to the Appellate Division of this Court is restricted as we discussed above. To meet the standard required by Article 35A of the Treaty, the Counsel for the Appellant had for example to demonstrate in his Submissions that the Trial Court committed errors of law or procedural irregularities or lacked jurisdiction. For that, we recall our decision in *Angella Amudo v. the Secretary General of the East African Community [EAC] Appeal No. 4 of 2014* that “a court commits an error of law or procedural error when it:-
- (a) misapprehends the nature, quality and substance of evidence: See, for instance *Peters v. Sunday Post (1959) EA 424*; *Ludovick Sebastian v. R, (CAT) Criminal Appeal No. 318 of 2007 (unreported)*;
 - (b) draws wrong inferences from the proven facts: see, *Trevor Price & Another v. Raymond Kelsal [1957] EA 752*, *Wynn Jones Mbwambo v. Waadoa Petro Aaron [1966] EA 241*; or
 - (c) acts irregularly in the conduct of the 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, ignores a party’s pleadings, etc.: see, *Attorney General of the United Republic of Tanzania v. ANAW” [EACJ] Appeal No. 3 of 2011*.

36. This Court is not persuaded that the Counsel for the Appellants pointed out an error of law or procedural error as elaborated in the above case law.
37. It was strange that even during the highlighting of the Written Submissions at the hearing, Counsel for the Appellants did not address the Court on Issues as agreed during the Scheduling Conference. He was many times asked to tell the Court what specific Issue he was submitting on, because there was no correlation between his arguments and the Issues, as illustrated in the Record of hearing.
38. In the analysis of the Appellants' Counsel's Submissions in the Appeal under scrutiny, we agree with the observation of The ICTY case (*supra*) that "the Appeal Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies..." The Court went further and held *inter alia* that... "the arguments are dismissed because the Appellant fails to make submissions as to how the alleged error led to the miscarriage of justice and that the appellant has not demonstrated that no reasonable trier of fact could have made this finding..."
39. We are persuaded by the above reasoning and we would borrow from it and find that the Appellants did not succeed in discharging their duty as per law and practice established. Their Counsel failed to meet the rigorous standards in presentation of his Submissions due to many manifest insufficiencies. Therefore, this Court is duty bound to reject the Submissions and dismiss the Appeal.

E. Conclusion

40. It is obvious to us that in the instant case, the Counsel for the Appellants failed to establish what the alleged errors of law were committed by the Trial Court in its determination of the Reference before it when it held that the President did not arbitrarily refuse to appoint the Judges and Justices in Uganda Judiciary. We therefore, find the Appeal, manifestly wanting in merit and it is hereby dismissed.
41. On the Issue of costs, we recall that it is our established jurisprudence that this Court has consistently exercised its discretion not to award costs in litigation involving public interest. The same reasoning will be applied in the instant Appeal.
42. Each Party shall bear his own costs both in this Division and the First Instance Division.

It is so ordered.

L. Rwakafuuzi Counsel for the Appellant

C. Kaahwa, C. Kukunda & J. Oburu for the Respondent

Appellate Division

Appeal No. 7 of 2015**The Secretary General of the East African Community v Rt. Hon. Margaret Zziwa**

Appeal from the Ruling and Order of the First Instance Division: Mugenyi, P. J, I. Lenaola, DPJ, F. Ntezilyayo, F. A. Jundu and A. Ngiye, JJ dated 6th November, 2015 in Reference No. 17 of 2015 [2012-2015] EACJLR, 499

Coram: E. Ugirashebuja, P.; L. Nkurunziza, V.P; E. Rutakangwa, A. Ringera, and G. Kiryabwire, JJ.A
May 27, 2016

Procedural irregularity - Whether a real preliminary objection was raised in the Trial Court- Whether privileged evidence was admissible - Pleadings differ from evidence - Record of Appeal - Orders distinguished from judgments and decrees- Procedural propriety on interlocutory decisions - Decisions of Partner States' highest courts merely persuasive

Article 35A of the Treaty - Rules: 1 (2), 41(1), 69, 88(1)111 (1), 114 EACJ Rules of Procedure, 2013 - Section 20(1) EALA (Powers and Privileges) Act, 2003

In 2015, the Respondent (the then Applicant) filed a Reference complaining about actions and decisions of East African Legislative Assembly (EALA) and its Committee on Legal Rules and Privileges which had led investigations resulting in her impeachment as the Speaker of EALA. Prior to the hearing, the Appellant raised a Preliminary Objection claiming that the Respondent's witnesses, members of EALA, could not testify on her behalf without the special approval of the Assembly pursuant to Section 20 of EALA's Powers and Privileges Act, 2003. The Respondent averred that the purported preliminary objection could not dispose of the case since no evidence had yet been adduced at the trial. In the ruling, the Trial Court found that it would be premature to forestall the Respondent's evidence on the ground that it did not comply with Section 20 without first hearing that evidence so the objection was overruled.

In its appeal, the Appellant alleged *inter alia* that: the Trial Court erred by overruling the preliminary objection; that the Statement of Reference, disclosed the nature of the evidence to be adduced and this evidence ran afoul of Section 20; the Trial Court committed a procedural irregularity by ignoring the Parties' Pleadings, Affidavit in support of the Reference and the documents supplied by the Clerk of EALA and finding that there was no evidence to enable it to determine whether the Respondent's evidence fell within the ambit of Section 20; that the Trial Court misinterpreted the law on admission of evidence relating to Parliamentary Proceedings by holding that the Respondent could use the proceedings as evidence as long as she did not rely on the contents thereof; and in awarding costs to the Respondent.

In reply, the Respondent argued that: there was a purported preliminary objection before the Trial Court which could not dispose of the case since no evidence had

been adduced at the trial; the objection was premature; furthermore, no procedural irregularities had occurred as the Respondent had opted to give oral evidence and the Trial Court was yet heard to hear the evidence and that of the witnesses.

Held:

1. A preliminary objection can only be properly taken where it involves a pure point of law, which if argued successfully, would summarily dispose of the suit or Application before the Court without a hearing on the merits. The purpose is to terminate the proceedings without a consideration of the merits and thereby saving the Court's and parties' time and money.
2. The objection in this case pertained to the production and admissibility of evidence and could not have been determined without the Trial Court hearing the witnesses and examining whether: the evidence offended Section 20 (1); they were adducing forbidden evidence; and whether special leave had been obtained. It was not a true preliminary objection because it was not founded on a pure point of law which, if upheld, would have summarily disposed of the Reference before the Court. Additionally, the Clerk of EALA had already produced certain documents in compliance with the witness summons, which would have had to be considered during hearing on the merits of the case even if the Respondent's witnesses had been debarred on the basis of the Appellant's objection.
3. The import of Section 20(1) of EALA's Powers and Privileges Act was that no member or officer of the Assembly, minute takers or evidence recorder could give evidence outside EALA of the contents of minutes or record of evidence of EALA or documents laid before the Assembly or a Committee in respect of any proceedings or examination held before the Assembly or Committee without the Assembly's special written leave. EALA minutes, records, documents, proceedings or examinations are privileged evidence inadmissible in any forum unless the privilege is waived by the Assembly. The proof of the waiver of the privilege is a written permission from the Assembly. While the witnesses are not incompetent to testify, the material they sought to adduce in evidence was privileged.
4. It is trite law that pleadings in Court whether in the form of a Reference, Motion on Notice, Statement of Claim or by whatever other name called are not evidence. They are averments the proof of which are submitted to the trier of fact. The Respondent's Statement of Reference and the documents enumerated therein as constituting the nature of evidence in support of her case were not evidence.
5. A Court commits a procedural irregularity when, *inter alia*, it acts irregularly in the conduct of a proceeding, for example by ignoring the party's pleadings. The Trial Court could not, fairly, be accused of committing a procedural irregularity by ignoring such 'evidence' in examining the applicability of Section 20 of the Privileges Act. The Trial Court in so holding had scanned the statute with legal lenses, and what it discerned was unimpeachable.
6. The Respondent elected at the Scheduling Conference to offer oral evidence, therefore the Respondent's affidavit in support of the Reference could not be regarded as evidence in the case until the Respondent adopted the contents thereof and the same was tendered as an exhibit in the case. The documents produced by the Clerk to the Assembly were not and could not be evidence to

be taken into account in the determination of whether or not the Respondent's witness should be barred from testifying by virtue of the provisions of Section 20 of the Privileges Act as the Clerk was not one of the Respondent's witnesses. The Trial Court did not therefore commit a procedural error, and such charge is devoid of merit.

7. With regard to the alleged error of law in the interpretation of Section 20 of the Privileges Act, the *ratio decidendi* of the impugned Ruling was that it was not open to the Court to find that the evidence the Respondent and her witnesses would adduce would be an affront to Section 20 of the Privileges Act, without first hearing them. Thus, the Trial Court did not commit any error of law.
8. While Article 35A of the Treaty throws open the door of the Appellate Division to any complaint against any decision of the First Instance Division (whether the decision is final or interlocutory), there is wisdom in appealing against the final decision of the Court. A lot of to-ing and fro-ing between the two Divisions of the Court could be avoided, with benefit in saving of costs and precious judicial time, if parties in the First Instance Division who are aggrieved with its interlocutory decisions could, unless justice would otherwise be irreparably damaged, reserve their right of appeal therefrom to the substantive appeal from the final decision of the First Instance Division. The adoption of this practice would result in more expedition in the dispensation of justice and the Court commends such a practice.
9. There is a difference between Judgment and Decree, on the one hand, and Ruling (or reasoned Order) and Order, on the other hand as set out in Rules 88(1) and 69. The Record of Appeal did not contain the Order appealed from and was thus incomplete and the Appeal was incompetent.
10. Costs in any proceedings follow the event unless the Court for good reasons otherwise orders. The "event" referred to in Rule 111 (1) is the outcome of the matter before the Court for consideration when the order for costs is made. The matter before the Trial Court at the time the order for costs was made was not the substantive Reference but the preliminary objection. The said objection was overruled so the Respondent succeeded was entitled to costs. The appeal is dismissed with costs.

Cases cited

Angella Amudo v The Secretary General of EAC [2012-2015] EACJLR 592, Appeal No. 4 of 2014
 AG of Kenya v Independent Medical Legal Unit [2005-2011] EACJLR 377, Appeal No. 1 of 2011
 Hezron M. Nyachij v Tanzania Union of Industrial Commercial Workers & Anor, CAT Civil Appeal 71 of 2001
 Hon. Gagawala N. G. Wambuzi v Kenneth Lubogo, CAU, Election Petition Appl. No. 10 of 2010
 Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696
 The AG of URT v African Network for Animal Welfare [2012-2015] EACJLR, 573, Appeal No. 3 of 2011
 Returning Officer Kampala & Ors v Catherine N. Nabagesera CAU, Civil Appeal No. 39 of 1997
 Union Trade Centre Ltd v The Attorney General of Rwanda, EACJ Appeal No. 1 of 2015

JUDGMENT

A. Introduction

1. This is an Appeal by the Secretary General of the East African Community ("the Appellant") against the Ruling of the First Instance Division of this Court ("the Trial Court") whereby the Trial Court overruled with costs the Preliminary Objection taken on behalf of the Appellant to the effect that the Appellant's witnesses in the Reference, who were all members of the East African Legislative

Assembly (“EALA”), could not adduce evidence in the Reference without first complying with the Provisions of the EALA (Powers and Privileges) Act, 2003 (“the Privileges Act”).

2. Dr. Margaret Zziwa is the Respondent. She was the Applicant in the Trial Court. She is represented in the Appeal by Mr. Justin Semuyaba and Mr. Jet John Tumwebaze.
3. The Appellant is, in this Court, as in the Trial Court, represented by Mr. Stephen Agaba.

B. Background

4. The Respondent is an elected member of EALA from the Republic of Uganda. At all material times during the Reference from which the Appeal arises, she was also the elected Speaker of the EALA.
5. In the Reference, she complained against certain actions and decisions of EALA and its Committee on Legal Rules and Privileges which pertained to investigations against her and a consequential impeachment motion.
6. The Reference was scheduled for hearing before the Trial Court on 8th and 9th September, 2015.
7. On the first hearing day, i.e. 8th September, 2015, the Appellant raised what its Counsel called a ‘point of law’ to the effect that the Respondent’s witnesses, all being members of EALA, could not testify on her behalf without first obtaining approval of the EALA as per Section 20 of the Privileges Act.
8. The Trial Court took the view that the point of law raised by the Respondent was a preliminary objection and that the same had been improperly raised before the Trial Court as notice thereof had not been given in accordance with Rule 41 of the East African Court of Justice Rules, 2013 (“the Rules of the Court”).
9. Counsel for the Appellant was aggrieved by the ruling and intimated that he would appeal against it but after listening to some observations from the Trial Court, he apparently relented and agreed that the Court could proceed with the hearing.
10. When the Respondent took the oath to testify, the Appellant’s Counsel stood up on what he called an issue for clarification. He requested the Court as a procedural concern before the production of the Respondent’s testimony, to ask the witness to confirm whether she had obtained a clearance and leave of the Assembly to appear in Court as a witness as was required under Section 20(1) of the Privileges Act.
11. After some to-ing and fro-ing, the Trial Court asked Counsel for the Appellant to file a formal preliminary objection to which the Respondent would also formally reply.
12. And thus, it came to pass that a Notice of Preliminary Objection dated 8th September 2015, and purportedly made under Rule 1 (2) and Rule 41 (1) of the Rules of the Court and the Orders of the Trial Court issued on 8th September, 2015, was lodged in the Registry on the selfsame 8th September 2015.
13. After hearing arguments thereon on the 9th September, 2015, the Trial Court, on the 6th November 2015, held that it would be premature to forestall the Appellant’s evidence on the ground that it did not comply with Section 20 of the Privileges Act, without first hearing that evidence, and overruled the objection

raised by the Appellant with costs to the Respondent.

C. The Appeal to the Appellate Division

14. Dissatisfied with the above ruling, the Appellant appealed to this Division. He preferred the following six grounds of Appeal, namely:

- (1) The Honourable Justices of the First Instance Division erred in law and even committed procedural irregularities when they held that since the Respondent had opted to give oral evidence as opposed to evidence by affidavit, the Honourable Justices of the First Instance Division were not able to determine whether the Respondent's evidence falls in the ambit of Section 20 of the East African Legislative Assembly (Powers and Privileges) Act 2003; yet on the record, there are Pleadings, the Affidavit of the Respondent, Documents obtained from the Clerk of the Assembly, upon which the Applicant's (Respondent's) case is grounded.
- (2) The Honourable Justices of the First Instance Division erred in law in misconstruing the provisions of Section 20 (1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003, by importing new terms in the provision hence leading to a different interpretation and application of the provision.
- (3) The Honourable Justices of the First Instance Division erred in law and committed procedural irregularities by over-ruling the Objection when in fact they had established and found that the provisions of Section 20(1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003 are valid and binding on all members and officers of the Assembly.
- (4) The Honourable Justices of the First Instance Division erred in law by distinguishing the Clerk from members and other officers of the Assembly and ordered him not only to produce the documents of the Assembly to Court but also appear as a witness without need for special leave of the Assembly contrary to Section 20(1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003; which they had found to be binding on all members and officers of the Assembly.
- (5) The Honourable Justices of the First Instance Division erred in condemning the Appellant to pay costs yet they had made a finding that the Appellant's Objection in respect of Section 20 (1) of the East African Legislative Assembly (Powers and Privileges) Act, 2003 is a valid and applicable law which was the Appellant's point of objection.
- (6) The Honourable Justices of the First Instance Division erred in law and even committed irregularities by issuing orders on matters that were not raised in the Objection or had been abandoned by the Parties in the course of hearing.

15. The Appellant asked the Court:

- (a) To allow the Appeal.
- (b) To vary the Ruling and Order of the Trial Court on the issues stated above.
- (c) To award the costs of the Appeal and of the Trial Court to the Appellant, or, in the alternative, to order that the costs abide the result of the Reference.

16. At the Scheduling Conference of this Appeal on 24th February, 2016, the Appellant abandoned grounds (4) and (6) of Appeal. And the remaining four grounds of Appeal were, with the concurrence of both Counsel, consolidated into the following three issues for determination:
- (1) Whether or not the objection raised in the Trial Court was a true Preliminary Objection.
 - (2) Whether or not the Trial Court erred in law and/or committed procedural irregularities in overruling the objection raised.
 - (3) Whether or not the Trial Court erred in condemning the Appellant to pay costs to the Respondent.
17. After the Scheduling Conference, the Parties, in compliance with this Court's Directives, filed their Written Submissions.
18. On the 9th of May 2016, both parties appeared before the Court and highlighted those Written Submissions.

A. The Court's Analysis and Findings

19. Having read the record of Appeal with care and considered the Written Submissions on behalf of the Parties and the highlights thereof at the hearing, we think it just and meet to consider this Appeal on an issue by issue basis. We do so below.

Issue No. 1: Whether or not the Objection raised in the Trial Court was a

20. The point of departure here must be an elucidation and understanding of what a true preliminary objection is in law.
21. Both Counsel cited the same judicial authorities for the meaning of a Preliminary Objection. The *locus classicus* in the Municipal Systems of Kenya, Uganda and Tanzania is, without doubt, *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd [1969] E.A. 696*.

In that case, Law, J. A. defined a Preliminary Objection thus:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

And at p.170, Sir Charles Newbold, P. with his characteristic force and clarity deplored “the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection”. He continued:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice must stop.”

The Judgment of the Tanzania Court of Appeal in *Hezron M. Nyachij v Tanzania*

Union of Industrial and Commercial Workers & Another [Civil Appeal No. 71 of 2001] was also invoked. After invoking the authority of *Mukisa Biscuit Manufacturing Co. Ltd (supra)* the Tanzania Court of Appeal expressed its view on the object of a preliminary objection thus:

“The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily.”

In similar vein, the same Court in *Selcom Gaming Limited v Gaming Management (T) Ltd & Another, [Civil Application No. 173 of 2005]*, said:

“A preliminary objection must...raise a point of law based on ascertained facts and not evidence. Secondly, if the objection is sustained, that should dispose of the matter... A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Any alleged irregularity, defect or default must be apparent on the face of the application.”

22. We desire to say at this stage that decisions of the Courts of the Partner States are not binding on this Court. They are nonetheless entitled to great respect, and they may be persuasive where they determine procedural issues akin to those submitted for the determination of this Court. And, of course, that is particularly so where those decisions are of the Partner States highest Courts. Be that as it may, we hasten to add that where a matter in contention has in the past received the attention of the East African Court of Justice (EACJ) it is in the interest of developing this Court’s jurisprudence that parties cite the authority of the EACJ and other regional and international courts on such points. In that regard, the EACJ has, as apparent below, pronounced itself with clarity on what constitutes a preliminary objection.

23. In *Attorney-General of Kenya v. Independent Medical Legal Unit [EACJ, Appeal No. 1 of 2011]*, this Court cited with approval the exposition of the law by Law, J. A. and Newbold, P. in *Mukisa Biscuit* case (*supra*) and said the Court must avoid “treating, as preliminary objections, those points that are only disguised as such; and will instead treat as preliminary objections, only those points that are pure law; which are unsustainable by facts or evidence, especially disputed points of fact or evidence or such like”. And in *The Attorney-General of Tanzania v. African Network for Animal Welfare (ANAW) [EACJ Appeal No. 3 of 2011]*, the Court opined that matters which:

“involved the clash of facts, the production of evidence and the assessment of testimony... cannot and should not be treated as a preliminary point.”

24. In our opinion, the above authorities lead us to the conclusion that a preliminary objection can only be properly taken where what is involved is a pure point of law, which if argued successfully, would summarily dispose of the suit or Application before the Court (that is to say, without a hearing on the merits). And in point of procedure, Rule 41 of the Court Rules is clear. It provides:

“(1) A Party may by pleading raise any preliminary objection.

(2) Where a Respondent intends to make a Preliminary Objection he shall, before the Scheduling Conference under Rule 53 of the Rules, give not less than seven (7) days written notice of the preliminary objection to the Court and to the other parties of the ground of that objection.”

25. In the instant Reference, the Appellant, in the first instance, took its Preliminary Objection orally at the commencement of the trial without the requisite or any notice at all to the Respondent. The Trial Court correctly held that the point of objection was raised improperly before the Court. In our view, that ought to have been the end of the matter. Fortunately, for the Appellant, lady luck was his companion that day. The Trial Court in its grace, which is codified in Rule 1 (2) of the Court's Rules, allowed him to file a formal objection to the self-same effect to be argued on the morrow. That was done without demur by Counsel for the Respondent.
26. What was the objection filed? It was this:
"The Applicant's witnesses (being members or officers of the East African Legislative Assembly) cannot adduce evidence without complying with the provisions of Section 20 of the East African Legislative Assembly (Powers and Privileges) Act, 2003."
27. And, pray, what is the import of Section 20 of the Privileges Act? The said Community Law provides as follows:
"20 (1). Notwithstanding the provisions of any other law, no member or officer of the Assembly and no person employed to take minutes or record evidence before the Assembly shall, except as provided in this Act, give evidence elsewhere in respect of the contents of such minutes or evidence or of the contents of any document laid before the Assembly or such Committee, as the case may be, or in respect of any proceedings or examination held before the Assembly or such Committee, as the case may be, without special leave of the Assembly first had and obtained in writing."
28. The import of the above provision is clear. No member or officer of the Assembly or minutes taker or evidence recorder can give evidence outside EALA of the contents of any minutes or record of evidence of EALA or of any documents laid before the Assembly or a Committee thereof, or in respect of any proceedings or examination held before that Assembly or such a Committee without the Assembly's special written leave. From the perspective of adjective law (Procedural Law), such minutes, records, documents, proceedings or examinations are privileged evidence. As such, they are inadmissible in any forum other than the Assembly itself unless the privilege is waived by such Assembly. And the proof of the waiver of the privilege is a written permission from the Assembly. We hasten to add that the witnesses themselves are not incompetent to testify. They are competent. It is the specified material from EALA they may seek to adduce in evidence which is privileged.
29. It is thus manifestly clear to us that before the sword of Section 20(1) of Privileges Act can be drawn to strike a witness, it is necessary to establish that the witness to whom the sword is pointed, and thus whose evidence is sought to be shut out is (i) a member or officer or staff of EALA; (ii) he or she intends to give evidence of the contents of minutes taken in, evidence given in, documents laid before, or any proceedings, or an examination held before the EALA or any of its Committees; and (iii) he or she does not have written special leave of the Assembly to do so.
30. That being so, was the Preliminary Objection taken by Counsel for the Appellant

and overruled by the Trial Court a true Preliminary Objection? Counsel for the Appellant submitted at length that it was because it was a point of law (the interpretation of Section 20 of the Privileges Act), which if determined in the Appellant's favour, may dispose of the Reference as the Respondent's case was built on the foundation of EALA documents as evident from the references thereto in the Statement of Reference and the supporting Affidavit, and without using such minutes, documents and proceeding of the Assembly, the Respondent's case would collapse, and the Court would have no jurisdiction to assess the evidence brought before it without the special leave of the Assembly. He added that the point of law raised was easily ascertainable from the facts in the Statement of Reference (Pleadings).

31. Counsel for the Respondent, on his part, submitted that the Objection taken was just a "a purported preliminary objection" which could not dispose of the case since no evidence had been adduced at the trial. In his view, the Reference could, in any event, stand as not all the documents relied upon by the Respondent form part of the Assembly or any of its Committee's documentation, and, further, that the Clerk had been ordered by the Court to produce documents which the Court could rely on in determining the case even if the Respondent's witnesses were barred from testifying.
32. Having considered the rival Submissions, we have come to the conclusion that the Objection taken by Counsel for the Appellant was not a true preliminary objection. It was just but a purported or pretended preliminary objection because it was not founded on a pure point of law which, if upheld, would have summarily disposed of the Reference before the Court. We say so for the following reasons. First, the point taken was not a pure point of law. It appertained to the production and the admissibility of evidence. The Objection taken could not have been determined either way without first examining the evidence. The reason for that conclusion is this: although it was not in dispute that the Respondent's witnesses were members of EALA, the Trial Court could not have determined whether their evidence offended section 20 (1) of the Privileges Act without first hearing them and determining: (i) whether they or any of them was adducing the sort of evidence which was forbidden to be tendered without special leave of the Assembly; and, (ii) that they or any of them did not have such leave. Secondly, the point, if upheld, would not have led to a summary disposal of the Reference. This is because the Clerk of the Assembly had, in compliance with the Trial Court's witness summons produced certain documents which the Trial Court would have had to consider during the merits of the case even if the Respondent's witnesses had been debarred by the Trial Court on the basis of the Appellant's Objection. We have deliberately used the expression "led to a summary disposal of the Reference" to disabuse Counsel for the Appellant of the notion that it suffices for a point of law raised to qualify as a Preliminary Objection if such point, if successfully argued, has the possibility (as opposed to the certainty) of disposing of the Reference. That is necessary because Counsel made heavy weather of the word "may" in the exposition of the law by Newbold, J.A. (*supra*) referred to in paragraph 21 herein above. In our view, the word "may" as used by Newbold, J.A. meant "should" or "must". We are fortified in that view by *Merriam-Webster Dictionary* (online),

which indicates that the word “may” could in law mean “shall” or “must” where the sense, purpose, or policy requires this interpretation.” And in *Black’s Law Dictionary, 9th Edition*, it is postulated that “in dozens of cases, courts have held may to be synonymous with shall or must.” As observed in paragraph 21 above, the purpose of a preliminary objection is to terminate the proceedings without a consideration of the merits thereof and thereby save both the Court’s and the parties’ time and money. Accordingly, the word “may” cannot but mean “must” in the usage of the same by Newbold, J.A.

33. In the result, we answer issue No. 1 in the negative. The Objection taken by the Appellant was not a true preliminary objection as understood in the jurisprudence of this Court.

Issue No. 2: Whether or not the First Instance Division erred in law or committed procedural irregularities in overruling the Objection raised.

34. It is necessary for a proper appraisal of this issue to set out the rationale for the Trial Court’s Decision to overrule the Objection.

35. At paragraph 41 of the Ruling attacked, the Trial Court delivered themselves as follows:

“We find that it has not been satisfactorily established before us that the evidence the Applicant intends to adduce before this Court does, in fact, fall within the ambit of section 20 of the EALA (Powers and Privileges) Act. We take the view that it would be premature at this stage to forestall her evidence on the pretext that it does not comply with the provisions of section 20 of the said Act. We do, nonetheless reiterate our position herein that the said Act is valid Community Law and must be complied with by all witnesses that seek to adduce evidence that fits within the parameters thereof. The only exception in this regard would be the Clerk to the Assembly who, as we have held above, was summoned as a witness in this matter pursuant to a Court order.”

36. Then at paragraph 42, the Court stated:

“in the final result, we do hereby overrule the objections raised by the Respondent with costs to the Applicant.”

37. Counsel for the Appellant pointed out that in the Statement of Reference, the Respondent in part (e) thereof disclosed the nature of the evidence she would adduce as being, *inter alia*:

- (i) Notice of intention to move the Motion for removal of the Speaker of EALA;
- (ii) Motion of a resolution to remove the Speaker of the EALA and a list of the Members of the House who signed;
- (iii) A list of the Members on the Committee of Legal Rules and Privileges;
- (iv) Three letters withdrawing the signatures from two EALA members of the United Republic of Tanzania dated 29th May 2014;
- (v) Ruling of the Speaker dated 4th June 2014;
- (vi) Letter by some members of EALA summoning and directing the Clerk of EALA to preside over the Assembly dated 26th November, 2014;
- (vii) Letter by Clerk of EALA requesting for advice from CTC dated 26th November, 2014;

- (viii) Letter by Clerk to the Speaker suspending her from office dated 26th November, 2014;
 - (ix) Response by the Speaker dated 27th November, 2014;
 - (x) Response by the CTC dated 30th November, 2014;
 - (xi) Letter by the Committee on Legal Rules and Privileges requiring the Speaker to appear before the Committee dated 1st December 2014;
 - (xii) Letter by the Temporary Speaker, Hon. Chris Opoka, directing the Clerk to convene the Assembly on 17th December, 2014 to consider the Committee Report dated 2nd December, 2014;
 - (xiii) A list of 17 complaints against Hon. Margaret Zziwa provided by the Committee.
38. He further pointed out that on 12th August, 2015, the Clerk of the Assembly was summoned by the Trial Court and in obedience to such summons availed the following documents:
- (i) Hansard Extract (The Proceedings of EALA), 3rd meeting, Wednesday, 26th November, 2014; (See pages 994-998 – Record of Appeal Vol III).
 - (ii) Report of the EALA Committee on Legal Rules and Privileges on investigation of the complaints raised in the motion for the removal of the Speaker from office (See pages 999-1019 – Record of Appeal Vol III).
 - (iii) Hansard (The Proceedings of EALA), 55th Sitting, Tuesday, 1st April, 2014; (See pages 1027-1033 – Record of Appeal Vol III).
 - (iv) Hansard (The Proceedings of EALA), 58th Sitting, Tuesday, 29th May, 2014; (See pages 1034-1052 – Record of Appeal Vol III).
39. Counsel also pointed out that the Reference was supported by the Respondent's Affidavit which also made reference to EALA documents.
40. Counsel for the Appellant submitted that all the above documents are on record as part of the Respondent's evidence, that they were all EALA documents, and, accordingly, there was evidence on record that would have enabled the Trial Court to make a determination that such evidence ran afoul of the provisions of Section 20 of the Privileges Act. He submitted that on this score, the Trial Court committed a procedural irregularity by ignoring the Parties' Pleadings, the Affidavit in support of the Reference and the documents that were supplied by the Clerk of the Assembly and pretended that there was completely no evidence before them to enable them determine whether the Respondent's evidence would fall within the ambit of Section 20 of the said Act because it was glaringly clear that documentary evidence on record squarely fitted the requirement of the said provision of law.
41. Counsel for the Appellant further submitted that the Trial Court overruled the Objection on the basis of an error of law on its part. He submitted that the Trial Court erred in law by misinterpreting the law on admission of evidence relating to Parliamentary Proceedings by holding that the Respondent could use the proceedings as evidence as long as she did not rely on the contents thereof. In his view, the Trial Court did so by adding the word "contents" before the words "in respect of proceedings" in their interpretation, whereas that term is only applicable to minutes or evidence or documents; but not to proceedings.
42. Counsel for the Respondent, on his part, submitted that there was no procedural irregularity on the part of the Trial Court for the reason that since the Respondent

had opted to give oral evidence, and she had not done so, the Trial Court was right to find that it could not determine whether her evidence would offend Section 20 of the Privileges Act, by merely looking at the Statement of Reference and the supporting Affidavit before hearing her. In his view, the Trial Court could not determine whether the documents on record offended the Act before the Appellant and her witness had testified on them.

43. As regards the alleged error of law, Counsel for the Respondent submitted that there was no error of law since the Trial Court had overruled the Preliminary Objection as being premature. He did not specifically answer the Appellant's complaint that the Trial Court misinterpreted Section 20 (1) of the Privileges Act, by erroneously placing the word "content" before the word "proceedings" thereby altering the meaning of the provision.
44. We have now weighed the rival submissions on this issue. Having done so, we have come to the following view of the matter.
45. In *The Attorney-General of Tanzania v. African Network for Animal Welfare (ANAW)* (*supra*), this Court defined a procedural irregularity 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 be 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 or failure of due process (i.e. fairness) of a proceeding or hearing."
46. And in *Angella Amudo v The Secretary General of the East African Community [EACJ APPEAL NO. 4 of 2014]*, we held that a Court commits a procedural irregularity when, *inter alia*, it acts irregularly in the conduct of a proceeding, for example by ignoring the party's pleadings.
47. Counsel for the Appellant sought to persuade us that the Trial Court committed a procedural irregularity by ignoring the Respondent's Pleadings (Statement of Reference) and the evidence on record in the form of EALA documents listed in paragraph 37 herein above and thus holding that there was no evidence before the Trial Court to enable it determine whether the provision of Section 20 of the Privileges Act was infringed.
48. We are not so persuaded for the following reasons. The submission is based on a fundamental misconception of what constitutes evidence in a trial. In that regard, we reiterate what we said in *Union Trade Centre Ltd (UTC) v The Attorney-General of Rwanda [EACJ Appeal No. 1 of 2015]*. We held:
 "It is trite law that pleadings in Court (Whether in the form of Reference, Motion on Notice, Statement of claim or by whatever other name called) are not evidence. They are averments the proof of which is submitted to the trier of fact."
49. From that exposition of the law, we think that first, it is self-evident that the Respondent's Statement of Reference and the documents enumerated therein as constituting the nature of evidence in support of her case were not evidence. The Trial Court could not, fairly, be accused of committing a procedural irregularity by ignoring such 'evidence' in examining the applicability of Section 20 of the

Privileges Act. If we may say so, the Trial Court in so holding had scanned the statute with legal lenses, and what it discerned is unimpeachable. Secondly, as regards her Affidavit in support of the Reference, the Respondent having elected at the Scheduling Conference to offer oral evidence, the said Affidavit could not be regarded as evidence in the case unless and until the Respondent adopted the contents thereof and the same was tendered as an exhibit in the case. Thirdly, as regards the documents produced by the Clerk to the Assembly, the same (though relevant to the Respondent's case) were not and could not obviously be evidence to be taken into account in the determination of whether or not the Respondent's witness should be barred from testifying by virtue of the provisions of Section 20 of the Privileges Act as the Clerk was not one of her witnesses. In the result, the Trial Court did not commit the alleged procedural error, and such charge is devoid of merit.

50. With regard to the alleged error of law in the interpretation of Section 20 of the Privileges Act, suffice it to state that the *ratio decidendi* of the impugned ruling by the Trial Court was that it was not open to the Court to find that the evidence the Respondent and her witnesses would adduce would be an affront to Section 20 of the Privileges Act, without first hearing them. That is a conclusion which this Court itself has reached in paragraph 32 herein above. That being the case, we cannot but find that the Trial Court did not commit any error of law in arriving at its conclusion. The overruling of the objection, we hasten to add, was not based on the prefixing of the word "contents" before the word "proceedings" as alleged. We therefore do not consider it necessary to determine whether the alleged interpolation of the word "content" before the word "proceedings" led to an erroneous interpretation of the statute by the Trial Court.
51. In the result, we answer Issue No. (2) in the negative as well.

Issue No. (3): Whether or not the First Instance Division erred in condemning the Appellant to pay costs to the Respondent.

52. As seen in paragraph 36, the Trial Court overruled the Appellant's Preliminary Objection with costs.
53. The Appellant submitted before us that the Trial Court erred in law in condemning the Appellant to pay costs yet the said Court had made a finding that Section 20(1) of the Privileges Act was a valid and applicable law, which was precisely the Appellant's Point of Objection. Counsel for the Appellant cited Rule 111(1) of the Rules of this Court as the basis of this submission. The said Rule provides:
- "111(1). Costs in any proceedings shall follow the event unless the Court for good reasons otherwise orders."
54. As we understood Counsel for the Appellant, his complaint was that the Trial Court departed from the Principle stated in Rule 111(1) that costs should follow the event unless for good reason the Court ordered otherwise. In his view, the event was the outcome of the substantive Reference (which had not been determined). Furthermore, according to him, there was no reason to order otherwise because the Appellant had not acted unreasonably to raise a point of law – which the Trial Court found to be a valid one – and there was no substantial success by the Respondent to warrant the award of costs to her.

55. Counsel for the Respondent, on his part, submitted that the Trial Court applied the general principle that costs follow the event and exercised its discretion properly in awarding the Respondent the said costs. In his view, there was nothing on the Trial Court's record to show that the said discretion was not exercised judiciously, or that it was exercised capriciously. In the circumstances, Counsel submitted, this Court should not interfere with the Trial Court's exercise of discretion.
56. We have considered the rival submissions. Having done so, we have concluded that the Appellant's complaint regarding the award of costs was manifestly ill founded. The "event" that Rule 111 (1) refers to is the outcome of the matter before the Court for consideration when the order for costs is made. The matter before the Trial Court at the time the order for costs was made here was not the substantive Reference but the Preliminary Objection taken by the Appellant. The said preliminary objection was overruled, meaning that the Respondent succeeded on the matter. A clearer case of costs following the event could not be found. The Trial Court did not order otherwise.
57. In the result, we answer Issue No. (3) in the negative.
58. Having answered all the issues framed for determination in the negative, we should now proceed to the final disposition of the matter. But before we do so, we feel impelled by the questions asked by the Court at the hearing of this Appeal and the answers thereto by Counsel to pronounce ourselves on procedural propriety.

E. Procedural Propriety

59. We begin by acknowledging the force of the judicial aphorism that rules of procedure are a handmaid of justice, and not its mistress. We also take note of the wise prescription in some of the Constitutions of the Partner States such as those of Kenya, Uganda, and Tanzania which provide that in exercising the judicial function, the Courts of Justice should do substantial justice without undue regard to technicalities of procedure. The aphorism referred to teaches all concerned that rules of procedure are useful tools in the dispensation of justice but they should not be elevated to a fetish above lady justice herself. And the National Constitutions referred to, do not jettison the rules of procedure. What they do is forbid undue regard to them in the sacred duty of dispensing justice. We discern nothing in that wisdom which justifies a haphazard approach to lady justice. She ought to be approached properly.
60. In the matter of preliminary objections, Rule 41 of our rules is crystal clear. A party may by pleading raise any point of preliminary objection (sub rule 1). And where a Respondent intends to raise a preliminary objection he shall, before the Scheduling Conference, give not less than seven (7) days written notice of the preliminary objection to the Court and to the other parties of the grounds of that objection. The objective of the rule is equally clear. The Court and the other parties to the suit should not be ambushed by a point of law. Trial by ambush is a judicial taboo. In this case, no notice of the Preliminary Objection was given. The Objection was taken on the day of the hearing. The Trial Court very properly overruled it. That ought to have been the end of the matter. We say so without questioning the exercise of grace by the Trial Court in allowing the

Appellant to re-agitate the same preliminary objection (albeit, now dressed as a formal application) the following day.

61. At the hearing of this Appeal, the Court asked Counsel for the Appellant to point out where in the Record of Appeal the extracted order appealed against was housed. Counsel pointed at pp. 317-335 of Vol 1 of the Record of Appeal. When informed by the Court that what he was referring to was the ruling of the Court, he appeared taken aback. He said that in his long experience in this Court, Appeals have been preferred and canvassed without there being a formal extracted order or decree on record. Now, we do not question Counsel's experience or the truth of his averment from the bar. Suffice it to say this: Rule 88(1) of the Rules of the Court provides that the Record of Appeal shall contain, inter alia, the following documents:
 - "e) the Judgment or reasoned order;
 - f) the decree or order;"
62. Rule 2 defines a decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit. And Rule 69 reads as follows:
 - "(1) Every decision of the Court shall be embodied in an order.
 - (2) An order ...shall be dated as of the date the decision was delivered and shall contain particulars of the case and specify clearly the relief granted or other determination of the case including costs."
63. From the foregoing definitions and provisions, it ought to be clear that there is an ocean of a difference between Judgment and Decree, on the one hand, and Ruling (or reasoned Order) and Order, on the other hand. The Record of Appeal here did not contain the Order appealed from and was thus incomplete and the Appeal was incompetent.
64. Counsel litigating before the East African Court of Justice are charged not to treat the Court's Rules as decorations on the Treaty (pursuant to which such Rules are made), or on the Rule Book itself.
65. In the instant matter, the Appellant is twice lucky. Lucky that he was given a second bite at the cherry in agitating the so-called Preliminary Objection, and lucky that the Respondent did not apply for the striking out of the Appeal on the ground that it was incompetent.

F. Appeals on Interlocutory Decisions and the Cost of Litigation.

66. As the curtain was falling on the hearing of this Appeal, Counsel for the Respondent referred us to two decisions of the Court of Appeal of Uganda which were not on his list of authorities. The Appellant's Counsel graciously did not object to their production. They are *Hon. Gagawala Nelson G. Wambuzi v Kenneth Lubogo [Election Petition Application No. 10 of 2010]* and the *Returning Officer Kampala & 2 Others v Catherine Naava Nabagesera [Civil Appeal No. 39 of 1997]*. Both decisions dealt with the right of Appeal against interlocutory decisions in election petitions. The Court of Appeal of Uganda held that Section 66 (1) of the Parliamentary Elections Act did not confer a right of appeal from interlocutory orders and, accordingly, none lay in those cases. However, the same Court made it clear in *The Returning Officer Kampala & 2 Others v Catherine*

Nabagesera (supra) that a party was at liberty to argue any grounds of appeal related to interlocutory orders made in the course of the hearing in an appeal against the final decision on an election petition.

67. The above jurisprudence is not strictly relevant in the East African Court of Justice (EACJ) because Article 35A of the Treaty confers on Parties a right of appeal even from interlocutory decisions. The said provision reads:
 “35A. An appeal from the judgment or any order of the First Instance Division of the Court shall be to the Appellate Division on –
- (a) Points of law;
 - (b) Grounds of lack of jurisdiction;
 - (c) Procedural irregularity.”
68. This provision throws open the door of the Appellate Division to any complaint against any decision of the First Instance Division (whether the decision be final or interlocutory) provided the complaint touches on a point of law, jurisdiction, or procedural irregularity.
69. Be that as it may, we think there is wisdom in the Ugandan Court of Appeal’s *obiter dictum* that grounds of appeal related to interlocutory orders may be taken in the appeal against the final decision of the Court. We say so because our experience in this Court shows that a lot of to-ing and fro-ing between the two Divisions of the Court could be avoided, with considerable benefit in the saving of costs and precious judicial time, if parties in the First Instance Division who are aggrieved with its interlocutory decisions could, unless justice would otherwise be irreparably damaged, reserve their right of appeal therefrom to the substantive appeal from the final decision of the First Instance Division. This Court commends such a practice. We think its adoption would result in more expedition in the dispensation of justice. Alas, we digress.

G. Conclusion

70. We have said enough in Part D of this Judgment to show that the Appellant has stumbled and fallen in all the three issues presented to the Court for determination.
71. The upshot of our consideration of the Appeal is that –
- (a) The Appeal be, and is hereby, dismissed with costs here and below.
 - (b) The taxation of those costs do abide the conclusion of the Reference on the merits.

It is so ordered.

J. Semuyaba & J. Tumwebaze Counsel for the Appellant

S. Agaba, Counsel for the Respondent

First Instance Division

Application No. 1 of 2016

(Arising from Reference No. 17 of 2014)

Hon. Dr. Margaret Nantongo Zziwa v The Secretary General of the East African Community

Coram: I. Lenaola, DPJ; F. Ntezilyayo, J & F. Jundu, JJ
June 24, 2016

Whether witness summons should issue - Special leave to produce Assembly documents - The principle of separation of powers cannot be circumvented - Voluntray witnesses need no compulsion

Article 20 of the Treaty – Rules: 1(2), 21(1), (2),(5), (56)(1), 2, 3, 4, 5, 6 EACJ Rules of Procedure, 2013 - Section 20 of the East African Legislative Assembly (Powers and Privileges) Act, 2003

In September 2015, the Applicant wrote to the Speaker of the East African Legislative Assembly (EALA) seeking leave to: adduce evidence by summoning witnesses from the Assembly; production of documentarty evidence from EALA on the events leading to her removal from the office of Speaker. In October 2015, the then Speaker advised the Applicant to seek special leave from the Assembly during the next plenary meeting. However, the matter was not included in EALA's Order Paper for consideration. Subsequently, the motion for leave was tabled on 3rd December, 2015 but a majority of Members voted against it. Thus, the Applicant filed this application seeking the issuance of witness summons for three EALA members arguing that their evidence and the production of documents was essential for the just determination of Reference 7 of 2014.

The Respondent opposed the application submitting *inter alia* that the application was an attempt to circumvent the requirements of Section 20(1) of the EALA (Powers and Privileges) Act, 2003 since the proposed witnesses had not sought and obtained leave of the Assembly as required. Furthermore: the proposed witnesses had voluntarily agreed to testify on behalf of the Applicant and granting the orders sought would be unfair and inequitable and would breach the separation of powers between EALA and the Court and be an affront to the powers and privileges of the Assembly.

Held

1. A witness summons is an order issued to compel the attendance of a person at a judicial proceeding, a *subpoena*. For summons to be issued, it must be shown that the witnesses are unwilling or reluctant to testify hence the need for summons to compel them to do so. Summons cannot be used to circumvent or review a decision of the Assembly. Furthermore, summons cannot be issued to voluntary witnesses nor can they be used as an appeal against a decision of the Assembly taken under Section 20(1), EALA (Powers and Privileges) Act, 2003 which has not been invalidated.

2. Since the Assembly did not address the issue of leave for the production of documents, the Court could not purport to ignore, circumvent or overturn a decision of the Assembly made pursuant to Section 20(1), without first declaring that section a violation of the Treaty. Moreover, certain documentation had already been produced pursuant to earlier summons issued by this Court upon the Applicant's Application that was not contested by the Respondent. Thus, the request for the Court to demand other documents from the Assembly is contrary to Section 20(1) and without a lawful basis.
3. When the East African Community was created, the principle of separation of powers was firmly in place, hence like a modern State, there is an independent court, legislature and executive. None of the organs can lawfully direct the work of the other one by the principle of separation of powers as well as checks and balances entrenched in the Treaty. Any call upon this Court to demand other documents from the Assembly contrary to Section 20(1) and without a lawful basis, other than the Applicant's dissatisfaction with a decision of the Assembly, would be a travesty of justice. This Court, can only interfere with decisions of the Assembly or the Sectoral Council if they are in violation of the Treaty.

Cases cited

Calist A.Mwatela & Ors v East African Community [2005 – 2011] EACJLR 1, Application No. 1 of 2005
 The Secretary General of EAC v Hon. Dr. Margaret N. Zziwa , EACJ Appeal No. 7 of 2015
 United States v Nixon 418 U.S. 683, 94 S. Ct 3090 41 L. Ed 2d 1039 (1974)

RULING

Introduction

1. This Application is premised on Article 20 of the Treaty for the Establishment of the East African Community (The Treaty), Rules 1(2), 21(1),(2),(5), (56)(1), 2, 3, 4, 5 and 6 of this Court's Rules of Procedure as well as Form 7 of the Second Schedule to the Rules.
2. The Applicant is a member of the East African Legislative Assembly (hereinafter "the Assembly") and former Speaker of the Assembly.
3. The Respondent is the Secretary General of the East African Community and is sued as such.
4. In *Reference No. 17 of 2014*, the Applicant challenges certain actions leading to her removal as Speaker of the Assembly and claims that they are in violation of the Treaty. The Reference is yet to be heard and by the present Application, she now seeks the following orders:
 - a) That the Applicant be allowed to obtain Court's Witness Summons to summon the following whose attendance is required either to give evidence or to produce document(s) and the Witness Summons specifies the time and place of attendance and states whether attendance is required for giving evidence and/or for producing documents. The following are the Applicant's possible witnesses, namely:
 - i) Hon. Dr. Margaret Nantongo Zziwa;
 - ii) Hon. Mumbi Ngaru Agnes;
 - iii) Hon. ShyRose Bhanji; and
 - iv) Hon. Nyerere Makongoro
 - b) Alternatively, The East African Court of Justice on its own motion summon the above mentioned witnesses to give evidence or to produce

- any document(s) which in the Court's opinion, the evidence or document is essential for the just determination of *Reference No. 17 of 2015*; and
- c) Costs of the Application be provided for.

The Applicant's Case

5. In the grounds in support of the Application, the Affidavit sworn on 22nd January, 2016, the Supplementary Affidavit sworn on 9th March, 2016, as well as Submissions on her behalf, the Applicant has stated that in view of the provisions of Section 20 of the EALA (Powers and Privileges) Act, 2003, her witnesses named above cannot adduce evidence in this or any other forum, without complying with that section of the Community Law.
6. It is her further case that on 9th September, 2015 and 15th September, 2015, she wrote to the Speaker of Assembly seeking leave to prosecute her case, adduce evidence and call witnesses from the Assembly on the events leading to her removal including producing such documents as are necessary in that regard. No response was given to her until 22nd September, 2015 when the Speaker wrote to her advising her to seek such leave from the Assembly during its plenary meeting on 14th – 16th October, 2015 in Nairobi.
7. Subsequently, according to the Applicant, the issue of leave was not placed on the Order Paper of the Assembly during the said meeting as there was pending delivery before this Division a Ruling on matters touching relating to Section 20 aforesaid and that the issue was therefore *sub judice*.
8. The Applicant then wrote to the Speaker on 6th November, 2015 renewing her quest for the leave to adduce evidence and by a letter dated 13th November, 2015, the Speaker advised her to make the necessary application before the Assembly at its plenary meeting of 23rd November – 3rd December, 2015 in Kigali. A motion to that effect was then tabled on 3rd December, 2015 but it was defeated by a majority vote of 23 and 3 abstentions while 5 members voted in its favour.
9. It is her case therefore that since it is clear that neither the Clerk, the Speaker nor the Assembly would ever grant her and her witnesses the required, leave it is in the interest of justice that the orders sought should be granted for the just determination of *Reference No. 17 of 2014*. That unless the said orders are granted, she stands to suffer irreparable damage and prejudice in total violation of the Treaty and the Rules of this Court. It is also just and equitable that the Application be granted as it is merited, so she argued.
10. In addition to the above, the Applicant states that her Application is not an attempt at circumventing Section 20(1) aforesaid but is rather, a last resort on her part, to avoid further frustration by the Assembly. That without the leave or orders of this Court, she cannot properly prosecute her Reference with relevant evidence surrounding her removal by the Assembly.
11. It is her further case that the Application is not an affront on the powers and privileges of the Assembly but rather an enforcement of the Principles of Checks and Balances as well as Separation of Powers enshrined in the Treaty.
12. In his submissions, Counsel for the Applicant, Mr. Tumwebaze and Mr. Semuyaba while reiterating the above facts added that under Rule 56(3) of the Rules of this Court, the Court may on its own motion summon any person to give evidence or produce any document if in the opinion of the Court such evidence

or document is essential for the just determination of any matter before it. That in that context, it is the Applicant's contention that the evidence to be produced by the named witnesses fits the expectation of the Rules.

13. Referring to Section 20 aforesaid and the application for leave made by the Applicant, Counsel submitted that whereas the Speaker was under duty to address it while the Assembly was in recess, he deliberately refused to do so, delegated it to the Assembly where a vote was taken against grant of leave hence the present Application.
14. Relying on our Ruling in *Reference No. 17 of 2014* (between the same Parties) reported as [2012-2015] EACJLR 496], Counsel stated that this Court has previously invoked Rule 56 to summon the Clerk of the Assembly to produce certain documents and it can still do so at the present instance.
15. He also relied on this Court's decision in *AG of the Republic of Uganda vs. East African Law Society & Anor Application No. 17 of 2014* and *African Network for Animal Welfare vs. The Attorney General of the Republic of Kenya, Reference No. 9 of 2010* where this Court in the former case, allowed electronic evidence to be adduced despite opposition by one party and in the latter case, the Court stated that it had inherent jurisdiction to give directions as to how each case should be heard.
16. Counsel finally relied on the International Criminal Court decision in the case of *Prosecutor vs. William S. Ruto and Jushua Arap Sang ICC Case No. 1/09-01/11* to argue that the Court can summon witnesses if it determines that those witnesses are necessary for the determination of the truth in any case before it. In doing so, that Court relied on International Law Principles to the effect that for witnesses summons to issue they must meet the threshold of:
 - i) Relevance
 - ii) Specificity; and
 - iii) Necessity
17. He added that the present Application has met that threshold and ought to be granted as prayed.

The Respondent's Case

18. In responding to the Application, the Respondent filed a Replying Affidavit sworn on 5th February, 2016 by Enos Bukuku, Deputy Secretary General (Planning and Infrastructure). Mr. Agaba, representing the Respondent, also made Oral Submissions.
19. His case is that he is opposed to any attempt by the Applicant to circumvent the requirements of Section 20(1) aforesaid by seeking this Court's help in securing witnesses who are members or officers of the Assembly, who have not requested leave of the Assembly as is required by the said Section.
20. He has also argued the point that summons are wholly unnecessary in the present instance because the named persons are in fact witnesses who have voluntarily agreed to come and testify on behalf of the Applicant and that the Applicant cannot in the same breathe seek summons for her own testimony as is apparent from the Application.
21. On the contention that the Assembly frustrated the Applicant's application for leave, it is the Respondent's case that it was in fact the Applicant who invoked the

sub judice rule at the first instance and cannot now deny that fact.

22. He further states that to grant the orders sought would not only be unfair and inequitable but would also lead to clash between the Assembly and the Court as such an action may be viewed as an affront to the powers and privileges of the Assembly.
23. In his Submissions, Mr. Agaba added that whereas the Applicant had by a Ruling of this Court in *Reference No. 17 of 2014 (supra)*, been precluded from using any documents from the Assembly where leave had not been granted for her to do, she was instead liberally making reference to them in the present Application and was therefore in breach of the Law.
24. Further, while relying on the definition of the word “summon” in *Black’s Law Dictionary*, he submitted that court summons are a compulsory measure to compel a person to attend court but that the witnesses named in the Application have agreed to attend, voluntarily, and no summons are thereby required. In any event, that this Court cannot take over the role of the Assembly in terms of Section 20(1) aforesaid and summon witnesses to refer to documents that the Assembly has refused to grant leave for release thereof.
25. It was also Mr. Agaba’s contention that, save for the Applicant, no other witness has sought leave as is required by Section 20(1) and there is therefore no basis for the prayers in that regard.
26. On the legal authorities submitted by Counsel for the Applicant, he stated that the Court User’s Guide adds no value as it merely reproduces and applies Rule 56 of the Rules of this Court.
27. Regarding the Ruling in *Reference No. 17 of 2014* aforesaid, he stated that it is of no use in the present case because the Summons issued to the Clerk of the Assembly were so issued because the Clerk, unlike the Applicant and the witnesses, was not willing to testify in the Reference, hence the summons and he was therefore a compellable witness.
28. For the above reasons, the Respondent prays that the Application herein be dismissed with costs.

Determination

29. At the heart of this Application is the question whether this Court should issue Summons to the Applicant and her witnesses or in the alternative, whether on the Court’s own motion such summons should be issued for the witnesses to testify in *Reference No. 17 of 2014*.
30. Before addressing that question, we had reserved one issue for quick determination within this Ruling: Whether the Applicant can make reference to any documents including the Hansard of the Assembly. In the present Application in that regard, upon reading the record of 18th March 2016 when this Application was heard, we note that Counsel for the Applicant steered clear of those documents although they were exhibited to the Supporting Affidavit. In any event upon perusing our Ruling dated 6th November 2015 in *Reference No. 17 of 2014*, we note that we addressed the same issue in the following terms:

“Be that as it may, as depicted above, the evidence that must be subjected to the leave of the Assembly before it can be adduced elsewhere includes contents of minutes, oral evidence, documentation,

proceedings or examination laid before or arising in the Assembly or a committee thereof.”

31. We reiterate the above finding and for purposes of this Ruling, where necessary, we shall make no reference to any of the above documents or evidence. Letters exchanged between the Applicant and the Speaker of the Assembly are however not privileged and it is obvious why.
32. Turning back to the Application proper, Summons under the Rules of this Court are provided for in Rule 56 of the Rules which provides:
- “56(1): Any party in a claim or reference may obtain on application to the Court, summons to any person whose attendance is required either to give evidence or to produce documents.
- 56(2): Every witness summons shall specify the time and place of attendance, and whether attendance is required for the purpose of giving evidence or to produce a document, or for both purposes. The summons shall describe with reasonable accuracy the document required.
- 56(3): The Court may on its own motion summon any person to give evidence or document if in the opinion of the Court such evidence or document is essential for the just determination of any matter before it.
- 56(4): Where a person summoned to give evidence or to produce a document fails to appear or refuses to give evidence to produce the document, the Court may in its discretion impose upon the witness a pecuniary penalty not exceeding USD 200.
- 56 (5): A penalty imposed under this Rule shall be enforceable as an order in accordance with Article 44 of the Treaty.
- 56 (6): Summons under this Rule shall be in accordance with Form 7 in the Second Schedule and shall be served in the manner prescribed for service of notification.”
33. In the Ruling in *Reference No. 17 of 2014*, between the present Parties, we rendered ourselves as follows regarding Rule 56(1) and (4):
- “Therefore, the order that emanates from Rule 56(1) is tantamount to witness summons compelling a person to give evidence or produce documents in his or her possession, failure of which he/she would be penalized. Thus, in the present case, the Clerk to the Assembly was compelled to produce documentation in his custody. He did indeed dutifully produce the required documentation and it was duly admitted on the Court record.”
34. We reiterate the above finding and Rule 56, in our view, speaks for itself and requires no more than a literal interpretation. We only need to add that Mr. Agaba is quite right, that a summon by its very nature, is an order issued to compel the attendance of a person at a judicial proceeding. It is what is called in other jurisdictions a *subpoena*. A *subpoena* that commands a person to bring certain evidence, usually documents or a paper, is called a *subpoena Duce Tutem* from the latin “*under a penalty to bring with you.*” A famous example of such a *subpoena* was in *United States vs. Nixon* 418 U.S. 683, 94 S.Ct 3090 41 L. Ed 2d 1039 (1974) where President Richard Nixon was, by summons, compelled to produce certain evidence in his custody. Rule 56(1) and (4) certainly create such a *subpoena*.

35. In the Application before us and in the above context, for summons to be issued either on the application of the Applicant or on its own motion by the Court, it must be shown that the witnesses are either unwilling or reluctant to testify hence the need for summons to compel them to do so. In the case of witness No.(i), the Applicant herself, this cannot be the case for the obvious reason that having chosen to give evidence, she would have to testify and produce whatever documents she wishes to produce without any summons being issued for her to do so. Similarly, proposed witnesses Nos. (ii) – (v) have voluntarily chosen to give evidence in support of the Reference. They too do not require any summons to do that. What is certainly an issue therefore is whether the Applicant and her witnesses can lawfully be compelled to produce documents within the purview of Section 20 of the EALA (Powers and Privileges) Act, 2003.
36. That section for avoidance of doubt provides thus:
“20 (1): Notwithstanding the provisions of any other law, no member or officer of the Assembly and no person employed to take minutes or record evidence before the Assembly shall, except as provided in this Act, give evidence elsewhere in respect of the contents of such minutes or evidence or of the contents of any document laid before the Assembly or such committee, as the case may be, or in respect of any proceedings or examination held before the assembly or such committee, as the case may be, without special leave of the Assembly first hand and obtained in writing.”
37. In addressing the import of that Section, this Court in the Ruling in *Reference No. 17 of 2014* rendered itself as follows:
“Thus, for the present purposes: the Applicant would be acting well within her legal rights to adduce evidence before this Court that has nothing to do with the minutes, evidence, documentation, proceedings or examination laid before or arising in the Assembly or Committee thereof. Secondly, Section 20(1) expressly prohibits the tendering of the contents of the above evidence only and not all evidence *per se*. Thus, in principle, reference may be made to minutes or documentation placed before the Assembly without adducing the contents thereof as captured in a specific minute, and similarly, reference may be made to the proceedings of the Assembly without relaying the specific contents of such proceedings as captured by the Hansard. That is not to say that mere reference to such documentation is sufficient proof thereof; rather, as we have stated hereinabove, proof of the documents enlisted in Section 20 would necessitate their production with the requisite leave of the Assembly.”
38. We reiterate the above holding as applicable to the present Application, a matter we have also partly addressed elsewhere above.
39. It is in the above regard that the Applicant invoked Section 20 above, which is Community Law and is operative but her application to have the witnesses testify and produce certain documents was rejected by the Assembly. Can she now have the same evidence presented to this court by way of summons?
40. We have held that summons cannot be issued to voluntary witnesses but more fundamentally, summons cannot be used as an appeal against a decision of the Assembly taken within Community Law which has not been invalidated. We

say so because the East African Community was created with the principle of separation of powers firmly in place, hence the fact that it has, like a modern State, an independent court, legislature and executive. None of the organs can lawfully direct the work of the other one by the Principle of Separation of Powers as well as Checks and Balances entrenched in the Treaty. This Court for example, can only interfere with decisions of the Assembly or the Sectoral Council if they are in violation of the Treaty – See *Calist Andrew Mwatela and others vs. East African Community, Application No. 1 of 2005, (2005 – 2011)EACJLR 1*.

41. We are fortified in our findings above by the decision of the Appellate Division in *Appeal No. 7 of 2015* between the present parties where the Division stated thus:

“From the perspective of adjective law (Procedural Law), such minutes, records, documents, proceedings or examinations are privileged evidence. As such, they are inadmissible in any forum other than the Assembly itself unless the privilege is waived by such Assembly. And the proof of the waiver of the privilege is a written permission from the Assembly. We hasten to add that the witnesses themselves are not incompetent to testify. They are competent. It is the specified material from EALA they may seek to adduce in evidence which is privileged.

It is thus manifestly clear to us that before the sword of section 20(1) of the Privileges Act can be drawn to strike a witness, it is necessary to establish that the witness to whom the sword is pointed, and thus whose evidence is sought to be shut out is (i) a member or officer or staff of EALA; (ii) he or she intends to give evidence of the contents of minutes taken in, evidence given in, documents laid before, or any proceedings, or an examination held before the EALA or any of its committees and (iii) he or she does not have written special leave of the assembly to do so.”

42. We are duly guided and it is obvious to us that summons, even if they could be issued to voluntary witnesses, cannot be used to circumvent, defeat or act as an appeal or review of a decision of the Assembly under Section 20(1) aforesaid.

43. The above findings would then necessitate a consideration of an alternative issue arising from the Application; if summons cannot be issued on the Application of the Applicant, can and should the same be issued through a motion by the Court?

44. In that regard, Rule 56(3) of the Rules indeed grants this Court the power to “summon any person to give evidence and produce any document” if in its opinion such “evidence or document is essential for the just determination of any matter before it.” The evidence and documents in issue in the present Application relate to proceedings before the Assembly and documents relating to the Applicant’s removal as Speaker of the Assembly. Two factors would however preclude us from taking that course of action, even if the evidence and documents are indeed essential.

45. The first is that we cannot, by Rules of Procedure, purport to ignore, circumvent or overturn a decision of the Assembly made pursuant to Section 20(1) aforesaid and without first declaring that Section a violation of the Treaty. Our hands are therefore tied.

46. Secondly, prior to the Ruling in *Reference No. 17 of 2014*, certain documents

required from the Assembly were ordered, by summons, to be produced by the Clerk to the Assembly, hence our statement in the Ruling aforesaid as follows:

“We now revert to the documentation presented to the Court by the Clerk to the Assembly. The facts of the present case are that the Clerk to the Assembly did produce documentation that was admitted on the court record. The said documentation was produced pursuant to Summons issued by this Court following an Application for that purpose by the Applicant that was not contested by the Respondent.”

47. In that context, any call upon this Court to demand other documents from the Assembly contrary to Section 20(1) and without a lawful basis, other than the Applicant’s dissatisfaction with a decision of the Assembly, would be a travesty of justice. If, at a later stage, such a course of action is rendered necessary, for example, after evidence has been tendered by parties, and a *lacunae* in evidence is noted by the Court, then it can, on its own motion, demand such documents. To do so in the present circumstances and at this stage of the proceedings would only force the Court to descend to the arena of contested facts, an invitation we decline to accept – see *Appeal No. 7 of 2015* at Para. 49.
48. From the foregoing, it is obvious that the two substantive prayers in the Application under consideration (one in the alternative) cannot be granted.

Conclusion

49. Before we dispose of the Application, it would be remiss of us not to address a matter of grave concern to us that was raised by Mr. Agaba in his submissions. While purporting to address us on the Principle of Separation of Powers, he took a detour and made the startling submission that should the orders sought by the Applicant be granted then “EALA may be forced to invoke such oversight powers in the activities of the Court as well.”
50. When pressed to explain himself, Mr. Agaba stated that in view of certain past decisions of the Court, including in the case of Hon Sitenda Sebalu (we know it to be *Hon Sitenda Sebalu vs. The Secretary General of the East African Community Reference No. 8 of 2012 (2012-2015) EACJLR 120*), the Sectoral Council on Judicial Affairs composed of the Attorneys General of Partner States, was studying “how this Court may not continue to go overboard.” He went even further to state that “when (EALA) starts to consider that the Court in making an affront on its own powers, its making an affront on its own immunity, its making an affront on its own integrity, the matters that are discussed within the House which are supposed to remain within the confines of the House, Court is now using its own powers to summon witnesses and bring documents and allow the dirty linen of the Assembly to come and be washed in this Court room. Then I see a big problem, that’s just my anticipation, My Lord.”(sic)
51. We were and are astounded by the intent and letter of Mr. Agaba’s statements above. Even more so because they would appear to suggest an underlying feud between two branches of the Community’s governance organs. Without giving the said statements undue attention, we do hereby clarify that such an insinuation could not be further from the truth. For avoidance of doubt, the East African Court of Justice is a recognized organ of the Community, whose paramount duty is to dispense justice to all manner of persons, natural and

juridical, whatever their station in life. Accordingly, members of the Bench are bound by and committed to the judicial oath of office that enjoins them to discharge their functions with due brevity, courage and civility. Therefore, any threats, real or perceived, to the independence and impartiality of the Court, as well as individual members thereof shall be regarded with the contempt they have so dubiously earned. Needless to say, the above unfortunate submission and conduct have no bearing on the outcome of this Application.

Disposition

52. For reasons set out above, we see no merit in the Application dated 22nd January 2016 and the same is hereby dismissed.
53. Costs shall abide the outcome of the Reference.
54. Orders accordingly.

J. Tumwebaze & Semuyaba, Counsel for the Applicant

S. Agaba for the Respondent

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First Instance Division

Application No. 3 of 2016

(Arising From Reference No. 1 of 2015)

Johnson Akol Omunyokol v The Attorney General of the Republic of Uganda

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ & A. Ngiye, J
December 1, 2016

Procedure – Delayed leave to amend pleadings- Whether the amendment would occasion an injustice - Judicial discretion

Rules 1(2), 48(c), 50(1), (2), (3) of the EACJ Rules of Procedure, 2013

The Applicant filed Reference No. 1 of 2015 seeking orders challenging the Government of Uganda's refusal to re-instate him to his permanent and pensionable employment as a Foreign Service Officer. Prior to the hearing, the Applicant sought leave to amend his pleadings claiming that: the intended additions were omitted through oversight and human error; and he would be prejudiced if the amendment was not allowed as he would miss out on some the remedies sought. He also alleged that the Respondent if would suffer no injustice or prejudice if leave to amend was granted.

The Respondent opposed the application averring that the amendments sought were not concise statements of facts but rather were evidence which would require the Respondent to reply to submissions. Additionally, there was inordinate delay in filing the application and this would be prejudicial to the Respondent's case.

Held

1. The Court has discretionary power to allow amendment of pleadings at any stage of the proceedings for purposes of determining the real issue in controversy between the parties. That discretion should be exercised judiciously so as to do justice to the case and with due consideration of all the facts and circumstances. The powers of amendment should not be used to substitute one cause of action for another or change an action into another of a substantially different character.
2. At this stage, the Court is not concerned with the merits of the Reference as those are matters will be canvassed at the hearing. The proposed amendments are necessary to help the Court conclusively determine the issues before it. A delay by a litigant in bringing a formal application to amend is not a ground for refusing the amendment.
3. The Respondent has not demonstrated what injustice it would suffer if the Applicant is granted leave to amend. Moreover, the Respondent will be granted leave to amend his Response to the Reference, if he so wishes, and he could also be entitled to costs. Thus, the intended amendment, though poorly drafted, will advance the cause of justice and is allowed

Cases cited

Eastern Bakery v Castelino (1958) E.A. 461

Rogers M. Mogusu v George O. Oloo & Ors (2014) eKLR

Shivji v Pellegrini (1972) HCD 76

Trans-Drakensberg bank Ltd v Combined Engineering 1967 (3) SA (D)

RULING

A. Introduction

1. The present Application arises from Reference No. 1 of 2015 where the Applicant has invoked Articles 6(d), 7(2), 27 and 30 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”), as well as Rules 24(1),(2),(3) of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as “the Rules”) in seeking orders challenging the Government of Uganda’s refusal to return him to his permanent and pensionable employment as a Foreign Service Officer.
2. Before the Reference could be heard, the Applicant filed a Notice of Motion under Rules 1(2), 48(c), 50(1),(2),(3) of this Court’s Rules seeking orders that:
 - a) Leave be granted to the Applicant to amend his pleadings; and
 - b) Costs of the Application be provided for.
3. The grounds of the Application are that the amendments are necessary to resolve issues in controversy between the Parties to the Reference. The Applicant in that regard contends that the intended additions were omitted by mere oversight and human error, and no injustice or prejudice shall be occasioned to the Respondent if the Application to amend is granted. He further argues that it is in the interest of justice that the Application be allowed.
4. In the supporting Affidavit sworn on 7th July 2016, the Applicant has outlined the justification for amendment and states that he will be prejudiced if this amendment is not allowed since he will have missed out on some remedies that he is entitled to.
5. Ms. Josephine Kiyingi of the Ministry of Justice and Constitutional Affairs/ Chambers swore an Affidavit in reply on 16th August 2016. She urged the Court to dismiss the Notice of motion dated 7th July 2016 arguing that the proposed amendments are an abuse of Court process since it is not true that there was a genuine mistake at the time of filing Reference No. 1 of 2015 as alleged. In her opinion, the intended amendments are argumentative and offend the Court’s Rules. Further, the amendments sought are not concise statements of facts as required by the Rules, but rather, amount to evidence adduced by the Applicant. Therefore, the Respondent will in effect be replying to submissions and not concise statements of facts. Lastly, the said deponent contends that there was inordinate delay in filing the Application, and therefore the Respondent will suffer prejudice in the event that it is allowed.
6. At the hearing of this Application the Applicant was represented by Mr. Fitz Patrick Furah, learned Counsel while Ms. Goretti Arianaitwe, learned State Attorney, represented the Respondent.

Applicant’s Submissions

7. Mr. Furah, in his submissions, maintained that the amendments sought seek to raise all the issues in controversy in this matter that, at the filing of the Reference, were not included by omission and oversight. He also argued that the Application was brought under the correct law, in good faith and for the ends of justice. He therefore prayed that this Court ought to allow it.

8. In response to questions from the bench, Mr. Furah conceded that it was not proper for the Applicant to amend his Affidavit in support of the Reference and to cite authorities in the body of the Amended Reference. He also conceded that his application was not concise.
9. Finally, Mr. Furah argued that the Court has discretion to allow the amendments as they are or to allow them with adaptations, striking out what may be offensive to the Rules, and committed to complying with whatever other orders the Court would make.

Respondent's Submissions

10. Ms. Arinaitwe, learned Counsel for the Respondent, strongly opposed the Application. Citing the Affidavit of Ms. Josephine Kiyingi, she maintained that the intended amendments were argumentative and offend the Rules of this Court. She further stated that the purported amendments in their entirety were tantamount to submissions.
11. Counsel went on to refer to Rule 37(1) and (2) of the Rules, arguing that in this case, the pleadings were not concise, which is prejudicial to the Respondent and a blatant abuse of court process.

Court's determination

12. From the foregoing arguments, it would appear that the sole issue for determination herein is whether the amendments should be granted or not.
13. The amendment of pleadings with leave of Court is governed by Rules 48(c) and 50 of the Rules. We reproduce the said Rules for ease of reference:

Rule 48

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any pleading, a party may amend its pleading –

- a) ...
- b) ...
- c) With leave of the Court.”

Rule 50

“(1) The Court may, at any stage of the proceedings, allow any party to amend its pleadings in such manner as it may direct and on such terms as to costs or otherwise as may be just.

(2) ...”

14. The above provisions expressly provide that this Court has discretionary power to allow amendment of pleadings at any stage of the proceedings for purposes of determining the real question or issue in controversy between the parties. That discretionary power is exercised so as to do justice to the case and must be exercised judiciously with due consideration of all the facts and circumstances before the Court.
15. The principles that guide the exercise of this discretion were discussed in *Eastern Bakery v. Castelino (1958) E.A. 461*. In that case, it was held that as a rule, amendments to pleadings should be freely allowed if they can be made without injustice to the other side. The powers of amendment should also not be used to substitute one cause of action for another or change an action into another of a

substantially different character. Subject to this, the fact that an amendment may introduce a new case is not a ground for refusing it. See also *Shivji v. Pellegrini* (1972) HCD 76 and *Rogers Mogaka Mogusu v. George Onyango Oloo & 2 Others* (2014) eKLR.

16. In the matter before us, the Applicant argues that the amendments sought are a result of oversight and human error in the pleadings and does not introduce any new cause of action. It is his contention that the amendment is not, therefore, an abuse of the Court process and neither is it made in bad faith as alleged by the Respondent.
17. Whereas we appreciate the Respondent's argument that the oversight the Applicant fronts as the reason for amendment was not adequately explained and, that the intended amendments are argumentative and not concise, we are not satisfied that that is sufficient reason to disallow the Application.
18. At this stage, we are not concerned with the merits of the Reference as those are matters that will be canvassed at the hearing. Rather, it seems to us that the proposed amendments are necessary to help the Court conclusively determine the issues before it.
19. The other issue raised by the Respondent in opposing the amendment is that there has been unreasonable delay in bringing the Application for amendment before this Court.
20. We note however that in the matter of *Trans – Drakensberg bank Ltd vs. Combined Engineering 1967 (3) SA (D)* it was held that a delay by a litigant in bringing a formal application to amend in itself was not ground for refusing the amendment, unless the Respondent could show prejudice.
21. In the instant case, the Respondent has not demonstrated what injustice, if any, it will suffer if the Applicant is granted leave to amend. On the contrary, if such leave is granted, not only will the Respondent be granted leave to amend his Response to the Reference, if he so wishes, but he could also be entitled to costs.
22. In the event, the Court finds that the intended amendment, though poorly drafted, which is an issue of form and not substance, will advance the cause of justice if granted in this matter.

Conclusion

23. For the above reasons, we are satisfied that the proposed amendments would enable this Court to conclusively determine the real issues in controversy in the Reference, and are not prejudicial to the Respondent. We do, therefore, allow the Application with costs to the Respondent. The Applicant is ordered to file and serve a properly amended Reference within 14 days from the date of this Ruling. The Respondent is at liberty to file a Reply to the Amended Reference within 14 days of service of the Amended Reference if he so wishes.
24. We so Order.

F. Furah Counsel for the Applicant

G. Arianaitwe Counsel for the Respondent

First Instance Division

Application No. 11 of 2016
(Arising from Reference No. 8 of 2016)
Castro Pius Shirima

v

**The Attorney General of the Republic of Burundi, The Attorney General of the Republic of Kenya,
The Attorney General of the Republic of Rwanda, The Attorney General of the Republic of South Sudan, The Attorney General of the United Republic of Tanzania,
The Attorney General of the Republic of Uganda, The Secretary General of the East African Community**

Coram: I. Lenaola, DPJ; F. Ntezilyayo & F. Jundu, JJ
July 6, 2017

Interlocutory injunction – Whether there was a link between signing of the Economic Partnership Agreement and irreparable injury was established -Jurisdiction - Summit decision - Cause of action

Articles: 6(a), (f), 27(1), 30(1), 39 of the Treaty - Rules: 21(1), (4), 73, EACJ Rules of Procedure 2013

In 2000, EAC States that are part of the African, Caribbean and Pacific Group of States and the European Union (EU) signed the Cotonou Partnership Agreement and committed to negotiate a reciprocal Economic Partnership Agreement (EPA) later. Negotiations commenced and in October 2007, the States harmonized their positions and a market access offer to the EU. Negotiations carried out by the EAC as a bloc, concluded and the EPA was initialled by five EAC Partner States on 14th October 2014. Subsequently, Kenya and Rwanda signed the EPA on 1st September 2016. Meanwhile in September 2016, the 17th Extra-ordinary EAC Summit of Heads of State, after considering a report of the Council of Ministers, requested for three months to finalize and obtain clarification on the concerns of some of the remaining Partner States before considering the signing of the EPA as a bloc. Kenya has since ratified the agreement.

The Applicant filed in Reference No. 8 of 2016 alleging *inter alia*, that by individually signing the EPA, the 2nd and the 3rd Respondents had violated Article 6(a) and (f) of the Treaty. Thereafter, the Applicant averred that the signing of the EPA was not in the interest of the Community as it posed economic risks to the East African region. He sought an order for stay of signing of the EPA by the First, Fourth, Fifth and Sixth Respondents. He claimed that: the signing of the agreement will continue violating the letter and spirit of the EAC Treaty as the EU subsidized its farmers so products imported from the EU may expose the EAC farmers to unfair competition without any compensatory remedy to reverse the impacts of application of the EPA. He also sought a stay of any further signature, ratification and regional application of the agreement as this would displace EAC products from the market thus undermining

its industrialization policy framework including tariff regimes.

The Respondents' opposed the application stating *inter alia* that: the Court lacked jurisdiction to hear and determine the matter since a treaty-making process is based on mutual consent of sovereign States and the Court's mandate does not extend to the interpretation of issues related to the process of treaty making. Furthermore, the Summit of Heads of State, was seized of the issue. Additionally, the Applicant: did not show a cause of action or raise triable issues nor the existence of a *prima facie* case with a probability of success; could not establish any injury he was likely to suffer which could not be compensated by an award of damages if an interlocutory injunction was not granted by this Court; and that on a balance of probabilities, looking at the economic benefits that the signing of the EPA was likely to bring to the Community *vis-a-vis*, the inconvenience the EAC Partner States would experience, the Applicant would not be inconvenienced at all if his Application was not granted.

Held

1. When a party approaches this Court, invokes specific provisions of the Treaty and alleges that a Partner State or an institution of the Community has violated or breached those provisions in the manner set out in Article 30(1) of the Treaty, then this Court is clothed with jurisdiction to determine such an allegation. In the present case, the allegation that by individually signing the EPA, the 2nd and the 3rd Respondents have violated Article 6(a) and (f) of the Treaty and that allegation is sufficient to cloth this Court with jurisdiction to determine the Reference and the Application.
2. The use of the word "stay" as used in the Application is an error as the submissions indicate that the Applicant was in essence, seeking an interlocutory injunction to restrain the impending signing of the EPA by Partner States who had not yet sign it, but he fell short of clarifying which procedures or processes had to be restrained with regard to the two Partner States which had already signed the Agreement, one Partner State having even ratified it.
3. The fact that the 17th Extra-ordinary EAC Summit of Heads of State was seized of the matter and decided to hold the signing of the EPA pending further consultations on the subject indicates that there is a live issue to be determined as to whether the remaining Partner States, should be stopped from signing the EPA pending the determination of the Reference. In the circumstances, both Reference No. 8 of 2016 and the present Application disclose no cause of action against the 5th Respondent and all other Respondents.
4. The Applicant's agent was unable to establish the link between the impugned signing of the EPA and the alleged irreparable harm that the said signing would cause. In the circumstances the Applicant failed to establish that he would suffer an irreparable injury that could not be compensated by an award of damages if the injunctive order sought is not granted.

Cases cited

Giella v Cassman Brown & Co. Ltd [1973] E.A 360

Mbidde Foundation & Anor v Secretary General of EAC [20012-2015] EACJLR 521, Appl. No. 5 of 2014,

Masenge Venant v The Attorney General of Burundi [20012-2015] EACJLR 136, Ref. No. 9 of 2012

Mary Ariviza v The Attorney General of Kenya & Anor 2005-2011] EACJLR, 268, Appl. No. 3 of 2010

Samuel M. Muhochi v The Attorney General of Uganda [2005-2011] EACJLR 274, Ref. 5 of 2011

Plaxeda Rugumba v The Secretary General of the EAC & Anor [2005-2011] EACJLR 226, Ref. No. 8 of 2010

Prof. Ayang' Nyong'o v The Attorney General of Kenya [2005-2011] EACJLR 40, Appl. 1 of 2006

Editorial Note: Appeal 3 of 2017 was dismissed on February 18, 2018. Application 3 of 2018 seeking reinstatement was also dismissed on May 9, 2018 for failure to serve the parties and non-appearance.

RULING

A. Introduction

1. This Application was filed on 31st October 2016 by Mr. Castro Pius Shirima (hereinafter referred to as the “Applicant”), a Tanzania citizen and resident in Arusha.
2. The Respondents are the Attorneys General of all the six East African Community Partner States who are sued in their capacities as the Principal Legal Advisors of their respective Governments and the Secretary General of the East African Community who is sued as the Principal Executive Officer of the Community.
3. The Application arises from *Reference No. 8 of 2016* and is premised on Article 39 of the East African Community (hereinafter referred to as the “Treaty”) and Rules 21(1)(4) and 73 of the East African Court of Justice Rules of Procedure 2013(hereinafter referred to as the “Rules”).
4. The Applicant has approached this Court under a certificate of urgency whereby he stated that “the hearing of the Application was of extremely urgency due to the fact that the 2nd Respondent went on ratifying the Economic Partnership Agreement between the East African Community and the European Union on 20th September 2016 despite the 17th East African Community Extra-Ordinary Summit decision to halt the signing of the EPA for further consultation in three-month period.” [sic]. He further stated that he stood to suffer irreparable economic loss and serious violation of his rights under the Treaty in case of further signatures and /or ratification to the Economic Partnership Agreement (hereinafter “EPA”) between the East African Community (hereinafter “the Community”) and the European Union (hereinafter “the EU”) before the determination of this Application.
5. In his Notice of Motion, the Applicant has therefore prayed for the following orders:
 - i. An order for stay of signing the Economic Partnership Agreement with the European Union by the first, fourth, fifth and sixth Respondents as proposed by the 17th EAC Extraordinary Summit’s resolution on 8th September 2016 at Dar-es- Salaam, on the ground that:
 - a. Signing such agreement by the Second and Third Respondent has violated and/or will continue violating the letter and spirit of the East African Community Treaty if signed by the remaining Respondents, respectively.
 - b. The signing of the Economic Partnership Agreement demands an intervention of the court to resolve the legal question that food security is the backbone of East African economies yet at the same time European Union subsidizes domestic farmers; which may expose the East African farmers to unfair competition.
 - c. If not stayed, any further signature will allow ratification and regional application of the Agreement in contravention which

will most likely displace East African Community products from the market thereby undermining the industrialization policy framework including tariff regimes.

- d. There is no any compensatory remedy or damages that will reverse the impacts of application of this Agreement in the region in event that the court does not intervene pending the hearing of the main reference.
 - ii. An order directing the second and third Respondents herein to stay forthwith any pending procedures and/or processes over the agreement they have signed until final decisions on the main reference is delivered;
 - iii. An order directing the seventh Respondent to withdraw forthwith any negotiations initiated with the European Union in view of the 17th Extraordinary Summit's decision until final decision on the main reference is delivered; and
 - iv. And for an order that the costs of and incidental to this application abide the result of the case." [sic]
6. When the Application came for hearing on 24th November 2016, it was noted that the Applicant had not served some of the Respondents with the Reference and the Application, namely the Republic of Burundi, the Republic of Rwanda and the Republic of South Sudan. The Court therefore directed the Applicant to properly serve them with the Reference and the instant Application. The Court also directed that preliminary objections filed against the Application should be argued at the hearing of the Application. The Application was subsequently heard on 13th March 2017.

B. Representation

7. The Applicant appeared in person at the hearing of the Application on 24th November 2016, but on 13th March 2017, Mr. Moto Matiko Mabange appeared as the Applicant's Agent. The 1st Respondent was represented by Mr. Nestor Kayobera; Ms. Jennifer Gitiri and Mr. Maurice Ogosso appeared for the 2nd Respondent; the 3rd Respondent was represented by Mr. Nicholas Ntarugera and George Karemera; Mr. Jeremiah Swaka Moses appeared for the 4th Respondent; the 5th Respondent was represented by Mr. Edson Mweyunge, Mr. Mark Mulwambo and Mr. David Kakwaya; Mr. Elisha Bafilawala, Mr. Gerald Batanda and Ms. Sylvia Cheptoris represented the 6th Respondent, while the Secretary General of the East African Community was represented by Mr. Stephen Agaba.

C. Case and Submissions for the Applicant

8. The Applicant's case is as stated in his Application and his supporting Affidavit filed on 31st October 2016. His agent, Mr Mabange also made oral submissions.
9. On why he had sued the Respondents including specifically the 4th Respondent, the Applicant deponed that the 4th Respondent was a Member State of the Community with full and equal rights, obligations and privileges from 5th September 2016 and was therefore properly sued in the Reference as a respondent.
10. He also asserted that the 7th Respondent, as the Principal Executive Officer of the Community was duty-bound under the Treaty, to provide advice and oversee the implementation of various activities and/or programmes of the Community.

11. He further stated that there have been formal trade agreements between EU and the East African region, which agreements maintain non-reciprocal tariff preference and that the latter was contested at the World Trade Organization (WTO) as being discriminatory against some members.
12. He averred that out of the five EAC Member States, only Kenya is classified by the World Bank as a developing country and that the four remaining countries are in the category of least developed countries.
13. He also stated that on 23rd June 2000, the African, Caribbean and Pacific Group of States and the EU signed the Cotonou Partnership Agreement and committed to negotiate a reciprocal Economic Partnership Agreement (EPA). He added that on the part of the Community, the negotiations that started in 2002 were carried out under the bloc auspices.
14. It is the Applicant's further submission that exports from the 2nd Respondent faced tariff rates between five and twenty-two per cent and that those from the remaining Community members were exempted from tariffs under the Everything But Arms (EBA) arrangement.
15. The Applicant further contended that the EU had unilaterally set 1st October 2014 as the deadline for the conclusion of EPA negotiations and that it had threatened that after that date, exports from East Africa would lose preferential treatment and would be subject to the Generalized Scheme of Preferences.
16. He also submitted that on 13th October 2007, the Community directed its member States to harmonize their positions on the EPA and submit harmonized market access offer to the EU, but that it was not possible to conclude the full EPA negotiations by the 1st October 2014 deadline; that indeed, negotiations were concluded shortly after the said deadline and the EPA was only initialled on 14th October 2014. He also stated that, specifically, the 2nd Respondent's exports were put back on the Preferential List on 25th December 2014.
17. It is also the Applicant's submission that the Community had committed itself to liberalising eighty-two per cent of imports from the EU over a transitional period of twenty-five years, and that the European Council did authorize the initial application and implementation of EAC-EU EPA on 20th June 2016.
18. He further pointed out that the East African Legislative Assembly (EALA) had, on several occasions declared that the EPA framework had to be subjected to National Parliaments for approval before signing of the resultant Agreement and added that EALA had also resolved that the signing of the EPA should be delayed until contentious matters between the negotiating parties to the Agreement are formally and fully resolved.
19. The Applicant also recalled that the Community had enacted an Industrialization Policy running from 2012 to 2032 and also established the East African Industrialization Strategy for the same period. He also mentioned the enactment of the East African Community Vision 2050 as relevant to his Reference and Application.
20. He also deponed that the 17th EAC Extra-Ordinary Summit of Heads of State convened in Dar-es-Salaam on 8th September 2017, had considered, *inter alia*, the Council of Ministers' report on the EAC-EU EPA and he also pointed out that the said Summit was also attended by the 4th Respondent which, however was not a member to the Community during negotiations for the EPA.

21. The Applicant further stated that the 2nd Respondent had ratified the EPA on 20th September 2016 and deposited its instruments of ratification on 28th September 2016.
22. In addition to the Applicant's deposition, his Agent made oral submissions and contended that the signing of the EPA was not in the interest of Partner States to the Community as it posed economic risks to the East African region. He also pointed out that there was uncertainty in the relationship between the Community and the European Union following the United Kingdom's decision to leave the European Union. He then stressed the need for Partner States to stand together rather than acting individually as was the case whereby two Partner States had signed the EPA while others were raising concerns over the signing of the said Agreement.

D. Cases & Submissions for the Respondents

1st Respondent

23. In a replying Affidavit sworn on 3rd February 2017, Mr. Nestor Kayobera, on behalf of the 1st Respondent, deponed that since there was no urgency or merit in the Application contrary to what was alleged by the Applicant, the Court ought to dismiss the Application with costs and thereafter schedule the Reference for determination.
24. Learned Counsel further referred to Article 39 of the Treaty where it is provided that for this Court to issue interim orders, it has first of all to be satisfied that the orders sought by the Applicant are necessary or desirable, and it was his view that the orders sought by the Applicant were not.
25. Furthermore, pointing out that granting of interim orders is governed by Article 39 of the Treaty aforesaid as read together with Rule 21 of the Rules, he asserted that this Court had, in a number of applications, including *Application No. 5 of 2015, arising from Reference No. 2 of 2015 in East African Society Organization Forum Vs The Attorney General of the Republic of Burundi & 2 Others*, set three conditions for grant of an interlocutory injunction. They are that:
 - i. An application must show a prima facie case with a probability of success;
 - ii. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and
 - iii. If the Court is in doubt, it will decide an application on the balance of convenience."
26. Based on the foregoing, Learned Counsel submitted that the instant Application did not meet any of the abovementioned conditions and prayed that the Court, therefore, ought to dismiss the Application and schedule *Reference No. 8 of 2016* for determination.
27. Counsel in addition to the above contended that the Applicant's assertion that the 17th EAC Extra-Ordinary Summit had decided that the 1st, 4th, 5th and 6th Respondents should abstain from signing of the EPA with the EU is unfounded and so is his contention that the two Partner States that have signed the EPA have violated the Treaty, which contentions in any event had no legal basis.
28. It was Learned Counsel's further submission that the Applicant could not establish any injury he was likely to suffer if an interlocutory injunction was not

granted by this Court and that the Applicant had also not established that he had a *prima facie* case with a probability of success against the Respondents and neither balance of convenience lies in favour of the Applicant.

29. He summed up his deposition by praying that this Court ought to dismiss the Application with costs and that Reference No. 8 of 2016 be scheduled for determination.

2nd Respondent

30. In response to the Application, the 2nd Respondent filed a preliminary objection mainly contending that the Court lacks jurisdiction to hear and determine the matter. In that regard, he contended that since a treaty-making process is based on mutual consent of sovereign States under international law and since such a process was mandated by the Summit and negotiated having regard to the Cotonou Partnership Agreement between the Members of the ACP States and the European Community and its Member States, the Court lacked jurisdiction to hear the matter as the negotiation, conclusion and ratification of the EPA by the 2nd Respondent is within its sovereign mandate and in fulfilment of its obligations under international law. To buttress his argument, Learned Counsel for the 2nd Respondent submitted that pursuant to Article 27 of the Treaty, the jurisdiction of this Court is limited to interpretation and application of the Treaty and does not extend to adjudicating a treaty-making process that is based on mutual consent between the Partner States and third parties under international law.

31. Learned Counsel also argued that this Court lacked jurisdiction since the Republic of Kenya's action of signing and ratification of the EPA was in fulfilment of its mandate pursuant to Article 37 of the Protocol on the Establishment of the EAC Customs Union and Article 37(1) of the Protocol on the Establishment of the EAC Common Market according to which Partner States have the mandate to "coordinate their trade relations to promote international trade and trade relations between the Community and third parties."

32. Further to the above, Counsel for the 2nd Respondent submitted that this Court lacked jurisdiction since the EAC Summit of Heads of State, which is the apex decision making Organ of the Community was seized of the issue and that the 17th EAC Extra-Ordinary Summit did not resolve to halt the signing and ratification of the EPA.

33. The 2nd Respondent also filed written submissions on 8th March 2017 and started by setting out the factual background to the present dispute recalling the various stages of the EPA negotiations that led to the initialling of the Agreement by the EU and all EAC Member States in October 2014. It was also pointed out that the EAC Sectoral Council on Trade, Industry, Finance and Investment (SCTIF) during its session of 26/2/2016 had directed the EAC Secretariat to liaise with the EU in order to organize the signing ceremony for the EPA, but that the possibility of signing the Agreement in July 2016 on the side-lines of the UNCTAD XIV Conference did not materialize. The Republics of Kenya and Rwanda in any event eventually signed the Agreement on 1st September 2016, he added.

34. The 2nd Respondent also contended that if Kenya had failed to sign and ratify the

EPA, it would have lost the Duty-Quota-Free market access to the EU since it would have been relegated to the category of Generalized System of Preferences which is less favourable than the EPA and Kenya's exports to the EU would as a consequence be immediately subjected to higher tariffs.

35. In his submissions, Counsel for the 2nd Respondent therefore framed three issues for determination, as follows:

- “1. Whether the Court has jurisdiction to hear and determine the application;
2. Whether the dispute is admissible; and
3. Whether an order of stay should be granted to stay the signing of EPA or the implementation of the same.”

36. On the issue of jurisdiction, he reiterated his contentions contained in the aforementioned preliminary objection that this Court's jurisdiction as provided by Articles 23 and 27 of the Treaty is limited to the interpretation and application of the Treaty and that it does not extend to the interpretation of issues related to the process of treaty making as is the case in the matter at hand. In support of that submission, he referred the Court to the cases of *Democratic Party Vs. The Secretary General of the East African Community & Others*, EACJ Appeal No. 1 of 2014; *Samuel Kamau Macharia and Another Vs. Kenya Commercial Bank*, eKLR; *Owners of the Motor Vessel 'Lilians' Vs. Caltex Oil (K) LTD (1989) KLR 1* and *The East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community*, EACJ Reference No. 9 of 2012.

37. The 2nd Respondent further relied on Article 31 of the Vienna Convention on the Law of Treaties which sets the benchmark of how a treaty is to be interpreted and submitted that no provision of the Treaty bestows upon this Court the power to adjudicate upon issues related to any treaty-making process *per se*. In that regard, he contended that the said process was within the sovereign mandate of States and hence not amenable to the Court's jurisdiction. In the same vein, it was Counsel's submission that under Article 6 of the Vienna Convention on the Law of Treaties, each State retains the right to make treaties with other States or international organizations and thus, he asserted, treaty making is essentially the preserve of their executive arms of government and therefore, issues arising therefrom are not justiciable.

38. As for the admissibility of the dispute, the 2nd Respondent submitted that the dispute “is not ripe for determination by the Court for it is being handled by one of the organs of the East African Community, namely the Summit.” He then referred to Article 11 of the Treaty where the functions of the Summit are set out and quoting the statement of the Communiqué issued following the 17th EAC Extra-Ordinary Heads of State Summit on 8th September 2016, which considered a report of the Council of Ministers on the EPA, he contended that the Summit had not made any determination on the matter and therefore, this Court should await that decision and should in the circumstances declare the Reference inadmissible.

39. Reverting to the issue on whether an order of stay should be granted to prevent the signing of EPA or further processes arising from its signing, the 2nd Respondent stated that the orders sought by the Applicant, being in the nature of a temporary injunction, some conditions must be satisfied before such an injunctive order is granted as set out in the landmark case of *Giella Vs Cassman*

Brown and Company Ltd (1973) EA 358. These conditions are couched in the same terms as those reproduced elsewhere above in the 1st Respondent's case. It was therefore the 2nd Respondent's submission that the Application had no chances of success since the Court has no jurisdiction to hear or determine the Reference and that in any event, the latter was inadmissible. Moreover, he contended that the Applicant had not set out the nature of injury that he would suffer in the event that the orders sought were not granted and prayed that the Application should consequently be dismissed.

3rd Respondent

40. The 3rd Respondent's case is contained in a Replying Affidavit sworn by Mr. George Karemera, Senior State Attorney in the Attorney General's Chambers of the Republic of Rwanda as well as in oral submissions made during the hearing of the Application on 13th March 2017.
41. In the aforesaid Affidavit, the deponent stated that he disproved the urgency of this Application and that the same in any event lacked merit and had no legal basis as regards the order sought to stop any further signing and ratification of EPA by the remaining EAC Partner States. In the rest of the Replying Affidavit, the depositions are, in our view, mere responses to the Reference than to the instant Application.
42. At the hearing of the Application, Counsel for the 3rd Respondent however stated that he fully supported the preliminary objections raised by the 2nd Respondent as regards the issue of jurisdiction and the admissibility of the Application. He also contended that the Applicant had not given any clarification on the damages that he or the Community would suffer by the signing of the EPA.
43. Learned Counsel further contended that the Applicant did not clarify or indicate the pending procedures that were supposed to be stopped by this Court as regards the Republic of Rwanda which had already signed the EPA in accordance with its obligations as an EAC Member State. He thus prayed for the dismissal of the Application with costs.

4th Respondent

44. In a Statement of Defence lodged on 3rd December 2016 as well an answer to the Application, the 4th Respondent stated that although it had been made aware of the proposed economic partnership between the Community and the EU, it did not participate in the EAC-EU EPA negotiations at all. It further asserted that any bilateral agreements concluded by an individual EAC Partner State with any other party was not binding on other Partner States not parties to such an agreement.
45. The 4th Respondent also stated that during the negotiations for admission to the Community, the Republic of South Sudan had accepted to be bound by the treaties, agreements, memoranda of understanding that the Partner States had already concluded "(as a bloc)" with other Partners without re-negotiations. He further pointed out that it was also agreed during negotiations for admission to the Community that the 4th Respondent would commit itself to accede and implement the EPA after all other Partner States had signed it prior to its admission as a full member of the Community and thus, the 4th Respondent

could not take part in the negotiations before its admission as a full member of the Community which was effective as of 1st October 2016.

46. The 4th Respondent also pointed out that the 2nd and 3rd Respondents had signed the EPA in Brussels on 1st September 2016 and the 2nd Respondent had ratified the same on 20th September 2016 before the admission of the 4th Respondent as a full member of the Community.
47. In light of the foregoing, the 4th Respondent stated that it had no case to answer and urged the Court to dismiss the Application against it.

5th Respondent

48. The 5th Respondent filed a Notice of preliminary objection and a counter Affidavit sworn by Mr. Aiday Alfred Kisumo, Senior State Attorney in the Attorney General's Chambers of the United Republic of Tanzania, on 18th November 2016. The preliminary objection is based on two grounds, namely, that the Applicant has no cause of action against the 5th Respondent and that the Application is frivolous and vexatious.
49. With regard to the cause of action, Counsel for the 5th Respondent referred the Court to the case of *Prof. Peter Anyang' Nyong'o & 10 Others Vs The Attorney General of Kenya & 5 Others*, EACJ Reference No. 1 of 2006 as well as the case of *Auto Garage Vs. Motokov (1971) EA 514* and pointed out that in both cases, the Courts had stated that a cause of action is a set of facts or circumstances that in law would give rise to right to sue or to take out an action in Court. He contended in that context that neither the Reference nor the Application had indicated a specific cause of action against the 5th Respondent. He further stressed that the 5th Respondent had not signed the EPA neither had the 5th Respondent indicated that it intended to sign it at all. He further contended that the Applicant's allegations were hypothetical and unfounded, and the Application being an abuse of the Court process, was thus frivolous and vexatious.
50. In furtherance of his argument, Learned Counsel asserted that the Applicant had not demonstrated any circumstances that showed that the 5th Respondent would act contrary to the decision of the 17th Extra-ordinary EAC Summit of Heads of State which had directed that there would be no further signatures appended to the EPA until they had resolved the concerns of the remaining Partner States. In that regard, he submitted that the case of *The Attorney General of the United Republic of Tanzania vs. African Network for Animal Welfare*, EACJ Appeal No. 3 of 2014 and the case of *Alcon International Ltd Vs Standard Chartered Bank of Uganda & 2 Others*, EACJ Appeal No. 3 of 2013, had made it clear that if there was no live dispute for resolution, a Court of Justice would be wasting the public resources of money and time by engaging in a futile and vain exposition of the law.
51. To further counter the Application, the 5th Respondent's Counsel contended that the Applicant had not demonstrated that the interlocutory injunction orders sought met the three conditions required for a Court to grant them. On those conditions - reproduced elsewhere above, he referred the Court to the case of *Mbidde Foundation Ltd & Another Vs The Secretary General of the East African Community*, EACJ Application No. 5 of 2014 and Application No. 10 of 2014 where this Court had quoted with approval the aforementioned case of *Giella Vs*

Cassman Brown.

52. Counsel for the 5th Respondent also took issue with the Applicant's Affidavit in support of the Application where he had deponed that the 4th Respondent had participated in the EAC Heads of State Summit of 3rd June 2010 while the Republic of South Sudan, the 4th Respondent, had not even attempted to be a Partner State to the Community by that date. Recalling therefore that an affidavit is a voluntary declaration of facts written down and sworn by a deponent before an officer authorized to administer an oath such as a Notary Public and is as such a statement of truth, learned Counsel argued that if such a declaration contains a falsehood as is the case with regard to the Applicant's affidavit, the latter ceases to be an affidavit. And then, relying on the case of *Kidodo Sugar Estate & 5 Others Vs Tanga Petroleum C. Ltd, Case No. 1 Civil Application No. 110 of 2009*, where the Court had found that "the application without a supporting affidavit remains with no legs to stand upon and for this reason, it must fail", Counsel submitted that, likewise, since there was no affidavit in support of the present Application, the latter was incompetent and should therefore be dismissed with costs.

6th Respondent

53 The 6th Respondent filed a Replying Affidavit sworn by Mrs Clare Kukunda, State Attorney in the Attorney General's Chambers of the Republic of Uganda, on 8th December 2016. The thrust of her deposition is that the Applicant's affidavit was a mere narrative and did not show that *Reference No. 8 of 2016* disclosed a *prima facie* case with a probability of success and that the Applicant had not shown the irreparable injury likely to be suffered in the event that the Application before us was not granted.

54 During the hearing of the Application, Counsel for the 6th Respondent's submissions more or less recouped those from other Respondents, namely that the Applicant had not demonstrated that he had a *prima facie* case with a probability of success and that in any event he stood to suffer no irreparable injury which could not be compensated by an award of damages. It was also learned Counsel's submission that, looking at the economic benefits that the signing of the EPA would bring to the Community, the Court ought to find that to grant an injunction against its signing would heavily inconvenience the EAC Partner States while conversely, the Applicant would not be inconvenienced at all if his Application was not granted. He therefore prayed that this Application be dismissed with costs to the Respondents.

7th Respondent

55. The 7th Respondent filed a Replying Affidavit sworn by Mr. Charles Njoroge, Deputy Secretary General of the East African Community, on 17th November 2016. He first of all stated that he disapproved of the alleged urgency of the matter, whereby the Applicant seeks certain interim orders and that the Court should instead schedule *Reference No. 8 of 2016* for determination since the Applicant's main concern with regard to the liberalization of trade between the Community and the EU would commence 7 years after the coming into force of the EPA, as provided by Article 11 and paragraph 2 of Annex II thereof.

56. He further pointed out the three conditions for the grant of an interlocutory

injunction as set out by this Court in *Application No. 3 of 2010, arising from Reference No. 7 of 2010 in Mary Ariviza case against the Attorney General of the Republic of Kenya and the Secretary General of the East Africa Community* and submitted that the Application did not meet any of the said conditions.

57. Moreover, Mr Njoroge stated that the Application and the Applicant's supporting Affidavit were based on speculation and/or misinformation on the role of the 7th Respondent in the EPA negotiations in that negotiations were spear headed by the Partner States and the role of the 7th Respondent was limited to the coordination, facilitation and management of the process in line with respective Council and Summit directives. He also stated that the 17th Extraordinary EAC Summit of Heads of State was seized of the EPA matter and was committed to addressing the concerns of some Partner States before proceeding with the signing of the EPA by Partner States that had not already signed it. In view of the foregoing, Mr Njoroge asserted that the Application did not disclose any bona fide case against the 7th Respondent and did not raise any triable issue nor did it show existence of a *prima facie* case with any likelihood of success against the 7th Respondent.
58. It was also stated, on behalf of the 7th Respondent, that the balance of convenience as far as the Community's interests were concerned, was not in the Applicant's favour; rather, if the orders prayed for were granted, such orders would disrupt the organs of the Community seized of the EPA matter and cause more injury to the Community as a whole. The 7th Respondent accordingly prayed that no single order sought should be granted and urged the Court to dismiss the Application with costs to the Respondents.

E. Rejoinder of the Applicant's Agent

59. In rejoinder, the Applicant's Agent did not address a number of issues raised by Respondents and opted instead to make a general statement whereby he reiterated his earlier submissions that the EPA posed serious risks to the Community and that Partner States should coordinate their efforts to address the serious issues he had raised before the signing of the EPA.
60. In response to the issue pertaining to the nature of the orders sought, Mr Mabange submitted that what was important was not the way those orders were formulated (i.e. stay orders versus injunctive orders), but their aim which, as he pointed out, is to stop the Partner States who had not signed the EPA from signing it and to restrain those who had signed it from carrying out further procedures or processes.

F. Determination

61. Given the abovementioned discussions over the nature of the orders sought by the Applicant as to whether they were stay orders or injunctive orders, we propose to start with this issue before examining the preliminary objections raised by the 2nd and 5th Respondents pertaining to issues of jurisdiction and cause of action, and thereafter, we shall address the main issue with respect to whether the orders sought should or should not be granted.

Nature of the orders sought by the Applicant

62. In the Notice of Motion and at the hearing of this Application, the Applicant

and his Agent have urged the Court to grant an order for stay of signing the EPA by the Community's Partner States who have not yet signed it, that is Burundi, South Sudan, Uganda and the United Republic of Tanzania. The Applicant has also prayed for an order directed at the 2nd and 3rd Respondents staying forthwith any pending procedures and/or processes over the said Agreement that they had signed earlier, until a final decision on *Reference No. 8 of 2016* is delivered.

63. In that regard, it should be recalled that, as far as the status of the EPA process is concerned, negotiations on the Agreement were finished in October 2014 and the same was initialled by all EAC Partner States at the time and thereafter, the signing of the EPA was considered by the Sectoral Council on Trade, Industry, Finance and Investment, which directed the Secretary General of the Community (the 7th respondent) to liaise with the EU in order to organize the signing ceremony of the EPA. It is also worth mentioning that Kenya and Rwanda have already signed the EPA, and Kenya has even gone further to ratify it.
64. In light of the aforesaid situation, was the Applicant seeking a stay order or an injunctive order (more precisely a preventive injunction)? Was there anything to stay given that there was no effective EPA in place since for one to be operational, it has to be ratified by all Parties involved (i.e. EAC Partner States and the EU)?
65. At the hearing of the Application, the Applicant's Agent, when asked to clarify the nature of the orders he was seeking, stated that what the Applicant was praying for, in essence, was to be granted an order stopping the EAC Partner States who have not signed the EPA from signing it and those who have signed it from carrying out any further procedures and processes which procedures and processes he was, however, unable to indicate. From the submissions that ensued and taking into consideration that the Application was seeking a permanent injunction in the main Reference, it clearly appeared that the Applicant was, in essence, seeking an interlocutory injunction to restrain the impending signing of the EPA by Partner States who had not yet sign it, but he fell short of clarifying which procedures/processes had to be restrained with regard to the two Partner States which had already signed the Agreement, one Partner State having even ratified it.
66. We shall therefore take it that the use of the word "stay" as used in the Application is an error and actually means that the Applicant is seeking a temporary injunction in the manner explained above, pending the hearing and determination of *Reference No. 8 of 2016*.

Preliminary objections

(i) Whether the Court has jurisdiction to entertain this Application

67. The 2nd Respondent has raised a preliminary objection that this Court lacked jurisdiction to hear the Reference as well as the Application and the thrust of his arguments is that a treaty-making process such as the negotiation, conclusion and ratification of the EPA by the 2nd Respondent is within its sovereign mandate and in fulfilment of its obligation under international law and therefore, such a process is outside the ambit of the Court's jurisdiction as provided for by Article 27 of the Treaty.
68. As pointed out herein above, EAC Partner States had undertaken to negotiate the EPA as a bloc and the said negotiations were concluded in October 2014

with the initialling of the EPA. It has also been submitted that the EAC Sectoral Council on Trade, Industry, Finance and Investment had thereafter directed the 7th Respondent to liaise with the EU in order to organize the signing ceremony of the EPA by June 2016. It is further a matter of record that the 2nd and the 3rd Respondents signed the EPA on 1st September 2016, and on 8th September 2016, the 17th Extra-ordinary EAC Summit of Heads of State, after considering a report of the Council of Ministers on the EPA, requested for three months to finalize and obtain clarification on the concerns of some of the remaining Partner States before considering the signing of the EPA as a bloc.

69. The Applicant has in that context alleged that “signing such agreement by the second and third Respondent has violated and/or will continue to violating the letter and the spirit of the EAC Treaty if signed by the remaining Respondents respectively” [sic] and prayed for a restraining order as stated herein above.
70. At this juncture, it is worth recalling that under Article 27(1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty. It is also worth mentioning that Article 30(1) of the Treaty which provides that “Subject to the provisions of Article 27 of this Treaty, any person who is resident in A Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such an Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.” In that context, this Court has previously held that the interpretation of the question whether for example Articles 6(d) and 7(2) of the Treaty has been violated squarely falls within the ambit of the Court’s jurisdiction. (See *Samuel Mukira Muhochi (supra)*, *Plaxeda Rugumba Vs The Secretary General of the East African Community & The Attorney General of Rwanda*, EACJ Reference No. 8 of 2010; *Masenge Venant Vs The Attorney General of the Republic of Burundi*, EACJ Reference No. 9 of 2012; and *Peter Nyang’o Nyong’o (supra)*). Therefore, without going into the merits of the case which is a matter to be addressed at the hearing of *Reference No. 8 of 2016*, when a party approaches this Court, invokes specific provisions of the Treaty and alleges that a Partner State or an institution of the Community has violated or breached those provisions in the manner set out in Article 30(1) of the Treaty, then this Court is clothed with jurisdiction to determine such an allegation.
71. In the instant Application and in *Reference No. 8 of 2016*, the allegation made is, *inter alia*, that by individually signing the EPA, the 2nd and the 3rd Respondents have violated Article 6(a) and (f) of the Treaty and that allegation is sufficient to cloth this Court with jurisdiction to determine the Reference and the Application, the merits or demerits of either of them notwithstanding. We are, for the above reasons, satisfied that we have the jurisdiction to determine both the Reference aforesaid and the Application before us.
- (ii) **Whether the Application discloses a cause of action against the 5th Respondent**
72. The 5th Respondent has argued that the Application did not disclose any specific cause of action against him since the United Republic of Tanzania had not signed the EPA and that there was no indication that it intended to sign it.
73. As stated above, the Applicant has moved the Court seeking in essence a

temporary injunction to restrain some EAC Partner States, including Tanzania, from signing the EPA, alleging that such an action violates some provisions of the Treaty. In addition, as also stated above, the 17th Extra-ordinary EAC Summit of Heads of State, seized of the matter, has decided to hold the signing of the EPA pending further consultations on the subject. It is clear from the foregoing that there is a live issue to be determined as to whether the remaining Partner States, Tanzania included, should be stopped from signing the EPA pending the determination of the Reference. In the circumstances, we are satisfied that both *Reference No. 8 of 2016* and the present Application disclose a cause of action against the 5th Respondent and all other Respondents.

(iii) Is the Application incompetent for lack of a proper supporting Affidavit?

74. The 5th Respondent has alleged that the Applicant's supporting Affidavit contained a "falsehood" as it deponed therein that the 4th Respondent had participated in the EAC Heads of State Summit of 3rd June 2010 while South Sudan by that date had not even attempted to be a party to the Community, and that for that reason, the Affidavit was incompetent and should be struck out. Having been so struck out, the Application was also rendered incompetent because it would not then be accompanied by an Affidavit contrary to the Rules.
75. In addressing the above issue, it should be recalled that the Republic of South Sudan applied to join the Community on 10th June 2011 and was admitted at the 17th EAC Heads of State Summit held on 2nd March 2016 in Arusha. Its instrument of ratification on the accession to the Treaty was deposited on 5th September 2016 (See <http://www.eac.int/news-and-media/press-releases/20160905/republic-south-sudan-deposits-instruments-ratification-accession-treaty-establishment-east-african>). It is, therefore, obvious that South Sudan could not have participated in an EAC Heads of State Summit before its accession to the Community. But, is that a sufficient reason to strike out the Affidavit in support of the Application? To our minds, such an action would not be justified. It is upon this Court to take whatever facts it deems relevant in determining the Application before it and ignore what is of no use in doing so. Further, as we understand it, the whole Affidavit is not the one that is said to be clothed with falsehood, but one line of it. Expunging that one line from the record would not therefore invalidate all other facts deponed to and in the event, we see no reason to strike out the entire Affidavit as prayed. The issue raised is also irrelevant to a just determination of the present Application and we shall therefore address the entire Application in its proper context.

(iv) Does the Application meet the criteria for grant of an interlocutory injunction?

76. As pointed out by all the Respondents, the conditions required for this Court to grant an interlocutory injunction have previously been settled following an approval of the landmark case of *Giella v. Cassman Brown & Co. Ltd [1973] E.A 360* (see *Mbidde Foundation & Another Vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2014 and Application No. 10 of 2014; Application No. 3 of 2010, arising from Mary Ariviza Vs The Attorney General of the Republic of Kenya and the Secretary General of the East Africa Community, EACJ Reference No. 7 of 2010*). The three-part test for granting an injunction is therefore that:

- (i) An Applicant must show a *prima facie* case with a probability of success;
- (ii) An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.
- (iii) If the Court is in doubt of the two above principles, it will decide an application on the balance of convenience.

77. As stated elsewhere above, the Applicant alleged that the signing of the EPA by the 2nd and 3rd Respondents contravened the Treaty and is urging the Court to issue an interlocutory injunction stopping other EAC Partner States from signing it. It is however admitted that the EPA needs ratification by all Parties for it to enter into force. Having heard all the parties, that issue is not frivolous and warrants interrogation by this Court. There is therefore a triable issue within Articles 27 and 30(1) of the Treaty and in addressing the question whether this Court should or not grant the orders sought by the Applicant.
78. The Applicant has also submitted that EAC Partner States which have not signed the EPA should be prevented from signing it because he allegedly stands to suffer irreparable economic loss and serious violation of his rights under the Treaty. At the hearing of the Application, the Applicant's Agent was asked to clarify the nature of injury in issue, and he contended that the injury should be considered, not at an individual level, but at a regional level. It was his further contention that the way some Partner States had acted individually in signing the EPA was harmful to the Community and to the East African economy. But when pressed to expound on the irreparable economic loss and the violation of rights that the Applicant/Principal stood to suffer, he was unable to make the link between the impugned signing of the EPA and the alleged irreparable harm that the said signing would cause. In the circumstances, therefore, it is our considered view that the Applicant has failed to establish that he would suffer an irreparable injury that could not be compensated by an award of damages if the injunctive order sought is not granted.
79. Besides, in view of the decision of the 18th Summit of Heads of States held in Dar-es-Salaam on 20th May 2017 stating that the remaining Partner States that had not signed the EPA were not in a position to do so pending clarification of the issues they had identified in the Agreement, it appears that there is no harm to the Applicant if the injunctive order sought is not granted and that rather, the matter proceeds to the hearing of *Reference No. 8 of 2016* as correctly stated by some of the Respondents.
80. Given the foregoing, we don't deem it necessary to carry out the test of balance of convenience as it is clear in our minds that the injunctive order sought is not warranted for the reasons given herein above.
81. As for the order directing the 2nd and 3rd Respondents to restrain from undertaking any pending procedures and/or processes over the EPA until a final decision in the Reference aforesaid is delivered, we reiterate that the Applicant was asked to explain which procedures or processes he was referring to in respect of the two Partner States who had already signed EPA, one having even ratified it. No explanation at all was given and that fact would thus preclude us from issuing any such restraining orders.
82. The Applicant also sought an order directing the 7th Respondent to withdraw

forthwith from any negotiations initiated with the EU in view of the 17th Extraordinary Summit decision aforesaid until a final decision on the Reference is delivered. But as pointed out elsewhere above, the EPA negotiations were concluded in October 2014 and therefore, such an order cannot be granted as the negotiation phase is now closed.

83. As for costs, given the nature of the matter and the parties involved, we deem it proper to order that costs shall abide the outcome of *Reference No. 8 of 2016*.

G. Disposition

84. In light of our findings above, the following orders are issued:

- (i) The order sought to restrain the 1st, 4th, 5th and 6th Respondents from signing the EAC-EU EPA is not granted;
- (ii) The order sought directing the 2nd and the 3rd Respondents to restrain from any pending procedures and/or processes over the EPA they have signed is not granted.
- (iii) The order sought directing the 7th Respondent to withdraw forthwith any negotiations initiated with the European Union is not granted.
- (iv) Costs of the Application to abide the outcome of *Reference No. 8 of 2016*.

85. It is so ordered.

M. M. Mabange, Applicant's Agent

N. Kayobera Counsel for the 1st Respondent

J. Gitiri & M. Ogosso for 2nd Respondent

N. Ntarugera & G. Karemera for 3rd Respondent

J. M. Swaka for the 4th Respondent

E. Mweyunge, M. Mulwambo & D. Kakwaya for 5th Respondent

E. Bafilawala, G. Batanda & S. Cheptoris for 6th Respondent

^^*^*

First Instance Division

Application No. 13 of 2016

(Arising from Reference No.2 of 2016)

Paul John Mhozya v The Attorney General of the United Republic of Tanzania

Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo J & Audace Ngiye, J
July 7, 2017

Amendment of pleadings ex-parte - Court' discretion to permit amendment of pleadings - Whether the amendment prejudiced applicant's case - Opportunity to respond to new issues

Rules: 21(1), (2), (3) 48 (c), 50(1), (2), (3), (4), 72(2) EACJ Rules of Procedure, 2013

When the Applicant's Reference came up for a Scheduling Conference on 21st November 2016, the Respondent's Counsel made an oral application to amend his Response and leave was granted in the Applicant's absence. The Applicant had notified the Court of his inability to attend scheduling. Being aggrieved by the order of the Court, the Applicant filed this application alleging that: the granting leave to amend has occasioned irreparable injustice to him since both parties had already signed the draft scheduling conference notes and therein was no indication that Respondent intended to make any application for amendment; the amendment was made out of malice and with an intention to sabotage the Scheduling Conference; and the *ex-parte* order granted contravened Rules 21(2) and (3) of the Court's Rules. Furthermore, the issues the Respondent sought to introduce by the intended amendment namely: the Applicant's suspension from employment; the dispute relating to his plot of land; and the alleged death threats directed at him were either outside the Court's jurisdiction or time-barred.

The Respondent raised a preliminary objection claim that the application was incompetent as the supporting affidavit contained falsehoods. Moreover, the Applicant suffered no prejudice from the amendment as he was granted an opportunity to file a rejoinder to the amended Response and any new issues would be addressed by the Court in its determination of the Reference.

Held

1. The question whether the Applicant misled the Court about Respondent's Counsel fraudulent intent of sabotaging the Scheduling Conference, is a matter of fact that requires interrogation as to its veracity. No point of law was raised in the preliminary objection, it was a waste of precious judicial time and is overruled.
2. The proceedings of 21st November, 2016 indicate that Rule 21(2) and (3) were partly complied with when the *ex-parte* order was made but sub-Rule (3) was not complied with since the *ex-parte* order was in fact final in nature although it was given in the absence of the Applicant who had no notice of the oral application made to amend the response to Reference. To that extent only Rule

21(2) and (3) are inapplicable to the present issue and the Applicant's objection to the invocation of the said Rule is justified.

3. As per the language of Rule 48 an amendment of pleadings is *inter alia* granted at the discretion of a Court for the purpose of determining the real question in controversy between the parties. We are satisfied that the proceedings of 21st November, 2016 were conducted within this Court's Rules and discretionary mandate and there is no reason to review the orders made on that day. Notwithstanding that Rule 21(2) and (3) invoked by the Respondent is not applicable to the oral application made on the said date, that fact alone cannot invalidate the proceedings as Rule 48(c) applies.
4. Since the Applicant he has been given an opportunity to formally respond to any new issues raised by the Respondent in the Amended Response to the Reference and to challenge any of those issues at the hearing of the Reference and in Submissions at the hearing, no prejudice would be caused to him.

Cases cited

Johnson A. Omunyokol v The Attorney General of Uganda, EACJ Application No. 3 of 2016
Mukisa Biscuits v West End Bakery [1969] EA 696

RULING

Introduction

1. Reference No.2 of 2016 was filed on 3rd June, 2016 and is said to have been founded on Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereinafter "the Treaty") as well as Rule 24 of this Court's Rules of Procedure (hereinafter, "the Rules").
2. The Applicant, acting in person, is a citizen of the United Republic of Tanzania and resident in Kongowe Mzinga (B), Temeke Municipality, Dar-es-Salaam.
3. The Respondent is the Attorney General of the United Republic of Tanzania sued in that capacity and his address has been given as Attorney General's Chambers, Magogoni Road, Kivukoki Front, P.O. Box 9050, Dar-es-Salaam.
4. The Reference is said to have been filed by the Applicant upon unresolved allegations of "widespread office hooliganism comprising high level conspiracy that [was] transmitted by persons within the Office of the President of the United Republic of Tanzania, various Ministries and Municipal Authorities" which have led *inter alia* to alleged complete isolation of the Applicant. Details of these matters will form the basis of the Petitioner's case as shall be addressed at the determination of the Reference.

The Application

5. The Application before us was filed on 28th November, 2016 and arises from the proceedings of this Court on 21st November, 2016 when the Reference aforesaid was listed for a Scheduling Conference under Rule 53 of the Rules. On that day, the record would show that the Applicant was absent, having notified the Court of his difficulty in attending Court but Mr. Richard John Kilanga, Senior State Attorney, representing the Respondent, was present.
6. Mr. Kilanga on that day made an oral application under Rule 21(2) and (3) read together with Rule 48 (c) of the Rules seeking leave to amend the Respondent's response to the Reference. This Court granted him the leave sought and directed

him to file the Amended Response within fourteen (14) days and serve the same on the Applicant who was granted twenty-one (21) days from the date of the service to file his Reply to the Amended Response should he have deemed it necessary to do so.

7. The Applicant, dissatisfied with that order filed the present Application premised on Rules 21(1) and (2) as well as Rules 72(2) of the Rules seeking orders of review of the orders of 21st November, 2016 on the following summarized grounds:
 - i. That when the Applicant and Mr. Kilanga signed the draft scheduling conference notes, there was no indication that Mr. Kilanga intended to make any application before this Court including on an amendment of the Response to the Reference;
 - ii. In the oral application for leave to amend the Response to the Reference, Mr. Kilanga relied on Rule 21(2) of the Rules which was not relevant to such an application;
 - iii. As a result of the grant of leave to amend the said Response to the Reference, the Applicant has been occasioned irreparable injustice.
8. In a supporting Affidavit sworn on 28th November, 2016, the Applicant has repeated his allegations above but has also added that he believes that Mr. Kilanga and his colleague, Mr. Alesia Mbuya, were out to sabotage his case and should not be allowed to handle the case on behalf of the Respondent again. (*sic*)

Applicant's Submissions

9. The Applicant filed written Submissions on 10th February, 2017 and of relevance to the Application before us, he submitted firstly, that the oral application for amendment was made out of malice and with a clear intention to sabotage the Scheduling Conference for the Reference.
10. Secondly, that the application was made *ex-parte* and the resultant *ex-parte* order also contravened Rules 21(2) and (3) of the Rules. Thirdly, that the issues sought to be introduced by the intended amendment would have the effect of introducing matters that would either be outside this Court's jurisdiction or are time-barred. The matters referred to are said to include his suspension from work as a teacher (he claims that this issue is under the jurisdiction of local legal and administrative institutions), and the non-survey of his plot of land, one of the subjects of the present dispute.
11. For the above reasons, the Applicant prays for review of the orders aforesaid.

Respondent's Reply

Preliminary Objection and Submissions

12. In a replying Affidavit sworn on 15th December, 2016, Mr. Kilanga, on behalf of the Respondents, deponed that he did not fraudulently and by false pretense solicit and obtain the orders in contention. And that the said orders were in any event properly granted under the relevant Rules.
13. Further, it is Mr. Kilanga's deposition that there was no agreement between the Applicant and himself that he would not pray for any orders in this Court on 21st November, 2016 and that no document concerning the Applicant and his case was ever forged by either Mr. Kilanga or his colleague, Mr. Mbuya.
14. Further to the above, the Respondent filed a Notice of Preliminary Objection

raising the issue that the Application is incompetent for being supported by an affidavit which contains lies. The lies are said to be the allegation that Mr. Kilanga had fraudulently and by false pretenses solicited and obtained the order to amend the Response to Reference; and that by so doing Mr. Kilanga is intent on sabotaging the Applicant's case. Relying on the decision of the Court of Appeal of Tanzania in *Ignazio Messina vs. Willow Investments SPRL, Civil Application No.21 of 2001*, it is therefore the Respondent's prayer that the said Affidavit be expunged from the record.

15. By way of Submissions, the Respondent has urged the point that no sufficient reason has been disclosed to warrant grant of the orders sought and in any event, no prejudice has been caused to the Applicant who was granted an opportunity to file any rejoinder to the amended Response if he thought it fit to do so.
16. It is the Respondent's further submission that if new issues are raised in the Amended Response, then they should be addressed at the Scheduling Conference and incorporated as new issues or facts to be addressed by the Court in its determination of the Reference.
17. As regards the procedure for effecting amendments to pleadings before this Court, the Respondent submits that Rules 21(2) and 3 as read with Rule 48(c) of the Rules were properly invoked and the amendments were sought only for purposes of enabling the Court to determine the real issues in controversy. In addition, that the application to amend was properly made, orally, and there was no need for a formal application to be made in that regard.
18. Invoking Rule 1(2) of the Rules, the Respondent further submits that this Court has inherent power to make such orders as would meet the ends of Justice and it was therefore properly within its mandate to grant the orders of amendment.
19. Regarding the Applicant's contention that some of the issues to be raised by the Respondent in the Amended Response are time-barred or are outside this Court's jurisdiction, the Respondent's answer is that those issues would be addressed at the Scheduling Conference and hearing of the Reference and not at this interlocutory stage of the proceedings. The same submission has been made with regard to all other issues of fact that are in contest between the parties including the issue *inter alia* of the dispute relating to the Applicant's plot of land and alleged death threats directed at him.
20. For the above reasons, the Respondent prays that the Application before us be dismissed with costs.

Applicant's Rejoinder to the Respondent's Submissions

21. In rejoinder Submissions filed on 10th April, 2017 and of relevance to the matter at hand, the Applicant has argued that since no proper notice of the Preliminary objection raised was given to him, the same should not be entertained at all.
22. Further, that prior to the proceedings of 21st November, 2016, Mr. Kilanga communicated with and met the Applicant and he knew that the Applicant would not attend Court on that day but did not indicate to the Applicant that he intended to seek an amendment of the response to the Reference. That his actions thereafter were fraudulent and were intended to halt the Scheduling Conference slated for that day.
23. On the invocation of the inherent powers of the Court by the Respondent, the

Applicant submits that such powers cannot be invoked to circumvent specific and laid down Rules of this Court. That therefore, the Court should find that improper rules were invoked by the Respondent and the order to amend should be reviewed as prayed.

Determination

24. Before we determine the only issue in disputed before us, one minor issue requires quick resolution; the preliminary objection raised by Mr. Kilanga and which the Applicant submitted that he had no notice of. Notice or no notice, the question whether the Applicant lied about Mr. Kilanga acting fraudulently and intent on sabotaging the Scheduling Conference, is not a matter of law which is what a preliminary objection should be about. Those are matters of fact that require interrogation as to their veracity. Lies or truth are matters of evidence and are the reason why cross-examination of witnesses is allowed in terms of Rule 64 of the Rules.
25. In the event, on the purported Preliminary Objection, we can but only reiterate the holding in *Mukisa Biscuits vs. West End Bakery [1969] EA 696* that unless a preliminary objection is premised on a pure point of law and where the facts are uncontested, then the same is no more than a waste of precious judicial time. Mr. Kilanga's Preliminary Objection falls in the latter category and is overruled.
26. Having so stated, what is before us is the issue whether the order to amend the Respondent's Response to *Reference No.2 of 2016* was properly obtained and if not, whether it should be reviewed and set aside. We note however, with respect to the Applicant and Respondent, that irrelevant matters of evidence to be properly adduced at the hearing of the Reference were raised and unnecessarily convoluted the Application. It is good practice for parties coming before this Court to be focused, succinct and clear in their pleadings and not to lose track and struggle in explaining irrelevancies.
27. Having so stated, it is the proceedings of 21st November, 2016 that triggered the filing of the present Application. But what exactly happened on that day?
28. From the record, Mr. Kilanga initially stated that "he would like to make an application before this Court. The application is based on Rule 21 sub Rules 2 and 3 together with Rule 48 (c) of the ... Rules". He then added as follows:
"..... What we pray from this Court in this application is to allow us to get an *ex parte* order so that we can file a formal application to amend our response. So, once we get this order we will be able to file a formal application to amend our Reference"
29. Mr. Kilanga upon directions being issued by the Court, proceeded to make an oral application and explained why he had to amend the Response to Reference i.e. that "from the time [he] prepared [the] response, [he] had not yet got information from the relevant department of the government from which [he] had been compiling this application [sic]". He then went on to name the said departments and stated that with the proposed amendments in place, the Court would be able to get "the real points for determination in this Reference" and the order for amendment was then granted by this Court on that basis.
30. In addressing the Applicant's complaints regarding grant of the order to amend therefore, we must begin by addressing the Rules cited by the Respondent's

Counsel in his oral application i.e. Rules 21(2) and (3) as read with Rule 48 (c) of the Rules. Rules 21(2) and (3) provides as follows:

Rule 21(2) and (3)

“(2) No motion shall be heard without notice to the parties affected by the application. Provided, however, that the First Instance Division, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable injustice, may hear the motion and make any *ex parte* order upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Division deems just.

(3) Upon making an *ex-parte* order the First Instance Division shall set down the application for inter partes hearing within thirty (30) days of the *ex-parte* order.”

31. Looking at the proceedings of 21st November, 2016, the above Rule was partly complied with when the *ex-parte* order was made but sub-Rule (3) was not complied with since the *ex-parte* order was in fact final in nature although it was given in the absence of the Applicant who had however indicated his inability to attend Court for the listed Scheduling Conference and who had no notice of the oral application to amend the response to Reference. To that extent only Rule 21(2) and (3) is inapplicable to the present issue and the Applicant’s objection to aforesaid to the invocation of the said Rule is justified.

32. What of Rule 48(c)? That Rule provides as follows:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any pleading, a party may amend its pleading: -

1.....;

2.....; or

3.with leave of the Court.”

33. From the record, the Respondent had clearly made his application under Rule 48(c) which must then for clarity be read with Rule 50(1), (2), (3) and (4) of the Rules which provides thus:

“(1) The Court may, at any stage of the proceedings, allow any party to amend its pleadings in such manner as it may direct and on such terms as to costs or otherwise as may be just.

(2) The Court may, in the following circumstances, grant such leave to amend notwithstanding that any relevant period of limitation current at the date of instituting the case has expired, if it thinks it is just so to do:

4. where the amendment is to correct the name of a party even if it has the effect of substituting a new party, if the Court is satisfied that the mistake sought to be corrected was a genuine mistake;

5. where the amendment is to alter the capacity in which the party is or is made party to the proceedings, if the altered capacity is one which that party could have been or been made party at the institution of the proceedings;

6. where the amendment adds or substitutes a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the party seeking leave in the same case.

- (3) Whenever a formal application is made to the Court for leave to amend any pleading, the amendment for which leave is sought shall be set out in writing, lodged with the Registrar and served on the opposite party before the hearing of the application.
- (4) Where the Court grants leave for the amendment of any pleading, the amendment shall be made or be lodged within the time specified by the Court and if no time is so specified then within fourteen (14) days of the granting of leave.”
34. The above Rule needs no more than a literal interpretation; that where leave is sought under Rule 48(c) then under Rule 50(1), such an amendment may be allowed “in such manner” as the Court “may direct and as on such terms as to costs or otherwise as may be just”. The leave may also be sought “at any stage of the proceedings” as opposed to leave under Rule 48(a) which must be made “before the close of pleadings”.
35. Of further note is Rule 50(3) which refers to formal applications for leave to amend a pleading and which, if made, would require that the same be in writing and ought to be served on opposite party before hearing. But in that context, what was the nature of the application before the Court on 21st November, 2016? While initially Mr. Kilanga had wanted to make a formal application for leave to amend his Response to the Reference, the Court directed him to make an oral application which he did. Was that an error on the part of both Mr. Kilanga and the Court as was strongly submitted by the Applicant? Can fraud be thereby attributed to Mr. Kilanga as alleged? We think not.
36. We have taken that position because we reiterate that Rule 50(1) as read with Rule 48(c) which was invoked by Mr. Kilanga, are couched in discretionary terms and the formality expected of both a party and the Court under Rule 50(3) do not apply in such informal or oral applications. Nothing would have been easier than for the drafters for the Rules to obligate parties and the Court to the filing of formal applications for leave to amend under Rule 50(1) which formality does not exist therein.
37. By way of comparative jurisprudence on the subject, we take note that the above finding is in line with the Ruling in *Johnson Akol Omunyokol vs. The Attorney General of Uganda, Application No.3 of 2016* where this Court, in determining a formal application for leave to amend the Applicant’s Reference under Rules 48(c) and 50(1), stated as thus: -
- “The above provisions expressly proved that this Court has discretionary power to allow amendment of pleadings at any stage of proceedings for purposes of determining the real question or issue in controversy between the parties. That discretionary power is exercised so as to do justice to the case and must be exercised judiciously with due consideration of all the facts and circumstances before this Court”.
38. We reiterate the above finding and we therefore have no reason for fault either Mr. Kilanga or the Court itself for the events of 21st November, 2016 which have caused the filing of the present Application.
39. In any event, what is the purpose for which amendment of pleadings is granted at the discretion of a court? As is the language of Rule 48 of the Rules, it is *inter alia* “for the purpose of determining the real question in controversy between the

parties.” We are in the event satisfied that the proceedings of 21st November, 2016 were conducted within this Court’s Rules and discretionary mandate and there is no reason to review the orders made on that day and we so hold notwithstanding that Rule 21(2) and (3) invoked by the Respondent is not applicable to the oral application made on the said date. That fact alone cannot in any event invalidate the proceedings as Rule 48(c) properly applies thereby and we have said why.

40. We must also add that no prejudice would be caused to the Applicant as he has been given an opportunity to formally respond to any issues to be raised by the Respondent in the Amended Response to the Reference and to challenge any of those issues at the hearing of the Reference and in Submissions at the hearing. Specifically, the two issues regarding the Applicant’s suspension from employment, the dispute relating to his plot of land and alleged death threats directed at him, are matters well within his knowledge, have been raised in pleading and he can, without much difficulty, respond to them within the period granted by this Court.
41. One other issue requires our consideration in explaining our decision above; the Applicant in correspondence to this Court, has explained his difficult personal circumstances that have precluded him from either engaging an advocate or personally attending to the Reference and Application before us. The wider interests of justice would necessitate that to alleviate those difficulties, the Reference should be determined on its merits at the earliest opportunity and interlocutory applications, whatever their merits, cannot aid the Court or the Parties in that regard.

Disposition

42. For the above reasons, it is obvious that we find no merit in the Application before us and the same is dismissed.
43. Regarding costs, although they ordinarily follow the event under Rule 111 of the Rules, noting the Applicant’s personal circumstances that are well documented on the record and since the substantive dispute before us is yet to be resolved, let each party bear its own costs.
44. It is so ordered.

The Applicant appeared in person
R. Kilanga for the Respondent

First Instance Division

Application No. 16 of 2016

(Arising from Reference No. 12 of 2016)

Forum pour le Renforcement de la Societe Civile, Action des Chretiens Pour L'Abolition de la Torture, Association Burundaise pour la Protection Des Droits Humains et des Personnes Detenues, Forum pour la Conscience et le Developpement, Reseau des Citoyens Probes

v

The Attorney General of the Republic of Burundi, The Secretary General of the East African Community

Coram: M. Mugenyi, PJ; F. Ntezilyayo, F. Jundu, A. Ngiye & C. Nyawello, JJ
January 23, 2018

Interlocutory injunction - Whether there was a serious triable issue - Cause of action - Irreparable injury - Whether damages would recompense for pain and suffering

Articles 6(d), 7(2), 27, 30(1), 39 of the Treaty - Rule 73 EACJ Rules of Procedure, 2013

The Applicants, Civil Societies filed a Reference challenging the legality of Ministerial Ordinance No. 530/1922 freezing their bank accounts following an operational ban issued by the Minister of Home Affairs. In the present application they averred that since the leaders of the applicant organisations were in exile, in their absence, the organisations' work hung in the balance and that in that void, their clientele could not be compensated for injury by an award of damages. They sought interim orders for a stay of the operation of the Ordinance, and a quashing of the decisions freezing their accounts as this breached their freedom of association and assembly, disrupting their role as human rights defenders.

In reply, the Respondent submitted that the Applicants were banned from operating for acting beyond their mandate; and their activities had destabilised Burundi. Additionally, the current application fell short of the grounds required for the granting of interim injunctions and should be dismissed as there was no cause of action.

Held

1. For the grant of interim orders, the court only needs to be satisfied that there is a serious question to be tried on the merits. Therefore, the court investigates the merits of the case to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Where a Reference is found to raise a legitimate legal question, then a serious triable issue would have been established.
2. For a Reference to be deemed to disclose a cause of action, it is enough if it is alleged that the matter complained of infringes a provision of the Treaty, *Sitenda Sebalu, 2010*, or where it is alleged that the matter complained of violates the national law of a Partner State or is otherwise deemed unlawful.
3. It is apparent on the face of the record that the Reference raises a question on

the legality of Ministerial Ordinance No. 530/1922 as well as compliance with the principles of good governance and rule of law in Article 6(d) and 7(2) of the Treaty.

4. Nothing in the supporting Affidavit established the specific injury the Applicants stood to suffer nor whether or not such injury could or could not be compensated by an award of damages. In the absence of satisfactory proof to the contrary, any pain and suffering the Applicants might reasonably be expected to experience would be adequately atoned by an award of damages.

Cases cited

American Cyanamid Company v Ethicon Ltd (1975) AC 396

Giella v Cassman Brown (1973) EA 258

Mbidde Foundation Ltd & Anor v The Secretary General of EAC, Consolidated Appl. 5 & 10 of 2014

Plaxeda Rugumba v The AG of Rwanda [2005-2011] EACJLR 226, Ref. No. 8 of 2010

Prof. P. Anyang' Nyong'o & Ors v The AG of Kenya [2005-2011] EACJLR 16, Ref.1 of 2006

Samuel M. Mohochi v The AG of Uganda, [2005-2011] EACJLR 274, Ref. No. 5 of 2011.

Simon P. Ochieng & Anor v The AG of Uganda, [2005-2011] EACJLR 361, Ref. No. 11 of 2013

Siskina (Cargo Owners) v Distos Compania Naviera SA [1979] AC 210

Sitenda Sebalu v Secretary General of EAC & Ors [2005-2011] EACJLR 160, Ref. No. 1 of 2010

Timothy A. Kahoho v Secretary General of EAC [2012-2015] EACJLR 181, Appl. No. 5 of 2012

RULING

Introduction

1. This is an Application by five (5) non-profit, civil society organisations for interim orders against the Attorney General of the Republic of Burundi ('the First Respondent') and the Secretary General of the East African Community ('the Second Respondent') pursuant to Article 39 of the Treaty for the Establishment of the East African Community ('the Treaty') and Rule 73 of this Court's Rules of Procedure.
2. The organisations in question are Forum pour le Renforcement de la Societe Civile (FORSC); Action des Chretiens pour l'Abolition de la Torture (ACAT); Association Burundaise pour la Protection des Droits Humains et des Personnes Detenues (APRODH); Forum pour la Conscience et le Developpement (FOCODE), and Reseau des Citoyens Probes (RCP), (hereinafter referred to collectively as 'the Applicants').
3. The Applicants were banned by the Minister of Home Affairs and their bank accounts frozen by the Prosecutor General pursuant to *Ministerial Ordinance No. 530/1922*, whereupon they filed *Reference No. 16 of 2017* challenging the legality of the Ordinance for violating provisions of the Burundi *Presidential Decree No 1/11 of 1992*, as well as the principle of good governance.
4. The Applicants did also file the present Application that *inter alia* seeks a stay of the operation of the Ordinance, a cancellation thereof by the Minister of Home Affairs and the quashing of the Prosecutor General's decision to freeze the Applicants' bank accounts.
5. At the hearing of the Application, the Applicants were represented by Mr. Donald Deya, while Mr. Nestor Kayobera and Ms. Brenda Ntihinyurwa appeared for the First and Second Respondents respectively.

Submissions

6. Learned Counsel for the Applicants relied on the principles governing the grant

of interim orders in this Court as stated in the case of *Giella vs. Cassman Brown* (1973) EA 258 and re-echoed by this Court in *Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 3 Others*, EACJ Application No. 1 of 2006 to argue, first, that in so far as the Applicants were banned and subsequently purportedly suspended in contravention of Articles 30, 36, 37 and 38 of the *Presidential Decree No. 1/11 of 1982*, the law governing the operations of civil society organisations in Burundi, a *prima facie* case had been established under Articles 6(d) and 7(2) of the Treaty. Mr. Deya sought to discredit any contrary averments in the First Respondent's Affidavit in Reply for lacking proof and specificity.

7. Secondly, with regard to the principle of irreparable injury, we understood Mr. Deya to argue that the leaders of the applicant organisations were in exile, in their absence the organisations' work hung in the balance and that void to their clientele could not be compensated by an award of damages. He countered the First Respondent's attestations that the Applicants' activities had destabilised Burundi and cases arising from their activities as such had been filed by the Government of Burundi, with the submission that the Applicants conducted their work within well-established global and regional parameters governing human rights defenders and, in any event, the First Respondent had not furnished specific proof in support of its allegations.
8. Finally, it was argued for the Applicants that following their ban and the freezing of their accounts they lacked the *locus standi* or the means to operate therefore the balance of convenience in this matter lay with them. It was learned Counsel's contention that, contrary to the First Respondent's unproven allegations about their having destabilised the country, the Applicants advocate for constitutionalism, democracy, good governance, the rule of law and the protections of human rights in Burundi.
9. We understood him to further contend that the Respondents stood to suffer no inconvenience or injury given that if the Applicants lost the substantive Reference the ban in issue presently would simply be reinstated by this Court.

Respondents' Submissions

10. In a very brief response to the Applicants' submissions, it was argued for the First Respondent that the Applicants had been banned because they had acted beyond their mandate, and the present Application lacked merit and should be dismissed to pave way for proof by the First Respondent vide the Reference of the violations by the Applicants of their own objectives.
11. In the same vein, the Counsel for the Second Respondent briefly argued that there was no reference whatsoever to her client in the Application therefore there was no cause of action against that office or *prima facie* case established by the Applicants in that regard. Consequently, it was the contention that the Application fell short of the grounds for the grant of interim injunctions as against the Second Respondent and should be dismissed.

Submissions in Reply

12. In reply, Mr. Deya reiterated his earlier submission that there was no proof of any of the allegations made by the First Respondents in support of the Applicants'

ban. He maintained his argument that a *prima facie* case had been established by virtue of the Applicants having been banned and their accounts frozen without due process, actions that could not (in his view) be atoned by damages in the event that the Applicants were successful in the Reference. On the other hand, Mr. Deya did concede that the Applicants had no cause of action against the Second Respondent for purposes of the present Application, neither was the Application applicable to that Party.

Court's Determination

13. The grant of interim orders by this Court is governed by Article 39 of the Treaty. It reads:

The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. Interim orders and other directions issued by the Court shall have the same effect *ad interim* as decisions of the Court.

14. This Court has pronounced itself on numerous applications for the grant of interim orders. In *Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya (supra)* and *Timothy Alvin Kahoho vs. The Secretary General of the EAC, EACJ Application No. 5 of 2012* the renowned principles for the grant of temporary injunctions, as laid out in *Giella vs. Cassman Brown (supra)*, were underscored as follows:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

15. On the other hand, in *Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community Consolidated Applications 5 & 10 of 2014* the foregoing legal position was juxtaposed against the position advanced in the case of *American Cyanamid Company vs. Ethicon Limited (1975) AC 396*, in which the previous emphasis on a *prima facie* case had been discounted in the following terms:

The use of such expressions as 'a probability', 'a *prima facie* case', or 'a strong *prima facie* case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.

16. It would appear that the principles for the grant of interim orders have since evolved, with emphasis presently on the judicial approach advanced in *American Cyanamid Company vs. Ethicon Limited (supra)*. This could not be stated any

better than it was succinctly espoused in *Blackstone's Civil Practice 2005*, para. 37.19 – 37.20, pp. 392, 393 as follows:

In *American Cyanamid Company vs. Ethicon Limited (1975) AC 396* Lord Diplock laid down guidelines on how the court's discretion to grant interim injunctions should be exercised in the usual types of cases. Although these guidelines are of great authority, they must not be read as if they were statutory provisions, and in practice they are applied with some degree of flexibility. However, it is not unknown for judges to give reasoned judgments in interim injunction cases following the sequence of steps set out by Lord Diplock. The court must also be careful to apply the overriding objective, and to grant an injunction only if it is 'just and convenient. Before *American Cyanamid Company vs. Ethicon Limited (1975) AC 396*, the courts would only grant an interim injunction if the applicant could establish a *prima facie* case on the merits. Consequently, the courts needed to consider the respective merits of the parties' cases in some detail... Therefore, the court only needs to be satisfied that there is a serious question to be tried on the merits. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality.

17. Meanwhile, a serious triable issue has been held to have been established where the substantive suit underlying the interlocutory application discloses a cause of action. See *The Siskina (1979) AC 210*.

18. We stand most respectfully persuaded by the foregoing summation of current judicial practice on the grant of interlocutory injunctions. For present purposes, therefore, we take the view that should the Reference be found to raise a legitimate legal question under this Court's legal regime, a serious triable issue would have been duly established. It is to that legal regime that we now revert. The circumstances that may give rise to a cause of action before this Court are delineated in Article 30(1) of the Treaty as follows:

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

19. In our considered view, Article 30(1) demarcates two (2) scenarios that would give rise to a cause of action: first, the illegality of a law or action⁵⁰ by a Partner State or EAC Institution; secondly, the infringement of any Treaty provision by a law enacted by a Partner State or EAC Institution, or of an action, directive or decision made by them. The operative words would be the illegality *per se* of the law or action, or their infringement of a Treaty provision. This position is clearly articulated in *Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 11 of 2013*, where it was held:

'Therefore, for a matter to be justiciable before this Court the subject matter in question must be an Act or statute, or a regulation, directive, decision or action. Further, it must be one, the legality of which is in

⁵⁰ See Oxford Dictionary of Law, Oxford University Press, 2009 (7th Ed.), p. 246

issue viz the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty.’

20. The question as to when a Reference is deemed to disclose a cause of action under Article 30(1) of the Treaty was specifically addressed in the case of *Sitenda Sebalu vs. The Secretary General of the East African Community & Others EACJ Ref. No. 1 of 2010* as follows:

‘In the instant case, like in the *Anyang’ Nyong’o* case (supra), the Applicant is not seeking a remedy for violation of his common law rights but has brought an action for interpretation and enforcement of provisions of the Treaty through the requisite procedure provided by the Treaty. In the premise, we have no hesitation in reiterating what this Court said in *Anyang’ Nyong’o* (supra) about the import of Article 30(1) of the Treaty, namely, that a claimant is not required to show a right or interest that was infringed and/ or damage that was suffered as a consequence of the matter complained of in the Reference in question. It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner.’

21. We respectfully abide by that decision, but would hasten to add a second scenario under which a cause of action would arise, namely, where it is alleged that the matter complained of violates the national law of a Partner State or is otherwise deemed unlawful.

22. It is apparent on the face of the record that the Reference does indeed raise a legal question as to the legality of Ministerial Ordinance No. 530/1922 viz Burundian national laws, as well as the Treaty. Quite clearly the Reference raises questions as to the Ordinance’s compliance with the principles of good governance and rule of law that are encapsulated in Article 6(d) and 7(2) of the Treaty. It is trite law in EAC Community Law that non-compliance with a Partner State’s national laws amounts to a violation of the principle of the rule of law enshrined in Article 6(d) and is, to that extent, a violation of the Treaty. See *Plaxeda Rugumba vs. The Attorney General of the Republic of Rwanda, EACJ Ref. No. 8 of 2010* and *Samuel Mukira Mohochi vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 5 of 2011*. Consequently, it seems abundantly clear to us that the Reference does indeed raise pertinent legal questions for interrogation by the Court. In the result, we are satisfied that the present Application does raise a serious triable issue. We so hold.

23. With regard to the question of irreparable injury, it was Mr. Deya’s contention that the absence of the Applicants’ leadership had left their work and clientele unattended to. The Applicants’ pleadings did allude to their ban leading to the inhibition of their freedom of association and a disruption of their right to execute their mandate as human rights defenders. It was the Applicants’ affidavit evidence that they were leading human rights organisations in Burundi, collaborating with international human rights and accountability mechanisms such as the International Criminal Court (ICC) in documenting human rights abuses and identifying their perpetrators, and thus their ban had impacted negatively on the said international organisations’ work.

Conversely, the First Respondent attested to the Applicants having been behind the insurrection and attempted coup that had happened in Burundi in 2015, accusing them of destabilising the country and fanning hatred within the

population.

24. Quite clearly, the Applicants' ban would have disrupted and stopped all their activities. The question would be whether the activities disrupted by the ban can be compensated by an award of damages. It is now well established law that 'if damages in the measure recoverable at common law would be an adequate remedy and a respondent would be in a position to pay them, no interim injunction should normally be granted'. See *American Cyanamid Company vs. Ethicon Limited* (1975) AC 396 at p. 408.
25. Further, in *Blackstone's Civil Practice 2005*, para. 37.22, p. 394 it was opined that damages would be inadequate where:
 - a) The defendant is unlikely to be able to pay the sum likely to be awarded at trial.
 - b) The wrong is irreparable e.g. loss of the right to vote.
 - c) The damage is non-pecuniary e.g. libel, nuisance, trade secrets.
 - d) There is no available market.
 - e) Damages would be difficult to assess. Examples are loss of goodwill, disruption of business and where the defendant's conduct has the effect of killing off a business before it is established.
26. We have carefully considered the Application and the Affidavit in support thereof. First and foremost, it was neither pleaded, attested to nor argued before us that the Respondents were unable to recompense the Applicants in damages should the circumstances so dictate. As was rightly opined in *Giella vs. Cassman Brown* (supra), 'the object of an interlocutory injunction or in this case an interim order is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.' Clearly therefore, had it been established before us that the Respondents were not in a position to recompense the Applicants for any injury suffered as a result of the actions complained of it would have been an exercise in futility for us to interrogate the merits of this issue. The inability by a respondent to recompense an applicant for injury s/he stands to suffer pursuant to a trial would most certainly render moot the question, at this stage of the proceedings, of the adequacy of damages to recompense such loss.
27. Turning to the merits of this issue, in a nutshell it was pleaded in the Application that the ban on the Applicants' activities had denied them freedom of association and assembly, as well as disrupted their role as human rights defenders. However, the Applicants' averments were not supported by the evidence adduced. An Affidavit in support of the Application was deposed by one Pierre Claver Mbonimpa, the Founding President of the Third Applicant, the gist of which was that the decision to ban the Applicants' operations and freeze their bank accounts flouted Burundian domestic law, as well as the Treaty; that following the Applicants' ban, international human rights and accountability mechanisms with which they had been working to bring to book the perpetrators of human rights abuses in Burundi stood suffer tremendous difficulties in the realisation of their mandate and, finally, that the loss that the Applicants had incurred could not be adequately compensated by an award of damages. It seems to us that the legality of the First Respondent's decision goes to the merits of the substantive

Reference and is not helpful in itself to the Applicants' assertion that they had suffered irreparable injury. Neither, in the same vein, can the impact of the ban on the activities of international human rights and accountability mechanisms with which the Applicants ordinarily work be equated to irreparable injury suffered by the Applicants themselves. We find nothing in the supporting Affidavit that establishes the specific injury the Applicants stood to suffer, let alone whether or not such injury could or could not be compensated by an award of damages.

28. Mr. Deya did argue that the Applicants' 'principals' were in exile purportedly as a result of the decision in issue in this Application, and the Applicants were currently in limbo and unable to operate given their ban and the freezing of their accounts.

He did also allude to the Applicants' clientele suffering the brunt of their ban by being denied their services. Suffice to note that these statements from the Bar were not borne out by the evidence on record. No mention whatsoever was made in the Affidavit in support of the Application that any 'principals' were in exile, neither was any averment made therein with regard to the effect of the ban and freezing of accounts on the Applicants. The effects cited by learned Counsel could very well have been experienced by the Applicants but a finding of fact on an issue so critical to an application such as the one before us presently can only be arrived at on the basis of evidence properly adduced before the Court, and not on the basis of statements from the Bar, however plausible or logical they might be. We do find, therefore, that it was not established before us that the Applicants stood to suffer the injury alleged in the Application.

29. Consequently, in the absence of any averment of the inability of the Respondents to recompense the Applicants for any injury they might have suffered as a result of the actions complained of herein and in the absence of the proof of any such injury, we are not satisfied as to the inadequacy of damages as a relief to the Applicants in the event that they emerge successful in the Reference. We are duly persuaded by the following proposition in *American Cyanamid Company vs. Ethicon Limited* (supra) on when the need to consider the balance of probabilities would arise: It is where there is doubt as to the adequacy of the respective remedies in damages available as to either party or to both, that the question of balance of convenience arises.
30. In the instant case where no such doubt has been established, it cannot be suggested that the Applicants would suffer irreparable injury. Suffice to note that general damages are 'given for a loss that is incapable of precise estimation such as pain and suffering'.⁵¹ In the absence of satisfactory proof to the contrary, we take the view that any pain and suffering the Applicants might reasonably be expected to experience would be adequately atoned by an award of damages.

Conclusion

In the result, we decline to grant the interim orders sought and do hereby dismiss this Application. The costs thereof shall abide the outcome of the Reference. We direct that it be fixed for hearing forthwith.

31. It is so ordered.

⁵¹ See Oxford Dictionary of Law, Oxford University Press, 2009 (7th Ed.), p. 246

D. Deya, Counsel for the Applicants

N. Kayobera for the First Respondent

B. Ntihinyurwa for the Second Respondent

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First Instance Division

Reference No. 5 of 2016**Ismael Dabule & 1004 Others v Attorney General of Uganda**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ; F. Jundu, A. Ngiye & C. Nyawello, JJ
November 29, 2018

*Cause of action in East African Community law - Whether there was a live dispute
- Onus of proof- Inherent power of the Court*

*Articles: 6(d), 7(2), 23(2), 30 (1), (2) of Treaty - Rules 1(2) EACJ Rules of Procedure,
2013*

In 1979, the National Consultative Council of Uganda enacted the Banking Act 1969 and this was amended by the Banking Act (Amendment) Statute 18 of 1980 giving the Minister of Finance power to enact Legal Notices 2 of 1982, and 2 and 3 of 1984 freezing the Applicants' bank accounts. In 1995, the then Minister of Finance wrote to the banks to defreeze the said accounts, on the basis of this, the Applicants wrote a letter to the Bank of Uganda on 21st March 2003, seeking to implement the Minister's letter. In April 2004, the Applicants filed *Constitutional Petition No.2 of 2004*, in the Constitutional Court of Uganda seeking; a defreezing of their accounts in commercial banks in Uganda; compensation for the continued defreezing of the accounts in question; and payment of the principal amounts and interest. The court dismissed the petition on 14th September 2007 where after *Constitutional Appeal No.3 of 2007* was lodged in the Supreme Court of Uganda. This was dismissed on 30th October 2015. On 5th August 2016, the Applicant wrote to the Minister of Finance demanding for the release of their money but received no response.

In the current Reference, the Applicants contend that, after the decisions of the national courts clarifying the unfreezing of the accounts in question, the failure by the Government of Uganda to release the funds violated the Treaty. They sought declarations *inter alia* that: the refusal by the Government of Uganda to release the money that was wrongfully frozen and unfrozen to the Applicants breached Articles 6(d) and 7(2) of Treaty establishing the East African Community; and that the continued holding of the Applicants' money was illegal, unlawful and in violation of the Applicants' right to property, fair hearing, freedom from discrimination, and the right to fair administrative action.

The Respondent invoked the principal of *res judicata*, arguing that no national court had determined the Applicants' entitlement to payment; the Applicants' right to property had been respected; and that the Respondent was not in custody of any of their frozen accounts; Furthermore, the Applicants Reference was time barred.

Held

1. There is a distinction between a cause of action under EAC law and under the traditional common law. Causes of action before EACJ are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law

rights. Where a Reference raises a legitimate legal question spelt out in Article 30(1) namely: where it is contented that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty then there is a cause of action.

2. While the action that initially gave rise to the Applicants' cause of action is Legal Notices No. 2 of 1982 and Nos. 2 and 3 of 1984 to freeze their accounts. However, this was reversed vide the Minister of Finance's letter of 3rd February 1995. Subsequent to the Applicant's letter to the Central Bank of Uganda in 2003, several cases were unsuccessfully instituted in the Constitutional Court and Supreme Court of Uganda. Thus, the Respondent's alleged refusal to release the monies in the frozen accounts despite the alleged 'decisions of the National Courts clarifying the unfreezing of the said accounts is the action complained of.
3. Neither the Constitutional Court nor the Supreme Court of Uganda pronounced the legal position governing the accounts in question. The Supreme Court simply recommended an interrogation of the current *status quo* by the right court acknowledging that the Applicants had a 'genuine grievance'. That grievance indicated a cause of action but it did not require a constitutional interpretation by the Constitutional Court. No clarification of the legal position on the unfrozen accounts was given.
4. It is debatable whether there is a live dispute since there was no clarification of the legal position of the previously unfrozen accounts. Hence, in the absence of any other evidence to the contrary, the circumstances of this case do not support the Applicants' allegations of a violation of Ugandan national law or the Treaty. Since the present Reference was premised on the false premise of non-existent court decisions; and it was not established what Ugandan law was contravened, there is no live dispute before the Court and the complaint in respect was misconceived and unsustainable.

Cases cited

British American Tobacco (BAT) Ltd v Attorney General of Uganda, EACJ Appl. No. 13 of 2017
 FORSC & Others v Attorney General of the Republic of Burundi, EACJ Appl. No. 16 of 2016
 Simon Peter Ochieng & Anor v Attorney General of Uganda [2012-2015] EACJLR 361, Ref. No. 11 of 2013
 Sitenda Sebalu v The Secretary General of EAC& Ors [2005-2011] EACJLR 160, Ref. No. 1 of 2010

Editorial Note: On 25 February 2020, Appeal 1 of 2018 was allowed and the case remitted to the Trial Court for determination on the merits.

JUDGMENT

A. Introduction

1. This is a Reference filed on 6th September 2016, and amended on 27th October 2016, by Ismael Dabule and 1004 Others (hereinafter referred to as 'the Applicants'), made under Articles 6(d), 7(2), 27 and 30 (1) and (2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty'); and Rules 24(1), (2) and (3) of the EACJ Rules of Procedure, 2013 (hereinafter referred to as 'the Rules').
2. The Applicants are ordinarily resident in Uganda, and their address for the purposes of this Reference is: C/O Omongole & Co. Advocates, Plot 30 Kampala Road, 2nd Floor Greenland Towers, P.O. Box 28511, Kampala. E-mail: omongole@yahoo.com.

3. The Respondent is the Attorney General of the Republic of Uganda, pursuant to Article 119(4) of the Constitution of the Republic of Uganda.

B. Background

4. In 1979, the National Consultative Council of Uganda enacted the Banking Act 1969, which was amended by the Banking Act (Amendment) Statute 18 of 1980 to introduce section 26A and 26B which gave the Minister of Finance power to make Legal Notices 2 of 1982, and 2 and 3 of 1984 freezing the Applicants' bank accounts.
5. Pursuant to the Banking (Freezing of Accounts) Legal Notice No.2 of 1982 and Legal Notices No.2 and No.3 of 1984, the then Minister of Finance instructed Bank of Uganda to take over the Applicants' Accounts in commercial banks in Uganda so as to freeze the various personal and business accounts belonging to the Applicants. Upon freezing the Applicants' accounts, the Central Bank had all the funds transferred to itself.
6. On 3rd February 1995, the then Minister of Finance wrote to the banks to defreeze the said accounts, on the basis of which learned Counsel for the Applicants wrote a letter to the Bank of Uganda on 21st March 2003, seeking to implement the Minister's letter.
7. In April 2004, the Applicants filed *Constitutional Petition No.2 of 2004, Ismael Dabule and 2 Others vs. Attorney General and Bank of Uganda*, seeking a defreezing order, compensation for the continued defreezing of the accounts in question, and payment of the principal amounts and interest. The court dismissed the petition by its Ruling delivered on 14th September 2007.
8. Dissatisfied with that Ruling, the Applicants lodged *Constitutional Appeal No.3 of 2007* before the Supreme Court of Uganda. By its Judgment of 30th October 2015, the Supreme Court dismissed the Constitutional Appeal on the authority of both *Ismael Serogo vs. Kampala City Council and Attorney General, Constitutional Appeal No.2 of 1998*) and *Attorney General vs. Major General D. Tinyefuza, Constitutional Appeal No. 1 of 1997*.
9. The thrust of the present Reference is that after the clarification by the national courts on the matter of the accounts in question, the continued refusal by the Government of Uganda to release those funds constitutes a violation of Articles 6(d) and 7(2) of the Treaty.
10. At the hearing, the Applicants were represented by Mr. Richard Omongole, while Mr. Elisha Bafirawala, Mr. Gerald Batanda and Mr. Bichachi Ojambo appeared for the Respondent.

Applicants' Case

11. The Applicants' case is set out in their Amended Statement of Reference filed on 26th October 2016, an Affidavit sworn on by Ismael Dabule on 18th October 2016 and filed on the same date as the Amended Statement of Reference, written submissions filed on 29th November 2017, and oral submissions made during the hearing.
12. In Submissions, Counsel for the Applicants contended that, after the decisions of the national courts clarifying the unfreezing of the accounts in question, the persistent refusal of the Government of Uganda to release the funds constituted

a violation of Articles 6(d) and 7(2) of the Treaty.

13. With respect to time-limit stipulated by Article 30(2) of the Treaty, learned Counsel relied on the precedent of *Audace Ngendakumana vs. The Attorney General of Burundi*, EACJ Ref. No. 11 of 2014, and maintained that the Applicants had filed the present Reference in strict compliance with the time limit set by Article 30(2) of the Treaty. On the protection of right to property and non-discrimination, learned Counsel for the Applicants further relied on *Venant Masenge vs. The Attorney General of Burundi*, EACJ Ref. No. 9 of 2012 to conclude that the act of the Government of Uganda contravened Articles 6(d) and 7(2) of the Treaty. On the matter of competence of the EACJ, as a Judicial body, to ensure adherence to law “in the interpretation and application of and compliance with the Treaty”, he invited this Court to consider its decision in *Sitenda Sebalu vs. The Secretary General of the East African Community and 3 Others*, EACJ Ref. No. 1 of 2010. Finally, learned Counsel invoked three (3) Articles from the Constitution of Uganda to support his position: Article 21(1) pertaining to equality before the law; Article 24 covering such elements of Human Rights as torture, cruel inhuman, and degrading treatment or punishment; and Article 26 dealing with the right to property.
14. On that premise, Counsel sought the following Declarations from this Court:
 - a. That the refusal by the Government of Uganda to release to the Applicants the money that was wrongfully frozen on their accounts and unfrozen as declared by Courts of Uganda is a breach of Treaty establishing the East African Community in Articles 6(d) and 7(2) that enjoin all partner states to govern while adhering to the rule of law ;
 - b. A Declaration that in violation of the Applicants’ fundamental rights and freedom against discrimination, right to fair and just administrative decision, right to property and livelihood, the Government of Uganda by continued refusal to pay or give back the Applicants their money equivalent to date is acting illegally, unlawfully and is in violation of Uganda’s obligations under Articles 6(d) and 7(2) of the Treaty;
 - c. A Declaration that the continued holding onto the Applicants’ money by the Government of Uganda without any justification, without a due process of law or any form of administrative process before the refusal to release the said money is illegal, unlawful and in violation of the Applicants’ right to property, right to fair hearing, freedom from discrimination, right to fair administrative action and contrary to the provisions of Articles 6(d) and 7(2) of the Treaty;
 - d. A Declaration that the continued holding onto the Applicants’ Bank documents and account balances details relating to frozen accounts after the courts pronounced the accounts unfrozen is an infringement of the Treaty;
 - e. An Order that costs of and incidental to this Reference be met by the Respondent; and
 - f. That this Court be pleased to make such further or other orders as may be fit and just in the circumstances of the Reference.

Respondent's Case

15. The Respondent's case is as stated in his Response to the Amended Reference filed on 28th February 2017, an Affidavit in support thereof deposed on 24th February 2017, written submissions filed on 30th May 2017, and oral submissions made on the day of the hearing.
16. In Submissions, Counsel for the Respondent denied the claims of the Applicants in toto, principally on grounds of *res judicata*, arguing that no national court had determined the Applicants' entitlement to payment; the Respondent had at all material times respected the Applicants' right to property; the Respondent was not in custody of any of their frozen accounts; rather, the Applicants had been treated fairly and neither discriminated against nor subjected to any form of torture or cruel, inhuman and degrading punishment, and the Respondent had not, by any act or omission, violated or infringed any provisions of the Treaty.
17. Counsel relied upon *Ibrahim Ulego & Others vs. Attorney General, High Court Civil Suit No. 138 of 2004*, which had been dismissed on account of being time-barred; *Attorney General of Kenya vs. Independents Medic Legal Unit, EACJ Appeal No. 1 of 2011*, on the rationale of time limitation enshrined in Article 30(2) of the Treaty, and *Attorney General of the Republic of Uganda & Another vs. Omar Awadh & Others, EACJ Appeal No. 2 of 2012*, which clarified the concept of legal certainty embodied in Article 30(2) of the Treaty. He did also cite *Benkay Nigeria Ltd vs. Cadbury Nigeria, Suit No. 29 of 2006 (Nigeria Supreme Court)*, as well as one academic authority: *Aduaka, Charles E. & Ifeyinwa Mercy Anyaegbu. 2013. The Abuse of Legal Process in Nigeria: The Remedies. Journal of Law, Policy and Globalization, Volume 20, pp. 126-134 at p. 128*, which define and set out the law on *abuse of court process*. In addition, the Counsel invoked *Ismael Dabule & Others vs. Attorney General of Uganda & Another, Constitutional Appeal No.3 of 2007*, which had confirmed the dismissal of the *Constitutional Petition No.2 of 2004 by the Constitutional Court of Uganda* and *Ismael Dabule & Others vs. Attorney General & Bank of Uganda, Civil Suit No. 300 of 2017*, which is pending determination before the High Court of Uganda, on the matter of those frozen bank accounts.
18. In conclusion, Learned Counsel for the Respondent invited this Court to invoke its power under Rule 1(2) of its Rules to stamp out what he perceived to be 'glaring abuse of court process', and sought the dismissal of the Reference with costs.

Issues for Determination

19. Pursuant to a Scheduling Conference held on 11th September 2017, the following issues were framed by the Parties:
 - a. Whether the Reference is time-barred;
 - b. Whether the Applicants have *locus standi*. This issue was subsequently conceded by the Respondent. Therefore, it shall not be canvassed in this judgment;
 - c. Whether the Ugandan Government's alleged continued refusal to allow the Applicants access their frozen funds or its equivalent to date, is a violation of Articles 6(d) and 7(2) of the Treaty;
 - d. Whether the Government's alleged refusal to release the Applicants'

documentation and account balances relating to their frozen funds is a violation of Articles 6(d) and 7(2) of the Treaty;

- e. Whether the alleged violations by the Government of Uganda of the Applicants' rights to a fair hearing, right to property and freedom from discrimination are a violation of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty; and
- f. Whether the Applicants are entitled to the remedies sought.

C. Court's Determination

Issue No. 1: Whether the Applicants Reference is time-barred.

20. It was the Respondent's contention that this Reference is time-barred, as it was filed outside the time-limit of two-months prescribed under Article 30(2) of the Treaty. As stated earlier herein, Counsel for the Respondent cited *Ibrahim Ulego & others vs. Attorney General* (supra), which was dismissed on account of being time-barred.
21. Learned Counsel for the Respondent relied upon the following decision of the Appellate Division of this Court in *Attorney General of Kenya vs. Independents Medic Legal Unit* (supra) to argue that the Treaty made no provision of extension of time within which References may be filed:

"Again, no such intention (to exclude the time limit) can be ascertained from the ordinary and plain meaning of the said Article 30(2) or any other provision of the Treaty. The reason for this short time limit is critical. It is to ensure legal certainty among the diverse membership of the Community."
22. He did also cite the case of *Attorney General of the Republic of Uganda & Another vs. Omar Awadh & Others* (supra), where the Appellate Division confirmed the position of legal certainty as follows:

"... the court[sic] is of the same view that the object of Article 30(2) is legal certainty. It still notes that the purpose of this provision of the Treaty was to secure and uphold the principle of legal certainty; which requires a complainant to lodge a reference in East African Court of Justice within the relatively brief time of only two months. Nowhere does the Treaty provided for any "exception" to the two-month period."
23. Apart from the foregoing judicial precedents, the Counsel made reference to an academic article, Tyler T. Ochoa, '*The Puzzling Purposes of Statutes of Limitation*', *Santa Clara Law Digital Commons*, 1997, pp. 453 - 514⁵², where the concept of limitation was most articulately espoused. We do revert to a more detailed consideration of this article later in this judgment.
24. Conversely, Counsel for the Applicants contended that the Applicants filed the present Reference in strict compliance with the time limit set by Article 30(2) of the Treaty. It was his contention that after the decisions of the national courts allegedly clarifying the unfreezing of the Applicants' accounts, the Applicants had, on 5th August 2016, written to the Minister of Finance demanding for the release of their money but the said Minister did not respond to their demand, whereupon, acting on the presumption that the Government had declined to

⁵² Available at: <http://digitalcommons.law.scu.edu/facpubs/81>

release their money, they filed the present Reference on 6th September 2016. Thus, in his view, the cause of action in issue presently is the 2016 ‘refusal’ of the Ugandan Government to release the funds sought. Learned Counsel sought to buttress his argument with the case of *Audace Ngendakumana vs. the Attorney General Burundi* (supra), where the Appellate Division held that “Article 30(2) of the Treaty demands strict application of the time limit stated therein”.

Determination of Issue No. 1:

25. We have read and considered carefully the pleadings and submissions, together with the supporting legal authorities cited by the Parties. Article 30(2), on which the present issue hinges, reads:
- “The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”
26. In our view, a decision on limitation period entails the ascertaining of the distinct point in time when the period begins to run in each case. In this regard, the records of the present Reference reveals the following chronology:
- a. By Legal Notice No.2 of 1982 and Legal Notices No.2 and No.3 of 1984, the Government of Uganda froze the Applicants’ accounts;
 - b. On 3rd February 1995, the Minister of Finance wrote to commercial banks to defreeze those accounts;
 - c. On 21st March 2003, the Applicants wrote to the Bank of Uganda, requesting the implementation of the Minister’s directive above;
 - d. In April 2004, the Applicants filed Constitutional Petition No.2 of 2004, which was dismissed vide a judgement dated 14th September 2007. Thereafter, Constitutional Appeal No. 3 of 2007, an appeal from that decision, was similarly dismissed by the Supreme Court of Uganda by its judgment of 30th October 2015; and
 - e. On 6th September 2016, the Applicants filed this Reference in this Court.
27. It seems to us that the action or decision that initially gave rise to the Applicants’ cause of action would have been the decisions vide *Legal Notices No. 2 of 1982 and Nos. 2 and 3 of 1984* to freeze their accounts. However, that decision was subsequently reversed vide the Minister of Finance’s letter of 3rd February 1995, and it would appear that it was on the basis of that letter of reversal that the Applicants did, in 2003, write to the Central Bank of Uganda, seeking the implementation of the Minister’s 1995 directive and unsuccessfully instituted legal action against the present Respondent and the Bank of Uganda in the Constitutional Court and Supreme Court of Uganda. Be that as it may, in paragraph 3(a), (b) and (d) of the Amended Reference it is quite clear that the action complained of by the Applicants is the Respondent’s alleged refusal to release the monies in the previously frozen accounts despite the alleged ‘decisions of the National Courts clarifying the unfreezing of the said accounts.’ Therefore, the questions we would be occupied with would be, first, whether in fact the national courts of Uganda did clarify the position on the ‘unfrozen’ accounts so as to entrench the Applicants’ claim herein thus giving rise to a cause of action and, if not, before a consideration of the time limitation, whether we have before

us a sustainable cause of action; even before we consider whether it was brought within time.

28. We are constrained to observe from the onset that, despite having raised the issue of the alleged clarification of the legal position on the accounts, the Applicants did not in their Written Submissions indicate which national courts' decisions made the said clarifications. In oral highlights of their Submissions, we understood learned Counsel for the Applicants to allude to the decisions in *Constitutional Petition No. 2 of 2004* and the Appeal therefrom to wit *Constitutional Appeal No. 3 of 2007* as the decisions in question. The Respondent, on the other hand, contended that the said decisions did not clarify the legal position on the accounts in issue in the present case, but simply observed that there was need for an 'ordinary' national court⁵³ to interrogate why the hitherto frozen had not yet been accessed by the Applicants.
29. We have carefully considered the judgments in *Constitutional Petition No.2 of 2004 and Constitutional Appeal No.3 of 2007*, as invoked by Counsel for the Applicants. We do agree with Counsel for the Respondent that neither the Constitutional Court nor the Supreme Court of Uganda pronounced itself on the legal position governing the accounts in question, the latter apex court simply recommended the interrogation of the current *status quo* by the right court in Uganda. Indeed, whereas the Supreme Court acknowledged that the Applicants had a 'genuine grievance' that called for redress, it did not think the grievance in question called for constitutional interpretation by the Constitutional Court. In our view, the acknowledgment of the genuine grievance is tantamount to acknowledgment that the Applicants did have a 'cause of action' albeit in the ordinary courts, but is most certainly not a clarification of the legal position on the unfrozen accounts. Quite clearly, therefore, the Respondent did not act in contravention of any court decision or order, as alleged by the Applicants, and any complaint in respect thereof is misconceived and unsustainable. Having so held, it does follow that the Respondent cannot be held to have contravened the principle of rule of law under Articles 6(2) and 7(d) of the Treaty in that regard. We so hold.
30. That then begs the question as to the import of the Respondent's alleged refusal to release the monies in the frozen accounts to the issue of time limitation under consideration presently. It was argued for the Applicants that the Respondent's alleged refusal is captured by the refusal of the Minister of Finance to respond to a letter from the Applicants' lawyer dated 5th August 2016, and captioned 'Final Demand for payment of Frozen Accounts Money after Court decision'. We have categorically held above that there was no court decision that supported any claim in respect of the frozen or unfrozen accounts. In fact, in addition to the constitutional cases considered earlier in this judgment, a case on the same subject – *Ibrahim Ulego & Others vs. Attorney General* (supra), – had been dismissed by the High Court of Uganda for *inter alia* being time barred.
31. Can it then be maintained, as has been opined by the Applicants, that the letter of 5th August 2016, premised as it was on a misdirection of the facts but nonetheless seeking the commitment of the Minister of Finance on modalities of payment of the monies sought, be tantamount to a grievance giving rise to a cause of

⁵³ Ordinary courts as opposed to the Constitutional Court.

action before this Court? Related to that, would non-response to a request that is rooted in a false premise give rise to a cause of action under Article 30(1) of the Treaty? Stated differently, we have before us a contention by the Applicants that a letter that was premised on a misdirection of the law by them, as well as a self-determined presumption that non-response thereto by the Minister to whom it was addressed would be tantamount to refusal to act on the misdirected legal position, is being flouted as the premise for the cause of action in the present Reference.

32. With respect, we are unable to agree with the Applicants on this proposition. We deem it necessary to interrogate the nature of the cause of action in the Amended Reference before us to enable us address the question as to whether it has been instituted within the requisite time. It is apposite to state here that a distinction has been drawn between a cause of action under EAC law viz one under the traditional common law. A cause of action before this court has, in numerous cases, been held to exist ‘where the Reference raises a legitimate legal question under the Court’s legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty. Causes of action before this Court are grounded in a party’s recourse to the Court’s interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights.’ See *Sitenda Sebalu vs. The Secretary General of the East African Community & Others EACJ Ref. No. 1 of 2010*; *Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 11 of 2013* and *FORSC & Others vs. Attorney General of the Republic of Burundi (supra)*.⁵⁴
33. In the instant case, the Applicants’ cause of action would have been two-fold: first, that the Respondent violated the legal position on the unfrozen accounts as clarified by the national courts of Uganda and, to that extent, they do appear to challenge the purported violation of national law; and secondly, the Applicants contend that the said disregard for the national legal position is a breach of Articles 6(d) and 7(2) of the Treaty. Indeed, in the case of *Simon Peter Ochieng & Another vs. Attorney General of Uganda (supra)*, where the material before the Court denoted silence from the President of the Republic of Uganda on the appointment of judges, a cause of action was held to have been disclosed in the following terms:

“The Reference raises issues of due process in the appointment of judges and the implication of in-action in that respect to the effective administration of justice and, indeed, the function of the Judiciary in the national governance structure. The subject matter that gives rise to a cause of action herein would be the inaction by the President with regard to the appointment of judges despite the recommendations of the Judicial Service Commission. Stated differently, the matter in issue presently is the ‘decision’ by the President not to act on the recommendations of the Judicial Service Commission. It is this decision that is construed by the Applicants as a refusal to effect judicial appointments as recommended.

⁵⁴ Cited with approval in *British American Tobacco (BAT) Ltd vs. Attorney General of Uganda, Appl. No. 13 of 2017*.

Further, the Reference raises questions to do with the President's compliance with the legal regime of Uganda, on the one hand; as well as whether or not his decision as described above is in compliance with the principles outlined in Articles 6(d) and 7(2) of the Treaty."

34. Suffice to note nonetheless that in that case,⁵⁵ the Court further held that the Applicants bore the onus of proof of that 'decision' being tantamount to a 'refusal' by the President of the Republic of Uganda to appoint judges. Similarly, in the present case, the Applicants bear the burden of proof of the Respondent's alleged refusal to comply with Ugandan national law, as well as the existence of the national law that they sought to invoke. The circumstances of the present case are such that it is debatable whether there is a live dispute before us at all.
35. We are acutely alive to the fact that the validity of the dispute or whether indeed there is a live dispute before us is an issue that was not raised before us. Nonetheless, the Court's rules of Procedure provide sufficient latitude for a court to interrogate a point of law raised on its own motion. In that regard, we fall back to the inherent powers of the Court as encapsulated in the indefatigable Rule 1(2) of the Rules. It reads as follows:
- "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."
36. Having found as we have earlier in this judgment that there was no clarification of the legal position on the unfrozen accounts as was claimed by the Applicants, and in the absence of any other evidence to the contrary, we find that the circumstances of this case do not support the Applicants' allegations of a violation of Ugandan national law by the Respondent, neither do they establish a Treaty violation on account of purported breach of Ugandan national law.
37. In any event, we do observe that the Applicants' letter of 5th August 2016 (upon which they sought to premise the present Reference) essentially sought payment of the monies on their previously frozen accounts on the basis of alleged court decisions, rather than applicable national law *per se*. Indeed paragraph 3 of the said letter alluded to ongoing discussions on 'how the payment was to be made'. Against the backdrop of the letter's reference to non-existent court decisions, however, we cannot fault the Respondent for declining to respond to a letter premised on falsehoods, neither is it readily apparent to us what was the legal basis of the Applicants' purported 2-week ultimatum to the Minister to either respond to the letter or be deemed to have refused to do so.
38. From the provisions of the *Financial Statutes (Amendment) Act of 1993*, as well as the Minister of Finance's letter of February 1995, it is apparent that the Applicants' hitherto frozen accounts had been unfrozen. Thus, the real issue in contention between the Applicants and the Ugandan Government was whether an earlier currency reform process should apply to the payments due to the Applicants and not necessarily the implementation of any court decisions, real or imaginary. This is reflected quite succinctly in the Minister's letter of February 2018. Nonetheless, that issue was not raised in the pleadings before us, neither was it canvassed in submissions. We shall therefore not belabor it further, save to note that the Respondent's commitment to equivocally and equally apply to all

⁵⁵The *Simon Peter Ochieng* case

Ugandans a reform process established by a Partner State would not constitute a violation of due process or the rule of law, as enshrined in the Treaty.

39. Consequently, it becomes abundantly clear that in the interrogation of Issue No. 1 thereof, has transpired that the present Reference is premised on the false premise of non-existent court decisions; the Applicants have not established what, if any, Ugandan national law was contravened by the Respondent, and therefore there is no live dispute before us.

D. Conclusion

40. Having decided as we have in the preceding issue that there is no live dispute before the Court, it would be an exercise in futility to purport to determine the residual issues in this Reference. The Court finds that the matter was not properly before it. Accordingly, the Reference is dismissed with costs to the Respondent.

R. Omongole, Counsel for the Applicant

E. Bafirawala, G. Batanda & B. Ojambo for the Respondent

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First Instance Division

Reference 6 of 2016**Grands Lacs Supplier S.A.R.L. & Others v The Attorney General of the of Burundi**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo, J; F. Jundu & C. Nyawello, JJ
June 19, 2018

Rule of Law- Free movement of transit goods - Unlawful seizure - State responsibility for conduct of its organs - Liability for breach of EAC customs union, common market protocols - When time started to run- Whether the Court has jurisdiction to grant compensatory damages and interest - Documentary proof

Articles: 3(e), 5(3)(d), 6(d), 7(1)(a)(c), 8(1)(a),(c), 8(5), 27(1), 29, 30, 38, 71, 75, 76, 105 of the Treaty - Articles: 2,3,4,5, 6 Protocol on the EAC Common Market, 2009 - Article 39, Protocol for the Establishment of the EAC Customs Union, 2004 - Section 213, 214, EAC Customs Management Act 2004 as revised.

In July 2016, the Applicants sought to convey foodstuffs purchased in the United Republic of Tanzania by road in 6 trucks through the Republics of Burundi, Rwanda and to the final destination Uganda. The Applicants had identified the Kirundo-Rutete-Kigali-Kampala route as the shortest and most economically viable. Upon payment of the requisite levies, charges, fees and taxes, the goods were cleared at Kobero border in Burundi, but due to lack of a functional scanner at the said border point, the Respondent directed the Applicants to convey their goods out of the Burundian territory via the border point of Kanyaru-Haut, where there to enable authentication of the goods through a scanner.

On 30th July 2016 the Respondent seized the goods despite the payment of the requisite government transit taxes and clearance the goods for exit of the goods by the Respondent's Customs and Revenue Authority. When the seizure came to the knowledge of the Applicants, they wrote to the Commissioner of Customs and Excise in Bujumbura on 1st August 2016 seeking clarification on the reasons for the seizure and demanding their immediate release. This was followed by letters to several officials including: the Minister of Commerce, the 2nd Vice President and the Permanent Secretary in the Ministry for East African Community in Burundi. The goods were seized by security officers, communal and provincial administrative authorities and subsequently transported to and impounded at the Government Warehouses/Customs Offices in Bujumbura.

The Applicants filed this Reference on 28th September 2016 averring that they had complied with the relevant legal requirements for their goods to exit the Burundi territory to their final destination in Uganda. They sought *inter alia*: A declaration that Respondent's actions violated Articles 6, 7 and 105 (1) (b) and (2) (g) of the Treaty, plus the EAC Common Market Protocol and the EAC Customs Union Protocol. The also sought compensation for losses on truck hire, loss of profits, loss of investments and loss of earnings; general damages to the for unlawful seizure of

goods and interest.

The Respondent claimed that the goods were legally seized in compliance with the law and policy of the country to protect the country's security and that the Applicants had deviated from their original itinerary and their transit in Burundi had become suspicious. The Respondent did not contest the sanctioning of the deviation from the original itinerary by the Burundi Revenue Authority and averred that the Reference was time barred.

Held

1. Time started to run on 30th July 2016, when the Applicants were informed that their goods had been collected by the Ministry of Human Rights, Social Affairs and Gender from the Customs Office of Kanyaru-Haut for violating a national policy on transportation of goods. Thus, the Reference was filed within the time prescribed by Article 30(2) of the Treaty.
2. Rule of law means that the law reigns supreme. Therefore, people who enforce and administer the law, such as police officers, judges and lawyers are subject to the same laws as everybody else. The rule of law limits the arbitrary exercise of power by a single person or group. In order to comply with the essential elements of the rule of law, the seizure of the Applicants' goods should have been executed in respect of the applicable laws in Burundi, particularly the East African Community Customs Management Act 2004 as revised. Section 213 on the power to seize goods liable to forfeiture and Section 214 on the procedure of seizure are most relevant. The decision of seizing the Applicants' goods without due process runs afoul of the principle of the rule of law stipulated in Articles 6(d) and 7(2) of the Treaty
3. It is a well-established rule of international law that the conduct of any organ of a State must be regarded as an act of that State. As held in *Zziwa case, Appeal 2 of 2017*, 'the remedies of compensation is firmly established in international law, and is available for the Community's breach of its Treaty obligations where a claimant establishes that the Act, regulation, directives, decision or action of the Community complained of has caused such claimant a loss which is financially assessable.
4. This Court, as an international Court set up by the Treaty, is vested with the jurisdiction to determine whether the Applicants are entitled to the damages and interest thereof sought as a remedy to the unlawful seizure of their goods by the Respondent through its organs. In the *Chorzow Factory* case the Permanent Court of International Justice opined that "the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.
5. The Applicants produced photocopies alleging that the Respondent had retained the original documents. Most of were illegible and no leave of the Court for production of the original documents by the Respondent was sought. Consequently, no special damages were awarded as special damages must be specifically proved.

6. General damages fall are discretionary and the Court's discretion has to be exercised judiciously upon facts and circumstances presented to the Court from which it must draw a conclusion governed by law. Taking into consideration the circumstances of the case, the sum of US\$ 20,000 and interest at rate of six (6) per cent per annum from the date of the judgment until payment in full were awarded for the loss suffered.

Cases cited

Air France v Mrs. Brenda Akpan, Court of Appeal of Nigeria, Lagos Division, CA/L/1001/2008
 Andrea Francovich & Danila Bonifaci v Italy (1991) ECR I-5357
 Attorney General Uganda v Lutaaya, SCU, Civil Appeal No. 16 of 2007
Factory at Chorzów, Germany v Poland, PCIJ Series A
 Hon. Dr Margaret Zziwa v The Secretary General of EAC, EACJ Appeal No. 2 of 2017
 Lusitania Opinion, Reports on International Arbitral Awards, 1923, Volume VII 32
 Shanique Myrie v The State of Barbados, CCJ Application No. OA002 of 2012, [2013] CCJ 3
 Stanbic Bank Tanzania v Abercrombie & Kent (T) Limited, CAT, Civil Appeal No. 21 of 2001

JUDGMENT

A. Introduction

1. This is a Reference filed on 28th September 2016 by Grands Lacs Supplier S.A.R.L and Others (hereinafter referred to as “the Applicants”), under Articles 3(e), 5(3) (d), 6(d), 7(1)(a)(c), 8(1)(a) &(c), 8(5), 27(1), 29, 30, 38, 71, 75, 76 and 105 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”); Articles 2, 3, 4, 5 and 6 of the Protocol on the Establishment of the East African Community Common Market; Article 39 of the Protocol on the Establishment of the East African Community Customs Union, and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as “the Rules”). The Applicant is a trading company duly incorporated in the Republic of Uganda. The company is also registered to do business in the Republic of Rwanda. The Applicant's address of service for purposes of this Reference is care of Messrs. Ochich T.L.O. & Associates Advocates, Postbank House, 4th Floor Right Wing, Banda Street of Market Lane, P.O. Box 79367-0020 Nairobi. Email: ochicht@gmail.com; Telephone: +254 722 687291/+254 721 335162.
2. Grands Lacs Suppliers S.A.R.L brings this Reference on its own behalf and on behalf of other general traders resident in the East African Community, namely Byansi Edward, Bizabishaka Eric Kamuhanda Moses and Murerwa Audreille who duly executed Powers of Attorney granting it authority to institute the instant Reference in pursuit of compensation for their seized goods.
3. The Respondent is the Attorney General of the Republic of Burundi who is sued in his capacity as the Principal Legal Advisors of the Republic of Burundi. His address is given as care of the Minister of Justice, Republic of Burundi, P.O. Box 1870, Bujumbura, Burundi.
4. Initially, the Applicant had also filed the Reference against the Secretary General of the East African Community as the 2nd Respondent, but during a hearing held on 7th March 2018, the Applicant, through his Counsel, withdrew the case against the Secretary General.
5. The Applicants alleged that the Respondent unlawfully seized their goods on 30th July 2016 in violation of the fundamental principles and objectives of the

Treaty and the Protocols on Customs Union and Common Market in that the seizure hinders the free movement of goods by Partner States' nationals across their borders.

6. The Applicants seeks the following prayers and orders against the Respondent:
 - (i) A declaration that the decision taken by the Respondent through Mr. Ndayiragije Boniface, the Advisor of the Minister of Human Rights Affairs on 30th July 2016 is in violation of Articles 6,7 and 105 (1)(b) and (2)(g) of the Treaty Establishing the East African Community;
 - (ii) A declaration that the said unlawful decision of the Respondent is in violation of Article 2,3,4,5 and 6 of the Protocol on the East African Community Common Market;
 - (iii) A declaration that the said decision of the Respondent is in violation of Article 39 of the Protocol for the Establishment of the East African Community Customs Union;
 - (iv) An order compelling the Respondent to pay the Applicant USD 218,849 in compensation for losses on truck hire, loss of profits, loss of investments and loss of earnings;
 - (v) An order compelling the Respondent to pay general damages to the Applicant for unlawful seizure of goods, breach and violation of EAC Treaty, Customs Union and Common Market Protocols, wrongful deprivation/denial of property and inconvenience to and hampering of Partner States' nationals' business, trade and economic activity;
 - (vi) An order compelling the Respondent to pay interest on the amount in (v) above at court rates from the date of this Reference until paid in full;
 - (vii) An order that the costs of and incidental to this Reference be met by the Respondent;
 - (viii) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances.

B. Representation

7. The Applicant was represented by Mr. Kennedy O. Wanyanga and Mr. Dieudonné Bashirahishize while Mr. Nestor Kayobera appeared for the Respondent.
8. During the Scheduling Conference, Counsel for the Respondent contested Mr Dieudonné Bashirahishize's appearance before this Court alleging that the latter was disbarred by the Court of Appeal of Bujumbura for having violated Law No. 1/14 of November 2002 reforming the Status of the profession of advocates and Law No.1/28 of December 2013 regulating demonstration and public meetings and that the lawyer was under an international warrant of arrest for serious criminal charges being prosecuted under case No. RMPG.696/MA and 697/MA. But later on, Mr. Bashirahishize submitted to the Court a certificate issued by the Rwanda Bar Association showing that he was (and still is) duly enrolled to practice law and the lawyer's appearance was therefore found to be in compliance with the Court's Rules.

C. The Applicants' Case

9. The Applicants' case is set out in their Statement of Reference filed on 28th September 2016, an Affidavit in support of the Reference sworn on even date by

Mr. Rugerinyange Salvator, General Manager of Grands Lacs Suppliers S.A.R.L., Written Submissions filed on 17th July 2017 and submission highlights made on 7th March 2018.

10. The Applicants contend that sometime in July 2016, they sought to convey goods comprising foodstuffs mainly maize, beans and cassava through the Republic of Burundi having purchased them from the United Republic of Tanzania. They said goods, perishable by nature, were transported via road in 6 trucks, which journey was scheduled to take them from Tanzania via Burundi, Rwanda and finally to Uganda, the final destination of the goods.
11. The Applicants further contend that they paid all requisite statutory, and government levies, charges, fees and taxes as required by Burundian laws, in order to permit the lawful and safe passage of the goods through and out of Burundi. The Applicants also contended that they had purposed to exit Burundi via the border point at Kobero, having chosen the Kirundo-Rutete-Kigali-Kampala route as the shortest and most economically viable.
12. It is the Applicants' allegation that the goods were cleared at the Kobero border, but due to lack of a functional scanner at the said border point to enable validation/authentication of the goods, the Respondent directed that the Applicants should convey their goods out of the Burundian territory via the border point of Kanyaru-Haut, where there was a working scanner.
13. The Applicants further contended that contrary to the Respondent's allegations, there was no deviation in route, nor was there any flouting of Burundian internal law. Rather, it is the Applicants' case that having complied with the Respondent's directive to exit via Kayanza/Kanyaru-Haut, it thereafter transpired that the Applicants' goods were seized on 30th July 2016 by the Respondent at the same border post despite the payment of the requisite government transit taxes and the clearance for exit of the goods by the Respondent's Customs and Revenue Authority.
14. The Applicants do also assert that on 1st August 2016 when that allegedly unlawful seizure first came to their knowledge, they promptly wrote to the Commissioner of Customs and Excise in Bujumbura asking for clarification on the reasons for the seizure of the goods and demanding their immediate realise.
15. The Applicants furthermore stated that on 3rd August 2016, having failed to receive any response from the Respondent to their letter dated 1st August 2016, they communicated the matter to the Minister of Commerce of Burundi, the 2nd Vice President of the Republic of Burundi, and the Minister of Home Affairs and in that communication, they again reiterated their concern and demand for release of the goods. The Applicants also indicated that a further follow up on the incident was made by letter dated 8th August 2016 when they sought recourse from the Permanent Secretary in the Ministry for East African Community in Burundi.
16. The Applicants also contend that on 10th August 2016, and in a specific response to its letter, the Commissioner of Customs and Excise of the Burundi Revenue Authority wrote to them re-affirming that there was no lawful cause for their goods to be held as they had been cleared and that an "acquittal" had been issued at the Kanyaru-Haut border. The Applicants further contended that given the Respondent's continued failure to release the goods, they made several additional

written appeals to the Respondent along with relevant government authorities in Rwanda and Uganda seeking their intervention, to no avail.

17. Finally, dissatisfied with the “Respondent’s egregious violation of municipal, Community and international laws,” they had no other recourse but to institute the instant Reference. They thus pray that the Reference be allowed and that orders sought as reproduced herein above be granted.

D. The Respondent’s Case

18. The Respondent’s case is as stated in his Response to the Reference filed on 15th December 2016, an Affidavit in support of his Response sworn on 15th December 2016 by Mr. Arcade Harerimana, Permanent Secretary in the Ministry of Justice, his Written Submissions filed on 12th September 2017 and submission highlights made on 7th March 2018.
19. The Respondent pleaded that:
- (a) On 24th July 2016, 5 trucks transporting goods were seized by communal, provincial administrative and security officials at the Kanyaru-Haut border in Ngozi Province.
 - (b) The Applicants had, however, declared that they would use the Kirundo-Rutete-Kigali-Kampala Route.
 - (c) The Applicants deviated from the original route and the one used to arrive at Kanyaru-Haut was different from the one declared at Kobero and all documents shown by the Applicant to the Government officials in Ngozi were just photocopies.
 - (d) Since the route taken to arrive at Kanyaru-Haut and the loads of goods discovered at Kanyaru-Haut differed from the ones at Kobero, the Applicants and the destination of the trucks became suspicious.
 - (e) The Government of Burundi had already taken a decision not to allow those kinds of goods to leave the country, especially for security purpose, and the goods were distributed to vulnerable people in order to discourage fraudulent business people.
 - (f) The empty five trucks were given back to the Applicant.
 - (g) The decision taken was to protect the security of the country and of its people and does not violate any provision of the Treaty, the EAC Common Market protocol and/ or the EAC Customs Union Protocol.
 - (h) This Court does not have jurisdiction to entertain the Reference as doing so would contravene the provisions of Article 27(2) and 30(3) of the Treaty except in respect of prayers i, ii, iii, and ix.
 - (i) The Applicants are not entitled to the remedies sought and therefore, the Reference ought to be dismissed with costs.

E. Issues for Determination

20. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 6th June 2017 at which the following were framed as issues for determination:
- (a) Whether this Court has jurisdiction to entertain this Reference.
 - (b) Whether the Reference is time-barred.
 - (c) Whether the Applicants are entitled to the remedies sought against the Respondent.

Issue No. 1: Whether this Court has jurisdiction to entertain this Reference:

21. The question as to whether the Court has jurisdiction to entertain this Reference was an issue raised by the Respondent. In that regard, it was submitted that this Court had jurisdiction to entertain and determine matters pertaining to the interpretation and application of the Treaty as raised in the Applicant's prayers (i), (ii) and (iii) on the alleged unlawful seizure of the Applicants' goods, but that the Court lacked jurisdiction to grant prayers (iv), (v) and (vi) on damages and interest thereof. Counsel for the Respondent submitted that the Applicants' prayer (iv) to compel the Respondent to pay it \$US 218, 819 in compensation for "the so-called losses on truck hire, loss of profits, loss of investments and loss of earnings" was unfounded since the Court does not have such a jurisdiction therefore this would be violating the provisions of Article 27(2) and 30(3) of the Treaty. Similarly, with regard to prayers (v) and (vii), Counsel contended that the power to compel the Respondent to pay compensations for "so-called general damages and interests for losses (especially unproved losses)" was only vested in national courts and tribunals of the Partner States in order to avoid violation of Articles 27(2) and 30(3) of the Treaty.
22. In support of his argument that this Court should refrain from entertaining the Applicants' abovementioned prayers on damages and interest, the Respondent's Counsel referred us to the case of *Alcon International Limited vs. Standard Chartered Bank of Uganda and 2 other, EACJ Appeal No.3 of 2013* in which the Appellate Division of this Court cited with approval the Kenyan Court of Appeal case of *Owners of the Motor Vessels 'Lillian S' vs. Caltex Oil (Kenya) Limited* where it was held (Nyarangi, J.A.) that : "Jurisdiction is everything. Without it, a Court has no power to make one step. Where a Court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."
23. Counsel further argued that while the Applicants had requested this Court to compel the Respondent to pay them money in compensation for losses and interest as indicated herein above, they did not show under which Articles of the Treaty those amounts were to be paid by the Respondent who had no contract with them at all. It was thus his contention that since extension of the Court's jurisdiction had yet to be operationalized in Article 27(2) of the Treaty, this Court was not clothed with the jurisdiction to entertain the aforesaid prayers aimed at awarding damages and interest to the Applicants. In buttressing his arguments on the latter matter, reference was made to the case of *Masenge Venant Vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 2012* and the case of *Ruhara Georges Vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 4 of 2014*, where the Court had decided that those matters were outside its jurisdiction as provided by Articles 23 and 27 read together with Article 30 of the Treaty.
24. In reply, the Applicants submitted that this Court has jurisdiction to hear and determine the matter by virtue of Articles 27 and 30 of the Treaty as well as Article 39 of the East African Community Customs Union Protocol. In this regard, the Applicants argued that under Article 27 of the Treaty reiterates that "the Court shall initially have jurisdiction over the interpretation and application

of this Treaty” and went on to provide that “the Court shall have such other original, appellate human rights and other jurisdiction as will be determined by this Treaty.” They further contended that the Respondent’s actions in unlawfully confiscating their goods on 30th July 2016 was patently discriminatory, a blatant violation of the fundamental principles and objectives of the Treaty, including the principle of the rule of law, as well as a violation of the East African Community Customs Union and Common Market Protocols in that it hindered the free movement of goods of Partner States’ nationals across their borders and unreasonably curtailed the distribution of economic benefits and trade. They hastened to add that breach of Treaty and Protocols provisions is a matter for which this Court is fully competent to hear and determine pursuant to Article 30 of the Treaty.

25. It was also the Applicants’ contention that prayers (i), (ii) and (iii) of the Reference comprised the primary and substantive court declarations of Treaty violations which the Applicants had sought, whilst prayers (iv), (v) and (vii) were consequential and procedural remedies which logically flowed directly from the preceding prayers and were meant to ensure that any judgment of this Honorable Court was capable of implementation and not issued in vain.

Court’s determination on Issue No. 1

26. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the parties.
27. As can be gleaned from the Applicants’ pleadings and submissions, it seems quite clear that the Court’s interpretative mandate as provided under Article 27 of the Treaty is not in dispute. What is in dispute before us is whether the Court is clothed with the jurisdiction to grant some of the prayers sought by the Applicants, specifically whether the Court has jurisdiction to award damages and interest thereon. We propose to address this issue together with the question of remedies (if any) available to the Applicants under Issue No.3.

Issue No. 2: Whether the Reference is time-barred

28. Counsel for the Respondent submitted that this Reference is time-barred as it was filed outside the time-limit of two months provided for under Article 30(2) of the Treaty. Counsel for the Respondent further submitted that, considering this Court’s decisions in *Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011* and *Georges Ruhara vs. The Attorney General of the Republic of Burundi, EACJ Reference No. 4 of 2014*, the Court is limited by Article 30(2) of the Treaty to hear References filed within two months from the date of an impugned action or decision complained of or the date the Claimant became aware of such action or decision. He thus argued that while the Applicant knew about the seizure of the trucks transporting the goods as of 24th July 2016 as evidenced by a letter written by the Applicants on 12th August 2016 to the Ambassador of Burundi in Kigali, they filed the Reference on 28th September 2016, beyond the two month-period and for that reason alone, the Reference should be dismissed with costs to the Respondent.
29. Conversely, the Applicants’ Counsel contended that the goods in issue were received on the 24th July 2016, but that due to a misunderstanding between

the Burundi Revenue Authority and the local administration at the Kanyaru border post, they were kept at the yards of the Burundi Revenue Authority to await a validation process for purposes of exiting the territory of Burundi. He added that for the period between 24th and 30th July 2016, the goods had not been seized and that it was only on 30th July 2016 that they got communication that one Mr. Ndayiragije Boniface, Advisor to the Permanent Secretary in the Ministry of Human Rights, Social Affairs and Gender had picked up or collected their goods from the Burundi Revenue Authority Customs Office of Kanyaru-Haut, an action amounting to seizure. It is thus the Applicants' submission that computation of time should start from 30th July 2016 instead of 24th July 2016 as alleged by the Respondent.

Determination of Issue No.2

30. We have carefully considered Parties' submissions on this issue together with some documents annexed to the Reference. Two of the said documents have attracted our attention and were also referred to us during the hearing of 7th March 2018. The first document is from the Burundi Revenue Authority's Customs Office of Kanyaru-Haut dated 30th July 2016 entitled "Acquittal", and co-signed by Mr. Diomede Ndayikeza, Auditor of Customs and Mr. Boniface Ndayiragije, Advisor to the Permanent Secretary of the Ministry of Human Rights, Social Affairs and Gender. It states that the latter Officer had acknowledged receipt and insured transport of 5 trucks which were parked at the Customs Office at Kanyaru-Haut since 24th July 2016 and that those trucks had been escorted towards Bujumbura, specifically in the Ministry of Human Rights, Social Affairs and Gender.
31. Another document is the letter of the Commissioner of Customs and Excise to Mr. Fleury Muhimpundu dated 10th August 2016 in which the Commissioner stated that the Applicants' goods were picked up on 31st July 2016 by the Advisor of the Permanent Secretary in the Ministry of Human Rights, Social Affairs and Gender from the Customs Office of Kanyaru-Haut. In the same letter, the Commissioner indicated that the said goods had been declared in transit from Tanzania to Uganda at the Customs Office of Kobero in accordance with the rules and laws regarding the management of customs in the East African Community and that no infraction had been noticed by the Burundi Revenue Authority's services located at the border.
32. In line with the aforesaid documents, during the hearing, Counsel for the Respondent was unable to answer a question as to whether there could have been lawful seizure of the goods on 24th July 2016 while the Burundi Revenue Authority (Customs and Excise) had stated that the Applicant had complied with the rules and laws regarding the management of customs in the East African Community and that no infraction had been noticed by the Burundi Revenue Authority's services located at the border. Counsel only reiterated his submission that computation of time should start on that date.
33. It seems quite clear that the Applicants had no indication of the seizure of their goods prior to 30th July 2016, when they were informed that the goods had violated a national policy on transportation of goods. We do therefore agree with the Applicant that the official communication of the seizure of their goods came on 30th July 2016 as per the aforementioned document marked "Acquittal".

It would therefore be from that date that time starts to run. In the premises therefore, we find that the Reference filed on 28th September 2016 was done within the time period prescribed by Article 30(2) of the Treaty.

Issue No. 3: Whether the Applicants are entitled to the remedies sought against the Respondent

34. As can be gleaned from the Applicants' prayers as reproduced in paragraph 6 of this judgment, prayers (i), (ii) and (iii) touch on the alleged liability of the Respondent for breach of the Treaty as well as the EAC Customs Union and Common Market Protocols while prayers (iv), (v) and (vii) concern consequential orders for compensatory damages and interest thereof.

Liability for breach of the Treaty and EAC Customs Union and Common Market Protocols

35. The first question to be resolved is whether the seizure of the Applicants' goods by the Respondent on 30th July 2016 violates Articles 6 (d) and 7(2) of the Treaty.
36. The Applicants alleged that they had arranged to transport goods from Tanzania to Uganda via Burundi and Rwanda. They added that hired trucks to transport the goods having exited Tanzania, had arrived at the Kobero border Customs Office where the goods were cleared by the Burundi Revenue Authority to use the Kirundi-Rutete-Kampala route, but that upon payment of the applicable customs transit fees, the Burundi Revenue Authority requested them to relay their goods via the Kanyaru-Haut border post so as to allow the local authorities validate the goods through a scanner that was only available there.
37. The Applicants further contended that while the goods and trucks were lawfully in transit within the Burundi territory at Kanyaru-Haut Customs Office en route to Uganda, they were, on instructions of an Advisor to the Burundi Government seized by security officers, communal and provincial administrative authorities and subsequently transported to and impounded at the Government Warehouses/ Customs Offices in Bujumbura.
38. The Applicants also averred that after the alleged unlawful seizure and detention of their goods (including trucks belonging to third party contractors and suppliers which had been leased out for the transaction), they lodged a complaint to the Burundi Revenue Authority. The latter, on 10th August 2016, confirmed that it had not noticed any customs infraction perpetrated by the Applicants; that the Applicants were cleared of any customs obligations in the Republic of Burundi in respect of the goods; that it was not in possession of the said goods and that the Applicants should seek remedial action from the Ministry of Human Rights, Social Affairs and Gender as a government agent from that Ministry, one Mr. Ndayiragije Boniface, had signed a document in order to discharge the Burundi Revenue Authority from any liability and had taken the goods by force without any legal reason to Bujumbura. The Applicants thus urged this Court to declare that decision to be in violation of Articles 6(d) and 7(2) of the Treaty contending that the seizure of their goods in transit, after the same had been cleared for exit by the Burundi Revenue Authority, went against the principle of the rule of law enshrined in the Treaty. They further argued that the Government should be held vicariously liable for such an unlawful act of its agent.

39. Further, after having explained what entails the rule of law (see Wikipedia, Free Encyclopaedia and Justice George Kanyeihamba in *Kanyeihamba's Commentaries on Law, Politics and Governance*, at page 14), Counsel for the Applicants further contended that the intervention of armed security agents of Burundi to prevent the free movement of goods violated the principle of the rule of law and consequently contravened the Treaty.
40. Counsel also submitted that the subsequent seizure of the goods in transit and their disposal thereof was an abuse of power by a State agency, namely the Security Provisional Corps. In that regard, he argued that according to the well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the Central Government or of a territorial unit of the State. Furthermore, Counsel submitted that an organ includes any person or entity which has that status in accordance with the internal law of the State. He also submitted that it is a well-established principle of international law that States are responsible for the conduct of State organs and that therefore, the Republic of Burundi was duly responsible for the unlawful conduct of its State organs. Reference was made to Article 4 of the UN Resolution on Responsibilities of States for International Wrongful Acts (2001) in that regard.
41. In response, Counsel for the Respondent did not contest that the said goods had been impounded by the Respondent; rather, he argued that the goods were legally seized as their transit in Burundi had become suspicious since the Applicant had deviated from the original route as the route taken to arrive at Kanyaru-Haut border was different from the one declared at Kobero border (i.e. Kirundo-Rutete-Kigali-Kampala). Counsel further alleged that it was also discovered that the loads declared at Kobero border were not the real truck loading when trucks and goods were detained at Kanyaru-Haut as they were trying to leave the border to Rwanda for an unknown destination.
42. Still on the same issue, Counsel asserted that in a Burundi Government Retreat, it had been decided that illegal goods detained while on transit should be distributed to vulnerable people in order to discourage fraudulent business people.
43. In reply, the Applicants' Counsel reiterated that the Applicants only opted to transport the goods via the Kanyaru-Haut border post as opposed to the previously scheduled Kobero border, on account of a lawful order and direction of the Burundi Revenue Authority which required that trucks and goods be passed through a scanner that was at the material time not available in Kobero.
44. Counsel further maintained that the goods and trucks were lawfully in transit within Burundi territory and that at no time had the Respondent notified or communicated to the Applicant its suspicion that the goods and trucks were illegal or that they intended to seize them for that purpose. On the contrary, an "Acquittal" and "Clean Bill of Health" were issued by the Burundi Revenue Authority, Counsel submitted.
45. Counsel also refuted the submission of the Respondent's Counsel that the Respondent had developed and implemented a policy for alleged "redistribution"

of seized illegal goods transported or leaving the Burundi territory and contended that if such a policy had been adopted, the Respondent's Counsel would have annexed it to the Respondent's Response, which he did not.

Court's determination

46. We have carefully considered the Parties' rival submissions on this issue and scrutinized the various documents annexed to the Statement of Reference.
47. In the clearance documents annexed to the Reference and issued by Kobero Customs Office of the Burundi Revenue Authority/Customs and Excise Department on 23rd July 2016, we note that four consignees, namely Byansi Edouard, Bizabishaka Eric, Kamuhanda Moses and Murerwa Audrielle were indicated as importers of goods (i.e. cassava, maize and beans) from Tanzania (country of origin) and that Uganda is mentioned as the country of destination while Kanyaru-Haut is indicated as office of entry/exit. It is also on record that the abovementioned consignees had signed with Grands Lacs Suppliers S.A.R.L. of Kampala, Uganda, contracts to supply cassava, maize grain and mixed beans and that the latter company had given advance payment on the goods to be delivered by each contractor.
48. It is also worth noting that on 1st August 2016, a lawyer called Fleury Muhimpundu, on behalf of Bizabishaka Eric, Murerwa Audrielle and Byansi Edouard (i.e. business owners of the trucks), wrote a letter to the Commissioner of Customs and Excise, stating that five trucks in transit belonging to his clients had been seized by the customs services in violation of the law regarding transit of goods and asking for the reasons for the seizure, the destination of the goods and the suspension of that illegal decision and release of the goods, otherwise a legal action would be filed against the Customs Authority.
49. In his response dated 10th August 2016, the Commissioner of Customs and Excise stated that the goods which belonged to the Advocate's clients had been declared in transit from Tanzania to Uganda at the Customs Office of Kobero in accordance with the rules and laws regarding management of customs in the East African Community and no infraction had been noticed by their services located on borders. He also stated that it was at the point of their validation at Kanyaru-Haut border before their exit from Burundi territory that the security agents and those of the municipal and provincial administration of Ngozi have forbidden the customs services to validate the goods. He also indicated in his letter that it was on 31st July 2016 that the Advisor of the Permanent Secretary in the Ministry of Human Rights, Social Affairs and Gender accompanied by Police officers had come to pick up those goods which were kept at Customs Office of Kanyaru-Haut. He ended his letter by referring the lawyer to a document marked "Acquittal" co-signed by the aforementioned Advisor to the Ministry of Human Rights, Social Affairs and Gender and directed him to the said Ministry for clarification as to the seizure of the goods.
50. The Applicants consistently contended that they had been left in the dark as regards the reasons for the seizure of their goods despite several written complaints and reminders to the Government and agents of the Republic of Burundi and despite the confirmation by the Burundi Revenue Authority that they had complied with the relevant legal requirements for their good to exit the

Burundi territory to their final destination in Uganda.

51. On its part, the Respondent, through its Counsel, pleaded that the goods were legally seized in compliance with the law and the policy of the country in order to protect the country's security especially taking into account the fact that the Applicants had deviated from their original itinerary.
52. We take the view that the Respondent's argument is untenable since, if an offense against the customs laws had been committed, at least a notification would have been made to the Applicants for them to eventually present their defence and more importantly, the Burundi Revenue Authority would not have given them green light that they had complied with all the legal requirements for goods in transit. Moreover, nowhere did the Respondent contest the sanctioning of the deviation from the original itinerary by the Burundi Revenue Authority, neither the Respondent did show how the said deviation hampered its security.
53. Having said that, the question that has to be resolved now is whether those impugned actions and decisions of the Respondent, through its agents, are an infringement of specific Treaty provisions to wit, Articles 6(d) and 7(2) as the Applicants allege.
54. For avoidance of doubt, Article 6(d) reads:
 "The fundamental principles that shall govern the achievement of the objectives of the Community by the partner States shall include: (...)
 (e) good governance including adherence to the principle of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."
 Article 7 provides:
 "1. The principle that shall govern the practical achievement of the objectives of the Community shall include: (...)
 (c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology. (...)
 2. The Partner States undertake to abide by the principles of good governance including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."
55. It should be pointed out in that regard that the principle in Article 6(d) and 7(2) of the Treaty that the Applicants single out is the principle of the rule of law. As generally understood, the principle of the rule of law entails that "nobody is above the law. (...) In a governing system based on the rule of law, everybody is held accountable under the same laws. One of the defining features of the rule of law is that, under such a system of the law, the law is applied equally to all citizens. Rule of law simply means that the law itself, rather than individuals or organizations, reigns supreme. Therefore, even people who enforce and administer the law, such as police officers, judges and lawyers are still subject to the same laws as everybody else. (...) The rule of law limits the arbitrary exercise of power by a single person or group."⁵⁶

⁵⁶ See <https://thelawdictionary.org/rule-of-law/>

56. On the issue at hand therefore, in order to comply with the afore-cited essential elements of the rule of law, it would require that the seizure of the Applicants' goods be executed in respect of the applicable laws in Burundi, particularly the East African Community Customs Management Act 2004 as revised. In this regard, Section 213 on the power to seize goods liable to forfeiture and Section 214 on the procedure of seizure are most relevant. It transpires from Section 213 of the Act that any officer or a police officer or an authorized public officer may seize and detain any goods or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture. And according to Section 214, when there is seizure, a Notice of seizure must be served upon the importer. The Notice must contain specific information about what was seized and must also state the laws applicable for the violation in justification of the seizure. When served with the Notice of seizure, the importer can object to the Notice of seizure and can institute a legal proceeding against the seizing authority.
57. Reverting to the matter at hand, we have not seen any Notice of seizure of the Applicants' goods or at least a written communication to the Applicants indicating that their goods had been seized. In light of the abovementioned provisions of the East African Community Customs Management Act which are applicable in Burundi as a Partner State of the Community, it is our considered opinion that the decision of seizing the Applicants' goods without due process runs afoul of the principle of the rule of law stipulated in Articles 6(d) and 7(2) of the Treaty. Can then the violation be attributable to the Government of Burundi? In this regard, it is a well-established rule of international law that the conduct of any organ of a State must be regarded as an act of that State.⁵⁷ In light of the foregoing therefore, we hold the Government of Burundi responsible for the unlawful seizure of the Applicants' goods by its agents, and consequently, it is liable for the violation of Articles 6(d) and 7(2) of the Treaty.
58. The Applicants have also prayed that the Court should make a declaration that the aforesaid decision of the Respondent is in violation of Articles 2,3,4,5, and 6 of the Protocol on the Establishment of the East African Community Common Market and that the said decision is in violation of Article 39 of the Protocol for the Establishment of the East African Community Customs Union. Neither the Applicants' pleadings nor their submissions do indicate that this matter has been canvassed so as to enable the Court make a finding on it. In light of the above therefore, the prayers are dismissed.
59. We now turn to the prayers on damages and interest thereof and in the same vein, the question as to whether this Court has jurisdiction to entertain the remedies sought in that regard. For ease of reference, we reproduce the Treaty provisions on the Court's jurisdictions below.
- Article 27 provides that:
- “1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty.
Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction

⁵⁷ Article 4 of the International Law Commission, *Draft Articles on Responsibility of States for International Wrongful Acts, with Commentaries, 2001*

conferred by the Treaty on organs of Partner States.

2. The Court shall have such other original, appellate, human rights and other jurisdiction as will determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extend jurisdiction.”

Article 30(1) (3) of the Treaty, on its part, provides that:

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

(....)

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

Claim for compensatory damages

60. The compensatory damages that can be awarded in international law are those for pecuniary loss or damages (also referred to as “special damages”) and for what is termed moral, non-material or non-pecuniary loss or damage (also referred to as “general damages”).⁵⁸ We shall start by examining the case of pecuniary or special damages claimed by the Applicants before turning to general damages.

61. As indicated in this judgment herein above, the Respondent submitted that this Court is not clothed with the jurisdiction to entertain prayers on damages and interest thereof. This issue was, however, been extensively examined and settled by the Appellate Division of this Court in the case of *Hon. Dr Margaret Zziwa vs. The Secretary General of the East African Community, EACJ Appeal No. 2 of 2017* (hereinafter “*Hon. Dr. Margaret Zziwa case*”). In that case, the Appellate Division started the determination of the matter by addressing the question as to whether the remedy of damages is in principle available in this Court. It stated that the Court’s mandate is not limited to only interpretation of the Treaty and that “the Court is the guardian of the Treaty and is charged with ensuring adherence to the law in the application of and compliance with the Treaty. In plain language, it is the Court’s duty to ensure that the Partner States and other duty bearers under the Treaty march in step with the Treaty and any breaches thereof are remedied as may be appropriate in the circumstances.” Relying on the Opinion of the European Court of Justice in *Andrea Francovich and Danila Bonifaci vs. Italy (1991) ECR I-5357*, the Appellate Division further opined that “the full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes.” The Appellate Division finally held on this matter that “Article 23(1) and 27(1) of the Treaty do not confine the Court’s mandate to mere Treaty interpretation and the

⁵⁸ See *Shanique Myrie vs. The State of Barbados, CCJ Application No. OA002 of 2012, [2013] CCJ 3 (OJ)*, para. 95, <http://www.caribbeancourtjustice.org/wp-content/uploads/2013/10/2013-CCJ-3-OJ.pdf>

making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its jurisdiction, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty.⁵⁹ On the nature of the remedies available, the Appellate Division held that “the remedies of compensation (usually known as damages in internal law) is very firmly established in international law, and is available for the Community’s breach of its Treaty obligations where a claimant establishes that the Act, regulation, directives, decision or action of the Community complained of has caused such claimant a loss which is financially assessable.”⁶⁰

62. We do respectfully abide by the foregoing decisions and accordingly hold that this Court, as an international Court set up by the Treaty, is vested with the jurisdiction to determine whether the Applicants are entitled to the damages and interest thereof sought as a remedy to the unlawful seizure of their goods by the Respondent through its organs.

63. We now turn to the assessment of the compensation claimed by the Applicants.

64. The Applicants alleged that they have suffered irreparable loss of business and earnings as a result of the Respondent’s unwarranted decision and actions and that their only recourse was for this Court to award compensation as the goods subject of the Reference were of a perishable nature and had already been substantially and effectively appropriated by the Respondent.

65. In the Statement of Reference, the Applicants have given the description and contents of the consignment released on transit from Tanzania to Uganda, indicating for each truck, the truck registration number (6 trucks), truck model, content, consignment weights (kgs), consignment packaging and the consignment number. The Applicants have thus claimed the sum of \$US 218,849 in compensation for losses on truck hire, loss of profits, loss of investment and loss of earnings. That amount comprised:

- (i) Advance on purchase of entire consignment on 6 truck: \$US 105,000;
- (ii) Balance of purchase of entire consignment on 6 trucks as at the date of the seizure: \$US 25,524;
- (iii) Cost of truck hire for 18 days from 18/07/2016 to 05/08/2016 : \$US 83,221;
- (iv) Loss of profit from sale of consignment on 6 trucks 20% of the value of the goods: \$US 5,104
- (v) Interest on (i, ii, iii) at Kenya Commercial Bank (Uganda Branch) Interest Rates from 1st August 2016 computed at 20% per annum.

66. The Applicants have, in support of the above claim, annexed to the Reference the following documents, among others:

- Grands Lacs Suppliers S.A.R.L.’s (Applicant) letters of award of contract to the traders: Byansi Edouard, Bizabishaka Erice, Kamuhanda Moses and Murerwa Audreille;
- Receipts and payment Vouchers for Applicants’ advance deposits on purchase of the goods to all to all those traders;
- Truck rental Agreements for 6 trucks;
- Certificate of origin for the entire consignment in the 6 trucks;

⁵⁹ Hon. Dr. Margaret Zziwa case, para 35, p.19.

⁶⁰ Idem.

- Tax Invoices, Tax Payment Receipts and Clearing Agency Certificates for the entire consignment in the 6 trucks.
67. All the above-listed documents are photocopies. On that matter, the Applicants alleged that the Respondent had retained their original transactions and transportation documents and that they would seek leave of this Court for production of the said original documents, failure to which the Applicants would be allowed to rely on the photocopies therein.
 68. In response, Counsel for the Respondent asserted that in their letter to the Ambassador of Burundi in Kigali dated 12th August 2016, the Applicants had indicated that “the Grand total of our items plus the expenses of our trucks and their transport are \$US 96,274” and at the same time, it was indicated on page 6 of the Reference that the “Grand total was \$US 218,849.” Given the discrepancy in the amount claimed, Counsel contended that there was speculation as evidenced by the amount of \$US 96,274 claimed for six (6) trucks.
 69. Counsel further contended that all the documents annexed to the Reference were photocopies, most of them illegible and that for that reason they should be considered null and void as they contradicted the provisions of Rule 8 of the Court’s Rules. It was also Counsel’s submission that the Applicants’ argument that the documents had been retained by the Respondent was not tenable since they had not indicated who had retained those documents.
 70. In the same vein, Counsel contended that at pages 5 and 6 of the Reference, the Applicants had indicated the amounts of money thought to have been lost but did not give proof of those calculations and therefore the unproved amounts became mere speculations and ought to be considered null and void.
 71. We have carefully considered the Parties’ pleadings and submissions and scrutinized all the documents annexed to the Reference. We note indeed that most of those documents are illegible (see for example, all the documents on the following pages of the Reference: 36,38,39,40,41,42,47,48,49,50,51,52,53,54,56,57,58 and 59) and yet, they have been produced in support of the abovementioned compensatory damages claimed by the Applicants.
 72. The Applicants had indicated that in case the photocopied documents were contested, they would seek leave of the Court to compel the Respondent to produce the original documents, failure to which the Applicants would be allowed to rely on the photocopies annexed to the Reference. Despite Counsel for the Respondent’s strong contestation of the photocopied documents and the concern that most of the documents were illegible, no leave of the Court for production of the original documents by the Respondent was sought. In these circumstances therefore, we are unable to assess the quantum of the damages claimed by the Applicants and bearing in mind that special damages must be specifically pleaded and proved,⁶¹ we hereby dismiss the Applicants’ prayers for the amount of \$US 218,849 in compensation for losses on truck hire, loss of profits, loss of investments and loss of earnings.
 73. The Applicants have also prayed for general damages for unlawful seizure of goods, breach and violation of EAC Treaty, Customs Union and Common Market Protocols, wrongful deprivation/denial of property and inconvenience

⁶¹ See *Stanbic Bank Tanzania vs. Abercrombie & Kent (T) Limited*, Court of Appeal of Tanzania, Civil Appeal No. 21 of 2001, www.safii.org/tz/cases/TZCA/2006/7.html and *Attorney General vs. Lutaaya*, Civil Appeal No. 16 of 2007 (SC), <https://ulii.org/ug/judgment/high-court/2012/249/>

to and hampering of Partner States' nationals' business, trade and economic activity.

74. In response, Counsel for the Respondent reiterated his earlier submission that this Court does not have jurisdiction to determine any claim of damages.
75. With respect to non-pecuniary or general damages, the Caribbean Court of Justice (CCJ) in *Shanique Myrie vs. The State of Barbados*⁶² stated that “an award of such damages is a well-established form of relief in international law. This principle has its genesis in the seminal *Lusitania Opinion* where the Umpire defined moral damages as compensation ‘for an injury inflicted resulting in mental suffering, injury to his feeling, humiliation, shame, degradation, loss of social position or injury to his credit or his reputation.’” The CCJ also stated that the concept was crystallized in the *Chorzow Factory* case where the Permanent Court of International Justice opined that “the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of sum corresponding to the value which a restitution in kind would have; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”⁶³ This jurisprudence shed some light on how a claim for general damages should be understood and we do find it to constitute persuasive authority.
76. The Applicants claimed general damages for unlawful seizure of goods, violation of the Treaty and wrongful deprivation/denial of property and inconvenience to and hampering of Partner States' business, trade and economic activity. As a result of those impugned actions, they contended that they had suffered irreparable loss of business and earnings for which they seek compensation. We have found herein above that the seizure of the Applicants' goods is a breach of the Respondent's Treaty obligations in that it violates the principle of the rule of law embodied in Articles 6(d) and 7(2) of the Treaty.
77. It is trite law that the question of general damages falls within the judicial discretion of the Court and that the Court's discretion has to be exercised judiciously upon facts and circumstances presented to the Court from which it must draw a conclusion governed by law.⁶⁴
78. In light of the foregoing and taking into consideration all the circumstances of the instant case, the Court considers that an award of American dollars twenty thousand (USD 20,000) constitutes appropriate compensation for the loss suffered by the Applicants as a result of the unlawful seizure and subsequent

⁶² *Shanique Myrie vs. The State of Barbados*, *op. cit.*, para 96.

⁶³ *Idem*.

⁶⁴ On this matter, see for example, *Air France vs. Mrs. Brenda Akpan*, *Court of Appeal, Lagos Division*, Ndukwe-Anyanwu, Abubakar, Nimpar *JJ.CA and* , <http://www.clrndirect.com/content/general-damages-award-must-be-judicially-and-judiciously-determined> and *Stanbic Bank Tanzania vs. Abercrombie & Kent (T) Limited*, *Court of Appeal of Tanzania*, *Civil Appeal No. 21 of 2001*, <http://www.saflii.org/tz/cases/TZCA/2006/7.pdf>

disposition of their goods by the Respondent.

Interest on damages

79. The Applicants have prayed for interest on the amount of general damages awarded. With respect to interest on damages awarded by this Court, the Appellate Division held that the Court has the jurisdiction and discretion to award interest on compensation.⁶⁵ Guided by this holding, we hereby decide that the Applicants will be awarded interest on the sum of American dollars twenty thousand (USD 20,000) at the rate of six (6) per cent per annum from the date of the judgment until payment in full.

Costs of the Reference

80. The gravamen of the Applicants' case being the unlawful seizure of its goods by the Respondent through its organs and having determined that the seizure of the goods was a breach of the Respondent's Treaty obligations under Article 6(d) and 7(2) of the Treaty, we find it appropriate that the Applicants be awarded the costs of the Reference to be paid by the Respondent.

G. Conclusion

81. The seizure of the Applicants' goods without due process and compliance with Sections 213 and 214 of the East African Community Customs Management Act 2004 is a breach of the Respondent's Treaty obligations under Articles 6(d) and 7(2) of the Treaty.
82. No finding is made as regards the Applicants' prayers to declare that the decision to seize their goods by the Respondent through its organs was a violation of the East African Community Customs Union and Common Market Protocols as the Applicants had not made any pleadings on this issue.
83. The special damages claimed by the Applicants in compensation for losses on truck hire, loss of profits, loss of investments and loss of earnings are not awarded as the Court has been unable to assess their quantum.
84. In exercising its judicial discretion in light of the facts and the circumstances of the instant case, the Court awards to the Applicants an amount equivalent to American dollars twenty thousand (USD 20,000) as general damages at an interest of six (6) per cent per annum from the date of the judgment until payment in full.
85. The Respondent shall pay the costs of the Reference to the Applicants.

H. Disposition

86. The Court:
- (a) Declares that the decision to seize the Applicants' goods taken by the Respondent through its organs/agents, including Mr. Ndayiragije Boniface, Advisor to the Minister of Human Rights, Social Affairs and Gender breaches Articles 6(d) and 7(2) of the Treaty.
 - (b) Orders the Respondent to pay an amount of American dollar twenty thousand (US 20,000) to the Applicants and interest rate of 6% per annum

⁶⁵ See *Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community*, op.cit., para.85

- of this amount from the date of this judgment until full payment is made.
- (c) Makes no order as regards special damages claimed by the Applicants
 - (d) Orders the Respondent to pay the costs of the Reference to the Applicants.

It is so ordered.

K. O. Wanyanga & D. Bashirahishize, Counsel for the Applicant
N. Kayobera Counsel for Respondent

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First Instance Division

Reference No. 7 of 2016

The Managing Editor, Mesto and Hali Halisi Publishers Ltd v The Attorney General of the United Republic of Tanzania

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo, F. Jundu, & A. Ngiye, JJ
June 21, 2018

Proscription of newspaper - Lawful rational, proportionate, reasonable restrictions on freedom of expression - Public interest of peace and good order - Whether the Minister's banning order complied with the Treaty - Principles of accountability and transparency - Opportunity to respond - Cogent reasons

Articles: 6(d), 7(2), 8(1)(c), 27(1), 30(1) of the Treaty - Articles 18, 30(2) Constitution of the United Republic of Tanzania - Section 25(1) - Media Service Act No. 12 of 2016 - Newspapers Act, 1979, Tanzania (Repealed) - Article 19(3) International Covenant on Civil and Political Rights, 166 - Articles: 9, 27 African Charter on Human and Peoples' Rights

On 10th August, 2016, the Minister of Information, Youth, Culture & Sports issued an order vide Gazette Notice No. 242 directing the Applicants to cease publication of their newspaper, *Mseto*, for three years under Section 25(1) of the Newspapers Act, 1979. Prior to this, on 8th August, 2016 the Registrar of Newspapers had written to the Applicants concerning a new item in Publication No. 480 and the Applicant had responded on 9th August 2016. Thereafter, on 11th August, 2016, the Office of the Registrar informed the Applicants, that they were prohibited from publishing or disseminating information by any means, including the internet. No reasons were given. Despite the fact that Section 25(1) was repealed by the Media Service Act No. 12 of 2016, the ban against *Mseto* remained in force.

In this Reference, the Applicants averred that: Section 25(1) gave the Minister unfettered discretion to prohibit the publication of newspapers; restricted press freedom; infringed upon the right to freedom of expression; and the banning order jeopardized the implementation of the fundamental principles in Articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty. Furthermore, the ban came with hefty fines or imprisonment for non-compliance. They sought *inter alia*; orders: annulling the Minister's order; resumption of publication of *Mseto* with immediate effect; a declaration that Section 25(1) violated the EAC Treaty; and amendment of the law to comply with the Treaty.

In defence, the Respondent submitted that the order was lawful and that reasons are specifically provided for in Section 25(1); and that freedom of expression had limitations as per Article 19(3) of the International Covenant on Cultural and Political Rights (ICCPR), as well as Article 9 of the African Charter.

Held:

1. The fundamental principles in Article 6(d), 7(2) and 8(1) of the Treaty demand that proscription of newspapers be done lawfully and not whimsically or

flippantly. Like any other rights and freedoms, the right to freedom of expression and press freedom are not absolute. Restrictions can be imposed for the purpose of respecting the rights or reputation of others, or protecting national security, public order, public health or public morals.

2. The Applicant was not accorded a reasonable opportunity to respond to the allegations made against it by the Registrar of Newspapers in his letter dated 8th August, 2016 which was served on the Applicants at 4.00 p.m. A detailed response was required by 9.00 a.m. on 9th August 2016 and their response was thereafter purportedly received by the Registrar, transmitted to the Minister who on 10th August 2016 who then issued the impugned Order. Such a drastic action less than 36 hours after the initial complaint was made was unreasonable.
3. The *Burundi Journalists Union case*, held that if a government restricts ideas or information that can be placed in the market place, the restriction must be rational, proportionate and reasonable. While the Minister had the power and authority to issue an order to cease the publication of any newspaper, Section 25(1) of the Newspapers Act was repealed by the Media Service Act No. 12 of 2016. The order restricted press freedom and freedom of expression thus violating the Respondent's obligation under the Treaty to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance and to abide by the universally accepted human rights standards as specified under Articles 6(d) and 7(2) of the Treaty. The order did not conform with the principles of accountability and transparency.
4. The Respondent failed to establish how the publication in the *Mseto* newspaper violated the public interest, or the interest of peace and good order of the people of the United Republic of Tanzania as prescribed under the Constitution and the provisions of the repealed Section 25(1) of the Newspaper Act. Thus the order breached the right of freedom of expression elucidated in Article 18(1) of the Constitution of Tanzania, Articles 19(3) of the ICCPR and 27(2) of the African Charter.
5. The order was discriminatory as it violated the principles of freedom of expression and press freedom as enunciated under Articles 18 and 30(2) of the Constitution of the United Republic of Tanzania, by failing to give proper and cogent reasons as to why a duly registered publisher should cease publication of its newspapers.
6. The order also violated public interest, interest of the peace and or good order of the people of the United Republic of Tanzania as prescribed under the Constitution and the provisions of the repealed Section 25(1) of the Newspaper Act. The Minister was therefore ordered to annul the order forthwith and to allow the Applicant to resume publication of *Mseto*.

Cases cited

- Burundi Journalists Union v The AG of Burundi* [2012-2015] EACJLR 299, Ref. No. 7 of 2013
Charles Onyango-Obbo & Anor v AG of Uganda, [2004] UGSC, Constitutional Appeal No. 2 of 2002
 Constitutional Rights Project & Ors v Nigeria, ACommHPR Communications 140/94 & 145/95
CORD v The Republic of Kenya & Ors, High Court of Kenya, Petition No. 628 of 2014
His Holiness Kesavananda B. Sripadanagalavaru v State of Kerala & Anor [1973] Supp. SCR
Julius Ndyababo v Attorney General of Tanzania (2004) TLR 14
Plaxeda Rugumba v Secretary General of EAC [2005-2011] EACJLR 226, Ref. No. 8 of 2010
Print Media South Africa Anor v Minister of Home Affairs & Anor [2009], ZACC 22
Ramesh Thappan v State of Madras 1950 SCR 594
Samuel M. Mohochi v The AG of Uganda EACJLR [2005-2011] 274, Ref. No. 5 of 2011

Editorial Note: The Notice of Appeal and Applications 3 & 4 of 2019 for extension of time to lodge an appeal were struck out on June 2, 2020.

JUDGMENT

A. Introduction

1. Before this Honourable Court for its determination is a Reference by the 1st and 2nd Applicants dated and filed on 7th October, 2016. The Reference is brought under Articles 6(d), 7(2), 8(1)(c), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community, as well as Rule 24 of the East African Court of Justice Rules of Procedure, 2013. The 1st Applicant describes himself as the editor for a weekly local Tanzanian newspaper, *Mseto*, duly registered under Tanzanian law as evidenced in the certificate of incorporation dated 13th April, 2013.
2. The 2nd Applicant describes itself as the publisher of *Mseto* and a legal person under Tanzanian law, duly registered as such and evidenced in the certificate of incorporation issued on 3rd January, 2005.
3. For purposes of this Reference, the 1st and 2nd Applicants shall hereinafter be referred to collectively as the *Applicants* and are represented by Fulgence Thomas Massawe and Jeremiah Mtobeysa, Advocates, and their address for service is given as Legal and Human Rights Centre, Legal Aid Clinic, Kinondoni, Justice Mwalusanya Isere Street, P.O. Box 79633, Dar Es Salaam, Tanzania.
4. The Respondent is the Attorney General of the United Republic of Tanzania and his address for purpose of service is given as No .20, Barabara ya Kivukoni, P.O. Box 11492 Dar Es Salaam, Tanzania.

B. The Applicants' Case

5. The Reference relates to an order issued by the Tanzanian Minister of Information, Youth, Culture & Sports (hereinafter the Minister) dated 10th August, 2016. The order, issued pursuant to the provisions of Section 25(1) of the Newspapers Act, 1979, is alleged to have had the effect of directing the Applicants to cease publication of the newspaper, *Mseto*, for a period of three (3) years. It was further alleged that no reasons were proffered for the order by the Minister but in a letter dated 11th August, 2016 in reference to the previous order issued, the Office of the Registrar of Newspapers informed the Applicants that they were prohibited from publishing or disseminating information by any means, including the internet. It is alleged that no reasons for this further directive were also given.
6. The Applicants in the above context thus contend that while the then Section 25(1) of the Newspapers, Act gave the Minister unfettered discretion to prohibit the publication of newspapers nonetheless, the order issued pursuant thereto violates the Respondent's obligations under the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty').
7. The Applicants in addition claim that the order issued specifically violates the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty as it unreasonably restricts press freedom and violates the fundamental and operational principles codified in the aforementioned provisions of the Treaty, which include accountability, transparency, good governance, rule of law and democracy.
8. Further, it is contended that the said order violates the Applicants' right to freedom of expression, and that the Respondent has failed in its obligations,

pursuant to the provisions of Articles 6(d) and 7(2) of the Treaty, to promote, recognize and protect human and peoples' rights in accordance with the provision of the African Charter on Human and Peoples' Rights (hereinafter the African Charter'), as well as abiding by the universally accepted standards of human rights, which include the right to freedom of expression guaranteed under Article 9 of the said Charter.

9. The Applicants furthermore contend that the order issued by the Minister is a restriction of press freedom and a violation of their right to freedom of expression, and therefore the Respondent has failed in his duty and obligation to abstain from any commission, act or omission likely to jeopardize the implementation of the fundamental principles enunciated in the Treaty under Article 8(1) (c) thereof.
10. The Applicants have added that while the then Section 25 of the Newspapers Act gave the Minister unfettered discretion to issue orders directing the cessation of publication of newspapers with the sanction of and/or a ban with hefty fines imprisonment for those failing to comply with the orders; the provision violates the right to receive and impart information, which adversely impacts on press freedom and freedom of expression, which are key components of democracy and indispensable to accountability and transparency.
11. For the above reasons, the Applicants, pursuant to Articles 27(1), 30 and 35 of the Treaty and Rules 68 and 69 of the Rules of this Court, beseech this Court to *inter alia*:
 - i. Declare that the order restricts press freedom and thereby constitutes a violation of the Respondent's obligations under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty;
 - ii. Declare that the order violates the Applicants' right to freedom of expression and thereby constitutes a violation of the Respondent's obligation under the Treaty to recognize, promote and protect human and peoples' rights and to abide by the universally accepted human rights standards as specified in Articles 6(d) and 7(2) of the Treaty;
 - iii. Declare that Section 25(1) of the Newspapers Act has a chilling effect on the rights to receive and impart information as well as the freedom of the press, which violates the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty;
 - iv. Order the Respondent State to annul the order and allow the Applicants to resume publication of Mseto with immediate effect;
 - v. Order the Respondent State to make reparations to the Applicants consisting of, among others, compensation for lost profits;
 - vi. Order the Respondent State to cease the application of Section 25(1) of the Newspaper Act and repeal or amend the Newspaper Act to bring it in conformity with the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty;
 - vii. Order that costs of the Reference be met by the Respondent State; and
 - viii. Any other relief that the Court deems appropriate.
12. The Reference is supported by the Affidavits of Saed Kubenea sworn on 7th

October, 2016 and 4th August, 2017, respectively. The Applicants also filed their submissions dated 28th August, 2017 in furtherance of their stated position as regards the issue in context.

C. The Respondent's Case

13. On its part, the Respondent refuted the allegations made by the Applicants in the Reference through his Response to the Reference dated and filed on 24th November, 2016. Further, in a Notice of Preliminary Objection filed on the same day, the Respondent stated that the Reference as filed was misconceived, incompetent and bad in law, and frivolous, vexatious and an abuse of the process of this Court. It was further alleged that the Reference contravened the settled principles of international law to the effect that local remedies available to the Applicants were not exhausted before invoking the jurisdiction of or seeking redress from this Court.
14. The Respondent further contends that the Minister's order to cease publication of *Mseto* under Gazette Notice No. 242 of 10th August, 2016 and purportedly made under the then Section 25(1) of the Newspapers Act, was lawful and that reasons for the said order are provided in that Section contrary to the allegations made by the Applicants that no reasons for the orders were given.
15. It is also the Respondent's case that the order by the Minister pursuant to Section 25(1) of the Newspapers Act aforesaid, was an order issued under a provision of law that was in accordance with international human rights instruments. Further, that the order was lawful and in compliance with the provisions of the Treaty, and that the Newspapers Act is also a valid Act passed by the National Assembly of the United Republic of Tanzania in compliance with Articles 6(d) and 7(2) of the Treaty.
16. The Respondent argued further that while the order issued by the Minister was in accordance with the provisions of the Treaty, freedom of expression is in any event limited as provided under Article 19(3) of the International Covenant on Cultural and Political Rights (ICCPR), as well as Article 9 of the African Charter and the penalties imposed under Section 25 of the Newspapers Act are reasonable and proportionate contrary to the Applicants' contentions.
17. For the above reasons, the Respondent seeks orders that:
 - i. The Court be pleased to order that there are adequate, satisfactory and effective legal remedies in Tanzania which the Applicants are required to pursue;
 - ii. The Court be pleased to dismiss the Reference in its entirety; and
 - iii. The costs of the Reference be borne by the Applicants.
18. The Response to the Reference was supported by the Affidavit of Nape Moses Nnauye, the Minister aforesaid deposed on 23rd November, 2016 and filed on 24th November, 2016. The Respondent on 5th May, 2018 also lodged its submissions dated the same day in support of its case as summarized above.

D. Scheduling Conference

19. At the Scheduling Conference held on 22nd June, 2017, it was agreed by the Parties that the issues for determination by this Court were the following:
 - i. Whether the Court has the jurisdiction to hear and determine the

Reference;

Whether the order of the Minister of Information, Culture, Arts and Sports dated 10th August, 2016 violates Articles 6(d), 7(2) and 8(1)(c) of the Treaty;

- ii. Whether the order by the Minister directing *Mseto* to cease publication restricts press freedom, the right to freedom of expression and the right to receive and impart information. If so, whether press freedom, the right to freedom of expression and the right to receive and impart information is absolute; and
- iii. What reliefs the parties are entitled to.

E. Determination

20. At the hearing on 23rd March, 2018, several of the prayers set out in the Reference were abandoned by the parties. The first was a challenge on the jurisdiction of this Court to hear and determine the instant Reference. In that regard, the Respondent conceded that this Court has the jurisdiction to hear and determine the matter and there was no need for the exhaustion of local remedies as had been urged in his Notice of Preliminary Objection and submissions, and further that the Reference was not frivolous or vexatious as he had earlier contended.
21. The issue raised in prayer No.(v) of the Reference on reparations, which included a prayer for *inter alia* compensation for lost profits was also abandoned as the Applicants conceded that they had not supplied or furnished the Court with any material to prove such a claim or the specific damages also claimed. The Applicant conceded in that regard that the submissions made to the Court on these issues were based on presuppositions and assumptions which the Court could not rely upon to make a determination of the same, and therefore, decided to abandon the whole prayer.
22. With regard to the prayers seeking a declaration that Section 25(1) of the then Newspapers Act violates the fundamental and operational principles of Articles 6(d) and 7(2) of the Treaty, and further, that the impugned Section should cease being applied and be repealed and/or amended, the parties conceded that the said provision had been repealed by new statutory provisions, namely, the Media Service Act No. 12 of 2016, and that therefore the prayer had been overtaken by events and was consequently abandoned.
23. Flowing from the above, only three (3) issues remain to be considered by the Court to wit:
 - i. Whether the order of the Minister of Information, Culture, Arts and Sports dated 10th August, 2016 violates Articles 6(d), 7(2) and 8(1)(c) of the Treaty;
 - ii. Whether the order of the Minister directing *Mseto* to cease publication restricts press freedom, the right to freedom of expression and the right to receive and impart information. If so, whether press freedom, the right of freedom of expression and the right to receive and impart information is absolute;
 - iii. [An] Order [directing] the Respondent State to annul the order and allow the Applicants to resume publication of *Mseto* with immediate effect.
24. We shall in their context now turn to the submissions made by Parties on these

issues which as can be seen are connected and the submissions were indeed made jointly on all the issues.

(a) The Applicants' Submissions

25. The Applicants have urged that the order issued by the Minister not only restricted press freedom, but also unjustifiably infringed upon the right to freedom of expression, which in turn violated the fundamental and operational principles under Articles 6(d), 7(2) and 8(1)(c) of the Treaty. It was further submitted that the United Republic of Tanzania has failed in its obligations to abide by and uphold the principles of good governance, democracy, the rule of law, accountability, transparency, social justice and the recognition, promotion and protection of peoples' and human rights as is its obligation under the Treaty.
26. Further, the Applicants submitted that international law, and in particular Article 19 of the International Covenant on Civil and Political Rights (ICCPR), guarantees and protects the rights to press freedom and freedom of expression. It was also argued that Article 9 of African Charter also guarantees freedom of expression, and that every individual should have the right to receive information. Although they agreed that these rights were not absolute, they added that the impugned order amounted to an unjustifiable restriction of these rights and freedoms contrary to Article 19 of the ICCPR and Article 9 of the African Charter.
27. The Applicants furthermore submitted that the order by the Minister failed to meet the threshold for restriction of the freedom of expression and press freedom as was set out by this Court in *Reference No. 7 of 2013 Burundi Journalists Union vs The Attorney General of the Republic of Burundi* where the Court established that any action restricting freedom of expression must be provided by law; that the objective or purpose of the law or action was pressing and substantial and that the law was proportionate relative to the aim that it sought to achieve. They thus argued that although the impugned order purportedly had legal basis under Section 25(1) of the Newspapers Act, it failed to meet the requisite quality of law as demanded by Article 19 of the ICCPR and Article 9 of the African Charter.
28. It was also argued by the Applicants that the law did not give "sufficient precision" to allow a person to foresee with any degree of certainty what publications would be prohibited by the Minister, and that concepts such as good order, peace and public interest were not defined under the Act and were therefore left to the unfettered discretion of the Minister to impose a ban of a publication based on a subjective opinion and his sole unrestricted judgment. Further, they contended that any restriction on freedom of expression should not be made unless there was a real risk of harm to a legitimate interest, and that there ought to be a close causal link between the risk of harm and the right of expression sought to be limited.
29. The Applicants have in addition alluded to the fact that the order was unnecessary and disproportionate in a democratic society because it was a severe and unjustifiable form of prior restraint and that due consideration and regard on the nature of the expression to be restrained was not given. Reference in that regard was made to *Application No. 13585/88 Observer & Guardian v United Kingdom (1991)* where the European Court of Human Rights stated that there was a need

for a most careful scrutiny on the inherent dangers of prior restraint in so far as the press is concerned.

30. In conclusion, the Applicants submitted that the order issued by the Minister was not founded in law as provided in Article 19 of the ICCPR and Article 9 of the African Charter, and that it did not pursue any of the legitimate aims under Article 19(3) of the ICCPR as well as Article 27(2) of the African Charter, and that it therefore amounted to an unnecessary and disproportionate restriction on the freedom of expression and press freedom. That in the circumstances Articles 6(d), 7(2) and 8(2) of the Treaty were also violated hence the prayers in the Reference.

(b) The Respondent's Submissions

31. The Respondent submitted that the order issued by the Minister under the repealed Section 25(1) of the Newspapers Act through Notice No. 242 of 10th August, 2016 did not violate the fundamental and operational principles under Articles 6(d) and 7(2) of the Treaty as alleged, and further, that the order was lawful and complied with the tenets and freedoms enshrined in the Constitution of the United Republic of Tanzania.
32. The Respondent also argued that the Applicants had been afforded the right of response and the right to be heard through a letter dated 9th October, 2016 that had been sent to them from the Registrar of Newspapers before the order was issued by the Minister banning and ordering cessation of the publication of *Mseto*. Further, it was argued that the restriction was in line with the provisions of Article 19(3) of the ICCPR, in that, the restriction was provided by law and was necessary.
33. It was also submitted on behalf of the Respondent that the right to freedom of expression and information is provided under Article 18 of the Constitution of the Republic of Tanzania and that the repealed Sections 25(1) of the Newspapers Act, which provided for the restriction of the right to freedom of expression, was anchored in Article 30(2) of the said Constitution and that the order was valid so long as it satisfied the proportionality test as enunciated in *Director of Public Prosecutions vs. Daudi Pete (1993) TLR 22*. In that case, the Court held that because of the collective rights of the society, it was common to find limitations to the basic rights of the individual in practically every society. Reference was also made to, *Julius Ndyababo vs. Attorney General (2004) TLR 14* in that regard.
34. The Respondent in addition contended that the repealed Section 25(1) of the Newspapers Act meets the requirements of Article 19(3) of the ICCPR and Article 9 of the African Charter in that the restrictions had a legal basis in statute and that the statute itself meets the requirement for quality of law. It was also submitted that the "sufficient precision" criteria was met by Section 25(1) of the Newspapers Act aforesaid in that it provided sufficient guidance to enable the public ascertain what sorts of expressions were properly restricted, and those that were not.
35. Further, it was argued that the provision granted a control over the scope of the ban and that the same was clear on what every newspaper should publish that is, it should not prejudice public interest and/or breach of peace and good order. The Respondent thus contended that this was in tandem with the provisions of

Article 19(3) of the ICCPR and Article 9 of the African Charter.

36. The Respondent also submitted that the impugned order was issued pursuant to a legitimate objective which was to maintain peace and tranquility in society, as well as to protect the Constitutional rights of the individual in conformity with Article 19(3) of the ICCPR and Article 27(2) of the African Charter. It was thus argued that the order was made by the Minister due to the inciting and false news published by *Mseto* in its Issue No. 480 of 4th -10th August, 2016 which seemingly was intended to defame the President of the United Republic of Tanzania. That despite the Editor of the newspaper being requested through several correspondences to provide credible evidence of the news in the publication, he failed to produce such evidence and therefore the publication was deemed as inciting and aimed at causing discontent amongst the people of the United Republic of Tanzania. The Respondent thus submitted that the Reference was not merited and ought to be dismissed with costs.

(c) Findings on issue No.(ii): Whether the right to press freedom, the right of freedom of expression and to receive and impart information were absolute and on issue No.(i); Whether the Minister's order violated Articles 6(d), 7(2) and 8(1) of the Treaty:

37. From the submissions above, both issues as set out may be surmised into one issue as they both have a point of convergence on the violation of press freedom and the right to freedom of expression and freedom to receive and disseminate information within the context of the Treaty. It has in that regard been argued that the order issued by the Minister dated 10th August, 2016 violates the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty. We shall in the circumstances and as earlier stated address both issues as one.

38. We note that the impugned order made under Government Notice No. 242 published on 10th August, 2016 purportedly pursuant to Section 25(1) of the Newspaper Act read as follows:

“The newspaper title “MSETO” shall cease publication including any electronic communication as per the Electronic and Postal Communications Act for the duration of thirty-six months with effect from 10th August, 2016.”

39. Section 25(1) of the Newspapers Act (now repealed) read thus:

“Where the Minister is of the opinion that it is in the public interest, or in the interest of peace and good order so to do, he may, by order in the Gazette, direct that the newspaper named in the order shall cease publication as from the date (hereinafter referred to as “the effective date”) specified in the order.”

40. Under the provisions of Section 25(1) therefore, while the Minister had the power and authority to issue an order to cease the publication of any newspaper, the parameters upon which such an order may be issued are clearly spelt out and are; (a) public interest, (b) public peace and (c) good order. It is this order that the Applicants have contended was *inter alia* in violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

41. While Section 25(1) was later repealed by the Media Service Act No. 12 of 2016, the order banning the publication of *Mseto* is still in force and that order having been gazetted and made under that Section, it is to it that we must advert to

determine whether that action was in violation of the Treaty.

42. For avoidance of doubt, Article 6(d) of the Treaty reads as follows:

“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:-

(a) ...

(b) ...

(c) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

43. Furthermore, Article 7(2) of the Treaty states:

“The Partner States undertake to abide by the principles of good governance, including the adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

44. Under Article 6(d) of the Treaty, reference is made to the African Charter on Human and Peoples’ Rights which in Article 9(1) & (2) thereof, provides that:

i. Every individual shall have the right to receive information;

ii. Every individual shall have the right to express and disseminate his opinions within the law.

45. The argument for the alleged violation of rights also hinges upon Article 8(1)(c) of the Treaty which reads:

“The Partner State shall-

(a) Abstain from any measures likely to prejudice the achievement of those objectives or the implementation of the provisions of this treaty.

(b)

(c)

46. The provisions of Articles 6(d), 7(2) and 8(1) (c) of the Treaty, considered alongside Article 9(1) & (2) of the African Charter thus, clearly indicate that the rights of freedom of expression, and indeed press freedom cumulating from the freedom of expression (provided under the provisions of Article 9(1) & (2) of the ACHPR), are guaranteed, but only within the strictures and/or confines of the law. It is also the obligation and the duty of the Partner States to ensure that any laws promulgated by them are not prejudicial to the achievement of good governance, which includes the promotion, protection and recognition of the fundamental human rights and freedoms.

47. In the above context, in *Burundi Journalists Union v The Attorney General of the Republic of Burundi* (supra), this Court, in determining the issue of the right to freedom of expression and press freedom stated thus:

“We reiterate the above holdings and further, in the present Reference, the substantive issue to be addressed is the freedom of the press and freedom of expression in the context of Articles 6(d) and 7(2) as read with the Press Law. In that regard, there is no doubt that freedom of the press and freedom of expression is an essential component of democracy.”

48. The Court further held;

“We are particularly persuaded that the holding in *Print Media South Africa*

(supra) is pertinent to this Reference. In that case, Van der Westhuizen J. held that “freedom of expression lies at the heart of democracy” and went on to state as follows:-

“.....It is closely linked to the right to human dignity and helps to realize several other rights and freedoms. Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression. This Court has emphasized the importance of freedom of expression as the lifeblood of an open and democratic society.”

49. Reference was also made to the Supreme Court of India decision in *Ramesh Thappar v State of Madras 1950 SCR 594*, where that Court stated thus:

“Freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion, no public education, so essential for proper functioning of the processes of popular government, is possible.”

50. It is thus, not in doubt that the rights to freedom of expression and free press run in tandem, and as rights guaranteed and also limited under law, may nonetheless also be described as human and democratic rights and freedoms which Partner States should aspire to protect and promote through the enactment of national laws that achieve the objectives of good governance, more so the adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities and gender equality.

51. The Applicants and the Respondents, with that background in mind, both agree that the rights to freedom of expression and press freedom while important are not absolute, and that restrictions are sometimes made to the exercise of these freedoms especially with regards to the press. What then is the law in Tanzania on these rights? Freedom of expression is specifically guaranteed and provided for under Article 18 of the Constitution of the United Republic of Tanzania. At Article 18(1), it is thus, provided that:

“Every person-

(1) has a freedom of opinion and expression of his ideas; has the right to seek; receive and or disseminate information in any form regardless of national boundaries; and has the freedom to communicate and freedom with protection from interference from his communications.

(2)

52. The limitation to these rights are provided for under Article 30(2) of the said Constitution of Tanzania, and the delimitation of the freedom of expression and the right to seek, receive and disseminate information are specifically made in these terms:

“It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purpose of:-

(a) ensuring that the rights and freedom of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals.

- (b) ensuring the defense, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property in any other interests for the purposes of enhancing the public benefit.
- (c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter.
- (d) protecting the reputation, rights and freedoms of other or the privacy of persons involved in any Court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts.
- (e) imposing restrictions, supervising and controlling the formation, management and activities of the private societies and organizations in the country; or enabling any other thing to be done which promotes or preserves the national interest in general.”

53. In that context, the repealed Section 25(1) of the Newspapers Act provided that an order issued by the Minister under that Section could be made in attaining and/or in accordance with the public interest, or public peace and good order. This provision would *prima facie*, be in tandem and in accordance with the provisions of Article 18(1), as read with Article 30(2) of the Constitution of Tanzania. And it is the Respondent’s position therefore that in the protection of public interest and good order, the Minister issued an order of cessation of publication of *Mseto* in accordance with and in exercise of his mandate and obligations under the Act. The underlying principle in determining whether that defence is acceptable and lawful however is that any decisions made should not unjustifiably restrict the right to freedom of expression, or press freedom, and any restraint or restriction should be made on the basis of existing law and with the intention to attain a legitimate objective or aim.

54. In stating so, we are alive to the persuasive approach taken by the African Commission on Human and Peoples’ Rights in Communications 140/94 & 145/95, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria, Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights* where it was stated:

“Freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and to express one’s opinion. The proscription of specific newspapers by name and the sealing of their premises, without a hearing at which they could defend themselves, or any accusation of wrongdoing, legal or otherwise, amount to harassment of the press. Such actions not only have the effect of hindering the directly affected persons in disseminating their opinions, but also possesses the immediate risk that journalists and newspapers not yet affected by any of the decree will subject themselves to self-censorship in order to be allowed to carry on their work.”

55. We agree with the above statement and would only add that the principles in Article 6(d), 7(2) and 8(1) of the Treaty including those on human rights certainly demand that proscription of newspapers should be done lawfully and not

whimsically or flippantly. In that context, we note that the Respondent, through the Registrar of Newspapers, had written to the Applicants on 14th September, 2012 and 27th August, 2012 and informed them that their publication of *Mseto* was against their license and stated that the Applicants were only supposed to publish sports news and no other kind of news. The Registrar had also informed the Applicants that failure to comply and conform with the terms of their license would lead to legal action being taken against them. The Applicants however continued publishing more than sports news and it seems that between 2012 and 2016, no adverse action was taken against them.

56. On 8th August, 2016, four or so years after the 2012 communication, the Registrar then wrote to the Applicants with regard to Publication No. 480 of 4th – 10th August, 2016, seeking clarification and information relating to a particular news item published therein. For avoidance of doubt, the item was headed “*Waziri amchafua JPM*” (“Minister soils JPM”). The news item was to the effect that one Engineer Edwin Ngonyani, an Assistant Minister in President John Pombe Magufuli’s (JPM’s) government had taken bribes from certain persons and entities in a bid to raise funds for President Magufuli’s election campaigns.
57. On 9th August, 2016, the Applicants responded to the letter by stating that the news item was published to safeguard the image of the President of the United Republic of Tanzania and that of his office and that in their view, they had committed no illegality. The order for ceasing publication was then issued by the Minister in a letter dated 11th August, 2016 (the order is dated 10th August, 2016).
58. The question that arises therefore is whether the Minister and Registrar of Newspapers had given the Applicants ample opportunity to defend their publications since 2012, and whether the Applicants had allegedly failed to comply with the directive issued on 8th August, 2016, and further, whether the Minister, in exercise of his powers under the repealed Section 25(1) of the Newspaper Act and vide Government Notice No, 242 of 10th August, 2016, acted reasonably, rationally and proportionately when he ordered that the Applicants should cease publication of the newspaper *Mseto* for a period of thirty-six (36) months.
59. As stated elsewhere above, and parties agreed on this point, like any other rights and freedoms, the right to freedom of expression and press freedom are not absolute. Indeed under Article 19(3) of the ICCPR, it is provided that restrictions on the rights to press freedom and freedom of expression can be imposed but only for the purpose of respecting the rights or reputation of others, or protecting national security, public order, public health or public morals. This is similar to the provisions of Article 27(2) of the African Charter which provides that freedom of expression and press freedom may only be restricted to ensure that the right is exercised with due regard to the rights of others, collective security, morality and common interest. In addition, for comparative purposes only, under Article 10(1) of the European Convention on Human Rights (ECHR), it is provided that;

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing

of broadcasting, television or cinema enterprises.”

60. Further, pursuant to Article 10(2) of the same Convention, the limitation of the right to freedom of expression and any other unreasonable delimitations to the exercise of this right, may be deemed undemocratic, an affront to the said freedoms and an abuse of justice and principles of good governance in a democratic society.
61. In addressing the issue at hand, we have also taken into account the decision in *Julius Ndyanabo v Attorney General* (supra), where the Court held that:
- “There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community...personal freedoms and rights must necessarily have limits, for as Learned Hand also rightly remarked in his eloquent speech on the Spirit of Liberty, cited by Khanna J in his judgment on *His Holiness Kesavananda Bharati Sripadanagalavaru vs. State of Kerala & Another [1973] Supp. SCR 1*: ‘a society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few.’”
62. The provisions of Articles 19(3) of the ICCPR and 27(2) of the African Charter are contextually similar to the provisions of Article 30(2) of the Constitution of the United Republic of Tanzania. Under Article 30(2) of the said Constitution, any existing law is not rendered unlawful if its intent and purpose is to ensure that the rights and interests of other people or the interest of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals. In essence therefore, any law that may be deemed as derogative or restrictive of the basic rights and freedoms of individuals may be enacted or enforced if the same serves a legitimate purpose and is aimed at protecting the society.
63. The same limitation for comparative purposes only is to be found in Article 10(2) of the ECHR, and for avoidance of doubt, it provides that:
- “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
64. The caveat on careful and lawful actions as a rationale for the delimitation of the right to freedom of expression and press freedom was however succinctly addressed by this Court in *Burundi Journalists Union v The Attorney General of the Republic of Burundi* (supra) which made reference to *High Court Petition No. 628 of 2014 CORD v The Republic of Kenya & Others where the High Court of Kenya* stated as follows on the rights to press freedom and freedom of expression;
- “It may be asked; why is it necessary to protect freedom of expression, and by extension, freedom of the media. In General Comment No. 34

(CCPR/C/GC/34) on the provision of Article 19 of the ICCPR, the United Nations Human Rights Committee emphasizes the close inter-linkage between the right of freedom of expression and the enjoyment of other rights... [The] importance of the freedom of expression and of the media has been considered in various jurisdictions, and such decisions offer some guidance on why the freedom is considered important in a free and democratic society. In *Charles Onyango-Obbo & Another v Attorney General Constitutional Appeal No. 2 of 2002*, the Supreme Court of Uganda (per Mulenga, SCJ) stated that;

‘Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with JJ Rousseau’s version of *the Social Contract theory*. In brief, the theory is to the effect that the pre-social human agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d’être* of the State is to provide protection to the individual citizens. In that regard, the State has the duty to facilitate and enhance the individual’s self-fulfillment and advancement, recognizing the individual’s rights as inherent in humanity... [Protection] of the fundamental human rights therefore, is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance’

65. Contrasting the cited provisions of international treaties and expositions by courts with the fundamental principles as enunciated under Articles 6(2) and 7(d) of the Treaty, this Court in *Burundi Journalists Union vs. The Attorney General of the Republic of Burundi* (supra), then explicitly held as follows regarding limitations to the rights under consideration:

“The Treaty gives no pointer in answer to this question but by reference to other Courts, it has generally been held that the test for reasonability and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of a higher law. In saying so, it is of course beyond peradventure to state that Partner States by dint of Article 8(2) of the Treaty are obligated to enact national laws to give effect to the Treaty and to that extent, the Treaty is superior law.”

66. Further, a contrast of the provisions of the Treaty and international law, as against national laws as enunciated under Article 8(2) aforesaid, more so on the undertaking to abide by and the maintenance of universally accepted standards of human rights, would lead to the question whether the order made by the Minister on 10th August, 2016 was in conformity with the universally accepted standards of human rights, good governance and rule of law as prescribed in Articles 19(2) of the ICCPR and 9(1) & (2) of the African Charter. As a corollary, the next question is whether the order was issued in contravention of Articles 6(d) and 7(2) of the Treaty and is a violation of the provisions of Article 8(1), (c) thereof.

67. In our view, a further corollary question is whether the order issued by the Minister met the test for reasonability, rationality and proportionality prescribed

in *Burundi Journalists Union vs. The Attorney General of Burundi* (supra) in which it was stated that a government should not determine what ideas or information should be placed in the market place and, if it restricts that right, the restriction must be proportionate and reasonable. In answer to that question, it is our view that the Minister's order had the following obvious unreasonable, unlawful and disproportionate anomalies:

- (a) There were no reasons proffered in the order issued on 10th August, 2016 vide Gazette Notice No. 242 as to why *Mseto* was being shut down and its publication ceased. The order was also ambiguous and not anchored in any provisions of law and is merely predicated upon the "opinion" of the Minister. In fact Section 25(1) of the Newspapers Act which was later relied upon was mentioned in the heading only;
- (b) The Petitioner was not accorded a reasonable opportunity to respond to the allegations made against it by the Registrar of Newspapers in his letter dated 8th August, 2016. The said letter did not articulate how the article printed by the Applicants violated the provisions of the repealed Section 25(1) of the Newspapers Act, and whether the publication or article was specifically in contravention of public interest, interest of peace and/or good order. Indeed, it is conceded that the demand for an explanation as to the offending news item was served on the Applicants at 4.00 p.m. on 8th August, 2016 for a detailed response to be made by 9.00 a.m. on 9th August 2016 and their response was thereafter purportedly received by the Registrar, transmitted to the Minister who on 10th August 2016 then issued the impugned Order. Such a drastic action less than 36 hours after the initial complaint was made was clearly unreasonable;
- (c) The order was discriminatory in that it violated the principles of freedom of expression and press freedom as enunciated under Articles 18 and 30(2) of the Constitution of the United Republic of Tanzania, by failing to give proper and cogent reasons as to why a duly registered publisher should cease publication of its newspapers;
- (d) The order was made without there being established how the publication of the newspaper specifically violated public interest, interest of the peace and or good order of the people of the United Republic of Tanzania as prescribed under the Constitution and the provisions of the repealed Section 25(1) of the Newspaper Act';
- (e) Whereas the 2012 correspondence indicated that the Applicants were to publish sports news only, the impugned order made no reference to this issue and therefore the same is presently irrelevant;
- (f) The offending news item related to alleged corruption on the part of Engineer Edwin Ngonyani. The Registrar's letter of 9th August, 2016 in their regard partly stated as follows: "The office of the Newspapers Registration wants you to verify the intention of publishing such a letter on the Article which mentions the President on power Dr. John Pombe Magufuli and the Deputy Minister of Works, Transportation and Communication, Eng. Edwin Ngonyani." It is unclear to us why such an article offends Section 25(1) aforesaid and the Respondent was unable to explain this obvious lack of nexus between the mention of the President

or Engineer Ngonyani relating to high level corruption.

68. The Respondent having failed to establish how the publication in the *Mseto* newspaper violated the public interest, or the interest of peace and good order of the people, can only lead to the conclusion that the impugned order was made in violation of the right of freedom of expression as elucidated in Article 18(1) of the Constitution of Tanzania, or as provided for in Articles 19(3) of the ICCPR and 27(2) of the African Charter as a measure of universally accepted human rights standards. The order indeed derogates from the principles of democracy and adherence to the principles of good governance, the rule of law and social justice. Further, the order failed to conform with and adhere to the principles of accountability and transparency. By issuing orders whimsically and which were merely his “opinions” and by failing to recognize the right to freedom of expression and press freedom as a basic human right which should be protected, recognized and promoted in accordance with the provisions of the African Charter. The Minister acted unlawfully.
69. In making that finding, we note that the provisions of Articles 6(2) and 7(d) as well as 8(1) the Treaty, as has been reiterated in the cases of *Samuel Mukira Mohochi vs. The Attorney General of Uganda Reference No. 5 of 2011 and Plaxeda Rugumba vs. The Secretary General of the East African Community* (supra), are binding and not merely aspirational. The provisions are justiciable and create an obligation to every Partner State to respect those sacrosanct principles of good governance, and rule of law which include accountability, transparency and the promotion and protection of democracy. We are also clear in our minds that these principles were violated in the instant case and so find. We further find that whereas the rights to press freedom, to received and impart information are not absolute, in the present case, the restrictions were unlawful, disproportionate and did not serve any legitimate or lawful purpose.
- (d) Findings on Issue No.(iii); Whether the impugned order ought to be annulled and the publication of Mseto resumed:
70. This issue is a consequential one and is dependent on our findings on the previous two issues. Having held, as we have’ that the Minister acted in breach of the Treaty, it only follows that an unlawful action must be followed by an order taking the parties to the *status quo ante* as of 9th August, 2016. We therefore find no difficulty in ordering the resumption of the publication of *Mseto* as prayed.

F. Conclusion

71. The issues placed before us for determination are matters that required the striking of a balance between the State’s obligation to adhere to principles of rule of law and acceptable standards of human rights including press freedom on the one hand and the right to receive and impart information on the part of citizens of Partner State. Our findings above would have been different had the Minister taken time to connect the expectations of Section 25(1) of the Newspapers Act aforesaid *vis-a-vis* the offending news item in *Mseto*.
72. Section 25(1) quite properly laid down the three criterion i.e. to be used as a basis for a Minister to ban the publication of a newspaper for which public interest, interest of peace and good order. The offending article suggested, with what is called evidence, that Engineer Edwin Ngonyani solicited for and received funds

corruptly to fund President Magufuli's election campaigns. By all measures, that is a serious complaint and in a time when the scourge of corruption is lagging issue in Africa and the World, newspapers have an obligation to highlight instances of high level corruption. While it is not our place to determine whether the information published was correct or not, a knee jerk reaction to ban a publication, hours after the story hit the news stalls, cannot, in our view, be conduct that is within the parameters of the rule of law and good governance. Worse still, it cannot be, as the Minister suggested, that the President of a Partner State cannot ever be mentioned in newspaper articles. That is the price of democracy and public watch dogs like the press must be allowed to operate freely within lawful boundaries.

73. For as long as no nexus was therefore made between the offending article and the criteria for banning of publications in Section 25(1) aforesaid, this Court can only reach the conclusion that the Minister, he acted unlawfully and in breach of Articles 6(d) 7(2) and 8(1)(c) of the Treaty and we so find.

G. Final Orders

74. In light of the above, we find that the order issued by the Minister for Information, Culture, Arts and Sports of the United Republic of Tanzania vide Government Gazette No. 242 of 10th August, 2016 violates the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty, and shall issue orders in favour of the Applicant and against the Respondent in the following terms:

- (a) It is hereby declared that the order issued by the Minister for Information, Culture, Arts and Sports of the United Republic of Tanzania dated 10th August 2016 vide Gazette Notice No. 242 restricts press freedom and thereby constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance as specified under Articles 6(d) and 7(2) of the Treaty;
- (b) It is also declared that the order issued by the Minister aforesaid violates the right to freedom of expression and constitutes a violation of the Respondent's obligations under the Treaty to promote, recognize and protect human and peoples' rights and to abide by the universally accepted human rights standards as stipulated under Articles 6(d) and 7(2) of the Treaty;
- (c) The Minister is hereby ordered to annul the order forthwith and allow the Applicant to resume publication of *Mseto*.
- (d) The United Republic of Tanzania shall, in accordance with Article 38(3) of the Treaty take measures, without delay, to implement this Judgment within its internal legal mechanisms and;
- (e) The costs of this Reference shall be borne by the Respondents.

75. Orders accordingly.

F. Massawe & J. Mtobeysa Counsel for the Applicants
Counsel, AG of the United Republic of Tanzania for the Respondent

First Instance Division

Reference No. 9 of 2016

**Rashid Salim Adiy & 39,999 Others v Attorney General of the
Revolutionary Government of Zanzibar, Chief Secretary of the
Revolutionary Council of Zanzibar &
Attorney General of the United Republic of Tanzania**

Coram: M. Mugenyi, PJ; A. Ngiye & C. Nyachae, JJ
Delivered by Video Conference on September 29, 2020.

Preliminary objection - Sovereignty - Partner States of the Community-Whether the Peoples' Revolutionary Republic of Zanzibar has locus standi- Jurisdiction ratione materiae and temporis - Principle of non-retrospective application of Treaties – Cause of action – Time limitations

Articles: 1, 3, 27(1), 30(1), (2), 31, And 32 of the Treaty - Article 28 of the Vienna Convention on the Law of Treaties - Rules: 41(1), (2) EACJ Rules of Procedure, 2013 - Rules: 127(1) 136, EACJ Rules of Procedure, 2019

The Applicant a resident of Zanzibar and 39,999 residents of Zanzibar and citizens of the United Republic of Tanzania filed this Reference alleging *inter alia* that: the Article of Union signed on the 22nd April, 1964 between the Republic of Tanganyika and the Peoples Republic of Zanzibar was non-existent, was not ratified on the 25th April, 1964 and therefore union was a nullity *ab initio*. They therefore sought: a declaration that the Revolutionary Government of Zanzibar was an autonomous and sovereign state on its own; and orders that the Revolutionary Council of the Revolutionary Government of Zanzibar and its cabinet of ministers should enact laws reestablishing the autonomy and sovereignty of the Revolutionary Government of Zanzibar.

The Respondents raised preliminary points of law objecting to the Reference averring that: the Court lacked jurisdiction to entertain the case as it questioned the sovereignty of the United Republic of Tanzania a Partner State of the East African community and therefore, the very existence of the EAC. Furthermore, since the Union between the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar occurred on 26th April 1964, the case was non-compliant with the limitation period set out in Article 30(2) of the Treaty.

In rejoinder, the Applicant alleged and the Respondent had raised a similar preliminary objection earlier and the present one should be dismissed.

Held

1. A point of law can be raised at any stage of the proceedings and it would save courts time and resources if the objection can dispose of the case at the earliest.
2. The Court's jurisdiction *ratione materiae* is outlined in Articles 30, 31 and 32 of the Treaty. The acts complained of in the Reference were undertaken by, the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar. These entities are not Partner States of the East African Community

3. With regard to the question of jurisdiction *ratione persone*, Article 1 of the Treaty defines Partner States to include the United Republic of Tanzania which includes the Peoples' Revolutionary Republic of Zanzibar. A Reference to this Court can only be in respect of the 'Act, regulation, directive, decision or action of a Partner State or an institution of the Community, as per Article 30(1) of the Treaty. Since the Peoples' Revolutionary Republic of Zanzibar is neither a Partner State nor an institution of the Community therefore neither Zanzibar nor its officials have *locus standi* before this Court. The 1st and 2nd Respondents are therefore struck out as parties to the Reference.
4. The matters complained of in the Reference led to the establishment of the United Republic of Tanzania in 1964 prior to the Treaty establishing the EAC. It is an accepted principle of customary international law that rights and obligations under a new treaty do not apply retroactively, Article 28 of the Vienna Convention on the Law of Treaties. Therefore, unless the principle on non-retrospective application of the Treaty is rebutted by demonstrating a contrary intention; as a matter of law, the Court lacks the juridical basis to determine a dispute in respect of events that took place before the coming into force of the Treaty. Consequently, the United Republic of Tanzania cannot be held responsible for actions and decisions that pre-date its existence. The cause of action cannot be imputed to it. Hence whereas the Third Respondent State has *ratione personae* in this matter, it clearly lacks *ratione materiae*.
5. Jurisdiction *ratione temporis* refers to time prescribed for the institution of cases in a court. Article 30(2) of the Treaty stipulates that a Reference should be filed within two months of the act giving rise to a cause of action and within two months of a litigant's knowledge of the act giving rise to a cause of action. Time starts to run two months after the action or decision was first taken or made. This Reference falls outside the ambit of the two-month limitation period having been filed on 2nd November 2016 and is therefore time-barred.

Cases cited

Alcon International Ltd v Standard Chartered Bank of Uganda & Ors, [2012-2015] EACJLR 430, Appeal No. 3 of 2013

Attorney General of URT v Anthony C. Komu, EACJ Appeal No. 2 of 2015

Attorney General of Uganda v Omar Awadh & Ors, EACJ Appeal No. 2 of 2012,

Attorney General of Kenya v Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011.

Brazil – Measures Affecting Desiccated Coconut, AB-1996 4, WT/DS22/AB/R 21

Emmanuel M. Mjawasi & Ors v AG of Kenya [2005-2011] EACJLR 183, Ref. No. 2 of 2010

RULING

A. Introduction

1. Mr. Rashid Salim Adiy and 39,999 other persons ('the Applicants') filed Reference Number 9 of 2016, Rashid Salim Adiy & 39,999 Others vs. The Attorney General of the Revolutionary Government of Zanzibar & 2 Others claiming *inter alia* that the purported unification of the Republic of Tanganyika and the Peoples Republic of Zanzibar to form the United Republic of Tanzania is a nullity.
2. Mr. Rashid Salim Adiy ("the First Applicant") is a natural person, and describes himself as a resident of Zanzibar, and a citizen of the United Republic of Tanzania; while the 39,999 persons on whose behalf he brought the Reference are similarly described as residents of Zanzibar and citizens of the United Republic of Tanzania.

3. The Applicants sought the following reliefs (reproduced verbatim):
 - a. A declaration that the purported Article of Union allegedly signed on the 22nd April, 1964 between the Republic of Tanganyika and the Peoples Republic of Zanzibar is non-existent.
 - b. A declaration that the purported Article of Union allegedly signed on the 22nd April 1964 between the Republic of Tanganyika and the Peoples Republic of Zanzibar is a nullity *ab initio*.
 - c. A declaration that the purported Article of Union allegedly signed on the 22nd April 1964 between the Republic of Tanganyika and the Peoples Republic of Zanzibar was not ratified on the 25th April, 1964, as alleged, or at all.
 - d. A declaration that the purported Republic of Tanzania to signify a union between the Republic of Tanganyika and the Peoples Republic of Zanzibar is a nullity.
 - e. A declaration that the Revolutionary Government of Zanzibar is an autonomous and sovereign state on its own.
 - f. An order directed at the Revolutionary Council of the Revolutionary Government of Zanzibar in conjunction with the cabinet of ministers to enact laws reestablishing the autonomy and sovereignty of the Revolutionary Government of Zanzibar.
 - g. Such other declarations and orders to meet the ends of justice.
4. The Reference is opposed by the Attorney General of the Revolutionary Government of Zanzibar ('the First Respondent'); the Chief Secretary of the Revolutionary Council of Zanzibar ('the Second Respondent') and the Attorney General of the United Republic of Tanzania ('the Third Respondent'), who are collectively referred to herein as 'the Respondents'. They are holders of the respective self-defining offices described above, and are respectively sued as such.
5. The Respondents did file Responses to the Reference, as well as a Notice of Preliminary Objection that was jointly filed pursuant to Rules 41(1) and (2) of the East African Court of Justice Rules of Procedure, 2013. The Notice of Preliminary Objections raised the following preliminary points of law:
 - a. The Court lacks jurisdiction to entertain a Reference that is questioning the sovereignty of the United Republic of Tanzania, which is a founding member of the East African Community;
 - b. The Reference is time-barred under Article 30(2) of the Treaty for the Establishment of the East African Community ('the Treaty').
6. At the hearing, the Applicants were represented by their agent, Mr. Rashid Mukabana Mutola, while the Respondents were represented by:
 - a. Mr. Gabriel Malata – Deputy Solicitor General;
 - b. Mr. Vincent Tango – Principal State Attorney;
 - c. Mr. Ali Hassan – Principal State Attorney;
 - d. Mr. Juma Msafiri – Principal State Attorney;
 - e. Mr. Mbarouk Uthman – Senior State Attorney, and
 - f. Mr. Stanley Kalokola – State Attorney

B. Respondents' Submissions

7. It was argued by the Respondents that the subject matter of the Reference does not fall under any of the jurisdictional powers granted to this Court by Article 27 of the Treaty; neither is it one that calls for Treaty interpretation and/ or application in terms of Article 27(1) thereof. It was the contention that, were the Court to assume jurisdiction on the issues raised in the Reference, it would be assuming jurisdiction to hear a challenge that goes to the very existence of the Community itself, as well as its organs, including the Court. In the Respondents' view, this is not contemplated by either the letter or the spirit of Article 27(1) of the Treaty.
8. The Respondents opined that the Union between the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar occurred on 26th April 1964, therefore any challenge thereto would by virtue of Article 30(2) of the Treaty be clearly time-barred. In this regard, the Respondents referred the Court to the cases of *Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu*, EACJ Appeal No. 2 of 2015; *Attorney General of the Republic of Uganda vs. Omar Awadh & 6 Others*, EACJ Appeal No. 2 of 2012, and *Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit*, EACJ Appeal No. 1 of 2011.
9. It was the Respondents' contention that the Reference must fail at this preliminary stage on account of the principle of non-retrospective application of Treaties. This principle, the Respondents argued, is one of general application in international law, as well as one that has been specifically endorsed by this Court. They thus referred us to the cases of *Alcon International Limited vs. Standard Chartered Bank of Uganda & 2 Others*, EACJ Appeal No. 3 of 2013 and *Emmanuel Mwakisha Mjawasi & Others vs. Attorney General of the Republic of Kenya*, EACJ Reference No. 2 of 2010.
10. The Respondents therefore asked the Court to dismiss the Reference with costs.

C. Applicants' Submissions

11. The Applicants apparently did not consider it necessary to respond to the specific issues raised by the Respondent in support of the Preliminary Objections. Rather, they argued that the Court having been seized of the matter, had jurisdiction to hear and determine the same. In their view, the Respondents having filed an earlier Notice of Objection on substantially the same issues, which had not been determined, they could not be heard on the present objections. They premised their argument on the principle that litigation must come to an end. The Applicants therefore prayed that the Preliminary Objections be dismissed and the Reference be heard on its merits.

D. Court's Determination

12. Having carefully listened to the Parties, we wish at the onset to make an observation. The Reference in which these objections arise, and the Notice of Preliminary Objection itself, was filed pursuant to the East African Court of Justice Rules, 2013. The Court's Rules have since been revised, the applicable Rules now being the East African Court of Justice Rules, 2019. In terms of Rule 136 of the latter Rules, we shall apply the 2019 Rules, 'without prejudice to the validity of anything previously done provided that if and so far as is impracticable to apply the (2019) Rules, the practice and procedure heretofore shall be followed.'

13. In his submissions, the Applicants' Agent went to great lengths to urge the Court to dismiss the Respondent's Preliminary Objection on the ground that a similar Preliminary Objection had earlier been raised by the Respondents, and which had neither been prosecuted nor determined by the Court. He therefore argued that the instant Objection was an abuse of court process. In response, Counsel for the Respondents submitted that it is established law that an objection on a point of law can be raised at any stage.
14. We are persuaded that the Respondent's submission represents the correct position of the jurisprudence of this Court. In *Emmanuel Mwakisha Mjawasi & Others vs. Attorney General of the Republic of Kenya* (supra), this Court observed:
It is trite law that a point of law can be raised at any stage of the proceedings. The rationale is that it would save courts time and resources if the objection can dispose of the case at the earliest.
15. We do not find it necessary to say anything further on this issue. On that premise, we now proceed with the determination of the points of law subject of the Preliminary Objections.

Objection (i): The Court lacks jurisdiction to entertain a Reference that is questioning the sovereignty of the United Republic of Tanzania, which is a founding member of the East African Community.

16. The jurisdiction of this Court, is stated in Article 27(1) of the Treaty as follows:
The court shall initially have jurisdiction over the interpretation and application of this Treaty.
17. Further, Article 30(1), which provides for References to the Court by Legal and Natural Persons provides:
Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.
18. Read together, Articles 27(1) and 30(1) provide that this Court has jurisdiction to interpret and apply the Treaty, in the case of a Reference by a Legal or Natural Person that is resident in a Partner State, where the impugned act is an Act, regulation, directive, decision, or action of a Partner State or an institution of the Community, on the grounds that such impugned act is unlawful or is an infringement of the provisions of the Treaty.
19. In *The Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu* (supra), jurisdiction was categorized into 3 broad bands: *ratione personae*, *ratione materiae* and *ratione temporis*. Lack of *ratione personae* would arise where one of the parties is devoid of the requisite capacity or *locus standi* to appear before a court; while a court's *ratione materiae* is questioned on the basis of the invoked subject matter, the court having no *ratione materiae* to try a matter where a treaty or convention does not grant it jurisdiction over designated actions. In the case of the EAC Treaty, the Court's *ratione materiae* is outlined in Articles 30, 31 and 32 thereof. *Ratione temporis*, on the other hand, refers to time prescribed for the institution of cases in a court. In the instant

case, it would appear that the Respondents challenge the Court's jurisdiction on account of 3 types of jurisdiction.

20. In terms of the *ratione personae*, Article 1 of the Treaty defines Partner States to include 'the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania, and any other country granted membership to the community under Article 3 of this Treaty'. The Court takes judicial notice of the fact that three (3) additional Partner States have since been admitted under Article 3 of the Treaty, namely, the Republics of Burundi, Rwanda and South Sudan. More importantly, judicial notice is taken of the fact that the Partner State referred to as 'The United Republic of Tanzania' in Article 1 of the Treaty includes the Peoples' Revolutionary Republic of Zanzibar. Indeed, it is this inclusion that is the subject matter of this Reference.
21. The First Respondent is the Attorney General of the Revolutionary Government of Zanzibar, while the Second Respondent is the Chief Secretary of the Revolutionary Council of Zanzibar. Even from a cursory reading of Article 30(1) of the Treaty, it is manifestly plain that a Reference to this Court can only be in respect of the 'Act, regulation, directive, decision or action of a Partner State or an institution of the Community. It is clear that Zanzibar is neither a Partner State nor an institution of the Community. It follows therefore that neither Zanzibar nor any of its officials have *locus standi* before this Court. Of the three Respondents, only the United Republic of Tanzania, a Partner State that is represented herein by its Attorney General, has *ratione personae* or *locus standi* before the Court. We therefore strike out the First and Second Respondents from the Reference.
22. Turning to the *ratione materiae*, the question then becomes what is the Act, regulation, directive, decision or action by the Third Respondent State, the legality of which has been challenged under Article 30(1) of the Treaty? The acts complained of in the Reference were undertaken by two entities, the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar. None of these entities is a Partner State of the East African Community in terms of Article 30(1). No evidence was adduced by the Applicants as would suggest that the Third Respondent State was responsible for any of the acts that they have challenged. Indeed the Claimant's Agent was not able to answer the specific question from the bench: what is the complaint against the United Republic of Tanzania in terms of Article 30(1) of the Treaty?
23. Consequently, whereas the Third Respondent State does have *ratione personae* in this matter, it clearly lacks *ratione materiae*. The matters complained of in the Reference gave birth to the United Republic of Tanzania but that Partner State cannot be responsible for actions and decisions that pre-date its existence. The cause of action in the Reference cannot be imputed to it.
24. In any event, the impugned acts of the Republic of Tanganyika and the Peoples' Revolutionary Republic of Zanzibar are stated to have been effected in 1964, many years prior to the existence of the Treaty. The Respondents were emphatic in their submissions that under both general international law, as well as the jurisprudence of this Court, acts that ensued prior to the coming into force of the Treaty are not within the purview of the Court to interrogate. This is the principle of non-retroactive application of a treaty. We do agree.

25. Article 28 of the Vienna Convention on The Law of Treaties provides:
Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or in any situation which ceased to exist before the date of the entry in force of the treaty with respect to that party.
26. This principle was applied by the World Trade Organisation (WTO) Appellate body, in *Brazil – Measures Affecting Dessicated Coconut, Brazil vs. Philippines, Appellate Body Report, WT/DS22/AB/R, Report No AB-1996-4, Doc No 97-0695, ITL 137 (WTO 1997), DSR 1997:I, 167, 21st February 1997*, where it was held:
It is an accepted principle of customary international law, reflected in Article 28 of the Vienna Convention that rights and obligations under a new treaty do not apply retroactively.
27. The WTO Appellate Body further held:
Absent a contrary intention, a treaty cannot apply to acts or facts which took place or situations which ceased to exist, before the date of its entry into force.
28. The reasoning in that case is echoed in *Emmanuel Mwakisha Mjawasi & Others vs. Attorney General of the Republic of Kenya (supra)*. It was held:
A Treaty cannot be applied retrospectively unless a different intention appears from the Treaty or is otherwise established. In the absence of the contrary intention, a Treaty cannot apply to acts or facts which took place or situations which ceased to exist before the date of its entry into force. ... There is no contrary intention from the reading of the Treaty that it is to apply retrospectively.
29. That decision was cited with approval in *Alcon International Limited vs. Standard Chartered Bank of Uganda & 2 Others (supra)*. It was held:
Where then, one may ask, did the court derive its jurisdiction since the Treaty which normally confers the jurisdiction on the court, did not apply? Non retroactivity is a strong objection: where it is upheld, it disposes of the case there and then. As non retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the court?
30. Indeed in the *Emmanuel Mwakisha Mjawasi* case, the Court concluded:
The objection of the non retroactivity of the Treaty is a fundamental issue, one that goes to the root of the case. The Court cannot avoid the question. It must determine it at the outset before dealing with any other issue. True, it is not possible to deal with the objection of non retrospectivity without considering the cause of action of the particular case. However, such consideration helps only to situate the objection in a certain period and it does not transform the principle of non retroactivity into a matter of facts. ... the objection of non retroactivity is interconnected with the question of jurisdiction. The Court must consider the question even where the parties fail to raise it.
31. Needless to state, the forgoing decisions of the Appellate Division have binding authority on us. Consequently, unless the principle on non-retrospective application of the Treaty is rebutted by demonstrating a contrary intention; as a matter of law, the Court would lack the juridical basis to determine a dispute

in respect of events that took place before the coming into force of the Treaty. We find that we have no jurisdiction over this Reference, and must decline the invitation to decide otherwise.

32. In the *Alcon International Limited* case, the Appellate Division cited with approval this Court's observation in *Attorney General of the United Republic of Tanzania vs. African Network of Animal Welfare, EACJ Reference No. 9 of 2010* as follows:

Jurisdiction is a most, if not the most, fundamental issue that a Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; from which springs the flow of the judicial process. Without jurisdiction, a Court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case.

33. Consequently, having held that we lack the jurisdiction to entertain this Reference, that should have been the end of the matter and we would dismiss the Reference on that basis. However, we do consider it appropriate that we make a determination on the second point of law objection raised by the Respondents. That then brings us to the issue of *ratione temporis* or time limitation.

Objection (ii): The Reference is time-barred under Article 30(2) of the Treaty.

34. Article 30(2) of the Treaty provides as follows:

The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.

35. That Treaty provision has two (2) limbs to it: first, that a Reference should be filed within 2 months of the act giving rise to a cause of action and, secondly, where the date of an action is not known, within 2 months of a litigant's knowledge of the act giving rise to a cause of action.

36. For purposes of computation of time, in *The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit (supra)*, the Court held that time would start to run 'two months after the action or decision was first taken or made.' This position was affirmed in *The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others*, where it was held that 'the starting date of an act complained of under Article 30(2) is not the day the act ends, but the day it is first effected.'

37. The actions that the Applicants in this case sought to impugn are stated to have transpired in April 1964. Whereas the Applicants contest the existence of the Articles of Union that executed the Union between the Republic of Tanganyika and the Peoples' Republic of Zanzibar, the import of paragraphs 5, 6 and 7 of the Reference is that the Articles of Union were recognized by the United Nations in May 1964 and the United Republic of Tanzania was formally recognized by the United Nations in November 1964. It will suffice to note that the said recognition did not at the time draw any objection from either the Republic of Tanganyika or the Peoples' Republic of Zanzibar.

38. Given that the Reference was filed in this Court on 2nd November 2016, it clearly falls outside the ambit of the two-month limitation period contemplated in the first limb of Article 30(2). The challenge to the existential basis of the United Republic of Tanzania is therefore time-barred.

39. As regards the second limb of Article 30(2), it hinges on proof by a party that wishes to rely on it that it only got to know of the act(s) complained after the event but within the two-month limitation period prescribed by Article 30(2) of the Treaty. The onus of proof would therefore be upon the Applicants herein to demonstrate when exactly the acts they now seek to challenge came to their knowledge. Having failed to discharge that burden, the second limb to Article 30(2) of the Treaty would not be available to them.
40. This Court has had occasion to pronounce itself on the interpretation and application of Article 30(2) of the Treaty. In *The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit (supra)*, the Appellate Division of this Court ruled out the possibility of the extension of the time set in Article 30(2), or the notion of continuing violations. It was held:
- In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognise any continuous breach or violation of the Treaty outside the two months; nor is there any power to extend that time limit. ... Again no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty.
41. This position was reiterated in the *Omar Awadh* case in the following terms:
- Moreover, the principle of legal certainty requires strict application of the time limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend or to condone to waive or modify the prescribed time limit for any reason, including for continued violation.
42. We therefore find that the matters in contention in the instant Reference are time-barred, the time of reckoning in respect thereof having commenced in May 1964. In so far as the Court neither has the mandate to extend the time limitation under Article 30(2) of the Treaty, nor the liberty to treat the alleged Treaty breaches herein as continued violations; the Court clearly has no jurisdiction *ratione temporis* to entertain this Reference.

E. Conclusion

43. For the reasons stated earlier in this ruling, we find and hold that this Court does not have jurisdiction to hear and determine the subject matter of the Reference. Further and in any event, it is also our finding that at the time of filing the Reference, the same was time barred. Accordingly, we hereby uphold both points of law as raised by the Respondents.
44. On the question of costs, Rule 127(1) of the Court's Rules of Procedure provides that 'costs in any proceedings shall follow the event unless the Court for good reasons otherwise orders.' In the instant case, misguided as the Reference was in the circumstances, we are mindful that it was brought in the public interest. We accordingly exercise our discretion under the said Rule 127(1) to order that each party shall bear its own costs.

It is so ordered.

R. Mutola, Agent for the Applicants

G. Malata, V. Tango, A. Hassan, J. Msafiri, M. Uthman & S. Kalokola, Counsel for the Respondents

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First Instance Division

Reference No. 10 of 2016**M/S Quick Telecommunications Services (Represented by James Alfred Korosso)**

v

The Attorney General of the United Republic of Tanzania

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ; F. Jundu, A. Ngiye & C. Nyawello, JJ
July 3, 2019

Jurisdiction - Vicarious liability- Decisions of the Judge Ethics Committee - Whether the complaint is properly before the Court - Rule of law

Articles: 5(1), 6(d), 7(2), 8(1) (c), 23, 27(1), 30 of the Treaty - Articles: 37(1), 38(1), 40(1), (3) Judiciary Administration Act, 2011, Tanzania - Rule 39(1) EACJ Rules of Procedure, 2013

The Applicant's claim arose from Land Case lodged in the High Court of Tanzania at Arusha in 2012 in which it partially succeeded as some of the defendants were ordered to return the properties owned by the Applicant. However, being dissatisfied, the Applicant alleged that: attempts to lodge an appeal were frustrated as legal documents were not availed, so the appeal was time barred. On 4th March 2016, the Applicant complained to the Chief Justice and the allegations against the Trial Judge were forwarded to the Judges Ethics Committee; the Committee did not consider all claims against the Trial Judge and therefore the Respondent and agents violated the Constitution of the United Republic of Tanzania; and there was vicarious liability for wrongful acts and omissions of the Judges Ethics Committee contravening Tanzanian statutory law and Articles 5(1), 6(d), 7(a) and 8(1)(c) of the Treaty. The Applicant averred that consequently, the business collapsed and the Respondent's acts undermined its relations with its bank.

The Respondent opposed the Reference submitting that the Court lacked jurisdiction to consider the alleged wrongful acts as the: Applicant's complaints against the Trial Judge had been referred to the Judge Ethics Committee which exercised its powers under section 38 of the Judiciary Administration Act No. 4, 2011 and determined the complaint in the presence of the Applicant; if the Applicant was dissatisfied with the decision of Committee, it ought to have filed an application for judicial review to challenge the decision. Furthermore, the Applicant had an appeal pending in the Court of Appeal.

Held

1. The Applicant alleged that the actions and omissions of the Judges Ethics Committee violated Tanzanian statutory law and Articles 6(d) and 7(2) of the Treaty; and that Government of the United Republic of Tanzania was vicariously liable for the Committees actions or omissions. Since the legality of the impugned acts are established on the face of the pleadings, this Court has jurisdiction.
2. The Judicial Ethics Committee's decision is not that of a court of law subject

to appeal to a superior court. Therefore, this Court would not be sitting as an appellate court as alleged.

3. The Judicial Ethics Committee heard the Applicant's complaint matter and dismissed the case on 4th October 2016. The High Court is entitled to investigate the proceedings of a lower court or tribunal thus the legal course of action was for the Applicant was to file a case before the High Court of Tanzania if dissatisfied by the decision of the Committee. Having failed to do so, the Applicant could not claim that due process of the law was not followed and that the Respondent violated the Treaty.

Cases cited

Hon. S. Sebalu v The Secretary General of EAC & Ors [2005-2011] EACJLR 160, Ref. 1 of 2010

Prof. A. Nyong'o & Ors v The AG of Kenya & Ors [2005-2011] EACJLR 16, Ref. No. 1 of 2006.

Sanai Mirumbe & Another v Muhere Chacha (1990) TLR 54

JUDGMENT

A. Introduction

1. This is a Reference filed on 5th December 2016 by M/S Quick Telecommunications Services, a Tanzanian registered Partnership (hereinafter referred to as the 'Applicant') owned by four Tanzanians, namely James Alfred Korosso, Elizabeth Alfred Korosso, Nicolas Obwana and Benedict Korosso, trading between Moshi, Himo and Arusha Townships, in the United Republic of Tanzania. The Applicant is represented by Mr. James Alfred Korosso and its address of service is: Quick Telecommunications Services, C/O The Managing Director, Mr. James Alfred Korosso, Old Plaza Cinema Building, Ground Floor, Opposite Moshi Bus Park, P.O. Box 10200, Moshi, Tanzania.
2. The Respondent is the Attorney General of the United Republic of Tanzania who is sued in his capacity as the Principal Legal Advisor of the United Republic of Tanzania. His address of service for the purposes of this Reference is given as Attorney General's Chambers, 20 Kivukoni Road, P.O. Box 9050, 11492 Dar Es Salaam, Tanzania.
3. The Reference was amended on 13th January 2017 and on 20th July 2018.

B. Representation

4. The Reference was heard on 15th November 2018. The Applicant was represented by its Managing Director, Mr. James Alfred Korosso, while Mr. Daniel Nyakiha and Ms. Rehema Mutoria appeared for the Respondent.

The Applicant's Case

5. The Applicant's representative alleged that, on 24th April 2012, he lodged in the High Court of Tanzania at Arusha a suit registered as Land Case No. 19 of 2012 which was heard and determined by Judge Fatuma H. Massengi and Judgment was delivered partly and unprofessionally by awarding the Applicant a minimum award and costs against "the plaintiff and its prayers." [sic] He also alleged that Judge Fatuma H. Massengi's unprofessional decision frustrated his application for leave to appeal to the Court of Appeal by confiscating application documents to the effect that the Application was time barred and the company sustained loss of business in relation to that case, including failure to service the bank loan from

Barclays amounting to Tsh. 195,222,391.62 as of 27th July 2015. Furthermore, the Applicant alleged that it had been subjected to violent intimidation and was offended by Judge Fatuma H. Massengi.

6. He further averred that faced with such a situation and other challenges in pursuing his case, the matter was eventually brought before the Judges Ethics Committee, but dismissed. He contended that before the said Committee, he was subjected to a tensional and repellent atmosphere by the Judges of the Ethics Committee and Justice Fatuma H. Massengi. In this regard, he submitted that the Judges of the Ethics Committee failed to abide by their oath of office, the rules and procedures of the said Committee, the rule of law, the Constitution of the United Republic of Tanzania, the statutes and the EAC Treaty.
7. The Applicant's representative contended that he wrote a complaint letter to the Chief Justice of the United Republic of Tanzania and on 16th June 2016, the Judges Ethics Committee responded to the said letter by inviting the Applicant to attend a hearing of his complaint in three separate days and on 4th October 2016, the said Committee delivered its ruling and dismissed the said complaint.
8. The Applicant's representative further averred that following the dismissal of the complaint by the Judges Ethics Committee, he lodged this Reference contending that the acts, conducts and omissions of the Respondent and his Agents are in violation of the statutes and the Treaty for the Establishment of the East African Community (hereafter referred to as the 'Treaty') in that they violate Articles 6(d) and 7(2) of the Treaty.
9. The Applicant therefore prayed for the following declarations and orders:
 - a. A declaration be issued that the Respondent and his Agents have violated the Treaty for the Establishment of the East African Community;
 - b. A declaration be issued that the Respondent and his Agents have contravened Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
 - c. A declaration further be issued that the Respondent and his Agents have contravened Articles 5(1) and 8(1) (c) of the Treaty for the Establishment of the East African Community;
 - d. The Ruling of the Judges Ethics Committee members on the Applicant's claims against Judge Fatuma H. Massengi delivered on 04th October 2016 be declared by this Honorable Court that it is unprofessional and the same is nullified.
 - e. The Respondent's Agents namely, Judge Fatuma H. Massengi, Judge M.S. Mbarouk, Judge B.M.K Mmila, Judge A.G. Mwarija, Judge H.T Songoro and Honorable K. Revocati be declared terminated from the Office for contravening their oath of office, the rule of law, the Constitution of the United Republic of Tanzania and EAC Treaty.
 - f. An order be issued that the Respondent and his Agents be liable for the damages born out from the date of eviction from the business premises that is 24th April 2012 to the date of affection of the orders due to their failure to deliver justice to the Applicant.
 - g. An order be issued that all the retirement benefits of Judge Fatuma H. Massengi, Judge M.S. Mbarouk, Judge B.M.K Mmila, Judge A.G.

- Mwarija, Judge H.T. Songoro and Honorable K. Revocati be withheld by the Respondent herein for the purpose of compensation to the Applicant herein.
- h. An order be issued that damages caused jointly by the Respondent and his Agents to the Applicant totalling Tsh. 3,000,000,000, equivalent to USD 1,376,146.79 through their acts and omissions be compensated by the said Agents of the Respondent in this case.
 - i. An order be issued that the action and omissions of the Respondent's Agents is unprofessional, against the rule of law and administration of justice and is an abuse of the Court process.
 - j. An order be issued that that application for leave to appeal or the Applicant be allowed to appeal on the judgment of the Land Case No. 19 of 2012 for justice to take its course or to be seen done.
 - k. An order be issued that the Respondent and his Agents be ordered to pay costs of the Reference.
 - l. An order be issued that the Respondent and his Agents pay interest of the said sum.
 - m. An order be issued that the Respondent and his Agents pay interests on the decretal sum at commercial rate to the date of payment.
 - n. An order be issued that the Respondent herein be ordered to affect all orders originating from this Reference immediately without fail.
 - o. An order be issued that all payment cheques that may originate from the orders above be transacted through the East African Court of Justice watch.
 - p. Any other relieves that the Court may deem fit and equitable.

C. The Respondent's Case

10. The Respondent has raised 3 points of Preliminary Objections on Point of Law, but later on, he abandoned the 2nd ground of Preliminary Objections and maintained the remaining grounds namely:
 - a. The Court lacks jurisdiction to entertain the matter.
 - b. The Reference is incompetent for contravening Rule 39(1) of the East African Court of Justice's Rules of Procedure, 2013 (hereinafter referred to as the "Rule").
 - c. The Respondent averred that, all that is stated in the Applicant's case is denied in its totality because the Respondent's Agents performed their duties legally, properly and in accordance with the Laws of Tanzania. Otherwise, the Applicant is put to strict proof.
 - d. The Respondent prayed for:
 - i. Dismissal of the Reference
 - ii. Costs be awarded to the Respondent.
 - iii. Any other Orders the Court may deem right and just to grant.

D. Issues for Determination

11. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 6th June 2017 at which the following were framed as issues for determination:

- a. Whether this Court has jurisdiction to hear and determine the Reference.
 - b. Whether the Reference is properly before the Court.
 - c. Whether the acts or decisions complained of by the Applicant, if proved, contravene Articles 6(d) and 7(2) of the Treaty.
 - d. What remedies are available to the Parties.
12. We propose to deal with Issue 2 together with Issue No. 1 because most of the Respondent's submissions on Issue No. 2 are pertaining to the jurisdiction of the Court, while the Applicant's short submissions on Issue No. 2 refer entirely to the Court's jurisdiction. Another part of the Respondent's submissions on Issue No. 2 relating to the legality of the Judges Ethics Committee's impugned acts will be addressed in Issue No.3.

E. Consideration and Determination of Issues

Issues Nos. 1 and 2: Whether the Court has jurisdiction to hear and determine the Reference and whether the Reference is properly before the Court

Respondent's submissions

13. As stated above in paragraph 10, the Respondent challenged the jurisdiction of the Court in his Notice of Preliminary Objection filed on 20th February 2017.
14. The Respondent's written submissions were filed on 13th November 2018. The Respondent's Counsel started his submission by providing the background to the instant case. He averred that the Applicant's claims before this Court are based on the original Land Case No. 19 of 2012 in a domestic Court, where the Applicant, as a plaintiff, filed a claim for specific damages of Tshs. 93,258,500 against Allan Solomon Mruma, Asseri Solomon Mruma, Tabu Simile and Nutmeg Auctioneers, alleging breach of the tenancy agreement which existed between them.
15. He also averred that the Applicant partially succeeded in the Land Court as some defendants were ordered to return the properties owned by the plaintiff. However, being dissatisfied with the decision of the High Court in the aforementioned land case, it filed for leave to appeal to the Court of Appeal, but the leave was dismissed for having been filled out of time.
16. The Respondent's Counsel further stated that, on 04th March 2016, the Applicant made allegations against Hon. Judge Fatuma H. Massengi, a Trial Judge in Land Case No. 19 of 2012 to the Chief Justice of the United Republic of Tanzania who forwarded the allegations to the Judges Ethics Committee. He added that, under Judiciary Administration Act No. 4 of 2011, the said Committee has been empowered to deal with any complaints either by its own motion or brought to it by any person having a complaint.
17. It was also the contention of the Respondent's Counsel that any person aggrieved by the decision of the Judges Ethics Committee is required to challenge the said decision by judicial review. He then referred the Court to the case of *Sanai Mirumbe and Another Vs. Muhere Chacha (1990) TLR 54* in which the Court of Appeal of the United Republic of Tanzania had laid down the circumstances under which Prerogatives Orders might be issued. He pointed out that the Court of Appeal held that:

“The High Court is entitled to investigate the proceedings of a lower

court or tribunal or public

authority on any of the following grounds apparent on the record:-

- a) Taking into account matters which it ought not to have taken into account;
- b) Not taking into account matters which it ought to have taken into account;
- c) Lack or excess of jurisdiction;
- d) Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it;
- e) Rules of natural justice have been violated;
- f) Illegality of procedure or decision.”

18. Against that background, the Respondent’s Counsel submitted that the Applicant, if dissatisfied with the Judges Ethics Committee, was required by law to challenge the decision by applying for prerogative orders. He underscored that the Applicant’s complaints against the trial judge had been referred to the Judge Ethics Committee and they were determined in the presence of the Applicant.
19. Learned Counsel also contended that the Applicant’s Notice of Appeal filed on 13th November 2015 in the Court of Appeal of Tanzania against Hon. Justice Fatuma Massengi’s judgment delivered at Arusha on 30th October 2015 had neither been struck out nor withdrawn by the Applicant. He opined that in accordance with Rule 89 of the Court of Appeal Rules, 2009, the Applicant could have withdrawn the Notice of Intention to Appeal if he so wished and/ or if he had no interest to pursue such an appeal. He then argued that since the Applicant had not withdrawn the Notice of Appeal from the Court of Appeal, it was still awaiting determination of the Court and the Applicant therefore two channels to pursue his claim and allegations. Those channels were to lodge an appeal to the Court of Appeal which the Applicant had done or to file an application for judicial review if he so intended to challenge the decision of the Judges Ethics Committee as per the direction of the Court of Appeal in the case of *Sanai Mirumbe (supra)*.
20. Moreover, Counsel for the Respondent asserted that the jurisdiction of this Court as enshrined in Article 27 of the Treaty is the interpretation and application of the Treaty. In that regard, he submitted that Article 27 does not confer an appellate jurisdiction on this Court over the decisions of the Partner State’s Supreme Court (See *Honorable Sitenda Sebalu Vs. The Secretary General of the East African Community, the Attorney General of the Republic of Uganda, Honorable Sam. K. Njuba and Electoral Commission of Uganda, EACJ Reference No. 1 of 2010*). He asserted that in that case, the Court held that Article 27 does not confer appellate jurisdiction of this Court over the decision of the Supreme Court of Uganda and that the said article was intended strictly for appealing a decision within the Court from the First Instance Division.
21. Relying on the above-mentioned authority, the Respondent’s Counsel argued that since the Applicant’s claims arose from Land Case No. 19 of 2012, and the Applicant had an appeal pending in the Court of Appeal and a further option of filing an application for judicial review against the decision made by the Judges Ethics Committee, it was therefore precluded by the Treaty from bringing the same claims to this Court. He opined that no law or procedures confer to this

Court any jurisdiction over the allegations made by the Applicant.

22. He also submitted that the scope of jurisdiction envisaged by the “founders of the Treaty” [sic] does not extend to the determination of the validity of the decision of the Judges Ethics Committee which is a judicial organ. In that regard, he contended that if the Court entertained this Reference, it would be sitting as an appellate court to determine the validity of a decision of an organ of a Partner State of which no jurisdiction has been vested in it.
23. Counsel further submitted that the matter before this Court is not for interpretation and application of the Treaty and therefore the jurisdiction of the Court is ousted.

Applicant’s submissions

24. Conversely, in its written and oral submissions, the Applicant’s representative strongly disagreed with the Respondent and contended that this Court has jurisdiction to hear and determine the Reference. He contended that Article 4(1) and (2) of the Treaty read together with Article 9(1) (e), which automatically refers to Articles 23,27(1) and 30 of the Treaty show that this Court has the inherent power to hear and determine this Reference.
25. In support of his argument, the Applicant’s representative referred the Court to the case of *East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community, EACJ Reference No. 9 of 2012*, p. 46 where the Court stated that:
- “The proviso to Article 27(1) and Article 30(3) undermines the supremacy of the EACJ and therefore contravenes Articles 5, 6, 8(1) (4) and (5) and 23 of the Treaty.”
26. Reliance was also placed on the said Court’s judgment at page 45 where it opined that:
- “We don’t think that it takes away directly or by implication the interpretative jurisdiction of this Court - Our view remains the same as above on the issue.”
27. The Applicant’s representative also submitted that the jurisdiction of the Court is vested in it under Article 27 of the EAC Treaty which provides that the Court shall have jurisdiction over the interpretation and application of the Treaty. He further submitted that Article 23 of the Treaty provides that the Court’s role shall be to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.
28. The Applicant’s representative then stressed that he had filed this Reference seeking interpretation and application of his rights under Articles 6(d) and 7(2) of the EAC Treaty. He further contended that through the orders sought from the Court, he is seeking to ensure that the Respondent’s complies with his Treaty obligations.
29. He also averred that the interpretation and application of Articles 6(d) and 7(2) of the Treaty had previously been dealt with by this Court in the case of *The Attorney General of the Republic of Kenya Vs. Independent Medical Legal Unit, Appeal No.1 of 2011* where it stated:
- “The respective partner States’ responsibilities to their citizens and residents have, through those States voluntary entry into the EAC Treaty,

been scripted, transformed and fossilized into the several objectives, principles and obligations now stipulated in, among others, Articles 5, 6, 7 of the Treaty the breach of which by any partner State, gives rise to infringement of the Treaty. It is that alleged infringement which through interpretation of the Treaty under Article 27(1) constitutes the cause of action [...]"

30. The Applicant's representative further stated that the Court's aforementioned position was buttressed in the case of *Samuel Mukira Mohochi Vs. The Attorney General of the Republic of Uganda*, EACJ No. 5 of 2011 where the Court opined that:

"The reasoning of this Court in Mukira Muhochi was to the effect that all the fundamental principles of the EAC under Article 6 are 'foundational, core, indispensable and enforceable.'"

31. He also referred the Court to the case of *East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community*, Reference No. 9 of 2012, citing the Court's judgment in *Professor Anyang' Nyong'o* where the Court stated that:

"Under Article 33(2) the Treaty obliquely envisages interpretation of the Treaty provisions by national courts. However, reading the pertinent provisions with Article 34, leaves no doubt about the primacy if not the supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty."

32. In further reference to the case of *East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community* (supra), the Applicant submitted that the point of argument in that judgment was that the Treaty was amended to create *inter alia* a proviso to Articles 27(1) and 30(3). The Applicant's representative pointed out that in the said case, the Court having found that it had jurisdiction to determine the Reference, went on to determine that issue at length and finally found that the Reference was properly before it and concluded thus:

In concluding this issue, we would like to echo the statement by the Court in the *East African Law Society* (supra) that:

"1. By the provisions under Articles 23, 33(2) and 34 the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty to ensure harmony and certainty.

The new proviso to Article 27, and paragraph 3 of Article 30 have the effect of compromising that principle and/or contradicting the main provision. It should be appreciated that the question of what

'The Treaty reserves for a partner State' is a provision of the Treaty and a matter that ought to be determined harmoniously and with certainty. If left as amended, the provisions are likely to lead to conflicting interpretations of the Treaty by national Courts of the partner States.....

We strongly recommend that the said amendment be revised at the earliest opportunity of reviewing the Treaty."

33. Furthermore, the Applicant's representative relied on the case of *Samuel Mukira Mohochi* (supra) on pages 83 to 90 to stress the point that the instant Reference is

properly before the Court. Other authorities relied upon were the Constitution of the United Republic of Tanzania 1977, *James Katabazi & 21 Others Vs. The Secretary General of the East African Community*, EACJ Reference No. 1 of 2007, *Professor Peter Anyang' Nyong'o Vs. The Attorney General of Republic of Kenya*, EACJ Reference No. 1 of 2006. The Applicant's representative contended that in the latter case, the Court reasoned on the cause of action that forms a set of facts or circumstances that in law give rise to a right to sue or to take out an action in Court for redress or remedy.

34. The Applicant's representative further referred the Court to the case of *The Attorney General of the Republic of Kenya Vs. Independent Medical Legal Unit*, EACJ Appeal No. 1 of 2012 where the Court dealt with preliminary objection on its jurisdiction and showed how to handle such a matter. The Applicant's representative averred that this Court had dealt with a similar question in the case of *Samuel Mukira Mohochi* (supra). He contended that in view of the instant Reference touching on the bottom of the intention of the establishment of the Treaty as reflected in Articles 4,5,6,7,8 and 23, this Court ought to have regard to its necessity to promoting the rule of law within EAC Partner States. He thus urged the Court to take into account Rule 55 (3), b, c, and d of the Court's Rules and dismiss any preliminary objections raised and aimed at oppressing the local society, "hence bring to the attention of the organs and administrators of the partner states that there is a superior monitoring organ monitoring their ill performances lastly arriving in the objectives of the community" [sic].
35. To sum up his submissions on this issue, the Applicant urged the Court to disregard the technicalities and hence administer substantive justice without undue regard to the said preliminary objections to the Reference before it. He further called upon the Court to use its inherent powers as stated in Rule 1(2) of the Court's Rules.

Determination of Issues Nos. 1 and 2

36. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the parties. The background to this case is reproduced herein above. The case arose from Land Case No. 19 of 2012 lodged in the High Court of Tanzania at Arusha and the matter has also been dealt with by the Judges Ethics Committee which has dismissed the Applicant's complaints.
37. The Applicant has instituted this Reference against the Respondent seeking to hold the Government of the United Republic of Tanzania vicariously liable for alleged wrongful acts committed by the Judges Ethics Committee. It claims that the said acts violate its rights under Articles 6(d) and 7(2) of the EAC Treaty.
38. The Respondent, on his part, contends that the subject matter of this Reference does not fall within this Court's jurisdiction for the reason that if the Applicant wanted to challenge a decision of the Judges Ethics Committee, it ought to have filed an application before the Respondent's competent Court by way of judicial review.
39. The jurisdiction of this Court is set out in Articles 23(1) and 27(1) of the Treaty. We reproduce the provisions of the said articles for ease of reference. Article 23(1) provides that:

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

As for Article 27(1), it states that:

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”

Also relevant for this case is Article 30(1) of the Treaty which provides that:

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

40. From the abovementioned provisions of the Treaty, it is clear that Article 27(1) designates the jurisdiction of this Court as the interpretation and application of the Treaty; Article 30(1) on its part provides the context within which such jurisdiction would be exercised. This Court has had opportunities to address the question of its jurisdiction in different decided cases. It has consistently found its jurisdiction to have been sufficiently established where it was averred on the face of the parties’ pleadings that the matter complained of constituted an infringement of the Treaty (See *Hon. Sitenda Sebalu vs. The Secretary General of the East African Community & Others*, EACJ Ref. No. 1 of 2010 and *Prof. Peter Anyang’ Nyong’o & 10 Others Vs. The Attorney General of the Republic of Kenya & 2 Others*, EACJ Ref. No. 1 of 2006.
41. As stated hereinabove, the Applicant filed the present Reference against the Respondent based on its vicarious liability for alleged wrongful acts, conducts and omissions of the Judges Ethics Committee. He contends that the said acts, conducts and omissions are in violation of Tanzanian statutory law, as well as the Treaty in that they violate Articles 6(d) and 7(2) of the Treaty. The Applicant therefore prays for among others, a declaration to be issued that the Respondent and his Agents have contravened Articles 5(1), 6(d), 7(2) and 8, 1 (c) of the Treaty.
42. As the case stands, this Court is called upon to determine the legality of the Respondent’s acts on the grounds that the impugned acts are an infringement of the abovementioned provisions of the Treaty. This is well within its mandate under Article 30(1) of the Treaty. We have heard the Respondent’s contention that by adjudicating the matter, the Court would have assumed appellate function which has not been bestowed upon it by the Treaty or would be exercising a judicial review which is the preserve of Tanzanian Courts. However, considering the provisions of Articles 27 (1) and 30(1) reproduced hereinabove, we are not convinced by the Respondent’s arguments and hereby hold that this Reference falls squarely within the Court’s jurisdiction. Issues Nos. 1 and 2 are therefore answered in the affirmative.

Issue No. 3: Whether the acts or decisions complained of by the Applicant, if proved, contravene Articles 6(d) and 7(2) of the Treaty.

Applicant's submissions

43. The Applicant's representative first of all submitted that by wrongly stating that the judgment in Land Case No. 19 of 2012 was delivered on 27th October 2012, the Trial Judge infringed her oath of office, the Constitution of the United Republic of Tanzania and Articles 6(d) and 7(2) of the Treaty.
44. He also alleged that there was lack of seriousness in the Trial Judge's judgment and the way she had analysed evidence. He contended that she deliberately disorganized the Applicant's pieces of evidence such as annexures to its case or failed to hear some witnesses, such as Mr. Kitundu, in order to weaken the Applicant's case.
45. The Applicant's representative further submitted that the Applicant's properties were seized forcefully without any court order, sold without any record of sale indicating for example the amount of the sale, and that the trial judge did not even ask the defendants in the land case to explain such anomalies.
46. It was also the representative's contention that he was intimidated and harassed by the Trial Judge when he tried to make a follow up on the case before the High Court at Arusha.
47. The Applicant's representative also took issue with the way the Judges Ethics Committee handled the Applicant's claims against the Trial Judge. In this regard, he contested the "ill formation" of the Committee and alleged that it had arrived at a pre-conceived verdict without due consideration of all claims raised against the Trial Judge and that during the hearing, the Committee had subjected him to harassment, tension and a repulsive atmosphere.
48. In line with the foregoing, the Applicant's representative submitted that the members of the Judges Ethics Committee had infringed their oath of office and had failed to abide by the Constitution of the United Republic of Tanzania. In the same vein, he submitted that the acts, conduct and omissions of the Respondent and his agents violate the Constitution of the United Republic of Tanzania and the EAC Treaty.
49. The Applicant's representative further contended that the Respondent had caused the Applicant's business to collapse, and that much suffering was caused to him, the Applicant's business partners, the company staff and their extended family. It was also submitted that the Respondent's acts had undermined the relations of the Applicant and its bank, Barclays Bank Ltd.
50. On the same issue, the Applicant's representative submitted that the cost of damages jointly caused by the Respondent and his agents to the Applicant and its associates through their acts and omissions from 24th April 2012, the date of the eviction from the business premises, amounted to Tshs. 3,000,000,000, equivalent to USD 1,976,146.79.

Respondent's submissions

51. On this issue, the Respondent contended that since much of the Applicant's complaints are against the Judges Ethics Committee castigating the way it had handled its case following alleged irregularities committed by Judge

Fatima Massengi, it ought to have brought its claims before domestic courts as determined in the case of *Sanai Mirumbe* (supra) according to which, if the Applicant was not satisfied with the decision of the Judges Ethics Committee, it ought to have filed a Judicial Review against such a decision, which he has not done. The Respondent's Counsel also submitted that nowhere had the Applicant indicated that the failure of the Judges Ethics Committee to determine its claim had violated or contravened Articles 6(d) and 7(2) of the Treaty.

52. The Respondent's Counsel also reiterated that this Court should not be used as an appellate body towards the decision of both the Judges Ethics Committee or the trial judge simply because there is no contravention or infringement of the principles enshrined in Articles 6(d) and 7(2) of the Treaty, contrarily to the Applicant's allegations.
53. The Respondent's Counsel also submitted that the Applicant's claim against the trial judge for the alleged wrongful handling of its case was duly heard and determined by the Judges Ethics Committee and therefore, the Applicant's seeming appeal before this Court had nothing to do with Articles 6(d) and 7(2) of the Treaty. He also submitted that the Applicant's allegations that Hon. Judge Fatuma Massengi's lack of seriousness in her judgment was a matter subject to appeal and in that respect, the Committee which heard its complaint had advised it to refer the case to the Court of Appeal for determination. Learned Counsel added that what was termed by the Applicant as intended to weaken its case was a very good ground of appeal before the Court of Appeal of Tanzania which is clothed with the jurisdiction to determine the matter and grant remedies sought as opposed to this Court.
54. Counsel further submitted that the Judges Ethics Committee, exercising its powers under section 38 of the Judiciary Administration Act No. 4, 2011 had addressed all the allegations being tabled before this Court. He argued that the mere fact that the Applicant was not satisfied with the decision of the Judges Ethics Committee did not entail abuse of legal process in the domestic courts since the Applicant is required to lodge its appeal in a superior court on the grounds already elaborated in the case of *Sanai Mirumbe & Another Vs. Muhere Chacha* (supra). Counsel opined that it was the Applicant's negligence that led to failure to file an application for leave to appeal on time, and thus resulted into dismissal of its case for being time barred. He hastened to add that the Applicant could not blame Judge Massengi or Judge Mwaimu for its failure. Relying again on the case of *Hon Sitenda Sebalu Vs. The Secretary general of the East African Community* (supra) and *Hon. Sam K. Njuba Vs. Electoral Commission of Uganda*, Counsel also submitted that the Applicant was abusing due process by inviting this Court to act as an appellate court against the decision of the High Court of Tanzania, an act not envisaged by Article 27 of the Treaty.
55. In sum, the Respondent submitted that he did not contravene Articles 6(d) and 7(2) of the Treaty since all the Applicant's allegations against Hon. Judge Massengi were heard and determined by a competent authority and at all level the Applicant did participate to the proceedings and was heard, thus its claims before this Court are baseless and unfounded.

Determination of Issue No. 3

56. We have carefully considered the pleadings and parties' rival arguments in respect of this issue. In line with our findings on Issue No.1, we consider that this Court is called upon to exercise its interpretative mandate and determine whether due process was observed by the Judges Ethics Committee in addressing the Applicant's complaints regarding alleged wrongful actions of Hon. Judge Massengi.
57. From the onset, it is apposite to shed some light on the Judges Ethics Committee and its functions within the United Republic of Tanzania's judicial system. The Judges Ethics Committee is established under Article 37(1) of the Judiciary Administration Act, 2011, which also determines its composition. Article 38(1) of the said Act provides that the functions of the Committee shall be:
- a) to receive and investigate complaints against [...] a Judge;
 - b) serve a Judge with a complaint;
 - c) [...]
 - d) hear the complaint.
58. Article 40(1) of the Act states that any complaint against a Judge may be lodged with the Committee by a person who has an interest in the matter. Article 41(2) of the same Act provides that a complaint shall contain adequate information disclosing an act or omission complained about and circumstances upon which that act or omission was committed. Article 41(3) stipulates that without prejudice to subsection (2) of Article 41, a complaint may be made regarding any of the following matters: (a) handling of cases; (b) allegation of corruption; (c) behaviour inconsistent with the Code of Judicial Ethics, and (d) inability to perform the functions of a Judge.
59. As stated hereinabove, the Applicant wrote a letter to the Chief Justice complaining about how its case had been handled by Judge Fatima Massengi and the Chief Justice forwarded the Applicant's complaints to the Judges Ethics Committee, which as indicated in paragraph 57 is competent to investigate such complaints. It is not in dispute that the Committee heard the matter in the presence of the Applicant and dismissed the case on 4th October 2016.
60. Dissatisfied with the decision of the Judges Ethics Committee, the Applicant filed this Reference on 5th December 2016. It is worth pointing out that in paragraph 46 of the Affidavit of James Alfred Korosso filed on 13th April 2018, he stated that he had chosen to file his case before this Court considering it superior to the Tanzanian judicial system. The question that arises then is whether this course of action is what entails due process in this matter.
61. The Respondent contends that if the Applicant was not satisfied with the decision of the Judges Ethics Committee, he ought to have challenged it before the High Court of Tanzania by way of judicial review. In support of his position, he refers the Court to the case of *Sanai Mirumbe & Another Vs. Muhere Chacha*. According to this authority, the Applicant ought to have challenged the impugned decision of the Judges Ethics Committee before the High Court of Tanzania. The Respondent's Counsel has also urged the Court not to determine the present Reference contending that by doing so, the Court would be sitting as appellate court of the decision rendered by the High Court of Tanzania. With regard to the latter contention, as stated herein above, we are of the view that what is in

issue in this Reference is the decision taken by the Judges Ethics Committee on the Applicant's complaints against alleged mishandling of its case by Hon. Judge F. Massengi. In this respect therefore, the contention that if this Court determined this matter it would be sitting as an appellate court does not arise because the decision of the Judges Ethics Committee is not a decision of a court of law subject to appeal to a superior court.

62. Nonetheless, considering the case at hand, we are persuaded by the Respondent's argument and supporting authority that the legal course of action was for the Applicant to file a case before the High Court of Tanzania if he was not satisfied by the decision of the Judges Ethics Committee. Having failed to do so, it cannot claim that due process of the law was not followed and that Articles 6(d) and 7(2) were violated by the Respondent. In the result therefore, Issue No. 3 is answered in the negative.

Issue No. 4: What remedies are available to the Parties

63. The Applicant has prayed for declarations and orders as reproduced hereinabove in the Applicant's Case. Considering our findings on Issue No. 3 that the Respondent did not violate the principles enshrined in Articles 6(d) and 7(2), the declarations sought in (a), (b) and (c) are not granted.

64. With regard to prayer (d) that the Court declares unprofessional and null the Ruling of the Judges Ethics Committee delivered on 4th October 2016 and prayer (i), we decline to grant the prayers as per our findings on Issue No. 3.

65. Concerning prayer (e) related to the termination of office, prayer (g) on retirement benefits for Judge Fatuma H. Massengi, Judge M.S. Mbarouk, Judge B.M. Mmila, Judge A.G. Mwarija, Judge H.T. Songoro and Hon. K. Revocati, and prayer (j) on the leave to appeal Judgment in Land Case No. 19 of 2012, the Court declines to grant the said prayers for they falls outside its statutory jurisdiction.

66. As regards prayers (f), (h), (l), (m), (n) and (o) on damages, interest thereto and other payments claimed by the Applicant against the Respondent and his agents, these prayers are not granted because no violation of the Treaty was found against the Respondent.

67. On the costs of the Reference, Rule 111(1) of the Court's Rules provides that "Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order." The Applicant has failed in all its claims against the Respondent and shall therefore bear costs of the Reference.

F. Conclusion

68. Given our findings, Reference No. 10 of 2016 is dismissed with costs to the Respondent.

G. It is so ordered.

J. Korosso, Applicant's Representative

D. Nyakiha & R. Mutoria, Counsel for the Respondent

First Instance Division

Reference No. 12 of 2016

**Le Forum Pour Le Renforcement De La Societe Civile (FORSC),
Action Des Chretiens pour L'abolition de la Torture (ACAT),
Association Burundaise pour la Protection Des Droits Humains et des
Personnes Detenues (APRODH), Forum pour la Conscience RT LE
Developpement (FOCODE), Reseau de Citoyens Probes (RCP)**

v

**The Attorney General of the Republic of Burundi, The Secretary General of
the East African Community**

Coram: M. Mugenyi, PJ; F. Ntizelyayo, DPJ; F. Jundu*; C. Nyawello & C. Nyachae, JJ
December 4, 2019

*Rule of law- Jurisdiction - Legality of banning Applicants' activities - EAC Secretary
General's role, functions, duties - Cause of action - Remedies*

*Articles: 3(3) (b), 4(3), 6(d), 7(2), 14(3) (i), 16, 23, 27, 29(1), 67(3), 71(1) (d), 127(3), (4)
of the Treaty -*

*Article 32 the Constitution of Burundi, 2005 - Article 30(2) Presidential Decree No 1/11
of 18/04/1992*

The bank accounts of the Applicants, non-governmental organisations (NGOs) incorporated and operating in Burundi, were frozen by agents of the 1st Respondent following an abortive *coup d'état* in 2015. They challenged Ministerial Order No 530/1597 of 23/11/2015 and Ministerial Order No 530/1922 of 19/10/2016 suspending their activities stating: they were not given an opportunity to make be heard before or after the suspension; Presidential Decree No 1/11 of 18/04/1992 and the procedures adopted by the Minister were contrary to Burundi laws regulating NGOs. Additionally, oral and written communication were made to the 2nd Respondent for his intervention but this was in vain.

They sought declarations *inter alia* that: there was a breach of separation of powers; absence of the right to a fair trial; and contravention of Articles 6(d), 7(2), 127(3) and (4) of the Treaty. They also sought an orders: directing the Government of Burundi to create mechanisms ensuring an enabling environment for civil society; lifting of the Ministerial Ordinance and freezing of the NGO's bank accounts. Furthermore, the 2nd Respondent was to commission an evaluation team to establish whether the government and administration system in Burundi was in line with the Treaty and file of progress reports on implementation of the principles of good governance to the Court quarterly or as the Court deemed expedient.

In response, the 1st Respondent submitted that a Commission had been set up to inquire into the causes of the "insurrection" and following their report, the Prosecutor-General submitted a request to the Minister of Home Affairs regarding the Applicant Organisations hence Ministerial Order No. 530/1597 of 23rd November 2015 was issued, suspending the activities of the Applicant organisations and, ultimately they were banned vide Ministerial Orders No 530/1597 of 23rd November 2015 and Article 30 of Presidential Decree No 1/11 of 18 April 1992

which empowered the Minister of Home Affairs to take safeguard measures in civil society organisation's involvement in the country's political affairs or a breach of public order. By urging their members to participate in an insurrectional movement, the Applicants endangered the nation and in banning them, the Minister was not obliged to resort to national courts. Moreover, the Court had no jurisdiction to entertain the matter or grant the remedies sought.

The 2nd Respondent submitted that the circumstances giving rise to this case, came to his attention upon the filing of the Reference and it would not be tenable to commence an investigation into the matter as it was *sub judice*. Furthermore, the case disclosed no a cause of action against the Secretary General who had no role in the ongoing Inter-Burundi Dialogue which commenced in 2006 where civil society organisations could have sought remedies. Three (3) Communiqués of the Summit of Heads of State or Government were produced indicating that the alleged instability in the Republic of Burundi was being handled by the Summit, and that there has been continuous reporting.

Held

1. Contesting jurisdiction on some of the remedies is not the same thing as contesting the jurisdiction of the Court to entertain the Reference. Remedy refers to the means of enforcing a right or preventing a wrong; legal or equitable relief. A court will give a remedy after it finds there has been a legal wrong committed against a party. The declarations sought are remedies designed to make amends for something wrong that has happened, which would follow the Court's findings of both violation of law and the infliction of injury. Nothing in Article 3(3) (b) of the Treaty is applicable to the instant Reference.
2. The 1st Respondent's affidavit evidence attested that the Applicants' breached public order. This was not rebutted beyond the assertion in submissions that the 1st Respondent bore the burden of proof. Under Article 30 of Presidential Decree No 1/11 of 18 April 1992 the Minister of interior' may order safeguard measures on any organisation which infringes its statutes, the mandatory provisions of the Decree-Law or public order. The terms 'Minister of interior' and 'Minister of Home Affairs' denote basically the same thing. Accordingly, Ministerial Order No 530/1922 of 19th October 2016 was issued in compliance with the Burundian law and does not infringe Articles 6(d), 7(2) and 127(3) and (4) of the Treaty.
3. Whereas the Secretary General investigates and indicts, it is the function of the Council to progress matters to court in the light of the accomplished investigation. Juxtaposing the list of the constituent elements of the duty of the Secretary General and the sequence of activities culminating in the issuance of the Communiqués, the 2nd Respondent complied with all the elements of his duty under Article 29(1) of the Treaty. The matter was reported to Summit through the Sectoral Committee and the Council of Ministers. Therefore, no cause of action was established against the 2nd Respondent

Cases cited

Burundi Journalists' Union v AG of Burundi [2011-2015] EACJLR 299, Ref. No. 7 of 2013
 Democratic Party v Secretary General of EAC & Ors [2011-2015] EACJLR 32, Ref. No.2 of 2012
 East African Civil Society Organisation Forum v AG of Burundi & Ors, EACJ Appeal No. 4 of 2016
 East African Law Society v AG of Burundi & Anor [2012-2015] EACJLR 466, Ref. No.1 of 2014
 James Katabazi v AG of Uganda [2005-2011] EACJLR 51, Ref. No. 1 of 2007

Plaxeda Rugumba v AG of Rwanda [2005-2011] EACJLR 226, Ref. No. 8 of 2010

Prof. Anyang' Nyong'o & Ors v AG of Kenya & Ors [2005-2011] EACJLR 16, Ref. No.1 of 2006

Sitenda Sebalu v Secretary General of EAC & Anor [2005-2011] EACJLR 160, Ref. No.1 of 2010

Editorial Note: Appeal No. 2 of 2020 is pending before the Appellate Division

JUDGMENT

Introduction

1. This Reference was brought under Articles 6(d), 7(2) and 127(3) and (4) of the Treaty for the Establishment of the East African Community ('the Treaty'), challenging the banning the Applicants' operational activities by the Government of Burundi, an act that allegedly constitutes a violation of Burundian law, the Treaty, as well as pertinent international legal instruments.
2. The Applicants are five (5) non-governmental organisations (NGOs) incorporated under Presidential Decree No. 1/11 of 18/04/1992 that regulates the activities of non-profit associations in Burundi. The Applicants are all resident in Burundi although some of their officers reside outside that Partner State.
3. The First Respondent is the Attorney General of the Republic of Burundi, sued on behalf of the Government of Burundi as its Principal Legal Advisor. The Second Respondent is the Secretary General of the East African Community (EAC), sued on behalf of the EAC, being the Principal Executive Officer of the Community and the Head of its Secretariat.
4. At the trial, the Applicants were represented by Mr. Donald Deya and Mr. Nelson Ndeki. On the other hand, the First Respondent was represented by Mr. Diomedé Vizikiyo, State Counsel; while Dr. Anthony Kafumbe, Counsel to the Community, appeared on behalf of the Second Respondent.

Background

5. In connection with the events in Burundi in the period from 2015 to 2016, the Burundi Prosecutor General froze the Applicants' bank accounts in the context of prosecutions that arose out of the insurrections and abortive *coup d'état* in that period.
6. Subsequently, the Minister of Home Affairs issued the Ministerial Order No 530/1597 of 23/11/2015, suspending the Applicants' activities. On this matter, the Applicants were not given the opportunity to make presentations, neither before the suspension nor after the suspension.
7. Around eleven months later, the Minister issued the Ministerial Order No 530/1922 of 19/10/2016, banning their activities. Again, they were not availed the opportunity to make their case before the banning order.
8. In the event, the Applicants made oral and written communication with Second Respondent for his intervention in the matter but in vain.
9. Aggrieved by the steps that culminated in the ban of their activities, as well as the Second Respondent's failure to intervene, the Applicants lodged this Reference on 19th December 2016.

Applicants' Case

10. The Applicants' case is set out in their Statement of Reference; Affidavits sworn in Kigali by one Ntiburumunsi, Ernest Nkurunza and Gervais Nibigiraon 20th

and 21st November 2018 respectively, on 20th November 2018 in Brussels by Pierre Caver Mbonimpa and Janvier Bigirimana, and on 21st November 2019 in Kampala by Dushimirimana Leatitia; and written submissions filed on 25th January 2019, as well as oral highlights thereof made during the hearing on 18th March 2019.

11. It is the Applicants' case that the procedures adopted by the Minister of Home Affairs and leading to the ban of their activities were not in accordance with the laws of Burundi, particularly the Presidential Decree No 1/11 of 18/04/1992 that regulates non-profit organisations. The Applicants contend that the actions of the First Respondent and the omissions of the Second Respondent were unlawful in that they constituted infringements of Articles: 6(d), 7(2) and 127(3) and (4) of the Treaty.
12. The Applicants seek the following reliefs:
 - a) A declaration that the system of administration and governance in Burundi is not conducive to enabling environment for civil society.
 - b) A declaration that by virtue of the damaging decision taken by the Minister of Home Affairs and Prosecutor General, civil society in Burundi is tremendously threatened, its activities sabotaged, and its future undermined and hence a breach of the relevant provisions in Articles 3(3) (b), 6(d), 7(2) and Article 127(3) (4) of the Treaty and the Arusha Accord.
 - c) A declaration that the procedure adapted and employed by the Minister of Home Affairs was in breach of International Instruments on the principles of separation of powers and the right to a fair trial.
 - d) A declaration that the Ministerial Ordinance infringes upon and is in contravention of Article 3(3) (b), 6(d) and 7(2) and 127(3) (4) of the Treaty.
 - e) An Order immediately and forthwith quashing, setting aside and or lifting the Ministerial Ordinance and related decisions including the freezing of the NGO's bank accounts.
 - f) An Order directing the Government of Burundi to put in place specific mechanisms aimed at ensuring enabling environment for civil society in Burundi.
 - g) An Order directing the Secretary General of the of the EAC to constitute and commission an evaluation team to establish whether or not the government and administration system in the Republic of Burundi are in line with the relevant provisions of the Treaty and whether the Republic of Burundi should continue being a member of the EAC.
 - h) An Order directing the Government of the Republic of Burundi, to appear and file a progress report on mechanisms and steps taken towards the implementation of the principles of good governance to this Honourable Court every quarter or such other lesser period as the Court shall deem expedient.
 - i) An Order that the costs of and incidental to this Reference be met by the Respondents.
 - j) That this Honourable Court be pleased to make such further or other.

First Respondent's Case

13. It is the First Respondent's case that the action complained of in the Reference violated neither Burundian Law nor the Treaty. Learned Counsel for the First Respondent argued that the procedure that culminated in the banning of the Applicant Civil Society organisations ensued in strict compliance with the Article 30(2) of the Presidential Decree No. 11 of 18th April 1992, which empowers the Minister of Home Affairs to take measures of safeguard where the involvement of a civil society organisation in the country's political affairs or in breaching public order arises. It was his contention that accordingly the said law does not oblige the Minister to resort to the national court on the matter of banning a civil society organisation. In that way, from his perspective, measures taken under Article 30(2) of that law did not violate the principles of good governance under Article 6(d) and 7(2) of the Treaty. He clarified his position by distinguishing between the regimes established by the first two sub-articles of Article 30: 30(1) that captures the resolution or liquidation of an association that is no longer able to meet its obligation *vis-a-vis* third party, and 30(2), which deals with the banning of an association on ground of meddling in political affairs or of committing breach of public order and security.
14. He further argued that when leaders of the Applicant Civil Society Organisations called upon their members to participate in an insurrectional movement they were endangering the nation, and failure to take measures to ban them would amount to violation of good governance under Article 6(d) and 7(2) of the Treaty. It was also his contention that there has been an enabling environment for private sector and civil society in the Respondent State because many of the civil society organisations that did not call their members to participate in the insurrectional movement had been carrying on their activities. Since they had not involved themselves in political affairs, they were functioning peacefully and enjoying the state of good governance and rule of law in the Respondent State. Thus, in his view, the Ministerial Order No 530/1922 of 19/10/2016 did not violate Article 127(3) and (4) of the Treaty in any way.
15. In conclusion, learned Counsel for the First Respondent opined that the Ministerial Order banning the Applicants was taken in accordance with the law in order to safeguard public order and security, and in conformity with the East African Treaty. On that basis the Learned Counsel pleads that prayers 4 and 5 be dismissed on ground of no violation and prayer 5, 6, 7 and 8 on ground that the Court has no jurisdiction to order them. Thus, he prays that the Reference against his client be dismissed.

Second Respondent's Case

16. On his part, Learned Counsel for the Second Respondent did not contest the jurisdiction of the Court, but challenged the case against his client on account of its failure to disclose a cause of action against him given that the office of the Secretary General had not played any role in the matter presently before the Court.
17. Learned Counsel argued that the circumstances giving rise to the current Reference only came to the attention of the Second Reference upon the filing of the Reference and it would not be tenable on the part of his client to commence an investigation into a matter that was now *sub judice*. He further submitted that since 2006 there had been an ongoing Inter-Burundi Dialogue that had served as a window where

civil society organisations could influence what happened in Burundi and seek remedies to what they thought was unsatisfactory. He cited *East African Civil Society Organisation Forum v. The Attorney-General of Burundi & 2 Others*⁶⁶ in support of his case.

Issues for Determination

18. At a Scheduling Conference held on 8th November 2018, the Parties framed the following issues for determination:
- a) Whether the East African Court of Justice has jurisdiction to hear and determine the Reference
 - b) Whether there is a cause of action against the Secretary-General of the East African Community.
 - c) Whether the banning of the Applicants violates the Articles 3(3) (b), 6(d) and 7(1) (2) and 127(3) (4) of the Treaty.
 - d) Whether the Applicants are entitled to the remedies sought

Court's Determination

Issue No. 1: Whether the East African Court of Justice has jurisdiction to hear and determine the Reference.

19. Counsel for the First Respondent conceded that this Court derives the mandate to interpret, apply, and ensure compliance with the Treaty from Article 23(1), 27(1) and (2) and Article 30 thereof. In line with that concession, Learned Counsel for the First Respondent clearly stated that he was not contesting the jurisdiction of the Court to entertain the matter but invited it to note that the Applicants seek ten remedies some of which fall outside its jurisdiction. He went on to point out that the remedies under paragraphs (i), (ii), (iii), (iv), (x) and (xi) might be granted if proved by the Applicants, but the remedies sought under (v), (vi), (vii), and (viii) could not be granted, being matters that (in his view) fall outside the jurisdiction of the Court. He cited the case of *Hilaire Ndayizamba vs The Attorney General of the Republic of Burundi and The Secretary General of the East African Community*,⁶⁷ where the Court held (p. 12, para. 34):

We are of the decided opinion, and in agreement with the Respondents, that the Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference, and that it is not clothed with the jurisdiction to grant prayers (c) and (d), since the latter clearly falls outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

20. On that basis, learned Counsel for the First Respondent concluded that this Court lacked jurisdiction to grant remedies which fall outside its jurisdiction as provided for by Article 23, 27 as read with Article 30 of the Treaty. The Second Respondent did not contest the jurisdiction of the Court, thus detached itself from the jurisdiction issue and leaving it as an issue of contention between the First Respondent and the Applicants.
21. Conversely, it was argued for the Applicants that this Court does have jurisdiction to hear and determine this Reference under both Article 27(1) and 30(1) since the matter relates to the interpretation of the Treaty. Articles 27(1) and 30(1)

⁶⁶ Reference No. 2 of 2015

⁶⁷ Reference No.3 of 2012

read as follows:

Article 27(1)

The Court shall initially have jurisdiction over the interpretation and application of this Treaty: Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Article 30(1)

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

22. It was also the Applicants' contention that they had sought the interpretation and application of Articles 6(d), 7(2) and 127(3) and (4) of the Treaty as the interpretation and application of the Treaty does not fall within the jurisdiction conferred by the Treaty on organs of Partner States. For avoidance of doubt, we reproduce the cited articles below.

Article 6(d)

a) The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

b) (..)

(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;

Article 7(2)

The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

Article 127

(1) (...)

(2) (.....)

(3) The Partner States agree to promote enabling environment for the participation of civil society in the development activities within the Community.

(4) The Secretary General shall provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.

23. To buttress his position, Counsel for the Applicants relied on international jurisprudence codified by the International Law Commission, particularly Article 4 of Draft Articles on Responsibility of State for Internationally Wrongful Acts⁶⁸. Article 4 reads:

⁶⁸ http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

24. To guide the interpretation of Article 4 as cited above, Mr. Deya cited paragraph(6) of the Commentary to the Draft Articles, which reads:

Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.

25. He further invoked the case of *Mohamed Abubakar vs United Republic of Tanzania*,⁶⁹ where it was held:

The Respondent State has violated Article 7 of the Charter and Article 14 of the Covenant as regards the Applicant's rights to defend himself and have the benefit of a Counsel at the time of his arrest; to obtain free legal assistance during the judicial proceedings; to be promptly given the documents in the records to enable him defend himself; his defense based on the fact that the Prosecutor before the District Court had a conflict of interest with the victim of the armed robbery, to be considered by the Judge; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade; and to have his alibi defense given serious consideration by the Respondent State's Police and Judicial Authorities.

26. In the light of the above-mentioned jurisprudence and precedents, learned Counsel for the Applicants maintained that, as an international court responsible for interpreting and applying international legal instruments, such as the EAC Treaty, this Court did have jurisdiction to determine whether a decision and/or an omission of any organ of the Respondent State was in violation that State's international obligation. To buttress this position, he referred us to the case of *Burundi Journalists' Union vs Attorney General of Burundi*,⁷⁰ where the Court decided that it had jurisdiction over matters where violation of the EAC Treaty were alleged; stating as follows:

With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty. (...)The above jurisdiction differs from that conferred by Article 27(1) which provides that this Court shall "initially have jurisdiction over the

⁶⁹ The African Court of Human and People's Rights, Application 007/2013, *Mohamed Abubakar vs The United Republic of Tanzania*. Judgement of 3 June 2016.

⁷⁰ *East African Court of Justice, 1st Instance Division, Reference No. 7 of 2013. Judgement of 15 May 2015, paras. 40 - 41.*

interpretation of the Treaty.” The proviso thereof is irrelevant for purposes of this Reference, but suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court’s jurisdiction.

27. On our part, having carefully considered the arguments of both Parties, we find that contesting jurisdiction with regard to some of the remedies sought in a Reference is not the same thing as contesting the jurisdiction of the Court to entertain the Reference. Indeed, at paragraph 31 of the Judgment in the *Burundi Journalists Union* case, this Court rendered itself as follows:

Given the foregoing and guided by the Courts previous decisions on similar matters [see for example - *Plaxeda Rugumba case (supra)* , *professor Peter Anyang’ Nyong’o & 10 others vs. Attorney General of Kenya & 3 others, EACJ Ref. No.1 of 2006; James Katabazi’s case (supra)*], we are of the decided opinion, and in agreement with the Respondents, that the Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference, and that it is not clothed with the jurisdiction to grant prayers (c) and (d), since the latter clearly falls outside the Court’s jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

28. Moreover, Counsel for the First Respondent expressly conceded this Court’s jurisdiction to hear and determine the issue, save for some of the remedies sought. This formulation on the part of the First Respondent in effect varied the issue. As a result of that variation, we find that the issue, as framed, ceased to be a point of contention between the parties. We so hold.

29. However, in relation to prayers (c) and (d) that were perceived by the First Respondent to have fallen outside the jurisdiction of this Court, it is our considered view that those prayers are remedies and, by definition, remedies would follow the Court’s findings of both violation of law and the infliction of injury. *Black’s Law Dictionary (13 ed., 2014)* reflects this sequencing in its definition of the concept of remedies by denoting the term ‘remedy’ to refer to ‘the means of enforcing a right or preventing a wrong; legal or equitable relief’.

30. A related source propounds the granting of remedies as a sequel to the finding of violation in the following terms:

A “remedy” is a legal reparation ordered by a court, i.e. a court order designed to make amends for something wrong that has happened. A court will give a remedy after it finds there has been a legal wrong committed against a party. This formal finding is very important.⁷¹

31. In spite of that concession on the part of the First Respondent, it seems to us that an understanding of the matters over which the Court has jurisdiction is critical for the determination of this issue, down to the remedies in issue between the Parties. We find apposite guidance on this point from both Article 27(1) and 30(1) of the Treaty, as well as the jurisprudence developed by this Court, particularly the landmark case of *Burundi Journalists’ Union vs Attorney General of Burundi (supra)*. It is clear to us that the Court has jurisdiction to hear and

⁷¹ www.google.com/search?client=firefox-b-d&q=remady%2Clegal+proceeding

determine any Reference in which violation of the Treaty is alleged. We so hold.

Issue No. 2: Whether there is a cause of action against the Secretary General of the East African Community

32. In submissions, learned Counsel for the Applicants faulted the Second Respondent for failing (or neglecting) to ensure adherence to the provisions of the Treaty, arguing that on that account was a cause of action against the 2nd Respondent. It was his argument that as the Chief Executive Advisor to the East African Community (save for the Court and the Assembly), the Second Respondent was mandated to play a supervisory role over the Partner States to ensure that they comply with the provisions of the Treaty. Further, that the said Respondent ought to weigh in on all the important legal that arose in the Community, but had failed to do so with regard to the matters in contention under the instant Reference. Counsel thus concluded that the Second Respondent ought to be held accountable for failure to discharge his duties under Articles 4(3). 29(1), 67(3) and 71(1) of the Treaty.

33. For ease of reference, we reproduce the said provisions below:

Article 4(3)

The Community shall, as a body corporate, be represented by the Secretary General.

Article 29(1)

Where the Secretary General considers that a Partner State has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned for that Partner State to submit its observations on the findings.

Article 67(3)

The Secretary General shall be the principal executive officer of the Community and shall:

- a. be the head of the Secretariat;
- b.
- c.
- d. carry out such other duties as are conferred upon him by this Treaty or by the Council from time to time.

Article 71(1)(d)

The Secretariat shall be responsible for:

- a.
- b.
- c.
- d. the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination;
- e. (...)
- p. such other matters that may be provided for under this Treaty.

34. Mr. Deya further cited the following decisions of this Court in support of his case: *Sitenda Sebalu v Secretary General of the EAC and Attorney General of*

Uganda,⁷² *East African Law Society v AG of Burundi and the SG of the EAC*⁷³, and *Democratic Party v The Secretary General of EAC and 4 others*⁷⁴. In the *Sitenda Sebalu* case, this Court held:

The Secretary General (in that case the 1st Respondent), representing the Community, takes no effective corrective measures, such as invoking Article 29 of the Treaty, justification arises for a complainant to seek alternative legal means of obtaining redress. The EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission. It would be well to remember that the court is a primary avenue through which the people can secure not only proper interpretation and application of the Treaty but also effective and expeditious compliance therewith.

35. On the other hand, in the case of *Democratic Party v The Secretary General of EAC and 4 others* (*supra*), the Court followed cited with approval its earlier decision in the *Katabazi* case and held:

Article 29(1) of the Treaty requires the Secretary General to submit his or her findings to the partner state concerned and that ... there is nothing to prohibit the Secretary General from conducting an investigation on his/her own initiative.

36. In the more recent case of *East African Law Society v AG of Burundi and the SG of the EAC* (*supra*), this Court found a cause of action against the Secretary General of the East Africa Community for failing to take appropriate action against the Partner State that had dishonoured its obligations under the Treaty.
37. On the basis of the foregoing precedents, it was argued for the Applicants that they had engaged the Second Respondent on the situation in Burundi in two (2) respects: they engaged him on more than one occasion to intervene, and they engaged him through a copy of the correspondence from the president of the East African Law Society to the prosecutor of the International Criminal Court. We do note, however, that this assertion was contested in paragraph 4 of the Response to the Reference, where it is averred that the Second Respondent had not only provided an enabling environment for civil society organisations in the Community, as provided by the Treaty, but had also catered for the private sector and other interest groups. This averment is supported by the attestation in paragraph 7 of the Affidavit in support of the Response to the Reference. In the same vein, the averment in paragraph 4 of the Additional Affidavit affirms that neither the Second Respondent nor any other person in the Secretariat could recall any civil society organisation in Burundi engaging the Second Respondent about any deteriorating situation of human rights and shrinking civil space in Burundi to which the Second Respondent did not propose any remedy. By implication, thus it aligns with the pleading in paragraph 4 of the Second Respondent's Response to the Reference.
38. Indeed, learned Counsel to the Community (CTC), Dr. Kafumbe, referred us to Annexures 1 – 5 of the Response to the Reference, all of which demonstrate the

⁷² Reference No. 1 of 2010

⁷³ Reference No.1 of 2014, paragraphs 60 and 61

⁷⁴ Reference No.2 of 2012

Second Respondent's activities as undertaken under the directive of the Council of Ministers and in accordance with the Calendar of Activities of the Secretariat. These activities and Calendar do cover the situation in Burundi.

39. Dr. Kafumbe further invited this Court to have regard to three (3) Communiqués of the Summit of the East African Heads of States in the accompanying List of Authorities. The Communiqués are:
- a) Communiqué emanating from the 17th Extraordinary Summit (of September 2016), which touches on Burundi in paragraph 24;
 - b) Communiqué emanating from the 18th Ordinary Summit of the East African Heads of States (of May 2017), which mentions Burundi in paragraph 21;
 - c) Communiqué emanating from 19th Ordinary Summit of the East African Heads of States (of February 2018), which pertains to Burundi in paragraph 22 and
 - d) Communiqué 20th emanating from Ordinary Summit of the Heads of States (of 2019), which makes reference to Burundi in paragraph 21.
40. These Communiqués indicate that the affair of Burundi has been in the domain of the Summit of the East African Heads of States since September 2016, or even earlier. Dr. Kafumbe also intimated that the Inter-Burundi Dialogue was initiated to address the issues arising from the alleged instability in the Republic of Burundi, that the matter was already being handled by the Summit, and that there has been continuous reporting.
41. In response to the allegations arising from additional affidavits of the Applicants, learned Counsel for the Second Respondent stated that his client had convened the "Forum for the Secretary General" in Burundi in accordance with Article 127(4) of the Treaty, in line with the directives of the Council of Ministers under Article 16 and approved calendar of activities, and in line with the directive of the Sectoral Council under Article 14(3)(i). He thus maintained that the Second Respondent neither participated in what happened in Burundi nor did that office have any control over it. On that basis, as argued hereinabove, he implores the court to dismiss the Reference as against the Second Respondent.
42. We have carefully considered the arguments and evidence of both sides. As quite rightly opined by both sides, the pertinent functions of the Second Respondent are spelt out in Articles 29(1), 67(3) and 71(1), which have been reproduced hereinabove. His other duties in relation to the Council of Ministers are prescribed by Articles 14, 16, and 127(4), which are reproduced below.

Article 14(3)(i)

For purposes of paragraph 1 of this Article, the Council shall:

- (i) establish from among its members, Sectoral Councils to deal with such matters that arise under this Treaty as the Council may delegate or assign to them and the decisions of such Sectoral Councils shall be deemed to be decisions of the Council.

Article 16

Subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and

the Assembly within their jurisdictions, and on those to whom they may under this Treaty be addressed.

Article 127(4)

The Secretary General shall provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.

43. From the totality of the cited Articles, what can be discerned as the elements of the duty of the Secretary General (the Second Respondent) are:

- a) among other functions, the Secretary General (the Second Respondent in the Reference) represents the Community, as a body corporate, since a corporate body acts only through the agency of a natural person [Article 4(1)];
- b) he polices the Partner States with reference to their Treaty obligation;
- c) on his own initiative, he investigates where he considers that a Partner State has failed to fulfil an obligation under the Treaty or has infringed a provision thereof;
- d) he submits his finding to the pertinent partner state to submit her observations on the finding within 40 days;
- e) If he either receives no response from that partner state or receives unsatisfactory comments, he submits his report to the Council;
- f) upon receiving that report, the Council decides either to resolve the issue itself or refers the matter to the Court for adjudication.

44. Hence, by analogy, whereas the Secretary General investigates and indicts, it is the function of the Council to progress matters to court in the light of accomplished investigation.

45. This Court has had many occasions to address the question of the cause of action against the Secretary General (the Second Respondent in this Reference). It has consistently found a cause of action against the Secretary General to have been sufficiently established where the matter relates to the violation of Article 29(1) and associated Articles of the Treaty. See *Sitenda Sebalu v Secretary General of the EAC and Attorney General of Uganda*, *East African Law Society v AG of Burundi and the SG of the EAC*, and *Democratic Party v The Secretary General of EAC and 4 others* (all *supra*). In the present Reference, the case of *Auto Garage v Motokov*⁷⁵ was also invoked with regard to what amounts to cause of action. We are constrained to observe that in the *Anyang Nyong'o* case,⁷⁶ the Court disallowed the definition of a cause of action in the *Auto Garage* case, distinguishing the parameters of the common law cause of action described therein from those that define a cause of action under the EACJ. It held:

That description (in *Auto Garage vs. Motokov*) sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However, a cause of action created by statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the statute or legislation which creates it. This reference is not an action seeking remedy for violation of the claimants' common law rights. It is an action brought for enforcement of provisions of the Treaty through a

⁷⁵ (1971), EA 514

⁷⁶ Reference No. 1 of 2006. pp. 15-16

procedure prescribed by the Treaty. The Treaty provides for a number of actions that may be brought to this Court for adjudication. Articles 28, 29 and 30 virtually create special causes of action, which different parties may refer to this Court for adjudication. Under Article 28(1) a Partner State may refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under Article 28(2) a Partner State may also make a reference to this Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under Article 29 the Secretary General may also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State.

46. On the other hand, in the case of *James Katabazi & 21 others vs. The Secretary General of the East African Community & Another*⁷⁷, the Court interpreted Article 29(1) as follows:

The Secretary General is required to “submit his or her findings to the Partner State concerned”. It is obvious to us that before the Secretary General is required to do so, she or he must have done some investigation. From the unambiguous words of that sub-Article there is nothing prohibiting the Secretary General from conducting an investigation on his/her own initiative. Therefore, the glaring answer to the second issue is: Yes the Secretary General can on his own initiative investigate such matters. But the real issue here is not whether he can but whether the Secretary General, that is, the 1st respondent, should have done so. It was in this regard that there was heated debate in the preliminary objection on whether or not the Secretary General must have intelligence of some activity happening in a Partner State before he undertakes an investigation. We are of the decided opinion that without knowledge the Secretary General could not be expected to conduct any investigation and come up with a report under Article 29(1).

47. Meanwhile, in the case of *East African Civil Society Organisation Forum (EACSOF) vs. The Attorney General of Burundi, Commission Electorale Nationale Independante and the Secretary General, EACJ Appeal No. 4 of 2016*, the Court did not find the Secretary General accountable for alleged violation of duties. It was held:

Whereas the Secretary General’s powers and functions are clearly spelt out in Article 67 and 71 of the Treaty, we have seen no evidence that he has breached any of his duties in the context of Reference. We reiterate that the Reference is predicated upon a specific decision of the Constitutional Court of Burundi issued on 5th May, 2015 with attendant events. What was the role of the Secretary General in that matter? None whatsoever.

48. The common thread running through the *Katabazi* case and the *EACSOF* appeal is that each was an instance where the Court could not find a cause of action against the Secretary General on ground of his proven compliance with Article

⁷⁷ *EACJ Reference No. 1 of 2007*

29 (1) and allied provisions of the Treaty, or on ground of the failure of the Applicant to show a cause of action premised on violation thereof. Thus, in each case, the Court has had the occasion to interpret Article 29(1). In this Reference, the Applicants seek to hold the Second Respondent accountable for failure to take action under Article 29(1) in connection to the alleged deteriorating political situation and shrinking space for civil society organisations in Burundi. The action the Applicants had hoped to see happen comprises the steps numerated above as the constituent elements of the duty of the Secretary General (see paragraph 52 *supra*).

49. On the other hand, there is the sequence of actions that has culminated in the four Communiqués, mentioned earlier in this judgment. The sequence consists of:

- a) Actions of the Sectoral Council of Ministers in response to some reporting, which, among other directives, directed the Secretary General to resume meeting in Bujumbura;
- b) Actions of the Council of Ministers, which especially has resulted in the Calendar of Activities and the directive to the partner States to abide thereby;
- c) Actions of the Summit, which resulted in the appointed a Head of State to mediate toward the settlement in Burundi and the issuing of the Communiqués.

50. This sequence is revealed by the four Communiqués, along with other Annexures, and Affidavits filed on behalf of the Second Respondent. By juxtaposing the list of the constituent elements of the duty of the Secretary General (the Second Respondent, in this Reference) and the sequence of activities culminating in the issuance of the Communiqués, it becomes apparent that the Second Respondent has complied with all the elements of his duty under Article 29(1) and associated Articles of the Treaty. It does also seem to us that there was due reporting which culminated into the presentation of the matter to the Summit through the Sectoral Committee and the Council of Ministers. Therefore, we find that no cause of action has been established against the said Respondent in this Reference. We so hold.

Issue No. 3: Whether the banning of the Applicants violates Articles 3(3) (b), 6(d) and 7(1) (2) and 127(3) (4) of the Treaty.

51. The Applicants faulted the Respondent State for issuing the Ministerial Order No. 530/1922 of 19 /10/ 2019, which (in their view) ran contrary to the Presidential Decree No 1/11 of 18/04/ 1992. They do also contest the freezing and seizing their bank accounts vide the Prosecutor General's decision dated 19/11/2015.

52. It was argued for the Applicants that:

- a) The act of banning the Applicants coupled with the continued silence and inaction by the Secretary General (the Second Respondent) constitute violation of Articles 3(3) (b), 6(d), 7(2) and 127(3) of the Treaty;
- b) The action of the Minister of Home Affairs was not only in violation of Burundi's obligations under the EAC Treaty, but also in violation of the provisions of Burundi law relating to the dissolution of associations as provided for under the Presidential Decree No 1/11 of 18/04/1992, and

- c) By failing to follow the procedures prescribed by Burundi's own law, the Ministerial Order No 530/1922 of 19/10/2016 and No 530/1597 of 23/11/2015 contravened the principal of rule of law, as the correct procedure to ban the Applicants should have been through a competent court.

53. In relation to the principle of the rule of law captured by Article 6(d) of the Treaty, the learned counsel resorted to the definition offered by the UN Secretary-General in his Report of 23/08/2004.⁷⁸We reproduce his definition below:

The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle Of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

54. Learned Counsel further referred us to the following international instruments:

- a) Article 10 of the African Charter on Human and People's Rights; Article 22 of the International Covenant on Civil and Political Rights (16 December 1966);
- b) Article 20(1) of the Universal Declaration of Human Rights(1948);
- c) Articles 5 and 12 of the United Nations Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1998) (UN Declaration of Human Rights Defenders);
- d) UN Human Rights Council Resolution 21/16 (2012);
- e) ACHPR Resolution 5/1992 on the Right to Freedom of Association, and
- f) Article 28 of the Kigali Declaration (2003) recognising the role and importance CSO.

55. We understood the Applicants' case to premised on their collective right to association and the right to pursue collective interests in groups such as NGOs. This right comprises the right to form and join associations freely any interference with which being permissible only to the extent that it is be prescribed by law. Reference in that regard was made to the African Court on Human and Peoples' Rights case of *Monim Elgak, Osman Hummeida & Amir Suliman v Sudan*.⁷⁹Learned Counsel for the Applicant did also refer us to Guideline 29 of the African Union on *Guidelines on Freedom of Association Assembly in Africa*,⁸⁰to argue that States are enjoined to uphold the right to freedom of association save

⁷⁸ The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General, p.4, para. 6.

Available from <https://digitallibrary.un.org/record/527647>.

⁷⁹ Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* (2014), para. 118

⁸⁰ *Guidelines on Freedom of Association and Assembly in Africa*, p.14. Available from <http://www.achpr.org/files/instruments/freedom-association>

where a legitimate reason exists for a limitation on the freedom of association.

Guideline 29 states:

Any limitations imposed by states shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that purpose within a democratic society, as these principles are understood in the light of regional and international human rights law.

56. Citing *Manariyo Desire v The Attorney General of Burundi*,⁸¹ learned Counsel argued that the burden of proof of the Applicants' participation in an insurrectional movement lay with the First Respondent. In that case the Court *inter alia* held that it was the litigant that sought to establish a fact that bore the burden of proving it. On the question as to whether a state action meets the general standard of rule of law and good governance, he referred us to the case of *Managing Editor, Mseto and Another v Attorney General of Tanzania*,⁸² where the Court held:

The Treaty gives no pointer in answer to this question but by reference to other courts, it has generally been held that the test for reasonableness and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of higher law.

57. Finally, learned Counsel for the Applicants maintained that the First Respondent had deprived his clients of the right to property in the form of money in their bank accounts; and that as that deprivation had not been done in public interest, there was no justification for it.
58. Conversely, it was argued for the First Respondent that Article 3(3)(b) was irrelevant to the instant

Reference as that Article relates to matters to be taken into account by Partner States in considering the application by a foreign country for the member of the Community. With regard to Articles 6(d) and 7(2), learned Counsel for the First Respondent argued that in so far as the 2 legal provisions relate to the fundamental principles that govern the achievement of the objectives of the Community, the banning of the Applicant associations had been taken in compliance therewith.

59. It was his contention that since 26th April 2015, the Applicants had been participating in an insurrectional movement that had not only brought chaos to Burundi, but had culminated in the aborted *Coup d'Etat* of 13th May 2015. Consequently, the Prosecutor General of Burundi was constrained to open criminal charges against the Applicants' legal representatives, who had been operating outside the country to destabilize the peace and security of Burundi. He further argued that whereas the Constitution of Burundi did recognize the right to freedom of association envisaged by Article 127(3) the Treaty, under that constitutional regime the legal personality of a civil society organisation was granted by the Minister of Home Affairs under Article 3 of the Presidential Decree. However, the Minister of Home Affairs was mandated to take safeguard measures under Article 30(2) of the Decree if the activities of a civil-society organisation endangered public order, as the principle rule of law does not

⁸¹ *Reference No 8 of 2015, para. 66*

⁸² *Reference No. 7 of 2016, para. 65.*

allow anarchy in the conduct of civil society activities. He invited the Court to agree with him that by going to the extent of participating in the activity leading to the aborted *Coup d'Etat*, the Applicants had rendered themselves political organisations and, therefore, had excluded themselves from the scope of the Presidential Decree No 1/11 of 18th April 1992, which provides the organic framework for non-profit organisations.

60. In conclusion, Mr. Kayobera maintained that the decision of the Minister of Home Affairs had not liquidated the Applicants, but had banned them. In his view, the said measures were undertaken as safeguard measures in accordance with Article 30(2) of the Presidential Decree, which empowers the Minister to take safeguard measures when public order is infringed. In his view, the decision was thus taken in compliance with the fundamental and operational principles enshrined in Articles 6(d) and 7(2) and 127 of the Treaty. Learned Counsel referred us to the case of *Bénoit Ndorimana v The Attorney General of the Republic of Burundi*,⁸³ where this Court declined to grant a consequential order sought on the premise that the applicant therein had not adduced evidence that there had been a Treaty violation imputable to the Respondent. He maintained that, as in that case, the present Applicant had not proven that the banning of the Applicant organisations violated Article 3(3) (b), 6(d), 7(2), and 127(3) and (4) of the Treaty.

61. We have carefully considered the rival arguments of both sides. As intimated by both Parties, compliance with the Treaty in the context of this Reference is compliance with Articles 6(d), 7(2), and 127(3) thereof. Those Articles are quoted hereinabove, and need not be reproduced below. What is in issue at this point is the legality of the sequence of actions that culminated in the banning of the Applicants in Burundi. There is contention between the Parties as to whether those actions did or did not violate the Burundian law and, as such, violated the cited provisions of the Treaty. We commence our determination with consideration of Article 3(3) (b). We reproduce it for ease of reference.

Article 3(3) (b)

Subject to paragraph 4 of this Article, the matters to be taken into account by the Partner States

in considering the application by a foreign country to become a member of, be associated with,

or participate in any of the activities of the Community, shall include that foreign country's:

(a)

(b) adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice.

62. As quite ably argued by learned Counsel for the First Respondent, we find nothing in that Treaty provision that is applicable to the instant Reference. The Respondent State is certainly not a 'foreign country' seeking to become a member of the Community; rather, it is already a partner State therein. We therefore find no merit in the Applicants' case in that regard.

63. We now turn to a consideration of Articles 6(d), 7(2) and 127(3) and (4) of the

⁸³ Reference No. 2 of 2013, p. 14, para. 44.

Treaty From the pleadings and submissions, we deduce both parties herein to be agreed on the following:

a) In relation to events in Burundi, a Commission was set up to inquire into the causes of the “insurrection”.

b) Based on the report of that Commission, the Prosecutor-General took a number of steps and submitted a request to the Minister of Home Affairs regarding the Applicant Organisations.

c) The Minister granted the request hence Ministerial Order No. 530/1597 of 23rd November 2015 was issued, suspending the activities of the Applicant organisations and, ultimately, banning their operations vide Ministerial Order No 530/1922 of 19 October 2016.

d) The banning was based on both the Ministerial Orders No 530/1597 of 23rd November 2015 and Article 30 of Presidential Decree No 1/11 of 18 April 1992.

64. It is the legality of the eventual banning of the Applicants’ activities that remains in issue. In that regard, Counsel for the Applicants challenged the banning on ground that ‘according to Article 30 of the Presidential Decree cases against non-profit association may be raised before competent courts in the case of breach of its constitution, or when the said non-profit association is no longer able to perform its obligations in line with its partners.’ (See paragraph 28 of the Statement of Reference). On the other hand, Counsel for the First Respondent contended that ‘the Minister of Home Affairs may take safeguard measures if the activities of the civil society endanger public order as provided for under Article 30(2) of the Decree-Law.’ (See the last half of the last sentence in the First Respondent’s written submission).

65. We reproduce the provisions of the invoked Burundi law below.

Article 32 of the Constitution of Burundi, 2005

The freedom of assembly and of association is guaranteed, as well as the right to found associations or organizations in accordance with the law.

Presidential Decree No. 1/11 of 18th April 1992

Article 1:

This Decree-Law is intended to govern the organization and the functioning of any non-profit organization whose legal existence is not subject to a particular law. In particular, mutual organizations, organizations of a political nature, public service corporations and foundations shall be excluded from its scope.

Article 30:

At the request of any interested person or the Public Prosecutor, the competent jurisdiction may dissolve any organization which is no longer able to honor its commitments *vis-à-vis* third parties, which allocates its assets or income to purposes other than the purpose for which it was established or which infringes its statutes, the mandatory provisions of this Decree-Law or public order. In the latter case, the Minister in charge of interior may, in advance, order safeguard measures, in particular those provided in Article 36 and

38 below.

Article 36:

The organization of foreigners, which is the subject of an application for judicial dissolution brought by the Public Prosecutor pursuant to Article 30 may jointly be prohibited from carrying out its activities by Order of the Minister in charge of Interior.

Article 37:

The period of the validity of this measure may not exceed two months.

Article 38:

On expiry of the term of suspension, the measure taken under the preceding Article shall be lifted *ipso jure*, unless the jurisdiction seized confirms them with a view to deciding on the dissolution of the Organization.

66. First and foremost, we note that Articles 36, 37 and 38 of the Presidential Decree No 1/11 of 18th April 1992 fall under the theme ‘SPECIAL PROVISIONS FOR ORGANIZATIONS OF FOREIGNER AND FOREIGN ORGANIZATION’, which is self-explanatory. On the other hand, this Reference pertains to organisations registered in Burundi and licenced to operate in that country. Further, the Reference is premised on the actions of the Burundian Government in relation to Applicant organisations that are Burundian civil-society entities. We therefore find Articles 36, 37 and 38 of the said Decree inapplicable to the matter before us. Consequently, we find no breach of those provisions of the Burundian law. We so hold.
67. We now revert to a consideration of Article 30 of the same Decree. Counsel for the applicants equated the reference in that Article to ‘competent jurisdiction’ to a ‘court’. However, in the absence of an authoritative definition equating “jurisdiction” to “court”, we find ourselves bound to determine what is meant by that term in the Decree by taking the ordinary meaning thereof within the context of that legal provision. In our considered view, “jurisdiction” in that context denotes “authority” that is inclusive of, but not restricted to, a court. The second limb to that provision clearly designates the ‘Minister in charge of interior’ as the competent office to order safeguard measures in the event of an infringement by any organisation of, among other things, public order. In the instant case, the First Respondent’s affidavit evidence did attest to the Applicants having breached public order. This attestation was not rebutted beyond the assertion in submissions that the First Respondent bore the burden of proof of that allegation.
68. Further, as we did observe earlier in this Judgment, Ministerial Order No 530/1922 of 19th October 2016 was issued by the Minister of Home Affairs under Article 30 of Presidential Decree No 1/11 of 18 April 1992 on the basis of the report of a Commission that had been set up to inquire into the causes of the “insurrection” in Burundi. We find the terms ‘Minister of interior’ and Minister of Home Affairs’ to denote basically the same thing and, accordingly, find the said Minister of Home Affairs to represent competent authority within the precincts of Article 30 of the Decree. Consequently, we are satisfied that Ministerial Order No 530/1922 of 19th October 2016 was issued in compliance with the Burundian

law and, accordingly, does not infringe Articles 6(d), 7(2) and 127(3) and (4) of the Treaty. In the result, we would answer this issue in the negative.

Issue No. 4: Whether the Applicants are entitled to the remedies sought

69. The Applicants sought the reliefs highlighted in paragraph 12 of this Judgment, which we do not find it necessary to reproduce here. Since all the issues have been resolved in favour of the Respondents, the substantive reliefs sought by the Applicants are not tenable.
70. On the question of costs, Rule 111(1) of this Court's Rules postulates that costs should follow the event unless the Court, for good reason, decides otherwise. In the instant Reference, where the Applicants have not succeeded, ordinarily the costs thereof would be to the Respondents. However, the Applicants are NGOs whose mandate essentially to provide necessary checks and balance to governments, and it was in the spirit of exercising this mandate that they filed the instant Reference. Consequently, we would depart from the general rule on costs and exercise our discretion to order each Party to bear its own costs.

Conclusion

71. In the final result, we hereby dismiss this Reference and order each party to bear its own costs.

It is so ordered.

*[Hon. Justice Fakihi A. R. Jundu retired from the court with effect from 30th June 2019, but he has signed the Judgment in terms of Article 25(3) of the Treaty.]

D. Deya & N. Ndeki, Counsel for the Applicants

D. Vizikiyo, Counsel for the 1st Respondent

A. Kafumbe, for the 2nd Respondent

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First Instance Division

Taxation Reference No. 1 of 2016

(Arising from Taxation Cause No. 1 of 2015; Arising from Reference No. 5 of 2013 and Consolidated Applications Nos. 8 and 9 of 2012)

The Inspector General of Government v Godfrey Magezi

Coram: I. Lenaola, DPJ; F. Ntezilyayo & F. Jundu, JJ
March 27, 2017

Instruction fees - Categories of legal practitioners- Different legal regime regulating State Attorney's - Fair reimbursement of costs – When to interfere in discretion in Taxing officer's discretion

Article 7(1) (f) of the Treaty - Rule 9(2),11(1) of the Third Schedule of the EACJ Rules of Procedure, 2013- Section 15 of the Government Proceedings Act Cap 77 Laws of Uganda

On 26th May 2016, the Taxing Officer in *Taxation Cause No. 1 of 2015: The Inspector General of Government Vs Godfrey Magezi*, declined to grant instruction fees to the Applicant stating that the Attorney General of the Republic of Uganda who represented the Applicant was performing his general duties as required of him under the Constitution of the Republic of Uganda and therefore was not entitled to instruction fees. Being dissatisfied, the Applicant brought this Taxation Reference averring that: the Taxing Officer erred in law in holding that the Applicant was not entitled to instructions fees, perusals, drawings and service; the denial was inconsistent with the core principle of equality of parties before courts of justice; and there is no provision either in domestic laws or in the EAC Treaty or Rules of this Court that bars lawyers from the office of the Attorney General from claiming instruction fees.

The Applicant also averred that Rule 9(2) of the Third Schedule of the Court's Rules does not envisage the exclusion of the Attorney General from the enjoyment of the benefits of the award of costs including instruction fees. That there was no justification to deny the Applicant costs on works and services incurred by the office of the Attorney General in pursuance of the defence of the Inspector General of Government. The money recovered through the taxed bill does not go into the pockets of the State Attorneys but goes back to the consolidated fund

In response, the Respondent submitted that Taxing Officer was mindful of Rule 9(2) and took into consideration the relevant circumstances especially the Attorney General's duties and rightly arrived at the conclusion that the Attorney General was not entitled to instruction fees.

Held

1. The Office of the Attorney General is a public office, an organ of the Government of the Republic of Uganda and that state attorneys from this office are public officers whose functions are regulated by a legal regime different from the one governing in-house Counsel of private corporations or other private legal

practitioners. Although state attorneys are entitled to practise as advocates, they are public officers who are paid salaries to represent the Government in Court, as part of their normal duties. Therefore, the application of a different approach in the allowance of instruction fees was justified by the different legal status applicable to the two categories of legal practitioners. The Taxing Officer had good reason to treat differently persons whose situations were different.

2. The Taxing Officer, when exercising her discretion upon certain materials placed before her in Taxation Cause No. 1 of 2015, did not misdirect herself nor did she apply any wrong principle in denying the Attorney General of the Republic of Uganda instruction fees and fees for perusals, drawings and service. There was no reason to interfere with the decision of the Taxing Officer. The Reference was thus dismissed.

Cases Cited

Bank of Uganda v Banco Arabe Espanol, SCC, App Number 23 of 1999
 Democratic Party & Anor v The AG of Uganda EACJ Ref. No. 3 of 2013
 Kipknei Kilach v D.P.P. & Ors, Petition No. 2 of 2013
 Paul Ssemogerere & Anor v AG of Uganda, SCC Appl No. 5 of 2001
 Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Ors (No. 3) [1972] EA 162
 The AG of Kenya v Prof. P. A. Nyong'o & Ors [2005-2011] EACJLR 68, Ref. No. 5 of 2010
 Zuberi v The Returning Officer & Anor [1973] EA 33

RULING

I. Introduction

1. By a Notice of Motion dated 8th June 2016, the Inspector General of Government of the Republic of Uganda, the Applicant, applied to this Court under Rule 114 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as “the Rules”) for orders that:
 - (a) The taxation ruling made by the learned Taxing Officer on 26th May 2016, denying the Applicant instruction fees in *Taxation Cause No. 1 of 2015: The Inspector General of Government Vs Godfrey Magezi* be set aside;
 - (b) Costs of this Taxation Reference be paid by the Respondent.
2. Before the Taxing Officer and before this Court, the Applicant was represented by Mr. George Kalemera, Ms. Arinaitwe Gorette and Mr. Ojambo Bichachi, all of them from the Attorney General’s Chambers of the Republic of Uganda, while the Respondent was represented by Mr. Mohamed Mbabazi, Advocate of M/S Nyanzi, Kiboneka and Mbabazi Advocates.

II. Factual Background

3. On 19th June 2014, this Court in Consolidated Applications Nos. 8 and 9 of 2014 made a ruling in which the Inspector General of Government of the Republic of Uganda was awarded costs as against the Respondent for being wrongly added as a party in Reference No. 5 of 2013.
4. A bill of costs was thereafter lodged on 17th April 2015 and when the parties appeared for taxation of the bill, both parties informed the learned Taxing Officer that they had agreed on disbursements at a total fee of United States Dollars Five Thousand (USD 5,000) as payable by the Respondent to the Applicant. The learned Taxing officer was further informed that the only items in dispute were items 1 to 20 and item 23 which related to instructions fees, perusals, drawings

and service.

5. On 26th May 2014, the learned Taxing Officer made a Ruling to the effect that the Attorney General in representing the Applicant was performing his general duties as required of him under the Constitution of the Republic of Uganda and therefore was not entitled to instruction fees as claimed. The Inspector General of Government being dissatisfied with that ruling has instituted the present Taxation Reference.

III. The Applicant's Case

6. The Applicant's case, as contained in the Notice of Motion aforesaid, is that the learned Taxing Officer erred in law when she found that the Applicant is not entitled to items 1 to 20 and item 23 of the bill of costs that related to instructions fees, perusals, drawings and service.
7. The Applicant further contended that denying the Attorney General of the Republic of Uganda instructions fees is inconsistent with the core principle of equality of parties before courts of justice and the principles for the establishment of the East African Community.

IV. The Respondent's Case

8. It is the Respondent's case that the learned Taxing Officer applied the right principles of law and correctly found that the Applicant was not entitled to items 1 to 20 and item 23 of the bill of costs related to instructions fees, perusals, drawings and service.

V. Issue for determination and submissions

9. In light of the parties' respective positions, the issue for determination was framed as to "Whether or not the learned Taxing Officer erred in law when she came to the conclusion that the Applicant is not entitled to instruction fees, perusals, drawings and service."

Submissions

10. The Applicant's complaints are contained in an Affidavit in support sworn by Mr. Bafirawala Elisha, Principal State Attorney in the Attorney General's Chambers of the Republic of Uganda dated 8th June 2016 and written submissions filed on 15th December 2016.
11. The Applicant first of all faulted the Taxing Officer for finding that the Attorney General of the Republic of Uganda representing the Inspector General of Government was not entitled to instruction fees because in doing so, he was performing his general duties as required of him under the Constitution of Uganda and that no evidence was tendered in court to show that the Attorney General was paid instruction fees or had demanded any instruction fees from the Inspector General of the Government he was representing in this case. Rather, the Taxing Officer found that, the Attorney General, as a public officer is not paid any fees in doing his job but earns a salary for so doing.
12. Given the aforesaid finding, it was the Applicant's submission that "denying the Attorney General of the Republic of Uganda instructions fees was inconsistent with the core principle of equality of parties before courts of justice and the

principles for the establishment of the East African Community.” In this regard, he argued that all litigants before this Court, in seeking justice and in the dispensation of justice by court, are all equal and ought to be treated fairly, equally and equitably. Moreover, referring to the Operational Principles of the Community and relying on Article 7(1) (f) of the Treaty on equitable distribution of benefits accruing or to be derived from the operations of the Community, the Applicant contended that “just as the Attorney General if and when condemned to pay costs to a successful party doth pays costs inclusive instruction fees, the same principle in equal measure should be available to the Attorney General where the Attorney general is a successful party.”

13. In the same vein, the Applicant, referring the Court to the provisions of Section 15 of the Government Proceedings Act Cap 77 Laws of Uganda, contended that the said provisions do not exclude the Attorney General from an award of instructions fees. He argued that, on the contrary, the abovementioned Section states that the same principles that apply to private persons/litigants shall in the same manner and measure without exclusivity apply to Government with regard to award of costs. Along the same line of argument, the Applicant submitted that Rule 9(2) of the Third Schedule of the Rules of Procedure of this Court does not envisage the exclusion of the Attorney General from the enjoyment of the benefits of the award of costs including instruction fees, since if that was the case, the framers of the Rules could have expressly stated the exclusion.
14. It was thus the Applicant’s submission that in the absence of such exclusion and in the face of the above provisions, the Attorney General was entitled to costs inclusive of instruction fees. Furthermore, the Applicant contended that Rule 11(1) of the Third Schedule of the Court Rules of Procedure, which set out the rules for taxation for this Court, does not mention instruction fees on ground of being a state attorney representing Government among exemptions given that disentitle a party from costs. His submission was, in sum, that “there is no provision either in our domestic laws or in the treaty or rules of this court that bar the lawyers from the office of the Attorney General from claiming instruction fees.”
15. The Applicant also contended that there was no justification to deny the Applicant costs on service under items 6,7,8,9 and 10 of the bill of costs since there were works and services that were incurred by the office of the Attorney General in pursuance of the defence of the Inspector General of Government.
16. To further buttress his argument that the Attorney General is entitled to costs, inclusive of instruction fees like any other litigant, the Applicant relied on the following case law where courts had basically addressed the matter pertaining to whether in-house counsel should be paid attorney’s fees for legal work performed and had answered that issue in the affirmative. In this regard, reference was made to United States Court of Appeal Seventh Circuit in the matter of *Alice Textor and Others versus The Board of Regents of Northern Illinois University and Others* 711.2D 1387; *Garfield Bank Versus Folb* (1994) [No. BO 74843. Second District Division Seven June 21, 1994]; *Randye M. Holland, trustee & Others Versus Emil Jachmann & Another* (No.1). 85 Mass. App. Ct. 202 January 8, 2014 – May 14, 2014 and *PLCM Group, INC Versus Drexler* (2000) No. S080201. May 8, 2000. Relying therefore on the above authorities, the Applicant submitted that the

lawyers in the office of the Attorney General of the Republic of Uganda, being a unique counsel and in a unique position, are paid a salary from the consolidated fund and instructions are taken from line ministries and institutions and no fees are therefore paid to them. He argued however that just like an in-house counsel who is hired and paid a salary to represent and enter appearance for his clients, he is entitled to collect instruction fees even in the absence of evidence of documentation of a fee note.

17. It was the Applicant's further argument that the fact of a successful party being entitled to instruction fees should have no bearing on the issue that the state attorneys are salaried. He thus stressed the point that "as a matter of fact, the money recovered through the taxed bill does not go into the pockets of the State Attorneys but goes back to the consolidated fund."
18. The Applicant also contended that since the rationale of costs is that they are punitive in nature and are meant to atone the successful party for money and time spent on the case, the Attorney General, who was involved in preparing and defending the Reference should, as a successful party, recover the fees for the time expended litigating the matter. "Otherwise it would be unfair to deny instruction fees to the office of the Attorney General because the lawyers practice in the public sector," the Applicant further argued.
19. Moreover, the Applicant contended that there was no reason to discriminate between counsel for the Attorney General and private counsel engaged in handling a particular case, since both counsels are bound by the same fiduciary and ethical duties to their clients and are both qualified to provide similar legal services. His further argument was that "for purposes of fairness, both parties should be entitled to instruction fees even in absence of a fee of note/billing."
20. The Applicant furthermore pointed out that the Taxing Officer relied on the authority of *Zuberi vs. The Returning Officer and Another [1973], EA 33, High of Tanzania, Court Civil Case No. 10 of 1970* in making her decision and in that regard submitted that "this authority is good authority as it was then. Legal practice is a pragmatic and progressive practice. It takes note of the changing world and judicial remedies and needs that arise and sets precedents accordingly."
19. The Applicant therefore summed up his submissions by contending that the Taxing Officer erred in law when she denied the Attorney General of the Republic of Uganda instruction fees in respect of *Taxation Cause No. 1 of 2015*. Hence, his prayer that the taxation Ruling made by her be set aside and the Applicant's bill of costs be allowed with regard to items 1 to 20 and item 23 which related to instructions fees, perusals, drawings and service. The Applicant also prayed that costs of this Taxation Reference be paid by the Respondent.
20. On his part, the Respondent, in his submissions, which also find full support in an Affidavit in reply sworn on 22nd November 2016 by the Respondent himself, strongly supported the Taxing Officer's Ruling from which this Reference arises.
21. The Respondent admitted that the Attorney General drew all the pleadings and represented the Applicant in *Reference No .5 of 2013 and Consolidated Application Nos. 8 and 9 of 2012* wherein the Applicant was awarded costs. He, however, contended that the Taxing Officer, relying on the case of *Zuberi vs. The Returning Officer & Another [1973] EA 33, High Court of Tanzania, Civil Case No. 10 of 1970* and being also mindful of Rule 9(2) of the Third Schedule

of this Court's Rules and taking into consideration the relevant circumstances especially the Attorney General's duties as highlighted at pages 7 lines 16-27 of her ruling, rightly arrived at the conclusion that the Attorney General was not entitled to instruction fees.

22. Reference was also made to the case of *Job Kipknei Kilach Vs. DPP, the Ethics and Anti-Corruption Commission and the Attorney General: Petition No. 2 of 2013* where the Court had ruled that instruction fees were meant to compensate a party for expenses paid to his advocates and learned Counsel contended that in the said case, the Court had noted that the Ethics and Anti-Corruption Commission had not instructed external lawyers but utilized the services of its salaried employees. It was also pointed out that the Court, having found that the documents filed were not drawn in the name of a professional firm but in the name of the Commission, readily found that the latter was not entitled to the item of instruction fees and the award of Kshs. 100,000/= granted by the Taxing Officer as instruction fees was accordingly set aside.
23. In the same vein, the Respondent referred us to the case of *Commissioner of Lands vs. Oginga Odinga [1972] EA 125*, where the Court held that "in a case of a judgment with costs passed in favour of a government department represented by the Attorney General, the state counsel who acts for the department concerned is paid his salary and all other dues by the Government of Kenya. The costs recovered can go only into revenue not into the pockets of the state counsel. This position is entirely different from the case of a private litigant. The profit costs in respect of advocates' work are simply paid over to the advocate. In fact, the advocate receives all monies and he pays over to his client only what is due to him under the judgment of the court."
24. The Respondent went on to assert, in the above context, that the Applicant did not tender any evidence that the Attorney General was paid instruction fees or that they had demanded any instruction fees from the Applicant.
25. In response to Counsel for the Applicant's submission that the Taxing Officer had no justification to deny the Applicant costs on service of process under items 6, 7, 8, 9 and 10 of their Bill of Costs, the Respondent referred to the case of *Nalugo Margaret Sekiziyivu Vs. Bakaluba Mukasa Peter and the Electoral Commission* in which the Court had relied on the case of *Patrick Makumbi Vs. Sole Electronics: SCCA No. 11 of 1994* to hold that: "instruction fees should cover the advocate's work including taking instructions as well as other work necessary in presenting the case for trial or appear as the case may be." In that regard, therefore, the Respondent pointed out that items 6,7,8,9 and 10 of the bill of costs being in respect of service of the Respondent to reference on all other parties, that costs of service were also seen to be included in instruction fees because it was work necessary in presenting the response to the Reference and hence the Taxing Officer was justified in denying the costs in respect of those items, he further argued.
26. In conclusion to his submission, the Respondent submitted that the Taxing Officer did not err in law in denying the Attorney General instruction fees in respect of *Taxation Cause No. 1 of 2015* and prayed therefore for the dismissal of this Reference with costs.
27. In his submissions in rejoinder, the Applicant brought the Court's attention to

some provisions of the Laws of Uganda, to wit, Section 1(a) (The Interpretation section) of the Advocates Act Chapter 267; Section 19(2) of the Advocates Act Chapter 267; Part VI of the Advocates Act Chapter 267 and Section 6 of the Advocates Act Chapter 267 and with regard to the latter, he stressed that the definition of an advocate includes any person mentioned therein. He also contended that Section 6 of the Advocates Act was specifically created for persons who practice law as advocates but are exempted from the procedures of enrolment and other procedures for private lawyers under the Act. He hastened to add that the exemption does not disentitle them from claiming instruction fees when costs are awarded to them.

28. He also criticized the Respondent's reliance on the case of *Commissioner of Lands Vs Oginga Odinga [High Court of Kenya at Nairobi Civil Case 11411 of 1968]* and submitted that the said ruling was no longer good authority as it had been overtaken by events due to the fact that the law, i.e. Rule 2 of the Advocates (Remuneration) Order relied upon, had been since repealed. Hence, it was his contention that the law and the authority aforementioned could not be relied upon to deny the Attorney General instruction fees and all other items that flow under instruction fees.
29. The Applicant's Counsel also took issue with the Respondent's argument pertaining to the affectation of costs recovered by a state attorney into a Government Consolidated Fund by pointing out the uniqueness of Government as "a client" and as a litigant in court.
30. The rest of the Applicant's submissions in rejoinder merely reproduced his main arguments that there were no good reasons for the Taxing Officer to deny the Attorney General instruction fees, that therefore, her ruling ought to be set aside and costs be allowed with regard to items 1 to 20 and item 23 related to instruction fees, perusals, drawings and service.

Analysis

31. We have carefully considered the able submissions of both Counsel as well as the authorities provided. As indicated in the Notice of Motion, this Taxation Reference was brought under Rule 114 of the Court's Rules which reads as follows:

"Any person who is dissatisfied with the decision of the taxing officer may within (14) days apply by way of a reference on taxation for any matter to be referred to a bench of three (3) judges whose decision shall be final."
32. This Court has had opportunity to deal with cases where applicants have challenged its Taxing Officer's orders and in determining those cases, the Court has relied on well settled principles governing this matter. In fact, as also submitted by both parties, the principles governing taxation of costs by a Taxing Master have been laid out by Spry V-P in the leading case of, *Premchand Raichand Ltd and Another Vs Quarry Services of East Africa Ltd and Others (No. 3) [1972] EA 162, at 163 to 165*. These principles as summarized by Richard Kuloba in his book entitled *Judicial Hints on Civil Procedure*, 2nd Edition, pages 118 to 119 are as follows:
 - (a) A successful litigant ought to be fairly reimbursed for the costs he has had to incur;

- (b) That costs be not allowed to rise to such level as to confine access to justice to the wealthy;
 - (c) That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
 - (d) That as far as practicable, there should be consistency in the awards made;
 - (e) That there is no mathematical formula to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its own merit and circumstances;
 - (f) The Taxing Officer has discretion in the matter of taxation but he must exercise the discretion judicially, not whimsically;
 - (g) The Court will only interfere when the award of the taxing officer is so high or so low as to amount an injustice to one party.
33. The abovementioned principles have been followed and reaffirmed by several courts when they were considering reversing orders of Taxing Officers. For example, in the case of *Bank of Uganda Vs. Banco Arabe Espanol, SCC, App Number 23 of 1999*, Learned Justice Mulenga (JSC) laid out some of the principles on which a judge should interfere with a Taxing Officer's assessment of a bill of costs. He stated that "Counsel would do well to have these principles in mind when deciding to make, and/or when framing grounds of a reference. The first is that save in exceptional cases, a judge does not interfere with assessment of what a taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs, are matters with which the taxing officer is particularly fitted to deal and in which he has more experience than a judge. Consequently, a judge will not alter a fee allowed by a Taxing Officer merely because in his opinion he should have allowed a higher or lower amount. Secondly, an exceptional case is where it is shown, expressly or by inference that in assessing and arriving of the quantum of the fee allowed, the Taxing Officer exercised, or applied, a wrong principle. In this regard, application of a wrong principle is capable of being referred from the award of an amount, which is manifestly excessive or manifestly low. Thirdly, even if it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount would cause injustice to one of the parties..." (See also *Paul Ssemogerere and Zachary Olum Vs. Attorney General, SCC Application No. 5 of 2001*).
34. This Court has also followed the aforesaid principles in, among others, *Kenya Ports Authority Vs. Modern Holdings Ltd, Reference No. 4 of 2010*; *The Attorney General of Kenya Vs. Prof. Peter Anyang' Nyong'o & Others, Reference No. 5 of 2010*; *Democratic Party & Mukasa Fred Mbidde Vs. The Attorney General of the Republic of Uganda, Reference No. 3 of 2013*.
35. Bearing in mind the afore-stated principles therefore we, shall now consider the grounds raised by the Applicant in the instant Reference.
- Before going further however, it is worth recalling, as indicated in the Taxing Officer's ruling, that parties had agreed on all items in the bill of costs lodged on 17th April 2015, except items 1 to 20 and item 23 relating to instruction fees, perusals, drawings and service. In that regard, the main task of the Taxing Officer was to make a determination on whether or not the Attorney General, who

represented the Inspector General of Government, was entitled to instruction fees and other fees in the aforesaid items, after duly considering both parties' submissions on the matter in light with the applicable law. In so doing, the Taxing Officer went to great lengths to assess the relevant rules applicable to the matter.

37. In answer to the Attorney General's Counsel's contention that, according to the Government Proceedings Act Cap 77 Section 15, costs and incidental to the proceedings should be awarded in the same manner and on the same principles as in cases between private persons, the learned Taxing Officer opined that the trial court had done exactly that by awarding costs to the Attorney General under Rule 111(1) of this Court's Rules and that that step having been passed, the only task remaining was to determine what costs were awardable to the Attorney General. We agree with this reasoning because we are of the view that it reflects a good assessment of the aforesaid provisions.
38. Thereafter, the Taxing Officer went on to tax the costs as directed under Rule 112(1), according to the mandate set out in Rule 113(1), the guidance by Rule 113(3) and the discretion conferred upon her to allow or disallow costs under Rule 11(1) & (2) of the Third Schedule of this Court's Rules.
39. Recalling that disbursements incurred by the Applicant were allowed as agreed by the parties, she exercised her discretion under Rule 11(2) of the Third Schedule of this Court's Rules in considering the issue as to whether the costs awarded by the Court to the Applicant included instruction fees paid or payable to the Attorney General of the Republic of Uganda for representing the Inspector General of Government.
40. Having found that the bone of the contention revolved around the issue as to whether instruction fees were payable to a public officer such as the Attorney General, learned Taxing Officer pointed out that the duties and/or functions discharged by the Attorney General under Chapter 7 Article 119(c) of the Constitution of Uganda "are of public interest and he is paid a salary out of a consolidated fund that is clearly provided by the public." And relying on the case of *Zuberi Vs. The Returning Officer and Another [1973]* (supra), she found that "the Attorney General and all the state attorney in his office are state officers doing the general duties that they are employed to do and earn a salary for the work they do therefore he is not entitled to instruction fees. Items 2 to 20 and item 23 all flow from instruction fees as provided under Rule 9(3) of the Third Schedule are taxed off."
41. Considering the issue at hand and bearing in mind the principles stated above guiding the reversal of taxing officer's order by the Court, it is now upon us to determine whether we should accede to the Applicant's prayer to interfere with the Taxing Officer's ruling.
42. It should be recalled in that regard that, as can be gleaned from the Notice of Motion and the affidavit of Mr. Bafirawala Elisha, this Reference is premised on the ground "that denying the Attorney General of the Republic of Uganda instruction fees is inconsistent with the core principle of equality of parties before courts of justice and the principles for the establishment of the East African Community." On this basis, the Applicant has requested the Court "to exercise its discretion to interfere with the award of the taxing Officer as she relied on the wrong principles and/or incorrectly applied the principles in regard

to instruction fees.”

43. In order to make the case that this Court should uphold the principle of equality before the Court, learned Counsel for the Applicant made an analogy between the duties/functions of state attorneys from the Attorney General’s Chambers and those of in-house Counsel or private legal practitioners and submitted that they should be treated equally as regards the allowance of instruction fees. With respect, we find this analogy untenable since the fees payable to those lawyers are governed by different legal regimes warranting a different treatment. In fact, as underscored by both parties, the Office of the Attorney General is established under Article 119 of the Constitution of the Republic of Uganda and the Attorney General is a member of the Executive, i.e. a Cabinet Minister. Its functions include, among others, to represent the Government in courts or any other legal proceedings to which the Government is a party. It is in that regard that the Attorney General represented the Inspector General of Government in proceedings before this Court.
44. From the foregoing, it is clear to us that the Office of the Attorney General is a public office, an organ of the Government of the Republic of Uganda and that state attorneys from this office are public officers whose functions are regulated by a legal regime different from the one governing in-house Counsel of private corporations or other private legal practitioners. It is our considered view therefore, that the application of a different approach in the allowance of instruction fees was justified by the different legal status applicable to the two categories of legal practitioners. The Taxing Officer had good reason to treat differently persons whose situations were different. We so hold.
45. Under the same issue of equality of parties before the Court, the Applicant’s Counsel also relied on Article 7(1) (f) of the EAC Treaty to urge the point that denying the Attorney General instruction fees ran afoul of the principle of equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations. Learned Counsel made this simple assertion without any supporting argument and we are therefore unable to find how the latter principle applies to the matter in issue.
46. Learned Counsel has also criticized the Taxing Officer for relying on the authority of *Zuberi Vs. The Returning Officer and Another* [1973] EA 33 (supra), arguing that that authority was no longer good authority. It is our view, however, that Counsel fell short in showing what should be considered as pertinent authority owing to his assertion that legal practice as a pragmatic and progressive practice ought to take note of the changing world and the judicial remedies and needs that arise and set precedent accordingly. Indeed, Learned Counsel did not refer us to any decision that had subsequently overturned the impugned decision or any legal provision that had rendered the said decision inoperative. In the circumstance therefore, as we have pointed out above, the analogy made between the duties/functions of state attorneys and in-house Counsel of private corporations and other private legal practitioners is irrelevant to justify the recognition of same treatment to persons whose professional activities are governed by different legal regimes.
47. The Applicant’s Counsel has also contested the Respondent’s Counsel’s reliance

on the authority of *Kipknei Kilach Vs. D.P.P., The Ethics and Anti-Corruption Commission and the Attorney General of Kenya; Petition No. 2 of 2013* where the Court, after stating that instruction fees were meant to compensate a party for fees paid to his advocates, held that in-house Counsel of a state corporation, i.e. The Ethics and Anti-Corruption Commission, being salaried employees of the latter, were not entitled to instruction fees. Again with respect to Learned Counsel for the Applicant and for the reason given above, we are not convinced by his assertion that the aforesaid authority is not applicable to the instant Reference, basing his argument on an analogy made between how Chambers of the Attorney General and private law firms carry out their respective legal functions. We say so because, although state attorneys are entitled to practise as advocates, they are public officers who are paid salaries to represent the Government in Court, as part of their normal duties. As a matter of fact, indeed, the Applicant did not pay any fees to state attorneys who represented him in the instant matter.

48. In a nutshell, we are of the view that the Taxing Officer, when exercising her discretion upon certain materials placed before her in *Taxation Cause No. 1 of 2015*, did not misdirect herself nor did she apply any wrong principle in denying the Attorney General of the Republic of Uganda instruction fees and fees for perusals, drawings and service.

VI. Conclusion

49. In light of the foregoing findings, we find no reason to interfere with the decision of the Taxing Officer. The Reference is accordingly dismissed with further order that the Respondent shall be awarded costs to be borne by the Applicant.

It is so ordered.

G. Kalemera, G. Arinaitwe & O. Bichachi, for the Applicant
M. Mbabazi Counsel for the Respondent

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First Instance Division

Taxation Reference No. 2 of 2016
UHAI EASHRI v Ojiambo & Company Advocates

Coram: M. Mugenyi, PJ; F. Jundu, & A. Ngiye, JJ
July 5, 2017

Taxation - Whether Bill of Costs was properly filed - Consultancy agreement for lead counsel- Whether there was a remuneration agreement

Rules 113(2), 114 of the East African Court of Justice Rules of Procedure, 2013

The Applicant Company executed an agreement with one Milka W. Kuria, an advocate practicing in the Respondent law firm whereby Ms. Kuria would file an application for the Applicant's joinder as *amicus curiae* in Reference No. 6 of 2014. The agreement also set out the fees payable. Consequently, Ms. Kuria appointed Messrs Aldrine Were Ojiambo and Colbert Ojiambo as lead Counsel and the Respondent law firm prepared the pleadings and attended court proceedings in respect of the Application No. 20 of 2014 for joinder as *amicus curiae*. The Application was resolved against the Applicant. Thereafter, the Respondent firm filed a Bill of Costs for taxation in *Taxation Cause No. 2 of 2015, Ojiambo & Co. Advocates vs. UHAI EASHRI*.

Prior to the finalization of the taxation, the Applicant filed an Application seeking to strike out the taxation cause claiming: that an advocate/ client relationship existed between itself and Ms. Kuria; that professional relationship was governed by the remuneration agreement; and Ms. Kuria had been fully remunerated for her services thereunder, and therefore, the Respondents Bill of Costs was improperly before the Court. The Taxation Officer found that no Advocate / Client Remuneration Agreement existed between the Parties as envisaged under Rule 113(2) and dismissed the application. Been dissatisfied, the Applicant filed this Taxation Reference.

In their response, the Respondents submitted that an Advocate/ Client relationship could be imputed between the parties by virtue of instructions to draft pleadings and proceed with the joinder application as was determined by the Taxing Officer.

Held

1. Before a Taxing Officer proceeds to tax a filed Bill of costs, s/he must establish whether or not there exists a remuneration agreement between the parties given under Rule 113(2). The existence of such an agreement would oust the Court Registrar's mandate to tax a Bill of Costs.
2. The import of the impugned agreement between the Applicant and the Ms. Kuria was that she was retained as a consultant to identify a lead counsel (the Respondent) to argue an application for joinder as *amici curiae*. Nevertheless, it was the Applicant that paid for the Respondent's travel and disbursements in respect of the application.
3. The impugned agreement simply established a legal consultancy arrangement between Ms. Kuria and the Applicant for the identification of the lead counsel.

There was no remuneration agreement between the Parties as envisaged in Rule 113(2) of the Court's Rules of Procedure thus the application was dismissed.

RULING

A. Background

1. In July 2014, the Applicant Company executed an agreement with one Milka Wahu Kuria, an advocate practicing in the Respondent law firm whereby the said Ms. Kuria was to file an application for the Applicant to be joined as *amicus curiae* in Reference No. 6 of 2014; identify a lead Counsel to argue the application; attend the hearing of the *amicus curiae* application, as well as the Reference with the designated lead Counsel, and file *amici* briefs on behalf of the Applicant in the event that the application was successful.
2. The agreement did also set out the fees payable for Ms. Kuria's assignment, including the instruction fee; disbursement costs of filing the application and amici briefs, service thereof on parties, as well as incidental costs such as printing and communication expenses, and the costs associated with court attendances.
3. Pursuant to the afore-mentioned agreement, Ms. Kuria appointed Messrs Aldrine Were Ojiambo and Colbert Ojiambo as lead Counsel and the Respondent law firm did prepare the pleadings and attend court proceedings in respect of the Applicant's Application for joinder as *amicus curiae*, to wit, *Application No. 20 of 2014*. Both *Application No. 20 of 2014* and *Reference No. 6 of 2014* have since been disposed of by the Court. The Application was specifically resolved against the Applicant, pursuant to which the Respondent firm filed a Bill of Costs for taxation vide *Taxation Cause No. 2 of 2015 – Ojiambo & Co. Advocates vs. UHAI EASHRI*.
4. Before the Bill of Costs could be taxed, however, the Applicant filed an Application for the same to be struck out on account of the existence of an agreement between itself and the Respondent firm governing fee payments between the two (2) parties and pursuant to which the law firm had already been paid. The said Application was formally dismissed by Her Worship, the Deputy Registrar, in a reasoned Ruling that was delivered on 26th May 2016. Dissatisfied with the Ruling of the Taxing Officer, the Applicant filed the Taxation Reference that is presently before us.

B. Taxation Reference

5. The Taxation Reference is premised on Rules 113(2) and 114 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter interchangeably referred to as 'the Court's Rules' or 'the Rules'). It essentially challenges the Taxing Officer's decision that there was no Advocate/ Client Remuneration Agreement between the Parties as envisaged under Rule 113(2) of the Court's Rules, such as would warrant the striking out of the Bill of Costs filed by the Respondent firm. The Applicant further challenges the Taxing Officer's construction of a pre-existing Advocate/ Client relationship between the Parties whereas there allegedly was no such relationship between them.
6. It is the Respondent's contention, on the other hand, that by instructing the Respondent firm to draft pleadings and argue the Application for joinder as *amicus curiae*, as well as the Reference, the Applicant's conduct was such as

would impute an advocate/ client relationship between itself and the Respondent firm therefore the Taxing Officer rightly inferred the existence of such a relationship between the Parties. It was further argued for the Respondent, having established a client/ advocate relationship between the present Parties, the alleged remuneration agreement that was relied upon by the Applicant, which had been executed between a one Milka Wahu Kuria and the Applicant was not a remuneration agreement as envisaged in Rule 113(2) of the Court's Rules. Consequently, it is the Respondent's contention that, in the absence of such remuneration agreement between the Parties, the Bill of Costs in issue presently was rightly filed in this Court within the precincts of the same Rule.

7. In a brief rejoinder, it was maintained for the Applicant that there was indeed an advocate/ client relationship albeit between the Applicant and Ms. Kuria and not the Respondent firm, which relationship was governed by the remuneration agreement in issue presently. In that regard, the point was made that recourse could not be made to the conduct of the Parties to impute an advocate/ client relationship when there was a document that explicitly spelt out the parties to such a relationship, as well as their interface with the Respondent.
8. Responding to questions from the Bench, learned Counsel for the Applicant did clarify that whereas the remuneration agreement between her client and Ms. Kuria was indeed governed by Kenyan law, the said agreement established an advocate/ client relationship between the said parties; outlined the remuneration terms applicable under the said relationship; details the said advocate as having been responsible for the remuneration of the Lead Counsel she appointed (who in this case were allegedly the Respondents), and had been produced in court in support of the proposition that there was no need for a Bill of Costs or the taxation thereof. Both sets of Counsel did also provide the Court with their understanding of the notion of 'lead counsel'.

C. Court's Determination

9. Having listened to both Counsel in submissions, it seems to us that the present matter raises two (2) distinct procedural questions that beg resolution. First is the question as to whether the matter before us is indeed a Reference on Taxation as encapsulated under Rule 114 of this Court's Rules. Relatedly, the issue of this Court's jurisdiction to interpret the remuneration agreement in issue between the Parties arose quite succinctly from the questions from the Bench with regard to a clause in the agreement that refers disputes thereunder to Courts of the Republic of Kenya. We propose to commence our determination of this Taxation Reference with a determination of the above issues.
10. We have carefully considered the pleadings and rival arguments in this matter. We have also considered the import of Rule 114 of our Rules. That Rule would appear to provide for the referral of a Taxing Officer's decision to a Bench of three (3) judges of this Division of the Court by a dissatisfied party. The question is what decision is so referred under that Rule? We find apt instruction on the nature of decisions that may be referred by way of Reference on Taxation in Rule 113 of the Rules.
11. For ease of reference, we reproduce both Rules 113 and 114 below:
 "Rule 113

- (1) The Registrar shall be a taxing officer with power to tax the costs of or arising out of any claim or reference as between the parties.
- (2) The remuneration of an advocate by the client shall be by agreement between them. Where there is no such agreement either of the parties may refer the matter to the Registrar for taxation.
- (3) The costs shall be taxed in accordance with the rules and scale set out in the Third Schedule for the First Instance Division and Eighth Schedule for the Appellate Division.

Rule 114

Any person who is dissatisfied with a decision of the taxing officer may within fourteen (14) days apply by way of reference on taxation for any matter to be referred to a bench of three (3) Judges whose decision shall be final.”

12. Our construction of Rule 113 is that the mandate of the Taxing Officer is restricted to the taxation of costs in accordance with the Third and Eighth Schedules to the Rules as the case may be. However, such mandate may only be exercised by the Taxing Officer where there is no advocate/ client remuneration agreement between the parties to a claim or reference. Rule 114 then provides for references on taxation where a party is dissatisfied with the Taxing Officer’s decision. It is quite conceivable that the decisions that may be so referred by a dissatisfied party are restricted to the Taxing Officer’s taxation of costs role as detailed in Rule 113(1) and (3). However, it seems to us that before a Taxing Officer may proceed to tax a filed Bill of costs, s/he must establish whether or not there does exist a remuneration agreement between the parties given that under Rule 113(2), the existence of such an agreement would oust the Court Registrar’s mandate to tax a Bill of Costs.
13. Turning to the matter now before us, following the Respondent’s submission of a Bill of Costs for taxation in June 2015, the Applicant did file a Notice of Motion in which it sought to invoke the provisions of Rule 113(2) to oust the Taxing Officer’s mandate to consider the said Bill for taxation on account of a pre-existing advocate/ client remuneration agreement. In a supporting affidavit deponed by one Mukami Marete, the Applicant’s Director of Operations, the point was made that the Applicant had instructed Ms. Kuria to file and represent it and 2 other parties in *amici* briefs in Ref. No. 6 of 2014; there was an agreement to that effect, and the Applicant had paid the full fees payable thereunder.
14. Quite clearly, therefore, the Taxing Officer in the present matter was faced with a challenge to the Bill of Costs presented to her for taxation viz a remuneration agreement that allegedly demarcated the remuneration terms as between the Parties before her in accordance with Rule 113(2) of the Rules. Logically, she had to make a determination as to whether indeed the remuneration agreement before her was in fact such agreement as was envisaged under the said Rule so as to render the Bill of Costs improperly filed. In any event, Rule 114 does not restrict the decisions in respect of which a dissatisfied party may petition this Court to only decisions to do with a taxed Bill of Costs. The Rule explicitly makes reference to ‘a decision’ of the Taxing Officer. A Taxing Officer faced with such interlocutory applications or preliminary points of law within a Taxation Cause might do well to consider reserving his/ her decision thereon for delivery with the actual taxation of the Bill in the interests of the prudent utilization of

judicial resources, which is a tenet of efficient case management. Nonetheless, the circumstances of the present case are that the present Reference is properly before the Court, having been duly grounded in a decision of the Taxing Officer. We so hold.

15. We now turn to the second procedural question. We have carefully perused the agreement submitted by the Applicant as purported proof of the remuneration terms agreed upon between itself and its alleged advocate in this matter. We shall return to the merits of the foregoing suppositions later in this Ruling, but for present purposes shall address ourselves to the question of this Court's jurisdiction viz Clause 3.2 of the agreement, which prescribes the Laws of Kenya and the courts of the same country as the governing law and dispute resolution forum in respect thereof. Clause 3.2 reads:

“Governing Law:

This Agreement shall be interpreted according to and shall be governed by the Laws of Kenya. Should any dispute arise in connection with (the) Agreement, including any question in respect of the interpretation, validity, termination or non-termination of this Agreement, the parties agree to submit to the exclusive jurisdiction of the courts of Kenya.”

16. The inference that we draw from the above Clause is that the law of Kenya is applicable to the interpretation of the agreement, and the courts of Kenya are the fora with jurisdiction to determine questions to do with any disputes that arise in connection with the agreement including but not limited to disputes on the interpretation, validity or termination thereof. We take the unreserved view that the matter before us is not ‘a dispute arising in connection with’ the agreement, but rather one in connection with a filed Bill of Costs presented for taxation. The contents of the agreement are neither in dispute nor do they require interpretation in the present case. The agreement is merely presented as evidence that there does exist a remuneration agreement between the present Parties, an allegation that is an issue for determination on its merits herein, and to which we revert shortly. Indeed, that evidential import of the agreement for present purposes was explicitly stated by learned Counsel for the Applicant, responding to an inquiry from the Bench. We are, therefore, satisfied that this Court does have jurisdiction to entertain the present Taxation Reference. We so hold.

17. We now turn to the merits of this Taxation Reference. As stated hereinabove, the Applicant essentially challenges the Taxing Officer's decision in so far as it infers an advocate/ client relationship between the Parties; finds the Bill of Costs under review to have been properly filed, and negates the applicability of the remuneration agreement between the Applicant and Ms. Kuria for purposes of Rule 113(2) of the Court's Rules.

18. The Applicant's position in that regard has been variously restated hereinabove but, in a nutshell, is that there was an advocate/ client relationship between itself and Ms. Kuria (who, thereunder, was tasked to ‘sub-contract’ lead counsel); that professional relationship was governed by the remuneration agreement in issue presently and Ms. Kuria had been fully remunerated for her services thereunder, and therefore, the Bill of Costs filed by the Respondents was improperly before this Court. Conversely, the Respondent contends that the Taxing Officer rightly

inferred an advocate / client relationship between the Parties from the Applicant's conduct; the alleged remuneration agreement being invoked by the Applicant was not a remuneration agreement as envisaged in Rule 113(2) of the Court's Rules, and therefore, in the absence of such a remuneration agreement between the Parties, the Bill of Costs in issue presently was properly before this Court.

19. We shall quickly dispose of the small matter of the agreement. We understood it to be the position of both Parties that there exists no remuneration agreement whatsoever between them. That, however, is as far as the consensus goes. Whereas the Applicant maintains that their advocate/ client relationship was with Ms. Kuria who, under that relationship, was responsible for the appointment and remuneration of lead counsel; the Respondent firm asserts that it was introduced to the Applicant by Ms. Kuria and established a separate advocate/ client relationship with it (Applicant), but the Applicant has since reneged on its remuneration to it.
20. We have carefully considered the agreement in reference herein. There is no mention of Ms. Kuria as the Applicant's advocate; rather she is referred to throughout the agreement as a consultant. There is no mention, either, of the Respondent as a party to the agreement or, indeed, any reference to that firm whatsoever save as the employer of Ms. Kuria. The import of that agreement is that Ms. Kuria was retained as a consultant by the Applicant to identify lead counsel to argue an application for joinder as *amici curiae* and, in the event the application was successful (which it was not), file *amici* briefs on behalf of the Applicant in Ref. No. 6 of 2014. Whereas Annexure 1 to the agreement does make reference to the facilitation of the lead counsel's participation as a specific task assigned to the consultant, other documentation on the record indicate that it was, in fact, the Applicant that paid for the appointed counsel's travel and disbursements in respect of Application No. 20 of 2014, the application for joinder as *amicus curiae*.
21. We must therefore dispel forthwith the notion by the Applicant that there was an advocate/ client relationship between itself and Ms. Kuria, which supposedly ousted its advocate/ client relationship with the Respondent firm, or that she was responsible for the remuneration of the lead counsel she was tasked to identify. In our view, the agreement simply established a legal consultancy arrangement between Ms. Kuria and the Applicants. Might we add that the specific assignment in that regard was the identification, and not necessarily appointment, of the lead counsel. On the other hand, the documentation attached to the Affidavit in Reply clearly infers an advocate/ client relationship between the Applicant and Messrs Aldrine Were and Colbert Ojiambo. We cannot, therefore, fault the Taxing Officer for arriving at the same conclusion.
22. Having so found, the question is was there a remuneration agreement between the present Parties as would of necessity render the impugned Bill of Costs improperly filed within the confines of Rule 113(2)? Try as we might, we are unable to find any such agreement on the Court record. It does follow then that the Bill of Costs in issue presently was properly filed for taxation. We do, therefore, uphold the Taxing Officer's decision in that regard.
23. Before we take leave of this Taxation Reference, we are constrained to observe that we have seen documentation in proof of payments effected to Ms. Kuria

in accordance with the impugned agreement. In our considered view, those payments would not negate on the obligation upon a client to recompense an advocate for advocacy services provided as is the case herein.

24. In the result, we would hereby dismiss this Taxation Reference with costs to the Respondent. It is so ordered.

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First Instance Division

Taxation Reference No. 3 of 2016

(Arising from Taxation Cause No. 3 of 2015 arising out of Claim No. 1 of 2012)

Angella Amudo v The Secretary General East African Community

Coram: M. Mugenyi, PJ; F. Jundu & A. Ngiye, JJ
July 4, 2017

Proof of expenses incurred - Affidavit evidence – Whether the affidavit in reply conformed with the rules - Functions of Counsel to the Community - Whether public officers can claim certain costs

Rules: 2(1), 3(1), 21(5), 37(2), 66 (2) (c), 69(1), (3), (4), 84(2), 85(1), 114 - Rules: 11(1), 17(2), Form 3 of the Second Schedule of EACJ Rules of Procedure, 2013

Following the delivery of the Ruling in Taxation Cause No. 3 of 2015, the Applicant filed this Reference averring that the Taxing Officer erred in: awarding the Respondents costs for perusals, drawing, filing documents and photocopying costs not supported by receipts. The Applicant submitted that the EAC is a Public Institution and Counsel to the Community is mandated by the Treaty and the EACJ Rules to represent the Community and he therefore cannot bill the Community for fees for representing the Community.

In response, the Respondent submitted that the Secretary General like any other party is entitled to the said costs and nothing in the rules prohibits any party from claiming such costs.

Subsequently, the Applicant raised a preliminary objection pointing out that the Respondent's Affidavit in Reply was incurably defective for non-compliance with requirements of the law governing affidavits as it did not reveal the identity of its holder and the signature appended thereon was different from the deponent Deputy Secretary General. The Respondent conceded that in the deponent did not sign the affidavit.

Held

1. A party who submits evidence in the form of affidavit must do so in the proper, authenticated form. An affidavit is a written oath embodying the facts as sworn to by the affiant; bearing the signature of the affiant; and an attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer. The Respondent's Affidavit in Reply was neither signed by the affiant nor was there evidence that it was sworn in the presence of a Commissioner for Oaths. Such an affidavit that does not conform to the Rules of Procedure, cannot be relied on by the Court and is struck out.
2. Pursuant to Article 2(1) and 3(1) of the Treaty, the East African Community is a public institution that has in its service the office of the Counsel to the Community (CTC) established by Article 66(2) (c). Under Article 69(1) the CTC is the Principal Legal Advisor to the Community delineated by Article 37(2) of the Treaty and Rule 17(2) of the EACJ Rules to appear before Court in any matter

in which the Community or any of its institution is a party.

3. By virtue of being in the service of the Community, the CTC is a public officer who is not paid fees for legal services but earns a salary for the work as per Article 69(3) and (4) of The Treaty. The CTC was entitled to peruse and draw documents, file documents in Court and ensure service thereof as part of his normal duties but cannot claim costs for perusals, drawing, filing documents in Court, service or instruction fees.
4. It is settled law that perusals, drawing, filing documents in Court and service fees, like instruction fees, are meant to compensate a party for expenses incurred for the attainment of justice. The Applicant failed to tender evidence showing that costs were awarded for photocopying or that other costs were awarded without receipts.

With regard to the other costs claimed, a review of the Respondent's Bill of Costs will be conducted before another Taxing Officer.

Cases cited

Perkins v Crittenden, 462 S.W. 2d 565, 567-68 (Tex. 1970)

Kenya Ports Authority v Modern Holding Ltd, EACJ Taxation Ref. No.4 of 2010

Democratic Party & Anor v The AG of Uganda, EACJ Taxation Reference No. 3 of 2013

The Inspector General of Government v Godfrey Magezi, EACJ Taxation Ref. No. 1 of 2016

Zuberi v The Returning Officer & Anor (1973), EA 33

RULING

A. Introduction

1. Before this Court for determination is a notice of motion dated 18th November 2016. The Applicant, Mrs. Angella Amudo, applied to this Court under Rules 114, 84(1), 84(2) and 85(1) of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "the Rules") for orders that:
 - a) The Taxation Ruling made by the learned Taxing Officer on 9th November 2016, awarding costs to the Secretary General of the East African Community, the Respondent in *Taxation Cause No. 3 of 2015: The Secretary General of the East African Community Vs Angella Amudo* be set aside;
 - b) Costs of this Taxation Reference be paid by the Respondent.
2. The grounds for the Application are set in the said Notice of Motion as follows: -
 - a) The learned Taxing Officer erred in law when he awarded costs for perusals, drawing, filing documents in Court and service, which the Secretary General is not entitled to;
 - b) The learned Taxing Officer erred in law when he awarded costs in Application No. 15 of 2012 when it was filed separately and heard independently from Claim No. 1 of 2012 and Angela v The Secretary General lost; and
 - c) The learned Taxing Officer erred in law when he awarded photocopying costs when the sums are not supported by receipts to have been spent or incurred by anyone or paid by anybody.
3. Before the Taxing Officer and before this Court, the Applicant represented herself while the Respondent was represented by Mr. Stephen Agaba.

B. Background

4. The Applicant was the unsuccessful party in *Appeal No. 4 of 2014*. The Appeal was dismissed in its entirety with full costs in the Appellate Division and in the First Instance Division. The Respondent then filed a Bill of costs which the Registrar taxed and allowed at USD 4,605.
5. However, the Applicant was dissatisfied with the Taxation Ruling and filed the present Taxation Reference.

C. Case for the Applicant

6. The Applicant's case as set out in the aforesaid Notice of Motion is that the learned Taxing Officer erred in law when he found that the Respondent is entitled to costs for perusals, drawings, filing documents in court, service and photocopying.
7. The Applicant further pleaded that the East African Community (hereinafter referred to as "the Community") is a Public Institution and the Counsel to the Community is a Public Officer mandated by the Treaty and Court Rules to represent the Community in Court and he therefore cannot bill the Community for fees for representing it.

D. Case for the Respondent

8. By way of rebuttal, the Respondent filed an Affidavit in Reply on 2nd December 2016 where he strongly supports the Taxing Officer's Ruling from which this Reference arises.
9. The Respondent pleads that, in the instant case, the Secretary General as any other party is entitled to the costs as awarded by the Court and that the Applicant's averment that the Respondent is not entitled to the costs for perusals, drawing, filing documents in court and service does not arise as there is nothing in the law that prohibits any party from claiming such costs.

E. Court's Determination

10. In light of the Parties' respective positions, the issues for Court's determination were framed as follows:
 - i) Whether the learned Taxing Officer erred in law when he awarded the Secretary General costs for perusals, drawing, filing documents in Court and service;
 - ii) Whether the learned Taxing Officer erred in law when he awarded the Secretary General costs in Application No. 15 of 2012; and
 - iii) Whether the learned Taxing Officer erred in law when he awarded the Secretary General photocopying costs.
11. However, the Applicant raised a Preliminary Objection in her oral submissions arguing that there is no Affidavit in Reply properly before the Court as envisaged by the Rules. We will proceed to determine that objection first.
12. The Applicant pointed out that the signature appended on the Affidavit in Reply does not reveal the identity of its holder. In addition, it appears that the person who signed it is different from the deponent, Hon. Jessica Eriyo, the Deputy Secretary General in Charge of Finance and Administration. In her view, the said Affidavit is incurably defective for non-compliance with requirements of the law that govern affidavits.

13. In response, Mr. Steven Agaba admitted that it was the Deputy Secretary General in charge of Productive and Social Sectors who signed on behalf of the Deponent. He stated that the Secretary General in charge of Finance and Administration is the one that deputises for the Secretary General in respect of matters to do with Finance and Administration of the Community, and if she is not on her desk, she also delegates her authority to any other Deputy Secretary General.
14. Having carefully considered the submissions of both Parties on the Preliminary Objection, we agree with the Applicant that a party who submits evidence in the form of affidavit must do so in the proper, authenticated form. And this Court should not permit admission of documents that do not strictly comply with procedural rules. In the instant case, the applicable rule is Rule 21(5) read together with the Second Schedule of the Rules, which provide for simple and expeditious manner of instituting an affidavit such as this one. Rule 21(5) of the Rules provides that:

“Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts, in accordance with Form 3 of the Second Schedule.”
15. Form 3 of the Second Schedule provides for how an affidavit filed before this Court should be made and the conditions it should comply with.
16. Applying the above cited rules, it appears that an affidavit must be signed by the deponent, or his name must appear therein as the person who took the oath.
17. In *Perkins vs. Crittenden*, 462 S.W. 2d 565, 567-68 (Tex. 1970), it was held that “an affidavit” is a “statement in writing of fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths ...”
18. It is also important to consider the specific elements a statement must satisfy in order for it to constitute an affidavit upon which courts will rely. The proffered statement must satisfy three essential elements: “(1) a written oath embodying the facts as sworn to by the affiant; (2) the signature of the affiant; and (3) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer”. See *3 Am. Jur. 2d Affidavits § 8 (2008)*. We are most persuaded by this restatement of the law on affidavits from the Journal of American Jurisprudence.
19. It therefore follows that, the Affidavit in Reply herein was neither signed by the affiant nor is there evidence that it was sworn in the presence of a Commissioner for Oaths. Needless to state, an affidavit that does not conform with the Rules of Procedure cannot be relied on by the Court. We accordingly strike out the impugned affidavit from the Court’s record.
20. We now revert to issues that are in contention before this Court.

ISSUE 1: Whether the learned Taxing Officer erred in law when he awarded the Secretary General costs for perusals, drawing, filing documents in Court and service:

21. On the above issue, it is the Applicant’s case that the Taxing Officer erred in allowing costs for perusals, drawing, filing documents in Court and service to the Secretary General.
22. The point taken is that the Counsel to the Community (CTC) is not paid any fee

like private practitioners for doing what he is employed by the Community to do, but earns a salary for the work he does as provided *inter alia* under Article 37(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as the “Treaty” and Rule 17(2) of the Rules.

23. Generally, this Court does not interfere with the decision of the Taxing Officer on a question of fact or amount but only where the Taxing Officer has not had reasonably sufficient material before him or has not taken into account matters that he should have considered. See *Kenya Ports Authority vs. Modern Holding Ltd*, Taxation Reference No.4 of 2010; *Democratic Party & Mukasa Fred Mbidde vs. The Attorney General of the Republic of Uganda*, Taxation Reference No. 03 of 2013 and *The Inspector General of Government vs. Godfrey Magezi*, Taxation Reference No. 1 of 2016. Of course, it would be an error of principle to take into account irrelevant factors or omit to consider relevant factors either.
24. In her oral submission, the Applicant further contended that the Taxing Officer applied a wrong principle in determination of costs awardable where upon he considered the Respondent Office as if it were a private practitioner entitled to fees and costs for items that flow from it. He thus failed to appreciate that the Respondent was a public institution and the Counsel to the Community and all the legal officers that represent it are public officers who earn salaries for performing their general duty, not fees or costs as is the case with private practitioners.
25. It was also the Applicant’s submission that this error of principle on the part of the Taxing Officer resulted into an award of costs for perusals, drawing, filing documents in Court and service which were never incurred by the Respondent.
26. She relied on the case of *Zuberi vs. The Returning Officer and Another (1973)*, EA 33, *High Court of Tanzania, Civil Case No. 10 of 1970* where it was held that State Officers are not entitled to instruction fees as they are doing their general duties that they are employed to do and earn a salary for.
27. In response to the above contentions, Mr. Agaba pointed out that the learned Taxing Officer correctly applied the provisions of the Third Schedule of the Rules to award costs to the Respondent. He strongly argued that the Secretary General like any other party is entitled to the costs as awarded by the Court, and as such, if the Applicant was aggrieved by the Court’s decision, she should have challenged it in accordance with the Rules.
28. He also contended that the Applicant’s averment that the Respondent is not entitled to the costs for perusals, drawing, filing documents in Court and service does not arise as there is nothing in law that prohibits any party from claiming such costs. He however conceded that instruction fees were neither claimed nor awarded.
29. We have considered the able submissions of both Parties, as well as the authorities provided. The relevant guiding principles relating to taxation are enshrined under Rule 113 and the Third Schedule of the Rules, specifically Rule 11(1) of the Third Schedule of the Rules which reads as follows:

“On taxation, the taxing officer shall allow such costs, charges and disbursements as shall appear to him or her to have been reasonably incurred for the attainment of justice...”
30. In this context, costs, charges and disbursements are expenses incurred by a

party to an action before this Court and if the Respondent had incurred no costs in this case, then none could be awarded.

31. Quite clearly in this matter, it is not contested that, pursuant to Article 2(1) and 3(1) of the Treaty, the Community is a public institution that has in its service the office of the CTC as established by Article 66(2)(c) of the Treaty; or that under Article 69(1) of the Treaty the Counsel to the Community is the Principal Legal Advisor to the Community delineated by Article 37(2) of the Treaty and Rule 17(2) of the Rules to appear before Court in any matter in which the Community or any of its institution is a party. It follows then that by virtue of being in the service of the Community, the CTC is a public officer who is not paid fees for doing his work but earns a salary for the work he does as provided under Article 69(3) & (4) of The Treaty.
32. Consequently, in defending this Claim, Mr. Agaba was entitled to peruse and draw documents, file documents in Court and ensure service thereof as part of his normal duties as required of the Office of the CTC. Mr. Agaba did concede that in the Bill of Costs as filed, the Respondent did not and cannot claim instructions fees in observation of a well-established principle that it did not and does not pay anything like fees or costs to the Counsel to the Community for performing his general duties but earns a salary for so doing.
33. Similarly, on the basis of the same principle, the Respondent cannot claim costs for perusals, drawing, filing documents in Court and service. We take it to be settled law that perusals, drawing, filing documents in Court and service fees, like instruction fees, are meant to compensate a party for expenses incurred for the attainment of justice.
34. The case of *Inspector General of Government vs. Godfrey Magezi* (supra) is quite instructive in this regard. This Court held:

“Although state attorneys are entitled to practice as advocates, they are public officers who are paid salaries to represent the Government in Court, as part of their normal duties. As a matter of fact, indeed, the Applicant did not pay any fees to state attorneys who represented him in the instant matter.”

The learned judges further held:

“In a nutshell, we are of the view that the Taxing Officer, when exercising her discretion upon certain materials placed before her ... did not misdirect herself nor did she apply any wrong principle in denying the Attorney General of the Republic of Uganda instruction fees and fees for perusals, drawings and service.”
35. We thus readily find that the Respondent was not entitled to costs for perusals, drawing, filing documents in Court and service, and that they should be disallowed as prayed and be taxed off.

ISSUE 2: Whether the learned Taxing Officer erred in law when he awarded the Secretary General costs in Application No. 15 of 2012:

36. On the above issue, it was submitted by the Applicant that costs in *Application No. 15 of 2012* were improperly included in the Bill of Costs in that it was filed separately, heard independently from the *Claim No. 1 of 2012* and a Ruling was delivered on 2nd May 2013 where the Respondent in this case lost.

37. In support of her stand, the Applicant relied on the principle in *Taxation Cause No 001 of 2014, Hon. Sitenda Sebalu vs. Secretary General of the East African Community* where this Court decided to tax off, an item, from the main Reference for the simple reason that it was taxed separately in a Bill filed in the Application.
38. The Applicant also took issue with the consistency in decisions of this Court which was breached by the Taxing Officer.
39. In response to the above, the Respondent argued that *Application No. 15 of 2012* arose from *Claim No. 1 of 2012*, and therefore when the Court awarded costs for that Claim, all the applications that had been heard in the process were also to be considered during the taxation process.
40. We are unable to agree with the argument raised by the Applicant in her submissions that *Application No. 15 of 2012* should be taxed separately when the Court never said so in its Order. Indeed, it was held as follows:
“As to costs let the same abide the outcome of Claim No. 1 of 2012.”
41. We considered the authority referred to us by the Applicant but find that it was concerned with a Court decision where costs were granted to the successful party. We therefore find that this authority does not help in the instant matter. However, the issue here is a matter that is clearly sorted out by Rule 111(1) of the Rules stating the general rule that costs follow the event. In addition, the Appellate Division made an order for the Applicant, in this case, to bear costs in the Appellate Division and in the First Instance Division.
42. Therefore, our holding on issue No. 1 with regard to costs for perusals, drawing, filing documents in Court and service notwithstanding, the second issue must be answered in negative.

ISSUE 3: Whether the learned Taxing Officer erred in law when he awarded the Secretary General photocopying costs:

43. The submission of the Applicant on this point was that the Taxing Officer erroneously awarded the Respondent photocopying costs when no receipts were provided to prove that the expenditure of the photocopying sums was actually incurred.
44. Conversely, Mr. Agaba strongly opposed this submission. He argued that the Respondent was never awarded costs by the Taxing Officer that relate to photocopying. The costs were awarded to the drawing of documents and copies per folio as per item 3(i) and item 4(a) of the Third Schedule of the Rules. It was further submitted by him that no costs were awarded for items which had no receipt.
45. With tremendous respect for the Applicant, we find that this issue was not supported by any evidence. Indeed, the Applicant failed to show any part of the Taxing Officer’s Ruling where costs were awarded for photocopying. We agree with the Respondent that what were awarded were costs relating to copies. But, even in that case, no evidence was tendered in Court to show that the Taxing Officer awarded costs for items that did not have receipts.
46. Consequently, we are inclined to find that we cannot interfere with the Taxing Officer’s decision in the absence of proof that he followed a wrong principle. This issue therefore fails.

F. Conclusion

47. In the result, we order that a review of the Respondent's Bill of Costs as regards perusals, drawing, filing documents in Court and service, in both the Appellate and First Instance Divisions, be conducted before another Taxing Officer.
48. Regarding costs, Rule 111 of the Rules provides that costs shall follow the event. The Rules also grants this Court discretion to determine whether any Party is entitled to costs. In the circumstances, noting that the Applicant has succeeded in two out of three contested issues, our decision is that the Applicant shall have 2/3 of the costs of this Taxation Reference.
49. It is so ordered.

The Applicant appeared in person
S. Agaba Counsel for the Respondent

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Appellate Division

Appeal No. 1 of 2016**Alice Nijimbere v The Secretary General of the East African Community**

Appeal from the Judgment of the First Instance Division: Mugenyi, PJ; Lenaola, DPJ; Ntezilyayo, Jundu & Ngiye JJ on 23 March, 2016 in Reference No. 7 of 2015

Coram: Nkurunziza, VP, Rutakangwa & Ringera, JJA
December 2, 2016

Error of law - Contents of a judgment - Objective scrutiny of evidence required - Whether the Trial Court erred in evaluating evidence - Whether there is jurisdiction to grant reliefs not pleaded

Articles: 6 (d), (e), (f), 71(h, 35A) of the Treaty- Rules: 5391), 65(5), 68(5), (e), (f), (g), (h), (i), EACJ Rules of Procedure, 2013

In 2015, the Appellant applied for and was short-listed for the post of Registrar of the East African Court of Justice. Candidates were to be interviewed through video conferencing at the offices of the Ministry of East African Community Affairs in Partner States and in the Appellant's case, in Bujumbura. Shortly prior to the interview, the Appellant sought a special dispensation from the Respondent allowing her to be interviewed at Arusha as her child was indisposed. The Respondent declined her request, interviews proceeded and the Respondent recruited a Registrar. The Appellant filed a Reference claiming that the Respondent's action infringed the principle of equal opportunity in the Treaty and the EAC Staff Rules and Regulations. The Respondent submitted *inter alia* that all candidates were accorded a level playing field without exception and that the rules for the interview could not be changed to relocate the Appellant's interview to Arusha. The Trial Court dismissed the Reference.

The Appellant appealed claiming *inter alia* that the Trial Court: erred in law by not considering all the evidence and submissions adduced and did not base its decision on the allegations of the parties, was hazy, faltering and legally wanting in sufficiency; the Court did not refer to affidavits, written submissions and rejoinder: it erred by not finding that the Respondent breached the Treaty and the Staff Rules in rejecting her request for a special dispensation to be interviewed in Arusha and not considering her claim for damages. She sought a reversal of the impugned judgment.

On their part, the Respondent averred that: the Appellant's request to be interviewed in Arusha was a request for a favour which cannot constitute a legal right; and going by the Staff Rules, the interview process was transparent and none of the other shortlisted candidates raised any complaint; and the Trial Court's judgment met all the requirements of the Court's rules of procedure, it was well-reasoned and took into account all the points for determination raised by the parties.

Held:

1. Both the Common Law and Civil Law systems of justice require judgments not to reproduce the pleadings and evidence but to give a concise statement of the facts, as can be objectively gleaned from the pleadings and evidence of both sides. There should be a clear indication in the judgment, of the issues the Court is being called upon to resolve, Rule 68(5) (f), as agreed upon at the Scheduling Conference held under Rule 53 (1) of the Court's Rules.
2. The points for determination were clearly spelt out in paragraph 25 of the Trial Court's Judgment, and as shown in para. 26 of that Judgment, the Trial Court dealt with each issue separately after summarising the submissions made by the Parties. The Trial Court critically evaluated all the material before it, and rendered its interpretation of the relevant provisions of the Treaty and Staff Rules and made its reasoned determinations thereon. The impugned Judgment was articulately and succinctly composed in plain language. The decision on every issue for determination was lucidly explained and justified by reasons.
3. The failure on the part of the judge (s) to comply with the mandatory requirements of law, be it wittingly or otherwise, amounts to an error of law. Findings of fact are precluded from questioning on appeal under Article 35A of the Treaty. However, the Court is not barred from observing that all the facts which formed the core of the Trial Court's decision are readily discernible from the Pleadings and affidavit evidence. It has not been proved that the Trial Court's decision was predicated on a misapprehension of the Pleadings and/or evidence on record. Therefore, we agree with the Trial Court that the Respondent did not breach Regulation 20(7) of the Staff Rules and the Appellant was not at all discriminated against having voluntarily opted out of the interview exercise.
4. The Trial Court was satisfied that the Respondent acted with all necessary promptitude on the Appellant's request. This was a finding of fact based, in our considered opinion, on a proper appreciation of the evidence.
The Appellant also failed to demonstrate that the Respondent abdicated his Treaty responsibilities under Article 71(h) of the Treaty. This Court has no legal mandate, to interfere with the Trial Court's findings of facts regardless of the Appellant's displeasure.
5. Judicial decisions entail a proper evaluation of evidence, an objective scrutiny of the entire evidence proffered by the parties, be it oral, documentary, real or demonstrative, with a view to reaching balanced conclusions of facts or reasonable inferences of fact and application of the governing law(s). From the record, the reasoning which justifies the conclusion indicates that the Trial Court's decision was not based on a misapprehension, real or apparent, of the evidence. It was a result of a balanced analysis of all the material before it. There is nothing perverse in that Judgment to justify our reversing it or even varying it. It is as balanced and clear as it is reasoned. It can only be upheld in its entirety, as we hereby do.
6. The claim for damages was raised for the first time by the Appellant in her final submissions, and no amendment was effected to the pleadings. It is trite law that parties are bound by their pleadings and that a Court has no jurisdiction to grant a relief not specifically pleaded. The Trial Court rightly held that the claim was unprocedurally introduced and where a matter is not pleaded and the other

Party has no opportunity to respond to it so the ends of Justice would not be met if a court were to determine it.

Cases cited

East African Law Society v Attorney General of Kenya & Ors [2005-2011] EACJLR, 68, Ref. No. 3 of 2007

JUDGMENT

Introduction

1. The Appellant was aggrieved by the decision of this Court's First Instance Division ("the Trial Court") dated 23rd March, 2016, dismissing in its entirety her Reference No. 7 of 2015 ("the Reference").
2. In the Reference, the Appellant was complaining against the Respondent's decision of, allegedly "unprocedurally and illegally" depriving her "of a deserved opportunity to be interviewed for the position of Registrar at the East African Court of Justice." The Respondent categorically denied this allegation.
3. The Trial Court, after a full trial, found the Appellant's complaint unsubstantiated and wanting in merit. It accordingly dismissed the Reference, ordering each party to bear her/his own costs, hence this Appeal ("the Appeal").

Background

4. The essential undisputed background to the Reference and this Appeal is as follows:-
5. Sometime in June, 2015, a vacancy announcement for the post of Registrar of the East African Court of Justice ("the Post"), was published. Only candidates from the East African Community ("the Community") Partner States of Burundi, Kenya and Uganda were eligible to apply for the Post.
6. The Appellant sent her application on 6th July, 2015. The application letter, which was ANNEX 1 to the Appellant's Affidavit sworn on 1st December, 2015, shows that as of that date she was residing in Bujumbura, Burundi.
7. On 23rd September, 2015, the Appellant was informed by Ms. Ngeze Mariapia of Deloitte and Touche Consulting Tanzania Ltd ("the Interlocutor") that she had been shortlisted for interview for the Post as a "Burundian candidate". She was further informed that the interviews for the Post were scheduled to take place on Monday 28th September, 2015, at the offices of the Ministry of the East African Community Affairs in the selected candidates' respective countries. The Appellant was accordingly advised to report at the said offices "in Bujumbura at 13 h 15 Burundi time", ready for the interview. She was further advised to make her "own travel arrangements by the most economic direct route to" Bujumbura, where she would have been reimbursed the travelling costs and "a maximum of two nights hotel full board accommodation", subject to "production of receipt/ticket and boarding pass used".
8. Reacting to the interview invitation, the Appellant, on 24th September, 2015, at 10:37 a.m., informed the Interlocutor by email that she would be unable to travel to Bujumbura. She, instead, requested to be granted a "special dispensation" to attend the interview in Arusha, as she had been "informed that the interview panel will be seated at the EAC Headquarters using teleconference services."
9. The sought dispensation was not granted by the Respondent. The interviews

took place as scheduled for the other shortlisted candidates in Nairobi and Kampala. The Post was filled. The Appellant was not happy. She accordingly accessed the Trial Court under Article 30 of the Treaty for the Establishment of the East African Community (“the Treaty”).

10. In the Reference, the Appellant was seeking the following orders and reliefs:-
 - (a) An annulment of the decision taken by the East African Community Secretariat (EACS) in its meeting held on 28th September 2015, rejecting her request for a dispensation to be interviewed in Arusha;
 - (b) An interim order suspending the process of recruiting the Registrar until the pleadings were closed;
 - (c) A declaration that the decision of the EAC Secretariat was null and void;
 - (d) The re-launching of the interview process to be done by a different interview panel; and
 - (e) Costs.
11. In his response to the Statement of the Reference, the Respondent unequivocally posited that the Appellant had been “given opportunity to be interviewed for the position of Registrar of the East African Court of Justice but did not utilise the same”. It was his further contention that having required all eligible candidates to go to their Capital Cities for interviews, it would have been not fair to “thereafter bend the rules to interview the Applicant in Arusha”.
12. The Respondent further pleaded that interviews had to be conducted at the candidate’s own home capital cities, as there was a requirement of making preliminary verifications of their nationalities and stated qualifications, which could not be easily done in Arusha.
13. On the above premise, the Respondent denied having breached any of the provisions of the Treaty as alleged by the Applicant/Appellant.

Agreed issues at the trial and submissions thereon

14. At the Scheduling Conference in the Trial Court, the following issues were agreed upon by the Parties:-
 - “(i) Whether the conduct of the Respondent in refusing to interview the Applicant in Arusha as she had requested breached Article 6 (d), (e) and (f) and 71(h) of the Treaty and Regulation 20(7) and (8) EAC Staff Rules and Regulations.
 - (ii) Whether the Respondent abused his administrative powers by communicating the decision rejecting the request of dispensation, which he received on a Saturday and responded just one hour before the interview time on the following Monday contrary to Article 71(h) of the Treaty.
 - (iii) Whether the Respondent breached the provisions of Regulation 20(7) of the EAC Staff Rules and Regulations 2006 by requesting the Applicant to pay on her own means of travel and accommodation expenses contrary to Article 6(d) of the Treaty.
 - (iv) Whether the Applicant is entitled to the prayers sought.”
15. The Parties’ also agreed that the hearing would proceed on the basis of affidavital evidence, written submissions and oral highlights on the latter.
16. Regarding the first Issue, the Appellant had submitted that the Respondent

had “breached the principles of social justice, gender equality, the promotion of Human and Peoples’ Rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights” as well as the Australian Anti-Discrimination Act, 1991. She was of this firm view because “she was denied special dispensation merely because she was a mother of a sick infant and the only shortlisted candidate from the Republic of Burundi.”

17. In response, the Respondent contended that the “principle of good governance enshrined in Article 6 (d) of the Treaty was properly applied” as he had “treated all interviewees equally.” He further contended that inability of the Appellant to participate in the interview because her child was sick could not be casually equated to a violation of Article 6(d) of the Treaty.
18. Denying the charge of gender discrimination, the Respondent strongly argued that it was untenable as “other women who had been shortlisted to attend the interview did so, and were interviewed in the Partner States.”
19. After adverting its attention to the provisions of Article 6(d) of the Treaty and the universally accepted attributes of the concepts of social justice, gender equality, equal opportunity and discrimination as well as re-visiting the facts leading to the impugned decision, the learned Trial Justices answered the first Issue in the negative.
20. The learned Justices of the Trial Court found the complaint providing the basis of the second Issue totally wanting in merit. It was their conclusive finding that this complaint was a result of an afterthought, having “no basis in either the Reference itself nor in the events prior to the filing of the Reference”. This Issue, too, was similarly answered in the negative.
21. The third Issue was answered in the negative as well by the Trial Court, as, first, the Appellant had not demanded “advance payment for travel and accommodation”, and more tellingly:
“Regulation 20(7) does not state that the payment must be in advance of the interview...”
22. In disposing of the matter before it, the Trial Court, in view of its findings on issues one to three, found itself enjoined by law not to grant any of the reliefs sought in the Reference including compensation for alleged losses, which had been belatedly and unprocedurally raised in the Appellant’s Written Submissions.

The Appeal

23. The Appellant was not amused at all by the Trial Court’s findings, holdings and its ultimate determination of the Reference. She accordingly duly instituted this Appeal under Article 35A of the Treaty and Rule 86(1) of the East African Court of Justice Rules of Procedure, 2013 (“the Rules”).
24. The Appellant’s Memorandum of Appeal lists six (6) grounds of complaint against the decision of the Trial Court. They are as follows:-
 - “1. That the Hon. Learned Justices of the First Instance Division in law wittingly in (sic) dispensing a judgment against the East African Community Secretariat, while the case was against the Secretary General of the East African Community;
 2. That the Hon. Learned Justices of the First Instance Division erred in law by issuing a judgment in contravention of the (sic) Rule 68(5) of the East

- African Court of Justice Rules of Procedure 2013, especially sub sections (sic) (e), (f), (g), (h) and (i);
3. That the Hon. Learned Justices of the First Instance Division erred in law by not considering Applicant's case as an issue of public order and good governance, and have not therefore interpreted properly Article 6 (d), (e), of the Treaty Establishing the East African Community; they even declined to interpret Regulation 20(7) of the Staff Rules and Regulations, 2006 and Article 71(h) of the Treaty Establishing the East African Community. Thus their attitude should be considered as a denial of justice;
 4. That the Hon. Learned Justices of the First Instance Division erred in law by not considering all evidence and all submissions filed by Appellant as well as oral pleadings by the Appellant; and thus, have decided in transgression of the legal principle governing the profession of judges in their worthy assignment of rendering a fair justice. They reasoned in favour of the Respondent who did not provide any evidence to support his case; (No litigation could be rendered *secundum allegata et probate*);
 5. That the Hon. Learned Justices of the First Instance Division committed a procedural irregularity by deciding the matter on facts which were not true and which were not investigated and proved prior to the decision;
 6. The Honourable Judges of the First Instance Division erred in law by not considering the issue of damages for the Appellant since by being shortlisted she had legitimate expectations of being interviewed."

Issues in the appeal

25. On the basis of the above grounds of appeal, at the Scheduling Conference, the following Issues were agreed on:-
1. Whether the Secretary General of the East African Community is a proper Respondent in this Appeal.
 2. If the answer in issue number one is in the affirmative, the question is whether the Judgment of the First Instance Division contravenes Rule 68(5) (f), (g), (h) and (i) of the Rules.
 3. Whether the First Instance Division erred in law in finding that by refusing to interview the Applicant in Arusha, the Respondent did not breach Article 6 (d) and (e) and Article 71 (h) of the Treaty and Regulation 20(7) of the Staff Rules.
 4. Whether the First Instance Division erred in law in the evaluation of the evidence thereby occasioning a failure of justice.
 5. Whether the First Instance Division erred in law by not considering the Appellant's claim to damages.
 6. What remedies are the Parties entitled to?

Legal representation

26. Both at the Scheduling Conference and the hearing of the Appeal, the Parties' appearances were as follows: The Appellant, a self-confessed highly qualified practising lawyer and jurist, appeared fending for herself. For the Respondent, Dr. Anthony L. Kafumbe, learned Counsel to the Community, appeared.

The Court's determination on the issues

Issue No. one: Whether the Secretary General of the East African Community is a proper Respondent in this Appeal.

27. After perusing the record of proceedings in the Trial Court, we are increasingly of the view that this issue need not detain us at all. It is common ground between the Parties that the issue of the right person to be sued was properly resolved by the Trial Court on 24th November, 2015.
28. It is true that initially, the Reference was instituted in the names of Alice Nijimbere as Applicant and the East African Secretariat as the Respondent. For sure, there is no institution or legal person in the Community known as the "EAC Secretariat". But, as the Appellant pointed out in her Written Submissions [page 5, lines 36-7], this "*lapsus calamy*" was redressed by the Trial Court on 24th November, 2015 (see pages 204 – 5 of the Record of Appeal).
29. On that particular day, the Appellant, as Applicant, orally applied to have the Pleadings amended and the name of the "Secretary General of the East African Community" be substituted for "the East African Community Secretariat" as the Respondent. The application was granted without any objection.
30. However, in its Judgment, the Trial Court appears to have reversed itself. It revived the issue of whether or not a proper person had been sued as the Respondent (see paras 26 to 29). It ended this travail holding thus:-
 "30. The Secretariat is an organ of the EAC under Article 1(g) of the Treaty and it seems to us that it can only be sued through the Secretary General and not directly as a Respondent. As we know it, where a wrong party in law has been sued, no orders should be issued against it. That is all we should say on that issue – see also *Ref. No. 3 of 2007, East African Law Society v. Attorney General of Kenya and 3 Others.*"
31. We respectfully hold that this was an issue which was improperly and unnecessarily raised *suo motu* by the Trial Court at the stage of composing its Judgment. We say improperly because the Parties could not have been heard on the issue at that stage. It was unnecessary because following the amendment of the Pleadings on 24th November, 2015, it was no longer a live issue at all. A proper legal person had been substituted in the place of a non-existing person and not merely "a wrong party in law". In our considered opinion, therefore, had there been no such prior amendment, the entire Reference would have been rendered incompetent. No competent proceedings can be brought against a non-existing legal entity. This is settled law.
32. Since the Secretary General of the Community was properly impleaded or brought on record as the Respondent by the Trial Court on 24th November, 2015, we answer the first Issue in the affirmative in line with the urging of both the Appellant and Dr. Kafumbe.

Issue No. two: If the answer in Issue number one is in the affirmative, the question is whether the Judgment of the First Instance Division contravenes Rule 68(5) (f), (g), (h) and (i) of the Rules.

33. The basis of this issue is the second ground of appeal in which the Appellant is reproaching the learned Trial Justices with contravening the clear and mandatory provisions of Rule 68(5) (e), (f), (g), (h) and (i) of the Rules.

34. Rule 65(5) of the Rules provides as follows:-

“The judgment of the Court shall contain –

- (a) the date on which it is read;
- (b) the names of the judges participating in it;
- (c) the names of the advocates and agents of the parties;
- (d) a concise statement of the facts;
- (e) the points for determination;
- (f) the decision arrived at;
- (g) the reasons for such decision;
- (h) the operative part of the judgment, including the decision as to costs”.

35. We wish to make it absolutely clear at once that we entertain no flicker of doubt in our minds that in our jurisdiction, failure on the part of the judge or judges to comply with the mandatory requirements of law, be it wittingly or otherwise, amounts to an error of law. Its consequences in law would depend on the nature and seriousness of the infraction in question in each particular case.

36. In her bid to substantiate this particular complaint, the Appellant adamantly maintains that the impugned Judgment is legally wanting in sufficiency. This is because the Trial Court “did not make a concise statement of the facts.” Instead, she is arguing:

“The Hon. Learned Justices reported on:

- Applicant’s case,
- Respondent’s case in Rejoinder,
- Scheduling Conference,
- And ended by
- The issues for determination.”

37. Advancing her argument further, the Appellant is insisting that the Trial Court did not refer not only to her affidavits and Written Submissions but also her “Rejoinder which as drafted on 6 pages has been summarised in three paragraphs.”

38. On the issue of “points for determination,” the Appellant submits without clear elaboration, that the “Hon. Learned Justices of the First Instance Division have been so much hazy and faltering in their motivation”, because they failed to appropriately interpret Articles 6 (d), (e) and (f), 71(h) of the Treaty, as well as Regulation 20(7) of the Staff Rules. We should pause to point out here that Article 6(f) is not a subject of complaint in the Appeal.

39. The Appellant further faults the Trial Court, for arriving at its decision, in what she claims to be a “transgression of the legal principles governing the profession of judges in their worthy assignment of rendering justice.” It is her contention here that the decision arrived at was not based “on the grounds of allegations of the parties and evidences (sic) provided by each party.”

40. She concludes her submission on this Issue registering her bewilderment as to why no explanation was given on why no order for costs was made. We shall take the liberty of quoting her verbatim lest we be misunderstood. She argues:-

“It was therefore difficult to know who lost and who won the case, because the Party who normally lose the case is supporting (sic) the costs. Anyone could believe that the Hon. Justices of the First Instance Division have been lenient towards the Applicant on that aspect!!!! (sic).”

41. The Submission of Dr. Kafumbe on this Issue is, admittedly, succinct.
42. He contends that the impugned Judgment of the Trial Court meets all the requirements of Rule 65 (5) of the Rules. The merits of the judgment aside, he defends it from the perspective that it contains the facts of the entire Reference, the points for determination and the decisions and reasons thereon based on a proper appreciation of the evidence on record, as well as the operative part. All these, he asserts, are captured in Paras 6, 7-14, 25, 71 (a), (b) and (c). He is, accordingly, urging us to answer the second Issue in the negative.
43. In resolving this Issue, we have found ourselves constrained to begin by stating that we have painstakingly studied the Trial Court's faulted Judgment which is found on pp. 237 to 260 of the Record of Appeal, the latter having been lodged by the Appellant herself. Not wishing in any way, to appear being discourteous to the Appellant, we should point out immediately that the Judgment bears out the assertion of Dr. Kafumbe and belies the Appellant's protestations that it is not in conformity with the mandatory requirements of Rule 65(5) of the Rules.
44. We have found the Judgment to contain a concise statement of the facts of the Reference (see paragraphs 6 to 23) and this is unwittingly conceded by the Appellant in her Written Submissions (see paragraph 36 above). Fortunately, the Appellant is a seasoned lawyer, who is currently "a Senior Advocate of the Burundi Bar Association" and "a Managing Partner of an International Law Firm ...in Bujumbura" (see her Letter of Application). In our respectful opinion, therefore, she ought to have realized that what both the Common Law and Civil Law systems of justice require is not a reproduction of the pleadings and evidence but "a concise statement of the facts", as can be objectively gleaned from the pleadings and evidence of both sides.
45. It is our considered view that the word "concise" as used in Rule 68 (5) (e) of the Rules, must be given its ordinary and plain meaning. Viewed from this perspective, it should mean:-
 - (a) giving only the information that is necessary using few words (i.e., brief in form but comprehensive in scope): *Oxford Advanced Learner's Dictionary*, 8th Edition at page 310; or
 - (b) free from all elaboration and superfluous detail: found at :From this view point, we hold without any demur that the learned Trial Justices, fully complied with Rule 65 (5) (e).
46. We have found the requirement of showing "the points for determination" to have been met by the Trial Court. For the benefit of the Appellant, what the law demands is an early and clear indication in the judgment, of the issues the Court is being called upon to resolve. For the purposes of Rule 68(5) (f), these are nothing but the issues agreed upon at the Scheduling Conference held under Rule 53 (1) of the Rules. These "points for determination" are clearly spelt out in paragraph 25 of the Trial Court's Judgment, and as shown in para. 26 of that Judgment, the Trial Court undertook "to deal with each issue separately after summarising the submissions made by the Parties".
47. Alive to its duty, the Trial Court, in a critical evaluation of all the material before it, and rendering its interpretation of the relevant provisions of the Treaty and Staff Rules, dealt with each issue separately and made its reasoned determinations thereon. This is reflected in paragraphs 31 to 73, contained in pages 11 to 24 of its

Judgment, found on pages 247 to 260 of the Record of Appeal.

48. We, therefore, hold that we have found the impugned Judgment to have been articulate and succinctly composed, and, gladly, in very plain language. The decision on every issue for determination was not only explained lucidly but was justified by reasons. The Trial Justices may be, might have arrived at wrong conclusions, but that cannot translate to being “hazy and faltering in their motivation”. All courts, short of being actuated by fear, ill will, affection or favour, have the jurisdiction to be wrong, hence the existence of appellate jurisdictions.
49. We accordingly find no merit in the second ground of appeal which we dismiss, and proceed to answer the second Issue in the negative.

Issue No. three: Whether the First Instance Division erred in law in finding that by refusing to interview the Applicant in Arusha, the Respondent did not breach Article 6(d) and (e) and Article 71(h) of the Treaty and Regulation 20(7) of the Staff Rules.

50. In her wide-ranging Submission on this Issue, the Appellant is claiming that the learned Trial Justices erred in law in not holding that the Respondent breached Articles 6 (d) and (e) and 71(h) of the Treaty and Regulation 20(7) of the Staff Rules in rejecting her request for a special dispensation to be interviewed in Arusha and/or making her entitlement to travel and accommodation expenses conditional to appearing for the interview in Bujumbura.
51. The Appellant begins by stating the obvious. This is that the Respondent as head of the Community’s Secretariat (the administrative organ) has a duty “to comply on a daily basis, with the fundamental principles that govern the achievement of the objectives of the Community by the Partner States.” We should admit forthwith that we are in full agreement with her on this unarguably correct statement of fact. She is borne out, as far as this issue is concerned, by Article 6 (d) and (e) of the Treaty.
52. These two provisions of Article 6 of the Treaty provide thus:-
- “6. The fundamental principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:
- (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.
- (e) equitable distribution of benefits.”
53. Furthermore, Article 71(h) reads as follows:-
- “71. The Secretariat shall be responsible for:
- (h) the general administration and financial management of the Community.”
- Regulation 20(7) of the Rules, on the other hand, prescribes that:
- “The Community shall pay travel and accommodation expenses for the shortlisted candidates for the posts advertised.”
54. With these provisions in mind, the Appellant submits that the Respondent in handling her case breached all the tenets of good governance, “from the date of notification of her short listing until the date of notification of the final decision complained of”.

55. After defining “good governance” as “the process of decision making by which decisions are implemented (or not implemented)”, the Appellant argues that the Respondent breached the following “characteristics of good governance”:-
- (a) Responsiveness: the Respondent belatedly informed her of her shortlisting on top of requesting her to travel to Bujumbura on her own means and never responded to her “administrative complaint.”
 - (b) Transparency: the Respondent failed to show the authority on which his action of contacting the shortlisted candidates was based, and also “failed to prove how other shortlisted candidates were contacted for the purpose of the interview.”
 - (c) Rule of Law: under this head the Appellant is requesting us “to insure (sic) if Appellant case was not a sensitive one which could have retained the attention and the compensation of the decision makers” and concludes arguing that the issue of level ground relied on by the Respondent was not relevant.
 - (d) Accountability: she claims to have been discriminated against by the Respondent, a complaint not investigated by the Trial Court.
 - (e) Equity and Inclusiveness: the Respondent failed to treat her “case as a fortuity (sic)” one and to note that she, “the Burundian candidate who she (sic) was in a critical situation... should have been treated as a vulnerable individual”. As a result, she is arguing, she was denied “her right to be interviewed with no legal reason”, thereby violating the African Charter on Human and Peoples’ Rights.
 - (f) Participation: she is claiming that the unreasonable short notice given to her by the Respondent denied her participation in the interview.
 - (g) Consensus oriented: the failure of the Respondent to accede to the offer of an out-of-court settlement occasioned what she believes would have been an otherwise avoidable dispute.
 - (h) Effectiveness and Efficiency: allowing a mother who had an acceptable excuse to be interviewed in Arusha would not only have been a humane act, but would also have “saved the Community from incurring expenses related to Applicant accommodation and ticket”, she is contending.
56. On the basis of the above contentions, the Appellant is asking the Appellate Division to:
- “conclude that Article 6 (d) and (e) of the Treaty has been breached by the Respondent in view of his attitude in treating the Appellant case since 23rd September.....until 28th September 2015.”
57. On Article 71(h) of the Treaty, she is contending that the Respondent breached it by, firstly, not providing the legal basis upon which the giving of short notice was based. Secondly, not responding promptly to her request for special dispensation and thirdly, wrongly reporting that she had declined the invitation to travel to Bujumbura for the interview.
58. Regarding Regulation 20(7) of the Staff Rules, the Appellant is arguing that the Respondent violated it by requiring her to travel to Bujumbura on her own means and meeting her accommodation expenses.
59. On his part, Dr. Kafumbe strongly denies the alleged breaches of Articles 6 (d) and (e), and 71 (h) of the Treaty and Regulation 20(7) of the Staff Rules.

60. It is his submission that none of the basic tenets of good governance as enumerated by the Appellant was breached by the Respondent in the entire process of recruiting the Registrar of the Court.
61. Dr. Kafumbe is urging us to hold that the Respondent acted transparently such that none of the other shortlisted candidates for the Post who attended the interview raised any complaint. He is arguing, and very correctly, that the Respondent had no legal duty to cite Rules and Regulations enabling him to give the shortlisted candidates a short notice and how they were contacted. His smoking gun, in our considered opinion, is that the “Appellant’s request to be interviewed in Arusha was only a request for a favour which cannot constitute a legal right”, and going by the Staff Rules, the “Respondent did not owe the Appellant any duty of care to the extent of facilitating her travel to the venue of the interview in advance.”
62. Regarding Responsiveness and Participation, Dr. Kafumbe posits that as “the Appellant communicated her inability to travel on a Saturday...it was not possible to generate a response until Monday, which was the next working day.”
63. Dr. Kafumbe concludes his Submission on the alleged breach of Article 6(d) stressing, firstly, that the Trial Court rightly upheld:

“the Respondent’s decision as he had no legal obligation to grant the Appellant any favours. Secondly, if the sought favour had been granted, it would have been prejudicial to other candidates who made efforts to attend at their capitals Cities. Thirdly, it would not have been reasonable to compel the Community to incur high costs on account of one candidate, who had no good reason for failing to travel to Bujumbura.”
64. Regarding Article 6 (e), Dr. Kafumbe is contending that the complaint of the Appellant is untenable as matters relating to equitable distribution of benefits has been accommodated through the adoption of the quota system which regulates employment in the Community. We out rightly agree entirely with him on this. This accounts, we believe, for the exclusion of Rwanda and Tanzania candidates.
65. Dr. Kafumbe finds no merit in the Appellant’s complaint based on Article 71 (h) of the Treaty. It is his position that, this provision which relates to the general administration and financial management of the Community was not breached. This is because, and we are inclined to agree with him, sound administration of the Community also requires that all interviewees are treated equally and as such it would have been a breach of the same if the Secretariat had opted to favour one candidate at the expense of the rest.
66. His other attractive argument, which was not refuted, is that the extra costs that were to be incurred to hire video conference facilities elsewhere in Arusha and hire people to verify that the Applicant was of Burundi nationality, and, her academic and professional skills, before she could do the interview, were costs that were not provided for in the budget of the Respondent. Accordingly, using resources outside the approved budget would have violated the very provisions of Article 71(h).
67. On Regulation 20(7), it is Dr. Kafumbe’s submission that it was not breached as the Respondent did not refuse to refund the costs had the Appellant travelled to Bujumbura.
68. The Appellant’s Rejoinder Submissions raised nothing new other than re-

emphasizing what she had submitted on in her main submission.

69. It is incumbent upon us now to determine whether or not the Respondent breached the above mentioned provisions of the Treaty and Staff Rules.
70. Fortunately, the Issue under scrutiny constituted Issues No. 2 and 3 in the Trial Court.
71. After re-visiting the facts as contained in the Parties' Pleadings and affidavital evidence as well as the Treaty and Staff Rules provisions, the Trial Court found the following germane facts either undisputed or satisfactorily established:-
 - (a) In the Appellant's initial e-mail of Thursday, 24th September, 2015, sent at 10:37 a.m., she never gave any reason as to why she wanted to be personally interviewed in Arusha and not in her home country.
 - (b) It was the Respondent who took the initiative of seeking the reason for the requested change of venue. When thus pressed, the Appellant, in her e-mail of Friday, 25th September, 2015 sent at 11:36 a.m. gave only one reason: her daughter was sick and at that very moment she was in hospital.
 - (c) The undisputably seven-year old child had been "suffering from periodical fever, nausea and vomiting for the previous five days" and on that day she had been attended and not admitted but was "required to return for observation after one week."
 - (d) The Appellant/Applicant had not from the outset given the issue of her indisposed child as the reason for seeking a special dispensation.
 - (e) The Respondent had set up a level playing ground for all candidates "to be treated equally in all aspects of the interview process."
 - (f) The Appellant had been shortlisted for the interview because she was qualified for the Post and not principally because she hailed from Burundi.
 - (g) No single interviewee with a sick child was treated differently from the Applicant/Appellant by the Respondent.
 - (h) At no time did the Applicant/Appellant complain about the short notice given. She sought dispensation on the basis of one reason: her sick child.
 - (i) If the Appellant was indeed convinced that the call for the interview had been given at short notice, she never requested the Respondent to push forward the interview date. Instead, she stuck to her preferred position to be interviewed in Arusha on 28th September, 2015.
 - (j) The communication between the Appellant, the Interlocutor and the Respondent took place between 23rd September, 2015 and 28th September 2015. As two of these days fell on a weekend, the Respondent could not respond immediately to the request prior to Monday, 28th September, 2015, which was the first working day and the interview day.
 - (k) The complaint based on Regulation 20 (7) of the Staff Rules was an afterthought as the Applicant/Appellant in her e-mail of 24th September, 2015, had unreservedly expressed her gratitude for "Deloitte's willingness to reimburse" her travel and accommodation costs in Bujumbura.
72. We hope it will be immediately appreciated that all these are findings of fact which we are precluded from questioning on appeal under Article 35A of the Treaty. All the same, we are not barred from observing that all these facts which formed the core of the Trial Court's decision are readily discernible from the

Pleadings and affidavital evidence. It has not been proved to us by the Appellant that they were predicated on a misapprehension of the Pleadings and/or evidence on record by the Trial Court.

73. In our determination of this Issue, therefore, we have found ourselves in full agreement with the Trial Court that the Respondent did not breach Regulation 20(7) of the Staff Rules. This particular provision as produced in full in paragraph 53 above, is self-explanatory and calls for no interpolations. As correctly held by the Trial Court, a view shared by Dr. Kafumbe, this Regulation does not prescribe that the Respondent must make these payments in advance of the interview.
74. Indeed, the Appellant had all along so understood this proper interpretation of the Regulation. This view gains credence from her acknowledgement e-mail to the Interlocutor alluded to in paragraph 71(k) above.
75. We accordingly dismiss the Appellant's complaint based on Rule 20(7) of the Rules.
76. Coming to Article 71(h) of the Treaty, it is the Appellant's claim that it was breached inasmuch as the Respondent:-
 - (i) failed to state the Rule or Regulation followed when inviting her for the interview on short notice;
 - (ii) did not respond promptly to her "special dispensation request";
 - (iii) "gratuitously accused" her "of having declined the invitation of travelling to Bujumbura for the interview";
 - (iv) had failed in his duty by informing her "about the interview process within less than one week, while we know that people are not supposed to be stuck at home".
77. We shall answer these accusations one after the other.
78. We have already shown that the Respondent was not barred by any law or even policy statement from giving the so-called "short notice". The Appellant has not referred us to any such requirement, be it statutory or an administrative circular, etc. The Trial Court's finding that the Respondent acted prudently given the exigencies of the then prevailing situation, remains solidly unchallenged.
79. Going by the evidence before it, the Trial Court was satisfied that the Respondent acted with all necessary promptitude on the Appellant's request. This was a finding of fact based, in our considered opinion, on a proper appreciation of the evidence. We have no legal mandate, therefore, to interfere with it, regardless of the Appellant's displeasure. We accept that to be her own prerogative.
80. It is true that the Respondent reported at the meeting of the Finance and Administration Committee that the Appellant had "declined to travel to Bujumbura to be interviewed". We have found nothing revolting in this to justify the charge that it was "wrong and offending". Given the facts narrated above, it was made in good faith and it could not have been more forthrightly put.
81. We are in full agreement with the Appellant that people, even those who have applied for jobs, "are not supposed to be stuck at home". This concession, however, does not, in our view, help to advance the Appellant's cause. As she has admitted, when writing and lodging the application for the Post, she was in Bujumbura. She unequivocally stated therein that she "is presently working as a Managing Partner of an International Law Firm established in Bujumbura". At no given time in between July, 6th, 2015, and September 23rd, 2015, did she inform

the Respondent that she had relocated, either permanently or temporarily, from Bujumbura to Arusha or any other place. She should, therefore, not look for a scapegoat.

82. In view of the above, we are of the firm view that the Appellant totally failed to demonstrate that the Respondent abdicated, in any way, his Treaty responsibilities under Article 71(h) of the Treaty.
83. On the basis of the above discussion, we find ourselves on a firm footing to provide our conclusive answer to the Issue under scrutiny.
84. We are settled in our minds that the Respondent responded positively to the Appellant's application for the Post. He found her to have the requisite qualifications for the Post and also qualified for the interview as a candidate from one of the three Partner States whose citizens were only eligible to apply. She was accordingly shortlisted and invited to attend the interview at Bujumbura.
85. For reasons peculiarly within her personal knowledge, she sought a special dispensation to be interviewed in Arusha. In order to make an informed decision, the Respondent requested her to support the request with reasons. At that juncture and for the first time, she informed the Respondent that she could not travel as her daughter was sick. Her own evidence shows that the daughter had been feeling unwell for the last four (4) days (then), but had not bothered to take her to hospital at all.
86. The Appellant took the child to hospital two days after she had received the interview call and a day after being required to furnish a reason or reasons for her request. Even, then, the child was only attended and not admitted. On the basis of these undisputed facts which were, unarguably, unfavourable to the Appellant's case, the Respondent refused to accede to the special request to avoid unfairly changing the set rules of the game at the last hour. The Appellant then decided not to report for the interview.
87. The Trial Court, in the light of these facts, posed to itself this germane question in its Judgment: was the Respondent's decision "unreasonable" and a "breach of the right to social justice, equal opportunity and gender equality?"
88. The Trial Court answered the posed pertinent question in the negative. That, in our considered opinion, was the appropriate answer. We are equally settled in our minds that the reason put forward by the Appellant as an excuse for her inability to travel to Bujumbura was a specious one. It lacked cogency. May be she would have been taken seriously if she had produced an iota of evidence to show that prior to Wednesday September, 23rd, 2015, she had taken the child to hospital and/or had offered that reason in her request for a special dispensation. Furthermore, she even failed to provide evidence to show that the child was too sick to travel. If she wanted to be believed and draw the sympathy of the Respondent and have her request for a favour or preferential treatment favourably considered, she had a duty to do so. In the circumstances, therefore, the Respondent cannot be condemned for refusing to grant an undeserved favour.
89. In view of the above, we are increasingly of the view that the Appellant was not at all discriminated against. She voluntarily opted out of the interview exercise. We shall, therefore, be failing in our duty to fairly interpret and apply the Treaty, if we hold that the decision of the Respondent was an infringement of Article 6

(d) and (e) of the Treaty. The third Issue is accordingly answered in the Negative.

Issue No. four: Whether the First Instance Division erred in law in the evaluation of the evidence thereby occasioning a failure of justice.

90. It is the Appellant's contention that the Trial Court failed to evaluate the evidence before it, thereby occasioning a failure of justice.
91. We take it to be settled law that in judicial decisions, a proper evaluation of evidence involves an objective scrutiny of the entire evidence proffered by the parties, be it oral, documentary, real or demonstrative, with a view to reaching balanced conclusions of facts and/or reasonable inferences of fact and applying them to the governing law(s). In the instant case the Reference was prosecuted and determined on the basis of affidavital and documentary evidence.
92. The over-arching issue was whether the Appellant had made up a good case for her failure to travel to Bujumbura for the interview and the Respondent had for no good reason, rejected her request for "a special dispensation," thereby illegally denying her, her Treaty right to be interviewed and recruited as the Registrar of the Court.
93. We have carefully read the Appellant's brief submission pressing us to fault the Trial Court for failing to conduct "an investigation at the Hospital where the child was treated to verify if her status could have allowed her" to leave it behind and proceed to Burundi. We have found this to be a strange submission, to say the least. That is why we accede to Dr. Kafumbe's contention that the Trial Court had no such obligation in law. It would have been highly monstrous for the Trial Court to do so.
94. For the above reasons, we reject the Appellant's reproach of the learned Trial Justices that they failed to "comply with the legal principle governing the profession of judges in their worthy assignment of giving a ruling '*infra petita*' for the Appellant, and '*ultra petita*' for the Respondent." We are minded here to let the Appellant know that in administering justice, judges are enjoined by law to remain impartial throughout. In our case, Article 24 (1) of the Treaty is of special significance.
95. The above observations notwithstanding and in all fairness to the Appellant, we take cognisance of her strong contention that she:
 "never said that her child was in Hospital..." but "that she was at the Hospital. Grammatically, being at the Hospital does not mean being hospitalized".
96. Grammatically, we entirely agree with her. But does this justify the accusation that the Trial Court erred in law in the evaluation of the evidence thereby leading to a failure of justice? We believe not. We shall let the Trial Court vindicate itself.
97. Dealing with the issue of the child's sickness, the Trial Court logically guided itself thus:-
 "46. In her initial e-mail of 24th September, 2015, at 10:37 a.m. (and we have deliberately stated the times that the e-mails were exchanged) she gave no reason why she wanted to be interviewed in Arusha and not Bujumbura. When pressed to explain her reasons, she responded on 25th September at 11:36 a.m. to say that her daughter was sick and at that moment, she was in hospital.

47. We have in that regard seen an AAR Insurance Claim Form dated 25th September, 2015 which indicates that the child had been suffering from periodical fever, nausea and vomiting for the previous five days and was treated on that day and required to return for observation after one week. On 24th September 2015, the child was therefore not in hospital and had not been treated and that explains the Applicant's e-mail of 25th September 2015; that she was in hospital at the time she sent the e-mail. She has not however explained why on 24th September 2015 she never gave any reason for her plea to be interviewed in Arusha but we presume that it was on account of the sick child.
48. The Respondent, having seen that form, took the view that since the child was not admitted in hospital, then the Applicant was in a position to travel to Bujumbura for her interview. Is that an unreasonable decision in breach of the right to social justice, equal opportunity and gender equality? We think not."
98. We have found force in this reasoning which justifies the conclusion arrived at by the Trial Court. We fully subscribe to it and hold that the Trial Court's decision was not based on a misapprehension, real or apparent, of the evidence. It was a result of a balanced analysis of all the material before it. It is the Appellant who, in her eagerness to find fault with others, totally misunderstood the reasoning of the Trial Court, for it was addressing itself to the situation obtaining on Thursday, 24th September, 2015. We accordingly answer the fourth Issue in the Negative.

Issue No. five: Whether the First Instance Division erred in law by not considering the Appellant's claim to damages.

99. This Issue, in our considered opinion, can be satisfactorily answered after having recourse to the reliefs which the Appellant was seeking in the Reference and the agreed Issues at the Trial. The former, were stated in full in paragraph 10 above, while the latter are to be found in paragraph 14 above. It is clear from both that the issue of damages does not feature at all. There is no gainsaying that the claim for damages was raised (and not pleaded) for the first time by the Appellant in her final Submissions, without effecting any amendment to her Pleadings. The Appellant admitted that much in her response to the Trial Court's questions at the hearing of the Reference on 28th January, 2016.
100. At the hearing, the Appellant is on recording saying:
 "In the Statement of Reference, I didn't develop these various compensations."
101. To the question on whether, being an advocate, she was "aware of the principle that a party or litigant is bound by his or her pleadings?", she replied:
 "Yes, I am aware that a party is bound by his pleadings."
102. Despite this admission, she did not deem it worthwhile to seek leave to amend her Pleadings. She had such a right under Rule 48 (c) of the Rules. So, until the time of Judgment, the Pleadings remained unamended and Damages not formally pleaded.
103. In its Judgment, the Trial Court briefly and understandably held that since the prayer for "compensation" was introduced in the Appellant's Written Submission, it could not delve into it at all. This was because, it held, the claim

was unprocedurally introduced and, “where a matter is not pleaded and the other Party has no opportunity to respond to it, the ends of Justice would not be met if a court were to determine it.”

104. We take this holding to be a correct position of the law. Apart from being settled law that Parties are bound by their Pleadings, it is equally trite law that a Court has no jurisdiction to grant a relief not specifically pleaded. In spite of the Appellant’s long and discursive submission in support of an affirmative answer to this Issue, Dr. Kafumbe did not directly address himself to it but responded on the assumption that the Trial Court had rightly rejected the claim for compensation on account of lack of merit. This lapse notwithstanding, we are convinced that the Trial Court rightly rejected the Appellant’s claim for “compensation” (damages). We, therefore, find ourselves constrained to answer this Issue in the Negative.

Issue No. six: What remedies are the Parties entitled to?

105. The Appellant accessed this Appellate Division seeking the reversal of the impugned Judgment of the Trial Court. From our elaborate discussion on the four preceding Issues, it is evident that she has totally failed to persuade us to hold that the said Judgment was flawed by errors of law and/or procedural irregularities to justify our intervention. We are in agreement with Dr. Kafumbe that the “sound well-reasoned Judgment of the First Instance Division of the Court... be upheld”, as we hereby do. Therefore, save for our holding on the first non-contested ground of appeal, we hereby dismiss the other grounds of appeal as encapsulated in Issues No. Two to Six.

Conclusion

106. To recap briefly, the Appellant had applied for the Post of Registrar of the East African Court of Justice. From a host of applicants, she was one of the lucky six (6) who were shortlisted for interview. The interview was slated for September 28th, 2015. It was to be carried out by way of video conferencing. The candidates/interviewees were to be interviewed at the offices of the Ministry of East African Community Affairs in their respective countries. The Appellant was, therefore, to appear for the interview at the said offices in Bujumbura.

107. The Appellant, at first and for no apparent reason, sought from the Respondent a “special dispensation” to be interviewed at Arusha. When pressed by the Respondent, she claimed (2 days later) that she was taking care of her sick 7-year old daughter. The Respondent took the view that since the daughter was not hospitalised in order “to accord all candidates a level playing field,” there “could be no exception for any candidate”. The request was accordingly rejected. The Appellant took offence of this decision and did not travel to Bujumbura. The interviews proceeded as scheduled and a new Registrar was duly recruited.

108. Believing that the Respondent’s decision denying her special dispensation was illegal, in that it was an infringement of Articles 6 (d), (e), and (f) and 71(h) of the Treaty, the Appellant, instituted the Reference under Article 30(1). She sought for the annulment of the Respondent’s decision and a re-launch of the entire “process of interview and organise a different interview panel”.

109. The Trial Court found the Respondent to have acted reasonably in refusing

to grant the special dispensation. It also found the extravagant request of relaunching the interview process incapable of achievement. It accordingly dismissed the Reference, ordering each Party to bear her/his own costs.

110. Only the Appellant was dissatisfied with the entire decision, hence this contested Appeal. In the Appeal, the Appellant is praying for:

“an order to reverse the decision appealed against and the decision of the First Instance Division be dismissed in its entirety with costs.”

She is, however, silent on what further orders the Court should make in the event the impugned Judgment is reversed. In view of the decision we have arrived at, this is only a by the way.

111. On our part, having dispassionately considered the Pleadings, evidence, the governing provisions of the Treaty and the Rules, the impugned Judgment and Parties’ Submissions before us, we are settled in our minds that this Appeal has been lodged without any sufficient ground of complaint. There is nothing perverse in that Judgment to justify our reversing it or even varying it. It is as balanced and clear as it is reasoned. It can only be upheld in its entirety, as we hereby do.

112. All said and done, we dismiss the Appeal. As the Respondent did not appeal the Trial Court’s order on costs, we make no order as to costs.

The Appellant appeared in person

A. Kafumbe for the Respondent

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Appellate Division

Appeal No. 2 of 2016
Godfrey Magezi v National Medical Stores

Appeal from the Ruling of the First Instance Division at Arusha: Lenaola, DPJ; Ntezilyayo and Jundu JJ, dated the 30th day of June 2016 in Application No. 9 of 2015 arising from
Taxation Reference No. 1 of 2015

Coram: E. Ugirashebuja, P.; L. Nkurunziza, V.P; E. Rutakangwa, A. Ringera & G. Kiryabwire, JJ. A
May 25, 2017

Taxation - Whether there was sufficient reason for extension of time - Judicial discretion - Purposive approach - Statements in an affidavit are evidence - Misdirection in law- Decisions of municipal courts have no precedential authority

Article 35A of the Treaty - Rules: 4, 99 of the East African Court of Justice Rules of Procedure 2013

On 25th July, 2013 the Appellant filed Reference No. 5 of 2013 against the Attorney General of the Republic of Uganda with the Inspector General of Government, the Auditor General, the Public Procurement and Disposal of Public Assets Authority, National Medical Stores and Quality Chemical Industries Limited as Interested Parties. After serving the Interested Parties with the Reference, the Appellant amended his Reference and served the Interested Parties with Notices of Withdrawal. The Respondent along with Quality Chemical Industries Limited then separately filed two applications before the First Instance Division that were consolidated as Consolidated Applications No. 8 and 9 of 2014 arguing that the discontinuance of the matter against them was without an agreement in writing as to the terms of such withdrawal and the costs incurred. The Trial Court held that the Respondent was entitled to costs.

Subsequently, the Respondent filed its bill of costs and on 7th September 2015 the Deputy Registrar delivered a Taxation Ruling. Being dissatisfied, the Appellant sought to set aside the taxation award on 22nd September 2015, a day after the 14-day period prescribed by the Rules of Procedure. Thereafter, on 2nd October 2015 the Appellant filed Miscellaneous Application No. 9 of 2015 in the Trial Court seeking orders for the enlargement of time for lodging Taxation Reference and for the validation of the late filing of Taxation Reference No. 1 of 2015: Godfrey Magezi v National Medical Stores. The Trial Court dismissed the Application stating that the Court's discretion to extend time under Rule 4 only comes into existence after sufficient reasons for extending time have been established. The Appellant's Counsel did not provide any evidential proof in support of his statement in the Affidavit and so it not meet the rigorous standard of proof set out in Rule 4. The Appellant's conduct was not irreproachable. He ought to have acted diligently upon learning that his Counsel would not meet the statutory deadline and requested that his case

be attended by another lawyer from his Counsel's law firm. The Appellant did not show that such a request had been made.

Being dissatisfied, the Appellant filed an appeal claiming that the Trial Court erred in law by declining to grant the Appellant's Application for extension of time and validation of the late filing of Reference No. 1 of 2015 which was filed eleven days after the filing of the Taxation Reference. Counsel for the Appellant argued that: his failure to file the Reference in time should not have been visited on the Appellant; and the Trial Court erred in law in failing to follow the doctrine of precedent by failing to follow the *ratio decidendi* in the case of; *The Attorney-General of the Republic of Uganda v. The East African Community Law Society & Another* and *Attorney-General of Kenya v Prof. Anyang' Nyong'o & 10 others* where the Court's purpose is to administer substantial justice without undue regard to technicalities was emphasized.

In reply the Respondent submitted that the Appellant had failed in his duty to present evidence of the alleged incidents and the Trial Court could not be faulted for finding that insufficient reasons had been given for extension of time.

Held:

1. The question whether or not a Trial Court exercised its discretion properly is a matter of law and an appellate court will not interfere with a trial judge's exercise of judicial discretion unless it is satisfied that the discretion was not exercised judicially. Such a conclusion can only be reached if it is established: that there was a misdirection on law; a misapprehension of facts; or that the trial court took into account some irrelevant factors, or failed to take into account some relevant factors; or that in taking into account all the circumstances of the case, the decision arrived at was so manifestly wrong that an improper exercise of discretion must be inferred.
2. The wording of Rule 4 of the Court's Rules of Procedure is permissive enough to allow the Court to take into account, *suo motu*, any reason or ground which is pertinent to the exercise of its discretion. In determining whether "sufficient reason" for extension of time exists, the court seized of the matter should take into account not only the considerations relevant to the applicant's inability or failure to take the essential procedural step in time, but also any other considerations that might impel a Court of Justice to excuse a procedural lapse and incline to a hearing on the merits. Such other considerations will depend on the circumstances of individual cases and include, but are not limited to, such matters as: the promptitude with which the remedial application is brought; whether there was manifest breach of the rules of natural justice in the decision sought to be challenged on the merits; and the prejudice that may be occasioned to either party by the grant or refusal of the application for extension of time. We prefer this broad purposive approach as judicial discretion is a tool, a stratagem or a device in the hands of a Court for doing justice or, in the converse, avoiding injustice.
3. There was record of the Appellant's own uncontroverted deposition of the steps he took to ensure that his Counsel filed the Application in time. Those depositions did not disclose sloth or dilatoriness on his part, they showed appropriate diligence. Statements made on oath in an affidavit are evidence and it was improper to

treat them as mere statements or allegations which required evidential proof, as would have been the case if they had been made in a pleading. The Trial Court took the view that the deposition by the Appellant's Counsel was an allegation or statement which required to be proved or substantiated by evidence such as a police report of the incident or factual particulars of the incident. Casting doubts on the veracity of such statements, without there being any rebutting evidence from the Respondent was a misdirection in law.

4. While decisions of Municipal Courts do not have precedential authority over EACJ, they may provide inspiration to particularly where they have been rendered by the highest tribunals in those countries and they are relevant to the matter under consideration in the Court.
5. The Trial Court failed to take into account some other relevant factors namely, that: the Taxation Reference raised the issue of the legality and equity of the impugned taxation; the period of delay in filing the said Reference was not inordinate; the Application for extension of time was filed promptly; and no prejudice to the Respondent had been shown. Consequently, the Trial Court did not exercise its discretion under Rule 4 judicially so the Appeal succeeds.

Cases cited

American Express International Banking v ATUL [1990-1994] EA 10
 AG of Kenya v Prof. A. Nyong'o & Ors [2005-2011] EACJLR, 259, Appl No. 1 of 2010 (Distinguished)
 Boney M. Katatumba v Waheed Karim, Civil Appl No. 27 of 2007, SCU
 Mary Ariviza & Anor v AG of Kenya & Anor [2012-2015] EACJLR, 228, Appeal No. 3 of 2012
 Mbogo v Shah [1968] E. A. 93
 Mugo & Others v Wanjiru & Anor [1970] E.A. 481
 Njagi v Munyiri [1975] E.A.179
 Shanti v Hindocha & Others [1973] E.A. 207
 The AG of Uganda v The East African Law Society & Anor [2012-2015] EACJLR, 379, Appeal No. 1 of 2013, (distinguished)

JUDGMENT

A. Introduction

1. This is an Appeal by Godfrey Magezi ("the Appellant") against the Ruling of the First Instance Division of the Court ("the Trial Court") whereby the Trial Court dismissed with costs the Appellant's *Application No. 9 of 2015* for extension of time for lodging *Taxation Reference No. 1 of 2015* and validation of the late filing of the same.
2. The Respondent, National Medical Stores, is a Corporation established in 1993 by an Act of Parliament of the Republic of Uganda.
3. The Appellant was both in this Court and in the Trial Court represented by Mr. Mohamed Mbabazi, Advocate, of Nyanzi, Kiboneka & Mbabazi Advocates of Kampala, Uganda and the Respondent was represented by Mr. Peter Kawuma, Advocate, of Kiwanuka & Karugire Advocates of Kampala, Uganda.

B. Background

4. The factual background to the Appeal is fully set out in the Scheduling Memorandum presented to this Court by both Parties on 15th November 2016 pursuant to the provisions of Rule 99 of the East African Court of Justice Rules of Procedure 2013 ("the Rules") and is as below.
5. The Appellant on 25th July, 2013 filed *Reference No. 5 of 2013* at the East African

Court of Justice against the Attorney General of the Republic of Uganda. The Appellant in the said Reference impleaded the Inspector General of Government, the Auditor General, the Public Procurement and Disposal of Public Assets Authority, National Medical Stores and Quality Chemical Industries Limited as “Interested Parties”.

6. After the interested Parties had been served with the Reference and filed their Responses, the Appellant amended his Reference and served the Interested Parties with Notices of Withdrawal. The Respondent along with Quality Chemical Industries Limited then separately filed two applications before the First Instance Division that were consolidated as *Consolidated Applications No. 8 and 9 of 2014* arguing that the withdrawal/discontinuance of the matter against them was without an agreement in writing as to the terms of such withdrawal and in particular with regard to terms as to costs incurred.
7. The Trial Court in its Ruling in *Consolidated Applications No. 8 and 9 of 2014* delivered on 19th June 2014 held that National Medical Stores and Quality Chemical Industries Limited were entitled to costs as prayed and also condemned the Respondent to pay costs of the application.
8. The Respondent then filed its bill of costs and a Taxation hearing was held by the Deputy Registrar on 13th May 2015 wherein the bill of costs was taxed under *Consolidated Taxation Cause No. 2 and No. 4 of 2014*.
9. The Deputy Registrar, as the Taxing Officer, delivered a Taxation Ruling in the matter on 7th September 2015.
10. Being dissatisfied with the Taxation Award of the Registrar, the Appellant on 22nd September 2015 filed *Taxation Reference No. 1 of 2015* by way of Notice of Motion supported by affidavits sworn by counsel Mohamed Mbabazi and the appellant himself before the Trial Court seeking to set aside the said award. The said application was filed on 22nd September 2015, one day in excess of the 14-day period prescribed by the Rules.
11. The Appellant subsequently on 2nd October 2015 filed *Miscellaneous Application No. 9 of 2015* in the Trial Court seeking for orders that (a) Enlargement of time for lodging *Taxation Reference No. 1 of 2015: Godfrey Magezi v National Medical Stores* against the decision of the learned Deputy Registrar in *Consolidated Taxation Causes Nos.2 and 4 of 2014: National Medical Stores & Quality Chemical Industries Ltd v Godfrey Magezi* be granted; (b) The late filing of *Taxation Reference No.1 of 2015: Godfrey Magezi v National Medical Stores* be validated; and (c) Costs of the application be in the cause. This Application, like the previous one, was also by way of Notice of Motion supported by the affidavits of Counsel Mbabazi and Godfrey Magezi, the Appellant herein.
12. When the Application for enlargement of time came up for hearing on 14th March, 2016, the Trial Court directed that the Parties file written submissions in both Application No. 9 of 2015 and Taxation Reference No. 1 of 2015.
13. The Parties accordingly filed Written Submissions in both *Application No. 9 of 2015 and Taxation Reference No.1 of 2015*.

C. The Appellant’s Application before the Trial Court

14. The Appellant’s Application for extension of time for lodging the Taxation Reference was predicated on the grounds that (i) the failure and/or omission to

file the Reference within the prescribed time was not the applicant's doing but that of his Counsel, (ii) the Reference was filed just one day late, (iii) immediate steps were taken to cure the default, and (iv) justice required that the application be granted.

15. In his affidavit in support of the application, Counsel Mbabazi deposed, *inter alia*, that (i) he had personal conduct of the Taxation Cause which was decided on the 7th day of September, 2015 against the Appellant, (ii) the Appellant decided to seek legal redress against the decision by filing a taxation reference, (iii) he begun building his client's case for the intended taxation reference and had prepared to file the same by the 21st of September 2015, (iv) on Sunday 20th September 2015, one of his workers drowned in a pool on his farm in Hoima District, in Uganda, an incident which required his involvement and cooperation with the police, who only managed to recover the body on Monday 21st September, 2015, (v) he was only able to return to his chambers in the evening of 21st September 2015 whereupon he prepared and signed the Notice of Motion for the intended taxation Reference, (vi) his client only managed to sign his affidavit in support of the Motion on the 22nd September 2015, (vii) the Motion was filed in Court that very day and his Clerk was informed it was one day late, (viii) he immediately informed the Appellant of the lapse in the filing of the Taxation Reference and advised him to file the application for extension of time with immediate effect, (ix) the omission to file the Taxation Reference within the prescribed fourteen days was unavoidable and beyond his control and was in no way owing to the appellant, and (x) the Motion for extension of time was filed as soon as the default in filing the taxation reference in time was discovered.
16. In his supporting affidavit, Godfrey Magezi, deposed that (i) he instructed Mr. Mbabazi to challenge the Taxation award, (ii) Mr. Mbabazi informed him that a taxation reference is done in fourteen days and that he would file a taxation reference on Monday, the 21st September, 2015 and that he implored him to file it by Friday 18th but Counsel told him that he would be going up country to his farm on Friday but would be back on Monday (21st September 2015) to file the reference, (iii) he called Mr. Mbabazi on Monday, 21st September 2015 and the latter told him that he had suffered personal problems whereby one of his farm workers had drowned in a pool on his farm, which required his presence and cooperation with the Uganda police, (iv) he could not attend his Counsel's chambers late in the evening of Monday 21st September and so he signed the affidavit in support of the Reference in the morning of 22nd September 2015, (v) the Reference was filed in Court that very day; (vi) in the circumstances, the delay in filing the Reference was owing to the inadvertent omission of his Counsel and no fault, dilatory conduct or omission could be ascribed to him for the delay in filing the Reference, and (vii) it was in the interest of the administration of justice to grant the Application.
17. The Appellant filed Written Submissions in support of his application on 21st March 2016.

D. The Respondent's Opposition to the Application

18. In opposition to the Application, Mr. Apollo Newton Mwesigye, the Respondent's Corporation Secretary, deposed in a Replying Affidavit as follows: (i) that the

Appellant in his Application and in the supporting Affidavits had not bothered to give the specific details of the incident that was alleged to have caused the delay in filing, (ii) that in the absence of any evidence in proof of the allegation in the application, there could not be said to be sufficient reason to grant the orders sought and the application, accordingly, was without basis and must fail, (iii) that he was aware that the law firm of Nyanzi, Kiboneka and Mbabazi Advocates which was handling the case was equipped with more than ten lawyers but no explanation had been given why none of them completed the filing of the application within time in the alleged absence of Mr. Mohamed Mbabazi, (iv) that the Appellant had also not given any explanation as to why he did not follow up on the matter with the other lawyers in the law firm in the alleged absence of Mr. Mohamed Mbabazi, and (v) that the Taxation Reference No. 1 of 2015 in itself did not have chances of success as the bill of costs being disputed was taxed in accordance with the law and the principles of taxation.

19. The Respondent filed Written Submissions in support of its opposition to the Application on 1st April 2016.

E. The Trial Court's Findings

20. After considering the Affidavits filed by the Parties and the opposing arguments articulated in the Written Submissions, the Trial Court made the Findings set out herein below.

21. It was settled law that the Court had discretion according to Rule 4 to extend time if sufficient reason was shown by the Applicant. The Court distilled from the cases of *Attorney-General of Kenya v Prof. Peter Anyang' Nyong'o* [Appeal No.1 of 2009] and *The Secretary General of the East African Community v Hon. Sitenda Sebalu* [Application No. 9 of 2012] the following propositions of law:-

- (a) Rule 4 requires a qualitatively higher standard to extend time (namely, sufficient reason), than the case with the standard of "any reason" which is prescribed under the corresponding rules in some member States; and
- (b) The Court's discretion to extend time under Rule 4 only comes into existence after sufficient reason for extending time has been established and that it is only then that the other considerations such as the absence of any prejudice and prospects or otherwise of the success in a reference or appeal can be considered.

22. The Appellant's Counsel had not provided any evidence in support of his statement in the Affidavit that his worker had drowned and that he had to collaborate with the police who recovered the worker's body on 21st September 2015. In that regard, the Trial Court said, one would have expected to have been annexed to his Affidavit some evidential proof of the said drowning incident and also further information on the incident and the extent of his involvement in the matter. The Court concluded that by making a statement in an affidavit without any evidence to substantiate it, such a statement did not meet the rigorous standard of proof set by Rule 4.

23. The Appellant's conduct was not irreproachable. He ought to have acted diligently upon learning that his Counsel would not meet the statutory deadline and requested that his case be attended by another lawyer from his Counsel's law firm. It was not shown anywhere that the Appellant had made such a request

and that it was either rejected or deemed to be impossible.

24. In the result, the Court was not satisfied that sufficient reason had been given for the late filing of *Taxation Reference No. 1 of 2015*.
25. In the above premises, the prayers for extension of time for filing the Taxation Reference and for validation of the late filing of the same were dismissed with costs to the Respondent.

F. The Appeal to the Appellate Division

26. The Appellant being dissatisfied with the above decision of the Trial Court appealed to this Court by lodging a Memorandum of Appeal containing eleven (11) grounds, namely:
 - i) The Hon. Learned Judges of the First Instance Division erred in law when they decided that the Appellant had no sufficient reason for not filing Taxation Reference No. 1 of 2015 within the prescribed time;
 - ii) The Hon. Learned Judges of the First Instance Division erred in law when they decided that the Appellant's counsel had not provided evidence to support his failure to meet the deadline for filing the taxation reference;
 - iii) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they visited the inadvertence and omissions of counsel on the litigant;
 - iv) The Hon. Learned Justices of the First Instance Division erred in law when they arrived at their decision that the Appellant failed to act diligently upon learning that his counsel would not meet the statutory deadline and request that his case be attended by another lawyer from his Counsel's law firm;
 - v) The Hon. Learned Justices of the First Instance Division erred in law when they failed to administer substantial justice;
 - vi) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they gave undue regard to technicalities;
 - vii) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they failed to apply and/or ignored the doctrine of precedent and *stare decisis* (sic) in *The Attorney General v. The East African Law Society & The Secretary General of the East African Community: [EACJ AD Appeal No. 1 of 2013]* and *Attorney General of Kenya v. Prof. Anyang' Nyong'o & 10 others: [EACJ AD Application No. 2 of 2010]*;
 - viii) The Hon. Learned Justices of the First Instance Division erred in law when they applied the strict standard of interpretation when interpreting sufficient reason;
 - ix) The Hon. Learned Justices of the First Instance Division erred in law when they wrongly interpreted the procedural rules and arrived at the conclusion that the Appellant had no sufficient reason for not filing Taxation Reference No.1 of 2015 within the prescribed period;
 - x) The Hon. Learned Justices of the First Instance Division erred in law when in reaching their decision they failed to use the Court's inherent powers to make orders necessary for the ends of justice;
 - xi) The Hon. Learned Justices of the First Instance Division erred in law

when in reaching their decision they failed to do the balancing act of weighing between competing interests of procedural fairness versus substantive justice.

27. The Appellant prayed this Court to:-
- (a) Set aside the order of the Trial Court dated 30th June 2016 in Application No. 9 of 2015;
 - (b) Enter Judgment for the Appellant as prayed in Application No. 9 of 2015; and
 - (c) Allow the Appeal with costs to the Appellant here and in the First Instance Division of this Court.
28. At the Scheduling Conference of this Appeal on 15th November, 2016, all the Grounds of Appeal were, by consent of the Parties, consolidated into one issue for determination, namely, whether the Trial Court erred in law when it declined to grant the Appellant's Application for extension of time and validation of the late filing of *Reference No. 1 of 2015*.
29. After the Scheduling Conference, the Parties, in compliance with this Court's Directions filed their Written Submissions. The Appellant's Written Submissions were filed on 14th December 2016 and the Respondent's Submissions were filed on 20th January 2017. The Appellant filed his Replying Submissions on 27th January 2017.

G. The Parties' Respective Cases

30. Counsel for the Appellant pointed out that *Taxation Reference No.1 of 2015* was filed one day late and the application for extension of time was filed eleven days after the filing of the Taxation Reference. He submitted that such delay could not be inordinate.
31. With respect to the reasons for the delay, Counsel faulted the Trial Court for doubting the occurrence of the drowning incident and his personal involvement in it as deposed in his affidavit and also in requiring evidential proof of the same by the Appellant. Counsel trenchantly argued that if one wanted to doubt, even with a police report one could doubt its authenticity and require further proof of any photos and video coverage supplied.
32. Counsel further argued that failure to file the Reference in time was clearly his omission or inadvertence and the same should not have been visited on his client, the litigant in the matter. He relied on the Ugandan case of *Julius Rwabinumi v Hope Bahimbisomwe [Civil Application No. 14 of 2009]* where G.M. Okello JSC held that:
- "It would be a grave injustice to deny any applicant to pursue his right of appeal simply because of a blunder of his lawyer when it is well settled that an error of Counsel should not necessarily be visited upon his client."
33. In this case, Counsel pointed out, the Appellant had deposed that he instructed his Counsel to appeal against the Taxation Award and even reminded him to file it on the Friday preceding Monday, 21st September 2015 which was the last day for filing the Reference as per the Rules. Counsel faulted the Trial Court for taking the position that the Appellant ought to have been more diligent and as a precaution should have thought about a possible alternative measure to be taken. In his view, that amounted to imposing a higher degree of caution and

diligence on a litigant to vigorously pursue his case in the event of inadvertence by Counsel and it was to open a new chapter in making justice accessible to the public. Counsel pointed out that, in the circumstances of this case, the events giving rise to the default happened within a period of 8 hours from 9:00 a.m. to 5:00 p.m. on 21st September 2015 and as such, the litigant could not be expected to get another lawyer even from the same firm to prepare and file the Taxation Reference without making such assumptions as to the ready availability of an Advocate to work on the Appellant's file and that such Advocate was capable of representing the Appellant as required under the East African Court of Justice Rules.

34. Counsel for the Appellant also faulted the Trial Court for failing to decide the Application for extension of time in consonance with substantive as opposed to procedural justice as propounded by this Court in *The Attorney-General of Uganda v the East African Law Society & the Secretary General of the East African Community* [EACJ Appeal No. 1 of 2013]. Counsel submitted that to determine whether there was sufficient reason to extend time within which the Appellant can file a Taxation Reference was not substantive justice but procedural. In similar vein, he further submitted that to determine whether the Taxation Award rendered by the Registrar was legal and assessed in accordance with law and principles was substantive justice. He asked rhetorically why this Court would shut out the Appellant and refuse to hear him on the issue of the quantum and lawfulness of the Taxation Award.
35. Counsel for the Appellant also contended that the Trial Court erred in law in failing to follow the doctrine of precedent by failing to follow the authority of *The Attorney-General of the Republic of Uganda v. The East African Community Law Society & Another* (*supra*) and *Attorney-General of Kenya v Prof. Anyang' Nyong'o & 10 others* (*supra*). Counsel submitted that the *ratio decidendi* in those cases was to administer substantial justice without undue regard to technicalities. In his view, if the Trial Court had applied those decisions in the determination of the Application for extension of time, they would have reached a decision allowing the extension of time to the Appellant to file the Taxation Reference. In His Submission, the Trial Court failed to balance the requirement of procedural fairness to establish sufficient reason against the ultimate search for justice by the Parties before the Court and, in so doing, allowed technicalities to prevail over substantive justice and thereby abdicated from performing its cardinal role and greatest commandment, namely, administering substantive justice.

H. The Respondent's Submissions

36. Counsel for the Respondent, on his part, submitted that the Trial Court did not err in arriving at the conclusion that sufficient reason for extension of time had not been established and that sufficient reason is required to be shown before an order for extension of time is granted. Counsel argued that it was trite law that he who asserts must prove, and that in the instant case, the assertion or statement made by the Appellant Counsel in his affidavit was not backed by any evidence in proof thereof to substantiate it, and, accordingly, the Trial Court did not err in holding that sufficient reason had not been shown for the extension of time. In short, Counsel contended, the Appellant failed in his duty to present evidence

of the alleged drowning incident and the Trial Court could not be faulted for finding that sufficient reason for extension of time had not been made.

37. With respect to inadvertence and omission of Counsel and the diligence of the Appellant himself, Counsel for the Appellant submitted that the statement by the Appellant that he was not to blame was to be assessed in the context of the Trial Court's finding that there was no sufficient reason given to enable extension of time. Counsel supported the Trial Court's reliance on the Irish Supreme Court's case of *Salim v Minister for Justice, Equality and Law Reform [2002] 12 SC17* holding that –
- “...the fact that the Applicant was not to blame for the delay was not in itself sufficient reason to extend time limits. ...in general delay by legal advisors will not prima facie be a good and sufficient reason to extend time. Circumstances must exist to excuse such delay and to enable the matter to be considered further”.
38. In Counsel's Submission, the reason for delay in this case, was wanting in proof. Furthermore, Counsel submitted, the Appellant was not as irreproachable as he contended. Counsel supported the Trial Court's reasoning and finding that the Appellant was wanting in diligence as he did not instruct his lawyer to have the filing of the reference taken up by one of the other lawyers in his firm or personally request that his case be attended to by another lawyer in the firm. That the Appellant was fully aware that the statutory deadline for filing his application would not be adhered to and yet failed to act to avert that, was, Counsel argued, a pointer to the Appellant's want of diligence.
39. Counsel for the Respondent also submitted at length that the Appellant's Counsel's contention that he had personal conduct of the Appellant's case and, accordingly, no other lawyer from his firm would have handled the Appellant's Application without straying from the rules was not correct. In his submission rules 17 and 18 relate to “appearances and representation” as opposed to filing of documents and as such did not preclude any other Advocate from the law firm apart from Mr. Mohamed Mbabazi from signing and filling Appellant's Application.
40. With respect to the length of the delay, Counsel for the Respondent submitted that such other considerations for grant of an order for extension of time could only be considered after sufficient reason had been established.
41. As regards the argument that the Trial Court sacrificed substantive justice to procedural justice, Counsel for the Respondent submitted that the Trial Court's ruling met the ends of justice and was to prevent abuse of the Court's own process. In his submission, substantive law requires that where no sufficient reason is given by an applicant, the Court cannot grant an order to extend time. To grant an order for extension of time in the absence of sufficient reason would be arbitrary or capricious: such an order would not amount to substantive justice, but would in fact be an abuse of the Court process, Counsel argued. He distinguished the case of *Attorney General of Uganda v The East African Law Society and Another* (supra) from the matter at hand on the ground that the case concerned the issue of the Court's authority to depart from or vary the Parties agreement at a Scheduling Conference in the interests of justice and sufficient grounds had been given to enable the Court to exercise its discretion to grant the orders sought.

42. With regard to the alleged failure by the Trial Court to adhere to the doctrine of precedent, Counsel for the Respondent submitted that the Trial Court did not depart from established precedents and jurisprudence. He reiterated his submission with respect to the case of *Attorney General of the Republic of Uganda v The East African Law Society & Another (supra)*. He also distinguished the case of *Professor Anyang' Nyong'o & 10 Others v Attorney General of Kenya (supra)* on the grounds that the Court in that case had sufficient reason to grant the order for extension of time even though it went on to state that it was doing so to administer substantive justice without undue regard to technicalities. Counsel concluded his submissions with a prayer that we dismiss the Appeal with costs.

I. The Appellant's Replying Submissions

43. The Appellant's Written Submissions in reply to the Respondent's Submissions were filed on 27th January 2017 in the Sub Registry at Kampala. In that Reply, the Appellant made the following points.

44. The Trial Court erred in law when it failed to consider the deposition of the Appellant's Counsel under oath in an Affidavit and instead referred to it as a mere statement without evidence. As that deposition was not rebutted or found to be false, Counsel for the Appellant submitted, the Trial Court should have considered the said deposition as cogent evidence to prove that he was prevented by the reason deposed from attending to the filing of the Taxation reference on Monday, 21st September 2015, and, accordingly, should have found that the Appellant had placed before it some material that was cogent and probable in explanation of the delay, which was not in any event inordinate, wanton or unreasonable. Counsel further submitted that to demand more evidence from the Appellant beyond what was produced was to increase the burden of proof beyond the required standard of balance of probability. In his view, if the deposition of the drowning incident was credible and cogent enough to explain the absence from his office, then the Appellant had met the "qualifying higher standard" which Rule 4 requires and proved sufficient reason that hindered him from filing the Taxation Reference in time. Counsel added that the "qualifying higher standard" does not increase the burden of proof but merely emphasises the credibility, cogency, or plausibility of the reason given for not acting within the prescribed period.

45. Counsel for the Appellant fortified his submission by reference to the case of *The Attorney-General of Kenya v Peter Anyang' Nyong'o & Others [EACJ Application No. 4 of 2009]* where Busingye, P.J. in considering an application for extension of time under Rule 4 had the following to say:

"I am aware of, and respectfully agree with, the holding of Githinji JA in *Wasike v Khisa & Another (Civil Application NAI 241 of 2003)* that ... it would be a fetter on the wide discretion of the Court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained... and that..." It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable and whether or not delay is unreasonable will depend on the circumstances of the case..."

46. With respect to the Respondent Counsel's support of the finding by the Trial

Court that the Appellant himself had not been diligent enough, Counsel for the Appellant submitted that if it was accepted that the drowning incident was a probable reason to keep him (the Appellant's Counsel) away from the office and make him unable to file the Reference in time, it followed that the lapse in filing the Reference in time was due to inadvertence by Counsel. In light of that, to interrogate, as the Trial Court did at the urging of the Respondent's Counsel, why another advocate in the firm of Nyanzi, Kiboneka and Mbabazi did not file the Appellant's taxation Reference in the absence of Mr.Mbabazi would have begged so many other questions such as whether the Appellant would have been able and was in contact with his Counsel at the material time, whether his Counsel had completed the necessary application and readied it for signature and filing, and if not, whether the new Counsel would have been able to start drafting and complete the work. In his submission, asking all those questions would have been to go into a minute examination of the cause for the delay. In his view, it was sufficient for the Appellant to show that his Advocate was away in Hoima on Monday 20th September, 2015 and came back to his office in Kampala on Tuesday, 21st September 2015 and filed the Taxation Reference one day outside the prescribed period.

47. With respect to the administration of substantive justice, Counsel for the Appellant submitted that the duty of the Court was clearly stated in the case of *Attorney-General of the Republic of Uganda v East African Law Society and another [EACJ Appeal No. 1 of 2013]* as to "answer authoritatively and conclusively all the issues and questions in dispute." He argued that the Trial Court, in the matter at hand, allowed procedure to outweigh substantive justice and instead of deciding *Taxation Reference No.1 of 2015*, it determined *Civil Application No. 9 of 2015* which it dismissed. Counsel contended that the proper balance between procedure and substantive law was done in the case of *Prof. Anyang' Nyong'o & 10 Others v. Attorney-General of Kenya [EACJ Application No. 2 of 2010]* where the focus of the Court was "the ends of justice" and substantive justice but not to penalize a party or prioritize procedure over substantive justice.
48. Lastly, Counsel for the Appellant wondered what injustice the Respondent had suffered as a result of the Appellant's late filing of Application No. 1 of 2015 considering that the filing was delayed by one day and that thereafter the said Application had been scheduled and the Parties had filed their Written Submissions.

J. The Court's Analysis and Determination

49. The jurisdiction of the Appellate Division to entertain appeals proffered from the Trial Court is granted by Article 35A of the Treaty for the Establishment of the East African Community which 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:-
- (a) points of law;
 - (b) grounds of lack of jurisdiction; or
 - (c) procedural irregularity."
50. The instant Appeal concerns a challenge to the Trial Court's refusal to grant extension of time to file the Taxation Reference out of time and to validate the

late filing of that Reference. In declining the Appellant's request, the Trial Court acted in exercise of its power under Rule 4. The power under Rule 4 is obviously discretionary, and thus, the Appeal here is challenging the Trial Court's exercise of its discretion. The agreed issue for determination does not raise lack of jurisdiction or procedural irregularity. It pointedly raises the question whether the Trial Court erred in law when it declined to grant the Appellant's Application for extension of time and the validation of the late filing of *Taxation Reference No. 1 of 2015*.

51. This Court states at the outset that whether or not a Trial Court has exercised its discretion properly is a matter of law. In *Mary Ariviza & Another v Attorney-General of Kenya & Another [EACJ Appeal No. 3 of 2012]*, this Court expressed the point thus:

“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 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)?”

52. The second matter for stating at the outset is that the principle on which an appellate court will interfere with a trial court's exercise of its judicial discretion is well known. It is simply that an appellate court will not interfere with a trial judge's exercise of his judicial discretion unless it is satisfied that the discretion was not exercised judicially. And the court will only reach such a conclusion if one or more of the following matters is established: (a) that there was a misdirection on law; or (b) that there was a misapprehension of fact(s); or (c) the trial court took into account some irrelevant factor(s), or failed to take into account some relevant factor(s); or (d) taking into account all the circumstances of the case, the decision arrived at was so manifestly wrong that an improper exercise of discretion must be inferred. See *Attorney-General of Kenya v Prof. Anyang' Nyongo' & Others [Appeal No. 1 of 2009]*, *The Attorney-General of the Republic of Uganda v The East African Law Society & Another [EACJ Appeal No. 1 of 2013]* where the Ugandan case of *American Express International Banking v ATUL [1990-1994] EA 10 (SCU)* was cited with approval, and *Mbogo v Shah [1968] E. A. 93*.

53. In the instant Appeal, Counsel appearing before the Court did not directly anchor their submission on those principles. They framed their submission as if the matter at hand was an ordinary Appeal on the merits of the Trial Court's adjudication of the matter before it. Be that as it may, we shall proceed to dispose the Appeal on the basis of those well-known principles. Before we do so, it is important to consider the tenor and import of Rule 4 on which the Court's discretion to extend time is rooted.

54. Rule 4 provides as follows:-

“4. A Division of the Court may, for sufficient reason, extend the time limited by these Rules and by any decision of itself for the doing of any act authorised or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a

reference to such time as so extended.”

55. Now, the term “sufficient reason” is not defined in the Rules. Neither, to our knowledge, has this Court ever interpreted the term. The Court has however had occasion to consider the term’s significance in procedural justice. In *Attorney-General of Kenya v Prof. Anyang’ Nyong’o* [Appeal No. 1 of 2009] this Court made the following observations while considering an appeal from a single Judge of the Trial Court in connection with the Judge’s exercise of discretion to extend time under Rule 4:

“We wish to emphasize that the trial Judge in this particular case was dealing with Rule 4 of the EACJ Rules, which requires a qualitatively higher standard to extend time (namely, “sufficient reason”), than is the case with the standard of “any reason” which is prescribed under the corresponding Rules in some of the EAC Member States (notably Kenya). Accordingly, the trial Judge in exercising his discretion to extend time in this case, had to and did indeed raise the bar appropriately to meet the more rigorous standard of the Community Rule.”

56. We apprehend the Court to be saying no more than that under Rule 4 “sufficient reason” (and not just “any reason”) must exist in order for the Court to exercise its discretion. The phrases “sufficient reason”, “qualitatively higher standard” and “rigorous standard” are used synonymously by the Court. The Court does not however define sufficient reason or indicate what the term encapsulates or excludes. And in *Prof. Anyang’ Nyong’o and 10 Others v Attorney General of Kenya* [Application No. 1 of 2010] consolidated with *Attorney General of Kenya v Prof. Anyang Nyong’o & 10 Others* [Application No. 2 of 2010] this Court noted Mulenga J.S.C’s construction of Rule 5 of the Supreme Court of Uganda Rules (which was *in pari materia* with rule 4 of this Court) in *Boney M. Katatumba v Waheed Karim* [Civil Application No. 27 of 2007] (unreported) where that learned Judge stated as follows:-

“Under r. 5 of the Supreme Court Rules, the Court may, for sufficient reason, extend the time prescribed by the Rules. What constitutes “sufficient reason” is left to the Court’s unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant taking the essential step in time or other reasons why the intended appeal should be allowed to proceed though out of time.”

57. Immediately after noting the opinion of the learned Supreme Court Judge, this Court delivered itself as follows:-

“The Court appreciates the reference to the Court’s “unfettered” discretion indicated in the *Katatumba* case. Nonetheless, as a matter of practical application and good jurisprudence, the Court’s “unfettered discretion” arises only after “sufficient reason” for extension of time, has been established. Therefore, to that extent, the Court’s discretion in an application to extend time is not unlimited.”

58. Three points emerge from the above postulation of law by the court: First, we must, with respect, point out that the Court misapprehended the reference to the Court’s “unfettered” discretion in the *Katatumba* case as referring to the discretion to extend time, whereas it was plain from the *Katatumba* case itself that the reference was to the discernment as to what would constitute “sufficient reason”; Secondly, the Court’s discretion to extend time is circumscribed by the

necessity to have “sufficient reason”; Thirdly, the Court did not define the term “sufficient reason” or indicate what it includes or excludes.

59. In the East African Court of Appeal case of *Mugo & Others v Wanjiru & Another* [1970] E.A. 481, Spry, V.-P. expressed himself as follows:

“Normally, I think, the sufficient reason must relate to the inability or failure to take the particular step in time, but I am not prepared to say that no other consideration may be invoked.”

And Duffus, P. expressed himself thus:-

“Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application.”

The reasoning of Spry, V.-P. was followed in *Njagi v Munyiri* [1975] E.A.179 by Musoke, J.A. of the same Court.

60. In the above premises, the Court is faced on the one hand, with a situation where the East African Court of Justice has not defined or interpreted the term “sufficient reason” or in any way indicated what it includes or excludes, and, on the other hand, judicial authority from the Supreme Court of Uganda where the Supreme Court is clear that the sufficient reason is either a reason that prevented an applicant taking the essential step in time or other reason(s) why the intended appeal should be allowed to proceed though out of time and the authority of the East African Court of Appeal where it is made clear that sufficient reason is not always or necessarily confined to the explanation of the inability or failure to take the necessary step in time.

61. The Court once again states that decisions of Municipal Courts do not have precedential authority here. However, as the Court has stated often before, such decisions may provide inspiration to this Court, particularly where they have been rendered by the highest tribunals in those countries and they are relevant to the matter under consideration by the Court.

62. Taking that view of the matter, we take inspiration from the Ugandan case of *Katatumba* and the East African Court of Appeal case of *Mugo v Wanjiru* wherein the courts in interpreting Rules which were *in pari materia* with our Rule 4, construed the term “sufficient reason” to comprehend not only reasons relevant to the applicant’s inability or failure to take the essential procedural step in time but also any other considerations that might impel a Court of Justice to excuse a procedural lapse and incline to a hearing on the merits. Being thus inspired, we hold that in determining whether “sufficient reason” for extension of time under Rule 4 exists, the court seized of the matter should take into account not only the considerations relevant to the applicant’s inability or failure to take the essential procedural step in time, but also any other considerations that might impel a Court of Justice to excuse a procedural lapse and incline to a hearing on the merits. In our considered opinion, such other considerations will depend on the circumstances of individual cases and include, but are not limited to, such matters as the promptitude with which the remedial application is brought, whether the jurisdiction of the Court or the legality of the decision sought to be challenged on the merits is in issue, whether there was manifest breach of the

rules of natural justice in the decision sought to be challenged on the merits, the public importance of the said matter, and of course, the prejudice that may be occasioned to either party by the grant or refusal of the application for extension of time. We prefer this broad purposive approach for the reason that judicial discretion is only but a tool, a stratagem or a device in the hands of a Court for doing justice or, in the converse, avoiding injustice. That tool should not be blunted by an approach which constricts the Court's margin of appreciation. In dealing with procedural lapses, the only relevant sign post is the beacon of justice. The Court's eyes must remain firmly fixed on that beacon.

63. With the above appreciation of the principles applicable when an appellate court is called upon to reverse a trial court's exercise of judicial discretion and the amplitude of the term "sufficient reason" in rule 4, we now turn to a consideration of the Appeal before us.
64. We remind ourselves that the gravamen of the Appellant's complaint is that the Trial Court erred in law when it found that sufficient reason had not been established to move it to extend the time as prayed. Did the Trial Court misdirect itself in law in finding that sufficient reason had not been established?
65. We have seen in paragraph 15 above that Counsel for the Appellant had deposed in the Affidavit in support of the application for extension of time the reasons why he was unable to file the Taxation Reference in time, namely, that he had intended to do it on Monday 21st September, 2015 (the last possible day) but on Sunday, 20th September, one of his workers drowned in a pool in his farm and that incident required his involvement and cooperation with the police, who managed to recover the body on Monday, 21st September, 2015 and, as a result, he was only able to return to his Chambers that evening whereupon he prepared and signed the Notice of Motion for the intended Taxation Reference. Counsel for the Appellant had further deposed that his Client, the Appellant himself, only managed to sign the Affidavit in support of the Motion on the 22nd September and the Motion was filed that very day – a day late. The Appellant himself had deposed in his supporting Affidavit that he instructed his Counsel to challenge the Taxation Award as soon as it was made, whereupon this Counsel informed him that such Reference is done within 14 days of the decision and he would do so on Monday 21st September, 2015. He had further deposed that he reminded his Counsel on Thursday 17th September 2015, and implored him to file it by Friday the 18th September 2015, but his Counsel told him that he would be going up country to his farm on Friday, 18th September, and would be back on Monday 21st September to file the Reference. He had further deposed that when he called his counsel on Monday, the 21st September 2015, the latter informed him that he had suffered a personal problem in that one of his workers had drowned in his farm, an incident which required his presence and cooperation with the police. He had further deposed that he signed the supporting Affidavit in the morning of 22nd September 2015.
66. Our review of the Trial Court's Findings show that the Court took the view that the above Deposition by the Appellant's Counsel was an allegation or statement which required to be proved or substantiated by evidence such as a police report of the incident or factual particulars of the incident. That Finding by the Trial Court was very much inspired by the Respondent's Counsel's submissions to

the same effect. In other words, the Trial Court found that the deposition by Counsel had no evidential value and, accordingly, concluded that the reason why the necessary step had not been taken in time was not proved and, therefore, sufficient reason had not been established. We say at once that that was misdirection on law. A statement or statements made on oath in an affidavit are evidence and it was improper to treat them as mere statements or allegations which required evidential proof (as would undoubtedly have been the case if they had been made in a pleading). To cast doubts on the veracity of such statements, as the Trial Court did at the urging of Counsel for the Respondent, without there being any rebutting evidence from the Respondent was also misdirection on law.

67. With respect to the Appellant's own deposition, the Trial Court took the view that the Appellant had not demonstrated due diligence and his conduct was not irreproachable. The Court did so on the basis that the Appellant had not instructed his Counsel to arrange for his alternative representation by another Advocate in his firm (which indisputably had about ten (10) lawyers) and that he himself had not bothered to ask any of those other lawyers to take up his matter. We agree with the submission by the Counsel for the Appellant that the condemnation of the Appellant's inaction was based on the conjecture or hypothesis by the Trial Court that another advocate in the firm was available, ready, and willing to take up the Appellant's brief and work on it on Monday, 21st September, 2015 and file the pertinent Application in Court. In contradistinction to such conjecture or hypothesis, there was on record the Appellant's own uncontroverted deposition of the steps he took to ensure that his Counsel filed the Application in time. In our view, those depositions did not disclose sloth or dilatoriness on his part, they showed appropriate diligence. In that connection, we fully agree with what the East African Court of Appeal said in *Shanti v Hindocha & Others* [1973] E.A. 207, at p.209 when reviewing the exercise of discretion by a single judge of the Court to extend time under the Court's rules. The Court said –

“The position of an applicant for extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing “sufficient reason” why he should be given more time and the most persuasive reason that he can show...is that the delay has not been caused or contributed to by dilatory conduct on his part.”

68. Last, but not least, it was patent on the face of the intended Reference on Taxation that the Taxation Award was to be challenged on *inter alia*, the following grounds: (i) the Award amounted to an illegality as there was breach of the Public Procurement Rules of the Republic of Uganda by the Respondent in instructing M/S Kiwanuka & Karugire Advocates, and (ii) there was inequity and discrimination by the Learned Deputy Registrar in awarding a total of USD 28,669.49 to the Respondent for disbursements in Taxation Cause No. 2 of 2014: *National Medical Stores v Godfrey Magezi vis-à-vis* USD 3,852 to Quality Chemical Industries in Taxation Cause No. 4 of 2014 for disbursements when both taxations flowed from the same Reference. In this connection, we take inspiration from the Court of Appeal of Tanzania in *Transport Equipment Ltd v D.P. Valambhia* [1993] T.L.R 11, where the Court expressed itself as follows:

“As stated much earlier, Dr. Ford gave us a bit of authority from outside this jurisdiction on the fact that this Court would enlarge time prescribed

by our Rules if there is a point of law involved in the Appeal. We agree with that and we have in fact already done so a number of times. In *Principal Secretary, Ministry of Defence v D.P. Valambhia* we said ‘in our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right.’”

69. Quite clearly in this matter, the intended appeal from the Taxation Award which was lodged in the Trial Court raised issues of illegality and discriminatory treatment of the Respondent. That was a consideration that could properly have been taken into account, but was omitted, in the disposition of the application for extension of time in the Trial court. We say so for the reason that the wording of rule 4, namely, that “the Court may, for sufficient reason, enlarge time” is permissive enough to allow the Court to take into account, *suo motu*, any reason or ground which is pertinent to the exercise of its discretion. In other words, in our view, Rule 4 is a standing invitation to the Court to consider an application for extension of time with its eyes wide open, taking a helicopter view of the matter placed before it.
70. As regards the Appellant’s complaint that the Trial Court erred in law by not determining the rights of the Parties and instead elevated procedural technicalities over substantive justice, we have come to the conclusion that the same is unmeritorious. His contention that the Court’s duty is to answer authoritatively and conclusively all the issues and questions in dispute between the parties and, accordingly, where, as here, the Court was faced with an application for extension of time to lodge a taxation reference out of time, it should have ignored the procedural arguments against such a prayer and proceeded to the determination of such Reference, must be rejected. In our view, to accept the Appellant’s counsel’s argument, would be to take away the discretion of the Court and open litigation to indeterminate timelines contrary to the objective of expeditious justice. The inexorable logic of his proposition would be to impel the Court to ignore procedural defaults and proceed willy-nilly to the merits of the cases which are the subject of such procedural defaults. On our part, we see no legal error in the Trial Court’s assumption of the duty to interrogate the Appellant’s application for extension of time with a view to satisfying itself that sufficient reason for extension of time existed. We do not accept the Appellant’s characterisation and condemnation of that approach as elevating procedural technicality over substantive justice. To our mind, the Trial Court merely did its judicial duty. Furthermore, the cases cited by counsel for the Appellant do not support his wide propositions. We accept the submission by Counsel for the Respondent that the case of *Attorney-General of the Republic of Uganda v East African Law Society and Another* (supra) was distinguishable from the case before the court in that in the former, sufficient grounds had been given to enable the Court to exercise its discretion to grant the orders sought by varying or departing from the parties agreement at the Scheduling Conference. We also accept Counsel for the Respondent’s further submission that equally the case of *Prof. Anyang’ Nyong’o & 10 Others v Attorney-General of Kenya* (supra) was distinguishable from the case before the Trial Court in that sufficient reason

to grant the order for extension of time had been shown in that case, and the other observations by the Court therein were mere *obiter*.

71. With respect to the submission by Counsel for the Appellant that the Trial Court erred in law in not following the Court's previous precedents, we again agree with Counsel for the Respondent's submissions that the Trial Court did not depart from previous precedents. We have in the preceding paragraph stated that the cases of *Attorney-General of Uganda v East Africa Law Society & Another (supra)* and *Anyang' Nyong'o & 10 Others v Attorney General of Kenya (supra)* relied upon by the Appellant were properly distinguished by Counsel for the Respondent. In the premises, we find the Appellant's submission devoid of merit.
72. It must by now be evident from our above findings that our conclusion in this Appeal is that: (i) the Trial Court misdirected itself on law in its treatment of the affidavit evidence of the Appellant himself and his Counsel; (ii) the Trial Court failed to take into account some other relevant factors which it ought to have taken into account, namely, that the Taxation Reference raised the issue of the legality and equity of the impugned taxation, that the period of delay in filing the said Reference was in no measure inordinate, that the Application for extension of time was filed promptly, and that no prejudice to the Respondent had been shown; and (iii) consequently, the Trial Court did not exercise its discretion under Rule 4 judicially. In the result, this Appeal succeeds.
73. With regard to costs, we are mindful of the Provisions of Rule 111(1) that costs shall follow the event unless the Court shall for good reason otherwise order. In this case, the proceedings under Rule 4 in the Trial Court were necessitated by the Appellant's procedural lapse. It is only meet and just in those circumstances that the Appellant bears those costs. As regards costs here, we are of the view that although the Appellant has succeeded overall, each party should bear his own costs of the Appeal in view of the fact that the Respondent has succeeded in resisting some of the grounds of Appeal.
74. The upshot of our consideration of this Appeal is that –
- (1) The Appeal be, and is hereby, allowed;
 - (2) The Order of the Trial Court dated 30th June 2016 in *Application No. 9 of 2015* be, and is hereby, set aside and is substituted with an Order that-
 - (i) Enlargement of time for lodging *Taxation Reference No. 1 of 2015: Godfrey Magezi v National Medical Stores* against the decision of the learned Deputy Registrar in *Consolidated Taxation Causes Nos. 2 and 4 of 2014: National Medical Stores & Quality Chemical Industries Ltd v Godfrey Magezi* be, and is hereby, granted; and
 - (ii) The late filing of *Taxation Reference No. 1 of 2015: Godfrey Magezi v National Medical Stores* be, and is hereby, validated;
 - (3) *Taxation Reference No. 1 of 2015: Godfrey Magezi v National Medical Stores* be heard on the merits in the Trial Court;
 - (4) The Appellant be, and is hereby, condemned to the costs in the Trial Court;
 - (5) Each Party shall bear his own costs of the Appeal.

It is so ordered.

M. Mbabazi, Counsel for the Appellant

P. Kawuma, Counsel for the Respondent

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Appellate Division

Appeal No. 3 of 2016**The Attorney General of Uganda v Media Legal Defence Initiative (MLDI) and 19 Others**

Appeal from the Ruling of the First Instance Division at Arusha; Mugenyi, PJ; Lenaola, DPJ; Ntezilyayo; Jundu; and Ngiye, JJ dated 28th June, 2016 in Application No. 4 of 2015

Coram: E. Ugirashebuja, P.; L. Nkurunziza, V.P; E. Rutakangwa; A. Ringera; G. Kiryabwire, JJ.A.
May 25, 2017

Preliminary objection - Points of law to be heard and determined first -Acts or omissions leading to procedural irregularities – Whether the supporting affidavit was defective – Competence of an application- Use right of appeal on interlocutory sparingly

Article 35A(c) of the Treaty - Rules: 21, 36 and 53 of the EACJ Rules of Procedure, 2013

In Reference No. 16 of 2014, which was still pending hearing in the Trial Court, the Applicant (Ronald Ssemuusi now deceased) sought a declaration that Uganda's criminal defamation law in Sections 179 and 180 of the Penal Code, Cap 120 was an affront to the Fundamental and Operational Principles of the EAC. Subsequently, the Respondents lodged an Application seeking leave to act as *amici curiae* on the grounds that they had a strong and genuine commitment to promoting respect for and observance of the right of freedom of expression, including freedom of the press and they should therefore be allowed to make submissions in the Reference. The Application was supported by the affidavit of Yakoré-Oulé Jansen. The Appellant, who was the Respondent in the Application, raised a preliminary objection claiming that the affidavit supporting the application was incompetent, based on hearsay and did not disclose the source of information contained therein. In its Ruling of 28th June 2015, the Trial Court only addressed itself to the merits of the Application and not to the preliminary objection, it then granted the orders sought.

On appeal, the Appellant averred that the Trial Court erred in law and procedurally by failing to find that the Respondent's Affidavit in support of the Application was incurably defective and therefore incompetent. Furthermore, the Trial Court, ignored the issue of the competence or otherwise of the Application and that this amounted to a procedural irregularity leading "to a miscarriage of justice so the impugned Ruling should be nullified as the Trial Court committed an irreversible procedural error.

Held

1. A court seized with a preliminary objection is, first of all enjoined by law to determine that objection before going into the merits or substance of the case

or application before it. Failure to do so amounts to an incurable procedural irregularity. A point of law may be argued whether raised in the pleadings or not. Procedurally, the raised point of preliminary objection ought to have been argued and disposed of before the hearing on the merits of the Application.

2. A court commits an error of law or a procedural error when it: acts irregularly in the conduct of the proceedings or hearing, leading to a denial or failure of fairness, due process; or irregularly admits or denies admission of evidence; denies a party a hearing; or ignores a party's pleadings.
3. The Affidavit of Y.O. Jansen was the subject of the preliminary objection. If the Affidavit was found to be incurably defective, then it could not validly support the Notice of Motion. And without a valid supporting affidavit, the Application could not be said to have been competently before the Trial Court. Thus, the Trial Court could not have been properly seized with jurisdiction to entertain and determine the Application on its merits.
4. It is imperative for the preliminary objection to be heard and disposed of first before hearing the Parties on the merits of the case. Failure to do so by the Trial Court was, "a colossal" incurable "procedural irregularity" envisaged by Article 35A(c) of the Treaty. The procedural error occurred when the Trial Court failed to make a determination on the challenged competence of the Application. No decision or order was made.
5. Since the Parties were heard in full on the undetermined point of preliminary objection, the Ruling dated 28th June, 2016 is a nullity and it is therefore quashed and set it aside. The Trial Court is directed to re-constitute itself in order to compose a fresh ruling clearly determining the pleaded point of preliminary objection, before considering the merits or otherwise of the Application.
6. Whereas Article 35A gives unfettered right of appeal against any judgment or order of the First Instance Division, this carries with it the potential for causing delays in the disposal of cases in both Divisions of the Court, thereby rendering the Court's vision a poetic dream. This is particularly true where the appealed from decision or order does not have the effect of finally disposing of the Reference, Application or Claim. Well intentioned parties are urged to sparingly resort to the right of appeal against interlocutory rulings or orders which are not likely to lead to a miscarriage of justice if no immediate redress is sought and obtained.

Cases cited

- Angella Amudo v The Secretary General of EAC [2012-2015] EACJLR 592, Appeal No. 4 of 2014
 Bank of Tanzania v Devran P. Valambia, CAT, Civil Appl. No. 15 of 2002
 Damas Ndaweka v Ally Saidi Mtera, CAT, Civil Appeal No. 5 of 1995
 Dy.CIT v Central Concrete and Allied Products Ltd. [1999] 236 ITR 595
 Juma Ibrahim Mtale v K. G. Karmali, [1983] TLR 50
 McNobb v U.S. (318) US 332
 Saggi v Roadmaster Cycles (U) Ltd [2002] 1EA
 Sangram Singh v Election Tribunal, AIR 1955 sc 425
 Shahida A. Hassenari v Mahed M. G. Kanji, CAT, Civil Appl. No. 42 of 1999
 Thabit R. Maziku & Anor v Amina K. Tyela & Anor CAT, Civil Appl. No. 98 of 2011
 The AG of URT v African Network for Animal Welfare [2005-2011] EACJ LR, 395, Appeal No. 3 of 2011,
 Uganda Railway Corporation v Ekwaro D.G. & Ors, U.L.R. [2008] 319 (UCA)

JUDGMENT

Introduction

1. It is axiomatic that in administering justice, procedural formalities and rules are not empty ones, that is, not without any intended salutary purpose. Procedure, as was aptly observed, is a legal requirement designed to facilitate the attainment of justice and further its ends: *Sangram Singh v. Election Tribunal*, AIR 1955 sc 425. The overriding objective of all procedural rules, is to enable justice to be fairly done between the parties in a dispute, consistent with public interest: *Dy.CIT v. Central Concrete and Allied Products Ltd.* [1999] 236 ITR 595 (Cal). The pertinent holding of Frankfurter, J. in *McNobb v. U.S.* (318) US 332 at page 347 is a further illumination of this. He said:

“The history of liberty has largely been the history of observance of procedural safeguards.”

2. Alive to these truths, the framers of the Treaty for the Establishment of the East African Community (“the Treaty”), through Article 42 (1), found it wise to vest the East African Court of Justice (“the Court”) with powers to make rules of the Court which, subject to the provisions of the Treaty, shall “regulate the detailed conduct of the business of the Court”. The promulgated rules are the East African Court of Justice Rules of Procedure 2013 (“the Rules”).
3. One of the important rules in the conduct of the Court business is Rule 21 of the Rules. This Rule provides as follows in sub-rule (1):

“Subject to sub-rule (4) of this Rule, all applications to the First Instance Division shall be by motion, which shall state the grounds of the application.”

Sub-rule (4) simply directs that a notice of Motion shall be substantially in the Fourth Schedule.

It is notably further prescribed in sub-rule (5) that:

“Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts, in accordance with Form 3 of the Second Schedule.”

4. The perceived failure of the Respondent to comply with the obviously mandatory provisions of sub-rule (5) of the Rules while instituting Application No. 4 of 2015 (“the Application”) in the First Instance Division (“the Trial Court”), is at the bottom of this Appeal, as we shall presently demonstrate.

Background

5. It is common ground that this Appeal (“the Appeal”) emanates from the Ruling of the Trial Court dated 28th June, 2016 in Application No. 4 of 2015 alluded to above.
6. The Application was lodged by the Respondents basically under Rules 21, 36 and 53 of the Rules. In the Application, the Respondents are seeking leave to act as *amici curiae* in Reference No. 16 of 2014 (“the Reference”) which is still pending hearing in the Trial Court. The Applicant in the Reference is one Ronald Ssemuusi (deceased).
7. The main grievance of the Applicant in the Reference is that the Ugandan criminal defamation law contained in Sections 179 and 180 of the Penal Code, Cap 120

is an affront to the Fundamental and Operational Principles of the East African Community (“the Community”) as enshrined in Articles 6, 7 and 8 of the Treaty. He is, accordingly, seeking the Court’s declaration to that effect.

8. During the pendency of the Reference, the Respondents in the Appeal, who are priding themselves on “possessing a strong and genuine commitment to promoting respect for and observance of the right of freedom of expression, including freedom of the press...,” accessed the Trial Court seeking leave to make submissions in the Reference and subsequently appear as *amici curiae*. The Application was by Notice of Motion as required by Rule 21 (1) of the Rules. It is stated in the said Notice of Motion that it is supported by the affidavit of one “Yakoré-Oulé Jansen sworn on or about the 23rd of April 2015”. This assertion notwithstanding, the only affidavit of the said Yakoré-Oulé Jansen in support of the Notice of Motion found at pages 64-70 of the Record of Appeal, shows that it was sworn on “4th June, 2015”.
9. The Appellant, who is the Respondent in the Application, resisted the merits of the Application and challenged its competence. The competence of the Application is challenged *vide* paragraph 3 of the Affidavit in Reply thus:

“That the affidavit accompanying the application is incompetent, based on hearsay and does not disclose the source of information contained therein.”
10. The Respondents, then Applicants, through the Affidavit in Rejoinder of one Annet Namugasa, resisted the preliminary objection asserting that the impugned Affidavit was competent and valid in law.
11. Procedurally, the raised point of preliminary objection ought to have been argued and disposed of before the hearing on the merits of the Application. This was not done. Instead, oral hearing on the merits of the Application was conducted on 12th November, 2015.
12. Mr. Francis Gimara, learned advocate, argued in favour of the Application and pressed the Trial Court to grant the sought orders. He had the full support of Mr. Nicholas Opiyo, learned advocate for the 1st Respondent.
13. For the 2nd Respondent, now Appellant, Mr. Geoffrey Atwine, learned Senior State Attorney, first of all, submitted in support of the point of preliminary objection, urging the Trial Court to strike out what they believed was an incompetent Application. In the alternative, he prayed for the dismissal of the Application for want of merit, were the Trial Court to overrule the point of preliminary objection.
14. It was in his rejoinder that Mr. Gimara “briefly” argued that the impugned Affidavit “conformed with the rules and the format provided for in the Third Schedule of the Rules”. Thereafter, the Trial Court reserved its ruling.
15. In its Ruling, the Trial Court, in our respectful opinion, made a fleeting reference to the challenge on the competence of the Application, at the stage of summarising the 2nd Respondent’s case. However, in its determination of the Application, it never addressed itself to the submissions of the Parties on the issue. It only addressed itself to the merits of the Application and finding it not wanting in merit, granted the orders sought therein, hence this Appeal.

The Appeal

16. The Appellant had lodged a Memorandum of Appeal containing seven (7) grounds of complaint. As we found these grounds to be interwoven, at the Scheduling Conference, they were condensed into three (3) substantive issues (“the Issues”) for our determination. These are:
- i) Whether the Trial Court erred in law and procedurally by failing to hold that the Respondent’s Affidavit in support of the Application was incurably defective.
 - ii) Whether the Trial Court erred in law in holding that the Respondents had sufficiently demonstrated their interests in the outcome of the case as well as their neutrality, impartiality and independence in the dispute to justify their joinder as *amici curiae* in the Reference, and
 - iii) To what reliefs are the Parties entitled?

Counsel for the Parties opted to lodge written submissions and make brief oral highlights, a commitment they carried out to the best of their abilities.

Legal Representation

17. At the hearing of the Appeal, the Parties’ representation was as follows: Ms. Harriet Nalukenge and Ms. Charity Nabasa, learned Senior State Attorney and State Attorney respectively, appeared for the Appellant. Mr. Francis Gimara, learned advocate, appeared for the Respondents.

Submissions of Counsel

18. Ms. Nalukenge addressed the three issues squarely in her submission. It was her contention that they had timeously challenged the competence of the Application in their Pleadings and had given the requisite details. The challenge, she stressed, was premised on the obvious defects in the Affidavit in support of the Notice of Motion which rendered the Affidavit incompetent to support the Notice of Motion. That being the case, she argued, that Affidavit ought to have been struck out, thereby rendering the Application incompetent and unmaintainable. However, she continued, the learned Justices in the Trial Court, ignored the issue on the competence or otherwise of the Application. Their failure to determine this crucial issue, in her view, amounted to a procedural irregularity leading “to a miscarriage of justice”. She accordingly urged us to answer the first issue in the affirmative and on that basis alone, allow the Appeal with costs.
19. On his part, Mr. Gimara was least impressed by Ms. Nalukenge’s submission. It was his startling submission, in our respectful opinion, that that submission does not hold water because “the Appellant did not specify which affidavit it is referring to”.
20. It was Mr. Gimara’s further contention that the Application “was supported by 17 affidavits of representatives of the respondents”, each containing “information on the mandate and work of the relevant non-governmental organisations as well as their interest in the outcome of the Reference”.
21. In his oral highlights, he devoted himself exhorting us to accept as competent the 17 affidavits which were lodged much later following a Court Order, but after the preliminary objection had been raised. It was only at the prompting of the Court, that he casually referred to the first issue saying the Trial Court did not

commit a procedural error in failing to determine the issue on the competence or otherwise of the Application.

22. As if he was taken unawares, he confidently asserted thus:
 “My Lord, if I may go back to the record, this issue first of all was not raised as an issue for this position (sic). It came in the Submissions of the Respondent...If you look at the record, it was raised as a submission on the part of the Appellant; and it wasn’t an issue that required the Court to make a determination on it. It was a submission and I think that the Court is enjoined not to take every submission and respond to it. They will take what is relevant and make a response on that... Otherwise you would have a judgment that is 150 pages if you decided to respond to every submission.”
23. On the basis of these sentiments, he pressed us to answer the first Issue in the negative.

The Court’s Determination on Issue No. 1

24. The first Issue is whether the Trial Court erred in law and procedurally by failing to hold that the Respondent’s Affidavit in support of the Notice of Motion was incurably defective.
25. Before venturing our opinion on this crucial issue, we have found it constructive, first, to repair the apparent misleading flaws in Mr. Gimara’s argument.
26. First of all, it is not true to assert, as did Mr. Gimara, that the Appellant did not specify the challenged Affidavit. The undeniable truth is that from the outset, the Appellant had been challenging one piece of Affidavit. This was the one of Yakaré - Oulé Jansen.
27. Secondly, it is equally not true to claim that the issue relating to the alleged invalidity of Jansen’s affidavit was belatedly raised for the first time by the Appellant in his submissions. On this Mr. Gimara is belied by the averments in paragraph 3 of Ms. Annet Namugasa’s Affidavit in Rejoinder sworn and lodged on 30th July, 2015, challenging the validity of the pleaded point of preliminary objection. All the same, even if we were inclined to uphold Mr. Gimara on this, we would have found his arguments untenable in law, because: One, on points of law, it is settled by the courts that illegality of an issue is a question of law which can be raised at any time or at any stage of the proceedings with or without prior knowledge of the parties See, *Uganda Railway Corporation v. Ekwaro D.G. & 5104 Others (UCA) U.L.R. [2008] 319*. Two, a court of law cannot sanction what is illegal; an illegality once brought to the attention of the court, overrides all questions of pleading including any admissions made between the parties. (*Uganda Railway Corporation v. Ekwaro* (supra)). It must be resolved by the court even at the risk of making the judgement frighteningly long.
28. Reverting to the issue under scrutiny, we have to quickly point out that its determination will rest on the following pertinent irrefutable established legal principles and/or requirements:-
- (i) A party cannot be permitted to defeat a preliminary objection notice of which has already been given; once a notice of preliminary objection is given or lodged, the time to remedy the deficiency complained of lapses: See, for instance, *Juma Ibrahim Mtale v. K. G. Karmali (CAT) [1983] TLR 50*, *Damas Ndaweka v. Ally Saidi Mtera (CAT) Civil Appeal No. 5 of 1995*

(unreported).

- (ii) An issue of jurisdiction on a preliminary objection has always to be determined first by the court: See, for example, *Shahida Abdul Hassenari v. Mahed M. G. Kanji (CAT) Civil Application No. 42 of 1999* (unreported).
 - (iii) A court seized with a preliminary objection is, first of all enjoined by law to determine that objection before going into the merits or substance of the case or application before it. Failure to do so amounts to an incurable procedural irregularity: See, for instance, *Bank of Tanzania v. Devran P. Valambia (CAT) Civil Application No. 15 of 2002*, *Thabit R. Maziku and Kisuku S. Kaptula v. Amina K. Tyela and Mrajis wa Nyaraka Zanzibar (CAT) Civil Application No. 98 of 2011* (both unreported).
 - (iv) If a party desires to have any point of law disposed of before the trial, he should raise it in his pleading by an objection on a point of law, especially where the point may dispose of the suit. A point of law, however, may be argued whether raised in the pleadings or not: See, for instance, *Saggu v Roadmaster Cycles (U) Ltd [2002] 1EA (UCA)*.
 - (v) A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued successfully as a preliminary point may dispose of the suit: See, *Garden Square Ltd v. Kogo and Another [2002] LL.R. 1695 (KCC)*, *Attorney General of Kenya v. Independent Medical Legal Unit, EACJ Appeal No. 10 of 2011 or EACJ LR 2005-2011, p. 377*, and *The Secretary General of the East African Community v. Rt. Hon. Margaret Zziwa, EACJ Appeal No. 7 of 2015*(unreported).
 - (vi) One of the most commonly pleaded ground of preliminary objection is failure of a pleading to conform to the requirements of law or rules of court.
 - (vii) A court commits an error of law or a procedural error when, for instance, it acts irregularly in the conduct of the proceedings or hearing, resulting or leading to a denial or failure of due process (i.e. fairness), irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings, etc: See, *The Hon. Attorney General of Tanzania v. ANAW, Appeal No. 3 of 2011 (EACJ LR 2005-2011, p. 395)*, *Angella Amudo v. The Secretary General of the EAC, Appeal No. 4 of 2014 (EACJ LR 2012-2015 p. 592)*.
29. As already shown in paragraph 8 above, the Application was instituted by a Notice of Motion in terms of Rule 21(1) of the Rules. It is evident from the Notice of Motion itself that it is supported by the Affidavit of one Yakoré-Oulé Jansen sworn on or about the 23rd of April, 2015. It goes without saying, therefore, that the requirements of Rule 21 were, on the face of it, complied with by the Respondents.
30. The immediately above observation notwithstanding, it is the Appellant's contention that the Respondent's Pleadings violated the dictates of the Rules. In elaboration, he contends that the said Notice of Motion was supported by an incurably defective affidavit, thereby rendering the Application incompetent and unmaintainable in law. It deserved no hearing on the merits but ought to have been struck out, the Appellant is protesting. As this was not done by the Trial

Court, argues the Appellant, it committed an irreversible procedural error and its impugned Ruling should be nullified by this Division of the Court.

31. There is no gainsaying here that the Appellant had properly pleaded in his Pleading, a point of preliminary objection on a pure point of law, challenging the competence of the Application. The Trial Court took cognizance of it in its Ruling but, admittedly, did not determine that objection. Instead, it proceeded to determine the Application on the merits as if its competence was not an issue, and much to the chagrin of the Appellant granted the orders sought therein.
32. We have already demonstrated (see para 28 (iii), above) that it is settled law that a court seized with a preliminary objection, is first of all enjoined by law to determine it before going into the merits or substance of the case before it and failure to do so amounts to an incurable irregularity.
33. It was thus succinctly stated by the Court of Appeal of Tanzania in *Bank of Tanzania v. Devram P. Valambia (supra)*:

“The aim of a preliminary objection is to save the time of the court and the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily”.
34. We may as well add without any fear of being contradicted that if a raised point of preliminary objection which otherwise would have disposed of the proceedings summarily is left undetermined and the party raising it is forced to defend an incompetent proceeding, he or she is greatly prejudiced. The prejudice arises through loss of his/her precious resources, such as time, money, etc. But more tellingly, he or she is denied his/her vested right to have the matter disposed of at the threshold, thereby, occasioning a failure of justice.
35. In the case of *Thabit R. Maziku (supra)*, following settled law and practice, it was stated with sufficient lucidity that failure by the trial court “to deliver the ruling on the point of preliminary objection...constituted a colossal procedural flaw that went to the root of the matter.” It was further aptly held that:

“It matters not, whether it was inadvertent or not. The Trial Court was duty bound to dispose of it fully, by pronouncement of the Ruling (on it) before dealing with the merits of the suit. This it did not do. The result is to render all the subsequent proceedings a nullity.”
36. In that case, the trial court had in fact properly heard the parties on the preliminary objection and had reserved its ruling to be delivered on 16/9/2009. The ruling was never delivered at all but the suit was heard and determined on its merits, hence forcing the Court of Appeal to nullify the proceedings. We subscribe wholly to the reasoning and holdings in the *Thabit R. Maziku* case, and having found it very persuasive, we shall adopt and apply it in our determination of the first Issue in this Appeal.
37. Coming back to the issue under discussion, we have found it as an established fact that the Notice of Motion which instituted the Application in the Trial Court was supported by only one affidavit. This has been the stance of the Appellant who is borne out on this by the Notice of Motion and Mr. Gimara himself.
38. Mr. Gimara is on record on the day of hearing the Application (12/11/2015) confidently asserting thus:

“My Lord (sic), the Applicants rely entirely on their Notice of Motion filed on the 10th June, 2015, the supporting Affidavit of Yakoré-Oulé

Jansen filed on (sic) the Notice of Motion, the EAC Treaty and the Rules of Procedure under the jurisprudence of this Court on those matters.”

This, to us, tells it all.

39. It is the Affidavit of Y.O. Jansen which was the subject of the preliminary objection. If this Affidavit was incurably defective as the Appellant is maintaining, then it could not validly support the Notice of Motion. Without a valid supporting affidavit, the Application, by any stretch of imagination, could not be said or held to have been competently before the Trial Court. In that eventuality, the Trial Court could not have been properly seized with jurisdiction to entertain and determine the Application on its merits. Viewed from this perspective, it has occurred to us that it was even more imperative for the preliminary objection to be both heard first, and disposed of by the Trial Court before proceeding to hear the Parties on the merits or otherwise of the Application. Failure to do so by the Trial Court was, in our settled minds, “a colossal” incurable “procedural irregularity” envisaged by Article 35A(c) of the Treaty.
40. In view of the above exposition, under normal circumstances, we would have proceeded forthwith to nullify and set aside the Proceedings in the Trial Court as from 12th November, 2015 including the Ruling appealed from. However, after perusing the only oral submissions of Counsel for the Parties in the Trial Court, we are of the settled view that this course of action will not serve the interests of justice both in the Application and the Reference which has been pending since 2014.
41. We are saying so advisedly because Counsel for both sides had the opportunity to address the Trial Court on the pleaded preliminary objection at the time the Application was heard on the merits. We have found nothing objectionable on this, as this is usually done in order to save time and costs, provided a ruling is given first on the merits or otherwise of the preliminary objection. It is our respectful finding, therefore, that the procedural error was committed when the Trial Court, inadvertently or not, failed to make a determination on the challenged competence of the Application within the same Ruling. This fundamental flaw rendered only the Ruling dated 28th June, 2016 a nullity. We are accordingly enjoined by law to quash and set it aside as we hereby do.
42. Counsel for the Parties had strenuously urged us to step into the shoes of the Trial Court and decide the preliminary objection. With respect, we have found this invitation untenable in law. We have no such jurisdiction under the Treaty. If we accede to this seemingly attractive invitation, we shall be trespassing into the exclusive preserve of the First Instance Division. Our jurisdiction under the Treaty is strictly confined to hearing and deciding appeals from “the judgment or any order of the First Instance Division” based on the grounds prescribed in Article 35A of the Treaty. We are of the firm view that the duty of an appellate court is to review decisions made by the trial courts and not to decide questions of law in the first instance. No decision or order was made by the Trial Court on the competence or otherwise of the Application. This crucial issue is within the competence of the Trial Court to determine it first. Once a decision thereon is rendered, then any aggrieved party, can, under the permissive provisions of Article 35A of the Treaty, access this Division on appeal.
43. We, all the same, have found ourselves constrained to make this pertinent

observation as we conclude our canvassing of this Issue. We are not oblivious of the fact that the unfettered right of appeal against any “judgment or order” of the First Instance Division carries with it the potential for causing delays in the disposal of cases in both Divisions of the Court, thereby rendering the Court’s vision a poetic dream. This is particularly true where the appealed from decision or order, like this one, does not have the effect of finally disposing of the Reference, Application or Claim. We therefore hope and pray that well intentioned parties will sparingly resort to this right of appeal against interlocutory rulings or orders which are not likely in the long run to lead to a miscarriage of justice if no immediate redress is sought and obtained.

44. That said, we answer the first Issue in the affirmative. Since we have nullified the impugned Ruling, the dictates of justice compel us to say nothing on the second Issue.

Conclusion

45. The crucial issue in the Appeal was whether or not the Trial Court erred in law and procedurally by failing to determine the point of preliminary objection challenging the competence of the Application. From our discussion on this Issue we have arrived at one conclusive finding. This is that the Trial Court actually so erred in law and procedurally. The error was incurable and vitiated the impugned Ruling which we have quashed and set aside.
46. As a way forward, since the Parties were heard in full on the undetermined point of preliminary objection, we direct the Trial Court to re-constitute itself in order to compose a fresh ruling which should contain a clear determination of the pleaded point of preliminary objection, before considering the merits or otherwise of the Application, if that need will arise. It is also our considered finding and holding that since the Parties are not to blame for this incurable procedural irregularity, they should bear their own costs here and below. It is so ordered.

H. Nalukenge & C. Nabasa, Counsel for the Appellant.

F. Gimara, for the Respondents.

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Appellate Division

Appeal No. 4 of 2016

**The East African Civil Society Organizations' Forum (EACSOFF) v The
Attorney General of the Republic of Burundi, Commission Electorale
Nationale Independante &
The Secretary General of the East African Community (EAC)**

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice M. Mugenyi (PJ), Hon. Isaac Lenaola (DPJ) and Hon. Justice F. Jundu (J) dated 29th September, 2016 in Reference Number 2 of 2015]

Coram: E. Ugirashebuja, P; L. Nkurunziza, VP; E. Rutakangwa, A. Ringera and G. Kiryabwire, JJ.A.
May 24, 2018

International responsibility attributable to States - State liability for acts and omission of domestic courts – Whether the Trial Court erred in disavowing jurisdiction - Judicial review powers - Testing Treaty compliance - Declarations or orders on substantiated Treaty infringements mandatory -Cause of action- Appropriate remedies

Articles: 5 (3) (f), 6 (d), 7 (2), 8 (1) (a), (c),(5), 35A, 67, 68, of the Treaty – Article 1 Draft Article on the Responsibility of States for internationally wrongful acts, International Law Commission

On 5th May 2015, the Constitutional Court of Burundi interpreted Articles 96 and 302 of the Constitution of Burundi and held that Mr Pierre Nkurunziza was eligible to run in elections in the Republic of Burundi. Subsequently, the second Respondent announced new dates for the general elections but on the 9th June, 2015, Mr Nkurunziza announced different dates for the said elections. Thereafter there were public and the Appellant alleges that many leaders and Burundians fled the country and some were killed during the violent demonstrations

In Reference 2 of 2015, the Appellant sought *inter alia*; a declaration that the decision of the Constitutional Court violated the Arusha Peace and Reconciliation Agreement for Burundi, 2000, the Constitution of Burundi and the EAC Treaty; and an order directing the 3rd Respondent to constitute and give immediate effect to the said judgment and to advise the EAC Summit of Heads of State and Government on whether the Republic of Burundi should be suspended or expelled from the EAC under Articles 29, 67, 71, 143, 146 and 147 of the Treaty.

The Trial Court dismissed the Reference finding that: while it had jurisdiction to interpret the Constitution of Burundi and the Arusha Agreement and determine whether any action taken amounted to an infringement of the Treaty, its mandate did not extend to the interrogation of decisions of other courts in a judicial manner. On Appeal the Appellant averred that the Trial Court: erred in law by disavowing itself of jurisdiction, bestowed by the Treaty, to review any decision of any organ

or institution of a Partner State on the basis that it is unlawful or a violation of the Treaty based on the theory of state unity and undifferentiated attribution; and that the Court committed procedural irregularities by incorrectly reframing the Appellant's Application to revise, review or quash the decision of the Constitutional Court of Burundi; and in declaring that there was no cause of action against the 3rd Respondent.

Held

1. The right of appeal is restricted to the scope provided for under Article 35A of the EAC Treaty and the burden of proof falls on the party alleging the error who must advance arguments in support of the contention and explain how the error invalidates the decision. The Appellate Division does not undertake a hearing *de novo* of the questions of fact and law examined by the Trial Court.
2. Pursuant to the EAC Treaty, Partner States have undertaken to abide by and carry out the obligations as provided for therein. At international law, this creates state responsibility to each and every Partner State that is attributable to them. Partner States are bound to follow the law created by the Treaty and have it applied by their courts. Even where a superior court of a Partner State has made a final determination on the constitutionality of a domestic law, which is not appealable to a higher court, such a determination would not stop EACJ from interrogating whether that domestic law violated the Treaty. EACJ can reach a different conclusion from that of the superior domestic court as was held in the *Burundi Journalist Union* case.
3. The case before the Trial Court was not a further appeal from the decision of the Constitutional Court of Burundi. It was an issue on Burundi's international responsibility in international law and the Treaty attributable to Burundi due to an action of one of its organs, namely the Constitutional Court of Burundi. State liability for domestic courts at international law covers both acts and omissions. The Trial Court had a duty to determine this international responsibility and in so doing so to consider the internal laws of the Partner State and to apply its own appreciation thereof to the provisions of the Treaty. By not carrying out this duty, the Trial Court disavowed itself of the jurisdiction to determine whether or not the impugned decision of the Constitutional Court of Burundi breached the Treaty.
4. The interrogation of a decision of a domestic court, to determine the international responsibility of a State, goes beyond having regard to the due process before that said domestic court and extends to every act or omission it may make. In exercising its duty, the Trial Court is not expected to review the impugned decision looking for new evidence or some mistake, fraud or error apparent on the face of the record. The Trial Court is to sift through the impugned decision and evaluate it critically with a view of testing its compliance with the Treaty and then make a determination. The Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers, but rather makes declarations as to the decision's compliance with the EAC Treaty. The Trial Court erred or misdirected itself in its holding and in not proceeding to hear the Reference on its merit.
5. While the Trial Court correctly found that the 3rd Respondent can and should

be found accountable for failure to discharge his duties under the Treaty, in the instant case there was no such evidence. Therefore, there was no cause of action against the 3rd Respondent, he is struck out as a party to this case.

6. A declaration of violation, or infringement of, or inconsistency of any action of a Member State with a Treaty violation is not a discretionary remedy. It is a command of the Treaty. However, remedies are only to be given to the extent possible and EACJ has wide discretion in granting appropriate remedies and making orders as may be necessary for the ends of justice as was held in *Henry Kyarimpa* case. Since Article 35A of the Treaty does not grant this Court the power to hear the merits of a case, Reference No. 2 of 2015 is reverted to the Trial Court for hearing on its merits.

Cases cited

Alcon International v Standard Chartered Bank (U) & Ors [20012-2015] EACJLR 430, Appeal No 3 of 2013
 Baranzira Raphael & Anor v AG of Burundi, EACJ Ref. No. 15 of 2014
 Burundi Journalists Union v AG of Burundi [20012-2015] EACJLR 299, Ref.7 of 2013
 East African Law Society v AG of Burundi & Anor, [20012-2015] EACJLR 465, Ref. No. 1 of 2014
 Flaminio Costa v ENEL 6/64/[1964] ECR 585
 Gerhard Kobler v Republik Osterreich [2003] ECR I-10239
 Henry Kyarimpa v AG of Uganda, EACJ Appeal 6 of 2014
 Lohe Issa Konate v Burkina Faso, ACHPR Application No. 004 of 2011
 Mohammed Abubakari v United Republic of Tanzania, ACHPR Application No. 007 of 2013
 Norbert Zongo and Others v Burkina Faso, ACHPR Application No. 013 of 2011;
 Simon Peter Ochieng & Anor v The AG of Uganda, EACJ Appeal No. 4 of 2015
 Sitenda Sebalu v Secretary General of EAC & Ors [2005-2011] EACJLR 160, Ref. 1 of 2010
 Wilfred O. Ngyani & Ors v United Republic of Tanzania, ACHPR Application No. 006 of 2013

JUDGMENT

Introduction

1. This is an Appeal against the Judgment of the First Instance Division of this Court (hereinafter referred to as “the Trial Court”) dated 29th September, 2016 arising out of Reference No. 2 of 2015, by which the Trial Court dismissed the Reference and held that each party bear its own costs.
2. The Appellant, The East African Civil Society Organizations’ Forum sued the first Respondent, the Attorney General of Burundi, in his capacity as the legal representative of The Republic of Burundi (hereinafter referred to as “Burundi”); the second Respondent, The Commission Electorale Nationale Independante of the Republic of Burundi (hereinafter referred to as “CENI”); and the third Respondent The Secretary General of The East African Community (hereinafter referred to as the “SG-EAC”) before the Trial Court in respect of a Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5th May 2015 (hereinafter referred to as the “impugned Decision”).
3. It is the case of the Appellant that the impugned Decision violated the letter and spirit of the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (hereinafter referred to as “the Arusha Accord”) and in particular Article 7 (3) of Protocol II to the Arusha Accord and the Constitution of Burundi. Furthermore by reason of the aforesaid breach of the Arusha Accord and the Burundi Constitution the impugned Decision also equally violated Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 8 (5) of the Treaty for the for the Establishment of The East African Community (hereinafter referred to as the “EAC Treaty”).
4. The Appellant was represented by Mr Donald Omondi Deya, Advocate; the

First Respondent by Mr. Nestor Kayobera, Principal State Counsel; and the third Respondent by Mr. Stephen Agaba, Advocate.

Background

5. The facts from which this Appeal arises are as follows. On 28th April, 2015, fourteen Senators of the Burundi Senate filed a motion dated 17th April, 2015 in the Constitutional Court of Burundi seeking an interpretation of Articles 96 and 302 as to whether the President, Mr Pierre Nkurunziza, who had twice previously been elected President of The Republic of Burundi, was eligible to run in the forthcoming elections in The Republic of Burundi. A day before the Constitutional Court of Burundi delivered its Decision the Vice President of the Constitutional Court fled the Country (alleging intimidation). That notwithstanding, the Constitutional Court of Burundi on the 5th May, 2015 rendered its Decision and held that Mr Pierre Nkurunziza was eligible to run for the Presidency of Burundi.
6. On the 8th June, 2015, the Chairman of the second Respondent, CENI, announced new dates for the general elections but on the 9th June, 2015, Mr Pierre Nkurunziza announced different dates for the said elections. Thereafter public demonstrations started in Burundi and many leaders and other Burundians fled the country while others were killed during the violent and chaotic demonstrations.
7. It is the eligibility or otherwise of Mr Pierre Nkurunziza to run for the third time for the Presidency of Burundi following the impugned Decision of the Constitutional Court of Burundi; the conduct of the CENI in connection with the holding of the said elections in 2015 and the alleged failure of the third Respondent SG-EAC to properly advise the Heads of State to take decisive steps against the alleged violation of the Arusha Accord and the EAC Treaty that led to the filing of Reference No 2 of 2015 in the Trial Court.
8. At the Trial Court, the Appellant, as the Applicant in the said Reference sought the following Declarations and Orders to be granted against the Respondents:
 - (a) A Declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5 May 2015 violated the letter and spirit of the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (the Arusha Accord) and in particular Article 7(3) of Protocol II to the Arusha Accord and the Constitution of Burundi;
 - (b) By reason of the aforesaid breach of the Arusha Accord and the Burundi Constitution, a Declaration that the Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5 May 2015 equally violated several Articles of the Treaty for the Establishment of the East African Community (the EAC Treaty);
 - (c) A Declaration that the decision of the CNDD-FDD political party to nominate or put forward President Pierre Nkurunziza as a candidate for election to the Office of the President of the Republic of Burundi in 2015 violated the Arusha Accord aforesaid and is unlawful; and
 - (d) An order directing the Secretary-General of the EAC to constitute and give immediate effect to the said judgment and to advise the Summit of Heads of State and Government of the East African Community (EAC)

on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29, 67, 71, 143, 146 and 147 of the Treaty for the Establishment of the East African Community.

9. In its Decision the Trial Court held that while it had jurisdiction to interpret the Constitution of Burundi and the Arusha Agreement and determine whether any action taken in furtherance of the said Constitution and Agreement are amount to an infringement or violation of the Treaty it further held that:
- (a) Its mandate did not extend to the interrogation of decisions of other courts in a judicial manner such as is being asked in the present reference;
 - (b) The second Respondent was improperly enjoined to the Reference and is struck out of the proceedings; and
 - (c) There was no plausible reason why the Third Respondent was enjoined to the proceedings. For the above reasons the Reference was dismissed and each party was ordered to bear its own costs (as the Reference was filed in the public interest); hence this appeal.

The Appeal

10. The Appellant has raised six grounds of Appeal namely:
- (a) That the Honourable Learned Judges of the First Instance Division of the Court erred in law by disavowing themselves of jurisdiction expressly bestowed upon them by the Treaty for the Establishment of the East African Community (the Treaty), to wit jurisdiction to review any Decision of any Court (or indeed of any organ or institution) of a Partner State on the basis that it is unlawful or a violation of the Treaty, in keeping with the theory of state unity and undifferentiated attribution.
 - (b) That the Honourable Learned Judges of the First Instance Division of the Court erred in law and committed a procedural irregularity by incorrectly reframing the Appellant's Application for the said Court to revise, review or quash the impugned decision of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on 5th May 2015, which Application was premised on the basis that the impugned decision was, *inter alia*, unlawful or a violation of the Treaty, as if the Applicant had merely appealed or applied for review on the sole basis of the municipal law of the 1st respondent.
 - (c) That the Honourable Learned Judges of the First Instance Division of the Court erred in law and committed a procedural irregularity by failing to interpret and/or apply Rules 24 (1) and (3) of the Court's Rules of procedure, which the appellant had expressly relied upon and which the Court had acknowledged.
 - (d) That the Honourable Learned Judges of the First Instance Division of the Court erred in law by failing to follow the precedent that this Honourable Court had set in Reference No. 7 of 2013; Burundi Journalist' Union versus Attorney General of Burundi and Another, or in the alternative, that the Honourable Learned Judges of the First Instance Division of the Court erred in law by failing to sufficiently distinguish the latter case

(Reference No. 7 of 2013) from the instant case (Reference No. 2 of 2015).

- (e) That the Honourable Learned Judges of the First Instance Division of the Court erred in law by failing to acknowledge that there were compelling reasons which motivated the Appellant to seek to enjoin the 3rd Respondent [The Secretary General of the East African Community] as a party to the proceedings in his own right.
- (f) That the Honourable Learned Judges of the First Instance Division of the Court erred in law and committed a procedural irregularity by declaring that there was no cause of action against the 3rd Respondent [The Secretary General of the East African Community].

11. The Appellant further prayed that the Court grants the following orders:

- (a) The Appellate Division of the East African Court of Justice (EACJ) reverses the above mentioned parts of the Decision of the First Instance Division of the Court;
- (b) The Appellate Division of the East African Court of Justice (EACJ) reverts the above mentioned parts of the decision to the First Instance Division of the Court for a Decision on the merits;

In the alternative, the Appellate Division of the East African Court of Justice (EACJ) to make the following Declarations and Orders against the Respondents:

- (i) A Declaration that the Decision of the Constitutional Court of the Republic of Burundi in case Number RCCB 303 delivered on 5th May 2015 violated the letter and spirit of the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (The Arusha Accord) and in particular Article 7 (3) of Protocol II to the Arusha Accord and the Constitution of Burundi;
- (ii) A Declaration that, by reason of the aforesaid breach of the Arusha Accord and the Constitution of Burundi, the decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5th May 2015 equally violated Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 8 (5) of the Treaty for the Establishment of the East African Community (the EAC Treaty);
- (iii) A Declaration that any decrees, decisions or orders of the 2nd Respondent (The CENI) of the Republic of Burundi for the purposes of organizing or supervising Presidential elections in 2015 in which Mr. Pierre Nkurunziza was a candidate for the Office of the President of Burundi were, are and shall be considered incompatible with the Arusha Accord and the Constitution of Burundi and therefore, unlawful and a violation of the EAC TREATY;
- (iv) An Order to annul, quash or set aside the decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303 delivered on 5th May 2015;
- (v) An Order directing the 3rd Respondent (the EAC Secretary General) to constitute and give immediate effect to the Judgment of the First Instance Division of this Court Honourable Court in *Reference No. 1 of 2014 (East African Law Society versus the Attorney General of Burundi and the Secretary General of the East African Community)* (EAC) on whether the Republic of Burundi should be sanctioned, suspended or expelled from

the East African Community under Articles 29, 67, 71, 143, 146, and 147 of the EAC Treaty;

- (vi) An Order directing the 1st and 3rd Respondents to appear and file before this Honourable Court not later than 14 days from the date of any decisions or orders that this Court may make, a progress report on the remedial mechanisms and steps taken towards the implementation of the Orders issued by this Honourable Court; and
- (vii) An Order that the costs of and incidental to this Reference (sic) be met by the Respondents

That this Honorable Court may be pleased to make such further or other orders as may be just, necessary or expedient in the circumstances.

12. At the Scheduling Conference of the Appeal held on the 15th February 2017, the six grounds of appeal were consolidated into three substantive issues namely:
 - (a) Whether or not the Honourable Learned Judges of the 1st Instance Division of the Court erred in law by disavowing themselves of Jurisdiction to review and/ or quash the Judgment of the Constitutional Court of Burundi?
 - (b) Whether or not the Honourable Learned Judges of the 1st Instance Division of the Court erred in law and committed a procedural irregularity by declaring that there was no cause of action against the 3rd Respondent?
 - (c) Whether or not the Appellant is entitled to the Orders that it seeks?

Mandate of this Court

13. As correctly submitted by all the Parties to this Appeal, the jurisdiction of the Appellate Division to hear appeals proffered from the Trial Court is provided for under Article 35A of the EAC Treaty. Such an appeal shall be on "...points of law, grounds of lack of jurisdiction; or procedural irregularity...". In the case of *Simon Peter Ochieng and Another Vs The Attorney General of The Republic of Uganda 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 the said Article 35A of the EAC Treaty. Furthermore, the burden of proof falls on the party alleging the error who must advance arguments in support of the contention and explain how the error invalidates the decision. The parties must ever bear in mind that this Court does not undertake a hearing *de novo* of the questions of fact and law examined by the Trial Court.

The Parties' Submissions

Issue No. 1. Whether or not the Honourable Learned Judges of the 1st Instance Division of the Court erred in law by disavowing themselves of Jurisdiction to review and/ or quash the Judgment of the Constitutional Court of Burundi?

Appellant's Submissions

14. Counsel for the Appellant submitted that the crux of their Appeal was based on just 3 paragraphs of the Judgment of the First Instance Division, namely paragraphs 46, 47 and 48. Those paragraphs are reproduced here for ease of reference:

"...As we have stated elsewhere above, this Court has primacy in the

interpretation of the Treaty but that mandate in our considered view does not extend to the interrogation of decisions of other Courts in a Judicial manner such as is being asked of us in the present Reference. An interrogation of the reasons, *ration decidendi* and contents of such decisions would necessarily require that we exercise an appellate Jurisdiction over the said decisions which jurisdiction we certainly do not have. The independence of the Courts of Partner States is a paramount principle of the Rule of Law as envisaged in Articles 6(d) and 7(2) of the Treaty and we cannot in upholding those principles, interfere willy nilly with that independence.

What of the Jurisdiction to interpret the aforesaid decision of that Court in the context of the Treaty and whether it was made in violation of the said Treaty? The Applicant has submitted in that regard that we should assume jurisdiction to do so in the context of Article 30(1) of the Treaty. Try as we have, we are unable to see any Jurisdiction to reopen decisions of Courts of Partner States and decide whether such decisions are or are not in line with either the Constitution of Burundi or the Agreement or even the Treaty. See *East African Law Society vs. Attorney General of Burundi & Secretary General of the EAC Ref. No. 1 of 2014*.

In doing so, we reiterate that what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation(sic) of the Republic of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the *Burundian Journalists* case (supra).

For the above reasons, we can only determine Issue No. 3 in the negative...”

15. It is the case for the Appellant in its written submissions, that the Trial Court in those paragraphs sought to find that:

- “ a. The East African Court of Justice (EACJ) has primacy in interpreting the EAC Treaty;
- b. The EACJ Treaty Interpretation mandate does not extend to interrogation of decisions of other Courts in a judicial manner;
- c. Inquiring into the reasons, *ratio decidendi* and contents of decisions of other Courts would make EACJ exercise an appellate jurisdiction over the said decisions which (appellate) jurisdiction (sic) EACJ says it does not have;
- d. Exercising an appellate jurisdiction would interfere with the judicial independence of these other Courts, and thereby violate a paramount principle of the rule of law;
- e. EACJ lacks jurisdiction to reopen decisions of Partner States’ Courts to decide whether or not such decisions are in line with: -
 - i. The EAC Treaty!
 - ii. The Constitution of Burundi
 - iii. The Arusha Accord

- f. EACJ tries to distinguish that: -
- i. Had the Applicant questioned whether there was due process before the Burundi Constitutional Court, the EACJ would have assumed jurisdiction to inquire into that (due process);
 - ii. But as the Applicant has challenged the correctness of the decision made by the Burundi Constitutional Court, the EACJ would have to interrogate the said Constitutional Court Decision, which is ONLY available upon a review or appeal, which jurisdiction the 1st Instance Division states that it does not have;
 - iii. In attempting to distinguish from its decision in the *Burundi Journalists' Union (BJU)* Case, the 1st Instance Division states that: -
 1. In the BJU case, the 1st Instance Division examined whether the (then) decision of the very same Burundi Constitutional Court was made in violation of the principles of the rule of law (a procedural question);
 2. In the instant case (EACSO case), the Applicant challenged the correctness of the decision of the same Burundi Constitutional Court (a substantive question)..."
16. Counsel raises five areas of law in which the Trial Court erred and/or misdirected itself in holding as it did above. Some of the areas are incidental to this issue but still do arise from the grounds of appeal.
17. The first area is that the Trial Court erred in law by disavowing itself of the existing jurisdiction in international law to review and/or quash the judgment of the Constitutional Court of Burundi.
18. He argued that this Court, being an international court which is responsible for interpreting and applying international legal instruments, such as the EAC Treaty and other relevant conventions, has jurisdiction to determine whether a decision and/or an omission of any judicial organ of a Partner State is a violation of the said international legal instrument, i.e. the EAC Treaty and EAC law generally.
19. Counsel for the Appellant submitted that Articles 23 (Role of the Court) and 27 (Jurisdiction of the Court) of the EAC Treaty bestow upon this Court the Jurisdiction to review any decision of any court of a Partner State on the grounds that it is unlawful or is a violation of the Treaty. This mandate of the Court is in keeping with the theory in international law of state unity and undifferentiated attribution. He further pointed out that there is no exception under international law (both case and customary law), for decisions made by the judicial organs of a state party. He argued that if this was so, then it would mean that a state party would be allowed to infringe on its international obligations through its judicial decisions which would be unacceptable. Therefore according to the general principles of international law all wrongful decisions including judicial decisions are attributable to a State.
20. Counsel further argued that this Court in a number of its decisions has consistently upheld the principle of state responsibility for judicial decisions that violate the EAC Treaty. He in particular referred us to the *Burundi Journalists Union (BJU) Vs Attorney General of Burundi, EACJ Application No. 007 of 2013*. In that case the First instance Division of this Court held (Para 40-41):

“With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty. (...)

The above jurisdiction differs from that conferred by Article 27(1) which provides that this Court shall “initially have jurisdiction over the interpretation of the Treaty.” The proviso thereof is irrelevant for purposes of this Reference, but suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court’s jurisdiction”.

21. Counsel also referred us to the case of *Baranzira Raphael and Another Vs Attorney General of Burundi*, EACJ Reference No. 015 of 2014 where again the First Instance Division of this Court held (in a matter where the Constitutional Court of Burundi had already previously rendered a judgment):

“In the instant case, although the constitutionality of the Bill that preceded Act No 1/26 was tested and sanctified by the Constitutional Court of Burundi, it is the Applicant’s contention that the Act nonetheless contravenes Articles 6(d) and 7(2) of the Treaty in so far as it offends the principles of rule of law and good governance. Clearly, the decision of the Constitutional Court of Burundi notwithstanding, there are matters of Treaty interpretation presented by the Reference that beg the Court’s interrogation. To that extent, therefore, we are satisfied that this Court does have jurisdiction to entertain the Reference. We so hold”.
22. Counsel for the Appellant also referred us to other related decisions of courts and tribunals at the international and African regional level. He cited the *Salvador Commercial Company Case UNRIAA, Vol. XV*, [p. 455 at p. 477 (1902)] where the Arbitration Tribunal found:

“..a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity...”

Counsel further referred us to the International Court of Justice (ICJ) Advisory Opinion while referring to decisions of state courts in the matter of *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999 [p. 87 para 62] where the Court ruled that:

“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character”.
23. Counsel for the Appellant submitted that based on those consistent findings by international Courts, the United Nations International Law Commission [*ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001] has codified the rule in the following terms:

“Article 4: Conduct of organs of a State

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the

central Government or of a territorial unit of the State.

An organ includes any person or entity which has that status in accordance with the internal law of the State”.

In the Commentary which is related to this Article, the ILC Commentary states as follows:

“Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs...”

24. At the African regional level, Counsel referred us to several decisions of The African Court on Human and Peoples Rights, where the Court held that decisions made by national Courts are attributable to the State concerned and such decisions may engage its international responsibility. He in particular referred us to the decision in the case of *Lohe Issa Konate Vs Burkina Faso, Application No. 004 of 2011*. In that case it was held that:

“Since the conduct of the Burkinabe courts fall squarely on the Respondent State [in footnote, reference is made to Article 4 of the *ILC Draft Articles*], the Court is of the view that the latter failed in its obligation to comply with the provisions of Article 9 of the Charter [and some other international human rights instruments], with regard to the Applicant...”

Other decisions of the African Court cited on this point included:

- *Norbert Zongo and Others Vs Burkina Faso, Application No. 013 of 2011;*
- *Wilfred Onyango Nganyi and Others Vs United Republic of Tanzania, Application No. 006 of 2013; and*
- *Mohammed Abubakari Vs United Republic of Tanzania, Application No. 007 of 2013.*

25. The second area under the first issue to be resolved that Counsel for Appellant submitted on, is in relation to errors and omissions in the Judgment of the Trial Court. Here Counsel argues three points.

26. First, Counsel submitted that the Trial Court, erred when it misdirected itself and resolved a different issue from that which was placed before it. The Trial Court he argues, was preoccupied with determining whether it had appellate jurisdiction over the decision of a national court. That particular question was never an issue he argued. What the Reference had placed before the Trial Court was whether this [Honourable] Court has jurisdiction to fulfill certain functions specifically provided for in the EAC Treaty and the Court’s own Rules.

27. He submitted that the Trial Court inaccurately found (para. 48), that the Applicant had only challenged the “correctness of the (Burundi Constitutional Court’s) decision in the context of the interpretation of the Constitution of the Republic of Burundi and the Arusha Agreement”. Counsel argued that this finding left out the very important element that the Applicant had also challenged the decision of the Constitutional Court of Burundi, as being a violation of the EAC Treaty. It is the case of the Appellant that this Court can challenge a decision of a Partner

State and its organs to establish whether the said decisions are in line with the EAC Treaty.

28. Counsel submitted that It is trite law that when this Court considers whether the Respondent State, through the decisions of its judicial organs, has conformed or not with the Treaty or any other relevant international legal instrument, it does not act as an appellate court.

29. Secondly, Counsel submitted that the Trial Court failed to interpret and/or apply Rules 24 (1) and (3) of the Court’s Rules of Procedure. Rule 24(1) provides the manner by which a litigant should institute a Reference at the Court. This includes legal or natural persons, as provided for in Article 30 of the Treaty. Rule 24(3) gives a hint of the kind of Orders that litigants who commence litigation under Rule 24(1) could seek. It specifically provides for:

“... annulment of an Act, regulation, directive, decision or action ...”

Counsel emphasised that annulment was just one of several orders that the Court could make taking into account all the circumstances of the case.

30. Counsel argued that Rule 24 of the Rules of this Court, makes no distinction on the types of decisions or actions that can be annulled. He further argued that if this Court could annul decisions of ‘Executive’ or ‘legislative’ arms of government, but that they could not annul decisions of judicial arms of governments of Partner States that are not in conformity with the Treaty then this would be an absurdity. Therefore where necessary this Court could call for “the annulment of any Act, directive, decision or action of a Partner State.”

31. Thirdly, Counsel submitted that the Trial Court failed to properly follow the precedent of the Court in the *Burundi Journalists’ Union* (Supra). In that case, the Respondents had argued that this Court had no jurisdiction because the Constitutional Court of Burundi had previously adjudicated on the same matter. However, this Court rejected that argument and adjudicated on the matter and even arrived at a different conclusion from the Constitutional Court of Burundi and proceeded to make other orders of Court. In this case however, the Trial Court erroneously found that it lacked jurisdiction to adjudicate on a matter previously decided upon by the Constitutional Court of Burundi.

32. The third and last area under the first issue to be resolved that Counsel for Appellant submitted on, is whether or not the second Respondent (CENI) has legal personality to be sued before the East African Court of Justice, under Article 30 (1) of the EAC Treaty. He pointed out that CENI had been added to the Reference for purposes of injunctive orders sought against it and also to give it an opportunity to be heard.

Counsel in principle accepted the finding of the Trial Court, that an institution of a Partner State like CENI cannot be sued directly in this Court.

33. Finally, Counsel for the Appellant prayed that this Court on the first issue find in favour of the Appellant on the basis that the Trial Court: “... ”

- a. Made assertions and findings that are not backed by the EAC Treaty;
- b. Made assertions and findings that are not backed by international law;
- c. Attempts to disavow itself of jurisdiction that it has, and which it has exercised previously;
- d. Tries to make a distinction between its handling of this case, and handling of the *Burundi Journalists’ Union* (BJU) case, which was largely in *pari materia*, which purported distinction is not sustainable...”

First Respondent's Arguments

34. Counsel for the First Respondent in response submitted that this Appeal is bad in law as it does not meet the standard required under Article 35A of the EAC Treaty and its well established jurisprudence. He stated that Article 35A provides:

“... 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...”

35. He referred the Court to its Decision in *Angella Amudo Vs The Secretary General of the East African Community, Appeal No.4 of 2014*, (paragraph 65 on page 28 of the Judgment of the Court) where this Court set out the conditions required under Article 35 A of the EAC Treaty to show that the Trial Court had committed an error of law or procedural errors or irregularities; namely:

“... ”

- (a) Misapprehends the nature, quality and substance of the evidence;
- (b) Draws wrong inferences from the proven facts; or
- (c) Acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e. fairness)...”

He further argued that this same test had also been applied in the case of *Simon Peter Ochieng case* (supra) where it was further held that

“...to meet the standard required by Article 35A of the Treaty, the Counsel for the Appellant had for example to demonstrate in his submissions that the Trial Court committed errors of law or procedural irregularities of (sic) (or) lacked jurisdiction ...”.

Counsel submitted that the Appellant had not shown how the Trial Court had committed errors of law or procedural irregularities or lack of jurisdiction.

36. Counsel submitted that the role of this Court as found under Articles 23 and 27 of The EAC Treaty is to ensure adherence to law in the interpretation and application of and compliance of the EAC Treaty. In this regard Counsel argued that the Trial Court did not willingly abdicate its duty, when it denied itself jurisdiction on the question of whether the decision of the Constitutional Court of Burundi complies with the EAC Treaty.

37. Counsel argued that the Appellant appeared not to understand the correct reasoning made by the Trial Court in its Judgment, that the power to review, revise and/or quash the decision of the Constitutional Court of Burundi is only available to a Court clothed with appellate and/or review jurisdiction which jurisdiction is not provided for under Article 23 and 27 of the EAC Treaty referred to by the Appellant.

38. Counsel further argued that had the Learned Judges of the Trial Court attributed to themselves the appellate jurisdiction to review and/or set aside the impugned Judgment, which jurisdiction is not conferred to them under the EAC Treaty, then their Judgment would be a nullity as in the *Angella Amudo Appeal case* (supra), where it was held that:

“All said and done, we hold without any demur that the entire proceedings in the Trial Court were a nullity on account of want of jurisdiction. We, accordingly, quash and set them aside. If authority for this is needed, we

shall quickly refer to our decision given in Appeal No.4 of 2012 between Legal Brains Trust and The Attorney General of the Republic of Uganda, where we nullified the proceedings in the First Instance Division which had been determined on merit when the Trial Court had no jurisdiction to entertain the matter.”

This would then mean that the entire proceedings of the Trial Court would have been a nullity for want of jurisdiction.

39. Counsel then prayed that this Court answers the first issue in the negative.

Arguments of the Third Respondent

40. Counsel for the Third Respondent, largely agreed with and adopted the arguments of the First Respondent. He submitted that the Appellant did not comprehend the reasoning of the Trial Court in its judgment. He referred us to paragraph 48 of the Judgment of the Trial Court, where it found that what the Reference sought was not determining a question regarding the due process before the Constitutional Court of Burundi but rather to determine the correctness of its decision. He further submitted that the Trial Court correctly held that such remedies as to revise, review and quash the decision of another Court are only available upon appeal or review of the said decision to an appellate court and not as a result of an interrogation by this Court as to whether the said decision was made in violation of the principles of the Rule of Law under The EAC Treaty.
41. Counsel submitted that the only route available to establish the correctness of a court decision is by way of Appeal or review. Therefore, since the East African Court of Justice’s jurisdiction is established under Article 23(1) and 27 of the EAC Treaty to ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty, the Learned Judges of the Trial Court were in order to disavow themselves of jurisdiction to review and/or quash the Judgment of the Constitutional Court of Burundi. He added that none of the legal authorities cited by the Appellant held that this Court could exercise appellate jurisdiction it did not have to revise, review or quash the decision of a domestic court of a Partner State.
42. Counsel prayed that the first issue be answered in the negative.

Court’s Determination

43. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the opposing parties for which we are grateful. We now resolve Issue number one as hereunder.
44. In this issue it is the case for the Appellant, that the Trial Court disavowed itself of jurisdiction to review and/or quash the Judgment of the Constitutional Court of Burundi in Case Number RCCB 303 delivered on the 5th May 2015, on the grounds that it violated the letter and spirit of the Arusha Accord and also Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 5 (5) of the EAC Treaty.
45. Indeed in the case of *Alcon International Vs Standard Chartered Bank of Uganda & 2 Others Appeal No 3 of 2013* (para. 58), we found that this Court is an international Court and exercises jurisdiction like any other international court in accordance with international law. In this case the issue of jurisdiction revolves around whether the Court had jurisdiction *ratione materiae* to annul and/or

review the decision of the Constitutional Court of Burundi within the meaning of The EAC Treaty and Rule 24 (3) of the Rules of this Court. Jurisdiction *ratione materiae* is concerned with the power of the Court to entertain and decide on the subject matter of the complaint before it.

46. Pursuant to The EAC Treaty, Partner States have undertaken to abide by and carry out the obligations as provided for therein. This at international law creates state responsibility to each and every Partner State that is attributable to them. It is the duty of this Court under Article 23 (1) of the EAC Treaty to "...ensure the adherence to law in the interpretation and application and compliance with this Treaty...". To this end it is the case for the Appellant, that the Partner State of Burundi by reason of the impugned Decision of the Constitutional Court of Burundi is in violation of Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 5 (5) of the EAC Treaty and the Arusha Accord (which all parties accept is an international agreement which has been domesticated under Burundian law No. 1/07 of 1st December 2000) and that this violation should be attributable to the said Partner State by this Court through its mandate to ensure adherence to the law through the interpretation and application of the EAC Treaty.
47. The Trial Court in hearing the original Reference to it from which this appeal arises however found (para. 48 of its Judgment) that:

"...what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation of the Republic (sic) of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the *Burundian Journalists* case (supra)..."

The First and Third Respondents agree with this position of the Trial Court and generally argued that this Court does not under the EAC Treaty have appellate jurisdiction over the Constitutional Court of Burundi to interrogate the correctness of its decision.

48. This case raises the question of what is the responsibility of States for internationally wrongful acts committed by its judicial organ, as is alleged by the Appellants, to have occurred in the impugned decision. The *International Law Commission (ILC) commentary on The Responsibility of States for internationally wrongful acts* (November 2001 hereinafter referred to as the "ILC Commentary") in Article 1 provides that:

"...Every internationally wrongful act of a State entails the international responsibility of that State..."

The State therefore takes international responsibility for any wrongful act of that State. This is the principle of State responsibility.

49. Furthermore the *ILC Commentary* in Article 4 when dealing with the conduct of an organ of a State provides:

"...1. The Conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in

the organization of the State, and whatever its character as an organ of the central government or of a territory unit of the State...”

It follows therefore, that a State under international law, assumes international responsibility for the wrongful acts of the judicial organ of that State.

50. In the book *International Law* 4th Edition (edited by Malcolm D Evans Oxford University Press) at page 452 the authors set out what the elements of State responsibility are. They write:

“...An internationally wrongful act presupposes that there is conduct, consisting of an action or omission, that:

(a) Is attributable to a State under international law; and

(b) Constitutes a breach of the international obligations of the State...

In principle, the fulfilment of these conditions is a sufficient basis for international responsibility, as has been consistently affirmed by international courts and tribunals...”

51. The position in the European Community law as outlined in the book by Anthony Arnall “*The European Union and its Court of Justice*” 2nd Edition Oxford Publishers (p. 313) is that:

“...the principle of State liability for the acts and omissions of supreme courts can be acknowledged as a general principle of Community law...”

It follows therefore that State liability for domestic courts at international law is quite wide as it covers both acts and omissions.

52. European Community law in many ways is similar to the position in the East African Community, as the EAC Treaty has been domesticated in all Partner States. The effect of this type of domestication in the EU was discussed in the European Court of Justice (hereinafter referred to as the “ECJ”) case of *Flaminio Costa Vs ENEL* 6/64/[1964] ECR 585 where it was held that:

“...By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which on entry into force of the Treaty became an integral part of the legal systems of Member States and which their courts are bound to apply...”

53. Indeed, the European Court of Justice in the case of *Gerhard Kobler Vs Republik Osterreich* [2003] ECR I-10239 held that the principle of state liability would also apply to violations of EU law by national courts of final appeal. In so making the said finding, the ECJ dismissed arguments against the said application by reason of state liability to the conduct of courts of last instance based on principles like legal certainty, *res judicata*, the independence and authority of the judiciary (see the book *EU Law Text, Cases and Materials* 5th edition Paul Craig Oxford Publishers p. 245).

We find these authorities of the ECJ to be persuasive in our situation under The EAC Treaty. So like EU Member States in terms of the EEC Treaty, EAC Partner States are bound to follow the law created by the EAC Treaty and have it applied by their courts.

54. As held at the Trial Court in their Judgment in this matter (para. 42 & 43), this Court has not been shy in the context of the EAC Treaty to interpret domestic laws and constitutions. This was done in the case of *Kyarimpa Vs Attorney General of Uganda*, EACJ Appeal No. 6 of 2014 where we held:

“...when the Court has to consider whether particular actions of a Partner

State are unlawful and contravene the Principle of the Rule of Law under the Treaty, the Court has jurisdiction, and, indeed, a duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty. The Court does not and should not abide the determination of the import of such internal law by the National Courts...”

The same logic therefore should apply to court decisions within the context of The EAC Treaty.

55. Furthermore even where a superior court of a Partner State has made a final determination as to the constitutionality of a domestic law, which is not appealable to a higher court, the Trial Court rightly held before in the case of *Burundi Journalist Union* (supra para. 40 and 41 supra) that such a determination would not stop this Court from still interrogating whether that domestic law was in violation of the EAC Treaty and reach a different conclusion from that of the superior domestic court. The Trial Court held:

“...With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the constitutional muster under the Constitution of the Republic of Burundi but whether it meets the expectations of Articles 6 (d) and 7(2) of the Treaty... suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court’s jurisdiction...”

This was also the position taken in the *Baranzira Raphael case* (supra). So clearly this Court has jurisdiction to interrogate matters of Treaty interpretation notwithstanding a previous decision of a superior court of a Partner State.

56. We agree with the submissions of Counsel for the Appellant that even at the African Court on Human and Peoples Rights, the position is no different from that at the EACJ and the ECJ. The African Court while interpreting and applying the *African Charter on Human and Peoples Rights* in the cases of *Lohe Issa Konate* (supra), *Norbert Zongo* (supra), *Wilfred Onyango Nganyi* (supra) and *Mohammed Abubakari* (supra) found that decisions made by the national courts are attributable to the State concerned and may engage its international responsibility.
57. In this case it is not in disputed that the Arusha Accord which *inter alia* was guaranteed by all EAC Partner States was an international agreement which was later domesticated under Burundian law. No. 1/017 of 1st December, 2000. The Arusha Accord therefore had the status of both an international agreement and a municipal law. On the 1st March 2005, the People of Burundi adopted a new Constitution and in the Preamble thereto they confirmed their faith in the said Arusha Accord. It was therefore fitting that any dispute arising from the Arusha Accord be settled in the Burundian Courts to ensure that both Burundi’s international and municipal law obligations are upheld. Indeed this is what led to the impugned decision and the allegations by the Appellant that the Constitutional Court of Burundi fell short of its international obligations.
58. The Appellants at the Trial Court in Reference No. 2 of 2015 sought declarations that the impugned decision: “...
 (a) A declaration that the Decision of the Constitutional Court of the Republic

of Burundi in Case number RCCB 303 delivered on 5 May 2015 violates the letters and spirit of the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (the Arusha Accord) and in particular Article 7(3) of Protocol II to the Arusha Accord and the Constitution of Burundi;

- (b) A declaration that by reason of the aforesaid breach of the Arusha Accord, the decision of the Constitutional Court of the Republic of Burundi in Case number RCCB 303 delivered on 5 May, 2015 equally violates Articles 5(3)(f), 6(d), 7(2),8(1)(a) & (c), 8(5) of the Treaty for the Establishment of the East African Community (the EAC Treaty);
- (c) A declaration that the decision of the CNDD-FDD to nominate or put forward the President of Burundi as a candidate for election to the office of the Presidency in the Republic of Burundi violates the Arusha Accord aforesaid and is unlawful;
- (d) A declaration that any decrees, decision or orders of the 2nd Respondent or the CENI of the Republic of Burundi for the purpose of organizing or supervising Presidential elections in which the 2nd Respondent is or may be considered a candidate for the office of the President of Burundi are and shall be considered incompatible with the Arusha Accord and the Constitution of Burundi and, therefore, unlawful;
- (e) An order setting to quash and set aside the decision of the Constitutional Court of the Republic of Burundi in case number RCCB 303 delivered on 5 May, 2015;
- (f) An order directing the 3rd Respondent to constitute and give immediate effect to the judgment of this Honourable Court in *Reference No. 1 of 2014* and to advise the Summit of Heads of State and Government of the East African Community (EAC) on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29, 67, 71, 143, 146, and 147 of the Treaty for the Establishment of the East African Community;
- (g) An order directing the 1st and 3rd Respondents to appear and file before this Honourable court not later than 14 days from the date of the present decision and orders a progress report on remedial mechanisms and steps taken towards the implementation for the Orders issued by this Honourable Court; and
- (h) An order that the costs of and incidental to this Reference be met by the Respondents..."

59. It is clear from the declarations and remedies sought at the Trial Court, that the Appellant sought to highlight three violations by the Constitutional Court of Burundi in their impugned Judgment namely:

- a) The Arusha Accord [in particular Article 7 (3) of Protocol II];
- b) The Constitution of Burundi; and
- c) Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 8 (5) of the EAC Treaty.

60. The Trial Court held (para. 43) that it had:

"...jurisdiction to interpret the Constitution of Burundi or the Arusha Agreement and if any action purportedly undertaken in furtherance of the said Constitution and Agreement are in anyway found to amount to an infringement of violation of the Treaty, this Court has Jurisdiction to

determine such an issue and we so find...”.

On this holding we agree with the Trial Court. The Trial Court then surprisingly went on to further hold (para. 48 and 49):

“... we reiterate that what is before us is not any question regarding due process before the Constitutional Court of Burundi but the correctness of its decision in the context of the interpretation of the Constitution of the Republic of Burundi and the Arusha Agreement. Only by undertaking an interrogation of that decision as to its correctness can we revise, review and quash it. Such remedies are available only upon a review or appeal against the said decision and not whether it was made in violation of the principles of the Rule of Law as was the approach taken by this Court in determining the issues raised in the *Burundian Journalists* case (supra) For the above reasons, we can only determine Issue No. 3 in the negative ...”

On this second holding we respectfully disagree.

61. We disagree with this second holding for the following clear reasons:

- i) The reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on The Republic of Burundi’s international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this international responsibility and in so doing, it had a further duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty.
- ii) The interrogation of a decision of a State Organ, like a domestic Court, to determine the international responsibility of a State, goes beyond having regard to the due process before that said domestic court and extends to every act or omission it may make.

In not carrying out this duty, we find that the Trial Court disavowed itself of the jurisdiction to determine whether or not the impugned decision of the Constitutional Court of Burundi was in violation of Articles 5 (3)(f), 6 (d), 7 (2), 8 (1)(a) and (c) and 8 (5) of the EAC Treaty. In so exercising its duty, the Trial Court is not expected to review the impugned decision as is the case under Article 35(3) and Rule 72 (2) of the Rules of this Court looking for new evidence or some mistake, fraud or error apparent on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate it critically with a view of testing its compliance with the EAC Treaty and then make a determination. In so making the said determination, the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers as known in the municipal laws of the Partner States, but rather makes declarations as to the decision’s compliance with the EAC Treaty.

62. In finding as we have above, we have in substance covered all five areas of law in which the Appellant under Issue Number one alleges that the Trial Court erred and/or misdirected itself in holding as it did in the impugned Judgment.

63. We accordingly answer Issue Number one in the affirmative.

Issue No. 2 Whether or not the Honourable Learned Judges of the 1st Instance

Division of the Court erred in law and committed a procedural irregularity by declaring that there was no cause of action against the 3rd Respondent?

Arguments of the Appellant

64. Counsel for the Appellant submitted that the Trial Court erred in law by failing to acknowledge that there were compelling reasons which motivated the Appellant to seek to enjoin the SG-EAC [3rd Respondent The Secretary General of the East African Community] as a party to the proceedings in his own right.
65. The Trial Court in its Judgment (paras. 59, 60 and 61) held that there was no plausible reason why the SG-EAC was enjoined to the Reference. The Trial Court held, that whereas in the past they had found the SG-EAC accountable for his actions in cases that called for accountability there were no circumstances that called for accountability in this case. They found that there was no evidence to show that the SG-EAC had breached any of his duties as provided for under Articles 67 and 68 of the EAC Treaty. Lastly, the Trial Court found that even the nature of the prayers in the Reference, showed that the SG-EAC had no role to play in the matter. This is because the only prayer sought against the SG-EAC was for an Order to implement any Orders issued by the Trial Court should the Reference have been successful.
66. Counsel for the Appellant argued that at the Trial Court, very profound Orders had been sought against the Government of the Republic of Burundi including the stay of national elections and the SG-EAC. This was against the back drop of a political crisis in Burundi at the time. He further argued that, such profound Orders against a Partner State would have to be urgently brought to the attention of the apex organs of the EAC (and of the African Union), by none other than the SG-EAC. Furthermore their implementation would necessarily involve the SG-EAC in a pivotal position, and therefore he had a right to be heard before the Court Orders are formulated.
67. Counsel also argued that once joined to the Reference, the SG-EAC through his counsel still nonetheless actively participated in all stages of the proceedings and made submissions on matters that went beyond his joinder to the Reference.
68. He also argued that it would best serve the interests of justice, if the SG-EAC was enjoined in the case, and had actively participated in it. Thereafter, should the Secretary General have defaulted in implementing any of the orders directed at him, the Applicant would have sought to enforce these orders by follow-up proceedings in case of default. In this light, it would be better if the Secretary General was already a party to the case.

Arguments of the Third Respondent

69. Counsel for the Third Respondent, submitted that the Trial Court did not err in law and/or commit any procedural irregularity by declaring that there was no cause of action against the 3rd Respondent because the Appellant did not at all prove any act, regulation, directive, decision or action that is unlawful or is an infringement of the provisions of the Treaty attributable to the 3rd Respondent whether before the trial court or even on appeal. He prayed that this issue be dismissed.

Arguments of the First Respondent

70. Counsel for the First Respondent also submitted that the Trial Court did not

commit any error in law and/or did not commit any procedural irregularity by declaring that there was no cause of action against the 3rd Respondent for failure by the Appellant to prove any provisions of the EAC Treaty that had been violated by the Secretary General of the East African Community, be it in the Trial Court or in the Appellate Division of this [Honourable] Court. He also prayed that this Issue be dismissed.

Court's Determination

71. We have carefully read and considered the pleadings and submissions together with the supporting legal authorities cited by the opposing parties for which we are grateful. We now resolve Issue number two as hereunder.
72. We agree with the findings of the Trial Court that the SG-EAC can and should be found accountable for failures to discharge any part of his duties under The EAC Treaty as was held in the cases of *Sitenda Sebalu Vs Secretary General of the East African Community & Anor. Reference No. 1 of 2010* and the *East African Law Society Vs Attorney General of Burundi & Another, Reference No. 1 of 2014*; however in this case there was no evidence of failure to discharge his duties.
73. All that the Appellant submitted in substance under this issue, is that it would be good and in the interests of justice to have the SG-EAC as a party so that should the appeal be successful, then the SG-EAC could be made to enforce the resultant orders of this Court. That reasoning in our understanding is totally misconceived as it does not *ipso facto* make the SG-EAC a party in this dispute and in any case does not amount to a cause of action. Where the SG-EAC is not a party to a dispute but wishes to be enjoined in a case he can only do so under Articles 37 (2) of the EAC Treaty where Counsel to the Community can appear before the Court where any of the EAC institutions is a party or where he thinks that such an appearance would be desirable and Article 40 (Intervention) of the EAC Treaty with the leave of the Court.
74. This being our finding we answer the second issue in the negative.

Remedies

75. The Appellant made prayers for alternative Orders in this appeal as detailed earlier in this Judgement. The Orders can generally be divided into three namely:
 - a) Reverse parts of the decision of the Trial Court that are in favour of the Appellant and then revert them to the Trial Court for a decision on the merits.
[Or in the alternative]:
 - b) Make Declarations against the Respondents that:
 - i. The Constitutional Court of Burundi by reason of its impugned Decision violated the letter and spirit of the Arusha Accord and the Constitution of Burundi; and
 - ii. The Constitutional Court of Burundi by reason of its impugned Decision violated Articles 5 (3) (f), 6 (d), 7 (2), 8 (1) (a) and (c) and 5 (5) of The EAC Treaty.
 - c) Make Orders against the Respondents:
 - i) To annul, quash or set aside the said Decision of the Constitutional Court of Burundi;

- ii) For the SG-EAC to give immediate effect to the Judgment of this Court and then advise the Summit of Heads of Government of the EAC on measures to be taken against the Republic of Burundi.

76. We have answered Issue number one in the affirmative meaning, that the Trial Court erred in not proceeding to hear the Reference on its merits. In the case of *Henry Kyarimpa Vs Attorney General of Uganda Appeal No. 06 of 2014* this Court held:

“...A declaration of violation, or infringement of, or inconsistency of any action of a Member State with a Treaty violation is not a discretionary remedy. It is a command of the Treaty...”

We are mindful of the passage of time in this case considering that the act complained about took place in 2015 (three years ago) and that many things on the ground may have changed in The Republic of Burundi. In the *Henry Kyarimpa* case we also established the principle that remedies are only to be given to the extent possible. This is in line with the ILC Commentary Article 35 which provides:

“... State Responsible for an internationally wrongful act shall take the form of restitution, that is to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve burden out of all proportion to the benefit deriving from restitution instead of compensation...”

This Court must therefore while not shying away from pronouncing itself on an alleged violation of the EAC Treaty take into account all the circumstances of the case when pronouncing itself on the remedy. The Appellant seeks orders to annul, quash or set aside the Decision of the Constitutional Court of Burundi. The Court has a wide discretion in granting what it considers to be an appropriate remedy and make such orders as may be necessary for the ends of justice. As it is, Article 35A of the EAC Treaty does not grant this Court the power to hear the merits of the Reference No. 2 of 2015.

77. The other alternative is to revert this case to the Trial Court to be heard on its merits with the view of establishing whether or not there was a Treaty violation as alleged. The passage of time notwithstanding, with the above guidance, we find that this is only logical path that we can direct.

Conclusion

78. We find and hold that this Appeal succeeds in part and is therefore allowed in part.

79. The Judgment of the Trial Court is set aside with the following Orders:

- a) Having found that the Trial Court erred in not proceeding to hear the Reference on its merits we hereby Order that this matter be reverted to the Trial Court to be heard on its merits and to determine whether or not the impugned decision of the Constitutional Court of Burundi was in violation of Articles 5 (3)(f), 6 (d), 7 (2), 8 (1)(a) and (c) and 8 (5) of the EAC Treaty.
- b) Having further found that there is no cause of action against the Secretary

General of the East African Community (as third Respondent), we strike out him out as a party to this case.

- c) As to costs, we agree with the finding of the Trial Court that this case was brought in the public interest and so each party should bear its own cost.

We so Order.

D. Deya Counsel for the Appellant

N. Kayobera Counsel for 1st Respondent

S. Agaba, Counsel for 3rd Respondent

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First Instance Division

Application No. 4 of 2017
(Arising from Reference No. 10 of 2013)**Union Trade Center Limited (UTC) v The Attorney General of the Republic
of Rwanda**
And
**Succession Makuza Desire Represented by Makuza Jean Fred, Succession
Nkurunziza Gerard Represented by Nkurunziza Janvier and Ngofero
Tharcisse – Applicants /Intervenors**

Coram: I. Lenaola, DPJ; F. Ntezilyayo; A. Ngiye, JJ
September 22, 2017

*Intervenors - Whether the principle of res judicata bars the application - Intervener's
interest - Whether minority shareholders have a direct stake in the outcome of
litigation - Court's discretion - Prejudice to parties*

Article 40 of the EAC Treaty - Rules 21, 36, EACJ Rules of Procedure 2013

The Applicants, three shareholders of Union Trade Center Limited (UTC Ltd), applied to be enjoined as intervenors in Reference No. 10 of 2013. They averred that, as minority shareholders, they were unaware of any resolution of shareholders of UTC Ltd or its Board authorizing Mr. Rujugiro Tribert Ayabatwa, the majority shareholder in UTC Ltd, to file Reference No 10 of 2013 as required under the Company Act, 2009 of Rwanda. Furthermore, if the said Reference proceeded without them, their interests in UTC Ltd could be affected as they would be condemned unheard, exposed to counter-claims and potential investors in the company would be impeded. Additionally, the Claimant would not suffer prejudice or the harm if the granting of the leave to intervene was allowed.

The Claimant, Union Trade Center Ltd, submitted that the application was barred by the doctrine of *res judicata* as it involved the same parties and subject matter as in Application No. 9 of 2014 where the Court delivered a Ruling on 29th March, 2017. Furthermore, news grounds were being introduced relating to the incorporation of UTC Ltd, its shareholding yet, the proposed Intervenors should accept the case as filed at the time of intervention.

The Respondent did not object to the application leaving it to the discretion of the Court.

Held

1. Only three elements of the doctrine of *res judicata* exist in the present case namely: the matter directly and substantially in issue was directly and substantially in issue either actually or constructively in the former application; the former application was between the same parties; and the parties were litigating under the same title in the previous suit. However, the doctrine of *res judicata* cannot properly apply in this case as the matter directly and substantially in issue in this

- case was not heard and finally decided on its merits by the Court in the first suit.
2. An intervener or an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. They have an interest and if not otherwise adequately represented, they will be affected by the decision of the Court when it is made, either way.
 3. The admission or non-admission of an intervener to any judicial proceeding is a matter of discretion. The Court has discretion to allow any intervention if it considers that the interests of justice would be served. An intervener is akin to a third party to judicial proceedings, the Court can only take what it considers relevant from such an intervener and the Court has ultimate control over what the intervener can do or state before it.
 4. In the current matter, the likely outcome of the Reference before the Court has a direct impact on all shareholders in UTC Ltd, since they have an interest not otherwise adequately represented. As required in Rule 36(2) (e) of the Court's Rules of Procedure, the Interveners have satisfied the interest requirement and shown a direct stake in the outcome of litigation and are therefore admitted as Interveners. Furthermore, no prejudice would be caused to the Claimant as he has been given an opportunity to respond to all the issues to be raised by the Applicants.

Cases cited

FORSC & Ors v Burundian Journalists' Union & Anor [2012-2015] EACJLR, 510, Appl No. 7 of 2013
 G. R. Mandavia v Rattan Singh [1965] E.A. 118
 R. v Morgentaler [1993] 1 S.C.R 462
 Trusted Society of Human Rights Alliance v Mumo Matemo & Ors [2014] eKLR

RULING

A. Introduction

1. The Applicants herein, Succession Makuza Desire, Succession Nkurunziza Gerard and Ngofero Tharcisse are shareholders in Union Trade Center Limited (UTC Ltd).
2. By their joint Notice of Motion dated 18th April 2017, they have sought leave pursuant to the provisions of Article 40 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") and Rules 21 and 36 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "the Rules") to be allowed to intervene and participate as parties in Reference No. 10 of 2013.
3. The above Reference seeks to hold the Government of the Republic of Rwanda responsible for the alleged misconduct of the Kigali City Abandoned Property Commission in taking over the UTC Ltd Mall as an abandoned property.
4. Whereas the 3rd Applicant has made the Application himself, the 1st and the 2nd Applicants have appointed Makuza Desire and Nkurunziza Janvier (hereinafter referred to as "the Representatives") to represent them in this Application, respectively.
5. The Application is supported by the following grounds spelt out in the Notice of Motion:
 - a) That the Applicants are shareholders in UTC Ltd and do not agree with the Statement of Reference presented by the Claimant;

- b) That the claim was filed on behalf of UTC Ltd yet as shareholders they did not pass such a resolution hence it is important to be represented in the case to ensure that their interests are protected;
 - c) That all the Applicants/Interveners were not made parties to the Reference while the Claimant knew that the orders sought by them would affect, and have now affected the Applicants adversely as minority shareholders; and
 - d) That legal fees and costs payable by UTC Ltd may be awarded to the Respondent thus affecting the Interveners.
6. The said two Representatives for the 1st and the 2nd Applicants respectively, and the 3rd Applicant have each deponed an Affidavit in support of the Application.

B. Representation

7. Ms. Molly Rwigamba, Learned Counsel, represented the Applicants. Mr. Francis Gimara and Isaac Bakayana, Learned Counsel, represented the Claimant while Mr. Nicholas Ntarugera and Mr. George Karemera, Learned Counsel, represented the Respondent.

C. Case for the Applicants

8. In their Affidavits, and as elaborated at the hearing, the Applicants submitted firstly, that as shareholders in UTC Ltd, they are not aware of any resolution of shareholders of UTC Ltd or its Board in terms of Articles 141 and 142 of the Company Act, 2009 of Rwanda that authorized Mr. Rujugiro Tribert Ayabatwa, the majority shareholder in UTC Ltd, to file the aforesaid Reference or Claim against the Attorney General of The Republic of Rwanda in this Court.
9. Secondly, they further contended that, as minority shareholders, they are directly affected by the unlawful conduct of Mr. Rujugiro who is in exile out of Rwanda and has abandoned his duties in UTC Ltd as a shareholder and as a chairman of the Board.
10. Thirdly, they claim a direct interest in the matter based on the fact that “if the Court proceeds without their participation in this Claim as shareholders, their interests in UTC Ltd may be affected in the sense that they may be condemned unheard.”
11. Fourthly, they argued that the Reference may expose the company to counter claims and orders for payment of legal fees and costs to the Respondent which, as shareholders of UTC Ltd, will affect them and their interest in the company.
12. Lastly, the Applicants state that the Reference or the Claim impedes potential investors from investing in UTC Ltd.

D. The Claimant’s Case

13. On the other hand, the Claimant vide its Affidavit in Reply deponed by Mr. Francis Gimara, as elaborated at the hearing, opposed the Application vigorously.
14. Firstly, the Claimant contended that the Application is barred by the doctrine of *res judicata* in the sense that it involves the same parties and the same subject matter that was brought to the attention of this Court vide Application No. 9 of 2014 whose Ruling was delivered on the 29th March, 2017 striking out the Application with costs. In addition, the Claimant submitted that the proper procedure for the Applicants to follow should have been an appeal and not a

fresh Application. Therefore, in the circumstances, the Applicants cannot be allowed to act as though the order that struck out their plea to be enjoined in the Reference was non-existent.

15. Secondly, Mr. Bakayana submitted that the Interveners should accept the case as it is at the time of intervention [see Rule 36(5) of the Rules], and that all they can do is making arguments either in support of the Claim or in opposition of thereto. Instead, the Claimant states that the grounds that are being brought through the present Application are new in that they relate to incorporation of UTC Ltd, its shareholding as well as the fear that costs may be awarded by this Court. In the event, it is the Claimant's case that this Application is improper because those arguments are fresh and will affect the trajectory of the Reference.
16. In conclusion, the Claimant argues that this Application cannot stand and the same should be struck out with costs.

E. Case for the Respondent

17. The Respondent on his part had no objection to the Application. This was clear from the Affidavit in Reply deposed by Mrs. Kabibi Specioza, the Division Manager of Civil Litigation in the Respondent's Office as well as on what Learned Counsel for the Respondent stated at the hearing. In his view, noting the provisions of Article 40 of the Treaty and Rule 36(4) of the Rules, this Court has the discretion to grant the Application.

F. The Applicants' Response

18. In reply to the Claimant's answer to the Application, the Applicants firstly submitted that this Application is not barred by *res judicata*. They relied on the case of *Standard Chartered (Uganda) Limited vs Mwesigwa Geoffrey Philip in Miscellaneous Application No. 44 of 2012* where it was held that: "a ruling on a preliminary point of law which is not on the merits does not render the main matter *res judicata*." Therefore, the decision of this Court to strike out Application Nov. of 2014 on technicalities and not on the merits of the Application could not bar the Applicants from filing a fresh application to intervene in the same Court and that *res judicata* was therefore improperly invoked as the earlier Application was never been dealt with on its merits.
19. On the orders sought, they stated that they are not bringing in new issues for determination because they are wholly supportive of the Respondent's case and were also intent on protecting the Applicants' interests in UTC Ltd based on the facts and evidence that they have provided to the Court.
20. Lastly, the Applicants indicated that the Claimant is unable to prove the prejudice or the harm that it stands to suffer if the Applicants are granted leave to intervene in this matter while the Interveners are likely to suffer a huge prejudice if they are not allowed to intervene as prayed. In addition, it will be in the interest of justice to allow the Application as to do so will allow the Court to have all information necessary to make a balanced decision in the Reference.

G. Court's Determination

21. Upon close scrutiny of the pleadings filed by the Parties and having heard the rival arguments of the Parties at the hearing, it seems to us that the present

matter raises a procedural question of whether this Application is *res judicata*. In our considered view, we have to determine and settle the said issue first before considering the merits of this Application if that will be necessary.

22. In his Affidavit and at the hearing, the Claimant contended that the Application is barred by the principle of *res judicata* and in support of this ground of objection, Learned Counsel for the Claimant submitted that the matter in issue has previously been dealt with and fully litigated with finality by this Court. However, Mrs. Rwigamba, Learned Counsel for the Applicants, strongly opposed this submission contending that this case cannot be treated as one barred by *res judicata* because it was not in earlier proceedings decided by this Court on its merits. That what transpired earlier was just a declaration of non-compliance with rules and consequently, the striking out of Application No. 9 of 2014 does not operate as a bar to the bringing of a fresh Application by the same parties (the Applicants) seeking the same reliefs but using the correct procedure.
23. In the above context, we are alive to the fact that there are no specific provisions governing this Court in determining whether a matter is *res judicata* or not.
24. We are also aware that as a general principal of law, no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim or are litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court (See Richard Kuloba in his book entitled *Judicial Hints on Civil Procedure*, 2nd Edition, page 42).
25. Therefore, it is our understanding that the court before which a plea of *res judicata* is raised is not deprived of its jurisdiction to hear the case; the court only declines to exercise its jurisdiction to allow the parties to relitigate a matter when it is satisfied that the same parties are suing in the same capacity and that the issue before it is the same as that alleged to have been the subject of adjudication on the merits in previous proceedings (See *G.R. Mandavia v. Rattan Singh*; *Civil Appeal No. 57 of 1963, Eastern Africa Law Reports, [1965] E.A.*).
26. The essentials for the applicability of the principle of *res judicata* are well summarized by Richard Kuloba (*supra*) as follows:
 - a) The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue either actually or constructively in the former suit;
 - b) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim;
 - c) Such parties must have been litigating under the same title in the former suit;
 - d) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit;
 - e) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.
27. All the above elements must be established by the pleader. However, in the present matter only three elements exist, that is, (a), (b) and (c) while (d) and

(e) cannot be established here. Element (d) above requires that the matter must be finally and conclusively heard on merits and a conclusive decision thereon entered but in this matter the previous Application was not conclusively heard but was struck out on technicalities. Therefore, the doctrine cannot be properly applied here. With regard to element (e), the pleader must establish that the matter was determined by a competent Court. In this case, it cannot be denied that this Court did not determine the matter on merit although it was and is still competent to do so.

28. We must also add that no prejudice would be caused to the Claimant as he has been given an opportunity to formally respond to all the issues to be raised by the Applicants in this Application.

29. In conclusion, the Application is not *res judicata* and the objection of the Claimant on the ground that the Applicants' Application is barred by *res judicata* is overruled.

30. Having so stated, what is before us in the issue is whether this Application is competent in terms of Rule 36(2) (e) and (5) of the Rules.

31. In their Notice of Motion and at the hearing, the Applicants vide their Learned Counsel, Ms. Rwigamba, contended that the Application is brought under Article 40 of the Treaty and Rules 21 and 36 of the Rules. Mr. Ntarugera and Mr. Karemera, Learned Counsel for the Respondent did not object to the Application contending that it was properly brought under Article 40 of the Treaty and Rules 36(4) and (5) of the Rules. However, Mr. Bakayana, Learned Counsel for the Claimant, opposed the Application contending that it was outside the scope of Article 40 and Rule 36(2) (e) and (5) of the Rules. Indeed, we agree that these mentioned provisions provide for the manner in which an application for intervention in a pending Reference before this Court should be made and the conditions it should comply with. However, for the purpose of this Ruling, we shall examine the provisions of Rule 36(2) (e) and (5) only. We hereby reproduce the said provisions for ease of reference:

“36 (1) An application for leave to intervene under Article 40 of the Treaty and an application for leave to appear as *amicus curiae* shall be by notice of motion.

(2) An application under sub-rule (1) shall contain:

(a)

(b)

(c).....;

(d).....;

(e) a statement of the intervener's or *amicus curiae*'s interest in the result of the case.

(3)

(4)

(5) The intervener or *amicus curiae* shall accept the case as it is at the time of intervention.”

32. The word used in these provisions is “shall” meaning the aforesaid conditions are mandatory to an application seeking intervention in a pending reference before this Court.

33. On our part, we have carefully considered the rival submissions before us and

we must begin by addressing our minds to the facts that the admission or non-admission of an intervener to any judicial proceeding is a matter of discretion. In that regard, the Court has a discretion to allow any intervention if it considers that the interests of justice would be served.

34. Discretion, as we understand it, must always be exercised in a judicious manner based on the facts placed before the Court and not on extraneous matters which, if looked at objectively, would cause injustice to one party (see *FORSC and Others vs. Burundian Journalists' Union and Another*, EACJ Application No. 2 of 2013).
35. This discretion is also codified in Rule 36(4) which provides that if an application for leave to appear as an intervener is found to be “justified”, the Court shall allow the application and fix the time within which the statement by the intervener should be filed.
36. In addition, as was stated in *Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others* [2014], eKLR, an intervener, or as is the term elsewhere, an interested party, must have an interest in the proceedings and its submissions must be relevant to the same proceedings and raise new contentions which may be useful to the Court.
37. The role of an intervener or interested party in proceedings was even more clearly defined by the Supreme Court of Kenya in *Trusted Society of Human Rights Alliance* (supra) where it is stated thus:

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or herself appears in the proceedings, and champions his or her cause.”
38. We are in agreement with the Learned Judges and the question that we must pose at this stage is, have the Applicants met the above test? Firstly, there is a statement of interest made on their behalf by Mrs. Rwigamba, an advocate and who is an officer of this Court. We take her word on the subject and more critically, the Claimant conceded that the Applicants are minority shareholders in UTC Ltd.
39. Secondly, looking at the Applicants’ Statement of interest again, it is clear to us that the likely outcome of the Reference before the Court has, with or without intervention, a direct impact on all shareholders in UTC Ltd, since they have an interest not otherwise adequately represented. And a direct stake in the outcome of litigation is important in satisfying the “interest” requirement under Rule 36(2) (e) of the Rules.
40. Thirdly, that because an intervener is akin to a third party to judicial proceedings, the Court can only take what it considers relevant from such an intervener and the ultimate control over what the intervener can do or state before the Court is the Court itself.
41. Lastly, looking at Reference No. 10 of 2013 and noting the issues in contest, it would be in the wider interests of justice that we admit the Applicants as interveners in the sense that they can contribute to the Court’s total understanding of the case but the intervention shall be within the parameters of Rule 36(2) (e) and (5) of the Rules. In fact, an intervener is not entitled to widen or add on to the points in issue (see *R. v Morgentaler* [1993] 1 S.C.R 462.)

H. Disposition

42. For the above reasons, the Application dated 18th April 2017 is allowed and Succession Makuza Desire, Succession Nkurunziza Gerard and Ngofero Tharcisse are enjoined as first, second and third Interveners in these proceedings. Their participation shall be limited to statements and submissions in support of the Respondent under Rule 36(2) (e) and (5) of the Rules.
43. Each party shall bear its own costs.
44. It is so ordered.

M. Rwigamba, Counsel for the Applicants

F. Gimara & I. Bakayana, for the Claimant

N. Ntarugera and G. Karemera, Counsel for the Respondent

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First Instance Division

Application No. 8 of 2017

(Arising from Reference No. 5 of 2017)

**Wani Santino Jada v The Attorney General of the Republic of South Sudan,
The Speaker of the Parliament of South Sudan, The Secretary General of the
East African Community**

Coram: M. Mugenyi, PJ; I. Lenaola, DPJ; F. Ntezilyayo, F. Jundu, & A. Ngiye, JJ
June 5, 2017

*Ex parte interim restraining orders – Nominees to the East African Legislative
Assembly - Whether administration of oath of office would result in an injustice*

*Articles 5, 6(d), 7(2), 8(1) (c), 50(1), 53(3), and 71 of the Treaty- Rules 21(2), EACJ
Rules of Procedure, 2013*

The Applicant, a resident of the Republic of South Sudan sought an *ex parte* interim orders under certificate of urgency restraining the members of the 4th Assembly of the East African Legislative Assembly (EALA) from convening, administering an oath of office or recognizing the allegedly unlawful nomination of the nominees from the Republic of South Sudan until the hearing of the application *inter partes*. He alleged that on or about the 11th March 2017, the President of the Republic of South Sudan appointed nine (9) persons to represent the said Partner State in EALA in violation of Article 50 of the Treaty. Furthermore he argued that the swearing-in of the members could happen before the hearing *inter partes* of his Application thus occasioning a gross injustice to him, and rendering his application nugatory.

Held

1. In an *ex parte* application, the Court determines the injustice the Applicant stands to suffer on the face of the record. On the face of the record presented it appears that the provisions of Article 50(1) of the Treaty may not have been followed in the election of the nine South Sudan nominees to the East African Legislative Assembly.
2. The justice of this matter dictates that the Court grant *ex parte* interims orders restraining the East African legislative Assembly from administering the oath of office, or otherwise recognizing the nominees for the Republic of South Sudan pending the application *inter partes*.

RULING

1. This Application was brought under Articles 5, 6(d), 7(2), 8(1)(c), 13, 14, 15, 16, 20, 21, 22, 23, 27(1), 29, 30, 33, 38, 39, 44, 53(3), and 71 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”), as well as Rules 1(2), 17, 21, 22, 23, 24, 74, 84 and 85 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as “the Rules”).
2. The Applicant, Wani Santino Jada, seeks *ex parte* interim orders under certificate of urgency restraining the members of the 4th Assembly of the East African

Legislative Assembly (EALA) from convening, administering an oath of office or otherwise recognizing the allegedly unlawful nomination of the nominees from the Republic of South Sudan until the hearing by this Court of a related Application for interim orders *inter partes*, Application No. 5 of 2017.

3. It is the Applicant's contention that on or about the 11th March 2017, His Excellency the President of the Republic of South Sudan appointed nine (9) persons to represent the said Partner State in EALA in violation of Article 50 of the Treaty.
4. The South Sudan nominees to the 4th Assembly of EALA whose nomination is in issue herein are:
 - a. Gabriel Garang;
 - b. Gai Dheng Nhial;
 - c. Joseph Okelle;
 - d. Anna Itto;
 - e. Gabriel Alaak Garang;
 - f. Thomas Duoth;
 - g. Gedion Gatban Thoan;
 - h. Isaa Aiz Justin, and
 - i. Adil Elias Sundeng
5. At the hearing of this Application, the Applicant (who was self-represented) argued that whereas the swearing-in of EALA MPs that was due to take place today 5th June 2017 at 2.30 pm had since been deferred indefinitely, it could nonetheless transpire before the hearing of his Application for interim orders *inter partes* thus rendering the said Application nugatory.

Court's Determination

6. The Proviso to Rule 21(2) does provide for the grant of *ex parte* orders where the Court is satisfied that the delay caused by proceeding *inter partes* could occasion an irreparable injustice. Rule 21(2) reads:

'No motion shall be heard without notice to the parties affected by the application. Provided, however, that the First Instance Division, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable injustice, may hear the motion and make any *ex parte* order upon such terms as to cost or otherwise, and subject to such undertaking, if any, as the Division deems just.'
7. In the instant case, the Applicant has argued quite persuasively that Application No. 5 of 2017 (the *inter partes* application) could be rendered nugatory thus occasioning a gross injustice to him, if the Respondents are not restrained from proceeding with the swearing-in of the South Sudan EALA nominees that were appointed vide an impugned process. We do agree with the Applicant in this regard.
8. Furthermore, we are mindful that in an *ex parte* application of this nature the Court would determine the injustice the Applicant stands to suffer on the face of the record, subject to sufficient proof thereof in the application *inter partes*. Indeed Rule 21(3) does enjoin the Court to schedule the hearing of the *inter partes* application within thirty (30) days from the granting of *ex parte* orders.
9. On the face of the record before us in the present Application, it does appear to us

that the provisions of Article 50(1) of the Treaty may not have been followed in the election of the nine (9) South Sudan nominees to the 4th Assembly of EALA. 10. In the result, we take the view that the justice of this matter dictates that the Court does and hereby grants Interims Orders (*Ex Parte*) as sought by the Applicant in the following terms:

- i. An Order is hereby issued restraining the East African legislative Assembly (EALA) from administering the oath of office, or otherwise recognizing the following nominees thereto from the Republic of South Sudan pending the hearing of Application No. 5 of 2017 (*inter partes*):-
 - a. Gabriel Garang;
 - b. Gai Dheng Nhial;
 - c. Joseph Okelle;
 - d. Anna Itto;
 - e. Gabriel Alaak Garang;
 - f. Thomas Duoth;
 - g. Gedion Gatban Thoan;
 - h. Isaa Aiz Justin, and
 - i. Adil Elias Sundeng
- ii. Application No. 5 of 2017 is hereby set for hearing on Thursday 15th June 2017 at 9.30 am.
- iii. It is hereby orders that these *Ex Parte* Orders are served on the Respondents forthwith.
- iv. We make no Order as to costs.

It is so ordered.

Applicant appeared in person

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First Instance Division

Application No. 12 of 2017
(Arising from Reference No. 12 of 2016)

Kenya Human Rights Commission (KHRC), Foundation for Human Rights Initiative (FHRI), International Federation for Human Rights (FIDH)

v

Forum pour le Renforcement de la Societe Civile (FORSC), Action des Chretiens pour L'abolition de la Torture (ACAT), Association Burundaise pour la Protection des Droits Humains et des Personnes Detenues (APRODH), Forum pour la Conscience et le Developpement (FOCODE), Reseau des Citoyens Probes (RCP)

And

The Attorney General of the Republic of Burundi, the Secretary General of the East African Community

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ & F. Jundu, J
September 26, 2018

Amicus Curiae distinguished from Intervener - Fidelity to law - Statement of interest - Veracity of an affidavit- Affidavit not disclosing source of information defective - Proof of expertise and neutrality

Articles 23, 27, 40, 127 of the Treaty – Rules: 21(5), 36 (1), (2) (e) EACJ Rules of Procedure, 2013

Five non-governmental organisations operating in the Republic of Burundi filed *Reference No. 12 of 2016* challenging the legality of an order issued in October 2016 banning them. Subsequently, the three Applicants filed this application seeking leave for enjoinder as *amici curiae* claiming that, given their core mandate in the field of human rights, they could contribute towards the administration of justice and rule of law in the EAC by expounding on comparative jurisprudence on human rights defenders' freedom of association and expression. They deponed one affidavit in support of their application.

The Sixth Respondent opposed the application claiming that it failed to stipulate the Applicants' interest in the outcome of the Reference or pass the neutrality and impartiality test.

Held

1. The import of Rules 36(1) and (2) (e) is that the application, which is by notice of motion, shall include a statement of interest. Therefore, a statement of interest that is expressed in a supporting affidavit would not suffice under Rule 36(2) (e). A more purposive interpretation of Rule 36(2) would lend credence to a statement of interest contained in the stated grounds of the application. All that Rule 36(2) (e) requires is a statement of the intervener's or *amicus curiae's* interest in the result of the case. This is not necessarily a stand-alone statement

of interest separate and distinct from the grounds of the application. The present Application contains a statement of the Applicants' interest in the outcome of the Reference.

2. Whereas the Application outlined the grounds, the statement of interest having been embedded therein, did not provide sufficient proof of the Applicants' expertise or neutrality. Such proof would ordinarily be a question of fact that would be availed vide a supporting Affidavit.
3. The best practice in civil procedure dictates that legal arguments should not be contained in affidavits, these should be reserved for Submissions. Furthermore, the failure to disclose the source of information coupled with a conflicting verification that all the matters attested to were within the deponent's knowledge, created a disconcerting opaqueness as to what facts were indeed within the deponent's knowledge and which facts were not known to him, and ultimately vitiated the veracity or cogency of the entire Affidavit. An affidavit that does not disclose the source of the deponent's information would be incurably defective
4. In the absence of the sole Affidavit in support of the Applicants' Application, remained unsupported by any affidavit and, to that extent, contravened the mandatory provisions of Rule 21(5).
5. An *amicus curiae* as opposed to an intervenor has no personal interest in the case as a party and does not advocate a point of view in support of one party or another. The benefits of the concept of *amicus curiae* hinge significantly on the neutrality, impartiality and independence of a prospective *amicus curiae*, as well as the expertise it avails to a court, underscored by its demonstrable fidelity to the law. If sufficiently established by an applicant, these parameters would obviate or mitigate the incidence of subjectivity or mal-advice in a successful applicant's *amicus* brief. An application that does not reasonably demonstrate proof of the foregoing factors would not justify an applicant's admission as *amicus curiae*. The Application fell short on proof of the Applicants' expertise, neutrality or fidelity to the law and would therefore not succeed had we considered its merits

Cases cited

Avocats Sans Frontieres v Mbugua M. Wanyambura & Ors [2012-2015] EACJLR 387, Appl No. 2 of 2013
 FORSC & Ors v Burundi Journalists Union & Anor [2012-2015] EACJLR 510, Appl No. 2 of 2014
 Hon. Fred M. Mbidde v Attorney General of Burundi & Anor, EAC] Appl No. 6 of 2018
 Noormohammed Janmohamed v Kassamali Virji Madhani (1952) 20 EACA 8
 Standard Goods Corporation Ltd v Harakchand Nathu & Co. Civil Appeal No. 21 of 1950
 UHAI EASHRI & Anor v HRAPF & Anor [2012-2015] EACJLR 54, Appl No. 20 & 21 of 2014

RULING

Introduction

1. In October 2016, pursuant to *Ministerial Ordinance No. 530/1922*, five (5) non-governmental organisations (NGOs) operating in the Republic of Burundi (the First, Second, Third, Fourth and Fifth Respondents herein) were banned by the Minister of Home Affairs of the said Partner State and had their bank accounts frozen by the Prosecutor General of the same Partner State. They subsequently filed *Reference No. 12 of 2016* challenging the legality of the Ordinance for violating the Burundi *Presidential Decree No. 1/11 of 1992*, as well as the Treaty for the Establishment of the East African Community ('the Treaty').
2. Three (3) NGOs namely Kenya Human Rights Commission (KHRC), Foundation

for Human Rights Initiative (FHRI) and International Federation for Human Rights (FIDH) (hereinafter collectively referred to as 'the Applicants') have since filed the present Application seeking the leave of this Court to appear as *amici curiae* in the afore-cited Reference.

3. The Application is premised on Articles 23, 27, 40 and 127 of the Treaty, as well as Rules 21, 36 and 53 of this Court's Rules of Procedure and supported by the Affidavit of Dimitris Christopoulos, the President of the Third Respondent, dated 14th June 2017. It is opposed by the Attorney General of the Republic of Burundi ('the Sixth Respondent'), on whose behalf an Affidavit of Reply deposed by Nestor Kayobera and dated 4th June 2018 was filed.
4. Mr. Kayobera did also represent the Sixth Respondent at the hearing of this Application, while the Applicants were represented by Ms. Catherine Anite; Ms. Wanjiru Mmaro appeared for the First, Second, Third, Fourth and Fifth Respondents (holding brief for Mr. Donald Deya) and Mr. Stephen Agaba represented the Seventh Respondent.

Applicants' Case

5. We understood the Application to have been premised on the following broad grounds:
 - a. In so far as the Reference sought the determination by the Court of what would be permissible limits to human rights defenders' freedom of association and expression viz Treaty-enshrined principles of democratic governance; it raises questions that are pivotal to the Applicants' core mandate and in respect of which they wish to avail their expertise to the Court.
 - b. The Applicants seek to contribute to the administration of justice and rule of law in the East African Community (EAC) by expounding on comparative jurisprudence on, first, the legal principles governing the limitations to the power exercised by public officials with regard to the restriction or prohibition of the work of NGOs; and, secondly, the importance of the right to free association and expression in a democratic society, how those rights should be balanced when faced with competing interests and the limited range of circumstances in which they may be justifiably curtailed or prohibited.
 - c. The Applicants' admission as *amici curiae* would serve the interests of justice without causing any delay or prejudice to the hearing of the Reference given their willingness to file joint written submissions therein.
6. The Applicants sought to reinforce the foregoing grounds with the Affidavit of Mr. Christopoulos, in which it was averred as follows:
 - a. The Applicants are active in the EAC Partner States with a strong history of promoting the rights to freedom of association and expression at international and regional level with a view to strengthening democratic values and institutions.
 - b. The Applicants would offer unique insights into the international and comparative standards that pertain to the matter before the Court.
 - c. The Applicants sought to impartially assist the Court with jurisprudence and legislation that would enrich its decision thereby contributing to the

administration of justice and rule of law in the EAC, as well as enhancing the Community's integration and development.

7. In Submissions, Ms. Anite reiterated the Applicants' motivation for filing the present Application, maintaining that they sought to galvanise their expertise in the area of human rights to provide clarity to the issues raised in *Reference No. 12 of 2016*. In response to an averment in the Affidavit of Reply that the Application neither contained a statement of the Applicants' interest in the Reference nor did the Applicants pass the neutrality test, she contended that Mr. Christopoulos' Affidavit had clearly stated the Applicants' interest in the Reference. She cited the cases of *Avocats Sans Frontieres vs. Mbugua Mureithi Wanyambura & 2 Others EACJ Application No. 2 of 2013* and *Forum pour le Renforcement de la Societe Civile (FORSC) & 8 Others vs. Burundi Journalists Union & Another EACJ Application No. 2 of 2014* to buttress her argument that it would suffice for a statement of interest to be spelt out in the body of an affidavit or the application itself and it did not necessarily have to be a separate document. Learned Counsel further argued that the Applicants were not parties to the Reference neither were they supporting the interests of either of the Respondents that were parties thereto; rather, they intended to restrict themselves to questions of law and were therefore neutral and impartial.

Respondents' Case

8. Save for the Sixth Respondent, none of the Respondents filed an affidavit of reply in this matter. Indeed, Ms. Mmaro and Mr. Agaba did both state at the hearing thereof that their respective clients did not oppose the Application.
9. On the other hand, it was the Sixth Respondent's contention, as spelt out in Mr. Kayobera's Affidavit in Reply, that:
 - a. The Applicant organizations had been banned following their participation in an insurrection that took place on 26th April 2015 and breached the law (presumably of the Republic of Burundi).
 - b. The present Application does not contain or stipulate the Applicants' interest in the outcome of the Reference as required by Rule 36(2)(e) of the Court's Rules.
 - c. The Applicants would not pass the neutrality and impartiality test set by this Court.
10. We do note with concern that the above Affidavit displayed the undesirable practice of the inclusion of matters of law, complete (we might add) with cited case law, thus making it unbecomingly argumentative. We must remind parties that best practice in civil procedure dictates that legal arguments should not be contained in affidavits but, rather, be reserved for Submissions. In this case, in Submissions, it was argued for the Sixth Respondent that the Applicants could not be deemed to be neutral yet paragraph 5 of the Application clearly stated that they were working to support and assist the work of their members and partner NGOs in the Partner States. In the alternative, we understood learned Counsel to argue that since all 3 Applicants worked in Burundi and were assisting NGOs, they were neither neutral nor impartial.

Submissions in Reply

11. In reply, Ms. Anite reiterated her earlier position that the interest of an applicant seeking leave to appear as *amicus curiae* could be deduced from such applicant's work or mandate. Citing the decision in *FORSC & 8 Others vs. Burundi Journalists Union & Another* (supra), where a statement of interest in a supporting affidavit made by the applicants' advocate had been held to be sufficient, she further maintained that the present Applicants' expertise in the rights of freedom of expression and association in itself made them impartial.
12. Learned Counsel did also cite this Court's reference in *UHAI EASHRI & Another vs. Human Rights Awareness Promotion Forum (HRAPF) & Another EACJ Applications No. 20 & 21 of 2014* to the objective of an *amicus curiae* being to provide 'cogent assistance to Court to engender the advancement of legal jurisprudence in a given subject', to argue that the present Applicants did similarly seek to provide the Court with comparative jurisprudence to enrich the advancement of the right to freedom of expression and association, and therefore (in her view) they were impartial.

Court's Determination

13. Applications for leave to appear as *amicus curiae* in this Court are governed by Rule 36 of the Court's Rules of Procedure. It reads: Rule 36:
 - (1) An application for leave to intervene under Article 40 of the Treaty and an application for leave to appear as *amicus curiae* shall be by notice of motion.
 - (2) An application under sub-rule (1) shall contain –
 - (a) A description of the parties;
 - (b) The name and address of the intervener;
 - (c) A description of the claim or reference;
 - (d) The order in respect of which the intervener or *amicus curiae* is applying for leave to intervene;
 - (e) A statement of the intervener's or *amicus curiae's* interest in the result of the case.
 - (3) The applicant shall serve on each party who shall, within thirty (30) days, file and serve a response.
 - (4) If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time within which the intervener or *amicus curiae* may submit a statement of intervention and the Registrar shall supply to the intervener or *amicus curiae* copies of the pleadings.
14. The Sixth Respondent herein did, in the Affidavit in Reply, take issue with the purported absence of a statement of interest in the Application, as well as the perceived partiality of the Applicants. Although the alleged absence of a statement of interest was not pursued by the said Respondent in Submissions, it was extensively canvassed by learned Counsel for the Applicants. We do therefore deem it necessary to address it forthwith.
15. Rule 36(2)(e) categorically provides for the inclusion in an application for leave to appear as *amicus curiae* of a statement of the applicant's interest in the outcome of the case in respect of which the application is brought. This Court has had occasion to consider the intricacies of this requirement in numerous cases. Indeed, learned Counsel for the Applicants did in her Submissions

make elaborate reference to the Court's decisions in *Avocats Sans Frontieres vs. Mbugua Mureithi Wanyambura & 2 Others* (supra), *FORSC & 8 Others vs. Burundi Journalists Union & Another* (supra) and *UHAI EASHRI & Another vs. HRAPF & Another* (supra). She relied upon the decision in the *Avocats Sans Frontieres* case that the statement of interest prescribed by Rule 36(2)(e) need not necessarily be a separate document from the application and it was sufficient that such interest was clearly or succinctly set out in the supporting affidavit or the body of the Application. She did also rely on the decision in *FORSC & 8 Others vs. Burundi Journalists Union & Another* (supra) where, in like vein, a statement of interest that was attested to by a party's advocate in an affidavit was held to be sufficient for purposes of the prerequisites of Rule 36(2)(e).

16. We are alive to a latter decision of this Court in *Hon. Fred Mukasa Mbidde vs. The Attorney General of Burundi & Another EACJ Application No. 6 of 2018* that, in our view, dealt quite comprehensively with the import of Rule 36(2)(e) viz the foregoing decisions. In that case, it was held:

Having construed that Rule to require an application for intervention to contain or include a statement of interest, we do respectfully agree with the decision in that case (*the Avocats Sans Frontieres case*) that there is no justification in the Rules for the statement of interest prescribed in Rule 36(2)(e) to be a separate document from the application for intervention but, rather, it should be included in the body of the application (Notice of Motion) itself. With utmost respect, however, we do clarify that Rule 36(2)(e) is not couched in terms as would endorse the propriety of the inclusion of a statement of interest in an affidavit in support of the application. The import of Rules 36(1) and (2)(e) read together is that the application, which is by notice of motion, shall include a statement of interest. No reference whatsoever is made to a supportive affidavit in that regard. It will suffice to note that it is a cardinal rule of judicial practice that written laws are the primary source of law to clarify any issue before a court, and recourse may only be made to case law or judicial precedent where the written laws on a matter before the court are not sufficiently clear or conclusive. In the present scenario, where Rule 36(2)(e) is sufficiently prescriptive, we are bound by and unable to depart from the substance and letter of the written Rule.

17. We respectfully abide by the above position and do unreservedly re-state here our decision in that case that a statement of interest that is expressed in a supporting affidavit would not suffice for purposes of the express provisions of Rule 36(2)(e). We hasten to add that although the foregoing decision arose in respect of an application for intervention, it is equally applicable to an application for leave to appear as *amicus curiae*, such as is before us presently, given that the prescription of a statement of interest in Rule 36(2)(e) does pertain to both eventualities.

18. Turning to the matter before us, a statement of interest was outlined in paragraph 5 of the Application and embedded within the grounds thereof. This scenario was also addressed in *Hon. Fred Mukasa Mbidde vs. The Attorney General of Burundi & Another* (supra) as follows:

A literal interpretation of Rule 36(2)(e) would suggest that such an application should depict a 'section' that states the grounds of the application and another 'section' that contains the statement of interest. Such an approach would overtly and conclusively satisfy the requirements of the Rule. A more purposive

interpretation of the same Rule, however, would lend credence to a statement of interest *contained* in the *stated* grounds of the application being equally satisfactory compliance with the express requirements of Rule 36(2)(e). ... Indeed, all that is required under Rule 36(2)(e) is 'a statement' of the intervener's (*or amicus curiae's*) interest in the result of the case, not necessarily a stand-alone 'statement of interest' that is separate and distinct from the grounds of the application.

19. We find no reason to depart from the foregoing proposition. We certainly would uphold its applicability to the present case where the statement of interest was demarcated as such but embedded within the grounds of the Application, rather than as a stand-alone clause therein. Consequently, in terms of its form, we find that the present Application does legally contain a statement of the Applicants' interest in the outcome of the Reference.

20. On the other hand, a determination as to the substance of the statement to discern whether it does in fact denote the Applicants' interest in the outcome of the Reference would require the interrogation of the statement itself. In that regard, the statement of interest outlined in paragraph 5 of the present Application *inter alia* reads as follows:

The Reference raises questions concerning the permissible limits on the right to freedom of association and expression and of how these freedoms relate to the Treaty-protected principles of democracy, the rule of law, accountability, transparency, social justice and the promotion and protection of human rights. In addition, the Reference raises these questions specifically with regard to the work of human rights defenders in a democratic society. These issues are central to the mandate of each of the NGO organizations thus they seek to utilize their expertise towards assisting the Court in its interpretation and application of the Treaty.

21. In our considered view, the last sentence of the statement sufficiently underscores the Applicants' interest in the outcome of the Reference to the extent that it spells out the vitality of the issues raised therein to the Applicants' respective mandates. We are, therefore, satisfied that the present Application does in form and fact contain a statement of the Applicants' interest in the outcome of the Reference and would disallow the Sixth Respondent's contention to the contrary. We so hold.

22. It is to the merits of the Application that we now turn. It was opined by learned Counsel for the Sixth Respondent that the Applicants did not pass the test of neutrality required of *amici curiae* given that they were working to support and assist the work of their members and partner NGOs in the Partner States. As stated earlier herein, we understood it to be Mr. Kayobera's contention that all 3 Applicants worked in Burundi and were assisting NGOs therein.

23. We have carefully perused the Application and supporting Affidavit on record. We have also carefully considered paragraph 5 of the Application, to which we were referred by learned Counsel for the Sixth Respondent. We reproduce the said paragraph for ease of reference:

The NGOs are active in the Partner States of the East African Community or, in the case of FIDH, working to support and assist the work of its member and partner NGOs in these states. The NGOs have a strong history of working to

promote human rights, in particular freedom of association and freedom of expression, at the international, regional and local level, in order to strengthen democratic values and institutions. As such, the NGOs can offer unique insights into the international and comparative standards related to this subject matter of the case at hand.

24. Before delving into the merits of the Sixth Respondent's assertions, we are constrained to state from the outset that the material on record is inconclusive in respect of Mr. Kayobera's contention that the Applicant organizations operate in Burundi. In that regard, whereas the Affidavit in support of the Application, which might have settled this question, does attest to the First and Second Applicants having been registered and being presumably operational in Kenya and Uganda respectively; the veracity of this attestation is debatable too given the defects of the Affidavit in which it is deposed. In paragraphs 4 and 5 of that Affidavit, Mr. Christopoulos attests to having been informed of the foregoing facts without disclosing the source of his information, then subsequently (in the verification section) purports to declare all the information deposed as having been within his knowledge.
25. As this Court did hold in *Hon. Fred Mukasa Mbidde vs. The Attorney General of Burundi & Another* (supra), it is now well settled law that an affidavit that does not disclose the source of the deponent's information would be incurably defective. Thus, in *Noormohammed Janmohamed vs. Kassamali Virji Madhani (1952) 20 EACA 8*, citing with approval *Standard Goods Corporation Ltd vs. Harakchand Nathu & Co. Civil Appeal No. 21 of 1950*, it was held:
- 'An affidavit of that kind ought never to be accepted by a court as justifying an order based on the so-called 'facts' It is well settled that where an affidavit is made on information it should not be acted upon by any court unless the sources of information are specified.'
26. It seems to us that a common thread in the foregoing case law is that matters in an affidavit that are within a deponent's knowledge should be clearly and succinctly attested to as such and be distinguished from those that s/he has been informed of, in respect of which the source of such information should be disclosed. This would leave no room for conjecture, sweeping statements and baseless assertions and uphold the sanctity of affidavit evidence.
27. In the present case the failure to disclose the source of information coupled with a conflicting verification that all the matters attested to were within the deponent's knowledge, created a disconcerting opaqueness as to what facts were indeed within the deponent's knowledge and which facts were not known to him, and ultimately vitiated the veracity or cogency of the entire Affidavit. In an application such as the present one that would be fundamentally determined on the basis of an applicant's claim to expertise in a given field, as well as his/her neutrality viz the parties to the main suit, the vitality of the veracity of an applicant's attestations in that regard cannot be over-emphasized. The cogency of his/ her assertions should be unassailable. Where, as in the present case, the cogency of the affidavit evidence is compromised by non-disclosure and material inconsistencies, this Court is constrained to abide the decision in *Hon. Fred Mukasa Mbidde vs. The Attorney General of Burundi & Another* (supra). Accordingly, we do hereby strike down the entire Affidavit in support of the

Application from the Court record.

28. Having thus struck down the sole affidavit in support of the Application, the question would be whether the Application before us is sustainable. Rule 21(5) of the Court's Rules is instructive on this. It reads:
- Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts...
29. We deduce from the foregoing Rule a mandatory requirement for all formal applications filed in this Court to be supported by affidavits. Thus, in the absence of the sole Affidavit in support thereof, it follows that the Application before us remains unsupported by any affidavit and, to that extent, contravenes the mandatory provisions of Rule 21(5). Further, in *Noormohammed Janmohamed vs. Kassamali Virji Madhani* (supra), where a defective affidavit that (like the presently impugned one) did not disclose the source of its deponent's information had been struck down, an appeal against the issuance of an interlocutory injunction premised on such an affidavit was upheld in the following terms:
- In my view there was no admissible evidence before the Judge on which he could be satisfied that there was an immediate danger of these (furniture and other chattels) being sold off... (*Our emphasis*)
30. Similarly in the Application before us, to the extent that the grounds thereof remain unproven, we find no justification as required under Rule 36(4) of the Court's Rules to grant the Applicants leave to join *Reference No. 12 of 2016* as *amici curiae*.
31. Before we take leave of this Application, we deem it necessary to briefly address the merits thereof for completion, this being a Court of First Instance. We do note that whereas the Application outlined the grounds thereof, the statement of interest having been embedded therein, it did not provide sufficient proof of the Applicants' expertise or neutrality. Such proof would ordinarily be a question of fact that would of necessity be availed in or vide a supporting Affidavit. In this case, in paragraphs 4, 5 and 6 the impugned Affidavit provides brief descriptions of the Applicant organizations and the nature and general scope of their work; indicates the countries in which the First and Second Applicants are registered, and attests to the Third Applicant having been in operation since 1922. The foregoing information would have been readily verifiable and supported by the founding documents of each organization clearly demarcating their respective mandates; periodic reports that give an indication of the organizations have indeed undertaken the activities spelt out in such mandate and to what degree, and/ such other supporting document in proof of their claim to specialist expertise in the field in issue in the main Reference.
32. In the instant case the impugned Affidavit fell short on this. Only the Second Applicant's Memorandum of Association, outlining its date of incorporation and mandate, was appended to it. Conversely, whereas the First Applicant simply availed a certificate of registration indicating it had been in operation since 1994, the Third Applicant supplied a 'declaration to the police' that in no way provides insight into its mandate or confirms how long it has been in operation so as to give an indication of its expertise. On the other hand, paragraphs 7 – 9 of the Affidavit simply regurgitated the statement of the Applicants' interest

in the outcome of the Reference as had been stated in the Application, while paragraphs 10 and 11 re-echo their desire to contribute to the development of the Community's jurisprudence. Perhaps more importantly, no reference whatsoever was made to or proof furnished of the Applicants' neutrality. Most certainly, the Applicants' expertise (had it been proven) would not in itself have amounted to sufficient proof of neutrality as was argued by Ms. Anite.

33. We take the view that the notion of *amicus curiae* is an extremely useful tool in adversarial adjudication that, if optimally utilized, could indeed foster the development of our regional jurisprudence exponentially. Whereas an *amicus curiae* is not necessarily a party to a dispute, it would arguably be an interested and/ or affected third party and therefore its independent advice, premised on demonstrable expertise, is invaluable for the development of the law beyond the strict limitations of the issues framed by the parties. This view could not be more succinctly propounded than it is in the following exposition in Mohan, S. Chandra, 'The Amicus Curiae: Friends No More?', 2010, Singapore Journal of Legal Studies, 352 – 371, p.9:

The essence of the quest for justice in an adversarial system is that it is restricted to the resolution of the dispute between the parties to the dispute and confined to the issues that have been raised in the course of this dispute. There is no wider third party or public interest involvement beyond the outcome. The interests of parties not "formally represented" are generally irrelevant in a traditional judicial setting. The very nature of legal proceedings in a common law adversarial system, the argument goes, compelled the accommodation of an independent adviser who could give the court assistance on behalf of a third party.

34. However, the benefits of the concept of *amicus curiae* hinge significantly on the neutrality, impartiality and independence of a prospective *amicus curiae*, as well as the expertise it avails to a court, underscored by its demonstrable fidelity to the law. If sufficiently established by an applicant, these parameters would significantly obviate or mitigate the incidence of subjectivity or mal-advice in a successful applicant's *amicus* brief. They would be, to that extent, fundamental determining factors in an application for leave to appear as *amicus curiae*. Consequently, an application that does not reasonably demonstrate proof of the foregoing factors would not justify an applicant's admission as *amicus curiae*. This proposition does resonate with numerous decisions by this Court that have been invariably referred to in this Ruling. We cite but a few.

35. The following position in *United States Tobacco Co. v. Minister for Consumer Affairs* [1988] 83 A.L.R. 79 (F.C.A.) was cited with approval in *UHAI EASHRI & Another vs. HRAPF & Another* (supra) and underscores the place of neutrality in the function of an *amicus curiae*:

An *amicus curiae* (as opposed to an intervenor) has no personal interest in the case as a party and does not advocate a point of view in support of one party or another.

36. In *Advocats Sans Frontiers vs. Mbugua Mureithi wa Nyambura & 2 Others* (supra), the independence of an intending *amicus curiae* was highlighted as another important consideration in the following terms:

One of the fundamental considerations for any *amicus curiae* to be admitted is

that such a party must be independent of the dispute between the parties.

37. In the same vein, in *FORSC & 8 Others vs. Burundian Journalists' Union & Another (supra)*, due cognizance was extended to the vitality of an *amicus curiae's* impartiality. It was held:

The *amicus curiae* has on the other hand, the most onerous duty of ensuring that it gives only the most cogent and impartial information to the Court or risk losing the respect and friendship of the Court.

38. Against that background, the present Application falls short on proof of the Applicants' expertise, neutrality or fidelity to the law and would therefore not succeed had we considered its merits.

Conclusion

39. In the result, we decline to grant the Applicants the leave sought to appear as *amici curiae* in *Reference No. 12 of 2016*. We do hereby dismiss this Application with no order as to costs. It is so ordered.

C. Anite & W. Mmaro Counsel for 1st, 2nd, 3rd, 4th & 5th Respondents

N. Kayobera for 6th Respondent

S. Agaba for 7th Respondent

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First Instance Division

Application No. 13 of 2017

(Arising from Reference No. 7 of 2017)

British American Tobacco (U) Ltd v The Attorney General of The Republic of Uganda

Coram: M. Mugenyi, PJ; F. Ntezilyayo, and F. Jundu, JJ
January 25, 2018

Interim orders- A prima facie case differentiated from serious triable issues - Whether a cause of action existed - Whether damages can atone for reputational injury- Disruption of business - Balance of convenience - Applicable status quo ante - Risk of injustice to either party

Articles: 23(1), 30(1), 39, EAC Treaty - Rules: 21, 73, EACJ Rules of Procedure, 2013 - Section 2, Excise Duty (Amendment) Act No. 11 of 2017, Uganda

In 2004, the Applicant, a company registered in the Uganda Securities Exchange (USE) moved its cigarette manufacturing factory from Uganda to Kenya as the East African Community represented a single customs entity for tariff purposes under the EAC Customs Union Protocol. In 2014 Uganda enacted the Excise Duty Act No. 11 of 2014, which *inter alia* uniformly provided for excise duty on cigarettes originating from any EAC Partner States. Subsequently, the Act was amended vide Excise Duty (Amendment) Act No. 11 of 2017. This created a distinction between locally manufactured goods and imported goods and resulted in a re-classification of the Applicant's goods as originating from a foreign country therefore eligible to pay excise duty to the Uganda Revenue Authority.

In Reference 7 of 2017, the Applicant challenged the legality of Sections 2(a) and (b) of the Amendment, claiming that they amendments: were discriminatory and resulted in additional financial costs passed on to its customers. Furthermore, the Applicant would suffer: unquantifiable reputational injury due to uncompetitive goods that could erode the company's business goodwill; reduction in its market reach would negatively impact the company's business operations if they were de-registered from the USE; and the irreparable injury caused could not be adequately compensated by an award of damages. They sought a stay of the operation of the said law pending the determination of the Reference.

In response, the Respondent argued that the impugned Act was enacted in accordance with due legislative process and pursuant to a House Committee Report that had recommended the differentiation in excise duty on locally manufactured goods viz imported goods in accordance with the practice of Uganda's neighbours in the EAC region. The *status quo* could not be maintained based on a repealed law. Furthermore, any injury suffered by the Applicant could be quantified and compensated by an award of damages; and the balance of convenience tilted heavily in favour of the Respondent due to the fact that the enactment process of the impugned Act had been lengthy and costly to Uganda; moreover, the law was already being enforced.

Held

1. For interim orders to be granted, an applicant must show a *prima facie* case with a probability of success. A *prima facie* case and a serious triable issue are not necessarily one and the same thing and should not be used interchangeably. The *American Cyanamid* case explicitly distinguishes a *prima facie* case, which would necessitate the resolution of 'conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend', which is a matter for trial, from a serious question to be tried that is established where a court is 'satisfied that the claim is not frivolous or vexatious.' All that needs to be shown is that the claimant's cause of action has substance and reality. For a serious triable issue to be established, the substantive suit should disclose a cause of action.
2. Within the EAC law context, a cause of action demonstrating the prevalence of a serious triable issue has been held to exist where the Reference raises a legitimate legal question spelt out in Article 30(1) of the Treaty, specifically where it is contended that the matter complained of violates the national law of a Partner State or infringes the Treaty. Causes of action are grounded in a party's recourse to the Court's interpretative and enforcement function encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights.
3. It is apparent on the face of the Reference that it presents a legal question as to whether the enactment by the Respondent of a law that draws a distinction between locally manufactured goods and goods from a foreign country contravenes. The Reference challenges both the legality of section 2 of the Excise Duty (Amendment) Act and its enforcement. To that extent, the Court's interpretative mandate comes to bear in examining the impugned law's compliance with the Community's legal regime on trade and investment. Notwithstanding the generality of some of the legal provisions the Applicant seeks to rely on, the issues presented in the Reference do at face value raise questions for interrogation by this Court which are serious triable issues.
4. It is trite law that, if damages in the measure recoverable at common law would be an adequate remedy and, a respondent would be in a position to pay them, no interim injunction should normally be granted. Damages would be inadequate where: the defendant is unlikely to pay the sum likely to be awarded at trial; the wrong is irreparable; the damage is non-pecuniary; there is no available market; and damages would be difficult to assess.
5. Reputation refers to the qualitative estimation in which a person is generally held. Therefore, the deregistration of a listed company for non-compliance with its financial undertakings to a Securities Exchange would negate its credibility in the estimation of the public thus causing it reputational injury. Whereas reputational injury would attract an award of damages, for purposes of applications for interlocutory orders, the question would be how adequate such awards are for atoning the injury that could otherwise be negated by the grant of the orders sought. The Applicant is liable to suffer business disruption, reputational injury and loss of goodwill that cannot be adequately compensated by damages.
6. With regard to balance of convenience, it is not mere convenience that needs to be weighed, but the risk of doing an injustice to one side or the other. Where other factors appear to be evenly balanced, it is prudent to take such measures

as are calculated to preserve the *status quo*. The applicable *status quo ante* is the state of affairs before a respondent commenced the conduct complained of by the applicant, unless there has been unreasonable delay in filing the application for interim orders, in which case it would be the state of affairs immediately before the application.

7. The Respondent's right to collect the additional duties must be weighed against the injustice of leaving the Applicant company to bear the brunt of a possibly misconstrued law that could indict it to the payment of exorbitant funds in excise duty pending the determination of the Reference. The justice of the matter dictates that the Respondent would suffer less injury from being temporarily prevented from exercising its right to collect the extra excise duty billed to the Applicant if the interim orders sought in the present Application were granted, than the injury the Applicant stands to suffer as a consequence of paying the additional duty. A stay of the application impugned law to the Applicant pending the determination of the Reference was therefore issued.

Cases cited

American Cyanamid Company v Ethicon Limited (1975) AC 396
 Cayne v Global Natural Resources PLC (1984) 1 All ER 225
 East African Industry v True Foods (1972) E.A. 420
 FORSC & Ors v Attorney General of Burundi & Anor, EACJ Appl. No. 16 of 2016
 Garden Cottage Foods v Milk Marketing Board (1984) AC 130
 Giella v Cassman Brown (1973) EA 258
 Mbidde Foundation Ltd & Anor v Secretary General of EAC [2012-2015] EACJLR 521, Consolidated Applications 5 & 10 of 2014
 Prof. A. Nyong'o & Ors v The AG of Kenya & 3 Ors [2005-2011] EACJLR, Appl. 1 of 2006
 Samsung Electronics Limited v Apple Incorporation (2012) EWCA Civ 1223
 Simon P. Ochieng & Anor v The AG of Uganda, [2012-2015] EACJLR 361 Ref. No. 11 of 2013
 Siskina v Distos Compania Naviera SA [1979] AC 210
 Sitenda Sebalu v Secretary General of EAC & Ors [2015-2011] EACJ LR 160, Ref. No. 1 of 2010
 Timothy A. Kahoho v Secretary General of EAC [2012-2015] EACJLR 181 Appl No. 5 of 2012

RULING

Introduction

1. This is an Application by the British American Tobacco (BAT) Uganda Ltd ('the Applicant') for interim orders against the Attorney General of the Republic of Uganda ('the Respondent') pursuant to Article 39 of the Treaty for the Establishment of the East African Community ('the Treaty'), and Rules 21 and 73 of this Court's Rules of Procedure.
2. The Applicant is a company incorporated under the laws of Uganda, and is operational and domiciled in the said Partner State. On the strength of the Treaty, the Protocol on Customs Union of 2004, as well as its own internal restructuring; the Applicant opted to move its cigarette manufacturing factory from Uganda to Kenya on the understanding that the East African Community (EAC) represented a single customs entity for tariff purposes.
3. In 2014 Uganda enacted the Excise Duty Act No. 11 of 2014, which *inter alia* made provision for an excise duty on cigarettes that uniformly applied to all such goods originating from any of the EAC Partner States. However, in 2017 the said Act was amended to create a distinction between locally manufactured goods and imported goods. Under the Amended Act, whereas the Applicant's goods were initially treated as locally manufactured goods, they were subsequently re-

classified by the Uganda Revenue Authority (URA) to be goods from a foreign country on account of their originating from Kenya, and subjected to the applicable excise duty.

4. It is the Applicant's contention that URA's erroneous application of the Excise Duty Act (as amended) amounted to discrimination between goods originating from Uganda and those from Kenya in so far as a different duty was imposed on goods from Kenya as opposed to like goods from Uganda in contravention of the Treaty and the Protocols thereunder.
5. The Applicant did file Reference No. 7 of 2017 challenging the legality of sections 2(a) and (b) of Uganda's Excise Duty (Amendment) Act No. 11 of 2017, and relatedly filed the present Application seeking to stay the operation of the said law pending the determination of that Reference. At the hearing of the Application, the Applicant was represented by Mssrs. Kiryowa Kiwanuka and Peter Kauma, while Ms. Margaret Nabakooza, Mr. Richard Adrole and Mr. Sam Tusubira appeared for the Respondent.

Applicant's Submissions

6. Learned Counsel for the Applicant highlighted the principles governing the grant of interim injunctions as expounded in the case of *Timothy Alvin Kahoho vs. The Secretary General of the EAC, EACJ Application No. 5 of 2012*, namely proof of a *prima facie* case with probability of success, irreparable injury that cannot be compensated by damages and, where the Court is in doubt on any of those two principles, a determination of the matter on the balance of convenience.
7. Mr. Kiryowa linked the demonstration of a *prima facie* case to the existence of a triable issue for determination in the Reference, arguing that should a triable issue be found to exist a *prima facie* case would have been established. Learned Counsel contended that in the present case there was indeed a triable issue as to whether or not the Republic of Uganda, vide the Excise Duty (Amendment) Act, was discriminating against goods of a Partner State in contravention of the Treaty and the Protocols made thereunder. Citing the case of *American Cyanamid Company vs. Ethicon Limited (1975) AC 396*, he contended that whereas at this stage of the case the Court would not have considered the Reference on its merits, looking at the evidence on record it was (in his view) apparent that there was indeed a triable question such as would establish a *prima facie* case with a very high likelihood of success.
8. With regard to the question of whether or not any injury suffered by the Applicant as a result of the Respondent's alleged actions could be atoned for in damages, the Applicant relied upon paragraphs 10 – 19 of one Mathu Kiunjuri's Affidavit to support the preposition that the injury that it stood to suffer as a consequence of the Respondent's actions was two-fold: on the one hand, it was faced with the possibility of incurring additional financial costs that would either be absorbed by the Applicant or passed on to its customers; and, on the other hand, it was likely to suffer unquantifiable reputational injury arising from uncompetitive goods that could erode the company's business goodwill built over a 30 year operational period, and see a reduction in its market outreach. The argument was made that both scenarios would negatively impact the company's business operations, occasioning immeasurable and irreparable injury that cannot be

adequately compensated by an award of damages.

9. Learned Counsel referred us to the cases of *Samsung Electronics Limited vs. Apple Incorporation (2012) EWCA Civ 1223* and *Kiwi European Holding B.V & Anor vs. Djaoto Arua Misc. Appl. No. 457 of 2006* to buttress his argument that reputational injury was immeasurable, as well as *Legal Brains Trust vs. Attorney General & Another Misc. Appl. No. 638 of 2014*, where a party opposing an application for interim orders had unsuccessfully argued that a sovereign state had a right to make laws and such laws would be enforced until they were declared illegal on the merits of the case.
10. As to where the balance of convenience lies in this matter, Mr. Kiryowa contended that no averment whatsoever had been made that the Respondent either stood to suffer any injury if the interim orders sought were granted nor had it been averred that the said Respondent was willing and able to atone in damages for any injury suffered by the Applicant. He argued that the balance of convenience in this matter weighed in favour of the Applicant, who had clearly demonstrated the injury it stood to suffer. In that regard, learned Counsel cited the cases of *Lansing Linde Limited vs. Kerr (1991) 1ALLER 417*, *Cayne vs. Global Natural Resources PLC (1984) 1ALLER 225* and *The Democratic Party & Mukasa Fred Mbidde vs. The Secretary General of the EAC & The Attorney General of the Republic of Uganda, EACJ Application No. 6 of 2011*.
11. Finally, the Applicant's submissions did allude to the present Application having been filed pursuant to a notice from URA to the Applicant to pay additional taxes following the re-categorisation of the Applicant's goods from Kenya as imported goods after the company had paid taxes for them as locally manufactured goods. They further submitted that it was, therefore, the pre-recategorisation status of the goods that the Applicant sought to maintain pending the determination of the Reference.

Respondent's Submissions

12. Ms. Nabakooza relied on an Affidavit in Reply deposed by Jane Kibirige, the Clerk to the Ugandan Parliament, to argue that the impugned Act was enacted in accordance with due legislative process and pursuant to a House Committee Report that had recommended the differentiation in excise duty on locally manufactured goods viz imported goods in accordance with the practice of Uganda's neighbours in the region. She further argued that given the reasons that were advanced by the House in support of the enactment of the impugned law, the Reference from which the present Application arises did not have a likelihood of success.
13. Pointing out that the Applicants had filed the Reference on 9th August 2017, way after the commencement of the impugned Act on 1st July 2017, it was her contention that mere filing of the Reference could not hinder the continued enforcement of a law before the hearing of the Reference on its merits. Indeed, Ms. Nabakooza did argue that the *status quo* in place presently was the enforcement of the impugned law by URA, and faulted the Applicant's pursuit of the maintenance of a status quo that depicted a repealed excise duty rate that was applicable under a repealed law. It was her contention that the status quo sought to be maintained by the present Application was no longer available.

14. Ms. Nabakooza sought to rebut the Applicant's contention that non-grant of interim orders would subject it to irreparable injury, contending that Annexures E1 and E2 to the Affidavit in support of the Application (tax payment registration slips) depicted items that were easily quantifiable financially and therefore could be compensated by an award of damages. She dismissed the Applicant's contrary claims to irreparable injury as speculative and maintained that the balance of convenience tilted heavily in favour of the Respondent due to the fact that the process entailed in the enactment of the impugned had been lengthy and costly to Uganda, not to mention the fact that the law was already being enforced.
15. For his part, Mr. Androle contended that the Applicants had not satisfactorily demonstrated that the Reference depicted a *prima facie* case with a likelihood of success. In tacit agreement with learned Counsel for the Applicant on the meaning of a *prima facie* case, Mr. Androle referred us to this Court's decision in *Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community Consolidated Applications 5 & 10 of 2014*, where a *prima facie* case was supposedly held to mean a claim that was not frivolous or vexatious, one that presented a serious question to be tried. On that basis and without delving into the merits of the Reference as had been reportedly extolled in the case of *Henry Kyarimpa vs. The Attorney General of the Republic of Uganda, EACJ Application No.3 of 2013*, it was Mr. Adrole's submission that the material on record *per se* had failed to establish a *prima facie* case with probability of success.
16. Reiterating Ms. Nabakooza's submission that the Applicant was not liable to suffer any injury that could not be compensated by an award of damages, Mr. Adrole did also make reference to the following exposition in *Giella vs. Cassman Brown (1973) EA 258*, as cited with approval in *Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa (supra)*:
- The object of an interlocutory injunction or in this case an interim order is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. But the plaintiff's need for such protection must be weighed against the corresponding need for the defendant to protect against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the certainty were resolved in the defendant's favour at the trial.
17. In like vein, he re-echoed Ms. Nabakooza's position that the balance of convenience tilted in favour of the Respondents given that there was an Act of Parliament in force, the stay of application of which would amount to a shift in status quo to revert to a repealed law which, in the Respondent Counsel's view, was untenable. To buttress this position, Mr. Adrole referred us to the case of *East African Industry vs. True Foods (1972) E.A. 420* as cited with approval in *Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa (supra)*, where it was held:
- I think the harm the respondent company would suffer as a result of an injunction, if it succeeded in the suit is likely to be greater and graver than that which the appellants company would suffer from the refusal of an injunction should it be

successful. Moreover and I attach particular significance to this, I cannot see that the appellant company would suffer any loss that could not sufficiently be compensated.

18. In an attempt to distinguish the facts of the present case from those in *Legal Brains Trust* (supra), learned Counsel further argued that in that case the law that had been subjected to an interim injunction was subsidiary legislation and not principal legislation, as is the case presently. We understood this argument to suggest that whereas subsidiary law was injunctible, principal legislation was not.

Submissions in Reply

19. In a brief reply, it was clarified for the Applicant that what was in issue in the Reference was not the Excise Duty (Amendment) Act *per se*, but the interpretation given to section 2(a) and (b) thereof by URA such as to make it discriminatory in application. In response to the Respondent's assertion that by the time the Reference was filed the status quo the Applicant sought to retain had been repealed, Mr. Kiryowa argued that the present Application aptly represented a case of changing status quo at the behest of the Respondent and invited the Court to interrogate this issue further by recourse to the case law on the subject that he had cited earlier in his submissions. He maintained that his client did not seek the application of the repealed law but, rather, to have the Amended law properly interpreted by the relevant bodies.
20. Be that as it may, Mr. Kiryowa faulted the Respondent's argument that a law that had been enacted pursuant to due process should remain in force in Uganda until such time as this Court declared it inconsistent with the Treaty, maintaining his position that a repealed law could indeed be the subject of interim orders if found to infringe on a party's rights. He contested the Respondent's suggestion that a law that was enacted pursuant to a costly due process could not be challenged regardless of its non-compliance with the EAC legal regime, to which Partner States are bound. In that regard, and in response to Mr. Adrole's endeavour to distinguish the circumstances in *Legal Brains Trust* (supra) from the present Application, Mr. Kiryowa opined that any attempt to draw a distinction between principal and subsidiary legislation for purposes of the grant of interim orders would be superfluous, rather, the principle established in the *Legal Brains Trust* case was that a law could indeed be the subject of injunctive orders.

Court's Determination

21. The grant of interim orders by this Court is governed by Article 39 of the Treaty. It reads:

The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. Interim orders and other directions issued by the Court shall have the same effect *ad interim* as decisions of the Court.
22. As was quite rightly opined by both sets of Counsel, this Court has had occasion to consider numerous interlocutory applications for interim orders and has indeed upheld the trifold principles for the grant thereof advanced in *Giella vs. Cassman Brown* (supra), to wit, 'first, an applicant must show a *prima facie* case with a

probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.’ See *Prof. Peter Anyang’ Nyong’o & 10 Others vs. The Attorney General of the Republic of Kenya & 3 Others (supra) and Timothy Alvin Kahoho vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2012.*

23. However, as was stated by this Court in *FORSC & Others vs. Attorney General of the Republic of Burundi & Another, EACJ Appl. No. 16 of 2016*, in the case of *Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community Consolidated Applications 5 & 10 of 2014* the foregoing position was juxtaposed against the judicial approach advocated in the case of *American Cyanamid Company vs. Ethicon Limited (1975) AC 396*, which espoused the need for courts faced with an application for an interlocutory injunction to be satisfied that the claim was not frivolous or vexatious – but that there was a serious question to be tried; without attempting to resolve conflicts of evidence, as was previously required in the determination of ‘a *prima facie* case with probability of success’, as those were matters to be dealt with at trial.
24. In *FORSC & Others vs. Attorney General of the Republic of Burundi (supra)*, this Court upheld the following text in *Blackstone’s Civil Practice 2005*, para. 37.19 – 37.20, pp. 392, 393, in deference to the demonstration of a serious triable issue rather than a *prima facie* case in applications for interlocutory injunctions: Therefore, the court only needs to be satisfied that there is a serious question to be tried on the merits. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant’s cause of action has substance and reality.
25. In the present case, both Parties misrepresented a *prima facie* case as extolled in *Giella vs. Cassman Brown (supra)* as being synonymous with the pre-requisite of a serious triable issue as underscored in *American Cyanamid Company (supra)*. We are constrained to observe that a *prima facie* case and a serious triable issue are not necessarily one and the same thing and, therefore, would not be used interchangeably. The *American Cyanamid* case explicitly distinguishes a *prima facie* case, which would necessitate the resolution of ‘conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend’ (a matter for trial), from a serious question to be tried that is established where a court is ‘satisfied that the claim is not frivolous or vexatious’. As was stated in *Blackstone’s Civil Practice 2005*,⁸⁴ ‘the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant’s cause of action has substance and reality’. Stated differently, for a serious triable issue to be established the substantive suit should disclose a cause of action. See *The Siskina (1979) AC 210*.
26. Within the context of EAC Community law, a cause of action demonstrating the prevalence of a serious triable issue has been held to exist where the Reference raises a legitimate legal question under the Court’s legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes

⁸⁴ Ibid.

any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights. See *Sitenda Sebalu vs. The Secretary General of the East African Community & Others EACJ Ref. No. 1 of 2010*, *Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 11 of 2013* and *FORSC & Others vs. Attorney General of the Republic of Burundi (supra)*.

27. Applying that standard to the present case, we note that Mr. Kiryowa did make the argument that there was indeed a triable issue in this case as to whether or not the Republic of Uganda, vide the Excise Duty (Amendment) Act, was discriminating against goods of a Partner State in contravention of the Treaty and the Protocols made thereunder. On the other hand, we understood Respondent Counsel to argue that the impugned law was enacted in accordance with due legislative process and the grant of the interim orders sought would be tantamount to reverting to the now repealed Excise Duty Act of 2014, yet the reasons that were advanced by the House in support of the enactment of the impugned law were such as would negate the present Application's likelihood of success.
28. Without recourse to the merits thereof, it is apparent on the face of the Reference that it presents a legal question as to whether the enactment by the Respondent of a law that draws a distinction between locally manufactured goods and goods from a foreign country contravenes Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Article 15(1) and (2) of the Customs Union Protocol, and Articles 4, 5, 6 and 32 of the Common Market Protocol. Learned Counsel for the Applicant did clarify in submissions that his client did not take issue with the impugned law *per se* but, rather, with URA's reclassification of the Applicant's goods as imported goods or goods coming from a foreign country. We take the view that the Applicant is bound by his pleadings and the Court's determination would, at this stage, simply be to deduce from the face of those pleadings whether there is a serious issue to be tried. Needless to say, the Reference would be the relevant pleading in this regard because it forms the basis of any 'trial' in respect of which triable issues would arise.
29. We have carefully scrutinised the Reference. We find that paragraph 3(q) – (t) thereof does indeed challenge the legality of section 2 of the Excise Duty (Amendment) Act, but sub-paragraph 3(u) does also contest the implementation of the said law. Indeed, the reliefs sought by the Applicant pertain to both the legality and application of section 2 of the impugned law. We reproduce the pertinent paragraphs for ease of reference: Paragraph 3 of the Reference
 - (a) – (p).....
 - (q) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 is unlawful, discriminatory and completely negates the purpose for which the Treaty was enacted.
 - (r) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 violates and infringes the provisions of the Treaty, to wit, Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty.

- (s) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 violates and infringes the provisions of the Customs Union Protocol, to wit, Article 15(1) and (2) of the Customs Union Protocol.
 - (t) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 also violates and infringes Articles 4, 5, 6 and 32 of the Common Market Protocol.
 - (u) The Applicant contends that the provisions of the Act, upon implementation, will adversely affect its operations and will have a negative impact on its business as the Applicant will be required to pay excessive amounts in excise duty, which its competitors are not subject to, only because the Applicant manufactures its cigarettes in Kenya, and despite the fact that Kenya is an EAC Partner State.
30. Consequently, the Reference does in fact challenge both the Excise Duty (Amendment) Act, as well as its enforcement. To that extent, the Court's interpretative mandate does come to bear in examining the impugned law's compliance with the Community's legal regime on trade and investment. Notwithstanding the generality of some of the legal provisions the Applicant seeks to rely on, the issues presented in the Reference do at face value raise formidable questions for interrogation by this Court. In the result, we are satisfied that the present matter raises serious triable issues. We so hold.
31. Turning to the question of irreparable injury, it was submitted for the Applicant that the injury the company stood to suffer would adversely impact its business operations, occasioning immeasurable and irreparable injury that could not be adequately compensated by an award of damages. Conversely, the Respondent contended that the quantifiable injury depicted in tax payment registration slips that were annexed to the affidavit in support of the Application could easily be atoned by an award of damages, while the alleged reputational injury was merely speculative.
32. We have carefully considered the authorities cited by either Party on this issue, as well as the rival submissions of both Parties. It is trite law that 'if damages in the measure recoverable at common law would be an adequate remedy and a respondent would be in a position to pay them, no interim injunction should normally be granted'. See *American Cyanamid Company vs. Ethicon Limited (1975) AC 396 at p. 408*. Be that as it may, in *Blackstone's Civil Practice 2005*, para. 37.22, p. 394 it was opined (quite correctly, in our view) that damages would be inadequate where:
- (a) The defendant is unlikely to be able to pay the sum likely to be awarded at trial.
 - (b) The wrong is irreparable e.g. loss of the right to vote.
 - (c) The damage is non-pecuniary e.g. libel, nuisance, trade secrets.
 - (d) There is no available market. of
 - (e) Damages would be difficult to assess. Examples are loss of goodwill, disruption business and where the defendant's conduct has the effect of killing off a business before it is established.
33. A definition of damages is also instructive. They are defined as follows in the *Oxford Dictionary of Law*, Oxford University Press, 2009 (7th Edition), p. 246:

General damages are given for losses that the law will presume are the natural and probable consequence of a wrong. General damages may also mean damages given for a loss that is incapable of precise estimation such as pain and suffering or loss of reputation. In this context special damages are damages given for losses that can be quantified.

34. In the present case the Head of Sales, Marketing and Distribution in the Applicant company attested to the financial impact on the company's business operations that would arise from either the absorption of the extra cost caused by a higher duty or the passing on of that cost to their consumers. It was his affidavit evidence that whereas absorption of the cost would lead to negative profit margins, operational losses and financially unstable business, and the deregistration from the Uganda Securities Exchange (USE) owing to consistent operational losses; if the cost was passed on to the company's consumers the unit price increase would cause a 17% market share loss, rendering the business unviable especially given more favourable prices from competitors. The foregoing evidence paints a clear scenario of business disruption, as well as loss of credibility in the market in the event that the company was de-registered from the USE, not to mention reduced trading prospects on the Securities Exchange even if it were reinstated at a later date.
35. Simply stated, the term 'reputation' refers to the qualitative estimation in which a person is generally held. Therefore, the deregistration of a listed company for non-compliance with its financial undertakings to a Securities Exchange would, in our view, certainly negate its credibility in the estimation of the public thus causing it reputational injury. Whereas reputational injury does indeed often attract an award of damages, for purposes of applications for interlocutory orders the question would be how adequate such awards are for atoning the injury that could otherwise be negated by the grant of the orders sought.
36. A similar question was addressed in the case of *Samsung Electronics Limited vs. Apple Incorporation* (supra), to which we were referred on the subject does appear to affirm this position. In that case the matter before the court was an application for stay pending appeal of a consequential order that required Apple Inc. to publicly advertise that it was wrong to have alleged that Samsung Electronics had copied its iPad design. Compliance with the said order by Apple was held to be likely to cause damage to Apple's reputation and goodwill, and such damage was likely to be unquantifiable and very difficult, if not impossible, to repair in the event that Apple prevailed on the appeal. It seems to us that the same manner in which the wrong that Apple was required to concede was deemed likely to lower the company's estimation in the electronics market, the Applicant's deregistration from a Securities Exchange for non-compliance issues would negate its estimation within its market and stakeholders.
37. Quite clearly, therefore, the Applicant is liable to suffer business disruption, as well as reputational injury. From the *Oxford Dictionary of Law* definition of damages, it is abundantly clear that damages would ensue from that injury. The question is whether such injury can be *adequately* compensated by an award of damages. We do find persuasive authority in the position advanced in *Blackstone's Civil Practice 2005* above.⁸⁵ In our considered view, the difficulty in assessment

⁸⁵ Para. 37.22, p. 394

of damages arising from loss of goodwill, reputation or disruption of business would pose the very real possibility of an inadequate award of damages. In the result, we are satisfied that the Applicant is liable to suffer business disruption, as well as reputational injury and loss of goodwill that cannot be adequately compensated by damages.

38. It is now well settled law that where an application for an interlocutory injunction cannot be determined on the existence of a serious triable issue or the adequacy of damages to atone for possible injury to an applicant, the court shall decide the matter on a balance of convenience. See *East African Industry vs. True Foods (1972) E.A. 420*. In the present case it was argued for the Applicant that in the absence of any averment or evidence that the Respondent either stood to suffer any injury if the interim orders sought were granted or was willing and able to atone for any injury suffered by the Applicant in damages, the balance of convenience weighed in favour of the Applicant, who had demonstrated the injury it stood to suffer. Learned Counsel for the Applicant relied on numerous cases that we have cited earlier in this judgment in support of this position. It was also clarified for the Applicant that the *status quo* sought to be maintained was the pre-recategorisation status of its goods that prevailed prior to the notice from URA to the Applicant seeking additional taxes.
39. On his part, Mr. Adrole opined that the balance of convenience tilted in favour of the Respondents given that there was an Act of Parliament in force, the stay of application of which by a grant of the interim orders sought would have the effect of a shift in status quo to revert to a repealed law. Mr. Adrole did also seek to distinguish the facts of the present case from those in *Legal Brains Trust* (supra), on the basis of the law in issue in that case having been subsidiary legislation as opposed to principal legislation, as is the case presently. However, this drew sharp criticism from Mr. Kiryowa, who deprecated any attempt to draw a distinction between principal and subsidiary legislation for purposes of applications for interim orders for being superfluous and non-cognisant of the principle that the *Legal Brains Trust* case established. We are constrained to observe that for purposes of the grant of an interim injunction the distinction between subsidiary and principal legislation is fairly redundant. It is quite commonplace for courts to declare a principal legislation illegal or indeed strike it off the law books. It defies logic, therefore, for the argument to be advanced that they cannot grant interim injunctions in respect of impugned principal legislation if the justice of the matter so dictates.
40. We now revert to a consideration of the balance of convenience herein. The balance of convenience in applications such as the one before us is largely determined on a case by case basis. As quite rightly advanced by Mr. Adrole, in *E. A. Industries vs. True Foods* (supra) the court weighed the harm that the respondent company was likely to suffer in the event that the injunction was granted against the harm that the applicant stood to suffer if it was not granted, and attached particular importance to the fact that the harm suffered by the applicant could be adequately compensated by damages, to uphold the refusal of the injunction by the lower court.
41. Similarly, *American Cyanamid* (supra) re-echoed the emphasis on adequacy of damages to atone for harm in the following terms:

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.

42. Meanwhile, in *Cayne vs. Global Natural Resources PLC (1984) 1 All ER 225* the court asserted that it was not mere convenience that needed to be weighed, but the risk of doing an injustice to one side or the other.⁸⁶
43. In the present case we understood the Respondent to have argued the balance of convenience of this matter concurrently with the question of the *status quo* sought to be preserved. For parity, we propose to adopt the same approach. In the *American Cyanamid* case,⁸⁷ the court linked the determination of the balance of convenience to the *status quo* sought to be preserved as follows:
Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*.
44. The question is what is the *status quo* that seeks to be preserved in the matter before us. We have carefully considered the case of *Garden Cottage Foods vs. Milk Marketing Board (1984) AC 130*, to which we were referred by the Applicant. In that case, the possibility of *status quo* changing was addressed in the following terms (Lord Diplock):
The *status quo* is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant *status quo* to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion.
45. Thus the applicable *status quo ante* is the state of affairs before a respondent commenced the conduct complained of by the applicant, unless there has been unreasonable delay in filing the application for interim orders, in which case it would be the state of affairs immediately before the application. Therefore it behoves an applicant for interim orders to act quickly. However, an apparently unreasonable delay may be negated if sufficiently explained by the applicant. See *Blackstone's Civil Practice 2005*, para. 37.29, p. 397.
46. We have already determined that the Applicant in the present case is likely to suffer irreparable harm that cannot be compensated by damages. On the other hand, we were not addressed on the injury the Respondent stood to suffer beyond the assertion that the balance of convenience tilted heavily in favour of the Respondent given that the process entailed in the enactment of the impugned had been lengthy and costly to Uganda, not to mention the fact that

⁸⁶ *Blackstone's Civil Practice 2005*, para. 32.27, pp. 396, 397.

⁸⁷ At p.408

the law was already being enforced; and staying the application of such a law by a grant of the interim orders sought, before a determination of the main suit, would have the effect of reverting to a repealed *status quo*. It was submitted for the Respondent that the *status quo* in place presently was the enforcement of the impugned law by URA and, therefore, the Applicant's pursuit of a *status quo* that prevailed under a repealed law was untenable. Ms. Nabakooza did also contend that the Applicants had filed the Reference on 9th August 2017, way after the commencement of the impugned Act on 1st July 2017 and mere filing of the Reference could not hinder the continued enforcement of a law before the hearing of the Reference on its merits. In reply, the stance adopted by the Respondent was faulted by the Applicant, on whose behalf it was argued that the Reference did not seek to resuscitate a repealed law but, rather, to secure a proper interpretation of the Amended law. Mr. Kiryowa further argued that the present Application aptly represented a case of changing status quo at the behest of the Respondent.

47. As we have held earlier in this Ruling, the Applicant's contestation of the misconstruction of the impugned law is indeed borne out by its pleadings. We shall not belabour that point further. Be that as it may, we are hard pressed to appreciate how a lengthy, costly enactment process can negate the obligation upon lawmakers to enact national laws that are in compliance with Partner States' obligations under the Treaty and its attendant Protocols, or how the fact of costliness of an enactment process can be used to mitigate against a party's right to proper application of a law. Even in the interim, we are unable to fathom how the lengthiness or costliness of a law enactment process can amount to irreparable injury to a party that enacted it in the event that the application of such law was stayed temporarily until the disposal of the Reference.
48. We do appreciate that the grant of an interim injunction in this case would inhibit the URA's right to collect the additional duties billed to the Applicant, however, that right must be weighed against the injustice of leaving the Applicant company to bear the brunt of a possibly misconstrued law that could indict it to the payment of exorbitant funds in excise duty pending the determination of the Reference. Would such an eventuality be in tandem with the dictates of commercial justice and expediency that should underpin regional trade? On interim basis, would it be more just to subject a commercial entity, the operations of which are heavily reliant on availability of financial resources and competitive product prices, to the payment of possibly unwarranted extra duties; or to stay the collection of those additional duties by a public entity until the determination of the matters in contention in a suit?
49. We take the considered view that the justice of the matter dictates that the Respondent would suffer less injury from being temporarily prevented from exercising its right to collect the extra excise duty billed to the Applicant if the interim orders sought in the present Application were granted, than the injury the Applicant stands to suffer as a consequence of paying the additional duty. We so hold.
50. Having so held, quite clearly the factors informing the balance of convenience in this matter are not evenly balanced so as to warrant recourse to the preservation of the *status quo* as a matter of prudence, as was opined in the *American*

Cyanamid case.⁸⁸ Nonetheless, had we considered a preservation of the status quo, in *Garden Cottage Foods vs. Milk Marketing Board* (supra) the status quo *ante* that was held in to be applicable in an application for interlocutory injunctions was the state of affairs before a respondent commenced the conduct complained of by the Applicant. In this case, that would be the state of affairs that prevailed prior⁸ to the service of a notice of additional taxes by the URA upon the Applicant. Stated differently, a grant of the interim orders sought in this case would in effect forestall the payment by the Applicant of the extra excise duties billed for by URA until the determination of the Reference. This does not amount to a reversal of the application of the impugned law, as was opined by learned Respondent Counsel, but a stay of its application to the Applicant company pending the determination of the Reference.

Conclusion

51. In the result, we do grant the interim orders sought and hereby uphold this Application. The costs thereof shall abide the outcome of the Reference. We direct that it be fixed for hearing forthwith. It is so ordered.

K. Kiwanuka & P. Kauma, Counsel for the Applicant

M. Nabakooza, R. Adrole & S. Tsubira for the Respondent

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⁸⁸ Ibid.

First Instance Division

Application No. 15 of 2017
(Arising from Reference No. 10 of 2017)**Ololosokwan Village Council & 3 Others v The Attorney General of the
United Republic of Tanzania**

Coram: M. Mugenyi, PJ, F. Ntezilyayo, J, F. Jundu, J.
January 25, 2018

Preliminary objection prior to Scheduling Conference - Locus-standi- Whether Village Councils have legal capacity to institute cases - Legal representation of a body corporate

Article 30 (1), 39 of the Treaty - Article 26(2) of the Local Government (District Authorities) Act, 1982- Section 31, The Office of the Attorney General (Discharge of Duties) Act of 2005, Tanzania - Rules: 17(3) , (5) 41(2) ,84, 85 EACJ Rules of Procedure, 2013

On 5th August 2017, the Respondent ordered the Applicants' to remove their cattle and homesteads from the Serengeti National Park and the Loliondo Game Controlled Area. The eviction, took place despite the fact that the Applicants had legal documents proving ownership of land. Consequently, they filed *Reference 10 of 2017* contesting the eviction and pending the hearing, the Applicants approached the Court under a certificate of urgency seeking interim orders restraining the Respondent from: forcefully evicting the Applicants' residents, confiscating their livestock or burning their bomas.

In a notice of preliminary objection, the Respondent averred that the Applicants were improperly before the Court as Village Councils were part and parcel of the local government authorities and were required by the Local Government (District Authorities) Act Cap. 287 to institute proceedings through District Councils. Furthermore, the Respondent claimed that the Applicants' lacked capacity to institute proceedings without the consent or authorization of the District Authority or the Attorney General and that they should have been represented by a State Attorney or a legal officer authorized by the local government.

The Applicants' opposed the current application claiming that Rule 41(2) of the Court's Rules, required not less than 7 days written notice of preliminary objection yet the notice had been served on the Applicants' on the morning of the hearing. Additionally, the Applicants were bringing this Application in their position as the heads of the Village Councils representing the claims of the villagers within those Councils.

Held

1. Rule 41(2) specifically talks about a scheduling conference to a Reference therefore, if the Rule is silent, the Court cannot impute it to apply to an application. Consequently, the Notice of Preliminary Objection on the Application was

properly before the Court.

2. Village Councils are bodies corporate under the Local Government (District Authorities) Act, Cap 287. The Act neither provides for appearance by or on behalf of the Village Council nor refers to any authorization to be sought by a Village Council before instituting a case in Court. Perusal of selected case law shows that Village Councils had in the past sued the Attorney General and governmental institutions.
3. Article 30(1) of the Treaty give *locus standi* before this Court to a Village Council in the terms of Article 26(2) of the Local Government (Districts Authorities) Act, 1982. Furthermore, since Rule 17(3) & (5) of the Court's Rules provide for a body corporate to appear and the manner in which they can be represented, it is untenable, as argued by the Respondent that since a Village Council is at the bottom of local government entities, it should be authorized by a superior body such as the District Council and represented by a State Attorney or a legal officer authorized by the local government authority.
4. The Applicants have the legal capacity to institute a case before this Court and therefore the preliminary objection is dismissed

Case cited

Mondorosi, Sukenya & Ors v Tanzania Breweries Ltd & Ors, High Court of Tanzania, Land Case No. 26 of 2015

RULING

A. Introduction

1. This is an Application by three (3) Village Councils for interim orders against the Attorney General of the United Republic of Tanzania (hereinafter referred to as "the Respondent") pursuant to Articles 6(d), 7(2), 27(1), 30, 39 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") and Rules 1(2), 21, 22, 23, 84 and 85 of the East African Court of Justice Rules of Procedure 2013 (hereinafter referred to as "the Rules").
2. The Village Councils in question are Ololosokwan Village Council, Oloirien Village Council, Kirtalo Village Council and Arashi Village Council (hereinafter referred to collectively as the "Applicants"). They are all legal entities established by law in the United Republic of Tanzania, body corporate that are contained within the Ngorogoro District, Arusha Region.
3. The Application arises from *Reference No. 10 of 2017* filed against the Attorney General of the United Republic of Tanzania. The gravamen of the Applicants' contention is that, on 04th August 2017, despite possessing legal documents as a proof of ownership of land that borders the Serengeti National Park to the West, members and residents of the Applicants had received correspondence from the Respondent State, directing them to remove their cattle and their *bomas* (homesteads) from the Serengeti National Park, as well as an area that was termed "the Loliondo Game Controlled Area."
4. The Applicants further contended that on 05th August 2017, each Applicant was ordered to vacate its residents from the demarcated area bordering the Serengeti National Park and that the eviction, removal of livestock and the burning of bomas took place on land that legally belongs to the Applicants.
5. It is therefore the Applicants' contention that the Respondent's aforesaid

impugned actions contravened and violated the Constitution of the United Republic of Tanzania, Village Land Act 1999 and Wildlife Conservation Act, 2009 as well as the Treaty.

6. The Applicants seek the following orders:
 - (a) This Honourable Court be pleased to dispose with service of this Motion in the First Instance Court owing to the urgency of the matter.
 - (b) Pending the hearing and determination of this application inter parties this Honourable Court be pleased to issue an interim ex parte order restraining and prohibiting the Respondent from evicting the Applicants' residents from the disputed land, confiscation of livestock by the Respondent belonging to the Applicants' residents grazing on the disputed land, the burning of bomas belonging to the Applicants' residents constructed on the disputed land; the prosecution of the Applicants' residents found on the disputed land and physically assaulting the Applicants' residents found on the dispute land.
 - (c) The costs of this Application be provided.
7. The Applicants have approached this Court under a certificate of urgency whereby they contended that the forceful eviction, confiscation of livestock and burning of bomas was causing untold hardship on the villagers residing in the Applicants' land; that the purpose of the application would be rendered nugatory if it was not determined before the commencement of the hearing of the main application and that therefore, they urged the Court to accept the Certificate of Urgency and dispose of the Application as soon as possible.
8. This Application is being resisted by the Respondent which, on 15th November 2017, has also challenged its competence by filing a notice of preliminary objection on one point of law, namely "That, the Applicants do not have requisite authority to institute this Application in Court."
9. At the hearing of the Respondent's preliminary objection held on 17th November 2017, the Applicants were represented by Ms. Anita Alfred Kyaruzi and Mr. Mark Mulwambo and Ms. Aidah Kisumo appeared for the Respondent.

B. Submissions

10. From the onset, Counsel for the Applicants said that she was seeking an adjournment of the hearing on the preliminary objection stating that she had only been served of the same that very morning. It was then her contention that as provided for by Rule 41(2) of the Court's Rules, the Respondent should have given not less than 7 days written notice of preliminary objection to the Court and to the Applicants.
11. In response to Ms. Kyaruzi's contention, Mr. Mulwambo pointed out that Rule 41(2) talked about a preliminary objection to a Reference raised before the scheduling conference in accordance with Rule 53 and that the Rules did not provide for raising a preliminary objection on an application for injunction. In addition, stressing that they had proceeded under Rule 41(1) of the Rules, he prayed the Court to hold that the preliminary objection was valid as it was properly before the Court.
12. In reply, Ms. Kyaruzi submitted that in the absence of any rules governing the notice of preliminary objection of an application, the same rules that apply

to a notice of preliminary objection to a Reference should also apply to an application. Therefore, she maintained that the Applicants should still receive the 7 days' notice.

13. On that disputed matter, the Ruling of the Court was as follows: "Rule 41(2) is very clear as it specifically talks about a scheduling conference to a Reference and therefore, if the Rule is silent, the Court cannot impute it to apply to an application. Consequently, the Notice of Preliminary Objection on the Application is properly before the Court and the Court shall proceed to hear it."
14. Moving the Court on the preliminary objection, Ms. Kisumo contended that the Applicants before the Court did not have the requisite authority to institute the Application. She argued that the Application was brought by three (3) Village Councils which are part and parcel of the local government authorities in the Respondent State and as such, they form part of the Government of the United Republic of Tanzania which is the Respondent before this Court.
15. It was Counsel's further submission that the Government of the United Republic of Tanzania appearing before this Court as a State was by law required to be represented by the Attorney General of the United Republic of Tanzania and that, therefore, the Applicants were improperly before this Court.
16. In support of the foregoing arguments, learned Counsel relied on the Local Government District Authority Act Cap. 287 revised edition 2002 under sections 55 and 56. She also referred to the Office of the Attorney General (Discharge of Duties) Act of 2005 and stated that section 31 of that Act amended the Local Government District Authority Act, Capt. 287 revised edition 2002 by creating a new section which is cited as section 192(A) which provides under sub-section one that:
Save as it is otherwise expressly provided appearance by or on behalf of a district or a township in any civil case or matter in a Court in which a local government authority is a party shall be made by a Solicitor authorized by the local government authority.
She also cited sub-section 3 of that section which states that:
Notwithstanding the provisions of sub-section 1 where a local government authority had not employed or engaged a Solicitor or where with respect to any proceedings in Court to which a local government is a party that local government authority may be represented by any law officer, a State Attorney or a legal officer authorized in that behalf by the local government authority.
17. In light of the foregoing, learned Counsel submitted that the Counsel representing the Applicants before this Court was neither a law officer nor a State Attorney, a Solicitor or a legal officer duly authorized by the Local Government (District Authorities) Act Capt. 287 revised edition 2002.
18. Learned Counsel further submitted that Village Councils were required by the Local Government (District Authorities) Act Cap. 287 to institute proceedings where necessary through the District Councils and that the present Application was improperly before this Court.
19. In conclusion, Ms. Kisumo submitted that since the Village Councils did not have the authority to institute the matter before this Court and whether they have the authority to institute the matter, the matter should have been instituted by the Attorney General of the United Republic of Tanzania since they form part

- and parcel of the Government of the United Republic of Tanzania. It was the Respondent Counsel's submission that this Application is improperly before this Court.
20. With regard to the additional argument that the Village Councils did not get the Village Assembly's Authority to institute the Application, when asked to clarify, Counsel abandoned it.
 21. In response to the Respondent's submissions, Counsel for the Applicants submitted that the instant Application's aim was to bring to the attention of the Court the Respondent's violations of its international obligations under the EAC Treaty and other relevant international legal instruments.
 22. She contended that the Applicants were bringing this Application in their position as the heads of the various Village Councils, and that therefore they were representing the claims of the villagers within those Councils. She further submitted that their purpose was to have the checks and balance of the acts of the Respondent State.
 23. Responding to an issue raised by the Respondent that Counsel for the Applicants could not duly represent them, learned Counsel referred to Rule 17(5) of this Court Rules that states that: "The advocate for party shall file with the Registrar a certificate that he/she is entitled to appear before a superior Court of a partner State." She contended that she had been duly appointed by the Applicants in this particular case instituted by the three (3) Village Councils as indicated elsewhere above, and that according to the Court Rules, those Village Councils were properly before this Court.
 24. She further contended that this matter had not to be brought before the District Courts as wrongly argued by Counsel for the Respondent because it was a matter on the violations of international obligations of the Respondent State. That therefore, the Applicants had duly come before this Court to seek guidance on the issue of the violation of the Respondent's alleged international obligations.
 25. In reply, Mr. Mulwambo stated that they had no objection to counsel in person and her ability to appear before this Court, but that the Respondent's objection was that the group she was representing, that is the Village Councils being part of the United Republic of Tanzania's Government, should be represented by the category of three (3) people according to the Village Local Government Authority Act, to wit a State Attorney, a Legal Officer, a Law Officer or a person who has duly been authorized by the Local Government Authority to represent those Village Councils.
 26. Mr. Mulwambo further argued that for the Village Councils to come and institute this matter before this Court was like the Government suing itself, which was not proper. He thus contended that the right person who was authorized by law to represent the Government was the Attorney General of the United Republic of Tanzania and that the Applicants did not have the capacity to institute proceedings without the consent or authorization of the District Authority or the Attorney General.

C. Court's Determination

27. We have carefully considered the oral submissions made by both Parties and analyzed the authorities referred to us in support of their respective arguments.

28. It can be gleaned from the Respondent's Notice of Preliminary Objection and Parties' submissions thereto that the only issue for determination is whether the three (3) Village Councils have the requisite authority to institute the instant Application in this Court against the Attorney General of the United Republic of Tanzania.
29. Counsel for the Respondent have submitted at length that according to Tanzanian Laws, especially The Local Government (District Authorities) Act, 1982 and the Office of the Attorney General (Discharge of Duties) Act, a Village Council, despite being a body corporate, had to be authorized by the local government authority in order to institute a lawsuit and that in any case, it could not sue the Attorney General of the United Republic of Tanzania since a Village Council was part of the Government.
30. Counsel for the Applicants, on her part, relied on the provisions of the Treaty, the Court Rules, i.e. Rule 17(3) & (5) and the Local Government (District Authorities) Act, 1982 and contained that the Village Councils in question had *locus standi* before this Court and that she had duly been appointed to represent them.
31. In light of the foregoing rival submissions, it is apposite to reproduce the main legal instruments applicable to the instant case for ease of reference. According to Article 30 (1) of the Treaty, "... any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, Directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."
32. As for Rule 17(3) of the Court Rules, it states that "a corporate or company may either appear by its director, manager or secretary, who is appointed by resolution under the seal of the corporation or the company, or may be represented by an advocate." Rule 17(5) provides that: "The advocate for a party shall file with the Registrar a certificate that he or she is entitled to appear before a superior court of a Partner State."
33. Article 26(2) of the Local Government (District Authorities) Act, 1982 reads as follows: "... Upon the issue of a certificate of incorporation in relation to a village, the village council of the village in question shall, with effect from the date of that certificate, be a body corporate, and shall- (...)
 - (b) in its incorporate name be capable of suing or being sued.
34. Counsel for the Respondent has also referred us to section 31 of the Office of the Attorney General (Discharge of Duties) Act of 2005 which amended the Local Government (District Authorities) Act Capt. 287 revised edition 2002 by creating a new section which is cited as section 192 A(1), reproduced elsewhere above in this Ruling.
35. As clearly indicated in the above-mentioned Court Rules, the latter envisage the type of parties that would appear before the Court and provides for companies, individuals, legal entities, body corporate under Rule 17(3). It is not in dispute that the Village Councils in question are body corporate and since the Court Rules have provided for a body corporate to appear before this Court and had laid out the manner in which they can be represented, we are not convinced by the Respondent's argument that the matter at hand has to be governed by

- the Tanzanian Laws if at all they provided for Village Councils' appearance and representation in Court. In this regard, having carefully read the provisions of the Local Government (District Authorities) Act referred to us, it is clear in our mind that this Act neither talks about appearance by or on behalf of the Village Council nor refers to any authorization to be sought by a Village Council before instituting a case in Court. We find untenable, therefore, the Respondent Counsel's argument that by extension, since a Village Council is at the bottom of local government entities, it should be authorized by a superior body such as the District Council and represented in Court according to the relevant provisions of the Local Government (District Authorities) Act. It is also worth noting that according to section 3 of the Local Government (District Authorities) Act, 1982, this Act only applies to a court of Mainland Tanzania of competent jurisdiction.
36. Regarding the Respondent's other argument that a Village Council cannot sue the Attorney General of the United Republic of Tanzania, a quick perusal of selected case law involving Village Councils shows that Village Councils had in the past sued the Attorney General (Tanzania) together with some governmental institutions seeking order recognizing their ownership of disputed lands. (See *Mondorosi, Sukenya and Soitsambu Village Councils vs. Tanzania Breweries Limited, Tanzania Conservation Ltd, Ngorongoro District Council, Commissioner for Lands and Attorney General (Tanzania)*, reported in Gilbert, J. (2017). *Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges and Limitations*, International Comparative Law Quarterly, 66(3), 657-686). Thus, the aforesaid argument is untenable as well.
37. Given the foregoing, therefore, we are of the view that Article 30(1) of the Treaty and Rule 17(3) & (5) of the Court Rules give *locus standi* before this Court to a Village Council which is a body corporate in the terms of Article 26(2) of the Local Government (Districts Authorities) Act, 1982.

D. Conclusion

38. In light of our findings, we are of the considered view that the three (3) Village Councils in question have the legal capacity to institute a case before this Court and therefore, the Notice of preliminary objection raised by the Respondent is dismissed. We direct that *Application No. 15 of 2017* be fixed for hearing forthwith.
39. Costs to abide the outcome of the main Reference.

It is so ordered.

Kyaruzi, Counsel for the Applicants

M. Mulwambo & A. Kisumo for the Respondent

First Instance Division

Application No. 15 of 2017
(Arising from Reference No. 10 of 2017)

**Ololosokwan Village Council & 3 Others v The Attorney General of the
United Republic of Tanzania**

Coram: M. Mugenyi, PJ, F. Ntezilyayo, J, F. Jundu, J.
September 25, 2018

*Interim orders - False affidavit evidence - Defective affidavit- Informal application
by consent of Parties - Cause of action - Serious triable issues - Applicable status quo
ante - Risk of injustice -Balance of Convenience*

*Articles: 6(d), 7(2), 23(1), 27(1), 30(1), 39, 137(1) of the Treaty - Section 3(1) Local
Government (District Authorities) Act, Tanzania - Rules: 1(2), 21(5), (7) 21(7) (b),
22, 23, 47(1) (c), 84, 85 EACJ Rules of Procedure, 2013*

In 2013 the Minister of Natural Resources and Tourism had communicated the Government of Tanzania's intention to acquire 1,500 square kilometers of land (the disputed land) that otherwise belonged to the Applicants for purposes of establishing a new Game Controlled Area. This decision was halted by the then Rt. Hon. Prime Minister of the United Republic of Tanzania, who acknowledged the villages' legal ownership of the land. Subsequently, on 5th August 2017 the Ngorongoro District Commissioner issued a directive and formed a Task Force, which began to evict people from the disputed land and destroy their houses and properties, an exercise that commenced on 13th August 2017. The Applicants, four village councils legally registered owners of land bordering the Serengeti National Park were advised to remove their cattle from the Park and to vacate their residence. The Applicants filed this application seeking interim orders restraining the Respondent's agents from evicting the residents from the land, assaulting or prosecuting them; and from confiscating of their livestock or burning of their homesteads on the disputed land. Four Chairmen or Village Executive Officers of their respective village councils deposed virtually identical Affidavits in support of the Application. However, before the Application was heard, the Applicant's Advocate wrote a letter dated 1st June 2018 to the Court seeking urgent interim orders against the office of the Inspector General of Police to desist from harassing, intimidating or otherwise engaging the Applicants pending the determination of the present Application. That letter was subsequently reduced into an application dated 6th June 2018 and supported by a duly commissioned affidavit of the same date, but both documents had not been filed in Court by the time the present Application was heard. At the hearing of the present Application, the unfiled application was formally admitted on the Court record with the consent of Respondents, Counsel. They averred that they would suffer irreparable damage and adverse effects on their livelihoods.

In reply, the Respondent submitted that: a re-mapping of the Applicants' land

was undertaken to re-ascertain boundaries; and the intention was to review laws relating to land and wildlife management and assess the infrastructure within the Wildlife Conservation Area and to assess the challenges associated with retaining the disputed land within that Area. Furthermore, the evictions were lawful and in respect of individuals living outside the established boundaries of their villages and conducting activities within the game reserve; and the conservation area in issue had no relation whatsoever with the registered villages. Moreover, the Applicants affidavits in support alleging they were fraught with misrepresentations.

Held

1. The core value of an affidavit as a document made on oath presupposes the veracity and truthfulness of the statements contained therein. Paragraph 2 of all 4 Affidavits wrongfully equated the deponents to village councils, notwithstanding the fact that in paragraph 1 of the same Affidavits all of the deponents had attested to being male adults and Chairpersons of the village councils. Section 3(1) of the Tanzanian Local Government (District Authorities) Act distinguishes between villages and village councils referring to a village as 'registered under this Act,' while a village council is 'in relation to a village, the village council of that village.' Therefore, a village council cannot be equated to an individual male adult as was deponed in all 4 Affidavits, neither can it be tantamount to a village, as 2 of the deponents thereto purported to attest on oath.
2. A false affidavit or false affidavit evidence is an affront to court process in so far as it defeats the purpose of evidence on oath, an indelible and indispensable tenet of judicial proceedings. Authentic, unassailable evidence is the bedrock of a fair and just trial and cannot be sacrificed at the altar of lacklustre, incoherent and false pleadings. An application for an interlocutory injunction that is premised on a fatally defective affidavit is unsustainable. Therefore, being unsupported by admissible affidavit evidence, the Application contravenes Rule 21(5) of the Court's Rules and is, to that extent, incompetent and improperly before the Court. Therefore, all four Affidavits in support of the formal Application were struck out of the Court record in their entirety.
3. Causes of action are grounded in a party's recourse to the Court's interpretative and enforcement function as in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights.
The gravamen of the dispute in Reference No. 10 of 2017 is the legality of the actions complained of by the Applicants viz their alleged property rights. This is a formidable legal question that fell within the ambit of Article 30(1) of the Treaty as an issue that the Court may interrogate. Consequently, without recourse to the merits, it is apparent on the face of the Reference that it presents a substantial cause of action and the informal application raises serious triable issues.
4. To the extent that the latter informal Application was argued together with the impugned earlier Application, the prayer for interim orders pending the earlier Application's determination was rendered redundant. Nonetheless, the orders sought pending the determination of the Reference remained valid.
5. Whereas the evictions, destruction and loss of property and arbitrary arrests that characterized the social upheaval in that village could, if subsequently found to

have wrongfully happened at the instance of the Respondent, be compensated by an award of damages; an award of damages in itself may not be adequate recompense for the magnitude of loss that they represent. Given doubts as to the adequacy of damages to recompense the affected persons the circumstances of this case make it necessary to consider the balance of convenience in this matter. Nevertheless, it was not mere convenience that needed to be weighed, but the risk of doing an injustice to one side or the other.

6. On the face of the record, the matter to be weighed is the livelihood, security and safety of a multitude of affected villagers and families viz the preservation of flora and fauna and unexplained economic instability. The Applicants' claim to protection from the violation of their property rights, as well as the right to access justice, would be weighed against the Respondent's right to implement the Tanzanian natural resources laws to protect the Wildlife Conservation Area from unlawful human activity, as well as its duty to ensure compliance by all persons with the Tanzania legal regime generally. In the short term, the important duty to avert environmental and other ecological concerns pales in the face of the social disruption and human suffering that would inevitably flow from the continued eviction of the Applicants' residents. The justice of the matter dictates a temporary intervention in favour of the Applicants who stand to suffer significantly more injustice should the grant of a temporary injunction be declined. Therefore the balance of convenience is heavily skewed in its favour.
7. The *status quo* to be preserved would be the *status quo ante* applicable to the state of affairs that pertained prior to the commencement of the alleged eviction by the Respondent forestalling the continued eviction and harassment of the Applicants' residents until the determination of the Reference.

An interim order restraining the Respondent, and any persons or offices acting on his behalf, from evicting the Applicants' residents from the disputed land or destroying their homesteads or confiscating their livestock on that land, until the determination of Reference No. 10 of 2017 was therefore granted.

Cases cited

- American Cyanamid Company v Ethicon Limited (1975) AC 396
 Bombay Flour Mill v Chunibhai M. Patel (1962) EA 803
 British American Tobacco (U) Ltd v A G of Uganda, EACJ Appl. No. 13 of 2017
 Cayne v Global Natural Resources PLC (1984) 1 All ER 225
 East African Industry v True Foods (1972) E.A. 420
 FORSC & Ors v AG of Burundi & Anor, EACJ Appl. No. 16 of 2016
 Garden Cottage Foods v Milk Marketing Board (1984) AC 130
 Noormohammed Janmohamed v Kassamali V. Madhani (1952) 20 EACA 8
 Prof. A. Nyong'o & Ors v A G of Kenya & 3 Ors[2005-2011]EACJLR Appl. No.1 of 2006
 The Secretary General of EAC v. Rt. Hon. M. Zziwa, EACJ Application No. 12 of 2015
 The Siskina (1979) AC 210
 Timothy A. Kahoho v Secretary General of EAC [2012-2015]EACJLR 181, Appl. No. 5 of 2012

RULING

Background

1. Ololosokwan Village Council, Oloirien Village Council, Kirtalo Village Council and Arash Village Council ('the Applicants') are all legally registered villages that are created by statute and located in Ngorongoro District, Arusha Region, Tanzania. They are the legally registered owners of land that borders the Serengeti National Park. Owing to the sub-division of villages in Tanzania over the years

and with a view to ending the ensuing land disputes, the Government of the United Republic of Tanzania undertook a re-mapping of the Applicants' land to re-ascertain their boundaries. Subsequently, in August 2017, residents of the Applicants' villages were advised to remove their cattle and *bomas* (homesteads) from the Serengeti National Park, and the Applicants directed to vacate their residents from areas bordering the said Park.

2. The Respondent has since allegedly embarked on the forceful eviction of the said residents and their livestock, hence the filing of Reference No. 10 of 2017 by the Applicants, *inter alia* seeking orders for a permanent halt to their residents' eviction, arrest and prosecution, as well as the destruction of their property. The Reference also seeks orders of restitution, reinstatement of the Applicants and the villagers to their properties, as well as reparations.
3. The Applicants did also file the present Application dated 21st September 2017 *inter alia* seeking a temporary halt to the residents' eviction and the destruction of their property pending the determination of the Reference. Before this Application could be heard, the Applicants (through their Advocate) wrote a letter dated 1st June 2018 to the Court seeking urgent interim orders against the office of the Inspector General of Police pending the determination of the present Application. That letter was subsequently reduced into an application dated 6th June 2018 and supported by a duly commissioned affidavit of the same date, but both documents had not been filed in Court by the time the present Application was heard. At the hearing of the present Application, with the consent of opposite Counsel, the said unfiled application was formally admitted on the Court record.
4. Learned Counsel for the Applicants did thereupon move the Court on both Applications, although the latter Application was presented with some oral adjustments the effect of which was to seek interim orders pending the determination of the Reference rather than the present Application No. 15 of 2017, as had been initially stated therein and in the letter in reference above.
5. The Applicants were represented at the hearing by Mssrs. Donald Deya, Jebra Kambore and Nelson Ndeki, while Mssrs. Mark Mulwambo and Abubaker Mrisha jointly appeared for the Respondent.

Applicants' Case

6. The Application dated 21st September 2017 ('the earlier Application') was brought under Articles 6(d), 7(2), 27(1), 30 and 39 of the Treaty for the Establishment of the East African Community ('the Treaty'), as well as Rules 1(2), 21, 22, 23, 84 and 85 of this Court's Rules of Procedure. Pending its determination *inter partes*, the Application sought interim *ex parte* orders restraining the Respondent from evicting the Applicants' residents from the disputed land, assaulting or prosecuting them; and from confiscating of their livestock or burning of their homesteads on the disputed land. It was, however, heard *inter partes* and we understood it to have been premised on the following grounds:
 - a. A directive from the Respondent (through Ngorongoro District Commissioner) dated 5th August 2017 asking the Applicants to vacate the land bordering Serengeti National Park is illegal given that the land in issue legally belongs to the Applicants and the Respondent has not

- complied with the legal procedure governing the transfer of land from one usage to another.
- b. The Applicants' residents purported to resist the eviction but have been forcefully evicted, and had their livestock confiscated or lost and their homesteads burnt down on routine basis.
 - c. The Respondent's acts, orders and decisions violate Articles 6(d) and 7(2) of the Treaty.
 - d. Unless the Respondent is restrained from evicting the Applicants' residents, confiscating their livestock and burning their homesteads, the Applicants will suffer irreparable damage in so far as their residents' livelihood will be adversely affected, thus rendering the Reference nugatory.
7. It was supported by four (4) affidavits deposed by Mssrs. Kerimbot Osesiy Dukuny, Nekitio Victor Ledidi, Yohana Kasosi Toroge and Lazaro Molono Sikoyo, residents of Ololosokwan, Oloirien, Kirtalo and Arash villages respectively. The 4 Affidavits were virtually identical, the collective gist of which is as follows:
- a. The deponents are current Chairmen of their respective village councils, and the respective villages represented by the Applicants are listed under Ngorongoro District Council and holders of valid land titles for their land.
 - b. In 2013 the Minister of Natural Resources and Tourism had communicated the Government of Tanzania's intention to acquire 1,500 square kilometers of land that otherwise belonged to the Applicants for purposes of establishing a new Game Controlled Area, but that decision was subsequently halted by the then Rt. Hon. Prime Minister of the United Republic of Tanzania, who acknowledged the villages' legal ownership of the sought land.
 - c. The majority of the villages' inhabitants are Masai pastoralists whose livelihood depends on their livestock and agriculture.
 - d. Whereas the Wildlife Conservation laws that had been in place in Tanzania since 1974 did not prohibit the use, settlement or grazing of livestock on the disputed land, new laws that were enacted in 2009 purport to restrict settlement or human activities in the Game Controlled Area.
 - e. Following the 2013 directive by the then Rt. Hon. Prime Minister, the villages had continued with their activities without interference until a 5th August 2017 directive by the Ngorongoro District Commissioner that led to the formation of a Task Force, which begun to evict people from the disputed land and destroy their houses and properties, an exercise that commenced on 13th August 2017.
 - f. Pursuant to this allegedly illegal exercise, thousands of the villages' residents had lost houses and properties, had their livestock confiscated and were subjected to arbitrary arrests, leaving them destitute and without shelter or food.
8. On the other hand, the Application dated 6th June 2018 ('the latter Application') *inter alia* sought an urgent interim order against the Respondent, directing the office of the Inspector General of Police to desist from harassing, intimidating or otherwise engaging the Applicants pending the determination of the Reference.

It also sought the issuance of summons against the Officer Commanding the Police District of Loliondo (OCD Loliondo) to explain to the Court the measures his office had taken with regard to the matters in issue in Reference No. 10 of 2017, as well as the present Application. We deduced this Application to have been premised on more recent actions the OCD Loliondo and his staff had allegedly meted out on the Applicants since the filing of the Reference. In a nutshell, that application was premised on the following grounds:

- a. Since 18th May 2018 the Applicants had been allegedly harassed, intimidated, their representatives detained and interrogated in intimidating circumstances and seven (7) of their residents had been summoned to Police, amid demands for the withdrawal of their signatures from the Reference and the present Application.
 - b. Unless the Respondent was restrained from such blatant intimidation, the Applicants would suffer irreparable damage, which would have the effect of abusing the process of this Court in the Reference, as well as the present formal Application.
9. The latter Application was supported by the Affidavit of one Kootu Tome, a resident of Ololosokwan village and member of the First Applicant village council since 2009. Duly commissioned by a Commissioner for Oaths and admitted on the record, the affidavit sought to substantiate details of the harassment, intimidation and detention referred to in the grounds above in the following terms:
- a. The OCD Ngorongoro summoned some members of the Applicant village councils, the members of the deponent's village council being summoned on or about 29th May 2018. She found members of the Kirtalo village at the police station as well.
 - b. The deponent escorted members of her village council to the police station, where she acted as translator for 3 women in her village's team as they were not fluent in Kiswahili.
 - c. The OCD inquired whether the Ololosokwan Chairman or Village Executive Officer had attended a meeting that was held on 18th August 2017 and signed the Minutes, to which the Chairman answered in the affirmative and the Village Executive Officer in the negative. Whereas the Village Executive Officer was thereupon discharged, the Chairman was threatened with imprisonment.
 - d. The members of Kirtalo village were asked the same questions which they answered in the negative and stated that a similar meeting in their village had been conducted by members of the Third Applicant village council only.
 - e. The 3 women from Ololosokwan village that attended the OCD's meeting described the events of a 13th August 2017 operation as having entailed the eviction of people, burning of houses, arbitrary arrests and confiscation of livestock and other properties, and affirmed their attendance of the 18th August village meeting, as well as their endorsement of the Minutes.
 - f. The OCD threatened to imprison the 3 women in the event that they were later discovered to have been peddling untruths.
10. In Submissions that covered both Applications, it was argued for the Applicants

that it did appear from paragraphs 1, 3, 5 and 10 of the Response to the Reference, as well as the Affidavits in Reply to the earlier Application deposited by one Aidah Kisumo, that the Respondent did not contest the fact of the Applicants having been registered villages with legal title to land in respect of which evictions had ensued. We understood it to be the Applicants' submission that in so far as the Respondent contends that the evictions were legal yet the Applicants had established their legal ownership of the disputed land, the latter party had established a *prima facie* case. Learned Counsel for the Applicants cited the case of *Democratic Party & Another vs. The Secretary General of the East African Community & Another, Application No.6 of 2011* in support of his argument that the merits of the foregoing assertions would await the determination of the Reference.

11. In terms of irreparable injury, Mr. Deya argued that the 4 Affidavits in support of the earlier Application had all attested to a Task Force including the District Police, Representatives of Ngorongoro Conservation Area, and officials from the Ministry of Natural Resources and Tourism, Tanzania Wildlife Authority and Serengeti National Park having evicted, burnt and destroyed properties of residents of the 4 villages in an allegedly ongoing exercise that also had the residents' livestock confiscated, numerous people subjected to arbitrary arrests and left destitute, without either shelter or food. It was his contention that whereas an award of damages would ultimately help, in the interim an award of damages would not be able to recreate the homes or the families as they were given family separations as a result of the evictions, neither could it guarantee food security for the evicted communities and the physical injuries might not be easy to recover from.
12. Making reference to Ms. Tome's affidavit in support of the latter Application, Mr. Deya further argued that an award of damages could not atone for the injury that allegedly continued to be suffered by the affected communities, alluding to a renewed onslaught of intimidation of the villagers with a view to securing the withdrawal of the earlier Application, as well as Reference No. 10 of 2017. Accordingly, it was his contention that the foregoing circumstances necessitated the grant of an interim order halting the actions of the District and other public officials pending the determination of the Reference, and justified the issuance of summons against the OCD Loliondo requiring him to appear before this Court at a convenient time and at the cost of the Respondent to explain the measures that his office had taken with regard to the matters in issue presently.
13. Finally, it was opined by Mr. Deya that the balance of convenience lay in granting the interim orders sought and expediting the hearing of the Reference such that in the event that the Applicants emerged successful in the Reference this Court would have minimized the damage to them, as well as any damages, reparations or costs that could be incurred by the Respondent. However, were the Respondent to succeed in the Reference, all it would have cost him (in learned Counsel's view) would have been a little more time in pursuit of the eviction. Mr. Deya thus concluded that it would be in the interest of all Parties to have the status quo maintained, to wit, leaving the villagers peacefully on the land pending the determination of the Reference.

Respondents' Case

14. On 9th November 2017, the Respondent filed 4 Affidavits of Reply, all of which were deposed by one Aidah Kisumo, a Senior State Attorney. They were more or less identical and, in a nutshell, stated:
- a. The letter from the then Rt. Hon. Prime Minister of The United Republic of Tanzania had communicated the Government's intention to review the laws related to land and wildlife management and assess the infrastructure within the Wildlife Conservation Area, as well as the challenges associated with retaining the disputed 1,500 sq km of land ('the disputed land') within that Area.
 - b. The Wildlife Conservation Area in issue had no relation whatsoever with the registered villages.
 - c. The Rt. Hon. Prime Minister's letter sought to clarify the Government's directives and assure the villagers that the retention of the disputed land would be undertaken as by law required, albeit in consultation with them to address the challenges engrained in the process.
 - d. The Minister for Natural Resources and Tourism is by law empowered to review game controlled areas.
 - e. No orders were issued by any State Authority directing that the houses and properties of civilians within the registered villages be burnt down.
 - f. Any eviction that had been carried out was lawful and in respect of individuals living outside the established boundaries of their villages and conducting activities within the game reserve.
 - g. The Government had not burnt any homesteads or individual properties in the registered villages.
15. In submissions, Mr. Mulwambo did strongly fault the Affidavits in support of the earlier Application for being fraught with misrepresentations and 'forgeries' in the Minutes that had purportedly authorized the filing of Reference No. 10 of 2017 and the present Application. It was his submission that he was unable to file an affidavit in reply within time as the State official that was due to avail material in proof of the above allegations and depose the affidavit had been taken ill as he travelled to Arusha for that purpose. He successfully applied to file 4 additional affidavits in respect of each of the 4 Applicants for purposes of furnishing appointment letters of the purportedly rightful Chairpersons of each of the respective villages. However, the affidavits that he did subsequently file furnished appointment letters of Village Executive Officers, as well as letters from the said Officers either denying participation in or the incidence of the meetings that authorized the present proceedings. Both categories of letters pertained to only three (3) of the Applicant Village Councils, leaving the allegations in respect of the Fourth Applicant uncontroverted. We propose to return to these affidavits later in this Ruling.
16. Be that as it may, learned Counsel did also argue that in so far as the Applicants had failed to prove that the evictions complained of had been carried out within the villages as opposed to Serengeti National Park, they had not established a *prima facie* case so as to warrant the grant of the interim orders sought. In support of this argument, we understood him to seek to make reference to a letter from one Rashid M. Taka dated 5th August 2017 that had been attached to all the

Affidavits in support of the Application and referred to in all the Affidavits in reply thereto. However, learned Counsel subsequently misdirected himself as to whether or not that letter had been duly translated from Kiswahili to English so as to bring it in conformity with Article 137(1) of the Treaty, before abandoning it altogether. He did, however, maintain his argument that no *prima facie* case had been established in the absence of proof that the evictions took place within the legally recognized boundaries of the Villages.

17. It was Mr. Mulwambo's contention that having negated the incidence of a *prima facie* case, it would be superfluous to consider whether there was irreparable injury or where the balance of convenience of the matter lay. In any event, in his view, the villagers could not have suffered irreparable injury if they were conducting their activities within the registered villages given that the evictions had been restricted to persons within the National Park. With regard to the balance of convenience, Mr. Mulwambo argued that it could not be convenient for the Court to allow the Applicants to continue grazing or living inside the National Park as this was destructive to flora and fauna, and could cause economic instability given its interference with economic activities. He accordingly prayed for the dismissal of the Application.

Applicants' Submissions in Reply

18. In reply, Mr. Deya maintained his position that the interim orders sought from the Court were in respect of evictions conducted within the 4 villages and not evictions carried out in the Serengeti National Park. He opined that, even if the letter that learned Counsel for the Respondent had sought to rely upon was found not to have been translated, the affidavit evidence encapsulated in paragraphs 16, 14, 16, and 16 of the respective Affidavits in support of the earlier Application was sufficient to prove the incidence of the impugned evictions in the deponents' villages. He faulted learned Respondent Counsel for purporting to attack the veracity of that evidence in the absence of an affidavit in rejoinder thereto yet he had had ample time to do so. Mr. Deya reiterated his clients' prayers for interim orders to accrue in respect of the impugned actions of the Respondent's agents and that the OCD Loliondo be summoned to appraise this Court on the status of the investigations into the actions complained of from the bar by learned Respondent Counsel.

Court's Determination

19. We have carefully considered the Applications before us, as well as their respective supporting affidavits. Even without recourse to the merits (or lack thereof) of the Respondent's allegations in respect of the veracity of the Affidavits in support of the earlier Application, it is abundantly clear that the said Affidavits do contain falsehoods or misrepresentations. Paragraph 2 of all 4 Affidavits wrongfully equates the deponents to village councils, notwithstanding the fact that in paragraph 1 of the same Affidavits all of the deponents had attested to being *male adults* and Chairpersons of the village councils depicted as the Applicants. In the Affidavits of Mssrs. Nekitio Victor Ledidi and Yohana Kasosi Toroge, the said deponents then go ahead to erroneously equate the Second and Third Applicants respectively to villages.

20. Obviously individual male adults such as the respective deponents in the impugned Affidavits cannot by any shade of imagination be equated to the village councils they purport to preside over, neither can village councils mean the same thing as villages. A look at the literal and legal meanings of those terms is instructive. The term ‘council’ literally refers to a group elected to govern a town or region.⁸⁹ On the other hand, section 3(1) of the Tanzanian Local Government (District Authorities) Act clearly draws a distinction between villages and village councils, referring to a village as ‘a village registered under this Act,’ while a village council is ‘in relation to a village, the village council of that village.’ On that premise, it becomes abundantly clear that a village council cannot be equated to an individual male adult as has been done in all 4 Affidavits in question, neither can it be tantamount to a village, as 2 of the deponents thereto purported to attest on oath.

21. This Court has had the occasion to consider the import of falsehoods in affidavits in *The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa*, EACJ Application No. 12 of 2015. It was held:

In our considered view, the core value of an affidavit as a document made on oath presupposes the veracity and truthfulness of the statements contained therein. Indeed, while rejecting an affidavit, the Supreme Court of Uganda upheld a decision of the Court of Appeal that had held the importance of affidavit evidence to be rooted in the fact that it is made on oath. See *Kakooza vs. Electoral Commission and another Election Petition No. 11 of 2007*. We are respectfully persuaded by the reasoning in that case. Applying the same analogy to the present facts, we find that it would undermine the importance of affidavit evidence to leave intact on the record a document purportedly made on oath that contains apparent falsehoods, even if such falsehoods were made on an innocent but mistaken application of the law.

22. We find no reason to depart from the foregoing decision. The question is what would be the implications of such a defect in an affidavit? Section 47(1)(c) of this Court’s Rules of Procedure provides for the expunging of all or part of a pleading that is an abuse of the court process. It reads:

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 –

- (a)
- (b)
- (c) is an abuse of the process of the Court.

23. We take the view that a false affidavit or false affidavit evidence is indeed an affront to court process in so far as it defeats the purpose of evidence on oath, an indelible and indispensable tenet of judicial proceedings. Indeed, Rule 21(5) of this Court’s Rules underscores the vitality of truthful affidavit evidence to the extent that it is quite emphatic on the deposition of affidavits in support of formal applications by ‘persons having knowledge of the facts.’ It reads:

Every formal application to the First Instance Division shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts...

24. To our minds, it cannot be said that false affidavits such as the ones in issue

⁸⁹ *Oxford English Mini Dictionary, Oxford University Press, 7th Ed., 2008, p. 122*

presently could have been deposed by persons with knowledge of the facts. Had the document in issue before us been a pleading in terms of a Notice of Motion, Statement of Reference or Response to a Statement of Reference, we could have considered expunging only such part of the pleading as is offensive or otherwise violates the procedural rules that pertain thereto. In the instant case, however, we are faced with affidavit evidence on oath that contains obvious falsehoods. A Court's duty to preserve the sanctity of the evidence that is adduced before it cannot be overstated. Authentic, unassailable evidence is the bedrock of a fair and just trial and cannot be sacrificed at the altar of lackluster, incoherent and false pleadings.

25. We are acutely aware of the lacuna in Rule 47(1) that seemingly obviates the Court's recourse to the remedies prescribed therein on its own motion, but as was held in *The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa* (supra), that mischief is curable by the indefatigable Rule 1(2) of the Rules. 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 the abuse of the process of the Court.

26. We do therefore strike out all the 4 Affidavits in support of the formal Application from the Court record in their entirety.

27. The question then would be whether the striking out of the Affidavits would obliterate the formal Application before us. Again, Rule 21(5) is instructive on this. We deduce from it a mandatory requirement for all formal applications filed in this Court to be supported by affidavits, albeit truthful ones. Thus, having expunged the 4 impugned Affidavits, it follows that the formal Application in respect of which they had been deposed remains unsupported by any affidavit and, to that extent, contravenes the mandatory provisions of Rule 21(5). We are fortified in the strict application of the Rules governing affidavits by a related approach in *Bombay Flour Mill vs. Chunibhai M. Patel* (1962) EA 803 as follows:

The strictures upon defective affidavits in Chandrika's case⁹⁰, however, as in the earlier cases there relied on⁹¹, are phrased in terms that are as general in their application as they are emphatic; and I do not think I would be justified in distinguishing affidavits in support of applications for leave to appear and defend, which applications are required by O. XXXVII, r. 3 (1) to be supported by affidavits of facts and in no other manner.

28. Quite clearly, the strict application of the rules governing affidavits would obtain regardless of the nature of the application in support of which an affidavit has been deposed. Nonetheless, for present purposes, it is now trite law that an application for an interlocutory injunction that is premised on a fatally defective affidavit would be unsustainable. Thus, in *Noormohammed Janmohamed vs. Kassamali Virji Madhani* (1952) 20 EACA 8, where a defective affidavit had been expunged, an appeal against the issuance of an interlocutory injunction premised on such an affidavit was upheld in the following terms:

In my view there was no admissible evidence before the Judge on which he could be satisfied that there was an immediate danger of these (furniture

⁹⁰ *Chandrika Prashad Singh & Others vs. Hira Lal & Others* (1924) AIR 312

⁹¹ *Noormohammed Janmohamed vs. Kassamali Virji Madhani* (1952) 20 EACA 8

and other chattels) being sold off...

29. We are satisfied, therefore, that the formal Application No. 15 of 2017, being unsupported by admissible affidavit evidence, contravenes the express provisions of Rule 21(5) of the Court's Rules and is, to that extent, incompetent and improperly before us. Further, in so far as there is no cogent evidence in support of the allegations stipulated therein, the said Application is unsustainable. We so hold.
30. Having so held, we now turn to the latter Application that was also argued before us. Having accepted the said Application on the court record with the consent of opposite Counsel, that Application would be deemed to have been formally admitted as such and, to that extent, could be considered a formal application within the precincts of the Rules. However, given the informal manner in which it was presented, and for completion this being a court of first instance, we deem it necessary to address ourselves to the Rules governing informal applications. Such informal applications are aptly provided for under Rule 21(7). It reads:
- The provisions of this rule shall not apply to –
- (a) applications made in the course of a hearing, which may be conducted informally;
 - (b) applications made by consent of all parties, which may be made by letter.
31. Having been presented informally at the onset of the hearing of Application No. 15 of 2017, rather than in the course of the hearing, it is reasonable to posit that the application under scrutiny presently does not quite fall within the ambit of Rule 21(7)(a) of the Rules. However, it was made by consent of the Respondent and certainly the Applicants did consensually make it, therefore it was made by consent of all the Parties herein. Consequently, it would be covered by Rule 21(7)(b) of the Rules. We must point out that the reference in that Rule to the possibility of an application thereunder being made by letter is not a mandatory requirement. We therefore take the view that the provisions of Rule 21(7)(b) sufficiently address the present scenario, where the contents of a letter were subsequently reduced into a written application in the anticipation that it would be filed within time to be entertained at the hearing of the formal Application. Thus the unfiled 'application' was informally presented by consent of the Parties.
32. Be that as it may, that latter Application *inter alia* sought the following order:
- This Honourable Court be pleased to hear the motion *ex parte* and grant urgent interim order addressed to the Respondent, to direct the Inspector General of Police and officers subordinate to him to cease and desist from harassing, intimidating or otherwise approaching and engaging the Applicants in this case, pending the hearing of Application No. 15 of 2017, which this Honourable Court has scheduled for Thursday 7th June 2018.
33. It was supplemented by the oral representations of learned Counsel for the Applicant. We reproduce them verbatim below for ease of reference:
- We plead that an interim order staying the evictions and asking or directing that the arbitrary arrests and intimidation be stopped pending hearing of this case on the merits would be an apposite order and it is in that context my Lords, that in the additional elements brought by the

notice of motions that we filed today, we seek the urgent interim order, addressed to the Respondent the learned Attorney General to direct the Inspector General of Police and officers subordinate to him to cease and desist from harassing, intimidating or otherwise approaching or engaging the applicants in this case with regard to the issues in this case and that issues if any can be raised by the learned Attorney General by way of additional pleadings, supplementary pleadings in the course of this case.

34. In our view, the sum effect of the foregoing statements is to present an application for interim orders before this Court, pending the determination of Reference No. 10 of 2017. Though not the most astute *modus operandi* for an application as convoluted as an application for interim orders, we find nothing in the Court's Rules that obviates this course of action (with consent of the parties) given the express provisions of Rule 21(7)(b). It is, therefore, to the merits of the latter Application before us that we now revert.
35. The grant of interim orders by this Court is governed by Article 39 of the Treaty. It reads:

The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. Interim orders and other directions issued by the Court shall have the same effect *ad interim* as decisions of the Court.

36. The foregoing Treaty provision has since been buttressed by numerous decided cases that have extensively considered the principles that inform the grant of interim orders by courts. We are alive to the more recent decisions of this Court that have underscored the demonstration of a serious triable issue by an applicant (rather than the establishment of a *prima facie* case) as one of the considerations taken into account in an application for interim orders. See *British American Tobacco (U) Ltd vs. Attorney General of Uganda*, EACJ Application No. 13 of 2017 and *FORSC & Others vs. Attorney General of the Republic of Burundi & Another*, EACJ Appl. No. 16 of 2016. The rationale for this position of the law is by no means whimsical. It is grounded in the sound preposition espoused in the case of *American Cyanamid Company vs. Ethicon Limited* (1975) AC 396 that courts faced with an application for an interlocutory injunction should be satisfied that the claim was not frivolous or vexatious but, rather, that there was a serious question to be tried; they should not attempt to resolve questions of evidence, as would be necessary in the determination of 'a *prima facie* case with probability of success', as those were matters to be dealt with at trial.
37. We hasten to add that the foregoing position does not negate the applicability of the principles of irreparable injury or balance of convenience to applications for the grant of interim orders or injunctions. Indeed, it is trite law that 'if damages in the measure recoverable at common law would be an adequate remedy and a respondent would be in a position to pay them, no interim injunction should normally be granted'. See *American Cyanamid Company vs. Ethicon Limited* (1975) AC 396 at 408. It is also well settled law that where an application for an interlocutory injunction cannot be determined on the existence of a serious triable issue or the adequacy of damages to recompense an applicant for possible injury, the court shall decide the matter on a balance of convenience. See *East African Industry vs. True Foods* (1972) E.A. 420. Stated differently, an interlocutory

injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury that could not adequately be compensated by an award of damages. Where a court is in doubt as to the incidence of a serious triable issue or the adequacy of damages to atone the foreseeable injury, it will decide an application on the balance of convenience. See *Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 3 Others EACJ Application No. 1 of 2006* and *Timothy Alvin Kahoho vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2012*.

38. As we did observe in *British American Tobacco (U) Ltd vs. Attorney General of Uganda* (supra), at the stage of an application for interim orders the court need only be satisfied that there is a serious question to be tried on its merits. A court considering such an application need not interrogate the merits of the substantive suit in detail but, rather, to a limited extent only. It is sufficient at that stage for a court to deduce a cause of action where a claim is substantial and not frivolous, vexatious or misguided. See *Blackstone's Civil Practice 2005*, para. 37.19 – 37.20, pp. 392, 393, *FORSC & Others vs. Attorney General of the Republic of Burundi* (supra), *American Cyanamid Company vs. Ethicon Limited* (1975) AC 396, and *The Siskina* (1979) AC 210. In that case⁹², it was further held that under EAC Community law a cause of action is considered to exist where 'the Reference raises a legitimate legal question under the Court's legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights.'⁹³ We find no reason to depart from this position.

39. Turning to the matter before us, paragraphs 13 and 14 of the Reference encapsulate the dispute between the Parties as follows:

13. That the Respondent has not adhered to nor followed the legal recourse as provided under the laws regarding neither transfer of ownership of land nor the change of land uses pursuant to the laws presently in force in the United Republic of Tanzania.

14. That the acts, omissions and conduct of the Respondent herein are a violation of the Treaty for the Establishment of the East African Community in that:-

- (a) The Respondent is in complete contravention of Article 6(c) of the Treaty for the Establishment of the East African Community.
- (b) The Respondent is in contravention of Article 6(d) of the Treaty for the Establishment of the East African Community.
- (c) The Respondent is in contravention of Article 7(2) of the Treaty for the Establishment of the East African Community.
- (d) The Respondent is in contravention of Article 15(1) of the Protocol on the Establishment of the East African Community Common

⁹² The *British American Tobacco (U) Ltd* case

⁹³ See *Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of Kenya & 3 Others* (supra) and *Timothy Alvin Kahoho vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2012*.

Market.

- (e) The Respondent is illegally evicting the Applicants' members and residents, burning homes, confiscating livestock, threatening, interfering with the liberty of the Applicants' members and residents by locking them up and vandalizing their private property.

40. Conversely, the Response to the Reference inter alia highlighted the following defence:

10. That the contents of paragraphs 10, 11, 12 and 13 of the Reference are denied and the Applicants are put to strict proof thereof. The Respondent states that evictions are lawful, the villages have been designated areas for reallocation and the exercise is being performed in compliance with the laws of the land.

11. That the contents of paragraph 14 of the Reference are disputed and the Applicants are put to strict proof thereof.

41. As was quite rightly stated by both Counsel in submissions, the gravamen of the dispute in Reference No. 10 of 2017 is the legality of the actions complained of by the Applicants viz their alleged property rights. The legality of the evictions is, in our view, a formidable legal question that falls squarely within the ambit of Article 30(1) of the Treaty as an issue that this Court may interrogate. We reproduce Article 30(1) for ease of reference:

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

42. Consequently, without recourse to the merits thereof, it is apparent on the face of the Reference that it presents a substantial cause of action. We are, therefore, satisfied that the informal application before us raises serious triable issues. We so hold.

43. Turning to the question of irreparable injury, we have carefully considered the rival submissions of both Parties on this issue. As we did acknowledge earlier in this Ruling, where damages would be adequate recompense and a respondent would be in a position to pay them, no interim injunction would normally be granted. In that regard, we rely on the following definition of damages in the *Oxford Dictionary of Law*, Oxford University Press, 2009 (7th Edition), p. 246:

General damages are given for losses that the law will presume are the natural and probable consequence of a wrong. General damages may also mean damages given for a loss that is incapable of precise estimation such as pain and suffering or loss of reputation. In this context special damages are damages given for losses that can be quantified.

44. *Blackstone's Civil Practice 2005*, para. 37.22, p. 394 postulates (quite correctly, in our view) that damages would be inadequate where:

- a. The defendant is unlikely to be able to pay the sum likely to be awarded at trial.
- b. The wrong is irreparable e.g. loss of the right to vote.
- c. The damage is non-pecuniary e.g. libel, nuisance, trade secrets.
- d. There is no available market.

- e. Damages would be difficult to assess. Examples are loss of goodwill, disruption of business and where the defendant's conduct has the effect of killing off a business before it is established.
45. Obviously the foregoing list is by no means conclusive. It is simply a reasonable guide for the courts. In the instant case, it was deposed in support of the Applicants that residents of the registered villages continued to suffer an onslaught of harassment and intimidation intended to secure the withdrawal of the impugned Application, as well as the Reference. The Applicants thus sought interim orders that would halt further 'engagements' by public officials with the residents pending the determination of the Application and the Reference. We do note, however, that to the extent that the latter Application was argued together with the impugned earlier Application, the prayer for interim orders pending the earlier Application's determination was rendered redundant. Nonetheless, the orders sought pending the determination of the Reference remain valid. It then becomes necessary to interrogate whether or not the claim in the latter Application for restraining interim orders is justified. It is to the evidence on record that we turn.
46. Our construction of the sole affidavit in support of the latter Application is that it affirms the incidence of the eviction of persons, burning of houses, arbitrary arrests and confiscation of livestock and other properties; attests to harassment and intimidation of some officials of the village councils and some residents of the villages for attending the meeting of 18th August 2017 and endorsing the Minutes thereof; and establishes that whereas the meeting that was organized by Third Applicant was solely attended by the said village council, a similar meeting organized by the First Applicant was also attended by some residents of Ololosokwan village, but the Village Executive Officer was not in attendance. It certainly paints a picture of widespread social upheaval in Ololosokwan village and an attempt to stifle village representatives' and/or the affected persons' access to justice.
47. Conversely, the Respondent's Affidavits in Reply alluded to the Wildlife Conservation Area in issue in the present dispute having no relation whatsoever with the registered villages; asserted that any evictions were legally conducted in respect of individuals living outside the established boundaries of their Villages and conducting activities within the game reserve; and averred that no orders had been issued by any State Authority for the burning of houses and or destruction of properties within the registered villages, neither had the Government carried out such acts. In a nutshell, the Respondent underscored the legality of the evictions and denied responsibility for the houses burnt or property destroyed.
48. Whereas the evictions, destruction and loss of property and arbitrary arrests that characterized the social upheaval in that village could, if subsequently found to have wrongfully happened at the instance of the Respondent, be compensated by an award of damages; we are not persuaded that an award of damages in itself would be adequate recompense for the magnitude of loss that they represent. On the other hand, the stifling of people's right to access justice, if subsequently proven, does appear to us to fall within the category of wrongs that might occasion irreparable injury given that once that right is lost in relation to specific facts and given limitation provisions, it may not be readily available at a later

date. In the instant case, a forced withdrawal of the Reference could decisively avert the Applicants' access to justice in this matter. We are inclined, therefore, to consider this latter eventuality (aversion of access to justice) in the category of irreparable injury. Consequently, our finding on the irreparability of the aversion of access to justice notwithstanding, given our doubts as to the adequacy of damages to recompense the affected persons for loss of land, property and arbitrary detention; the circumstances of this case make it necessary to consider the balance of convenience in this matter.

49. The essence of the balance of convenience in applications such as the one before us is perhaps most appositely captured in the following exposition from the *American Cyanamid* case:

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.

50. That case did also posit that 'where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.'⁹⁴The nature of the status quo under reference therein was clarified as follows in *Garden Cottage Foods vs. Milk Marketing Board (1984) AC 130* (Lord Diplock):

The *status quo* is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion.

51. Thus, the applicable status quo *ante* is the state of affairs before a respondent commenced the conduct complained of by the applicant, unless there has been unreasonable delay in filing the application for interim orders, in which case it would be the state of affairs immediately before the application. Therefore it behoves an applicant for interim orders to act quickly. See *Blackstone's Civil Practice 2005, para. 37.29, p. 397*.

52. We did carefully listen to the rival submissions of both Parties as reproduced earlier in this Ruling. On the face of the record, the matter to be gravely weighed by this Court is the livelihood, security and safety of a multitude of affected villagers and families viz the preservation of flora and fauna and unexplained economic instability. The Applicants' claim to protection from the violation of their property rights, as well as the right to access justice, would be weighed

⁹⁴ *American Cyanamid* case, at p.408

against the Respondent's right to implement the Tanzanian natural resources laws to protect the Wildlife Conservation Area from unlawful human activity, as well as its duty to ensure compliance by all persons with the Tanzania legal regime generally. We are constrained to add that compliance with Tanzanian laws does extend to the respect of citizens' right to access neutral arbiters for the settlement of their concerns. Contrary to the assertion of Learned Counsel for the Respondent, the weighty issue hanging in balance presently has more to do with the *justice* of the matter, rather than mere *convenience*. Indeed, in *Cayne vs. Global Natural Resources PLC (1984) 1 ALLER 225* the court asserted that it was not mere convenience that needed to be weighed, but the risk of doing an injustice to one side or the other.⁹⁵

53. On that premise, we ask ourselves the question: in the instant case would it be just in the interim to abandon to the dictates of law enforcement by the State, residents of 4 villages at the risk of eviction from parcels of land which they have historically occupied and from which they derive their security of tenure and livelihood OR would it be more just to temporarily defer the evictions by the State that, though commenced have not yet been concluded, pending the determination of the legal remedies sought by such citizens? With utmost respect to well acknowledged environmental considerations, would the injustice to flora and fauna, in the short term, be graver than the injustice to the social existence of communities of human beings?
54. We have carefully considered the totality of the circumstances of this case. We take the view that, in the short term, the important duty to avert environmental and other ecological concerns pales in the face of the social disruption and human suffering that would inevitably flow from the continued eviction of the Applicants' residents. It is undoubtedly apparent to us that the justice of the matter dictates a temporary intervention in favour of the residents' representatives, to wit, the Applicants. That Party stands to suffer significantly more injustice should we decline to grant a temporary injunction in this matter than does the opposite party, therefore the balance of convenience is heavily skewed in its favour. We so hold.
55. Having so held, quite clearly the factors informing the balance of convenience in this matter are not evenly balanced so as to warrant recourse to the preservation of the status quo as a matter of prudence, as was opined in the *American Cyanamid* case.⁹⁶ They are significantly skewed in favour of the Applicants. Nonetheless, had we considered a preservation of the status quo, as was held in *Garden Cottage Foods vs. Milk Marketing Board (supra)*, that status quo that we would have sought to preserve would be the status quo *ante* that is applicable to applications for interlocutory injunctions, which is 'the state of affairs before a respondent commenced the conduct complained of by the applicant.' In this case, that would be the state of affairs that pertained prior to the commencement of the alleged eviction by the Respondent. Stated differently, a grant of the interim orders sought in this case would in effect forestall the continued eviction and harassment of the Applicants' residents until the determination of the Reference. We so hold.

⁹⁵ *Blackstone's Civil Practice 2005*, para. 32.27, pp. 396, 397.

⁹⁶ *Ibid.*

56. Before we take leave of this Application, we deem it necessary to consider the evidential worth of the 4 additional affidavits that were filed by the Respondent. We construed them to have sought to discredit the authority of the Chairpersons of the Applicant village councils to convene the meetings that apparently sanctioned the Reference and the present proceedings. Learned Respondent Counsel appeared to have sought to rely on these affidavits to buttress his contention that there were ongoing investigations about fraud and misrepresentation in the procurement of the decision to institute the said legal action. However, obviously the investigations were not yet complete when this Application was heard therefore the purported proof of fraud and misrepresentation was premature and superfluous.
57. In any event, it would appear that the affidavits were themselves self-defeating in that regard. By way of illustration, whereas in justifying his application to file them, Mr. Mulwambo had suggested that the chairpersons cited in the now impugned Affidavits in support of the earlier Application had impersonated the rightful chairpersons of the village councils in question; the letters that he did furnish through the additional affidavits pointed to the contrary. It transpired that a one Leni Emil Sayingo that Mr. Mulwambo had alluded to as being the rightful Chairperson of the Second Applicant deposed an affidavit attesting to simply being the Village Executive Officer instead. Further, the additional affidavits did appear to corroborate Ms. Tome's assertions of harassment and intimidation in her affidavit in support of the informal application. Perhaps more importantly, having struck down the Affidavits the deponents of which are being investigated, we do not readily discern the evidential value of the Respondent's additional affidavits to the present application.

Conclusion

58. In the result, having held as we have in this Ruling above, we do hereby allow the subsisting Application with the following Orders:
- a. An interim order doth issue restraining the Respondent, and any persons or offices acting on his behalf, from evicting the Applicants' residents from the disputed land, being the land comprised in the 1,500 sq km of land in the Wildlife Conservation Area bordering Serengeti National Park; destroying their homesteads or confiscating their livestock on that land, until the determination of Reference No. 10 of 2017.
 - b. An interim order doth issue against the Respondent, restraining the office of the Inspector General of Police from harassing or intimidating the Applicants in relation to Reference No. 10 of 2017 pending the determination thereof.
 - c. The costs hereof shall abide the outcome of the Reference. We direct that it be fixed for hearing forthwith.

It is so ordered.

D. Deya, J. Kambore & N. Ndeki, Counsel for the Applicants
M. Mulwambo & A. Mrisha for the Respondents

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First Instance Division

Application No. 18 of 2017
(Arising from Reference No. 11 of 2017)

**Civil Aviation Authority v Uganda Revenue Authority,
The Attorney General of the Republic of Uganda**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ & A. Ngiye, J
September 27, 2018

Intervener - Judicial discretion - Whether Intervener had immediate direct interest in the litigation - No enlargement of issues - Submission limited to facts and law parties not raised by the parties

Article 40 of the Treaty - Rules: 21, 36(2) (e) East African Court of Justice Rules of Procedure, 2013

In a rent dispute instituted by the Applicant for the payment of rent by Uganda Revenue Authority, the First Respondent for office space at Entebbe International Airport, the Second Respondent rendered a decision against the First Respondent herein on 4th September 2017. Dissatisfied, the First Respondent filed Reference No. 11 of 2017 challenging the legality of the decision alleging that it violated the EAC Treaty and the East African Community Customs Management Act.

Through the current application, the Applicant, the Civil Aviation Authority sought leave for enjoinder as an Intervener in the Reference. They claimed to have an interest in the subject matter as it raised the question whether a statutory mandate exercised by the First Respondent under the EAC Customs Management Act, 2004 hindered the Applicant's power to levy and collect rent for use and occupation of gazetted customs areas at Entebbe International Airport.

The First Respondent opposed the application claiming: there was no evidence supporting the Applicant's statement of interest as required in Rule 36(2)(e); and that Applicant's intervention would not assist the Court in making a determination on whether the Second Respondent's decision was lawful as it would only enlarge the issues and delay the finalisation of the Reference.

The Second Respondent's supported the Applicant's request averring that the First Respondent would suffer no prejudice if the Application was allowed.

Held

1. Rule 36(4) of the Court's rules provides that the Court may the Court allow an application for leave to intervene if it is satisfied that the application is found to be justified. Nonetheless, the admission or non-admission of an intervener to any judicial proceeding is a matter of discretion, if the Court considers that the interests of justice would be served. Discretion must be exercised in a judicious manner based on the facts placed before the Court and not on extraneous matters which, if looked at objectively, would cause injustice to one party.

2. The outcome of the Reference 11 of 2017 will have a direct impact on the Applicant and the remedies sought by the First Respondent have a bearing and direct effect on the Applicant's supposed legitimate expectation of payment rent for use of its space at Entebbe International Airport.
3. Article 40 of the Treaty restricts an intervention to submissions in respect of evidence in support of one or the other party to the suit. The Court has ultimate control over an Intervener's intervention may only take only what it considers relevant from an Intervener's submissions.
4. An Intervener may provide its perspective on questions of fact adduced by one party viz the other and may address the law applicable to the facts that they seek to substantiate but, they are not be at liberty to address the court on issues of law as between the Parties to the Reference. Therefore in this instance, the Applicant's participation shall be limited to such support of the Second Respondent as is propounded by the Court's Rules.

Cases Cited

FORSC & Ors v Burundian Journalists' Union & Anor [20012-2015] EACJLR 510, Application No. 2 of 2014
 Hon. Fred Mukasa Mbidde v The Attorney General of Burundi & Anor, EACJ Application No. 6 of 2018
 Laurence Nathan Levy v The State of Victoria & Ors (1997) 146 ALR 248

Editorial Note: Reference 11 of 2017 was withdrawn by consent of the parties on 22nd November 2017

RULING

A. Introduction

1. On 4th September 2017, the Attorney General of Uganda ("the Second Respondent") rendered a decision against the Uganda Revenue Authority ("the First Respondent") in favour of the Civil Aviation Authority of Uganda ("the Applicant"), in a dispute as to payment of rent by the former for the occupation and use of office space at Entebbe International Airport.
2. The First Respondent subsequently filed *Reference No. 11 of 2017 The Uganda Revenue Authority vs. The Attorney General of Uganda* in this Court, challenging the legality of that decision on account of its alleged violation of the Treaty for the Establishment of the East African Community ("the Treaty") and the East African Community Customs Management Act ("the EACCMA").
3. By its Notice of Motion dated 5th December, 2017 and filed on 11th December, 2017, the Applicant has since sought leave, pursuant to the provisions of Article 40 of the Treaty and Rules 21 and 36 of the East African Court of Justice Rules of Procedure 2013 ("the Rules"), to be joined as an intervener in the Reference in opposition to the case advanced by the First Respondent.
4. The Application is supported by the following grounds spelt out in the Notice of Motion:
 - a) Reference No. 11 of 2017 is grounded on a decision of the Second Respondent in favour of the Applicant enjoining the First Respondent to pay to the latter rent for spaces occupied and used by the Customs arm of the First Respondent at Entebbe International Airport.
 - b) The First Respondent challenges the said decision as being unlawful and in contravention of the Treaty thus directly questioning the mandate of

the Applicant.

- c) The Applicant has an interest in the subject matter and the result of the Reference in so far as it raises an important question as to whether a statutory mandate exercised by the First Respondent under the East African Community Customs Management Act, 2004 would hinder the Applicant's power to levy and collect rent for the use and occupation of gazetted customs areas at Entebbe International Airport.
 - d) This Application will not prejudice any of the Parties to the Reference.
5. The Application was supported by an Affidavit deposed by Mrs. Sarah Ssebunya, the thrust of which is as follows:
- a) As part of its functions as established under the Act, the Applicant is responsible for the establishment, maintenance, development, operation and ownership of aerodromes, and has all powers pertaining to a legal person and to do all things necessary for the execution of its functions, including, but not limited to letting out assets of the intending Intervener and entering into contracts.
 - b) The Applicant has the mandate to prescribe charges and fees to be charged in respect of services and facilities provided by the intending Intervener, more specifically, the mandate to provide suitable facilities based on terms and conditions under which facilities are made available for purposes of customs, immigration and health.
 - c) The First Respondent is presently an occupant of the Applicant's aerodromes at Entebbe International Airport.
 - d) In or about 2010, the Government of Uganda, through its Ministry of Finance, paid up rent dues for all Government agencies including the First Respondent for occupation and use of premises at Entebbe International Airport, but the First Respondent has since reneged on further rental payments to the Applicant despite remaining in occupation and use of the airport premises.
 - e) On 23 September 2011, the Commissioner Customs gazetted Entebbe International Airport and its precincts (including aerodromes over which the Applicant has power and mandate as the aviation authority) as customs area.
 - f) During the use and occupancy by the First Respondent of the customs area as described above, the Applicant prescribed and severally demanded rent from the First Respondent in vain, neither did the said Party respond to the Applicant's subsequent request to formalize the parties' tenancy arrangements.
 - g) The First Respondent has not complied with the Applicant's demands for rent, arguing that the premises in issue are gazetted for them to carry out a statutory function under the East African Community Customs Management Act, 2004 (EACCMA) and they are relying on sections 12(1)(b) and 253 of the said Act.
 - h) The Solicitor General has in several legal opinions to the Applicant confirmed that the First Respondent is obliged to pay rent for use and occupation of premises at Entebbe International Airport.
 - i) The subject matter now before this Court directly concerns and affects

the interest of the intending Intervener who asserts that the complaints of the First Respondent in the Reference No. 11 of 2017 are directly against the actions of the intending Intervener, therefore, the Applicant has a significant interest in the outcome.

- j) The outcome of the decision of this Court is of great importance to the Applicant who is interested in making submissions and providing its own evidence to the effect that the decision sought to be challenged is not contrary to the Treaty.
6. Conversely, in an affidavit in Reply deposed by Mr. Dickson C. Kateshumba and objecting to the Application, it was averred as follows in a nutshell:
- a) The First Respondent sued the Attorney General of Uganda, in Reference No. 11 of 2017, on grounds that his decisions in favor of the Applicant were deeply unfair to the First Respondent and its operations at Entebbe International Airport.
 - b) The Attorney General has enough legal capacity to defend his office and all his decisions, including the decision that gave rise to the Reference No. 11 of 2017 from which this Application arises.
 - c) The intending Intervener does not show that the defense by the Second Respondent will compromise the interest of her organization and thus this Application is not justified.
 - d) The rental charges by the intending Intervener are illegal, unjust and contrary to the provisions of the Treaty.
 - e) This Court has discretion to bar the intending Intervener from intervening in the proceedings as their role will disturb, delay, distort and duplicate the proceedings given that it does not offer any additional valuable facts and law in the Application as all key facts are readily covered in the Reference No. 11 of 2017.
 - f) The issues in the Reference are simple, clear and can easily be decided without any outside help, and the purported issues proposed by the Applicant are outside the scope of the Court as the same do not relate to the interpretation of the Treaty.
7. On his part, the Second Respondent had no objection to the Application. As was deduced from the Affidavit in Reply deposed by Mr. Oburu Jimmy, Principal State Attorney at the Attorney General's Chambers, the Applicant purportedly has the statutory duty to promote the safe, regular, secure and efficient use and development of civil aviation inside and outside Uganda, and the Reference thus had far reaching implications on the functions of the Applicant under the Civil Aviation Act. He asserted that the Applicant as an intervening party would offer assistance to this Court in terms of matters of fact and evidence that they would wish to produce before Court.

B. Representation

8. At the hearing of the Application, the Applicant was represented by Mr. Michael Mafabi; Mr. George Okello and Ms. Barbara Ajambo represented the First Respondent, while Ms. Christine Kaahwa and Ms. Jacqueline Amsugut appeared for the Second Respondent.

C. Applicant's Submissions

9. It was argued for the Applicant that his interest in *Reference No. 11 of 2017* was motivated by the fact that he is charged *inter alia* with the responsibility to establish, maintain, develop, operate and own aerodromes including the space occupied and used by the First Respondent at the Entebbe International Airport and which is in issue in the said Reference, a matter of contention between itself and the First Respondent. Thus, in *Reference No. 11 of 2017*, the First Respondent challenges the Second Respondent's decisions by way of advice which crystalized in the latest decision of 4th September 2017 as being contrary to the Treaty.
10. It was further contended by the Applicant that the remedies sought by the First Respondent in the Reference would have a bearing on its legitimate expectation of rental payments for the use of its spaces. Thus the Applicant is interested in supporting the Second Respondent's case that the decision sought to be challenged is not contrary to the Treaty, neither does its statutory mandate to levy and collect rent for the use and occupation of gazetted customs areas contravene of the Treaty. The Applicant seeks to assist in clarification of the issues in the Reference without necessarily enlarging them given that it would be restricted to evidence that is on record therein.
11. Lastly, it was submitted for the Applicant that no prejudice or injustice would be suffered by the First Respondent if the Application was allowed, neither did the First Respondent, in its response, allude to any such injustice or prejudice. The Applicant referred this Court to the case of *Hon. Fred Mukasa Mbidde vs. The Attorney General of the Republic of Burundi & Another, EACJ Application No. 6 of 2018* where this Court allowed an application for intervention on the premise that it deduced no injustice or prejudice whatsoever to be suffered by the respondent in the event the application was allowed.
12. On the orders sought, the Applicant stated that it is not bringing new issues for determination because it is wholly supportive of the Second Respondent's case and is only intent on protecting its interests. Further, it was proposed that it is in the ultimate interest of the Applicant that the Reference is determined quickly without any distortions.

D. First Respondent's Submissions

13. On the other hand, the First Respondent vide its written submissions vigorously opposed the Application.
14. First, the First Respondent submitted that the Application fell outside Rule 36(2)(e) of the Rules as there was lack of evidence on the part of the Applicant supporting her statement of interest and that there was no exceptional or technical contribution that the Applicant sought to bring that the Court could not obtain from the existing Parties to the Reference. The First Respondent contended that an application for intervention should not be granted where the Parties to the matter could appropriately and sufficiently present their cases before Court and buttress the interests of the person seeking to intervene; arguing that granting the Application would merely lead to the duplication and enlargement of the issues in the Reference and constitute a wastage of judicial time and resources.
15. The First Respondent relied on the case of *Laurence Nathan Levy vs. The State of*

Victoria & Others (1997) 146 ALR 248, where it was held:

Of course, if the intervener's submission is merely repetitive of the submission of one or other of the parties, efficiency would require that intervention be denied. ... In my opinion every question that is at issue in this case can be adequately and completely argued and determined by Counsel for the parties, with the assistance they will receive from counsel for the Commonwealth. In those circumstances, I see no necessity to grant leave to the State of South Australia and Victoria. ... there is no necessity for them to appear, and no need for us to hear them. There are sufficient representatives here to put that view and to oppose it. An appearance by the states would be utterly useless."

16. It was the First Respondent's contention that this Application would not assist the Court in the determination of whether the decision made by the Second Respondent is lawful, but rather would result in the enlargement of the issues thus defeating the ends of justice.
17. Lastly, the First Respondent invited this Court to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which the intervention by the Applicant would cause to the First Respondent and prayed that this Application be dismissed with costs.

E. Second Respondent's Submissions

18. At the hearing, Mrs. Christine Kaahwa, Counsel for the Second Respondent, submitted that the Second Respondent associated itself with the Application given that the requirements set out in Article 40 of the Treaty and Rule 36 of the Rules had been met, including the demonstration of legal interests that are likely to be substantially affected by the outcome of this matter. She added that the discretion lay with this Court to allow the Applicant to proceed as an intervener.
19. It was the Second Respondent's contention that there is no prejudice that would be suffered by the First Respondent if the Application was allowed.

F. Court's Determination

20. As this Court has invariably held, applications for intervention in any matter before it are substantively governed by Article 40 of the Treaty, while Rules 21 and 36 of the Rules outline the procedure entailed therein. We reproduce these provisions for ease of reference.

Article 40:

A Partner State, the Secretary General or a resident of a Partner State who is not a party to a case before the Court may, with leave of the Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case.

Rule 21(1):

Subject to sub-rule (4) of this Rule, all applications to the First Instance Division shall be by motion, which shall state the grounds of the application.

Rule 36:

- (1) An application for leave to intervene under Article 40 of the Treaty and an application for leave to appear as *amicus curiae* shall be by notice of

motion.

- (2) An application under sub-rule (1) shall contain:
 - (a) A description of the parties;
 - (b) The name and address of the intervener;
 - (c) A description of the claim or reference;
 - (d) The order in respect of which the intervener or *amicus curiae* is applying for leave to intervene;
 - (e) A statement of the intervener's or *amicus curiae*'s interest in the result of the case.
- (3) The applicant shall serve on each party who shall, within thirty (30) days, file and serve a response.
- (4) If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time within which the intervener or *amicus curiae* may submit a statement of intervention and the Registrar shall supply to the intervener or *amicus curiae* copies of the pleadings.

21. Rules 21(1) and 36(1) provide for all applications before this Court to be instituted by way of a Notice of Motion that outlines the grounds on which such applications are premised. However, for the purpose of this Ruling, we shall examine the provisions in Rule 36(2)(e) and (5) only. Having reproduced them earlier in this Ruling, we do not deem it necessary to do so here.

22. Rule 36(2)(e) and (5) highlights the parameters against which an application for leave to appear as an intervener may be allowed. Whereas Rule 36(2)(e) necessitates the demonstration of an interest in the outcome of the case in which an applicant seeks to appear, Rule 36(5) prescribes the additional test that the intervention will not enlarge the issues in the case as a basis for the grant of leave to appear as intervener.

23. Upon close scrutiny of the pleadings filed by the Parties and having heard the rival arguments of the Parties at the hearing, it appears that compliance of this Application in terms of Article 40 of the Treaty and Rules 21(1) and Rule 36(1) of the Rules is not in issue. It is not disputed by either the Applicant or First Respondent that applications for intervention, such as the present one, are brought by way of Notice of Motion. Indeed, not only does Rule 21(1) prescribe a Notice of Motion as the manner in which all applications before this Court may be brought; Rule 36(1), which explicitly addresses applications for intervention, does prescribe the same procedure. The only issue in contention between the Parties as far as the procedure to be followed is concerned appears to gravitate around the statement of the intervener's interest in the result of the case.

24. Having so stated, what is in issue before us is whether this Application is competent in terms of Rule 36(2)(e) and (5) of the Rules. We have carefully considered the rival submissions before us and we must begin by addressing our minds to the fact that the admission or non-admission of an intervener to any judicial proceeding is a matter of discretion. In that regard, the Court has the discretion to allow any intervention if it considers that the interests of justice would be served.

25. This discretion is codified in Rule 36(4) which provides that if an application for leave to appear as an intervener is found to be "justified", the Court shall allow the application and fix the time within which the statement by the intervener

should be filed. Discretion, as we understand it, must always be exercised in a judicious manner based on the facts placed before the Court and not on extraneous matters which, if looked at objectively, would cause injustice to one party. See *FORSC and Others vs. Burundian Journalists' Union and Another*, EACJ Application No. 2 of 2013.

26. In *Hon. Fred Mukasa Mbidde* (supra), intervention was considered to be appropriate where:

- (1) The nonparty has a direct and immediate interest in the litigation;
- (2) Intervention will not enlarge the issues in the case; and
- (3) The reasons for intervention outweigh any opposition by the existing parties.

We are most respectfully persuaded by the position expounded therein.

27. Indeed in *Laurence Nathan Levy vs. The State of Victoria & Others* (supra), due emphasis was placed on the grant of an application for leave to intervene where an applicant demonstrated a direct interest in the outcome of a case. It was held:

“The legal interests of a person may be affected in more indirect ways than by being bound by a decision. They may be affected by operation of precedent – especially a precedent of this Court – or by the doctrine of *stare decisis*. ... Ordinarily, such an indirect and contingent affection of legal interests would not support an application for leave to intervene. But where a substantial affection of a person’s legal interest is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied. Nothing short of such an affection of legal interests will suffice. ... Jurisdiction to grant leave to intervene to persons whose legal interests are likely to be substantially affected by a judgment exists in order to avoid a judicial affection of such a person’s legal interests without that person being given an opportunity to be heard.”

28. We are most persuaded by the reasoning of the Court in that case. In the Application before us, it was argued by learned Counsel for the Second Respondent that the Applicant’s legal claim to and interest in rental payments for the spaces ‘leased’ to the First Respondent was delineated and reinforced by the Second Respondent’s legal advice, which decision was the issue in contention in the Reference. Thus, we understood Ms. Kaahwa to argue that the Applicant’s said legal interest would be substantially affected by a contrary decision by this Court hence the need for the Applicant to be granted leave to intervene and present its intrinsic interests in that regard. That position was reinforced by the Affidavit of Sarah Sebunya that clearly outlined the Applicant’s legal basis for its claim for rental arrears.

29. On the other hand, although the First Respondent relied upon the decision in *Laurence Nathan Levy vs. The State of Victoria & Others* (supra) that “an indirect affection or legal interest enlivens no absolute right to intervene”, the said Respondent did not sufficiently demonstrate why it deemed the Applicant’s interest in the outcome of the Reference to have been an indirect, rather than direct, legal interest. In the Affidavit of Reply deposed by Mr. Kateshumba the First Respondent simply attested to the issues for determination being simple and straightforward, and capable of resolution by the Court without the Applicant’s

intervention.

30. We have carefully considered the Notice of Motion and find a Statement of Interest in paragraphs C1-4 therein. It is clear to us that the outcome of the Reference before the Court has, with or without intervention, a direct impact on the Applicant. It is not open to doubt that the remedies sought by the First Respondent have a bearing and a direct effect on the Applicant's supposedly legitimate expectation of payment for use of its spaces at Entebbe International Airport. Needless to say, it is not the Second Respondent who is likely to bear the brunt of a decision in favour of the First Respondent in the Reference. Indeed, the First Respondent does concede in submissions that "the case arose from menacing demands for rent by the Applicant from the First Respondent, for the latter's occupancy and use of aerodromes at Entebbe International Airport for customs purposes."
31. In arriving at this decision, we are mindful of the fact that, a Court faced with an Intervener's statement may only take what it considers relevant from such an intervener in light of Article 40 of the Treaty, the ultimate control over an Intervener's intervention remaining with the Court itself.
32. Indeed, in *Hon. Fred Mukasa Mbidde (supra)*, this Court held:

"Suffice to note that Article 40 restricts the intervention of an intervener to submissions in respect of evidence in support of one or another of the parties, meaning an intervener may provide his/her/its perspective on questions of fact adduced by one party viz the other(s). It is, therefore, to that scope of intervention that the statement of intervention in reference in Rule 36(4) would be restricted. ... Secondly, whereas Article 40 appears to restrict the role of an intervener to questions of fact, an *amicus curiae* would appear to be mandated to address the court on question of law and fact. In our considered view, this is not to say that an intervener may not address the court on the law applicable to the facts that s/he seeks to substantiate, but s/he would not be at liberty to address the court on issues of law as between the Parties to the Reference."

We do respectfully abide by that position.

33. The issue of an exceptional or technical contribution raised by the First Respondent is, in our view, not relevant in this case. Only intended *amicus curiae* would be required to show his expertise in the matter and demonstrate that he would be of any assistance to the court in resolving the dispute before it. Consequently, looking at *Reference No. 11 of 2017* and noting the issues in contention, we take the view that it would be in the wider interests of justice that we admit the Applicant as intervener but such intervention would be to the parameters of Rule 36(2)(e) and (5) of the Rules.

G. Disposition

34. For the above reasons, the Application is allowed and the Applicant is hereby granted leave to intervene in *Reference No. 11 of 2017*. Its participation shall be limited to such support of the Second Respondent as is propounded under Rule 36(2)(e) and (5) of the Rules.
35. Each party shall bear its own costs.

It is so ordered.

M. Mafabi, Counsel for the Applicant

G. Okello, B. Ajambo for the First Respondent

C. Kaahwa, J. Amsugu for the Second Respondent

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First Instance Division

Reference No. 1 of 2017**Eric Kabalisa Makala v The Attorney General of the Republic of Rwanda**

Coram: M. Mugenyi, PJ; F. Ntezilyayo*, DPJ; A. Ngiye, C. Nyawello & C. Nyachae, JJ

Delivered by Video Conference on June 18, 2020

Jurisdiction ratione personae, ratione materiae - State responsibility for wrongful judicial acts- Rule of law - Consideration of internal laws - Interrogation of decisions of national courts - Whether there was unlawful unequal treatment in dismissal from employment - Burden of proof, fully conclusive evidence - Administration of justice- Compliance with procedural rules- Circumstances warranting a departure from the general rule on costs

Articles: 6(d), 9(2) 9(e), 23(1), 27(1) 30(1) of the Treaty - Article 4(1) of ILC Articles on Responsibility of States for Internationally Wrongful Acts - Articles : 6, 16, 18(3), 141(2), 200(2) the Constitution of the Republic of Rwanda (as amended) - Articles: 6(4) , 69 (2) Law No. 21/2012 Relating to Civil, Commercial, Labour and Administrative Procedure, 2012, Rwanda - Rules: 111, 127, EACJ Rules of Procedure, 2019

The Applicant, a resident of Rwanda, aggrieved by the procedure that culminated in his dismissal from employment as Personnel Administration Officer with Rwanda Utilities Regulatory Authority (RURA). A Prime Ministerial Order informed RURA's restructuring process and performance appraisals were carried out. On 31 May 2012, instituted two consecutives: *High Court Case No. RAD 0153/12/HC/KIG*; and *Supreme Court Case No. RADA 0034/13/CS*. In both cases, judgment was delivered in favour of the Respondent. Dissatisfied with the Supreme Court's ruling, the Applicant unsuccessfully sought to have it reviewed by the same court

Thereafter, the Applicant filed this Reference claiming that: the process leading up to his dismissal was flawed and contravened Articles 16 and 18(3) of the Constitution of the Republic of Rwanda (as amended); Staff with equivalent or lower qualifications than his had allegedly been retained; and the High Court failed to either carry out an investigation into the matters that were before it or call for the Applicant's evidence resulting in an unjustified decision that violated Article 141 of the Constitution.

Furthermore, the following laws were flouted: Articles 6, 69, 148 and 186 of *Law No. 21/2014 relating to the Civil, Commercial, Labour and Administrative Procedures*; Article 114 of *Law No. 22/2002 on General Statutes for Rwanda Public Service*; Articles 3 and 28 of *Law No. 15/2004 relating to evidence and its production*, and Articles 5, 6, 8, 9 and 10 of the *Protection of Wages Convention, 1949*. The Applicant also contended that whereas Article 6(4) of *Law No. 21/2012* prohibited reliance upon foreign decisions in the determination of suits, the High Court in *Case No. RAD 0153/12/HC/KIG* relied upon French jurisprudence. The Applicant sought to have the Government of Rwanda held culpable for the infringement of Article 6(a)

and (d) of the Treaty and compensation.

The Respondent opposed the claim averring that: this Court lacked jurisdiction as the acts complained of were neither that of a Partner State nor of an institution of the Community under Article 9(2) of the Treaty; and the Court could not entertain matters relating to the violation of the Constitution and laws of a Partner State. Moreover, the Respondent's contention was improperly enjoined as a party to the Reference and there is no cause of action against the Respondent State.

In rejoinder, the Applicant invoked Articles 6(d), 9(e), 23(1), 27(1) and Article 30(1) of the Treaty as the basis for this Court's interpretative mandate.

Held

1. Whereas Article 27(1) of the Treaty designates the jurisdiction of this Court as the interpretation and application of the Treaty, Article 30(1) provides the context within which such jurisdiction should be exercised. To succeed on a claim of lack of jurisdiction, a party must demonstrate the absence of any of the three types of jurisdiction: *ratione personae/ locus standi*, *ratione materiae* and *ratione temporis* i.e.: jurisdiction on account of: the person concerned; matter involved; and the time element. jurisdiction on account of the person concerned; matter involved; and the time element. (*Komu, Appeal 2 of 2015*).
2. The Respondent challenged the Court's jurisdiction on account of the *ratione personae* and *ratione materiae* and therefore appears to deny responsibility for RURA's impugned actions. Under Article 30(1) of the Treaty, any EAC Partner State has jurisdiction *ratione personae* before this Court. Therefore, such an argument is not tenable as nation states can be held internationally responsible for the actions of any state organ as per the Articles on Responsibility of States for Internationally Wrongful Acts. Moreover, in the Applicant's pleadings, the impugned judicial actions are considered to constitute a violation of Article 6 of the Treaty. Thus, the Respondent State was explicitly designated as the party internationally responsible for the cited Treaty violations and it therefore has *ratione personae* in this matter.
3. Jurisdiction *ratione materiae* is sufficiently established where it was demonstrated on the face of the pleadings that the matter complained of constituted an infringement of the Treaty. Moreover, the violation of Partner States' domestic laws to constitute a Treaty violation that is justiciable; and the subject matter in question is one the legality of which is in issue viz the national laws of a Partner State or one that constitutes an (outright) infringement of any provision of the Treaty. This Court's is obligated to consider the internal law of a Partner State so as to determining whether the conduct complained of amounts to a contravention of the Treaty (*Kyarimpa, Appeal 6 of 2014*). Thus, the Court is adorned with jurisdiction *ratione materiae* to adjudicate the Reference.
4. With regard to the burden of proof, the party putting forward a claim must establish the elements of fact and of law on which a decision in its favour might be given. While there is no evidence of RURA having heard the Applicant prior to his dismissal, it seems that Article 18(3) of the Constitution of the Republic of Rwanda is couched in terms that make it applicable to judicial, quasi-judicial or disciplinary proceedings that prefer charges. It would not necessarily apply where termination of employment was on account of a national restructuring

policy.

5. The organisational structure delineated in the Prime Ministerial Order did not include the Applicant's job position, therefore there was no reason for RURA to retain him. Furthermore, the fact that after a performance appraisal, other members of staff with similar or lesser qualifications might have been retained while the Applicant was dismissed, would not necessarily amount to a constitutional indictment on RURA. Without the benefit of the performance appraisals of the retained staff, and the job designations to which they were retained, the imputation of unequal treatment on the part of RURA and contravention of Article 16 of the Rwandan Constitution cannot stand.
6. State responsibility for a wrongful judicial act would only accrue where such judicial act is established on the face of the record as depicting outrage, bad faith and wilful dereliction of judicial duty; and no sufficient action was been taken to redress it.
7. The High Court's judgment in *Case No. RAD 0153/12/HC/KIG* spelt out the reasons for the rejection of the Applicant's assertion of illegal dismissal stating that it was due to the non-existence of a job matching his qualifications. *Case No. RS/REV/AD 0001/16/CS* failed for lack of proper grounds of review. Consequently, there is no merit in the allegation that the Constitution of Rwanda was contravened, neither would Article 200(2) thereof apply to this case so as to render the court decisions in question an outright nullity. Additionally, since the appellate decision in *Case No. RADA 0034/13/CS* was never availed to the Court, this Court did not interrogate the Supreme Court.
8. Under Article 6(4) of *Law No. 21/2012*, reference to foreign courts' decisions is only obviated to the extent that 'they are in contradiction with the principles of public order or the Rwandan legal system.' The Applicant bore the onus of demonstrating any such contradictions, he did not attempt to discharge this duty.
9. Courts are enjoined to administer justice with due regard to procedural rules therefore it is not enough for a litigant to seek to have a matter reviewed, s/he must furnish the court with sufficient grounds to be so entertained. Adherence to established procedural rules by courts and court users alike is a crucial building block in the promotion of the rule of law concept of equality of all persons before the law. The Supreme Court espoused its grounds for dismissing the Applicant's application for review - *RS/REV/AD 0001/16/CS*. The Applicant did not satisfactorily discharge the onus on him to adduce fully conclusive evidence that the impugned decisions of the Rwandan courts amounted to a clear and notorious injustice.
10. As per Rule 127 of this Court's Rules, costs should follow the event unless the Court, for good reason, decides otherwise. In the instant case, each of the Parties succeeded in one of the two substantive issues, therefore their success in the Reference is evenly balanced and renders moot the question as to which party won. In terms of hardship, the Applicant propagated his case personally without the benefit of advocacy services that, given his circumstances, he was seemingly unable to afford. Therefore, the circumstances of this case warrant a departure from the general rule. Consequently, one third of the costs hereof are awarded to the Applicant.

Cases cited

- Raphael Baranzira & Anor v AG of Burundi, EACJ Ref. 15 of 2014
 Bosnia & Herzegovina v Serbia & Montenegro, Judgment, ICJ Reports 2007, 43
 British American Tobacco (U) Ltd v AG of Uganda, EACJ Ref. 7 of 2017
 Corfu Channel (United Kingdom v Albania), Judgment, ICJ Reports 1949, 17
 EACSO v AG of Burundi, EACJ Ref. 2 of 2015
 Gold v Gold (1993) BCCA
 Henry Kyarimpa v AG of Uganda, EACJ Appeal No. 6 of 2014
 Hon. Sitenda Sebalu v Secretary General of EAC & Ors[2005-2011]EACJLR 160, Ref. 1 of 2010
 Ida Robinson Smith Putnam (USA) v United Mexican States, 1927, UNRIAA, vol. IV, 151
 James Katabazi & Ors v Secretary General of EAC [2005-2011] EACJLR 51, Ref. 1 of 2007
 Modern Holdings Ltd v Kenya Ports Authority, [2005-2011]EACJLR, Ref. 1 of 2008 (Distinguished)
 Plaxeda Rugumba v AG of Rwanda [2005-2011] EACJLR 226, Ref. 8 of 2010
 Prof. Anyang' Nyong'o & Ors v AG of Kenya & Ors[2005-2011]EACJLR 16, Ref 1 of 2006
 Samuel M. Muhochi v AG of Uganda [2005-2011] EACJLR 274, Ref.No. 5 of 2011
 Schuller v Roback (2012) BCSC
 Simon Peter Ochieng & Anor v AG of Uganda, EACJ Ref. No. 11 of 2013
 The AG of URT v Anthony C. Komu, EACJ Appeal No. 2 of 2015

Editorial Note: Appeal 4 of 2020 is pending determination in the Appellate Division

JUDGMENT

Introduction

1. This Reference was brought under Articles 6(d) and 9(e) of the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty'), challenging the termination of the Applicant's service with Rwanda Utilities Regulatory Authority (RURA) in the context of the restructuring and downsizing of that institution pursuant to a policy of the Government of the Republic of Rwanda. The Reference hinges on the allegation that the termination process flouted Rwandan law, the Treaty and other international Conventions.
2. The Applicant is a resident of Kalisimbi Village, Cyivugiza Cell, Nyamirambo Sector, Nyarugenge District, Kigali City, Rwanda; and thus, resident within the East African Region (for purposes of Article 30(1) of the Treaty. The Respondent is the Attorney General of the Republic of Rwanda, who was sued on behalf of the Government of Rwanda as its Principal Legal Advisor.
3. The Applicant was self-represented at trial, while Mssrs. Nicholas Ntarugera and Timothy Tutasesswa appeared on behalf of the Respondent.

Background

4. The dispute in issue in this Reference arose from the *Prime Minister's Order N° 139/03 of 19/10/211* on the re-organisation of job positions within RURA, which was the basis of the subsequent directive to implement the re-structuring policy. Pursuant to that directive RURA embarked on an annual performance evaluation and appraisal of all staff, including the Applicant.
5. Based on his grading in performance evaluation results, RURA served the Applicant with a letter of suspension on 14th November 2011, and a dismissal letter on 31 May 2012. Aggrieved by the procedure that culminated in his dismissal, the Applicant instituted two consecutive cases: *High Court Case No. RAD 0153/12/HC/KIG* and *Supreme Court Case No. RADA 0034/13/CS*. In both cases, judgement was delivered in favour of the Respondent upholding the legality of the process that led to the termination of the Applicant's services with RURA.

6. Dissatisfied with the Supreme Court Ruling in *Case No. RADA 0034/13/CS*, the Applicant unsuccessfully sought to have it reviewed by the same court and subsequently lodged this Reference challenging the legality thereof.

Applicants' Case

7. The Applicant's case is set out in his Statement of Reference; his Affidavits of 9th January 2017, written submissions lodged on 8th August 2019 and oral highlights made during the hearing on 13th June 2019. In a nutshell, he contests his dismissal by the Respondent State, alleging that RURA adopted unlawful procedures for his termination and Rwanda's national courts from which he sought legal redress flouted the country's domestic law, the Treaty and other international conventions.
8. The allegedly flouted laws include Articles 16, 18(3), 96, 141 and 200 of the Constitution of the Republic of Rwanda (as amended); Articles 6, 69, 148 and 186 of *Law No. 21/2014 relating to the Civil, Commercial, Labour and Administrative Procedures*; Article 114 of *Law No. 22/2002 on General Statutes for Rwanda Public Service*; Articles 3 and 28 of *Law No. 15/2004 relating to evidence and its production*, and Articles 5, 6, 8, 9 and 10 of the *Protection of Wages Convention, 1949*. It is on that premise that the Applicant seeks to have the Government of Rwanda held culpable for the infringement of Article 6(a) and (d) of the Treaty. We reproduce them later in this judgment.
9. The Applicant seeks the following reliefs (reproduced verbatim):
- i. Because of all the reasons I have mentioned I am requesting the Court to accept and study my complaint that I have submitted stating that the Government of Rwanda did not abide by the EAC convention in relation to Article 6 of that convention/agreement.
 - ii. And to declare that the Government of Rwanda did not honour the law of EAC and I have (suffered) injustice.
 - iii. To oblige the Government of Rwanda to compensate me as I have been pursuing this in its courts.

The Respondent's Case

10. On the other hand, it is the Respondent State's case that it is neither in contravention of its Constitution and domestic laws, nor the Treaty and international conventions, either at the executive or judicial levels. On the contrary, the Respondent questions this Court's jurisdiction over the matters before it. It is the contention, first, that the acts being challenged are neither the acts of a Partner State nor of an institution of the Community under Article 9(2) of the Treaty. The second limb to this contestation is that the Court is not clothed with the jurisdiction to entertain any matter relating to the violation of the Constitution and laws of a Partner State. On that premise, it is the Respondent's contention that it was improperly enjoined as a party to the present Reference as the Applicant's Statement of Reference does not disclose any cause of action against the Respondent State.

Issues for Determination

11. At a Scheduling Conference held on 19th September 2018, the Parties framed the

following issues for determination:

- a. Whether this Honourable Court has jurisdiction over the matter before it for determination.
- b. Whether or not the acts complained of by the Applicant are in contravention of Article 6 of the Treaty.
- c. Whether or not the Applicant is entitled to remedies sought.

Court's Determination

Issue No. 1: Whether this Honourable Court has jurisdiction over the matter before it for determination.

12. It was the Applicant's submission that the Treaty did vest the Court with jurisdiction to deal with the instant matter in so far as it challenges the legality of a decision taken by a Partner State in violation of the provisions of the Treaty. He invoked Articles 6(d), 9(e), 23(1), 27(1) and Article 30(1) of the Treaty as the basis for this Court's interpretative mandate with regard to the Treaty, arguing that as a citizen of an EAC Partner State he was entitled to institute the present proceedings.
13. Conversely, citing Article 27 of the Treaty, it was the contention of learned Counsel for the Respondent that this Court had no jurisdiction to entertain this matter given that the acts complained of were neither the acts of a Partner State nor of an institution of the Community. To buttress this argument, Mr. Ntarugera referred us to the following decision in the case of *Modern Holdings Limited vs. Kenya Ports Authority*, EACJ Ref. No. 1 of 2008 where Kenya Ports Authority had been adjudged to not be an institution of the Community. It was held:

Further and in respect of the submission by learned Counsel for the claimant based on Article 93 of the Treaty, the Court finds that the obligation to promote the development of efficient and profitable sea port services enumerated in the said Article is an obligation of the Partner States. In this particular case, the obligation lies squarely on the shoulders of the Republic of Kenya, and not on other implementers along the way like KPA. In sum, therefore, the reference is not properly before this Court due to lack of capacity of KPA as a respondent under Article 30 of the Treaty. Based on the above reasons, we hold that this Court has no jurisdiction to entertain this reference. We accordingly uphold the preliminary objection raised by Counsel for the Respondent and dismiss the reference with costs to the Respondent.
14. We carefully listened to both Parties on this issue and considered the pleadings before us. As quite rightly argued by the Applicant, the Court's jurisdiction is delineated in Articles 27(1) and 30(1) of the Treaty. We reproduce them below for ease of reference.

Article 27(1):

The Court shall initially have jurisdiction over the interpretation and application of this Treaty.

Article 30(1):

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner

State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

15. Whereas Article 27(1) categorically designates the jurisdiction of this Court as the interpretation and application of the Treaty, Article 30(1) provides the context within which such jurisdiction would be exercised. In the matter before us, although the latter issue was not canvassed in submissions, the Respondent did raise two (2) related points of law. First was the argument that the perpetrator of the actions complained of had no legal standing before the Court and, secondly, was the question of the Court being devoid of jurisdiction to entertain a Reference that required it to interpret the domestic laws of a Partner State.
16. The 2 issues raised aptly capture the dichotomies of the legal notion of jurisdiction. Thus to succeed on a claim of lack of jurisdiction in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdiction: *ratione personae/ locus standi*, *ratione materiae* and *ratione temporis*.⁹⁷ Simply stated, these 3 jurisdictional elements respectively translate into jurisdiction on account of the person concerned, matter involved and the time element. In the instant case, the Respondent has challenged the Court's jurisdiction on account of the *ratione personae* (person concerned) and *ratione materiae* (matter involved).
17. In terms of the *ratione personae*, we understood it to be the Respondent's contention that the actions complained of were undertaken by an entity that was neither a Partner State nor an Institution of the Community with legal persona before the Court under Article 30(1) of the Treaty. We could not agree more. Indeed that precisely was the mischief that *Modern Holdings Limited vs. Kenya Ports Authority* (*supra*) sought to address when the Court adjudged the Kenya Ports Authority to have had no *ratione personae* before it.
18. However, that is as far as the commonalities with this case go. In the matter before us (unlike *Modern Holdings Ltd*) it is the Republic of Rwanda that has been sued. Quite obviously, any of the EAC Partner States would have *ratione personae* before this Court under Article 30(1) of the Treaty. By maintaining its assertion that the Court has no jurisdiction over this matter and advancing the subtle preposition that there is no cause of action against it, the Respondent State would appear to deny responsibility for RURA's impugned actions. That argument is not tenable. It is trite law that nation states can be held internationally responsible for the actions of any state organ. Thus Article 4(1) of the *International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts*, reads:

The Conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
19. In *The East African Civil Society Organisations Forum (EACSOFF) vs. The Attorney General of Burundi*, EACJ Ref. No. 2 of 2015, this Court clarified that state responsibility for a wrongful judicial act would only accrue as against a state party where such judicial act is established on the face of the record as depicting

⁹⁷ See *The Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu*, EACJ Appeal No. 2 of 2015.

outrage, bad faith and wilful dereliction of judicial duty; and no sufficient action has been taken to redress it.

20. At this preliminary stage, however, it is not necessary to consider the merits of the Applicant's case. It is sufficient if it has been demonstrated, on the face of the pleadings, that a judicial decision violated the Treaty in a significant way and the Respondent State is responsible for that Treaty infringement. In this case, the Statement of Reference did elaborately detail the circumstances under which domestic laws of Rwanda were flouted in the decisions of the High Court and Supreme Court. He did also unsuccessfully explore the avenue of judicial review. He considers the impugned judicial actions to constitute a violation of Article 6 of the Treaty, and stated as much in his pleadings. The Respondent State was explicitly designated as the party internationally responsible for the cited Treaty violations. We would therefore disallow the proposition that the Respondent has no *ratione personae* in this matter.
21. Turning to the *ratione materiae* propounded herein, it is now well established law that this Court's jurisdiction would have been sufficiently established where it was demonstrated on the face of the pleadings that the matter complained of constituted an infringement of the Treaty. See *Hon. Sitenda Sebalu vs. The Secretary General of the East African Community & Others*⁹⁸ and *Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 2 Others*.⁹⁹
22. The Court has gone further to expound on this, adjudging the violation of Partner States' domestic laws to constitute a Treaty violation that is justiciable before it. See *Plaxeda Rugumba vs. The Attorney General of Rwanda*¹⁰⁰ and *Samuel Mukira Muhochi vs. The Attorney General of Uganda*.¹⁰¹ In the more recent case of *Simon Peter Ochieng & Another vs. The Attorney General of Uganda*, EACJ Ref. No. 11 of 2013 it was further clarified that for a matter to be justiciable before the Court, the subject matter in question had to be one 'the legality of which is in issue viz the national laws of a Partner State or one that constitutes an (outright) infringement of any provision of the Treaty.'
23. The foregoing legal position was conclusively summed up in *Henry Kyarimpa vs. The Attorney General of Uganda*, EACJ Appeal No. 6 of 2014 as follows:
- Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the principle of rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.
24. It does then become abundantly clear that the Respondent's argument that the Court is not vested with the jurisdiction to entertain a matter relating to the violation of a Partner State's domestic laws is fundamentally flawed. This Court is most evidently adorned with the *ratione materiae* to adjudicate the present Reference. Having found that the Court is similarly vested with *ratione persona*

⁹⁸ EACJ Ref. No. 1 of 2010

⁹⁹ EACJ Ref. No. 1 of 2006

¹⁰⁰ EACJ Ref. No. 8 of 2010

¹⁰¹ EACJ Ref. No. 5 of 2011

viz the Respondent State, we would answer this Issue in the affirmative.

Issue No.2: Whether or not the acts complained of by the Applicant are in contravention of Article 6 of the Treaty.

25. The Applicant avers that the restructuring of RURA was inevitable but was wrongly done because it did not conform to the guidelines embodied in the Prime Minister's *Order No. 139/03 of 19 October 2011*, that was intended to inform that exercise. That supposedly flawed restructuring process resulted in his dismissal, loss and suffering, for which he seeks compensation. In addition, he faults the Rwandan domestic courts (to which he had turned for legal redress) for flouting Rwandan domestic law, and considers the Supreme Court of Rwanda to have violated the rule of law principle espoused under Article 6(d) of the Treaty when it endorsed what in his view was the erroneous decision of the High Court. He holds the Government of Rwanda responsible for the violation of its domestic laws, which violation constitutes an infringement of Article 6 of the Treaty.
26. Meanwhile, it was the Respondent's contention that the measures leading to the Applicant's dismissal were done in compliance with the law. In that regard, it was argued that the re-organisation of RURA was done in accordance with the Prime Minister's *Order No. 139/03 of 19 October 2011*; along with many others, the Applicant was suspended for a six-month period after which they were all dismissed, and the Applicant was paid his terminal benefits in accordance with Article 93(5) of *Law No. 86/2013 of 11/09/2013*, which establishes the general statute for public service in Rwanda. Learned Respondent Counsel cited the decisions in *Case No. RAD 0153/12/HC/KIG* and *Case No. RADA 0034/13/CS*, from Rwanda's High Court and Supreme Court respectively, in support of his case.
27. The chronology of events in this matter is instructive as to the intrinsic nature of the dispute before us. On 31st May 2012 the Applicant's employment with RURA was terminated. Dissatisfied with the procedure that informed his termination, the Applicant sought redress before the High Court of Rwanda vide *Case No. RAD 0153/12/HC/KIG*. In its judgment of 26th April 2013 the High Court held that he had not been dismissed illegally and was not entitled to any compensation. The Applicant unsuccessfully appealed to the Supreme Court of Rwanda vide *Case No. RADA 0034/13/CS*, which in its decision of 11th October 2013 upheld the High Court's decision. He then invoked the provisions of Article 186 of *Law No. 21/2012* and vide *Case No. RS/REV/AD 0001/16/CS* sought to move the Supreme Court to review its decision. The Supreme Court dismissed that application on 11th November 2016, citing the absence of valid grounds for the review of its earlier judgment.
28. The nature of judicial practice is such that there often is an elaborate appeal and review process inbuilt therein. Indeed the option of review is often available with regard to final appellate courts' decisions. From the chronology of events highlighted above, the same processes are available within the Respondent State and were exhaustively explored by the Applicant in pursuit of his legal rights. It thus becomes superfluous to reconsider in detail either the processes that underlay the Applicant's dismissal by RURA or the judicial proceedings in the

High Court of Rwanda where they were challenged. We take the view that, the legality of those processes and proceedings having been tested in the Supreme Court, due process ensued and there would scarcely be need for this Court to revisit them.

29. Therefore, it is the final Supreme Court decision in *Case No. RS/REV/AD 0001/16/CS* that is primarily in issue before us. We would have considered it alongside *Case No. RADA 0034/13/CS* given that the latter was the substantive appellate decision but it was not availed to us. In the premises, we are constrained to refer to the High Court decision in *Case No. RAD 0153/12/HC/KIG* in so far as it sheds light on the Supreme Court decision in *Case No. RS/REV/AD 0001/16/CS*.
30. Before progressing further, we deem it necessary to interrogate international practice on the review by international courts of domestic courts' decisions. We draw inspiration from decided cases from this and other international courts. As was held earlier herein, it is now trite law that nation states are responsible for the conduct of their judicial organs under international law. See Article 4(1) of the ILC Articles on State Responsibility and a legal advisory opinion by the International Court of Justice (ICJ) in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p.62 at pp. 87-88, paras. 62, 63. Consequently, where a domestic court is alleged to have flouted its national laws, as well as related Treaty provisions (as is the case before us), 'an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international (Treaty) obligations.' See *EACSOV vs. The Attorney General of Burundi (supra)*.¹⁰²
31. The applicable burden of proof could not be stated any better than it was in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)*, Judgment, ICJ Reports 2007, p.43 as follows:
- On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*,¹⁰³ "it is the litigant seeking to establish a fact who bears the burden of proving it."
32. Stated differently, 'the court will require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given.' See *Henry Kyarimpa vs. The Attorney General of Uganda (supra)*, *British American Tobacco (U) Ltd vs. The Attorney General of Uganda*¹⁰⁴ and *Raphael Baranzira & Another vs. The Attorney General of Burundi*.¹⁰⁵
33. On the other hand, in the *Bosnia & Herzegovina vs. Serbia & Montenegro* case the ICJ spelt out the standard of proof applicable to international claims that invoke state responsibility and are of exceptional gravity. It held:

¹⁰² EACJ Ref. No. 2 of 2015 (2)

¹⁰³ Judgment, ICJ Reports 1984, p.437, para. 101

¹⁰⁴ EACJ Ref. No. 7 of 2017

¹⁰⁵ EACJ Ref. No. 15 of 2014

The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.¹⁰⁶ The same standard applies to the proof of attribution for such acts.

34. In *Ida Robinson Smith Putnam (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.151 at 153*, challenges to the decisions of nation states' apex courts were recognised as cases of exceptional gravity and an onerous duty placed on applicants. It was held:

The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.¹⁰⁷ A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only (proof of) a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.

35. Thus the 'fully conclusive evidence' required of challenges to apex courts' judicial decisions should demonstrate 'a clear and notorious injustice, visible, to put it thus, at a mere glance.' The *Ida Robinson Smith Putnam* case (rightly in our view) places an onerous duty upon applicants that seek to challenge apex domestic judicial decisions in the international arena. However, decisions that emanate from lower domestic courts need not necessarily be held to the same onerous standard, this being the apparent preserve of decisions from apex courts. Further, the consequential remedies proposed in that case are not entirely tenable. The prudence of an international court setting aside a domestic court's decision yet the 2 courts exercise significantly distinct mandates is debatable.¹⁰⁸ For present purposes, we are more inclined to accept the remedies proposed in *EACSOFF vs. The Attorney General of Burundi* (supra), where it was held:

It then becomes abundantly clear that this Court cannot set aside the impugned decision. It can only scrutinize it to ascertain its compliance with the Respondent State's international obligations under the Treaty and make consequential orders. The obligations in question would include the adherence to the *rule of law* principle encapsulated in Articles 6(d) and 7(2) of the Treaty.

36. The foregoing position was inspired by the decision in *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others, EACJ Appeal No.4 of 2016*. The Appellate Division of this Court held:

The Trial Court is not expected to review the impugned decision ... looking for new evidence or some mistake, fraud or error apparent on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate it critically with a view of testing

¹⁰⁶ See *Corfu Channel (United Kingdom vs. Albania), Judgment, ICJ Reports 1949, p.17*.

¹⁰⁷ See case of *Margaret Roper, Docket No. 183, paragraph 8*

¹⁰⁸ See *EACSOFF vs. The Attorney General of Burundi, EACJ Ref. No. 2 of 2015*. Whereas international courts evaluate such decisions from the perspective of states parties' international obligations, domestic courts approach the same set of facts within the context of the rights conferred upon parties by domestic laws.

its compliance with the EAC Treaty and then make a determination. In so making the said determination, the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers as known in municipal laws of the Partner States, but rather makes declarations as to the decision’s compliance with the EAC Treaty.

37. Turning to the instant case, we deem it necessary to reproduce Article 6(d) of the Treaty and restate our understanding of the notion of rule of law enshrined therein. It reads:

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

- (a)
- (b)
- (c)
- (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights;

38. Meanwhile, the rule of law is well elucidated in the following excerpt from a *Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,¹⁰⁹ as cited with approval by this Court in *Raphael Baranzira & Another vs. Attorney General of Burundi* (supra).

It refers to the principle of governance (according) to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

39. Simply stated;

The rule of law is a concept that describes the supreme authority of the law over governmental action and individual behaviour. It corresponds to a situation where both the government and individuals are bound by the law and comply with it. It is the antithesis of tyrannical or arbitrary rule.¹¹⁰

40. In other words, as espoused in the case of *James Katabazi & 21 Others vs. The Secretary General of the East African Community*, ‘the principle that no one is above the law.’¹¹¹

41. Against that yardstick, it is to an interrogation of the Parties’ contestations that we now turn. The Prime Ministerial Order that the Applicant thought should

¹⁰⁹ UN Doc S/2004/616 (2004), para. 6

¹¹⁰ Valcke, Anthony, *The Rule of Law: Its Origins and Meaning*, 2012, <http://ssrn.com/abstract=2042336>

¹¹¹ EACJ Ref. No. 1 of 2007.

have informed RURA's restructuring process was annexed to the Reference as Appendix 12. It essentially lays out the organisational structure and job positions that would pertain to the restructured RURA. The Applicant was at the time of his termination serving as Personnel Administration Officer.¹¹² That position was not retained in the Prime Ministerial Order. The Applicant nonetheless took issue with his dismissal because staff with equivalent or lower qualifications than his had allegedly been retained. It is his contention that the process leading up to his dismissal was flawed and contravened Articles 16 and 18(3) of the Constitution of the Republic of Rwanda. For avoidance of doubt, we reproduce the cited constitutional provisions below.

Article 16

All human beings are equal before the law, they shall enjoy, without any discrimination, equal protection of the law.

Article 18(3)

The right to be informed of the nature and cause of charges and the right to defense are absolute at all levels and degree of proceedings before administrative, judicial and all other decision making organs.

42. The Applicant faulted the domestic courts of Rwanda for endorsing the foregoing constitutional infringements without regard for Article 200(2) of the Rwandan Constitution, which stipulates that 'any law, any act which is contrary to this Constitution shall be null and void.' In his view, the High Court had flouted Rwandan law and failed to either carry out an investigation into the matters that were before it or call for the Applicant's evidence, resulting in a decision that was devoid of any justifiable basis, which it itself is a violation of Article 141 of the Constitution.¹¹³ He particularly faulted the Supreme Court for acquiescing the supposed illegalities that had been overlooked by the High Court.

43. Article 141(2) of the Constitution reads:

Every court decision shall indicate the grounds of its basis, be written in its entirety, delivered in public together with the reasons and orders taken therein.

44. We did carefully consider the constitutional provisions in reference above, the documentation annexed to the Reference, as well as the impugned court decisions that were availed to us. It seems to us that to the extent that the organisational structure delineated in the Prime Ministerial Order did not include the Applicant's job position, there cannot have been any reason for RURA to retain him. The fact that other members of staff with similar or lesser qualifications might have been retained while the Applicant was dismissed would not necessarily amount to a constitutional indictment on RURA. We do also observe that the Applicant was (alongside other staff) subjected to a performance appraisal. Without the benefit of the performance appraisals of the retained staff, as well as the job designations to which they were retained, we cannot impute unequal treatment on the part of RURA in contravention of Article 16 of the Rwandan Constitution.

45. With regard to Article 18(3) of the Rwandan Constitution, the Applicant would

¹¹² See Appendix 4 - Performance Evaluation Form

¹¹³ See also Article 69, paragraph 2 of Rwanda's *Law No. 21/2012 of 14th June 2012 relating to civil, commercial, labour and administrative procedure*.

appear to challenge his dismissal in so far as the organ that took the decision to terminate his services did not avail him a hearing before so deciding. Having carefully considered the material on record, we indeed find no averment or evidence of RURA having heard the Applicant prior to his dismissal. However, it seems to us that Article 18(3) is couched in terms that make it applicable to judicial, quasi-judicial or disciplinary proceedings that prefer *charges*. It would not necessarily apply to the scenario in the present case where termination of employment ensued on account of a national restructuring policy.

46. In the same vein, a perusal of the judgments that were availed to us would negate the Applicant's assertion that they violate Article 141(2) of the Constitution for being devoid of any justifiable basis. In our considered view, both judgments do explain with sufficient clarity the reasons for the conclusions arrived at. In the ruling on the application for review (*Case No. RS/REV/AD 0001/16/CS*), it was clearly stated that the application failed for lack of proper grounds of review. The Supreme Court's judgment in *Case No. RADA 0034/13/CS* was not availed to us. However, the High Court's judgment in *Case No. RAD 0153/12/HC/KIG* clearly spelt out the reasons for the rejection of the Applicant's assertion of illegal dismissal. It attributed his dismissal to the non-existence of a job that matched his qualifications. Consequently, we find no merit in the allegation that the Constitution of Rwanda was contravened, neither would Article 200(2) thereof apply to this case so as to render the court decisions in question an outright nullity.
47. Be that as it may, we are constrained to interrogate the other allegations of similar nature that were set forth in the Reference albeit in respect of other laws. It was the Applicant's contention that whereas Article 6(4) of *Law No. 21/2012* prohibited reliance upon foreign decisions in the determination of suits, the High Court did in *Case No. RAD 0153/12/HC/KIG* rely upon French jurisprudence. As we have held earlier in this judgment, the High Court decision having been subjected to an appeal process, it is the decisions from the latter process that are in issue before us. The appellate decision in *Case No. RADA 0034/13/CS* was never availed to us so as to enable us interrogate how the Supreme Court navigated that issue. In any event, under Article 6(4), reference to foreign courts' decisions is only obviated to the extent that 'they are in contradiction with the principles of public order or the Rwandan legal system.' The Applicant bore the onus of demonstrating any such contradictions if they did exist. He did not attempt to discharge this onerous duty upon him. We would therefore disallow this claim.
48. The Applicant further opined that, although Article 114 of *Law No. 22/2002* prohibits the withholding of an employee's salary until a related suit that is pending before a court has been determined and the judge in *Case No. RADA 0034/13/CS* had acknowledged the Applicant's withheld salary, he made no attempt to resolve the issue in his decision and similarly ignored the provisions of the *Protection of Wages Convention, 1949*. In like vein, the Applicant asserted that the miscomprehension of his evidence had caused a travesty of justice that entitled him to seek revision but the same evidence was similarly ignored by the Supreme Court vide its decision in *RS/REV/AD 0001/16/CS*. To compound matters, in that decision the judge allegedly ignored a Supreme Court decision

in *RADA/0006/12/CS*. Finally, it was his view that the absence of one of the Supreme Court judges at the delivery of the judgment in *Case No. RADA 0034/13/CS* violated Article 148 of *Law No. 21/2012*.

- 49. We have belaboured to explain earlier herein that the Supreme Court did espouse quite clearly its grounds for dismissing the Applicant’s application for review - *RS/REV/AD 0001/16/CS*. Courts are enjoined to administer justice with due regard to procedural rules therefore it is not enough for a litigant to seek to have a matter reviewed, s/he must furnish the court with sufficient grounds to be so entertained. Adherence to established procedural rules by courts and court users alike is a crucial building block in the promotion of the rule of law concept of equality of all persons before the law.
- 50. Similarly, at the risk of repeating ourselves, in the absence of the judgment in *Case No. RADA 0034/13/CS* we are unable to agree with the Applicant that the Supreme Court merely ignored the issue of the Applicant’s supposedly withheld salary or disregarded the *Protection of Wages Convention, 1949*. On the other hand, the Supreme Court was neither obliged to follow the decision in *RADA/0006/12/CS*, it being another Supreme Court decision; nor apparently would the delivery of a judgment in the absence of the physical presence of a member of a coram be prejudicial to the legality of the judgment. The Supreme Court did categorically pronounce itself on this latter issue in *RS/REV/AD 0001/16/CS*.
- 51. We therefore find that the Applicant has not satisfactorily discharged the onus on him to adduce before this court fully conclusive evidence that the impugned decisions of the Rwandan courts amounted to a clear and notorious injustice.
- 52. Conversely, the Respondent supported the decisions of the Rwandan Courts, urging that they were made in compliance with Rwandan law, particularly Article 93(5) of *Law No. 86/2013 of 11th September 2013*. We consider it appropriate to reproduce Article 93 in its entirety so as to provide a holistic view of the legal regime it puts in place.

Article 93:

A public Servant shall be subject to automatic removal:

- 1.
- 2.
- 3.
- 4.
- 5. after the period of suspension of more than six (6) months.

- 53. The totality of the material on record would support the conclusion that the Applicant was undoubtedly dismissed under the above legal provision. Having so complied with its domestic laws and thus the rule of law principle, we find that the sanctity of Article 6(d) of the Treaty remains intact. Accordingly, we would answer Issue No. 2 in the negative.

Issue No. 3: Whether or not the Applicant is entitled to the remedies sought.

- 54. The Applicant sought the reliefs highlighted in paragraph 9 of this judgment. The first remedy sought literally seeks to have this Court entertain the present Reference that questions the Respondent State’s compliance with Article 6 of the Treaty. *Issue No. 1* herein did challenge the mandate of the Court to so entertain the Reference. It does follow that, the Court having resolved that issue in the affirmative and indeed proceeded to hear the Reference, the first remedy sought

by the Applicant was granted and fully discharged.

55. The Applicant did also seek a declaration that the Respondent State contravened EAC law and sought recompense for the expenses incurred in pursuit of his legal rights. However, given that the preceding issue was resolved in favour of the Respondent, the declaration sought by the Applicant is clearly untenable.
56. On the question of costs, Rule 127 of this Court's Rules posits that costs should follow the event unless the Court, for good reason, decides otherwise. In *Schuller vs. Roback (2012) BCSC* ¹¹⁴ 8, citing with approval *Gold vs. Gold (1993) BCCA* ¹¹⁵ 82, the following factors informed judicial discretion in departing from the general rule:

When the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of the Court. ... Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

57. In the instant Reference, each of the Parties succeeded in one of the 2 substantive issues that had been framed, therefore their success in the Reference is evenly balanced and renders moot the question as to which party won the event. Suffice to state here that we do consider the point of law raised by the Respondent to have been a substantive issue in the Reference given its vitality to the determination of the Parties' respective interests.
58. In terms of hardship, it is not lost upon us that the Applicant propagated his case personally without the benefit of advocacy services that, given his circumstances, he was seemingly unable to afford. Perhaps had he had the benefit of legal advice he might have forgone the present legal proceedings and spared himself and opposite party the costs incurred. It seems to us, therefore, that the circumstances of this case do warrant a departure from the general rule as espoused in Rule 127(1) of this Court's Rules. Consequently, we would exercise our discretion to award one third of the costs hereof to the Applicant.

Conclusion

59. In the final result, we hereby dismiss this Reference with one third (1/3) costs to the Applicant.
It is so ordered.

*[Hon. Justice Dr. Faustin Ntezilyayo resigned from the Court in February 2020 but signed this judgment in terms of Article 25(3) of the Treaty.]

The Applicant appeared on person

Nicholas N. & T. Tutasesswa Counsel for the Respondent

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¹¹⁴ British Columbia Supreme Court

¹¹⁵ British Columbia Court of Appeal

First Instance Division

Reference No.2 of 2017**Media Council of Tanzania, Legal and Human Rights, Centre Tanzania
Human Rights Defenders Coalition v The Attorney General of the United
Republic of Tanzania**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ; F. Jundu, A. Ngiye, & C. Nyachae, JJ
March 28, 2019

Freedom of press and of expression - Whether certain sections of Media Services Act contravened the Treaty – The three-tier proportionality test - Clarity of law – Vague undefined restrictions – The legitimate aim of criminal defamation - Seditious offences - Minister’s prohibition powers to be exercised judiciously - Principle of res judicata not applicable – No exhaustion of domestic remedies required - Time of enactment

Articles: 6(d), 7(2), 8(1),(c),(2), 23(1),27(1),30(1), 34 of the Treaty - Sections: (3) (a), (b), (c), (f), (g), (h), (i), (j),7,19, 20, 21,35, 36, 37, 38, 39, 40, 50, 54, 52, 53, 58, 59 Media Services Act, No. 120 of 2016, Tanzania - Article 27(2) African Charter on Human & Peoples’ Rights - Article 19 International Covenant on Civil & Political Rights, 1966 - Rule 24 EACJ Rules of Procedure, 2013

On 5th November, 2016, the Parliament of the United Republic of Tanzania enacted the Media Services Act, No. 120 of 2016 which received presidential assent on 16th November, 2016. The Applicants challenged certain provision of the Act alleging *inter alia* that: they restricted the type of news or content; introduced mandatory accreditation of journalists; gave wide powers to the Board of Accreditation; provided criminal penalties for defamation for: publication of false news, rumours and seditious statements; and gave the Minister absolute powers to prohibit the importation of publications, sanction media content, and prohibit the publication of any content that jeopardized national security or public safety. These were far reaching and limited freedom of expression. They sought declarations that Sections 13, 14, 19, 20, 21, 50, 52, 53, 54, 58,59 of the Act violated the EAC Treaty by imposing arbitrary and unjust restrictions on news and other information and content without reasonable justification and this infringed the right to freedom of expression.

The Respondents averred that: freedom of expression was not absolute; the Act reflected the intent and purport of Article 18 of the Constitution of Tanzania and the promotion of public awareness in issues of national interest and national importance by protecting the rights and interests of individuals and was justifiable; that accreditation of journalists provided an oversight and control mechanism over the journalism profession for scrutiny, statistics and growth; the defamation provisions ensure the rights, freedoms, privacy and reputation of other people or interest of public are not prejudiced by wrongful exercise of the rights and freedoms of individuals. Furthermore: National Courts had jurisdiction to hear and determine the Applicants’ grievances and they could have referred the matter to EACJ on Treaty interpretation or application; the Applicants should have first attempted to exhaust available remedies before filing the Reference as the EAC

Treaty had been domesticated; and the matter was *res judicata* as *Union of Tanzania Press Clubs & Others* had filed *MISC Civil Cause No. 02 of 2017*, before the High Court of Tanzania at Mwanza challenging various provisions of the Media Services Act as being unconstitutional. This case was determined and dismissed therefore the current Reference was *res judicata*.

Held

1. Article 30(1) of the Treaty gives *locus standi* to any person to directly access the Court and there is no provision on the exhaustion of domestic remedies as a condition for the admissibility of cases brought by individuals or legal persons.
2. The litigant in Tanzania High Court *MISC Civil Cause No. 02 of 2017* was different from the Applicants in the instant case; and the issue therein was whether the provisions of the Act, offended the Constitution of the United Republic of Tanzania. In the current Reference, the question is whether the certain provisions of the Media Services Act violated specific Articles of the Treaty therefore, the principle of *res judicata* does not apply to the instant case.
3. Freedom of the press and freedom of expression are essential components of democracy however, these rights are not absolute. The three-tier proportionality test requires: a Statute to be clear and accessible to citizens so that they are clear on what is prohibited; the objective of the law must be important to the society; and the State, in seeking to achieve its objectives ought to choose a proportionate way to do so (*Burundian Journalists* case). As was held by the African Court in the *Konate* case, ‘to be considered as law, norms have to be drafted with sufficient clarity to enable an individual to adapt his behavior to the rules and made accessible to the public.’
4. The aim of content restrictions in Section 7 of the Media Services Act is not self-evident. The word “undermine” is too vague to be of assistance to a journalist or other person, to regulate his or her conduct, within the law. Similarly, the word “impede” is vague and would not meet the United Nations Human Rights Committee’s guidance that “laws must contain rules which are sufficiently precise, to allow persons in charge of their application to know what forms of expression are legitimately restricted and what forms of expression are unduly restricted. “Hate speech” is undefined therefore, in the context, the term is vague and potentially too broad. The scope and extent of the respective content restrictions are also not clearly defined to enable journalists and other persons to properly appreciate the limitation to the right to freedom of expression or to be clear on what is prohibited.
5. A wide range of actors, including professional full time reporters and analysts, as well as others, who engage in forms of self-publication in print, on the internet or elsewhere share the journalism function. The definition of “journalist” in Section 19 of the Act is too broad, “to provide sufficient provision to allow an individual to foresee what activities they are forbidden from performing without accreditation. Additionally, in the context of Section 19, it is not clear, what legitimate aim accreditation serves, as a limitation on the right to freedom of expression.
6. Section 52 on “seditious intention” fails the test of clarity and certainty as the definitions of sedition are hinged on the possible and potential subjective

reactions of audiences to whom the publication is made. This makes it almost impossible, for a journalist or other individual, to predict and thus, plan their actions. In Section 52(3) “the consequences which would naturally follow” would be dependent on the subjective reaction of the person or audience to whom the publication is made.

7. In Section 54, the offence of publication of a false statement, the words “likely to cause fear and alarm to the public or to disturb the public peace”, is too vague and does not enable individuals to regulate their conduct. Apart from serious and very exceptional circumstances such as incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences (*Konate* case).
8. Criminal defamation in a democratic society is punitive power exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impart or endanger them (*Kimel* case). Section 35 which defines defamation is not sufficiently precise to enable a journalist or other person to plan their actions within the law. The definition makes the offence continuously elusive by reason of subjectivity.
9. Sections 58 which gives powers to the Minister to prohibit publications and Section 59 which provides for powers of the Minister contain provisions that constitute disproportionate limitations on the right to freedom of expression. The absolute nature of the discretion granted to the Minister, as well as the lack of clarity on the circumstances in which such Minister would impose a prohibition, make the provisions objectionable relative to the rights being restricted.
10. Sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j); Sections 19, 20 and 21; Sections 35, 36, 37, 38, 39 and 40; Sections 50 and 54; Sections 52 and 53; and Sections 58 and 59 of the Act, violate the right to press freedom and freedom of expression and Articles, 6(d) and 7(2) of the Treaty. The Respondent is directed to take such measures as are necessary, to bring the Media Services Act, into compliance with the Treaty.

Cases cited

Andrew M. Mwenda & Ors v Attorney General, Constitutional Court of Uganda, UGCC 5(2010)
 Chavunduka & Choto v Minister of Home Affairs & Anor, SCZ CIV APP NO. 156/99
 CORD v The Republic of Kenya & Ors High Court of Kenya Petition No. 628 of 2014
 Federation of African Journalists v The Republic of The Gambia EWC/CCJ/JUD/04/18
 James Katabazi & Ors v Secretary General of EAC & Anor [2005-2011] EACJLR 51, Ref.1 of 2007
 Julius Ndyababo v Attorney General of Tanzania, (2004) TLR 14
 Kimel v Argentina SERIE C No.177-2008, the Inter-American Court of Human Rights
 Konate v Burkina Faso, App No. 004/2013/(2014), ACHPR
 Malcom Lukwiya v The AG of Uganda & Anor, EACJ Reference No. 6 of 2015
 Plaxeda Rugumba v The AG of Rwanda [2005-2011] EACJLR 226, Ref. 8 of 2010
 Prof. Anyang' Nyong'o & Ors v The AG of Kenya & Ors [2005-2011] EACJLR 16 Ref. 1 of 2006
 R. v Oakes, (1986) ISCR 103 - Supreme Court of Canada
 Samuel M. Muhochi v The AG of Uganda [2005-2011] EACJLR 274, Ref. 5 of 2011
 Scanlen v Zimbabwe, Case No. 297/05(2009) African Commission on Human and Peoples Rights
 The AG of Rwanda v Plaxeda Rugumba [2012-2015] EACJLR 204 Appeal 1 of 2012

JUDGMENT

A. Introduction

1. This is a Reference that was filed on 11th January, 2017 by the Applicants pursuant

to Articles 6(d), 7(2), 8(1)(c), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as “The Treaty) as well as Rule 24 of the East African Court of Justice Rules of Procedure, 2013.

- 2. The Applicants are Non-Governmental Organizations registered as such under the Laws of The United Republic of Tanzania, a Partner State in the East African Community. In the present Reference, they are represented by Mr. Fulgence Masawe Advocate of P.O. Box 79633 Dar-es-Salaam, Tanzania.
- 3. The Respondent is the Attorney General of the United Republic of Tanzania whose address is 20 Kivukoni Front 11492 Dar-es-Salaam, Tanzania.

B. Background

- 4. This Reference is a challenge to the Media Services Act, No. 120 of 2016 (hereafter referred to as “The Act”) enacted by the Parliament of the United Republic of Tanzania on 5th November, 2016, and assented to by the President of the United Republic of Tanzania on 16th November, 2016.
- 5. The Applicants allege that the Act in its current form is an unjustified restriction on the freedom of expression which is a cornerstone of the principles of democracy, rule of law, accountability, transparency and good governance which the Respondent has committed to abide by, through the Treaty, amongst other international instruments.
- 6. The Reference specifically challenges the alleged violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

C. Applicant’s Case

- 7. The Applicant’s case is contained in the Reference dated 11th January, 2017, the Affidavits of Kajubi D Mukajanga, Helen Kijo-Bisimba and Onesmo Olengulumwa all filed on 11th January, 2017; the supplementary Affidavits of Jabir Iddrissa and Geoffrey Dilinga, both filed on 14th August, 2018; the Applicants’ written submissions filed on 13th April, 2018, and the Applicants Supplementary List of Authorities filed on 14th November, 2018. The Applicants also filed a Rejoinder to Respondents written Submissions, on 14th August, 2018.
- 8. The Applicants contend in the Reference that the Respondent State, in enacting and applying the Act, violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty which provide as follows:

Article 6:

“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

- (a)
- (b)
- (c)
- (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

Article 7

“2. The Partner States undertake to abide by the principles of good governance,

including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

Article 8

1. The Partner States shall:

(a)

(b)

(c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.”

9. The Applicants state that the United Republic of Tanzania (hereafter referred to as Tanzania) is a Partner State of the East African Community (EAC) and therefore has an obligation to ensure compliance with the Treaty.

10. The Applicants’ contend that Tanzania, in enacting and applying the Act, violates the said provisions of the Treaty.

11. The Applicants’ cite various provisions of the Act which they contend are in violation of the specific provisions of the Treaty referred to above, particularized as follows:

(a) That Sections 7(3)(a), (b), (c), (f), (g), (h), (i) and (j) of the Act violate freedom of expression by restricting type of news or content without reasonable justification;

(b) That the Act introduces the mandatory accreditation of journalists and gives powers to the Board of Accreditation to cancel the same under Sections 13, 14, 19, 20 and 21 of the Act, in violation of Articles 6(d), 7(2), and 8(1)(c) of the Treaty;

(c) That the Act, under Sections 35, 36, 37, 38, 39 and 40 provides for criminal penalties when defamation is established thereby restricting freedom of expression and the right to access information;

(d) That the Act, in Sections 50 and 54 criminalises publication of false news and rumours thereby restricting freedom of expression, and the right to access information;

(e) That the Act, in sections 52 and 53, criminalises seditious statements thereby restricting freedom of expression and the right to access information;

(f) That the Act in sections 58 and 59 vest the Minister with absolute powers to prohibit the importation of publications, or sanction media content, which is unjust and restrictive of freedom of expression and access to information.

12. The Applicants therefore seek the following reliefs:

(a) A declaration that the provisions of Sections 7(3)(a), (b), (c) (f), (g), (h), (i), and (j) of the Act violate the said provisions of the Treaty in that they restrict the type of news or content and thus impose arbitrary and unjust restrictions on news and other information and content and therefore infringe the right to freedom of expression;

(b) A Declaration that the Provisions of Sections 13, 14, 19, 20 and 21 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;

(c) A Declaration that the provisions of Sections 35, 36, 37, 38, 39 and 40 of

- the Act violate the aforementioned provisions of the Treaty in that they restrict freedom of expression;
- (d) A Declaration that the provisions of Sections 50 and 54 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;
 - (e) A Declaration that the provisions of Sections 52 and 53 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;
 - (f) A Declaration that the provisions of Sections 58 and 59 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;
 - (g) A Declaration that the Act violates the said provisions of the Treaty;
 - (h) An order to the Respondent state to cease the application of the Act and repeal or amend the Act to bring it in conformity with the fundamental and operational principles contained in the Treaty; and
 - (i) An order that the costs of and incidental to this Reference be met by the Respondent.

D. Respondent's Case

13. The Respondent filed a Response on 28th February, 2017, as well as an Affidavit sworn by Silvia Novatus Matiku, and filed on the same day. The Respondent also filed written submissions on 29th June, 2018. These latter submissions were filed out of time, but later upon application by the Respondent, and no objection by the Applicant, the Court granted an extension of time and deemed the same to be properly filed.
14. The Respondent's Response to the Reference included a Notice of Preliminary Objection whereby the Respondent contended that the Court did not have jurisdiction to entertain the Applicant's Reference. In the event, on the direction of the Court, the Preliminary Objection was heard together with the main Reference.
15. The Respondents case is that:
 - a) Freedom of expression is not absolute and that the Act is reflective of the intent and purport of Article 18 of the Constitution of Tanzania and pays special regard to the promotion of public awareness in issues of national interest and national importance by protecting the rights and interests of individuals and that of the public and is therefore justifiable;
 - b) The act does not violate the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty, but rather the alleged impugned Sections of the Act are in line with the spirit and purport of the said Articles of the Treaty;
 - c) Sections 7(3)(a), (b), (c), (f), (g), (h), (i) and (j) of the Act do not violate freedom of expression but rather provide the rights and obligations of a media house and the manner in which they should conduct themselves in exercising the rights under the provisions of the Act. Further, the said provisions of the Act are in line with the Constitution of Tanzania and with the Treaty;
 - d) The functions of the Board under Section 13 of the Act, the powers of the Board under Section 14 thereof, the accreditation of Journalists under Section 19, the release of press cards under Section 20 and the roll of

- journalists under Section 21 do not violate the said provisions of the Treaty. The said provisions provide an oversight and control mechanism over the journalism profession for scrutiny, statistics and growth;
- e) The Provisions of Section 35 which define defamation, Section 36 which deals with defamation in print media, Section 37 which provides for the definition of unlawful publication, Section 38 which provides for cases in which publication is absolutely privileged, Section 39 which provides for cases in which publication is conditionally privileged, and Section 40 which provides for offers of amends do not restrict the freedom of expression and right to access information but rather ensure the rights, freedoms, privacy and reputation of other people or interest of public are not prejudiced by wrongful exercise of the rights and freedoms of individuals;
 - f) The provisions of Section 50 which provide for offences relating to media services and Section 54 which provide for an offence of publication which is likely to cause fear or alarm do not restrict the freedom of expression and right to access of information as provided under the Constitution of Tanzania, or the Treaty;
 - g) The provisions of Section 52 which define “Seditious intention” and Section 53 which provides for seditious offences do not restrict the freedom of expression and right to access of information, as provided under the Constitution of Tanzania, or the Treaty; and
 - h) The provisions of Section 58 which gives powers to the Minister to prohibit publications and Section 59 which provides for powers of the Minister, are just and do not restrict the freedom of expression and right to access of information.
16. The Respondent therefore prays that the Reference be dismissed with Costs to the Respondent.

Scheduling conference

On 13th March, 2018, the Parties attended a Scheduling Conference at this Court, where it was agreed *inter alia*, that the following are the issues for determination:

- a) Whether the Court has Jurisdiction to hear and determine the Reference;
- b) Whether the cited provisions of the Act, are a violation of the cited Articles of the Treaty; and
- c) Whether the Parties are entitled to the remedies sought.

E. Determination

ISSUE NO.1: Whether the Court has Jurisdiction to hear and determine the Reference:

17. The Respondent challenges the jurisdiction of the Court to hear and determine this Reference, essentially on three grounds:
- i That the Reference before this Court which is an International Court, was filed without the Applicants first exhausting all available remedies in the National Courts;
 - ii That the matter is *res judicata*; and
 - iii That in any event, the Reference was filed out of time and in violation of

Article 30(2) of the Treaty;

Exhaustion of Local Remedies

18. The thrust of the Respondent's argument on this issue is that "Although the Treaty and the Rules do not specifically state that Applicants should exhaust local remedies before approaching this Court, it is a practice of International Law that litigants should first attempt to exhaust available remedies." The Respondent further submits that "the Court is not precluded by the Treaty or the Rules of this Court from applying this International principle on a case to case basis as it sees fit to prevent the abuse of Court process or in the interest of Justice."
19. Further, the Respondent cites Article 30(3) of the Treaty which provides as follows:

"The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State."
20. The Respondent proceeds to argue that the fact of the Respondent having domesticated the Treaty by enactment of the Treaty for the Establishment of the East African Community Act, Cap 411, brings Article 30(3) above into play and thus limits the jurisdiction of the Court in this instance. The Respondent contends that this position is further supported by Article 34 of the Treaty which provides as follows:

"When a question is raised before any court or tribunal of a Partner State Concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or action of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question."
21. The Respondent concludes therefore that in the instant case, jurisdiction to hear and determine the Applicants' grievances lay with the National Courts, which could have referred to this Court, any question of interpretation or application of the Treaty or any provision thereof. The Respondent draws the attention of the Court to the case of *Union of Tanzania Press Clubs and Hali Halisi Publishers Ltd vs. The Attorney General of the United Republic of Tanzania, MISC Civil Cause No. 02 of 2017*, before the High Court of Tanzania at Mwanza. In that case, the Petitioners therein challenged various provisions of the Act as being unconstitutional and violating Article 13(6)(a) of the Constitution of the Republic of Tanzania. Stating that the said case was dismissed by the High Court of Tanzania, the Respondent contends that the same is therefore *Res Judicata*, although there in an appeal in respect thereof, pending before the Court of Appeal of Tanzania.
22. The issue of its *res judicata* shall be addressed separately and substantively in this Judgment.
23. In urging that this Court should not entertain the matter as the Applicants have not exhausted available remedies in the National Courts, the Respondent further relied on the case of *Urban Mkandawire vs. The Republic of Malawi, Application No.003 of 2011*, where the African Court on Human and Peoples Rights dismissed the subject application for failure to first exhaust local remedies. The Respondent

cited the similar position taken by the *African Commission on Human and Peoples Rights, in Article 19 Vs. Eritrea (2007) AHRLR 73 (ACHPR 2007)* as well as the *Communication No.263/02 Kenya Section of the International Commission of Jurists, Law Society, Kituo cha Sheria, Kenya*.

24. On their part, the Applicants contended that the Respondent's objection was without basis, and that the Court has jurisdiction to consider and adjudicate upon the Reference. In the Applicants' submission, there is no requirement to exhaust domestic remedies before filing a reference in this Court. The Jurisdiction of the Court is expressly set out in Article 27(1): "The Court shall initially have jurisdiction over the interpretation and application of this Treaty." Nor in this case, is jurisdiction compromised by the *proviso* to the said Article 27 (1) which states: "Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States." The Applicants' Submission is that, contrary to the Respondent's argument, the proviso to Article 27(1) does not limit the Court's jurisdiction to interpret or apply the Treaty on the basis of domestication of the Treaty. Rather, the court's Jurisdiction to interpret or apply the Treaty will be limited where the Court's Interpretation is to be applied to jurisdiction that has been conferred by the Treaty on Organs of the Partner States. No such jurisdiction, argues the Applicant, to interpret and apply the Treaty, has been conferred on organs of a Partner State, by any provision of the Treaty. In the event therefore, this Court has exclusive jurisdiction in the interpretation and application of the Treaty. The Applicants cite the statement of the Court in its decision in the *Anyang' Nyongo and Others vs. The Attorney General of Kenya and Others, EACJ Reference No.1 of 2006* that, "there is no doubt about the primacy, if not supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty."
25. The Applicant submitted that the African Court on Human and Peoples Rights and the African Commission on Human and People's Rights referred to by the Respondent were unhelpful and indeed irrelevant to the instant case, as they were decided in specific application of provisions in the African Charter on Human and Peoples Rights and the relevant rule of the Rules of the African Court. In contrast, the Applicant drew the Courts attention to the decisions on the matter, by the Court of Justice of the Economic Community of West Africans States (ECOWAS), applying the ECOWAS Protocol and Supplementary Protocol which, like the Treaty for the Establishment of the East African Community, do not have any provision requiring exhaustion of local remedies before approaching the Regional/International Court.
26. The Applicant therefore invited the Court to take up jurisdiction, and determine the Reference before it.
27. Having considered the respective pleadings and submissions of the parties on this first issue of exhaustion of local remedies (forming part of the question regarding the Courts jurisdiction), we now turn to the Courts determination on the same.
28. It is common ground that the Court's jurisdiction is drawn from the Treaty and in particular Articles 23(1) and 27 (1) thereof. These provide as follows:

ARTICLE 23:

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

ARTICLE 27:

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

29. As stated above, the Respondent sought to argue that the fact of domestication of the Treaty, in this case the Respondent State’s enactment of the East African Community Act, Cap. 411, confers jurisdiction on the National Courts of Tanzania, thus, bringing into operation the proviso to Article 27(1) of the Treaty, and limiting the jurisdiction of this Court. In so arguing however, the Respondent did not demonstrate to the Court how such domestication limited the Court’s jurisdiction in terms of the said provision. In enacting the East African Community Act, the Respondent State was fulfilling a specific obligation under Article 8(2) of the Treaty, which provides as follows:

“Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular:-

- (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and
- (b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.”

30. Beyond that, there is nothing in the clear wording of Article 8(2) to suggest that, the Article confers jurisdiction to interpret and apply the Treaty on any state organ.

31. In an attempt to shore up its argument on this issue, the Respondent makes reference to Article 34 of the Treaty which provides as follows:

“Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.”

33. It is our view that far from supporting the Respondent’s position, Article 34 buttresses the position that this Court has exclusive jurisdiction to interpret and apply the Treaty. This is consistent with Article 33(2) of the Treaty that provides:

“Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.”

34. Analysing Articles 34 and 33(2) of the Treaty in *Anyang’ Nyongo and Others vs. Attorney General of Kenya and Others (Supra)*, this Court observed that “The purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the

same provision of the Treaty.’

35. The Court went further:

“Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor in is there any other provision directly conferring on the National Courts’ jurisdiction to interpret the Treaty.”

36. We turn to consider the question of whether there was an obligation on the Applicants in this matter, to pursue and exhaust available local remedies in the National Courts of the Respondent State, before filing the instant Reference before this Court. In bringing the instant Reference, the Applicants were exercising the right granted to them as residents of a Partner State of the Community, by Article 30(1) of the Treaty which provides that:

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

37. In the *Anyang’ Nyongo* case referred to above this Court stated:

“Article 30 no doubt confers on a litigant Resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. We therefore, do not agree with the notion that before bringing a reference under Article 30, a litigant has to exhaust the local *remedy*. In our view, there is no local remedy to exhaust.”

38. The “exhaustion of local remedy” argument has been canvassed before this Court in a number of cases. The rule and its application, or otherwise, in the context of the Treaty, was considered by this Court at some length, in *Malcom Lukwiya vs. The Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya, Reference No. 6 of 2015*. “The Court observed that “The exhaustion of domestic remedies rule is widely upheld by International Courts having direct jurisdiction over individuals as a treaty requirement and as a rule of Customary International Law. In that regard, the exhaustion of local remedies rule is considered as condition precedent for the assumption of jurisdiction over suits brought in an International Court against a state by an individual from a member state”; However, this Court went further to state: “The EAC Treaty recognizes the capacity of individuals to seek redress for a breach of their rights enshrined therein against any Partner State or an institution of the Community. Article 30(1) of the Treaty --- gives *locus standi* to any person to have direct access to the Court and the Treaty has not provided the exhaustion of domestic remedies as a condition for the admissibility of petitions brought by individual before the Court.”

39. In the *Lukwiya* Case, the Court made reference to the earlier case of *Plaxeda Rugumba vs. The Attorney General of the Republic of Rwanda, Reference No. 8 of 2010* where the Court held that “It is not in doubt that there is no express provision

barring this Court from determining any matter that is otherwise properly before it, merely because the Applicant has not exhausted local remedies.” In dismissing the Respondent’s contention, the Court held, “The EACJ is the only court mandated to determine whether the EAC Treaty has been breached or violated Whether the Applicants complaints can be addressed elsewhere is immaterial to the exercise of jurisdiction under the Treaty....”

40. With respect, the authorities cited by the Respondent herein, from the African Court of Human and Peoples’ Rights and the African Commission on Human and Peoples’ Rights, cannot, in our view, assist the Respondent. This is because, both the African Charter on Human and Peoples’ Rights, as well as the Rules of the African Court on Human and Peoples’ Rights, specifically require exhaustion of local remedies in the subject Respondent States as a pre-condition to admission of complaints or applications. In a somewhat disingenuous approach, the Respondent sought to rely on the reference to the African Charter on Human and Peoples’ Rights, in Article 6(d) and the reference therein to “the maintenance of universally accepted standards of Human Rights” in Article 7(2). The Court however is persuaded by the Applicants Submission that “it is clear from reading these provisions that Articles 6(d) and 7(2) of the Treaty are referring to the substantive rights and duties that form the basis of International Human Rights Law, and do not refer to the procedural laws that are applicable to certain regional or international human rights mechanisms.” And further, “Articles 6(d) and 7(2) establish the obligations that are placed on Partner States of the Community and do not set out procedural rules governing the jurisdiction of this Court.”
41. In the *Lukwiya* case, the Court made reference to the consideration of the local remedies rule by the ECOWAS Court of Justice. That Court has constantly held that to the extent that the Court’s Protocols do not contain the rule, it is not applicable before the Court. This position is similar to that adopted by this Court. Indeed in the Appeal in the *Rugumba case Appeal No. 12 of 2010* the Appellate Division of this Court, whilst acknowledging that “the obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the International Court of Justice” and “it is also to be found in other International Human Rights Treaties” ---- nevertheless, the Court concluded:
- “However, the EAC Treaty does not have any provision requiring exhaustion of local remedies. In our view, though the Court could be flexible and purposeful in the interpretation of the principle of the local remedies rule, it must be careful not to distort the express intent of the EAC Treaty.”
42. In the instant case, the Applicants, who are Residents of a Partner State of the EAC, seek to exercise their rights under Article 30 of the Treaty, to approach this Court directly, for determination of the legality of an Act of the Partner State on the grounds that such Act is unlawful or an infringement of the provisions of the Treaty. On its part, the Court is bound to take up jurisdiction under Articles 23 and 27 of the Treaty.

Res Judicata

43. Although in its Notice of Preliminary Objection the Respondent did not

specifically raise the issue of *res judicata*, in submissions, the same was urged under the general cover of jurisdiction. The Applicants in turn made submissions on the same in the Applicants' Rejoinder to Respondent's written submissions, filed on 14th August, 2018. The Respondents submission is that "similar" cases have been filed in the National Courts challenging the Act. Specifically, the Respondent cites *Union of Tanzania Press Clubs and Hali Halisi Publishers Ltd. vs. The Attorney General of the United Republic of Tanzania*, (supra). In its submissions, the Respondent states that in that matter, the Petitioners challenged certain provisions of the Act as being unconstitutional and offending provisions of the Constitution of the United Republic of Tanzania. Stating that the High Court of Tanzania dismissed the Petition, the Respondent herein therefore urges that the matter is *res judicata*.

44. It is trite law that, for a matter to be *res judicata*, the matter must be between the same parties in respect of the same subject matter, and determined on merits by another court of competent jurisdiction. In *James Katabazi and 21 Others vs. Secretary General of the East African Community, and the Attorney General of Uganda*, EACJ Reference No.1 of 2007, this Court stated:
- "Three situations appear to us to be essential for the doctrine to apply: One, the matter must be 'directly and substantially' in issue in the two suits. Two, Parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of *res judicata* to operate."
45. From the Respondent's own Submissions, the litigant in the Tanzania High Court matter was different from the Applicants in the instant case. Further, in the Tanzania High Court, the matter at issue was whether the provision of the Act, offended the Constitution of the United Republic of Tanzania. In the instant case, the question is whether the provisions impugned by the Reference, violate specific Articles of the Treaty.
46. No evidence was tendered before this Court, on the question of whether or not the *Union of Tanzania Press Clubs Case* was actually concluded on merit.
47. It is our view that, without even delving into what actually transpired in the Tanzania High Court proceedings, it is clear that the principle of *res judicata* has no application to the instant case.

Filing the Reference out of Time

48. Again, the question of whether the Reference was filed out of time, was not specifically raise by the Respondent in the Notice of Preliminary Objection, but was urged in the Submissions. The Applicants responded thereto. Article 30(2) of the Treaty provides as follows:
- "The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."
49. With undue emphasis on the word "enactment" in Article 30(2), the Respondent argued that the "enactment" of the Act is the date that the Parliament of the United Republic of Tanzania passed the Act, namely 5th November, 2016 and

that the two month period referred to in Article 30(2) should be reckoned from that date, and that therefore the Reference having been filed on 11th January, 2017, the same was out of time, and should be dismissed on that basis.”

50. On their part, the Applicants submitted that prior to the President assenting to the law, the law making process is not complete, and that such process was completed on the date of assent, 16th November, 2016. That being the reckon date, in filing the Reference on 11th January, 2017, the Applicants were within time, and in compliance with Article 30(2) for the Treaty.
51. As stated above, the Respondent appears to have placed undue emphasis on the word “*enactment*” in Article 30(2). Indeed the Respondent, in its submissions has proceeded on the basis that in the legislative process, “*enactment*” is equated to passing of a Bill in Parliament. Reading Article 30(2), what is “the action complained of” in the instant Reference? It is clearly the Law known as the Media Services Act, which became law after firstly, being passed by the Parliament of the United Republic of Tanzania on 5th November, 2016 and secondly, being assented to by the President of the said Respondent State on 16th November, 2016. The passage of the Bill by the Parliament was only one step towards the making of the law. Prior to the Act being assented to by the President, there was no law in respect of which there could be a complaint. Indeed as regards Article 30(2) the focus is on “the action complained of.” The action complained of against the Respondent State, is the enactment of the Media Services Act, which became law on 16th November, 2016 upon assent by the President.
52. In this regard, the Applicants were well within time, in terms of Article 30(2), in filing the Reference on 11th January, 2017.
53. On the question of the jurisdiction therefore, we find that this Court has jurisdiction under Articles 23 and 27 of the EAC Treaty; the Applicant is well within his right to approach this Court under Article 30; the issue of *res judicata* does not arise in the instant case; and in terms of Article 30(2) the Reference was filed within time.
54. In answer to the First Issue therefore, whether the Court has jurisdiction to hear and determine the Reference, we answer in the affirmative.

ISSUE NO.2: Whether the cited provisions of the Act, are a violation of the cited Articles of the Treaty:

55. The gravamen of the Applicants case in the Reference is that they challenge the Sections of the Act set out in paragraph 12 above, as violating Articles 6(d), 7(2) and 8(1)(c).
56. It is not disputed that Tanzania as a Partner State, has obligations *inter alia*, under Articles 6(d), 7(2) and 8(1)(c) of the Treaty. These Articles are reproduced earlier in this Judgment. At the heart of this Reference however, is the question of whether by enacting the Media Services Act, the Respondent State violated the said Treaty provisions or any of them. Both in the Reference and in the Applicants’ submissions, the Applicants set out specific provisions of the Act which in their contention, fall foul of the said Treaty provisions. Indeed, of the nine orders prayed for by the Applicants in the Reference, seven are for declarations that various provisions of the Act violate the Treaty.
57. This Court has on several occasions in the past been invited to consider alleged

violations of the said Articles of the Treaty. In *Samuel Mukira Muhochi vs. The Attorney General of Uganda*, Reference No .5 of 2011, this Court stated, with reference to Article 6(d) of the Treaty:

“... these principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance; they are to observe these as a matter of Treaty obligation.”

58. In *Rugumba vs. Attorney General of Rwanda*, (supra), the Court stated:

“... we are of the firm view that the principles set out in Articles 6(d) and 7(2) were not inscribed in vain. The jurisdiction of this Court to interpret any breach of those Articles was also not in vain, neither was it cosmetic. The invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States hence the words that Partner States must bind themselves to “the adherence to the principles of democracy, the rule of law as well as the recognition, promotion and protection of the human and people’s Rights in accordance with the provisions of the African Charter on Human and Peoples Rights.”

59. In *Burundian Journalists Union vs. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013, the substantive issue was the freedom of the press and freedom of expression in the context of Articles 6(d) and 7(2) of the Treaty. This Court observed that “there is no doubt that freedom of the press and freedom of expression are essential components of democracy.” In that case, reviewing a number of decisions from various jurisdictions the court quoted with approval, the Supreme Court of Canada in *Edmond Journal*:

“It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over emphasized.”

60. Upon review of the said several earlier decisions in the *Burundian Journalists* case, the Court concluded as follows with regard to interpretation of Articles 6(d) and 7(2):

“... Under Articles 6(d) and 7(2), the principles of democracy must of necessity include adherence to press freedom.”

“... A free press goes hand in hand with the principles of accountability and transparency which are also enshrined in Articles 6(d) and 7(2).”

“... by acceding to the Treaty and based on ... finding that Articles 6(d) and 7(2) are justifiable, Partner States are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National laws must be enacted with that fact in mind. In stating so, we have previously held that whereas this Court cannot superintend the Organs of Partner States in the ways they enact their laws, it is an obligation on their part not to enact or sustain laws that completely negate the purpose for which the Treaty was

itself enacted.”

61. In answering its own question “.... What is the test to be applied by this Court in determining whether a National Law.....meets the expectations of the Treaty,” and finding no answer in the Treaty itself, the Court adopted the three part test set out by the Supreme Court of Canada in *R. vs. OAKES, (1986) ISCR 103*. This test, which was adopted by the High Court of Kenya in *CORD vs. The Republic of Kenya and Others HC Petition No. 628 of 2014*, may be paraphrased and broken down into these questions as follows:

- (a) Is the limitation one that is prescribed by Law? It must be part of a Statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited;
- (b) Is the objective of the law pressing and substantial? It must be important to the society; and
- (c) Has the State, in seeking to achieve its objectives chosen a proportionate way to do so?

This is the test of proportionality relative to the objectives or purpose it seeks to achieve.

62. It is common ground between Parties hereto, that freedom of opinion and freedom of the media are at the core of the fundamental and operational principles set out in Articles 6 and 7 of the Treaty. Indeed this is no more than the law as enunciated in the *Burundian Journalists* case, as well as the other authorities cited above. That said, it is trite law, and again common ground herein, that these rights are by no means absolute. Various courts in different jurisdictions have endeavored to set the parameters of when and how these rights may be restricted or limited. In *Julius Ndyabo vs. Attorney General, (2004) TLR14*, applying the constitution of Tanzania, the High Court of Tanzania stated:

“What the Constitution attempts to do; in declaring the rights of the people is to strike a balance between individuals liberty and social control.”

63. Referring to the *Burundian Journalists* case and the three tier test adopted therein, the Applicants submitted that if any provision of the impugned Act fails to pass any one of the three tests, that failure will constitute a violation of the right to freedom of expression and press freedom. Further, such provision of the Act will consequently breach the fundamental and operational principles set out in Articles 6 and 7 of the Treaty. We respectfully agree with Applicants.

64. Accordingly, to answer Issue No.2 in the instance Reference, we proceed to subject the impugned provisions of the Act to the said three tier test.

Section 7 of the Act:

65. The Applicants contend that “The Act under Section 7 (3) (a), (b), (c), (f), (g), (h), (i), and (j) violate freedom of expression by restricting type of news content without justification. The said section 7(3) provides as below:

“A media House shall, in the execution of its obligations, ensure that information issued does not:

- (a) undermine:-
 - i) The national security of the United Republic of Tanzania; or
 - ii) Lawful investigations being conducted by a law enforcement agent;
- (b) impede due process of law or endanger safety of life of any person;

- (c) does not constitute hate speech;
- (d) disclose the proceedings of the Cabinet;
- (e) facilitate or encourage the commission of an offence;
- (f) Involve unwarranted invasion of the privacy of an individual;
- (g) infringe lawful commercial interests, including intellectual property rights of that information holder or a third party from whom information was obtained;
- (h) hinder or cause substantial harm to the Government to manage the economy;
- (i) significantly undermines the information holder's ability to give adequate and judicious consideration to a matter of which no final decision has been taken and which remains the subject of active consideration; or
- (j) damage the information holder's position in any actual or contemplated legal proceedings, or infringe professional privilege."

66. In response, the Respondent, while conceding that the Treaty clearly states the fundamental and operational principles ... under Article 6 and 7 of which freedom of opinion and expression are core, submitted that, like all other rights, freedom of expression and opinion is not absolute but subject to reasonable limitation, therefore the limitation should be subject to reasonableness. After interrogating the Constitution of the United Republic of Tanzania, on the limitation of rights, the Respondent urged that the restrictions in Section 7 of the Act are reasonable and are limited to specific instances.

67. Applying the three tier test:

- i) Whilst it is manifestly clear that by definition, the Section is set out in the law, does that in and of itself meet the first test as set out and contemplated in the cases referred to above? In the *CORD* Case (supra), the Court stated that: "It must be part of a statute and must be clear and accessible to citizens so that they are clear on what is prohibited." In *Konate vs. Burkina Faso*, App No.004/2013/(2014), the African Court on Human and Peoples Rights, quoted with approval, the UN Human Rights Committee as follows:

"..... to be considered as law, norms have to be drafted with sufficient clarity to enable an individual to adapt his behavior to the rules and made accessible to the public."

Against this requirement, in our view the several impugned provisions in Section 7 (3) of the Act must fail the first test, as being vague, unclear and imprecise. Unlike in the *Burundian Journalists Case*, in the instant Reference, the Applicants were very specific as to which content-based provisions of the Act, they impugn as falling foul of Articles 6 and 7 of the Treaty.

Section 7(3)(a) – the word "undermine" which forms the basis of the offence, is too vague to be of assistance to a journalist or other person, who seeks to regulate his or her conduct, within the law.

- ii) Again, the word "impede" is vague and would not meet the UN Human Rights Committee's guidance that "laws must contain rules which are sufficiently precise, to allow persons in charge of their application to

know what forms of expression are legitimately restricted and what forms of expression are unduly restricted.”

- iii) The Act does not define hate speech, and therefore, in the context, the term is vague and potentially too broad.
- iv) “Unwarranted invasion” also in our view fails the test of clarity and precision.

The phrase “infringe lawful commercial interests”, in subsection (g), “hinder or cause substantial harm” in subsection (h), “significantly undermines” in (i) and “damage the information holders position”, all, similarly fall short of clearly defining the scope and extent of the respective content restrictions, to enable journalists and other persons to properly appreciate the limitation to the right to freedom of expression or to be clear on what is prohibited.

68. As regards the impugned provisions of Section 7 of the Act therefore, we find ourselves unable to accept the Respondent’s Submission that “the restrictions are not too wide and do not act as a fishing net, sweeping across and catching wanted and unwanted fish.” With respect, that is precisely what the impugned provisions do.
69. On the second limb of the three-tier test, the High Court of Kenya in the *CORD* case stated that “the objective of the law must be pressing and substantial, that it must be important to society.” The aim of the content restrictions in Section 7 is not self-evident, nor did the Respondent make specific submissions on the same.
70. On their part, the Applicants referred the Court to the respective provisions to be found in The African Charter on Human and Peoples rights and the International Covenant on Civil and Political Rights, (ICCPR). Article 27(2) of the African Charter provides that: “rights shall be exercise in respect of the rights of others, collective security, morality and common interests.”
71. Article 19(3) of the ICCPR provides that free expression may be limited for respect of the rights or reputation others; or for the protection of national security or of public order (“*ordre public*), or of public health or morals. The Applicants further referred the Court to the position stated in the *UN Human Rights Committee’s General comments* to the effect that a State Party relying on legitimate aim to justify a provision restricting free expression, can only do so by demonstrating “in specific and individualized fashion the precise nature of that threat, and the necessity (and proportionality) of the specific action taken, establishing a direct and immediate connection between the expression and the threat.”
72. Whereas as stated the Respondent made no specific submissions on the issue of legitimate aim as regards the impugned sections the Applicant urged that the impugned Section “in imposing a system of prior censorship, does not pursue a legitimate aim consistent with Article 19 of the ICCPR and Article 9 of the African Charter.”
73. Nor did the Respondent submit or otherwise seek to demonstrate to the Court that the impugned Sections of the Act contain restrictions which are necessary or appropriate to the legitimate aim sought to be achieved.
74. For the reasons set out above, we are of the view that the impugned provisions of Section 7 of the Act, fail the first test of the three tier test set out in the *CORD*

Case and the other authorities cited above. This failure is by reason of the broad and imprecise wording used in the sections, with the result that the provisions do not make it clear to citizens what exactly is prohibited, such that they may regulate their actions. That failure alone constitutes a violation of the right to press freedom and freedom of expression which in turn translates into a breach of the fundamental and operational principles set out in Articles 6 and 7 of the Treaty.

75. In this we are guided by what was stated by the Court in the *Burundian Journalists* Case that "...under Article 6(d) and 7(2), the principles of democracy must of necessity include adherence to press freedom" and, "free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2)." The Court thus concluded that "Partner States ... are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted with that fact in mind."
76. Over and beyond the first test, the Respondent also failed to establish either that there was a legitimate aim being pursued by the Respondent State in enacting the limitation in the impugned section of the Act, or indeed that the said limitations are proportionate to any such aim. As regards the cited provisions of Section 7 of the Act therefore, we find that they are in violation of Articles 6(d) and 7(2) of the Treaty.

Sections 13, 14, 19, 20 and 21

77. The Applicants impugn these provisions, which establish and deal with a system of accreditation, as being in violation of the said Articles of the Treaty. On its part, the Respondent denied the violation and submitted that the purpose of the provisions is to provide oversight and put in place, a control mechanism on the journalism profession for scrutiny, statistics and growth.
78. In the *Burundian Journalists* Case, it was acknowledged that accreditation *per se* is not objectionable. In the instant reference also, we see nothing objectionable to either section 13 which deals with functions of the Board or section 14 which deals with powers of the Board. In this regard, we read section 14 together with section 21(4)(5) and (6).
79. Sections 19 on the other hand is problematic, when we apply the three tier test referred to above. This is so in relation to the meaning and definition of the term "journalist" used in section 19 and defined in section 3. In the latter Section, journalist is defined as "a person accredited as a journalist under this Act, who gathers, collects, edits, prepares or presents news, stories, materials and information for a mass media service, whether an employee of media house, or a freelancer" In turn, "mass media" is defined as "includes any service, medium or media consisting in the transmission of voice, visual data, or textual message to the general public."
80. We agree with the Applicants' submission that the definition of "journalist" in section 19 is too broad, "to provide sufficient provision to allow an individual to foresee what activities they are forbidden from performing without accreditation." Indeed, the term "journalist" is difficult to define with precision. This was recognized by the *UN Human Rights Committee in its General Comment*

- 34: “journalism” is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as others, who engage in forms of self-publication in print, on the internet or elsewhere.
81. In the context of section 19 of the Act, it is also not clear, what legitimate aim the accreditation requirement therein (as a limitation on the right to freedom of expression), pursues. In *Scanlen vs. Zimbabwe, Case No. 297/05(2009)* the African Commission on Human and Peoples Rights took the view that a system of compulsory accreditation of journalists did not pursue the legitimate aims of public order, safety and protection of the rights and reputation of others. In the same case, the Commission concluded that: “the Respondent State’s arguments that the accreditation of journalists, are on grounds of public order, safety and for the protection of the rights and reputation of others, to be unsustainable and an unnecessary restriction of the individual practice of journalists.”
82. In our view, sections 20 and 21 of the act flow from section 19, and therefore they stand or fall together. We have already found that, section 19 does not pass the three tier test.
83. In answer therefore to the question, are sections, 13, 14, 19, 20 and 21 of the Act a violation of Articles 6(d) and 7(2) of the Treaty, we find that read together as they must be, sections, 19, 20 and 21 do violate the said provisions of the Treaty.

Sections 35, 36, 37, 38, 39 and 40 of the Act

84. These sections that comprise Part V of the Act deal with the offence, established in sections 35, of Criminal Defamation. Section 35 provides as follows:

Section 35:

- (1) Any matter which, if published, is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation, is a defamatory matter;
 - (2) The matter referred to under subsection (1) shall qualify to be a defamatory matter even when it is published against a deceased person; and
 - (3) The prosecution for the publication of defamatory matter concerning a person who is dead shall not be instituted without the written consent of the Director of Public Prosecutions.
85. The Applicants submitted that criminal defamation laws are an inappropriate means of limiting the freedom of the press. They argued that the protection of the reputation of others, including public figures can be assured appropriately and proportionately by the civil laws of defamation. The Applicants referred the Court to the 2010 resolution of the African Commission on Human and People’s Rights that called on all State Parties to “repeal criminal defamation laws or insult laws which impede freedom of speech.”
86. On its part in *Kimel vs. Argentina SERIE C No.177-2008*, the Inter-American Court of Human Rights stated:

“The broad definition of the crime of defamation might be contrary to the principles of minimum necessary, appropriate, and last resort or *ultimo ratio* intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to

protect fundamental legal rights from serious attacks which may impart or endanger them. The opposite would result in the abuse exercise of the punitive power of the State.”

87. The Respondent did not make substantive submissions in defence or justification of the introduction of the law on criminal defamation. Their submission was that “any reasonable government should have the protection of its society at the forefront.”
88. Applying the three tier test, it seems to us that section 35 which defines defamation is not sufficiently precise to enable a journalist or other person to plan their actions within the law. The definition makes the offence continuously elusive by reason of subjectivity. How for example, would an intending publisher, for the purposes of this section, predict that what they intend to publish concerning X is likely to expose X to hatred, contempt or ridicule and therefore injure X’s reputation” The offence created by Section 35 falls short on clarity.
89. Turning to the second tier of the test, the legitimate aim; in its brief submission referred to above, the Respondent states that “the intent of the legislature was to protect honour of the founders of (our) Nation...”
90. In its Reply to the Reference, the Respondent states that sections 35 to 40 of the Act do not restrict the freedom of expression and right to access information but rather, ensure the rights, freedoms, privacy and reputation of other people or interest of public are not prejudiced by wrongful exercise of the rights and freedoms of individuals. It is our view that this fails to meet the parameters referred to above, set by the UN Human Rights Committee, in its General Comment 34, that the Respondent State demonstrates a direct and immediate connection between the specific threat, and the specific action taken. The Restriction by creation of the offence of criminal defamation also therefore fails on the second tier of the test.
91. On the third tier, we do no more than refer to the Statement of the *UN Human Rights Committee General Comment 34*, that to meet the criterion of proportionality, the mode of restriction adopted should “be the least intrusive protective function.”
92. In *Federation of African Journalists vs. The Republic of The Gambia EWC/CCJ/JUD/04/18*, the ECOWAS Court of Justice had this to say:

“The practice of imposing criminal sanctions on sedition, defamation, libel and false news publication has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists. The application of these laws will amount to a continued violation of internationally guaranteed rights of the Applicants.”

In answer to the question: does the Act, under sections 35, 36, 37, 38, 39 and 40 violate the provisions of Articles 6(d) and 7(2) of the Treaty, we find in the affirmative.

Sections 50 and 54

93. Section 50 creates what are therein described as offences relating to media services. It provides as follows:

Section 50:

- (1) Any person who makes use by any means of a media service for the purposes

of publishing:

- (a) Information which is intentionally or recklessly falsified in a manner which:
 - i Threatens the interest of defence, public safety, public order, the economic interests of the United Republic, public morality or public health; or
 - ii Is injurious to the reputation, rights and freedom of other persons;
- (b) Information which is maliciously or fraudulently fabricated;
- (c) Any statement the content of which is:
 - i Threatening the interest of defence, public safety, public order, the economic interests of the United Republic, public morality or public health; or
 - ii Injurious to the reputation, rights and freedom of other persons.
- (d) Statement knowingly to be false or without reasonable grounds for believing it to be true;
- (e) A statement with maliciously or fraudulent intent representing the statement as a true statement; or
- (f) Prohibited information, commits an offence and upon conviction, shall be liable to a fine of not less than five million shillings but not exceeding twenty million shillings or to imprisonment for a period not less than three years but not exceeding five years or both.

(2) Any person who:-

- (a) Operates media outlet without license;
- (b) Practices journalism without accreditation; or disseminates false information without justification.
Commits an offence and upon conviction, shall be liable to a fine of not less than five million shillings and not exceeding twenty million shillings or to imprisonment for a period not less than three years but not exceeding five years or both.

94. Section 54 in turn creates the offence of publication of a false statement likely to cause fear and alarm.

95. Applying the above test, and in particular the first limb thereof, to section 50, it seems to us to be largely unobjectionable. However, subsection 1(c) fails the test in that “threatening the interests of defence, public safety, public order, the economic interests of the United Republic, public morality or public health”, is too broad and imprecise, to enable a journalist or other person to regulate their actions.

96. Similarly, we agree with the Applicants’ submission that in section 54, the phrase “likely to cause fear and alarm to the public or to disturb the public peace”, is too vague and does not enable individuals to regulate their conduct. The Applicants referred the Court to the case of *Chavunduka and Choto vs. Minister of Home Affairs & the Attorney General*, CIV APP NO. 156/99, where the Supreme Court of Zimbabwe struck down a similar provision.

97. On the question of whether Sections 50 and 54 of the Act are in violation of Articles 6(d) and 7(2) of the Treaty, we find that Section 50(1),(c)(i) and Section

54 are indeed in such violation.

Section 52 and 53

98. Section 52 defines “seditious intention” and Section 53 creates what it describes as seditious offences. Section 52 provides as follows:

- (1) A “seditious intention” is an intention to:-
 - (a) Bring into hatred or contempt or to excite disaffection against the lawful authority of the Government of the United Republic;
 - (b) excite any of the inhabitants of the United Republic to attempt to procure the alteration, otherwise with than by lawful means, of any other matter in the United Republic as by law established;
 - (c) Bring into hatred, contempt or to excite disaffection against the administration of justice in the United Republic;
 - (d) raise discontent or disaffection amongst people or section of people of the United Republic; or
 - (e) promote feelings of ill-will and hostility beaten different categories of the population of the United Republic.
- (2) An act, speech or publication shall not be deemed as seditious by reason only that it intends to:-
 - (a) Show that the Government has been misled or mistaken in any of its measures; or
 - (b) Point out errors or defects in the Government of the United Republic in legislation or in administration of justice with a view to remedying such errors or defects.
- (3) In determining whether the intention for which the act was done, any work spoken or any document published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and in the circumstances in which he conducts himself.

99. The Applicants submitted that these provisions, in defining sedition, fall foul of the first limb of the test. The Respondent made no submission on these provisions, but did state in its Response, that the provisions do not restrict freedom of expression and right to access of information as provide under the Constitution of the United Republic of Tanzania.

100. We are persuaded by the Applicants’ submission, with reference to section 52(1) that the same fails the test of clarity and certainty, required in the first limb of the test. The definitions of sedition in the said section are hinged on the possible and potential subjective reactions of audiences to whom the publication is made. This makes it all but impossible, for a journalist or other individual, to predict and thus, plan their actions. Section 52(3) compounds this problem in that, “the consequences which would naturally follow” would be entirely dependant on the subjective reaction of the person or audience to whom the publication is made.

101. With reference to similar provisions in the *Federation of African Journalists vs. the Republic of The Gambia*, (supra) the ECOWAS Court stated that:

“The restrictions and vagueness with which these laws have been framed and the ambiguity of the *mens rea* (seditious intention) makes it difficult

to discuss with any certainty what constitutes seditious offence.”

102. In that case, the Court held that the impugned laws were “violations of the internationally guaranteed rights of the Applicants.” In similar vein, the Constitutional Court of Uganda, in *Andrew Mujuni Mwenda and Others vs. Attorney General, UGCC 5(2010)*, struck down the impugned seditious laws for *inter alia* being vague and overly broad.
103. Read together, Sections 52 and 53 also fall foul of the proportionality part of the three tier test. Section 53(d) imposes custodial sentences for the offences created therein, In *Konate vs. Burkina Faso*, (supra), the African Court on Human and Peoples’ Rights had this to say:
- “Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.”
104. For these reasons, and in the circumstance, we find that Sections 52 and 53 of the Act violate Articles 6(d) and 7(2) of the Treaty.

Section 58 and 59

105. Section 58 provides as follows:
- “Where the Minister is of the opinion that the importation of any publication would be contrary to the public interest, he may, in his absolute discretion and by order published in the Gazette, prohibit the importation of such publication.”
106. And Section 59 provides:
- “The Minister shall have powers to prohibit or otherwise sanction the publication of any content that jeopardizes national security or public safety.”
107. The powers granted to the Minister in Sections 58 and 59 are far reaching, and clearly place limitations on the rights stated in both Article 19 of the International Covenant on Civil and Political Rights, as well as in Article 9 of the African Charter on Human and Peoples Rights. Is this limitation justifiable within the applicable parameters and specifically the three tier test set out above? The Applicants submitted that the provisions fail the test. As regards the first limb of the test, the provisions do not have sufficient clarity to enable a person to predict what publications would fall foul of the Minister’s subjective judgment as to what is “contrary to the public interest” in Section 58 and what context would jeopardize national security or public safety, in section 59. Further, the Applicants submitted that the Respondent failed to establish what legitimate interest is being pursued in the limitation of rights in those sections. The Applicants concluded that the powers granted to the Minister in these two Sections, constitute a severe form of prior restraint and do not accord with either the said Article 19 of the ICCPR or Article 9 of the African Charter, and are therefore in violation of the Treaty.
108. On its part, the Respondent stated that the Minister has to exercise the powers

judiciously, and they are not arbitrary, and that the exercise of the powers was subject to pre-conditions such as public safety and natural security. Further, the Respondent argued that a person aggrieved by the Minister's exercise of the power in this section, may challenge the same by way of judicial review.

109. With respect, the Respondent's submission does not answer the question of the subjectivity of the Minister's judgment in deciding when to exercise the powers, and more importantly, that this subjectivity denies persons the precision and certainty that would enable them to plan their actions. Further, what the Respondent calls pre-conditions are themselves subjective judgments of the Minister. Section 58 gives the Minister absolute (i.e. unfettered) discretion. Section 59 contemplates that it is the Minister who will determine that the content of a publication jeopardizes national security, or public safety, and prohibit or otherwise sanction such publication.
110. In *Media Rights Agenda and Constitutional Rights Project vs. Nigeria*, COM NO. 105/93-128/94-130/94-152/96. The African Commission on Human and Peoples Rights stated with regard to a similar provision that gave the Government power to prohibit publication: "this invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9(1). There has thus been a violation of Article 9(1)." This was with reference to the African Charter on Human and Peoples Rights.
111. Applying the said test used by this Court in the *Burundian Journalists Case* and taking into account the authorities referred to above, we are constrained to agree with the Applicants' submissions that Sections 58 and 59 of the Act contain provisions that constitute disproportionate limitations on the right to freedom of expression. The absolute nature of the discretion granted to the Minister, as well as the lack of clarity on the circumstances in which such Minister would impose a prohibition, in our view, make the provisions objectionable relative to the rights being restricted.
112. In answer therefore, to the question, are Sections 58 and 59 of the Act in violation of Articles 6(d) and 7(2) of the Treaty, we answer in the affirmative.
113. In the foregoing paragraphs, we have stated our findings that certain of the impugned provisions of the Act do indeed violate Articles 6 and 7 of the Treaty. Specifically we have found the following provisions to be in violation: Sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j); Sections 19, 20 and 21; Sections; 35, 36, 37, 38, 39 and 40; Sections 50 and 54; Sections 52 and 53; and Sections 58 and 59.
114. We find that Sections 13 and 14 of the Act are not in violation of the Treaty.
115. The Reference therefore, partially succeeds, in respect of the said provisions we have found to be in violation, and partially does not succeed, in respect of the said sections we have found not to be in violation. Below we make orders accordingly.

ISSUE NO.3: Whether the Parties are entitled to the Remedies Sought

116. The Applicants sought that the Court grant the remedies set out in Paragraph 12 of this Judgment.
117. On its part the Respondent prayed for the following:
- i Dismissal of the Reference;
 - ii Costs; and

iii Any other orders that the Court may deem just and necessary.

118. Having addressed the issues before us for determination, we have found that certain provisions of the impugned Media Services Act, hereinafter set out, are in violation of the principles set out in Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.

119. As stated above, each of the Parties prayed for costs. In terms of Rule 111(1) of this Court's Rules, "Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order." The subject matter of this Reference was of public importance. Having categorized the Reference as public interest litigation we exercise our discretion accordingly, and we are inclined to find that each Party should bear their own costs.

F. Final Orders

Having found as stated above, we hereby order as follows:

- (a) It is hereby DECLARED that: the provisions of Sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j); Sections 19, 20 and 21; Sections; 35, 36, 37, 38, 39 and 40; Sections 50 and 54; Sections 52 and 53; and Sections 58 and 59 of the Act, violate Articles, 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.
- (b) The United Republic of Tanzania is directed to take such measures as are necessary, to bring the Media Services Act, into compliance with the Treaty for the Establishment of the East African Community; and
- (c) Each Party shall bear their own costs.

It is so ordered.

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First Instance Division

Reference No. 4 of 2017**Niyongabo Theodore, Niyungeko Gerard & Manariyo Désiré****v****The Attorney General of the Republic of Burundi**

Coram: M. Mugenyi, PJ; F. Ntezilyayo* DPJ & C. Nyachae, J

Delivered via video conference on June 16, 2020

Rule of law - Property rights - The principle of supremacy of the law – Jurisdiction - Whether a citizen not resident in East Africa has locus standi - Whether the principle of res judicata applies - State responsibility - International review of national court decisions - Balance of probabilities – Legal burden of proof – Proprietary interest in land - Bona fide purchaser- Deponent Advocate’s affidavit defective - Discretion on costs

Articles: 6(d), 7(2), 23(1), 27(1), 30(1) of the Treaty - Article 15(1) EAC Common Market Protocol - Article 14, African Charter on Human & Peoples’ Rights – Article 205 Constitution of Burundi, 1995 -Article 4(1) Articles on Responsibility of States for Internationally Wrongful Acts, 2002 ILC- Articles: 217 Civil Code Volume III, Burundi - Article 142, 276 o Civil Code of Procedure, Burundi – Rules: 127, 136 EACJ Rules of Procedure, 2019

In 1997, the 3rd Applicant allegedly bought three adjacent parcels of land in Kibenga Rural, Bujumbura from three sellers namely: Mrs. Scholastique Niyonzima (daughter of Pascal Bindariye, deceased), Mr. Andre Habonimana and Mr. Simon Nzophabarushe. In 1999, he and the Sellers authenticated their sale contracts before the Tribunal of Residence of Musaga, in Bujumbura by executing a single Attested Affidavit, Number 356/99 of 27th July 1999 for all 3 parcels of land. Thereafter, the 3rd Applicant consolidated the 3 parcels of land and obtained a Certificate of Title No.1/1875 from the Registrar of Lands. The land was then sub-divided and parcels sold to the 1st and 2nd Applicants. Certificate of Title No.1/1875 was subsequently annulled by the Registrar of Lands, who kept the original Certificate and issued separate Certificates of Title to the new buyers. Both the 1st and 2nd Applicants took possession of their respective plots and later sub-divided the land further. They sold parts thereof to other *bona fide* purchasers who built houses thereon and are residing there.

In 2010, two heirs of the initial owners of the land lodged separate cases against the 1st Applicant at the *Tribunal de Grande Instance de Bujumbura*, claiming parts of the land. The 2nd & 3rd Applicants were enjoined as parties and all Applicants tendered proof of ownership of the properties in question. On 27th December 2016, the Tribunal rendered its judgment in case RC 069/16.863 annulling the 1st and 2nd Applicants’ certificates of title. The Applicants’ lawyer was notified of the said judgment on 18th January 2017.

Aggrieved, the 3rd Applicant filed *Reference No. 8 of 2015* at EACJ and the case was dismissed on 2nd December 2016. *EACJ Appeal No. 1 of 2017* was also dismissed on

2019. In the interim, the three Applicants, filed the current Reference on 27th March 2017. They challenged the legality of the *Tribunal de Grande Instance* decision alleging that the annulment of the Certificates of Title to land without giving sufficient reasons or following the special procedure prescribed in Burundian law violated of the principles of the rule of law and human and peoples' rights. They sought *inter alia*, a declaration that the Respondent State's actions and omissions were unlawful and infringed Articles 6(d) and 7(2) of the EAC Treaty; Article 15 of the EAC Common Market Protocol; and Article 14, African Charter. They prayed for restoration of their property rights and orders for a remedial mechanism to ensure implementation of the judgment by the Republic of Burundi.

The Respondent opposed the case averring that: the Court lacked appellate jurisdiction over decisions from municipal courts; the title deeds were nullified by courts of competent jurisdiction in Burundi thus rendering nugatory the Applicants' claim of Treaty violations; and the same case had been previously determined by this Court in *Reference No. 8 of 2015*. Furthermore, the Third Applicant lacked *locus standi*; and the annexures to the Reference were not certified as required by Rule 39 of the Court's Rules of Procedure.

Held

1. While this Reference was filed under the EACJ Rules of Procedure, 2013, the revised EACJ 2019 Rules took effect in February 2020. Therefore, the new Rules shall apply to the present Reference to the extent practicable as per to Rule 136.
2. The jurisdiction of this Court is sufficiently established where it is averred, on the face of the pleadings, that the matter complained of constitutes an infringement of the Treaty. Recourse to this Court in this Reference is with regard to a decision of a judicial organ in Burundi, the *Tribunal de Grande Instance* of Bujumbura. This is not an invocation of an unavailable appellate jurisdiction but, rather, the application of the jurisdiction conferred to the Court by Article 27(1) of the Treaty as was held in *EACSOJ, Appeal 4 of 2016*.
3. With regard to the 3rd Applicant's *locus standi*, his supplementary affidavit attests that his address is West Brook Main, USA. This apparent non-residence in an EAC Partner State negates his jurisdiction *ratione personae* to submit to this Court and the Court's jurisdiction to entertain his case as was held in the majority appellate judgment in *Manariyo Desire, Appeal 1 of 2017*. The 3rd Respondent is therefore struck out as party in this Reference.
4. Both *Reference 8 of 2015* and the present Reference concern the 3rd Respondent's legal interest as reflected in *Attested Affidavit No. 356/99*. However, in *Reference No. 8 of 2015*, it was alleged that the Burundi Supreme Court ignored the legal and probative value of the Attested Affidavit following a challenge to his proprietary interest by Simon Nzophabarushu. In the present case, the question is the annulment by a different Burundi court of sale agreements that conferred legal interest as reflected in the Attested Affidavit and the certificates of title.
5. While the 1st and 2nd Applicants had an interest in the property and the Attested Affidavit in issue in *Reference No. 8 of 2015*, they were not parties to *Reference No. 8 of 2015*. Moreover; the two References are not identical; and though the claims in both References are rooted in land conveyance transactions that derive their legitimacy from the legal title conferred in the Attested Affidavit, the separate

claims could not reasonably have been consolidated and jointly filed before this Court as the different domestic courts / tribunals delivered judgments in 2015 and 2017. The present Reference poses a different set of issues, therefore the question of *res judicata* does not arise against the 1st and 2nd Respondents.

6. In this Reference, the 1st and 2nd Applicants bore the legal burden to prove the illegalities and violation of Burundi law and infringement of the Treaty. The 3rd Applicant's primary legal interest in the disputed land was the subject of an Appeal in the Supreme Court of Burundi and the decision rendered by that court was binding on the Tribunal. Since the 3rd Applicant's interest in the Attested Affidavit was nullified, the 1st and 2nd Applicants' secondary interest would have been rendered nugatory but for the Common Law notion of a *bona fide* purchaser, namely: the purchase should have been 'made in good faith, without fraud or deceit. The 1st and 2nd Applicants made no attempt to demonstrate that the 3rd Applicant was a *bona fide* purchaser who in good faith paid valuable consideration for the property without notice of pre-existing adverse claims.
7. It is trite law that under international law the conduct of any organ of the State, including a judicial organ, is considered to be the act of that State. There was no proof on the record that the land that had been purportedly sold by two of the deceased Bandariye's children was not subject to joint inheritance under their father's estate at the time this sale was executed. On the contrary, both Ms. Niyonzima and her brother, Deo Nahimana, in their evidence before the *Tribunal de Grande Instance*, conceded that the land they purportedly sold belonged to their family and that they received money from 'some people' but they denied executing any sale contracts. Therefore, the Tribunal rightly nullified the illegal sale under Article 276 of the Burundi Civil Code that forbids the sale of items that do not belong to the seller.
8. One of the core components of the rule of law is the principle of supremacy of law, whether substantive or procedural. The domestic process applied by the *Tribunal de Grande Instance* of Bujumbura in this matter addressed the issues in conformity with Burundian law and the resultant judgment was legal and, to that extent complied with the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty. It is also in tandem with the property rights encapsulated in Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and Peoples Rights.

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Editorial Note: Appeal 5 of 2020 is pending determination in the Appellate Division

JUDGMENT

A. Introduction

1. This Reference was brought under Articles 6(d and 7(2) of the Treaty for the Establishment of the East African Community ('the Treaty'), Article 15(1) of the Protocol on the Establishment of the East African Community Common Market ('the Common Market Protocol'), Article 14 of the African Charter on Human and Peoples' Rights and Rule 1(2) of the East African Court of Justice's Rules of Procedure, 2013 ('the Rules').
2. It was instituted by Mssrs. Theodore Niyongabo, Gerard Niyungeko and Desire Manariyo ('the Applicants'), who are citizens of the Republic of Burundi, a Partner State of the East African Community (EAC). The Respondent is the office of the Attorney General of the Republic of Burundi, a self-defining office that was sued in its representative capacity as the Principal Legal Advisor of the Republic of Burundi.
3. The Reference sought to challenge the legality of a decision of the *Tribunal de Grande Instance* of Muha/Bujumbura in case RC069/16.863 for allegedly annulling the Applicants' Certificates of Title without giving sufficient reasons or following the special procedure prescribed under Burundian law for annulling Certificates of Title.
4. At the hearing the Applicants were represented by Mssrs. Donald Deya and Nelson Ndeki, while Mr. Diomede Vyizigiro appeared for the Respondent.

B. Factual Background

5. In 1997, Mr. Desire Manariyo ('the Third Applicant') allegedly bought three adjacent parcels of land in Kibenga Rural, Bujumbura from three individuals, namely, Mrs. Scholastique Niyonzima (daughter of the late Pascal Bindariye), Mr. Andre Habonimana and Mr. Simon Nzophabarushu ('the Sellers'). In 1999, he and the Sellers had their sale contracts authenticated before the Tribunal of Residence of Musaga, in Bujumbura and executed a single Attested Affidavit, Number 356/99 of 27th July 1999, in respect of the all 3 parcels of land.
6. The Third Applicant subsequently consolidated the 3 parcels of land and obtained a Certificate of Title for the consolidated piece of land from the Registrar of Lands, being Certificate of Title No.1/1875. He later sub-divided the consolidated parcel of land and sold the sub-divided plots to new buyers including Mr. Theodore Niyongabo ('the First Applicant') and Mr. Gerard Niyungeko ('the Second Applicant'), who bought two (2) plots each. The Third Applicant's Certificate of Title No.1/1875 was thereafter annulled by the Registrar of Lands, who kept the original Certificate and issued separate Certificates of Title to the new buyers. Both Applicants took possession of their respective plots, engaged in farming on them, later had them sub-divided further, and sold parts thereof to other *bona fide* purchasers that have since built their own houses thereon and are residing there.
7. In 2010, Mr. Jean Ndayishimiye (son of late Mr. Pascal Bindariye) and Mr. Nicola Mpitabavuma (son of the late Francois Biniga) lodged separate cases against the First Applicant before the *Tribunal de Grande Instance de Bujumbura*, claiming

parts of the land owned by him. The Second and Third Applicants were later enjoined as parties to the proceedings and, together with the First Applicant, tendered before the Tribunal evidence that sought to prove their legal ownership of the properties in question. On 27th December 2016, the Tribunal rendered its judgment in case RC 069/16.863 and annulled the First and Second Applicants' certificates of title. The Applicants' lawyer was notified of the said judgment on 18th January 2017.

8. Aggrieved by the manner in which the Burundi Judiciary had handled the matter, the Third Applicant filed *Manariyo Desire vs. The Attorney General of Burundi*, Reference No. 8 of 2015 before this Court. The First Instance Division of this Court dismissed the Reference on 2nd December 2016, a decision that has since been successfully challenged before the Appellate Division of the Court, albeit on a point of law, vide *Manariyo Desire Vs. The Attorney General of the Republic of Burundi*, Appeal No. 1 of 2017. Meanwhile, following the determination of the Reference by this Division, the Applicants did on 27th March 2017 file the instant Reference premised on the alleged violation by the same Respondent State of the principles of the rule of law and human and peoples' rights.

C. Applicants' Case

9. In a nutshell, it is the Applicants' case that the decision of the *Tribunal de Grande Instance* of Bujumbura in RC 069/16 863 illegally annulled the Applicants' Certificate of Title without either giving sufficient reasons or following the special procedure prescribed for the annulment of certificates of title, and ignored proof of the Applicants' legal interest in the contested land as had been availed to it. It is the contention that the Tribunal's actions contravened the principles of rule of law enshrined in Articles 6(d) and 7(2) of the Treaty and Article 15(1) of the Common Market Protocol, as well as the human rights outlined in Article 14 of the African Charter on Human and Peoples' Rights. This position was re-echoed in the affidavits of the First and Second Applicants of 17th March 2017.
10. The Applicant sought the following Declarations and Orders (reproduced verbatim):
 - a. A Declaration that the Respondent's actions and omissions are unlawful and an infringement of Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the EAC Common Market Protocol; and Article 14 of the African Charter on Human and Peoples' Rights;
 - b. A Declaration that the Respondent has violated the property rights of the Applicants, and their heirs or assigns, and in so doing has violated the commitment that it has made under the EAC Treaty, the EAC Common Market Protocol and the African Charter aforementioned;
 - c. An Order directing the Respondent to restore the property rights of the Applicants and their respective heirs or assigns;
 - d. Orders for reparations to the Applicants;
 - e. An Order directing the Respondent to appear and file before this Honourable Court no later than 60 days from the date of Judgment, a progress report on the remedial mechanisms and steps taken towards the implementation of the Orders issued by this Honourable Court;
 - f. An Order that the costs of and incidental to this Reference be met by the

Respondent;

- g. That this Honourable Court be pleased to make such further or other orders as may be just, necessary or expedient in the circumstances.

D. Respondent's Case

11. The Respondent did not contest the factual basis of this Reference; rather, its case hinges on two (2) points of law. It is the Respondent's contention that this Court does not have appellate jurisdiction over decisions from municipal courts and, even if perchance it did, the actions/omissions complained of herein with regard to the title deeds were time-barred and had been previously determined by this Court in Reference No. 8 of 2015. The Respondent also contended that the title deeds in respect of the land that was bought from the Third Applicant by the First and Second Applicants had previously been nullified by courts of competent jurisdiction in Burundi rendering nugatory the Applicants' contestations of violations of any provision of the Treaty, Common Market Protocol or the African Charter on Human Rights and Peoples' Rights. Finally, the Respondent faulted the annexures to the Reference for not being certified as required by Rule 39 of the Court's Rules of Procedure.

E. Issues for Determination

12. At a Scheduling Conference held on 5th September 2018, the following issues were framed for determination:
 - a. Whether this Honourable Court has jurisdiction to determine the Reference.
 - b. Whether this matter is time-barred.
 - c. Whether this matter is *Res Judicata*.
 - d. Whether the Respondent violated Articles 6(d) and 7(2) of the EAC Treaty; Article 15(1) of the EAC Common Market protocol; and Article 14 of the African Charter on Human and Peoples' Rights.
 - e. Whether the Respondent's failure to recognize the legal and probative value of the Certificate of Title associated with the Applicants and the disregard of its own laws and provisions was unlawful and violates the Applicants' rights to peaceful enjoyment of property.
 - f. Whether the Applicants are entitled to the remedies sought.

F. Court's Determination

13. We are constrained to observe from the onset that although the present case was filed and heard under then applicable Rules of Procedure, the East African Court of Justice Rules of Procedure, 2013 have since been revised and the applicable Rules presently are the East African Court of Justice Rules of Procedure that took effect in February 2020 ('the Rules as amended'). Rule 136 of the Rules as amended reads:

In all proceedings pending before the Court, preparatory or incidental to, or consequential upon any proceeding in court at the time of the coming into force of these Rules, the provisions of these Rules shall thereafter apply, without prejudice to the validity of anything previously done:-
Provided that if and so far as it is impracticable in any such proceedings to

apply the provisions of these Rules, the practice and procedure heretofore shall be followed.

14. Accordingly, the Rules as amended shall apply to the present Reference to the extent practicable, failure of which, recourse shall be made to the hitherto applicable Rules of Procedure, 2013.

Issue No. 1: Whether this Honourable Court has jurisdiction to determine this Reference

15. In submissions, it was argued for the Respondent that this Court did not have appellate jurisdiction over cases tried at first instance by municipal courts therefore purporting to impute such a jurisdiction would contravene the provisions of Articles 3(3) and 27(2) of the Treaty. It was asserted that although exhaustion of local remedies was not a prerequisite under the Court's Rules; given the Court's role, the rationale behind the exhaustion of local remedies in international justice and for the good functioning thereof, it was worth considering whether a party whose case had been tried at the first instance level in a Partner State and still had opportunity to appeal could file a case in this Court. In support of this position, the Respondent referred us to the ICJ decision in *South-West Africa Cases (Ethiopia vs. South Africa; Liberia vs. South Africa); Second Phase, International Court of Justice (ICJ), 1966* where it was held:

It is a necessary universal principle meanwhile that is like elementary in law of procedure that has to be distinguished on one hand, the right to seize a tribunal and the jurisdiction of a tribunal over the case and, on other hand the right toward the object of the reference that the applicant has to establish at the satisfaction of the tribunal.

16. To buttress this argument, the Respondent cited the opinion of Jean Chapez¹¹⁶ that the rationale of the rule of exhaustion of local remedies in international justice was to ensure respect for each country's sovereignty. In this regard, it was the Respondent's contention that since Case RC 069/16863 had been decided at the first instance level by the *Tribunal de Grande Instance* of Muha, the Applicants ought to have lodged an appeal against the said decision before the Court of Appeal of Bujumbura in accordance with Article 197 of the Civil Procedure Code of Burundi. It was further submitted that failure to do so did not confer a right upon the Applicants to cloth this Court appellate jurisdiction. On the contrary in his view, were this Court to find that it had jurisdiction over the case it would have strongly interfered with the internal judicial system of the Republic of Burundi and created a bad precedent whereby whoever lost a case before a municipal court at the first instance level could ignore Burundi's procedural laws and lodge an appeal before this Court. In learned Counsel's view, such an eventuality would contravene Article 7(g) of the Treaty that provides for the principle of complementarity.
17. The Respondent did also challenge the jurisdiction of this Court on the ground that the Third Applicant was not resident in a Partner State as required by Article 30(1) of the EAC Treaty, his Affidavit in support of the Reference having been purportedly deposed at Portland, United States of America (USA).

¹¹⁶ Chapez, Jean, *The rule of exhaustion of local remedies*, Edition A Pedone, Paris, 1972, pp. 25-39

18. Conversely, the Applicants contended that this Court did have jurisdiction to determine this Reference on the basis of Articles 23(1), 27(1) and 30(1) and (3) of the Treaty. It was argued on their behalf that they sought the interpretation and application of the Treaty, particularly Articles 6(d) and 7(2) which make reference to the African Charter on Human and Peoples' Rights, as well as the interpretation and application of Article 15(1) of the Common Market Protocol, which is an integral part of the Treaty. Specifically, it was submitted that in the present case the Applicants sought the Court's determination on:
- i. The legality under the EAC Treaty of a decision of a Partner State (Burundi) that is the Judgment RC 069/16863 [hereafter the Judgment] of the *Tribunal de Grande Instance* of Bujumbura [hereafter the Tribunal], dated December 27, 2016.
 - ii. The legality of the said decision on the grounds that is a violation of Articles 6(d) and 7(2) of the EAC Treaty, Article 15(1) of the EAC Common Market Protocol and Article 14 of the African Charter.
 - iii. Such a decision has not been reserved, under this Treaty, to an institution of a Partner State.
19. While conceding that this Court did not have appellate jurisdiction with respect to decisions of national courts, the Applicants nonetheless contended that in terms of Article 27(2) of the Treaty, in dealing with the present Reference this Court would not be exercising any appellate jurisdiction but, rather, the jurisdiction conferred upon it under Article 23 of the Treaty. In that regard, learned Counsel cited jurisprudence of the African Court of Human and Peoples' Rights in *Alex Thomas vs. The United Republic of Tanzania*¹¹⁷ and *Mohamed Abubakari Vs. The United Republic of Tanzania*,¹¹⁸ as well as the decision of this Court in *Burundi Journalists' Union (BJU) vs. The Attorney General of the Republic of Burundi*, EACJ Reference No. 7 of 2013.
20. Referring specifically to the latter case, the Applicants argued that as a matter of principle, an appellate jurisdiction presupposes that the parties before the latter court are exactly the same as the ones before the first Court and, more importantly, the applicable law or legal system would be the same before both courts. It was the contention that none of those requirements existed in the present case because, first, the parties before the national Court (Heirs of Pascal Bindariye and Others vs. Theodore Niyongabo) were not the same as the parties before this Court; secondly, Burundian law that was applicable before the domestic court was not applicable to this Court presently, the applicable law being the Treaty, the African Charter on Human and Peoples' Rights to which the Treaty refers, and the Common Market Protocol.
21. In addition, the Applicants referred us to *Manariyo Desire Vs. The Attorney General of the Republic of Burundi*, EACJ Reference No. 8 of 2015 where the Respondent had raised a similar objection but this Court had held that it had jurisdiction to consider the Burundi's Supreme Court's proceedings and the resultant judgment with a view to determining whether they contravened

¹¹⁷ African Court of Human and Peoples' Rights, Application 005/2013, *Alex Thomas Vs. The United Republic of Tanzania*, Judgment of 20th November 2015, para 130

¹¹⁸ African Court of Human and Peoples' Rights, Application 006/2003, *Mohamed Abubakari Vs. United Republic of Tanzania*, para 28-29 [sic]

Burundi's obligations under Articles 6(d) and 7(2) of the Treaty. It was argued that in the said decision the Court had opined that doing so would not be invoking an appellate jurisdiction over the Burundi Supreme Court, since 'there is a clear distinction between what constitutes an appellate review of a subordinate court's decision, and the dialectical approach which is synonymous with international review of domestic judgments.'

22. The Applicants further argued that the Respondent's contention that the Applicants were constrained to appeal the impugned judgment before the Court of Appeal of Bujumbura was totally ill-founded in so far as it invoked the rule on exhaustion of local remedies that was neither provided for by the Treaty nor by any other applicable EAC legal instrument. They refuted the Respondent's argument that non-exhaustion of local remedies would undermine the sovereignty of the Partner States, contending that it was precisely by virtue of the principle of sovereignty that Partner States had freely chosen not to require exhaustion of local remedies in the EAC judicial system.
23. With regard to the argument that this Court lacks jurisdiction to entertain this Reference on account of one of the Applicants residing outside the EAC Partner States, the Applicants urged that in the event that this Court found that the Third Applicant indeed had no *locus standi* before it, the First and Second Applicants' case should continue.
24. We carefully listened to the Parties' rival arguments on this issue. As quite rightly acknowledged by both Parties, the jurisdiction of this Court is encapsulated in Articles 23, 27 and 30 of the Treaty. We reproduce the relevant provisions of these articles for ease of reference.

Article 23(1):

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

Article 27 (1):

The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

Article 30:

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

(2)

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

25. It is clear from the abovementioned provisions of the Treaty that Articles 23(1) and 27(1) of the Treaty do give this Court the exclusive mandate to apply and interpret the Treaty, except in terms of the proviso to Article 27(2). Article

30(1) on its part provides the context within which such jurisdiction would be exercised. Further, this Court has had occasion to address the question of its jurisdiction in different decided cases. It has consistently found its jurisdiction to have been sufficiently established where it was averred on the face of the pleadings that the matter complained of constituted an infringement of the Treaty. See *Hon. Sitenda Sebalu vs. The Secretary General of the East African Community & Others*;¹¹⁹ *Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 2 Others*;¹²⁰ *Burundi Journalists' Union vs. The Attorney General of the Republic of Burundi (supra)* and *M/S Quick Telecommunications Ltd Vs. The Attorney General of the United Republic of Tanzania*.¹²¹

26. In the present Reference, the Applicants contest the legality of a decision of the *Tribunal de Grande Instance* of Bujumbura, a course of action that the Respondent faults for being tantamount to an appeal, which is the preserve of the Court of Appeal of Bujumbura. A related issue was quite conclusively settled in *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others*.¹²² It was held:

The reference before the Trial Court was not a further appeal from the Decision of the Constitutional Court of Burundi. It was a reference on the Republic of Burundi's international responsibility under international law and the EAC Treaty attributable to it by reason of an action of one of its organs namely the Constitutional Court of Burundi. The Trial Court had a duty to determine this international responsibility and in so doing, it had a further duty to consider the internal laws of the Partner State and apply its own appreciation thereof to the provisions of the Treaty.

27. Similarly, recourse to this Court with regard to a decision of the *Tribunal de Grande Instance* of Bujumbura would not amount to the invocation of an unavailable appellate jurisdiction but, rather, the application of the jurisdiction conferred upon this Court under Article 27(1) of the Treaty. We so hold.

28. With regard to the question of the exhaustion of local remedies, we observe that the Respondent did concede that it was not provided for under the Rules of this Court but simply sought to persuade us to lavish an unduly creative construction to the absence of such a rule, an invitation that we respectfully decline. The Respondent's concession thus renders the exhaustion of local remedies a moot issue before us.

29. On the other hand, on the question of the Third Applicant *locus standi* in this matter, we stand duly guided by the decision of the Appellate Division of this Court in *Manariyo Desire vs. The Attorney General of the Republic of Burundi*¹²³ where the same deponent, Mr. Manariyo, attested in an affidavit to being in Portland, USA. On that premise, it was held that he was not 'resident in' any of the EAC States' and the Court disavowed itself of the jurisdiction *ratione personae* to deal with the Appeal. In the matter before us, Mr. Manariyo attested in his supplementary affidavit to being in West Brook Main, USA. Whereas

¹¹⁹ EACJ Reference No. 1 of 2010

¹²⁰ EACJ Reference No. 1 of 2006

¹²¹ EACJ Reference No. 10 of 2016

¹²² EACJ Appeal No. 4 of 2016

¹²³ EACJ Appeal No. 1 of 2017

learned Counsel for the Applicants sought to argue that he might have been in the USA at the time he deposed the said affidavit but was otherwise ordinarily resident within an EAC Partner State, that fact was not affirmed either in the Third Applicant's affidavit or in any other evidence, leaving it unproven and speculative. Had he attested to being ordinarily resident in Burundi but had at the time he deposed the affidavit been temporarily in the USA, it would have been an entirely different matter. Needless to state, we are bound by the decision in the above Appeal. Consequently, we are constrained to find that Mr. Manariyo's apparent non-residence in an EAC Partner State negates his *ratione personae* to submit to this Court or the Court's jurisdiction to entertain his case. In the premises, we would strike the Third Applicant from this Reference but the First and Second Applicants' claims do subsist.

Issue No. 2: Whether the Reference is time barred

30. It was the Respondent's contention that, aside from the Reference being a disguised Appeal, the title deeds that were in issue before the *Tribunal de Grande Instance* of Muha/ Bujumbura had been issued in 1999 and 2001 thus rendering the present Reference time-barred. On their part, relying on the provisions of Article 30(2) of the Treaty, the Applicants stressed that the matter complained of in the present case was the judgment in RC 069/16863 of 27th December 2016, which the Applicants' lawyer had been notified of on 18th January 2017. Thus, having filed this Reference on 17th March 2017, it had been filed within the prescribed two-month time frame from the date on which the impugned judgment had come to their knowledge. It was argued that under Rule 3(1)(a) of the then applicable Rules of the Court, time would have started to run on 19th January 2017 (a day after the notification of the impugned Judgment) and the last day of the two- month period would have been *Saturday* 18th March 2017, which by virtue of Rule 3(1)(d) of the Rules would have translated to *Monday* 20th March 2017.
31. It was an agreed fact at the Scheduling Conference held in respect of the instant Reference that the Applicants' lawyer had been notified of the impugned decision on 18th January 2017 and the Reference was filed on 17th March 2017. Consequently, even without recourse to Rule 3 that was invoked by the Applicants, we find no contestation as to whether the Reference is time barred. It was clearly filed within the two-month time frame that is prescribed by Article 30(2) of the Treaty. We would answer *Issue No. 2* in the negative.

Issue No. 3: Whether the Reference is *res judicata*

32. It was the Respondent's contention that the matters in contention in both Reference No. 8 of 2015 and the present Reference were essentially the same, (in his view) the First and Second Applicants only joining the latter Reference to assist the Third Applicant. The Respondent asserted that the Third Applicant was the seller of the land in reference in *Attested Affidavit No. 356/99* of 27th July 1999 that was bought by the First and Second Applicants, and said Applicants' certificates of title that were in issue in the present Reference originated from the land reflected in *Attested Affidavit No. 356/99*, which had been nullified by the municipal courts. According to the Respondent, the claim in the present

Reference was mainly based on the question of the probative value of the First and Second Applicants' title deeds that, if acknowledged, would revive the issue of the nullified Attested Affidavit.

33. The Respondent also contended that the similarity of both References was reflected in the nature of the orders sought in each of them, as well as the following statement in the judgment in Reference No. 8 of 2015:

'The Reference is premised on the failure of the cited courts in the Republic of Burundi to acknowledge the legal and probative value of the attested affidavit No. 356/99 of 27th July 1999, despite it having been executed by State organs.'

34. On their part, the Applicants referred us to the following definition of *res judicata* in *Black's Law Dictionary*¹²⁴:

An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

35. The Applicants also referred to the case of *Steven Dennis Vs. The Attorney General of the Republic of Burundi & Others*¹²⁵ where it was held that:

The doctrine is meant to ensure that parties and courts are not burdened with multiple resolutions of the same dispute between the same parties on the same subject matter before the same court and which issue has previously been conclusively determined.

36. The Applicants argued that the *res judicata* principle was inapplicable to the present case given that whereas in Reference No. 8 of 2015 the Third Applicant's complaint was in respect of a Burundi Supreme Court judgment, in the present case the impugned judgment was by the *Tribunal of Grande Instance* of Bujumbura. They further argued that in Reference No. 8 of 2015 the Third Applicant had sought legal redress for the failure by the Supreme Court of Burundi to recognize the legal and probative value of the Attested Affidavit No. 356/99, while in the present case he was aggrieved by the annulment by the *Tribunal de Grande Instance* of Bujumbura of all the sale agreements between himself and Scholastique Niyonzima, Deo Nahimana, Andre Habonimana and Francois Biniga.

37. In addition, the Applicants argued that the disputed properties were not the same in both References, the property in Reference No. 8 of 2015 being a piece of land that the Third Applicant had bought from one Simon Nzophabarushu, while the land in contention presently was a piece of land that he bought from Scholastique Niyonzima and Andre Habonimana. It was further argued that this Court's judgment in Reference No. 8 of 2015 was not final since it was subject to a then ongoing appeal, the Applicants citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina*

¹²⁴ 9th Edition, 2009, p. 1425

¹²⁵ EACJ Reference No. 3 of 2015, para. 44

vs. Serbia & Montenegro),¹²⁶ to propose that in international law the underlying principles in the concept of *res judicata* had been identified as ‘first, the stability of legal relations that requires that litigation comes to an end, and secondly, the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.’¹²⁷

38. We have carefully considered the rival submissions of both Parties on this issue. Clearly the First and Second Applicants were not parties to Reference No. 8 of 2015 therefore the question of *res judicata* would not arise against them. On the other hand, whereas the Third Applicants was indeed a party in that Reference, having struck him from the present Reference the issue of *res judicata* that might have otherwise been relevant to him now lies redundant.
39. Be that as it may, had we considered the issue on its merits, it is quite clear to us that the claims in both Reference No. 8 of 2015 and the present Reference hinge on the Third Applicant’s legal interest as reflected in *Attested Affidavit No. 356/99*. It was indeed on the basis of that primary legal interest that the First and Second Applicants herein subsequently purchased their respective pieces of land. In Reference No. 8 of 2015, Mr. Manariyo had faulted the Burundi Supreme Court for ignoring the legal and probative value of the Attested Affidavit in its handling of a challenge to his proprietary interest therein by Simon Nzophabarushu. In the present case, on the other hand, he questions the annulment by a different Burundi court of sale agreements that conferred legal interest reflected in the Attested Affidavit, as well as certificates of title the interest in which was derived from the same Attested Affidavit.
40. We respectfully abide by the ICJ’s reasoning in *Bosnia & Herzegovina vs. Serbia & Montenegro* (*supra*) that litigation must come to an end therefore an issue which has already been adjudicated in favour of a party need not be argued again. In the same vein, we find no reason to depart from this Court’s observation in *Steven Dennis Vs. The Attorney General of the Republic of Burundi & Others* (*supra*) that in terms of the efficient utilisation of scarce judicial resources courts should not be burdened with adjudicating ‘the same dispute between the same parties on the same subject matter before the same court and which issue has previously been conclusively determined.’ The foregoing precedents resonate with the import of the defense of *res judicata*, which bars the litigation by the same parties and before the same court of a suit arising from the same subject matter as had been conclusively determined by the court. It similarly forestalls the litigation of a claim arising from a transaction or series of transactions that could have been, but were not, raised in the original suit.
41. Turning to the matter before us, it becomes apparent that although the parties in the 2 References are not identical, the First and Second Applicants in the present Reference did have privity with the legal interest that was in issue in the earlier Reference in so far as their interest in the property that is in issue herein is derived from the same Attested Affidavit. In fact, they do derive title to their property from the Third Applicant’s interest in the Attested Affidavit that was in issue in *Reference No. 8 of 2015*.
42. It seems to us, therefore, that the matters in contention before us presently

¹²⁶ *Judgment, ICJ Reports 2007, p.43*

¹²⁷ *Ibid.* at para. 116.

ideally should have been raised in that Reference to ensure their conclusive determination and obviate the unnecessary duplicity of proceedings. This, however, was not feasible owing to time constraints. Although the underlying domestic claims in both References had been lodged in the municipal courts in 2010, the judgment that gave rise to *Reference No. 8 of 2015* was rendered in 2015 while that in respect of which the present Reference arises was only delivered in 2017. Given the restrictive 2-month limitation period that is applicable to matters before this Court, it is quite conceivable that Mr. Manariyo could not wait till 2017 to lodge a comprehensive Reference in this Court as the earlier judgment would have been rendered time-barred. Therefore, although the claims in both References are rooted in land conveyance transactions that derive their legitimacy from the legal title conferred in the Attested Affidavit, the separate claims could not reasonably have been consolidated and jointly filed before this Court. It would be surreal and unjust to utilize the bar of *res judicata* against the Applicants in those circumstances.

43. In any event, although rooted in the same land conveyance, the legal claims in the 2 References are at variance. In the earlier Reference Mr. Manariyo's claim to the suit property had in the case before the municipal courts been challenged by one of the sellers thereof leading to the cancellation of the Attested Affidavit. The present case, on the other hand, is grounded in a claim before the Tribunal by 2 persons that, though strangers to the sale agreements that conferred legal title to the Third Applicant, would nonetheless appear to lay concurrent and conflicting claim to the suit property *inter alia* as beneficiaries of deceased persons' Estates in respect of which it accrues. The present Reference thus poses a different set of issues including the circumstances under which a certificate of title that is conclusive evidence of title (as opposed to an Attested Affidavit) may be legally nullified, the legal rights of beneficiaries of deceased persons' Estates, the rights of *bona fide* purchasers etc. Consequently, the striking out of the Third Respondent notwithstanding, the bar of *res judicata* would not have been applicable even as against him. We would therefore answer *Issue No. 3* in the negative.

Issue No. 4: Whether the Respondent violated Articles 6(d) and 7(2) of the Treaty, Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and Peoples' Rights.

AND

Issue No. 5: Whether the Respondent's failure to recognize the legal and probative value of the certificates of title associated with the Applicants and the disregard of its own laws and provisions was unlawful and violates the Applicants' rights to peaceful enjoyment of property.

44. We propose to address the above issues together because we find them repetitive. We understood it to be the preposition herein that by the provisions of Articles 6(d) and 7(2) of the Treaty the Partner States committed to *inter alia* abide by the principles of rule of law on the one hand, and the principle of respect for human rights as guaranteed by the African Charter on Human and Peoples' Rights, on the other hand. It is alleged that, having failed to recognize the legal and probative value of the First and Second Applicants' certificates of title (as sought

to be illustrated in *Issue No. 4*) and thus violating Burundian law, the Respondent State (through the decision of its organ – the *Tribunal de Grande Instance* of Bujumbura) contravened both the principle of rule of law and the respect for human rights. The impugned decision was also alleged to have been unlawful *per se* in terms of Article 6(d) and 7(2) of the Treaty. *Issue No. 5* herein sought to clarify the nexus between that decision and the negation of the Applicants' right to quiet enjoyment of their property.

45. The Applicants relied upon the definition of the rule of law principle as stipulated in the United Nations Secretary General's Report of 23rd August 2004¹²⁸ and adopted by this Court in *Mary Ariviza and Okotch Mondah vs. The Attorney General of the Republic of Kenya & Another*¹²⁹ to propose that one of the core components of the rule of law is the principle of supremacy of law, whether substantive or procedural. The Applicants contended that in many cases, this Court had assimilated the rule of law principle to the principle of supremacy of the law, such law being the national laws of Partner States when the latter were the Respondents or Community law when the Secretary General of the Community was the Respondent. In that regard, we were referred to *James Katabazi & 21 Others vs. The Secretary General of the East African Community & Another*;¹³⁰ *Henry Kyarimpa vs. The Attorney General of the Republic of Uganda*;¹³¹ *Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda*,¹³² and *Manariyo Desire vs. The Attorney General of the Republic of Burundi*.¹³³
46. The Applicants further asserted that this Court had severally held that any violation of national laws by any organ of a Partner State amounted to a violation of the rule of law principle in terms of Article 6(d) and 7(2) of the Treaty, arguing that that standard was applicable to the violation of any other provision of the Treaty or indeed any other EAC legal instrument. In addition, noting that Article 34 of the Burundian Code of Civil Procedure also obliged presiding judges to abide by applicable national laws, the Applicants contended that by violating its own laws through the impugned judgment the Respondent State had flouted the rule of law principle in terms of the supremacy of the law. The Applicants maintained that only 2 sale agreements related to the parcels of land that were in issue before the Tribunal: the sale agreement between the Third Applicant and Scholastique Niyonzima and the one between Third Applicant and Andre Habonimana, who in any case was not a party to the dispute before the *Tribunal de Grande Instance* of Bujumbura.
47. It was the contention that the Tribunal had based its nullification of the sale agreement between the Third Applicant and Ms. Niyonzima on Article 276 of the Civil Code which provides that '*the sale of someone's thing is null; this may give rise to damages where the buyer has ignored the fact that the item sold belongs to another.*' The Applicants faulted this decision for violating Burundian law. Citing Article 137(1) of the Code of Civil Procedure which provides that '*the statement*

¹²⁸ Report S/2004/616

¹²⁹ EACJLR (2005 – 2011) 212 at 222, para. 30

¹³⁰ EACJLR (2005 – 2011) 51 at 58, paras. 44, 45

¹³¹ EACJLR (2005 – 2011) 274, 280, paras. 32, 75

¹³² EACJLR (2012 – 2015) 361 at 365, para. 14

¹³³ EACJ Reference No. 8 of 2015, para 71.

of reasons must relate to every claim and plea in the parties' submissions, they asserted that the Tribunal had not addressed the Third Applicant's arguments that each of the late Bindariye's children had sold off their respective pieces of land separately, the alleged joint inheritance not having been in existence at the time of sale. They further argued that by nullifying the agreement on the ground that Ms. Niyonzima had sold a piece of land that she did not own, the Tribunal violated the principle of '*Nemo auditor propriam turpitudinem allegens*' that literally means that nobody may benefit from his/her own wrongdoing. They pointed out that Ms. Niyonzima ought to have been condemned for selling land that she did not own rather than being granted property that she had previously sold to a bona fide purchaser. In their view, the Tribunal thus deprived a bona fide purchaser of his right to the property contrary to a general principal of law in Burundi that bona fide third parties should be protected and not penalized.

48. The Applicants took issue with the fact that although Deo Nahimana had been recognized as having sold his land to the Third Applicant; both his sale agreement and the agreement between his sister (Scholatisque Niyonzima) and the Third Applicant had been nullified on the same ground – that the land they sold was held in joint inheritance and was therefore not theirs. Further, to the extent that the land in the sale agreement between Mr. Nahimana and the Third Applicant was never in dispute before the Tribunal, its nullification was opined to have been done in contravention of Article 142 of the Civil Code of Procedure that reads:

Under penalty of a decision being set aside on appeal or cassation, the judge shall pronounce on all that has been requested and only on what has been requested.

49. The Applicants similarly contested the Tribunal's nullification of the private sale agreement between the Third Applicant and André Habonimana, who was a witness (not a party) to the dispute, arguing that it violated provisions of Burundian Laws on the inadmissibility of witness evidence against written agreements;¹³⁴ the prohibition of *ultra petita* decisions;¹³⁵ ambiguous, dubious, or hypothetical reasons,¹³⁶ and decisions against a person who is not a party to a case,¹³⁷ and the legal binding force of agreements.¹³⁸ In the same vein, it was argued that by its nullification of the agreement between Jean Ndayishimiye and Liberata Kiburago without any valid reason, contrary to Article 140 of the Code of Civil Procedure, the impugned judgment violated Article 33 of the Civil Code, Volume III¹³⁹ on the binding force of agreements.
50. In addition, it was asserted that the agreement between the Third Applicant and Mr. Francois Biniga was in respect of a piece of land outside the disputed property therefore its nullification by the Tribunal violated legal provisions

¹³⁴ Article 217 of the Civil Code Volume III and Article 142 of the Civil Code of Procedure

¹³⁵ Article 142 of the Civil Code of Procedure

¹³⁶ Article 140 of the Civil Code of Procedure

¹³⁷ Article 151 of the Civil Code of Procedure

¹³⁸ Articles 33 and 2014 of the Civil Code Volume III

¹³⁹ This Article provides that 'legally constituted agreements serve as law for those who have made them. Such agreements may only be revoked by their mutual consent or for causes authorized by law. The agreement must be executed in good faith.'

on the procedure to be followed when a party to an agreement challenged the authenticity of property that was not in contention; the rules of interpretation of agreement/contracts;¹⁴⁰ the various options for signing contracts,¹⁴¹ and the binding force of agreements.¹⁴²

51. On the other hand, despite having been furnished with certified copies of the First and Second Applicants' certificates of title in evidence, the Tribunal allegedly disregarded them and annulled the certificates without furnishing any reasons. By so doing it allegedly violated Burundian law on the prohibition of a judge changing the claims of parties,¹⁴³ the obligation to respond to all parties' pleadings¹⁴⁴ and due process for the nullification of certificates of title. The Applicants asserted that Burundian law¹⁴⁵ designated certificates of title as conclusive evidence of legal interest, which could only be challenged for fraud or forgery under procedures that were duly outlined under the Civil Code of Procedure.¹⁴⁶
52. The First and Second Applicants also contested the Tribunal's directive to them to make alternative arrangements with the Third Applicant following the nullification of their certificates of title, arguing that it violated the legal prohibition against changing a party's claim or adjudging a matter beyond the parties' pleadings. They stressed that neither of them had sought such an order, their prayers having been restricted to the recognition of their respective proprietary interests as reflected in their certificates of title, therefore the Tribunal had no authority to introduce a claim that was never raised.
53. In terms of Article 15(1) of the Common Market Protocol, it was the Applicants' contention that the nullification of the Third Applicant's sale agreements and the First and Second Applicants' certificates of title without due process violated that legal provision given that the Respondent State did not apply Burundi property laws properly and thus arbitrarily deprived the Applicants of their property rights. The Applicants maintained that by illegally disregarding their proprietary interest in the disputed property, the Respondent State had (through the impugned judgment) violated their right to property as guaranteed by Article 14 of the African Charter on Human and Peoples Rights and specifically denied the First and Second Applicants their right to peaceful enjoyment of their property.
54. In support of their case, the Applicants cited the following decision in *Venant Masenge vs. the Attorney General of Burundi*,¹⁴⁷ where the Court held that it had jurisdiction over the land and property rights of parties:

For all those reasons given above, we hold that the failure by the appropriate authorities of the Republic of Burundi to ensure the protection of the Applicant's land property rights was fundamentally inconsistent with Burundi's express

¹⁴⁰ Articles 54 and 55 of Civil Code Volume III

¹⁴¹ Articles 205 and 206 of the Civil Code Volume III

¹⁴² Articles 33 and 2014 of the Civil Code Volume III

¹⁴³ Articles 28, 132, 133 and 134 of the Civil Code of Procedure

¹⁴⁴ Article 207 of the Constitution, 2005 and Articles 132 and 137 of the Civil Code of Procedure

¹⁴⁵ See Articles 199 and 201 of the Civil Code Volume III; Article 313, 317 and 344 of the Land Code, 2011.

¹⁴⁶ See Articles 110, 117, 118 and 121 of the Civil Code of Procedure

¹⁴⁷ EACJ Reference No. 9 of 2012

obligations under Article 6(d) and 7(2) of the Treaty to observe the principle of good governance including in particular the principles of adherence to the rule of law, and the promotion and protection of human rights. This failure constitutes an infringement of the said provisions of the Treaty.¹⁴⁸

55. Conversely, it was argued for the Respondent that the Applicants had not satisfactorily established any breach of Articles 6(d) and 7(2) of the Treaty, the contention seemingly being that in so far as their right of appeal had not been curtailed by the Respondent State, an appeal from the Tribunal's decision to the Burundi Court of Appeal would have sufficed for purposes of compliance with the rule of law principle. The Respondent reiterated the same argument with regard to the alleged violation of Article 15(1) of the Common Market Protocol and Article 14 of the African Charter of Human and Peoples' Rights, maintaining that the Burundian Court of Appeal (not this Court) was the appropriate appellate body to address the Applicants' misgivings about the impugned Tribunal decision.

56. In the same vein, on *Issue No. 5*, the Respondent reiterated its submissions on Issues 3 and 4 above. Citing the following observation by this Court in *Reference No. 8 of 2015*, it was argued that the present proceedings were an abuse of court process. We reproduce the opinion of the Court below.

Even more importantly, we are constrained to observe that it was averred in paragraph 14 of the Reference that the Applicant sub-divided the consolidated parcels of land and sold them out to new buyers. In paragraph 15, it is further averred that following the said sale, the Registrar of Lands (*Conservateur des Titres Fonciers*) annulled the Applicant's certificate of title to the property and issued new certificates of title to the new buyers. It would appear then that the Applicant had relinquished all legal title to the disputed property to the new buyers. What then are the property rights he purports to reserve for himself and alleges were violated? We did not find any evidence whatsoever of any subsisting proprietary interest vested in the Applicant. Consequently, we do not find any rights vested in the Applicant either with regard to the disputed property or to the purported peaceful enjoyment thereof; neither do we find any violation therein of Article 15(1) of the Protocol and Article 14 of the African Charter.

57. It is trite law that under international law the conduct of any organ of the State, including a judicial organ, is considered to be the act of that State.¹⁴⁹ In that regard, the duty upon this Court would be to interrogate the compliance of municipal courts' judicial conduct with Treaty provisions, a mandate that is well within its purview.¹⁵⁰ Thus in so far as the EAC Partner States did bind themselves to the international obligations demarcated in the Treaty, their domestic courts are

¹⁴⁸ At p.19

¹⁴⁹ See Article 4(1) of the *International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts, 2002*; *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others, EACJ Appeal No. 4 of 2016*, and the ICJ's *Legal Advisory Opinion in Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p. 62 at pp. 87 – 88, paras. 62, 63.*

¹⁵⁰ See Article 27(1) of the EAC Treaty and *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others (ibid.)*

obliged to so enforce domestic laws as to ensure compliance by themselves, as well as States parties, with these international obligations. Far from being an appeal, as learned Respondent Counsel would have us believe, the international review of national courts is characterized by the application of distinct legal perspectives whereby national courts enforce domestic laws while international courts approach the same set of facts from the perspective of State parties’ international obligations. It has indeed been opined that the process at the international level would be merely subsidiary or supervisory; intervention being limited to when the domestic process fails to address the issues appropriately and conform to the international obligation.¹⁵¹ To that end, the duty upon us is two-fold: first, to determine the Respondent State’s international responsibility and, secondly, to interrogate the Tribunal’s decision so as to deduce its compliance with the EAC Treaty (or the lack of it).¹⁵²

- 58. It is not in dispute that the *Tribunal de Grande Instance* of Bujumbura is a judicial organ in the Respondent State. Indeed, Article 205 of the Constitution of Burundi does recognise ‘Tribunals of Residence’ alongside courts as organs that exercise judicial power. The tribunal in issue in the present case being the *Tribunal de Grande* of Bujumbura, we are satisfied that it is a recognised *Tribunal of Residence* that is duly acknowledged as a judicial organ in Burundi. On the other hand, the Applicants have specifically invoked the Respondent State’s international obligation to observe the rule of law. The gist of their contestation is that the *Tribunal de Grande Instance* of Bujumbura – a judicial organ of the Republic of Burundi – flouted Burundi national law and, consequently, the rule of law principle as enshrined in the Treaty. It is also the contention that the resultant judgment was an illegality, which is a Treaty violation in its own right.
- 59. We cannot fault the Applicants’ approach in this regard. It does reflect the import of Article 30(1) of the Treaty that designates 2 scenarios under which an illegality giving rise to a cause of action before this Court would accrue. Such illegality would arise in respect of an ‘Act, regulation, directive, decision or action’ that is either unlawful *per se* or on account of infringing a Treaty provision. Thus a decision that purportedly flouts the domestic law of a Partner State, as is the allegation herein, may be categorized as being unlawful *per se*. See also Simon Peter Ochieng & Another vs. The Attorney General of Uganda (supra).
- 60. In the instant case, the Applicants challenge the Tribunal’s decision for flouting Burundi’s domestic law, an illegality in itself; and one that does also constitute an infringement of the rule of law principle encapsulated in Articles 6(d) and 7(2). We reproduce the cited Treaty provisions for clarity.

Article 6(d)

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

- (e)
- (f)
- (g)

¹⁵¹ See *Tzanakopoulos, Antonios, Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 *Loyola of Los Angeles (Loy. LA), International and Comparative Law Review* (2011) 133 at 167.

¹⁵² See *The East African Civil Society Organisations’ Forum (EACSOFF) vs. The Attorney General of Burundi & Others* (supra)

- (h) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Article 7(2)

1.
2. The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

61. The duty to adhere to the rule of law would therefore be the Treaty obligation against which the impugned decision of the *Tribunal de Grande Instance* is evaluated. It is now well settled law that where an action complained of is alleged to be inconsistent with municipal law and, to that extent, a breach of a Partner State's Treaty obligation to observe the rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in its determination as to whether the action complained of amounts to a Treaty violation. See *The East African Civil Society Organisations' Forum (EACSOFF) vs. The Attorney General of Burundi & Others (supra)* and *Henry Kyalimpa vs. Attorney General of Uganda*.¹⁵³

62. The burden of proof lies with the applicant to establish its case and the party that asserts a fact bears the duty to establish it;¹⁵⁴ as was observed by the ICJ in the case of *Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America)*,¹⁵⁵ 'it is the litigant seeking to establish a fact who bears the burden of proving it.' The burden of proof in international courts was aptly summed up in *Henry Kyalimpa vs. Attorney General of Uganda (supra)*¹⁵⁶ as follows:

Generally, in application of the principle of *actori incumbit probatio* the court will require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given.¹⁵⁷

63. The foregoing summation of the burden of proof in international claims depicts a two-pronged process of proof before this Court: proof of an applicant's case against a respondent, as well as proof of a specific fact by the party asserting it.¹⁵⁸ We find no reason to depart from that position.

¹⁵³ *EACJ Appeal No. 6 of 2014*

¹⁵⁴ See *British American Tobacco Ltd (BAT) vs. The Attorney General of the Republic of Uganda*, *EACJ Ref. No. 7 of 2017 and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)*, *Judgment, ICJ Reports, 2007, p.43*

¹⁵⁵ *Judgment, ICJ Reports 1984, p.437, para. 101*

¹⁵⁶ *Ibid.* para. 61 hereof.

¹⁵⁷ See also *Raphael Baranzira & Another vs. The Attorney General of the Republic of Burundi*, *EACJ Ref. No. 15 of 2015* and Shabtai, Rosenne, *The Law and Practice of the International Court, 1920 – 2005, Vol. III, Procedure, p. 1040.*

¹⁵⁸ *Same observation was made in The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community, EACJ Reference No. 2 of 2018*

64. On the other hand, *Halsbury's Laws of England* propel the notion of a distinction between the *legal* and *evidential* burden of proof, urging as follows on the legal burden of proof:

The legal burden (or the burden of persuasion) rests upon the party desiring the Court to take action; thus a claimant must satisfy a court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon that party for whom the substantiation of that particular allegation is an essential of his case.¹⁵⁹

65. Conversely, the evidential burden is expounded as follows:

The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden but, as the weight of evidence given by either side during the trial varies, the evidential burden may be said to shift the party who would fail without further evidence.¹⁶⁰

66. It does then follow that the Applicants in this case would bear the legal burden to prove the illegalities they seek to attribute to the Respondent State, to wit, the violation of Burundi law and infringement of the principles of rule of law and human rights as outlined in Articles 6(d) and 7(2) of the Treaty.¹⁶¹

67. The Applicants lodged 3 Affidavits in support of their case – 2 Affidavits deposed by the First and Second Applicants and a supplementary affidavit deposed by the Third Applicant. In a nutshell the First and Second Applicants attested to having each bought 2 pieces of sub-divided land from the Third Applicant on the strength of *Certificate of Title No. 01/1875*, and subsequently secured certificates of title for their respective pieces of land. On his part, the Third Applicant essentially laid out the background to his legal interest in *Certificate of Title No. 01/1875* and the circumstances surrounding his subsequent sale of the disputed property.

68. The Applicants did also avail the Court with the impugned decision of the *Tribunal de Grande Instance* of Bujumbura as Annexure 1 to the Reference. The dispute in that case was lodged by the respective heirs of Pascal Bindariye and Francois Biniga – Jean Ndayishimye and Scholastique Niyonzima, and Nicolas Mpitabavuma respectively. It was a consolidation of 2 separate claims against the First Applicant, RC16863 and RC16865; which were consolidated as RC16863 and later RC 069. The Tribunal stayed its decision in the consolidated case No. 16863/16865 pending the Supreme Court's determination of RCC 25153 between Simon Nzophabushe and the Third Applicant in respect of validity of the Attested Affidavit. The Supreme Court having upheld the Tribunal's nullification of all the Third Applicant's certificates of title, the Tribunal determined the consolidated case in the following terms:

- a. It highlighted irregularities in the sale agreements to declare void the land sale transaction between Francois Biniga and Third Applicant.
- b. With regard to the land the Third Applicant had purportedly bought from Andre Habonimana, the Tribunal found grave inconsistencies in

¹⁵⁹ *Halsbury's Laws of England, Civil Procedure Vol. II, 5th Edition, 2009, para. 770*

¹⁶⁰ *Ibid.* at para. 771

¹⁶¹ The African Charter on Human and Peoples Rights was invoked by reference thereto under Article 6(d) of the Treaty.

the evidence, which was riddled with many contradictions that went to the heart of the dispute. For instance, Mr. Habonimana's brother discredited his evidence by his testimony that their father did not own the land that Habonimana had purportedly sold to the Third Applicant, Habonimana's own evidence being self-contradictory as to whether their father was still alive at the time the land was sold. The Tribunal concluded that Habonimana had sold land that did not belong to him and nullified the purported sale in accordance with Article 276 of the Burundi Civil Code.

- c. The Tribunal gave a detailed recital of all the considerations it had taken into account in arriving at its decision and, at page 11 of the judgment, expressly advanced the reason for its non-reliance on the Applicants' evidence. It had earlier in the judgment highlighted the following evidential contradictions. Nicolas Mpitabakana who had been depicted as a witness to the sale agreement between Francois Biniga and the Third Applicant, denied affixing the signature attributed to him on the agreement and attested to the sale contracts being forged because his mother (wife to the deceased Francois Biniga) did not know about them. Deo Nahimana and Scholastique Niyonzima conceded to receiving money from 'some people' but denied executing sale contracts, conceding that the land they had purported to sale belonged to the deceased Bindariye's family. Andre Habonimana who accepted selling land to the Third Applicant that used to belong to his father, Juma Kibiriti was denounced by the plaintiffs who said he did not own any land in the area and, in any event, his evidence was riddled with grave inconsistencies as highlighted above.
- d. In its final orders, which were rooted in Articles 5 and 31 of the Code of Civil Procedure and Articles 276 and 303 of the Civil Code, the Tribunal *inter alia* nullified the sale transaction between the Third Applicant and Scholastique Niyonzima and Deo Nahimana; the sale transaction between the Third Applicant and Andre Habonimana, and the First and Second Applicants certificates of title that cascaded therefrom. Given the apparent absence of guarantees as spelt out in Article 303 of the Burundi Civil Code, the Tribunal enjoined the First and Second Applicants to pursue arrangements with the Third Applicant that would resolve the question of the land improperly sold to them and, the Third Applicant is advised to pursue similar arrangements with the persons that had purported to sale him the land in question.

69. On its part, the Respondent relied upon the affidavit of Mr. Diomedé Vyizigiro that was deposed by an advocate with personal conduct of this Reference. At the risk of getting repetitive, it will suffice to reiterate our earlier decision on this issue that 'an affidavit deposed by an advocate with sole personal conduct of a case raises connotations of procedural impropriety that cannot be ignored but, rather, would vitiate the entire affidavit.'¹⁶² We do accordingly strike the offensive affidavit off the Court record.

70. Striking the sole affidavit in support of opposite party's case would not necessarily

¹⁶² *The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community* (supra), para. 55

obviate the duty upon a court to evaluate the subsisting evidence on record to determine whether it can sustain the allegations in issue. We did carefully and dutifully consider the totality of the evidence adduced by the Applicants, as well as the impugned judgment. We are acutely mindful of the standard of proof in international claims involving state responsibility as was re-stated by the ICJ in *Bosnia & Herzegovina vs. Serbia & Montenegro* (supra) in the following terms:

The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.¹⁶³ The same standard applies to the proof of attribution for such acts.

71. However, whereas in *Ida Robinson Smith Putnam (USA) vs. United Mexican States*,¹⁶⁴ challenges to the decisions of nation states' apex courts had been recognised as cases of exceptional gravity and an onerous burden of proof was placed on applicants, we take the view that decisions that emanate from lower domestic courts need not necessarily be held to the same onerous standard of proof. The international review of national decisions that are not from apex courts may be subjected to the ordinary balance of probabilities. The same standard would apply to proof of state attribution in cases involving a judicial decision from a non-apex domestic court.¹⁶⁵ In *The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community* (supra), this Court cited with approval the preposition that proof by the 'balance of probabilities' entails 'evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.'¹⁶⁶
72. Turning to the matter before us, the question is whether the Applicants have in fact satisfied the applicable standard of proof. As quite rightly argued by them, one of the core components of the rule of law is the principle of supremacy of law, whether substantive or procedural. Accordingly, fidelity to Burundi domestic law is the yardstick against which the Applicants' contestations in this matter would be evaluated both in terms of the rule of law principle, as well as the alleged illegality of the impugned decision *per se*.
73. On that premise, we are unable to fault the impugned judgment on the basis of the complaints advanced by the Applicants or at all. To begin with, the Third Applicant's primary legal interest in the disputed land had been the subject of an Appeal in the Supreme Court of Burundi. Quite clearly, the decision rendered by that court would have binding authority over the Tribunal. Therefore the Tribunal rightly decided to await the superior court's decision. That court having nullified the Third Applicant's interest in the Attested Affidavit, the First and Second Applicants' secondary interest would have been rendered nugatory but (in principle) for the Common Law notion of a bona fide purchaser. That notion

¹⁶³ See *Corfu Channel (United Kingdom vs. Albania)*, Judgment, ICJ Reports 1949, p.17.

¹⁶⁴ 1927, UNRIIA, Vol. IV, p. 151 at 153

¹⁶⁵ Indeed that is the same standard of proof that this Court has considered to be similarly applicable to international disputes where the question of state responsibility does not arise. See *The Attorney General of the Republic of Burundi vs. The Secretary General of the East African Community*, EACJ Reference No. 2 of 2018 and *British American Tobacco Ltd (BAT) vs. The Attorney General of the Republic of Uganda*, EACJ Ref. No. 7 of 2017.

¹⁶⁶ See *Black's Law Dictionary*, 10th Edition, p. 1373

hinges on the bona fides of a purchase; in other words, the purchase should have been ‘made in good faith, without fraud or deceit.’¹⁶⁷ Indeed, a bona fide purchaser has been defined as follows:

One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.¹⁶⁸

74. In the matter before us the issue of a bona fide purchaser was propelled by the Applicants with regard to the property purchased from Scholastique Niyonzima by the Third Applicant. However, they made no attempt to demonstrate that this principle was indeed applicable under Burundian law or that the Third Applicant was in fact a bona fide purchaser that had no knowledge of any other claim to the property; one who in good faith paid valuable consideration for the property without notice of pre-existing adverse claims. We find no proof whatsoever on the record that the land that had been purportedly sold by two of the deceased Bandariye’s children was not subject to joint inheritance under their father’s estate at the time this sale was executed, as was the Applicants’ contention. On the contrary, both Ms. Niyonzima and her brother, Deo Nahimana, did in their evidence before the Tribunal concede that the land they had purported to sale belonged to their family. To compound matters, the same witnesses conceded to receiving money from ‘some people’ but denied executing any sale contracts.
75. The inference that the Third Applicant had conjured sale agreements after the event that were not executed by the alleged sellers would denote fraud on his part that effectively negates any claims of his having been a *bona fide* purchaser. Further, having established that Ms. Niyonzima and Mr. Nahimana did not own the property that had been sold to him, the Tribunal was bound by the provisions of Article 276 of the Burundi Civil Code that forbids the sale of any item that does not belong to the seller. We therefore cannot fault its decision to nullify the said sale. Indeed, contrary to the Applicants’ allegations to the contrary, it rightly returned the said property to the deceased Bandariye’s family. In any event, the Applicants’ argument that the sale agreement between Mr. Nahimana and the Third Applicant was not in issue is superfluous given that the Supreme Court had nullified the Attested Affidavit that highlighted properties that he had purportedly purchased, inclusive of the land sold under that agreement. We would therefore disallow the Applicants’ contestations that the Tribunal illegally deprived the Third Applicant of his proprietary interest in the property that accrued to the late Bandariye’s Estate.
76. In like vein, we cannot fault the Tribunal for nullifying the purported sale agreement executed between the Third Applicant and Andre Habonimana. Having found it to have been similarly grounded in the illegal sale of land that did not belong to the seller, and faced with evidence in that regard that was riddled with grave inconsistencies and contradictions, the Tribunal rightly invoked the provisions of Article 276 of the Civil Code to nullify the said sale. As was aptly captured in the impugned judgment, Mr. Habonimana’s evidence was discredited by none less than his brother, who testified that their father did not

¹⁶⁷ That is the definition of the term ‘bona fide’ in *Black’s Law Dictionary, 8th Edition, 2004, p. 186.*

¹⁶⁸ *Black’s Law Dictionary, 8th Edition, 2004, p. 1271*

own the land that Mr. Habonimana had purportedly sold to the Third Applicant; Habonimana's own evidence lack in cogency for being self-contradictory as to whether their father was still alive when the land was sold. We find no merit in the Applicants' reliance on Article 33 of the Civil Code Vol. III to assert the invincibility of the sale agreements in issue presently. That legal provision clearly and unambiguously hinges the unassailability of written agreements on their having been executed in accordance with the law and in good faith. It reads:

Legally constituted agreements serve as law for those who have made them. Such agreements may only be revoked by their mutual consent or for causes authorized by law. The agreement must be executed in good faith.

77. In the instant case where the sale agreements between the Third Applicant and Ms. Niyonzima, Mr. Nahimana and Mr. Habonimana were executed in contravention of Article 276 of the Civil Code and their bona fides have been impeached, we are hard pressed to appreciate how they could have benefitted from this legal provision. The same considerations would apply to the sale agreement between the Third Applicant and Francois Biniga that was similarly nullified by the Tribunal. The connotations of fraud raised by Ms. Niyonzima and Mr. Nahimana were seemingly corroborated by the testimony of Nicolas Mpitabakana, who had been depicted as a witness to the sale agreement between Francois Biniga and the Third Applicant but denied affixing the signature attributed to him on the agreement and attested to the sale contracts being forged because his mother (wife to the deceased Biniga) did not know about them. Curiously, although the Applicants had argued that this agreement was not in issue in this case, they did advance submissions in relation to it.
78. Against the foregoing background, we decline the invitation extended to us by the Applicants to adjudge as illegal the Tribunal's nullification of the First and Second Applicants' certificates of title. To begin with, it is not true that the Tribunal gave no reasons for its final orders that include the cancellation of the First and Second Applicants' certificates of title. It did furnish a lengthy recital of all the considerations it had taken into account in arriving at its decision and, at page 11 of the impugned judgment, expressly advanced the reason for its non-reliance on the Applicants' discredited evidence. In any case, the Supreme Court having nullified the Attested Affidavit, in the absence of proof of their having been bona fide purchasers either, and given the succinct provisions of Article 276 of the Civil Code; the cancellation of the First and Second Applicants' titles was inevitable in so far as they were deduced to have acquired the properties in question from a person (the Third Applicant) whose claim to ownership thereto had been nullified by the apex court of the land.
79. The assertion in paragraph 23 of the Reference that under Burundi law certificates of title could not be nullified save through a special action for forgery/ fraud was rebutted by the Respondent State which, in paragraph 11 of its Response to the Reference averred that the Applicants had cited old, inapplicable law – Article 379 of the Burundi Land Law of 1986 – that had since been replaced by Article 344 of the Land Law of 2011. That position was not controverted.
80. In addition, whereas the Applicants contested the 'arrangements' the Tribunal made reference to at the end of its judgment, we find those observations to

reflect third party proceedings against the Third Applicant (the person that sold the disputed land to the First and Second Applicants) who in turn could claim similarly against the persons that sold to him. It would appear that the Tribunal invoked the provisions of Article 5 of the Code of Civil Procedure that provides that ‘the court can always join declinatory exceptions on the merits and order the parties to conclude for all purposes.’ No evidence was adduced by the Applicants as would impeach the propriety of this legal provision for that purpose.

81. Finally, it was the Applicants’ contention that the Tribunal’s nullification of the sale agreements and certificates of title violated Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and Peoples Rights given that the Respondent State did not apply national property laws properly and thus arbitrarily deprived the Applicants of their property rights. Our simple response to this assertion is that property rights would not accrue to a person that acquires property irregularly. As the old adage goes, *he who comes to equity must come with clean hands*. The Applicants bore the onus of proof of their claim but, in our judgment, did not discharge the duty upon them to the requisite standard.
82. In the result, we are satisfied that the domestic process applied by the *Tribunal de Grande Instance* of Bujumbura in this matter did address the issues that were before it in conformity with Burundian law. We find the resultant judgment to have been legal and, to that extent, is in compliance with the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty. It is also in tandem with the property rights encapsulated in Article 15(1) of the Common Market Protocol and Article 14 of the African Charter on Human and Peoples Rights. We would therefore answer *Issues 4 and 5* in the negative.

Issue No. 6: Whether the Applicants are entitled to the remedies sought

83. The remedies sought by the Applicant in this matter are delineated verbatim in paragraph 10 hereof. We do not deem it necessary to reproduce them here. Be that as it may, having answered the 2 preceding issues in the negative, the remedies sought herein would be untenable, save for the order on costs to which we revert forthwith.
84. Rule 127 of this Court’s Rules postulates that costs should follow the event unless the Court, for good reason, decides otherwise. In the instant case the subsisting Applicants were successful in *Issues 1, 2 and 3* although they were unsuccessful on the substantive Reference. Therefore, the success in the Reference is evenly balanced and renders moot the question as to which party won the event. We would therefore exercise our discretion to order each Party to bear its own costs.

Conclusion

85. In the final result, the Reference is hereby dismissed; each Party to bear its own costs. It is so ordered.

*[Hon. Justice Dr. Faustin Ntezilyayo resigned from the Court in February 2020 but has signed this judgment in terms of Article 25(3) of the Treaty.]

D. Deya & N. Ndeki, Counsel for the Applicants

D. Vyizigiro for the Respondent.

^^*^*

First Instance Division

Reference No. 7 of 2017**British American Tobacco (U) Ltd v The Attorney General of Uganda**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ; A. Ngiye, C. Nyawello & C. Nyachae, JJ
 March 26, 2019

Customs Union - Single EAC economic area - Free movement of goods across borders - Domestic legislation versus Community laws - Application of Excise duty and value added tax laws - Whether locally manufactured goods were reclassified as imported goods - Differential taxation of goods - The principle of non-discrimination De jure tax discrimination in interpretation and application of laws - Illegality giving rise to a cause of action - Burden of proof - Equitable distribution of benefits

Articles: 2(2), 5(2),6(d), (e), 7(1) (c), 8(1)(c) 27(1), 30(1), 75(1), (4), (6), 77, 80(1) (f) of the Treaty; Articles: 1(1), 2(4), 10,11(1) 15(1), (2), 25 (1), (2)(b) EAC Customs Union Protocol, 2004 - Articles: 4, 5, 6, 32 EAC Common Market Protocol, 2009 - Section 2(a),(b) Excise Duty (Amendment) Act No. 11 of 2017, Uganda - Section 1(j) Value Added Tax Act, Cap 349, Uganda - Section 23 Tobacco Control Act, Uganda - Articles: 1, 2 General Agreement on Tariffs & Trade, GATT - Articles: 6, 15 WHO Organisation Framework Convention on Tobacco Control - Section 111(1) EAC Customs Management Act, 2004 - Section 3 East African Community Act No. 13 of 2002, Uganda - Rules: 37(1), 38(2), EACJ Rules of Procedure, 2013

In 2014 the Republic of Uganda enacted the Excise Duty Act No. 11 of 2014 subsequently, the Excise Duty (Amendment) Act No. 11 of 2017 was enacted. The Applicants averred that: parliamentary debate manifested the discriminatory intentions of the House in contravention of the provisions of the Treaty, Customs Union and Common Market Protocols; the amendments *inter alia* created differential treatment between ‘locally manufactured’ goods and ‘imported’ goods, which were charged a higher excise duty. Thus the Uganda Revenue Authority (URA) issued the Applicant with tax assessment notices that re-classified cigarettes that had hitherto been categorized, assessed and taxed as locally manufactured products as imported goods the company’s. The law impugned law designates a higher excise duty on cigarettes from by its sister company in Kenya than it imposes on cigarettes that are locally manufactured in Uganda and was therefore unlawful, discriminatory and at cross-purposes with the Treaty. The differentiation of the excise duty applicable to goods originating from Uganda as opposed to like goods from elsewhere in the region also violated the EAC Customs Union and Common Market Protocols. The Applicant sought declarations that section 2 of the Excise Duty (Amendment) Act was unlawful, discriminatory and negated the purpose for which the Treaty was promulgated, and Articles 15(1) and (2) of the Customs Union Protocol plus Articles 4, 5, 6 and 32 of the Common Market Protocol and was therefore null and void to the extent that they infringement. The Applicant adduced evidence that in July

2017, two packages of cigarettes were declared as locally manufactured goods and the Respondent assessed the applicable Excise Duty and Value Added Tax (VAT) in the sum of Ushs. 862,706,849/= and Ushs. 132,897,503/= respectively. Subsequently, URA re-classified both batches of cigarettes and sought to collect additional taxes totalling Ushs. 325,208,000/=.

The Respondent contended that the impugned law was enacted in good faith and well intentioned for the benefit of the Republic of Uganda and the EAC region. Furthermore, Uganda's Parliamentary Committee on Finance, Planning and Economic Development considering that differential treatment for locally manufactured viz imported goods brought it in tandem with the practice purportedly prevailing in the region; it also counteracted smuggling and its adverse effects on locally manufactured goods. Furthermore, the Republic of Uganda as a signatory to the World Health Organisation's Framework Convention on Tobacco Control which recognized the sovereign right of State Parties to determine their own tax policies and encourages tax prices as would inhibit tobacco consumption for health reasons and the need to eliminate illicit trade practices. Thus, increased excise duty on both locally manufactured and imported cigarettes was aimed at protecting young, vulnerable groups from tobacco consumption. In implementing the impugned law, URA was simply exercising its mandate in compliance with a duly enacted law, the purpose was not discriminatory.

Held

1. An illegality that gives rise to a cause of action can accrue either from a Treaty violation or the contravention of a domestic or international law. Violation of municipal law gives rise to a cause of action either under Article 30(1) to the extent that it amounts to an 'unlawful' act *per se*, or under Article 6(d) of the Treaty in so far as it would constitute a violation of the principle of rule of law. By accepting to be bound by Treaty provisions with no reservations, Uganda could no longer apply domestic legislation in ways that make its effects prevail over those of Community Law.
2. It is manifestly clear that the intention of the framers of the Treaty and EAC Customs Union Protocol was to establish the Community as a single economic area characterized by the free movement of goods in which goods from any of the Partner States were not treated as imports.
3. Under Article 2(2) of the Treaty, the Partner States undertook to establish a Customs Union and a Common Market as transitional stages to and integral parts of the Community. By purporting to construe the Excise tax law to the exclusion of the applicable Treaty and Customs Union Protocol, Uganda Revenue Authority acted in a manner that was likely to jeopardize the achievement of the Treaty's objectives, thus rolling back the gains of the Customs Union and Common Market realized thus far. The misconstruction of the term 'import' was misconceived and infringed Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol. To that extent, it is unlawful and negates the objectives of the Treaty establishing the Community jeopardizing its objectives and implementation.-
4. Equitable distribution of benefits alludes to the elimination of imbalances that could accrue from the existence of the EAC that are not necessarily trade-related.

To suggest that the equitable interventions that are envisaged under Article 6(e) could accrue to commercial transactions would, in run afoul of Article 7(1)(a) of the Treaty, which seeks to entrench a 'market-driven cooperation' in the EAC. Indeed, the Treaty provides for trade-related imbalances in Article 77 of the Treaty.

5. The concept of equal opportunity is wont to curtail discrimination in a person's access to social services on account of numerous factors including age, gender, race creed etc. The evidence lends credence to the supposition that by virtue of its identity, the Applicant was denied access to or otherwise, disadvantaged in its cross-border cigarette-sale activities. While the Applicant's business decision to restructure its operations to sell on the Ugandan market cigarettes manufactured in Kenya influenced the debate in the Ugandan Parliament to introduce a disparity in the excise duty applicable to locally manufactured viz imported cigarettes, the current dispute accrues from a purely commercial transaction as opposed to a socio-political considerations inherent in the notion of equal opportunities, thus the suggestion that Article 6(d) was infringed is disallowed.
6. Article 75(4) imposes an obligation upon the Partner States not to impose any new duties and taxes or to increase existing ones in respect of products traded within the Community. This is conditional upon the Council of Ministers designating a date by which such obligation accrues. No evidence was furnished by the Applicant demonstrating that the Council of Ministers designated such date of accrual. In the absence of such proof, any claim arising thereunder is unsustainable.
7. Articles 75(6) of the Treaty and 15(1)(a) of the Customs Union Protocol delegitimizes discrimination not so much attendant to the process of promulgating a law *per se*, but that in respect of the substance and content of the law that is ultimately formulated. The alleged discrimination against the Applicant's cigarettes pertains to 'the same' goods, as envisaged under Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol. The Respondent violated Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol in so far as it sought to implement an administrative measure that discriminated against the Applicant's goods. That administrative measure amounts to a Treaty infringement and is, to that extent, unlawful
8. The impugned law introduced differential treatment in the taxation of domestic and imported goods, which did not exist in the Excise Duty (Amendment) Bill. However, a plain reading of section 2 of the impugned law does not establish for a fact that cigarettes from any of the other Partner States would be classified as imported goods so as to impute discrimination on the said law. There is no provision in the impugned law that expressly demarcates goods from other Partner States as imported goods. On the contrary, when properly applied within the ambit of the definition of imports in Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol, the reference in section 2 to imported goods pertains to goods from 'third-party states' or countries outside the Community. The tone of the parliamentary debate and deduced intention of the House notwithstanding, the substance or content of the impugned law is neither discriminatory nor unlawful.
9. In re-classifying the Applicant's cigarettes as imported goods, the Uganda

Revenue Authority acted in absolute oblivion of Article 15(2) of the Customs Union Protocol. It disregarded the applicable Community Law and misconstrued the Excise Duty Act and the Value Added Tax Act to suggest that goods from EAC Partner States would correspond to the definition of imports. To that extent, URA misapplied Ugandan tax laws, stepped out of legal purview and the ambit of its legal mandate, and thus its attempt to implement the impugned law becomes tantamount to a purely administrative measure or intervention.

10. The Respondent's interpretation and implementation of section 2 of the impugned law resulted in *de jure* tax discrimination against the Applicant's cigarettes violating Article 15(2) of the Customs Union Protocol and was at cross purposes with the principles and objectives of the Treaty and is to that extent flawed and unlawful.
11. Uganda Revenue Authority's interpretation and application of Ugandan Excise and VAT tax laws to the exclusion of the Respondent State's obligations under Community law was misconceived and not legally tenable as Partner States' domestic laws could not be invoked as justification for failure to perform a treaty obligation. A Declaration was therefore issued that the misapplication of the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act, No. 11 of 2017 by the issuance of Payment Registration Slips for additional taxes in the sum of Ushs. 325,208,000/= in respect of Applicant's cigarettes was illegal, null and void.
12. The Respondent was ordered to forthwith ensure the interpretation and application of Excise Duty (Amendment) Act, No. 11 of 2017 was in compliance with applicable Community Law, and to align the Ugandan tax laws with Community Law applicable to goods from EAC Partner States.

Cases cited

- Herzegovina v Serbia & Montenegro, Judgment, ICJ Reports 2007, p. 43
 B. E. Chattin (USA) v United Mexican States, 1927, UNRIAA, vol. IV
 Captain Harry Gandy v Caspair Air Charter Ltd (1956) 23 EACA 139
 Henry Kyarimpa v AG of Uganda EACJ Appeal No. 6 of 2014
 Nicaragua v United States of America 1984 I.C.J. 215
 Rwenga Etienne & Anor v The Secretary General of EAC, EACJ Ref. No. 5 of 2015
 Simon Peter Ochieng & Anor v AG of Uganda, [2012-2015] EACJLR 361, Ref No. 11 of 2013
 United States – Measures Affecting Imports of Woven Wool Shirts & Blouses from India, WT/DS33/ AB/R,1997

JUDGMENT

A. Introduction

1. This is a Reference by British American Tobacco Uganda Limited ('the Applicant') challenging the legality of section 2(a) and (b) of the Republic of Uganda's Excise Duty (Amendment) Act No. 11 of 2017 for contravening various provisions of the Treaty for the Establishment of the East African Community ('the Treaty'); the Protocol on the Establishment of the East African Customs Union ('the Customs Union Protocol), and the Protocol on the Establishment of the East African Community Common Market ('the Common Market Protocol').
2. The Applicant was incorporated in the Republic of Uganda in 1984 as a company limited by shares that would manufacture and otherwise deal in tobacco and tobacco products, and to date remains domiciled and operational in Uganda. It has since restructured its business operations to have its sister company in the Republic of Kenya (British American Tobacco Kenya Limited) manufacture and

supply it with cigarettes for sale on the Ugandan market.

3. The Respondent is the Attorney General of Uganda and has been sued herein as the legal representative of the Republic of Uganda.
4. Both the Republic of Uganda and the Republic of Kenya are Partner States in the East African Community (EAC), and signatories to the Treaty, Customs Union Protocol and Common Market Protocol.
5. At trial the Applicant was represented by Mssrs. Kiwanuka Kiryowa, Peter Kawuma and Richard Bibangamba of M/s K & K Advocates, while Ms. Margaret Nabakooza, Principal State Attorney; Mr. Sam Tsubira, Senior State Attorney and Ms. Maureen Ijang, State Attorney appeared for the Respondent.

B. Background

6. In 2014 the Republic of Uganda enacted the Excise Duty Act No. 11 of 2014 that sought to consolidate the law applicable to excise duty and related matters. An Excise Duty (Amendment) Bill No. 6 of 2017 that was subsequently introduced by the same Partner State sought to have all tobacco products manufactured within the EAC region have a uniformly applicable excise duty rate, with an increment of the duty chargeable on soft cap cigarettes from Ushs. 50,000 per 1,000 sticks to Ushs. 55, 000 for the same number of sticks.
7. The Bill was eventually passed by the Parliament of Uganda, duly assented to and enacted into the Excise Duty (Amendment) Act No. 11 of 2017 with such amendments as *inter alia* created differential treatment between goods 'locally manufactured' in Uganda and 'imported' goods, whereby a higher excise duty was chargeable in respect of the latter category of goods.
8. Following the enactment of the Excise Duty (Amendment) Act, the Uganda Revenue Authority (URA) issued the Applicant Company with tax assessment notices that re-classified as imported goods the company's cigarettes that had hitherto been categorized, assessed and taxed as locally manufactured products.
9. Aggrieved by the differential treatment introduced by the amendment, the Applicant filed the present Reference on the premise that the differentiation of the excise duty applicable to goods that originate from Uganda as opposed to like goods from elsewhere in the region was discriminatory and a violation of the Treaty, the Customs Union and Common Market Protocols.

C. Applicant's Case

10. It is the Applicant's case that the definition of the term 'import' in the Excise Duty Act, when read together with the definition of the same term in the Value Added Tax Act, Cap 349 (VAT Act) is such as would categorise goods from Kenya as imported goods thus attracting a higher excise duty thereon than is applicable to goods locally manufactured in Uganda, notwithstanding prevailing Community law that requires goods from the EAC Partner States to attract uniform tax rates within the region.
11. The Applicant further contends that section 2 of the Excise Duty (Amendment) Act is unlawful, discriminatory and negates the purpose for which the Treaty was promulgated, and the same legal provision violates Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common

Market Protocol. It takes issue with both the enactment of the impugned law to the extent that it violates the foregoing Treaty and Protocol provisions, as well as its implementation by URA in so far as it poses a threat to its business operations, condemning it to the payment of exorbitant excise duty simply on account of its cigarettes being manufactured in Kenya.

12. The Applicant seeks the following reliefs:

- i. A declaration that the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 contravene and infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.
- ii. A declaration that the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 are null and void to the extent that they infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.
- iii. An order directing the Respondent to immediately take the necessary measures to ensure that the Applicant's rights under the Treaty are not violated by the application of the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017.
- iv. An order that the costs of this Reference are paid by the Respondent.

13. The Reference is supported by the Affidavit of Mathu Kiunjuri, the Managing Director of the Applicant Company, essentially re-stating the Applicant's case as briefly highlighted above and adducing in evidence the documents referred to thereunder. Mr. Kiunjuri elaborates that section 2 of the impugned law is unlawful, discriminatory and at cross-purposes with the Treaty in so far as it designates a higher excise duty on cigarettes from Kenya than it imposes on cigarettes that are locally manufactured in Uganda; its illegality being further entrenched by its violation of section 23 of the Tobacco Control Act No. 22 of 2015. He attests to URA having initially classified and assessed the excise duty payable towards his company's cigarettes at the rate of locally manufactured cigarettes but, following the enactment of the Amended Act, it re-classified them as imported cigarettes. The deponent furnished the pre- and post-amendment tax assessment notices in proof thereof.

14. It is also Mr. Kiunjuri's averment that despite correspondence from his company; the Principal Secretary, EAC Integration, and the Director General (Customs and Trade) of the EAC Secretariat that brought the erroneous categorization of the Applicant's cigarettes to the attention of various industry stakeholders (including URA); as well as the assurances of Uganda's Ministry of Finance, Planning and Economic Development, no measures have been taken to redress the anomaly.

D. Respondent's Case

15. In its Response to the Reference, the Respondent contends that when Uganda's Parliamentary Committee on Finance, Planning and Economic Development considered the Excise Duty (Amendment) Bill, it recommended the differential treatment for locally manufactured viz imported goods to bring it in tandem with the practice that purportedly prevails in other countries in the region, as

well as to counteract the practice of smuggling and its adverse effects on locally manufactured cigarettes, cigarette prices in those countries being lower than those in Uganda. In the same vein, the Committee sought to promote the growth of local industries, encourage more companies to invest in Uganda and promote the consumption of locally manufactured cigarettes. It is the Respondent's case that when the Committee Report was subsequently presented to the Ugandan Parliament, it agreed with the reasoning of the Committee as highlighted above and endorsed the charging of higher excise duty on imported goods than similar locally manufactured ones.

16. The Respondent denies that the Excise Duty (Amendment) Act is unlawful, discriminatory or negates the purpose for which the Treaty was enacted; and denies that the same Act violates Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Article 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol. It is the Respondent's contention that the impugned law was passed in good faith, was well intentioned and was intended for the benefit of the Republic of Uganda and the EAC as a whole, and accordingly seeks to have the Reference dismissed with costs.
17. The Response to the Reference is supported by the affidavit of Ms. Jane Kibirige, the Clerk to the Parliament of Uganda, which essentially restates the averments in the Response to the Reference from her personal knowledge of what transpired during the enactment of the impugned law. She does, vide her affidavit, adduce in evidence the Parliamentary Committee's Report, as well as a certified copy of the Hansard (Parliamentary Debate) Report in which the impugned Act was debated and passed.

E. Issues for Determination

18. At a Scheduling Conference held on 12th June 2018, the Parties framed the following issues for determination:
 - i. Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 are unlawful, discriminatory or negated the purpose for which the Treaty was enacted, as alleged or at all.
 - ii. Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty, as alleged or at all.
 - iii. Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Article 15(1) and (2) of the Customs Union Protocol, as alleged or at all.
 - iv. Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 4, 5, 6 and 32 of the Common Market Protocol, as alleged or at all.
 - v. What remedies are available to the Parties.

F. Court's Determination

Issue No. 1: Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the *Excise Duty (Amendment) Act No. 11 of 2017* are unlawful, discriminatory or negated the purpose for which the Treaty was enacted, as alleged or at all.

19. The Applicant faults the Respondent State for enacting and seeking to implement section 2 of the impugned law in such a manner as would introduce different excise duty rates for locally manufactured viz imported cigarettes, and re-classifying and purporting to tax the Applicant's cigarettes that are manufactured by its sister company in Kenya as imported goods contrary to the provisions of the Treaty, Customs Union and Common Market Protocols. It was argued for the Applicant that whereas, on the one hand, Uganda's tax laws that URA apparently sought to apply broadly defines the term 'imports' as goods from any foreign country; the Treaty and Customs Union Protocol restrict the applicability of the same term to goods that are brought into a Partner State or the 'customs territory' from beyond the Partner States. This argument was reinforced with the contention that in so far as both the Treaty and Customs Union Protocol define the term 'foreign country' as 'any other country other than a Partner State', it did follow that Kenya, being an EAC Partner State, was not a foreign country, goods from which would warrant consideration by the Respondent State as imports. To that extent, it was the Applicant's contention that Uganda's tax law regime¹⁶⁹ was not aligned with the relevant provisions of the Treaty and Customs Union Protocol and the categorization of its viz the locally manufactured cigarettes, an anomaly that could be redressed by re-categorising the Applicant Company's cigarettes as locally manufactured products.
20. Citing the House Committee Report on the Excise Duty (Amendment) Bill, as well as the Parliamentary Hansard of 10th May 2017, learned Counsel for the Applicant argued that the parliamentary debate manifested the discriminatory intentions of the House in contravention of the provisions of the Treaty, Customs Union and Common Market Protocols, which place clear and unambiguous obligations on each Partner State. It was opined that such international treaty obligations were further entrenched in Uganda's legal regime by Objective xxiii (i)(b) of the Uganda Constitution. Articles 8(1); 75(1), (4), (5) and (6), and 127(2) (b) of the Treaty, as well as section 23 of the Tobacco Control Act were invoked as legal provisions that had been contravened by the enactment and purported implementation of the impugned law, rendering it unlawful and discriminatory. We reproduce these legal provisions later in this judgment.
21. The case of *Burundi Journalists Union vs. The Attorney General of Burundi*, EACJ Ref. No. 7 of 2013 was cited by learned Counsel for the Applicant to underscore the point that the fundamental principles outlined in Articles 6 and 7 of the Treaty are justiciable and binding on the Partner States. The Applicant relied on the following decision therein:
- By acceding to the Treaty ... Partner States ... are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted

¹⁶⁹ The Excise Duty Act No. 11 of 2014 read together with the VAT Act, Cap 349.

with that fact in mind. In stating so, we have previously held that whereas this Court cannot superintend the organs of Partner States in the way they enact their laws, it is an obligation on their part not to enact or sustain laws that completely negate the purpose for which the Treaty itself was enacted.

22. The Applicant did also refer us to the case of *Samuel Mukira Muhochi vs. The Attorney General of Uganda*, EACJ Ref. No. 5 of 2011, where it was held that by accepting to be bound by Treaty provisions with no reservations, Uganda could no longer apply domestic legislation in ways that make its effects prevail over those of Community Law.
23. Conversely, the Respondent made reference to Uganda's being a signatory to the World Health Organisation Framework Convention on Tobacco Control (WHO FCTC) to portend that Article 6 thereof recognizes that price and tax measures are an effective and important means of reducing tobacco consumption. It was argued for the Respondent that in so far as the Guidelines promulgated for the implementation of Article 6 of the WHO FCTC not only recognizes the sovereign right of (states) parties to determine their own tax policies, but also encourage such tax prices as would inhibit tobacco consumption for health reasons; the Ugandan Parliament rightly increased the excise duty on both locally manufactured and imported cigarettes to protect young, vulnerable groups from its consumption. Learned Counsel for the Respondent similarly applauded the Parliament of Uganda for seeking to control smuggling, arguing that its reasoning in that regard was in tandem with Article 15 of the WHO FCTC to the extent that the said Convention acknowledges the need to eliminate such illicit trade practices. Thus, it was the contention of learned Counsel for the Respondent that the enactment and implementation by the Respondent State of section 2 of the Excise Duty (Amendment) Act was lawful in so far as it complied with the WHO FCTC legal regime.
24. With regard to the allegedly discriminatory character of the section 2 of the impugned law and its purported negation of the Treaty's purpose, Ms. Nabakooza relied upon the decision in *Mangin vs. Inland Revenue Commissioner (1997) 1 All ER 197*, to argue that tax laws should be considered on 'as is' basis and there was nothing in the impugned Act to suggest discrimination as had been alleged. In that case it was *inter alia* held:

One has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax period. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.
25. She maintained that the purpose of the impugned law was not to discriminate against the Applicant but, rather, was clearly stated in the Parliamentary Committee's Report as highlighted above. In a direct response to Mr. Kiunjuri's contrary attestations, learned Counsel further argued that the views of one (1) Member of Parliament as reflected in the Hansard did not and could not be held to represent the views of the entire House. In conclusion, she urged that in seeking to implement the impugned law in respect of the Applicant Company, URA was simply exercising its mandate in compliance with a duly enacted law.
26. In a brief reply, we understood it to have been argued for the Applicant that

the reasons that had purportedly informed the enactment of the impugned law (as advanced by learned Counsel for the Respondent) were well recognized and might have been applauded had they not had a discriminatory effect on the Applicant. It was Mr. Kiryowa's contention that a law that treats cigarettes from Kenya differently from cigarettes from Uganda seemingly suggests that cigarettes from Uganda are less harmful to consumers' health than those from Kenya. We understood him not to take issue with the health considerations advanced, but rather the differentiation in treatment of like goods from the region, the express provisions of the Treaty and related Protocols notwithstanding. In his view, this was both unlawful and discriminatory.

27. On our part, having carefully considered the very elaborate arguments of either Party on this issue, it seems to us that an understanding of what would amount to an unlawful Act of Parliament under the EAC legal regime is critical to a determination of whether the impugned tax law is indeed unlawful or, in effect, at cross-purposes with the EAC Treaty. We find apposite instruction on this question from the Treaty itself.
28. Article 27(1) of the Treaty defines the jurisdiction of this Court as 'the interpretation and application of the Treaty'. On the other hand, Article 30(1) demarcates the acts that would give rise to a cause of action before this Court. It reads:

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty.
29. It seems to us that a cause of action under Article 30(1) of the Treaty would arise where the legality of the acts designated therein is in issue on account of being unlawful *per se* or an infringement of a Treaty provision. Whereas a Treaty violation would give rise to a fairly obvious cause of action, what is envisaged as an unlawful act under Article 30(1) is not as readily apparent. Our construction of that legal provision is that such an unlawful act would arise from a violation of any other laws – domestic or international.
30. We are fortified in that regard by the decision in *Simon Peter Ochieng & Another vs. Attorney General of Uganda*, EACJ Ref. No. 11 of 2013, where a matter was held to be justiciable before this Court if it was one 'the legality of which is in issue viz the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty'. Although that case alludes only to a cause of action arising from the breach of national laws, in *B. E. Chattin (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p. 282 at 310* the violation of international laws was similarly acknowledged as a sustainable international claim, so that a court or tribunal was required to determine 'whether there exists an injury and whether the act which causes it violates any rule of international law'.
31. Consequently, it becomes abundantly clear that two (2) categories of acts would give rise to a sustainable cause of action before this Court: first, a claim arising from an act that contravenes and thus calls for the interpretation and application of any Treaty provision and, secondly, a claim that arises from an act that violates any law – international or municipal.

- 32. In the instant case, by dint of the issue under consideration presently, the legality of an Act of Parliament (the impugned Act) has been challenged on account of its enactment and implementation having been allegedly laced by discriminatory considerations in contravention of the definition of the terms ‘import’ and ‘foreign country’ under Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol. This infringement has in turn been suggested to negate the purpose of the Treaty as expounded in Articles 2, 8, 75 and 127 thereof. In Submissions, though not pleaded, it was also argued that the said Act was enacted and implemented in contravention of Objective xxiii(i)(b) of the Constitution of Uganda and section 23 of Uganda’s Tobacco Control Act.
- 33. Given our finding above that an illegality that gives rise to a cause of action can accrue either from a Treaty violation or the contravention of a domestic or international law, a determination of Issue No. 1 hereof would hinge on an interrogation as to whether the Treaty, the invoked international instruments – the Protocols, as well as Ugandan domestic law have indeed been contravened by the impugned law. Aside from the contested definition of the term ‘import’ and the invoked municipal law, which would ensue hereunder; the bulk of the Treaty and Protocol violations that are in question in this Reference accrue under Issues 2, 3 and 4. Thus, a determination of Issues 2, 3 and 4 must of necessity precede and inform the conclusive resolution of Issue No.1.
- 34. The Applicant delineated Articles 2; 8(1)(c); 75(1), (4), (5) and (6), and 127(2) (b) as the provisions that represent the Treaty’s purpose, which would thus stand negated by the enactment and implementation of the impugned law. Curiously, the highlighted subsections of Article 75 are also directly invoked under Issue No. 2. We shall therefore address them at that stage. Nonetheless, for ease of reference, we reproduce Articles 2, 8(1)(c) and 127 of the Treaty below:

Article 2

- 1. By this Treaty the Contracting Parties establish among themselves an East African Community hereinafter referred to as ‘the Community’.
- 2. In furtherance of the provisions of paragraph 1 of this Article and in accordance with the protocols to be concluded in this regard, the Contracting Parties shall establish an East African Customs Union and a Common Market as transitional stages to and integral parts of the Community.

Article 8

- 1. The Partner States shall:
 - (a)
 - (b)
 - (c) Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of this Treaty.

Article 127

- 1.
- 2. For purposes of paragraph 1 of this Article, the Partner States undertake to:
 - a.
 - b. Stimulate market development through infrastructural linkages and the removal of barriers and constraints to market development

and production.

35. The violation of municipal law does give rise to a cause of action either under Article 30(1) to the extent that it amounts to an ‘unlawful’ act *per se*, or under Article 6(d) of the Treaty in so far as it would constitute a violation of the principle of rule of law enshrined therein. We understood the Applicant in the instant case to have contested the legality of section 2(a) and (b) for contravening Objective xxiii (i)(b) of the Constitution of Uganda and section 23 of Uganda’s Tobacco Control Act. It thus sought to invoke a cause of action under Article 30(1) of the Treaty. On the other hand, learned Counsel for the Respondent contended that the alleged breach of the Tobacco Control Act had not been pleaded by the Applicant and could not, therefore, be entertained at this stage of the proceedings. She remained silent on the invoked constitutional provision.
36. We have carefully scrutinized the Reference. It is indeed apparent that no mention whatsoever was made in it to either the Constitution of Uganda or the Tobacco Control Act. Whereas reference to the cited Act only arose in the affidavit in support of the Reference, no mention whatsoever is made to the constitutional provision in question till the Applicant’s submissions. Clearly there is discordance between the Applicant Company’s pleadings on the one hand, and its evidence and submissions, on the other hand.
37. It is a well established rule of procedure that parties to a dispute are bound by their pleadings. The rationale behind this rule could not be stated better than it was in *Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139* as follows:

The object of pleadings is of course to ensure that both parties shall know what the points in issue between them are so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.

38. Moreover, Rule 37(1) of this Court’s Rules of Procedure does detail a mandatory requirement for every pleading to contain ‘a concise statement of the material facts upon which the party’s claim or defence is based’ while, in the same vein, Rule 38(2)(b) enjoins parties to ‘plead every matter which if not specifically pleaded would take opposite party by surprise.’ It is our considered view, therefore, that purporting to raise a new matter either in evidence or in submissions would run afoul of the foregoing Rules of Procedure and established judicial process. It seems to us that the Applicant’s complaints in relation to Objective xxiii (i)(b) of the Ugandan Constitution and section 23 of the Tobacco Control Act were belated afterthoughts. In the premises, we respectfully decline the invitation to make a determination on them.
39. With regard to the contested construction of the term ‘import’, it would appear that in interpreting that term as it did, URA relied on its definition in section 2 of the Excise Duty Act and section 1(j) of the VAT Act, to the exclusion of the relevant Treaty and Protocol definitions. The relevant provisions of those 2 tax laws read:

Section 2 of the Excise Duty Act, 2014

“Import” as used in relation to goods has the meaning assigned to it in the Value Added Tax Act.

Section 1(j) of the Value Added Tax Act, Cap. 349

“Import” means to bring, or cause to be brought, into Uganda from a foreign country.

40. For completion, we do also reproduce the definition of the same term under the Treaty and Customs Union Protocol.

Article 1 of the Treaty

“Import’ with its grammatical variations and cognate expressions means to bring or cause to be brought into the territories of the Partner States from a foreign country.

“Foreign Country” means any country other than a Partner State.

Article 1(1) of the Customs Union Protocol

“Import’ with its grammatical variations and cognate expressions means to bring or cause goods to be brought into the customs territory.

“Customs Territory” means the geographical area of the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania and any other country granted membership of the Community under Article 3 of the Treaty.

41. It will suffice to note that unlike the VAT Act, the Treaty and Protocol go a step further to clarify what would amount to a ‘foreign country’ under the EAC dispensation. It is manifestly clear that the intention of the framers of the Treaty and Customs Union Protocol was to establish the Community as a single economic area characterized by the free movement of goods, and in which goods from any of the Partner States were not treated as imports. Indeed, under Article 2(2) of the Treaty, the Partner States undertake to ‘establish an East African Customs Union and a Common Market as transitional stages to and integral parts of the Community.’ This commitment is reiterated in Article 5(2) where the Partner States undertake to establish a Customs Union and Common Market as conduits to a Monetary Union and ultimately a Political Federation.

42. In the Vienna Convention on the Law of Treaties, States Parties are admonished that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’¹⁷⁰ The gist of that provision is reflected in Article 8(1)(c) of the Treaty, which enjoins EAC Partner States to abstain from any measures that are likely to jeopardize the achievement of the Treaty’s objectives or the Treaty’s implementation at all. Further, Article 27 of the Vienna Convention succinctly constrains a party to a treaty from invoking ‘the provisions of its internal law as justification for its failure to perform a treaty.’ Article 27 of the Convention resonates firmly with Article 8(4) of the Treaty that gives pre-eminence to Community Laws in the following terms:

Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty.

43. A Customs Union, as was envisaged under Article 2(2) of the Treaty and Article 2(4) of the Customs Union Protocol, consists of a region or geographical area in which the cooperating (Partner) States engage in trade amongst themselves that is free from tariff and non-tariff barriers, and apply a common external tariff on goods from non-Partner States.¹⁷¹ On the other hand, a Common Market, as was anticipated in the same Treaty provision and Article 2(4) of the Common Market

¹⁷⁰ Article 26 of the Vienna Convention

¹⁷¹ See Ssempebwa, Edward F., *East African Community Law*, 2015, LexisNexis, p. 21

Protocol, is a customs territory that is characterized by free trade as underscored under a Customs Union, the free movement of goods, capital, labour, services and persons, as well as EAC nationals' right of residence and establishment.

44. By purporting to construe the cited domestic tax laws to the exclusion of the applicable Treaty and Customs Union Protocol, URA acted in a manner that is likely to jeopardize the achievement of the Treaty's objectives, thus rolling back the gains of the Customs Union and Common Market that have been realized thus far. A negation of the benefits of such regional trade initiatives would be an unfortunate trajectory for the EAC. The dichotomy between the commitments made under the Treaty and attendant Protocols, on the one hand, and the reality posed by the conflicting misapplication of domestic legislation, on the other hand, does not augur well for EAC integration.
45. We do therefore find that the misconstruction of the term 'import' that has been attributed to URA is misconceived and constitutes an infringement of Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol. To that extent, it is unlawful and negates the objectives of the Treaty as encapsulated in Articles 2(2), 5(2) and 8(1)(c) of the Treaty. It is so held.
46. On the other hand, the WHO FCTC was cited by learned Counsel for the Respondent as an international instrument that justifies the enactment of the impugned law. We shall address that defense forthwith, prior to a determination of the issues as proposed above. The cited provisions of the WHO FCTC are reproduced below for ease of reference.

Article 6

1. The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.
2. Without prejudice to the sovereign right of the Parties to determine and establish their tax policies, each party should take into account its national health objectives concerning tobacco control and adopt or maintain as appropriate, measures which may include:
Implementing tax policies and where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption.

Article 15

The Parties recognize that the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control.

Guidelines promulgated under Article 6

- i. All parts of the guidelines respect the sovereign right of the Parties to determine and establish their taxation policies, as set out in Article 6.2 of the WHO FCTC.
- ii. Effective taxes on tobacco products that lead to higher real consumer prices (inflation-adjusted) are desirable because they lower consumption and prevalence, and thereby in turn reduce mortality and morbidity and improve the health of the population. Increasing tobacco taxes is

particularly important for protecting young people from initiating and continuing tobacco products.

47. To be clear, we do abide by the foregoing provisions of the WHO FCTC and its attendant Guidelines, particularly to the extent that they duly recognize the sovereign right of nation states to formulate and implement their own national tax laws and policies. We do not and cannot fault this well established principle of international law. Indeed, Article 15 of the WHO FCTC, to which we were referred by learned Counsel for the Respondent, in no uncertain terms acknowledges nation states' sovereign right to develop and implement national laws in addition to sub-regional, regional or global agreements to which they are party. To that extent, though an international instrument itself, the WHO FCTC does recognize the concurrent obligations upon nation states in respect of sub-regional, regional and international treaties to which they are signatories. We are in absolute agreement with this principle as encapsulated in the Framework Convention. We might add that the EAC Treaty is undoubtedly one such treaty, the obligations accruing from which the EAC Partner States are each required to honour and observe.

Issues 2 & 3: Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty, and Article 15(1) and (2) of the Customs Union Protocol, as alleged or at all.

48. The Applicant contests the legality of section 2 of the impugned law in so far as it allegedly violates Articles 6(d) and (e); 7(1)(c); 75(1), (4) and (6), and 80(1) (f) of the Treaty. It did also delineate Articles 2, 8(1)(c) and 127(2)(b) as the Treaty provisions, the objectives inherent in which are negated by the enactment and implementation of the impugned law. Accordingly, the Treaty violations alleged in Issue No. 2 shall be evaluated against that yardstick, as will the alleged violation of Article 15(1) and (2) of the Customs Union Protocol under Issue No. 3 and (subsequently) the invoked Articles 4, 5(2), 6(1) and 32 of the Common Market Protocol under Issue No. 4.

49. Turning to Issue No. 2, with regard to Article 6(d) and (e) the Respondent State is faulted for its failure to avail the Applicant with the same opportunities as were made available under the impugned law to local cigarette manufacturers in Uganda, as well as its failure to ensure the equitable distribution of the benefits of the same law to all cigarette manufacturers from the EAC Partner States, to the detriment of the Applicant's business. The Applicant does also fault the impugned law for undermining the free movement of goods in the region that is underscored in Article 7(1)(c) of the Treaty.

50. A fleeting reference was made to the non-compliance of the impugned law with the Respondent State's obligations under Article 75(1)(b) and (c) of the Treaty to eliminate internal tariffs and related charges, as well as non-tariff barriers; and barely any mention was made in submissions to the provisions of Article 75(4). As we understood it, the mainstay of the Applicant's argument was that the enactment of the impugned law and the attempt by the URA to implement

it, were indicative of the Respondent State's perceived disregard for its obligation under Article 75(6) of the Treaty to refrain from the enactment of laws or application of administrative measures that have the effect of discriminating against like products from within the EAC. Finally, the Applicant suggested that in enacting and seeking to implement the impugned law, the Respondent State omitted to institute measures that would harmonise and rationalize the investment incentives available to imported and locally manufactured products with a view to promoting the Community as a single investment area, thus running afoul of Article 80(1)(f) of the Treaty.

51. On its part, without any substantiation whatsoever, the Respondent made blanket denials about its alleged breach of Articles 6(d) and (e) or 7(1)(c) of the Treaty. With regard to Article 75, we did understand learned Counsel for the Respondent to argue that Article 75(4) was inoperative and ineffective given that no date had as yet been designated by the Council of Ministers, upon which Partner States were expected to cease the introduction of new taxes or duties, or make increments to existing ones. In the same vein, Ms. Nabakooza argued that the progressive, futuristic and aspirational nature of the obligations imposed under Article 80(1)(f) was such that they were not yet operational, therefore the allegation that they had been contravened by the Respondent State was unsustainable. In conclusion, she opined that URA's endeavour to collect taxes from the Applicant Company is well within its legal mandate and cannot be equated to a mere administrative measure. Learned Counsel made no reference to sub-Articles (1) and (6) in Written Submissions, simply denying quite emphatically in her oral highlights thereof any incidence of discrimination as denoted in Article 75(6) and Article 15(1)(a) of the Customs Union Protocol.

52. We are constrained, from the onset, to underscore a pertinent evidential rule. The burden of proof in international claims was articulated in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro)*, Judgment, ICJ Reports 2007, p. 43 as follows:

On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of Military and para-military *Activities in and against Nicaragua (Nicaragua vs. United States of America)*¹⁷², "it is the litigant seeking to establish a fact who bears the burden of proving it."

53. Citing with approval Shabtai Rosenne, *The Law and Practice of the International Court*, 1920 – 2005, Vol. III, Procedure, p. 1040, this proposition was re-echoed by this Court's Appellate Division in *Henry Kyalimpa vs. Attorney General of Uganda EACJ Appeal No. 6 of 2014* as follows:

Generally ... the court will formally require the Party putting forward a claim or particular contention to establish the elements of fact and of law on which the decision in its favour is given.

54. Within the context of international trade disputes, such as the present one, the burden of proof was most persuasively summed up by the Appellate Body of the WTO Dispute Settlement Body in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Reports, 1997, p. 14 in

¹⁷² Judgment, ICJ Reports 1984, p. 437, para. 101

the following terms:

Various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that a party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof (*footnote omitted*). Also, it is a generally accepted canon of evidence in civil law, common law and in fact, most jurisdictions, that the burden of proof rests with the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

55. Stated differently, the burden of proof rests with a complainant to establish an alleged violation by demonstrating that the parameters encapsulated in the relevant treaty or trade agreement have not been complied with. The general rule is that the complaining party should establish a *prima facie* case of inconsistency with a cited treaty or agreement, before the burden shifts to the opposite party to demonstrate its consistency. See Trebilcock, Michael J. and Howse, Robert, *The Regulation of International Trade*, 1999 (2nd Ed.), Routledge, p. 68. A *prima facie* case is deemed to have been established once a contestation has been ‘supported by sufficient evidence for it to be taken as proved should there be no adequate evidence to the contrary.’ See *Oxford Law Dictionary*, 2009 (7th Ed.), Oxford University Press, p. 422.
56. Neither Party in the present case disputes the fact that the impugned law increased the excise duty applicable to both locally manufactured and imported goods, or that it established two different levels of taxation in that regard. This is clearly and unambiguously stated in paragraph 3(o) of the Reference and conceded by the Respondent in paragraph 4(i) of its Response to the Reference. The main thrust of the Reference is simply to question the validity of the enactment, substance and implementation of the impugned law for being unlawful and discriminatory. This is set forth in paragraph 3(r), (s), (t) and (u) of the Reference.
57. The Applicant adduced evidence before this Court that sought to establish that the Ugandan Parliament had been driven by discriminatory considerations when it enacted the impugned law; the substance or content of the law does indeed reflect such discrimination, and URA erroneously sought to implement the impugned law in such a manner as would entrench the alleged discrimination. To that end, the Applicant presented the Excise Duty (Amendment) Bill that had proposed the uniform increment of all soft cap cigarettes from Ushs. 35,000/= to Ushs. 55,000/= per 1,000 sticks, with no distinction between domestic and imported cigarettes. For comparative purposes, it did also adduce in evidence the Excise Duty (Amendment) Act that emanated therefrom, depicting the introduction of different prices for domestic and imported cigarettes.
58. The Applicant also produced an April 2017 *Report of the Committee on Finance, Planning and Economic Development* that included the following statement: The Committee recommends that, in accordance with its neighbours in the region, excise duty on locally manufactured cigarettes should not be the same rate with imported cigarettes. This will promote growth and encourage more companies to invest in the country and provide market for tobacco farmers.

59. The Applicant further produced the Parliamentary Hansard of 10th May 2017 that attributed to a Member of the House (Hon. Nandala Mafabi) the following justification for the disparity in treatment of goods imported from Kenya:
- BAT are my friends but they decided to shift the company from here to Kenya and we lost jobs to Kenya. We should make it very hard for them to export to Uganda. Therefore, my proposal is that the locally manufactured cigarettes should be taxed Shs. 60,000 per 1,000 sticks and the imported ones Shs. 90,000 per 1,000 sticks so that we promote the local cigarettes and deter imported ones.
60. Finally, the Applicant attached tax assessment notices from the URA that had initially classified its cigarettes as locally manufactured goods, as well as 2 Payment Registration Slips in which its cigarettes had been re-classified as imported cigarettes. URA sought to have the Applicant pay the outstanding taxes due from that re-classification.
61. Conversely, the Respondent did similarly rely on the April 2017 House Committee Report and the Hansard of 10th May 2017 albeit with different emphasis. From the Respondent's perspective, far from demonstrating any form of discrimination against the Applicant's goods, the Hansard portrayed a House that was driven by altruistic considerations in the enactment of the impugned law, including encouraging the growth of the tobacco sector; securing increased investment in the country, and discouraging young people from the dangerous practice of smoking. It thus sought to discredit the inference of discrimination drawn by the Applicant from the contribution of Hon. Nandala Mafabi to the parliamentary debate (as highlighted above), asserting that the contribution of 1 Member of the House was not indicative of the views of the entire House.
62. The Respondent did also rely on the impugned law itself to support its contention that it was not discriminatory in content or substance. Further, it sought to rebut the Applicant's contrary position in respect of the tax assessment notices on record by construing them to have been issued in compliance with the law as duly reflected in the Excise Duty (Amendment) Act, which compliance was neither unlawful nor discriminatory.
63. We have carefully scrutinized the totality of the evidence on record. We are appropriately mindful of the onus upon the Applicant to establish a *prima facie* case of the alleged Treaty violations, prior to the shifting of the burden to the Respondent to counteract this position.¹⁷³ We are also aware that a *prima facie* case is established by evidence that sufficiently establishes the contestations of a complaining party in the absence of contrary evidence by opposite party.¹⁷⁴ Nonetheless, ultimately (as with all civil cases) this Reference shall be determined on a balance of probabilities. We do bring these evidential rules to bear as we evaluate the evidence before us.
64. Similarly, we are duly cognizant of the preposition in Article 31(1) of the Vienna Convention that a treaty should be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' We do abide by this canon of treaty Union Protocol provisions, to which we now revert.

¹⁷³ See Trebilcock, Michael J. and Howse, Robert, *The regulation of international trade* (supra)

¹⁷⁴ See *Oxford Law Dictionary* (supra)

65. With regard to Articles 6(d) and (e) of the Treaty, the Applicant did demarcate the principles of equal opportunities and equitable distribution of benefits as the specific obligations that have been violated by the enactment, content and purported implementation of section 2 of the impugned law. We reproduce the cited legal provisions below for ease of reference:

Article 6

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

- (a)
- (b)
- (c)
- (d) Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.
- (e) Equitable distribution of benefits.

66. A clear understanding of these terms is critical to determination of whether they have indeed been contravened. *Collin's English Dictionary* defines the term 'equal opportunity as 'the policy of giving everyone the same opportunities for employment, pay and promotion without discriminating against particular groups.' For comparative purposes, this definition resonates well with the following definition of the same term in Uganda's *Equal Opportunities Commission Act, 2007*:

Having the same treatment or consideration in the enjoyment of rights and freedoms, attainment of access to social services, education, employment and physical environment or the participation in social, cultural and political activities regardless of sex, age, race, colour, ethnic origin, tribe, birth, creed, religion, health status, social or economic standing, political opinion or disability.

67. In a nutshell, it seems to us that the concept of equal opportunity is wont to curtail discrimination in a person's access to social services on account of numerous factors including age, gender, race creed etc. In our considered view, the evidence on record does lend credence to the supposition herein that by virtue of its identity the Applicant had been denied access to or otherwise, disadvantaged in its cross-border cigarette-sale activities. It would appear from the *Hansard Report* on record that the Applicant's business decision to restructure its operations so as to sale on the Ugandan market cigarettes that were manufactured in Kenya did influence the debate in the Ugandan Parliament to introduce a disparity in the excise duty applicable to locally manufactured viz imported cigarettes. However, to the extent that the dispute in issue herein accrues from a purely commercial transaction as opposed to the socio-political thrust of the considerations inherent in the notion of equal opportunities, we are constrained to disallow the suggestion that there is an infringement of Article 6(d). Having so held, we do not deem it necessary to determine whether the impugned law is at cross-purposes with the establishment of a Customs Union

or Common Market as is the deduced objective of Article 2(2) and 8(1)(c), or the removal of barriers and constraints to market development as is the import of Article 127(2)(b).

68. By the same token, the term ‘equitable distribution’ that is inherent in the notion of ‘equitable distribution of benefits’ in Article 6(e) would, in its literal sense, denote a fair and just allotment that seeks to redress apparent imbalances. This literal interpretation, as advocated by Article 31(1) of the Vienna Convention, is reinforced by the observations made by this Court in the case of *Rwenga Etienne & Another vs. The Secretary General of the East African Community*, EACJ Ref. No. 5 of 2015. In that case, it did transpire that the EAC operates an *Operational Manual for the Implementation of the Quota System in the Recruitment of Staff in the East African Community*, which allocates recruitment quotas to each Partner State to ensure the equitable distribution of jobs to nationals of each of the countries. This Court observed:

The Operational Manual that regulates the quota system appears to have been formulated to give effect to the provisions of Article 6(e) of the Treaty, which enumerates the ‘equal distribution of benefits’ as a fundamental principle of the Community. Indeed clause 2.0 of the Operational Manual explicitly expounds its legal basis as being grounded in Article 6(e) of the Treaty. ... Article 31(3)(a) of the Vienna Convention on the Law of Treaties does take due cognizance of ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.’ The Operational Manual was enacted on the recommendation of Council to operationalise the quota system now operational in the EAC.

69. Accordingly, it is our considered view that in so far as the Operational Manual was rooted in Article 6(e) of the Treaty, it is indicative of the meaning that the states parties to the Treaty sought to attach to the phrase ‘equitable distribution of benefits’ that is espoused in that legal provision. That interpretation would be instructive to our construction of the same term in the present context.
70. Against that background, it would appear that the notion of ‘equitable distribution of benefits’ alludes to the elimination of imbalances that could accrue from the very existence of the EAC that are not necessarily trade-related. To suggest that the equitable interventions that are envisaged under Article 6(e) could accrue to commercial transactions would, in our judgment, be to run afoul of Article 7(1) (a) of the Treaty, which seeks to entrench a ‘market-driven cooperation’ in the EAC. Indeed, the Treaty makes specific provision for trade-related imbalances in Article 77 of the Treaty. Article 77 reads:

For purposes of this Article, the Partner States shall within the framework of the Protocols provided for under Articles 75 and 76 of this Treaty, take measures to address the imbalances that may arise from the application of the provisions of this Treaty.

71. That legal provision was never in issue in the present reference. However, Article 75 was invoked by the Applicants as having been infringed by the Respondent. We do revert to a detailed interrogation thereof, as well as the relevant provisions of the Customs Union and Common Market Protocols later herein. For present

purposes it will suffice to note that in the matter before us, the tax assessment notices that were adduced in evidence do demonstrate that between 6th July 2017 and 2nd August 2017 the Applicant sought to bring 2 batches of soft cap cigarettes into Uganda through the Busia border post, in respect of which taxes – Excise Duty and VAT – had (prior to the re-classification of the cigarettes as imports) been assessed at Ushs. 995,604,352/=. This evidence does *prima facie* establish the movement of goods from Kenya to Uganda for commercial purposes. Given the express provisions of Article 77 of the Treaty that make provision for any imbalances arising from the establishment of a Customs union and Common market in the EAC, we take the view that the Applicant’s cross-border trade activities are not the sort of activities that were envisaged by the Treaty framers for intervention under Article 6(e), the inhibition of which would give rise to a justiciable claim thereunder. To that extent, the impugned law does not, either by its enactment or implementation by the Respondent, contravene the spirit and letter of Article 6(e) of the Treaty, so as to be at cross-purposes with the Treaty as alleged. We so hold.

72. We now turn to a determination of Articles 7(1)(c) and 80(1)(f) which we consider to be inter-related. They read:

Article 7

1. The principles that shall govern the practical achievement of the objectives of the Community shall include:
 - (a)
 - (b)
 - (c) The establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology.

Article 80

1. For purposes of Article 79 of this Treaty, the Partner States shall take measures to:
 - (a)
 - (b)
 - (c)
 - (d)
 - (e)
 - (f) Harmonise and rationalize investment incentives including those relating to taxation of industries particularly those that use local materials and labour with a view to promoting the Community as a single investment area.

73. Article 7(1)(c) imposes an obligation upon Partner States to establish an export oriented economy characterized by free movement of goods, persons, labour, services, capital, information and technology. In like vein, Article 80(1)(f) imposes the obligation to harmonise and rationalize investment incentives including those relating to taxation of industries with a view to promoting the Community as a single investment area. The gist of these legal provisions is to impress it upon Partner States to establish an export oriented economic dispensation in the EAC region and pursue such investment policies as would entrench the EAC as a single investment area.

74. The question would be whether the evidence on record supports the notion that these lofty policy aspirations were indeed obviated by the impugned law. We are acutely mindful of the fact that the EAC integration process is significantly tempered by the principles of variable geometry and asymmetry that are encapsulated in Article 7(1) of the Treaty 'to ensure that economies that were relatively less developed were not swamped by goods from the relatively better economies.' See Aloo, Leonard Obura, *East African Community Law: Institutional, Substantive and Comparative EU Law Aspects*, Brill, 2017, p. 306. The principle of variable geometry is captured under Article 7(1)(e) as an operational principle in the implementation of the Treaty that 'allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds.' On the other hand, the principle of asymmetry is succinctly interpreted in Article 1(1) of the Customs Union Protocol to mean 'the principle which addresses variances in the implementation of measures in an economic integration process for purposes of achieving a common objective.' It does become apparent, then, that the implementation of the Treaty provisions relating to intra-regional trade was anticipated by the Treaty itself to be progressive and, in some instances, differential.
75. A few examples would suffice. First, Article 10 of the Customs Union Protocol subrogates the obligation therein for the Partner States to 'eliminate all internal tariffs and other charges of equivalent effect on trade among them' to the exceptions in Article 11 of the same Protocol. Article 11(1) in turn makes explicit provision for the progressive implementation of the Customs Union Protocol during a 5-year transitional period during which differential tariff treatment would be extended to goods from the (then) 3 EAC Partner States under Article 11(2).
76. To compound matters, section 111(1) of the East African Community Customs Management Act of 2004¹⁷⁵ acknowledges the interim tariff permitted by Article 11 of the Customs Union Protocol as spelt out above, and states that 'goods originating from the Community shall be accorded Community tariff treatment in accordance with the Rules of Origin provide for under the (Customs Union) Protocol.' Whereas it is well recognized herein that Article 11 of the Customs Union Protocol represents a transitional arrangement the import of which should not be legally tenable any more, it is hoped that that is indeed the position in practice in the Community.
77. Secondly, and more specifically related to the promotion of an export-oriented economy as stipulated in Article 7(1)(c) of the Treaty, Article 25(1) of the Customs Union Protocol provides for the establishment of Export Promotion Schemes in the following terms:
The Partner States agree to support export promotion schemes in the Community for the purposes of accelerating development, promoting and facilitating export oriented investments, producing export competitive goods, developing an enabling environment for export promotion schemes and attracting foreign direct investment.
78. Most significantly, Article 25(2)(b) permits the levying of duties and other charges upon the goods benefitting from export promotion schemes in the event

¹⁷⁵ A Community Act that makes provision for customs management and administration.

that they are sold within the Partner States. It reads:

In the event that such goods are sold in the customs territory such goods shall attract full duties, levies and other charges provided in the Common External Tariff.

79. Neither of the Parties herein saw it fit to avail the Court with evidence in proof, rebuttal or clarification of the seeming avenues under which the imposition of ‘qualified’ duties may be permissible under the EAC trade regime. In the absence thereof, this Court is unable to determine whether in fact the impugned law violates the principles enumerated in Articles 7(1)(c) and 80(1)(f) of the Treaty. The onus lay with the Applicants to prove its case in that regard but, in our considered view, this burden was not sufficiently discharged. In the result, we find that the violations inferred under Articles 7(1)(c) or 80(1)(f) have not been sufficiently proven.

80. We now turn to the provisions of Article 75(1), (4) and (6). We reproduce the Article below:

Article 75

- 1. For purposes of this Chapter, the Partner States agree to establish a Customs Union details of which shall be contained in a Protocol which shall, inter alia, include the following:
 - (a)
 - (b) The elimination of internal tariffs and other charges of equivalent effect;
 - (c) The elimination of non-tariff barriers;
 - (d)
- 2.
- 3.
- 4. With effect from a date to be determined by the Council, the Partner States shall not impose any new duties and taxes or increase existing ones in respect of products traded within the Community and shall transmit to the Secretariat all information on any tariffs for study by the relevant institutions of the Community.
- 5.
- 6. The Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Partner States.

81. We construe the obligation imposed under Article 75(1)(b) and (c) to enjoin the Partner States to conclude a Customs Union Protocol that would make provision for the elimination of internal tariffs and other charges of equivalent effect, as well as non-tariff barriers. That is the primary obligation on the Partner States under that legal provision. The Partner States did indeed enact the Customs Union Protocol in 2004. We do take judicial notice of this. In the present Reference, we did not hear the Applicant to challenge the enacted Protocol for not making provision for the elimination of tariffs and non-tariff barriers, as required by Article 75(1)(b) of the Treaty. Rather, it is the legality of the impugned law that is in issue, on the basis of its alleged non-compliance with Article 15(1) and (2) of the Protocol. We do revert to a determination of that issue shortly. However, for present purposes, we are hard pressed to appreciate how Article 75(1)(b) and (c)

have been violated by the Respondent State yet the primary obligation therein has since been realized. We would, therefore, disallow this claim.

82. On the other hand, as quite rightly argued by learned Counsel for the Respondent, Article 75(4) imposes an obligation upon the Partner States that is conditional upon the Council of Ministers designating a date by which such obligation accrues. No evidence was furnished by the Applicant as would demonstrate that the Council of Ministers has ever designated such date of accrual. There is a primary duty upon the Applicant to establish its case in that regard, before the evidential burden can shift to the Respondent to discredit the Applicant's evidence. In the absence of such proof by the Applicant, any claim arising thereunder would be unsustainable. We so hold.
83. Turning to Article 75(6) of the Treaty and Article 15(1) and (2) of the Customs Union Protocol, we reproduce the cited Protocol provisions below:
- Article 15:
1. Partner States shall not:
 - a. Enact legislation or apply administrative measures which directly or indirectly discriminate against the same or like products of other Partner States; or
 - b. Impose on each other's products any internal taxation of such nature as to afford indirect protection to other products.
 2. No Partner State shall impose, directly or indirectly, on the products of other Partner States any internal taxation of any kind in excess of that imposed, directly or indirectly, on similar domestic products.
84. It will suffice to note that Article 15(1)(a) of the Protocol is more or less identical to Article 75(6) of the Treaty, save that the Protocol provision is couched in conclusively mandatory terms. In any event, both legal provisions explicitly prohibit the enactment of legislation that has the effect of discriminating against like products originating from other Partner States. Stated differently, Partner States are prohibited from providing preferential treatment to domestic products viz a viz like products from other Partner States.
85. We construe Articles 75(6) of the Treaty and 15(1)(a) of the Customs Union Protocol to delegitimize discrimination not so much attendant to the process of promulgating a law *per se*, but that in respect of the substance and content of the law that is ultimately formulated. In the present case, however, we understood the Applicant to challenge both the law-making process, as well as the substance or content of the resultant enactment or impugned law. In this regard, learned Counsel for the Applicant did rely upon the decision in *Mangin vs. Inland Revenue Commissioner* (supra), where it was held that 'the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.' We are constrained to point out that the decision in that case pertains to the principles governing the interpretation and application of tax laws to deduce the intention of the law-makers as to the incidence of a tax obligation. It does not necessarily apply to the construction of treaties, which, as we have held earlier herein, is primarily governed by the Vienna Convention on the Law of Treaties.
86. Nonetheless, for completion, we do evaluate the process of enactment as challenged by the Applicant. *The Hansard Report* on record does establish that

although the allegedly discriminatory statement that was cited in the Reference is attributable to only 1 Member, it was endorsed by virtually all the Members of the House that contributed to the debate on the Committee Report. To that extent, therefore, it does appear to reflect the thinking of the House and we cannot fault the Applicant for considering it to be indicative of the House's position on the issue of differential tax rates.

87. The question, however, is whether the predisposition of the House in that regard sufficiently demonstrates the intent of the Honourable Members of Parliament to discriminate against the Applicant's cigarettes? With respect, we are inclined to answer this question in the affirmative. It seems quite clear to us that a reasonable person reading the parliamentary debate as reflected in the Hansard of 10th May 2017 at its face value, in the absence of any evidence to the contrary, cannot but come to the conclusion that the Honourable Members had been well persuaded as to the need to purportedly redeem Uganda's fortunes from the tobacco industry by introducing higher rates for goods that were not locally manufactured therein. Whereas we do appreciate the well intentioned albeit misconceived considerations that informed the Honourable Members' position, it is abundantly clear that they were oblivious to Uganda's Treaty obligations or the dictates of Community Law as appositely encapsulated in the *Burundi Journalists Union* case. It is to be hoped that in future the House would be appropriately mindful of the legal implications of laws enacted by it viz a viz the Respondent State's international and regional obligations.
88. Be that as it may, would the pronouncements of the Honourable Members in themselves lead to the conclusion that the impugned law is legally non-compliant with Article 75(6) of the Treaty? We think not. The evidence on record does establish that the impugned law introduced differential treatment in the taxation of domestic and imported goods, which did not exist in the Excise Duty (Amendment) Bill. This is borne out by a comparison of section 2 of the Bill with the same section in the impugned law. However, a plain reading of section 2 of the impugned law does not establish for a fact that cigarettes from any of the other Partner States would be classified as imported goods so as to impute discrimination on the said law. There is no provision in the impugned law that expressly demarcates goods from other Partner States as imported goods. On the contrary, when properly applied within the ambit of the definition of imports in Article 1 of the Treaty and Article 1(1) of the Customs Union Protocol, it becomes undoubtedly clear that the reference in section 2 to imported goods pertains to goods from 'third-party states' or countries outside the Community. To be categorically clear, the tone of the parliamentary debate and deduced intention of the House notwithstanding, the substance or content of the impugned law is neither discriminatory nor unlawful. We cannot therefore fault the enactment thereof.
89. The parliamentary discourse is moot in this regard given that the case of *Mangin vs. Inland Revenue Commissioner* (supra), to which we were referred by both Parties, quite rightly portends that tax laws should be given a literal interpretation; 'words should be given their ordinary meaning One has to look merely at what is clearly said. There is no room for any intendment. ... There is no presumption as to a tax. Nothing is to be read in, nothing is to

be implied.’ Similarly, the impugned law must be evaluated by a look at only what is stated therein; nothing is to be read into it, nothing is to be presumed. Consequently, in the absence of a provision that succinctly demarcates goods from Partner States as imported goods, we are satisfied that the enactment of the impugned Act did not violate Article 75(6) or Article 15(1)(a) of the Customs Union Protocol. We so hold.

90. In terms of the contested implementation of the impugned law, we draw apposite instruction from the principle of non-discrimination as propounded under the World Trade Organisation (WTO) General Agreement on Tariffs and Trade (GATT) legal regime. Whereas Article 1 of GATT depicts the most favoured nation (MFN) principle of discrimination that generally constrains the proffering of preferential treatment to any member(s) of an international trading bloc to the exclusion of other members; the national treatment principle of discrimination that is espoused in Article 3 of GATT seeks to forestall the adoption by a member of an international trading bloc of such domestic policies as are designed to favour its domestic producers viz a viz ‘foreign’ producers.¹⁷⁶ It is the latter principle that is in issue in the present Reference. We reproduce Article 3.2 of GATT below:

Article III of GATT

2. The products of the territory of any contracting party (Member State) imported into the territory of any other contracting party (Member State) shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party (Member State) shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

91. A preview of how that legal provision was recently enforced by the WTO dispute settlement regime is instructive. In *Brazil – Certain Measures concerning Taxation and Charges*, Appellate Body Report, 2018, p. 29, the Appellate Body of the WTO Dispute Settlement Body was faced with imported finished ICT products that had been subjected to a higher tax burden than like domestic products. Having deduced the imported products to have indeed been ‘taxed in excess of like domestic finished ICT products, contrary to Article III: 2, of the GATT 1994’, the Appellate Body held:

Article III: 2, first sentence, of the GATT 1994 is concerned with the protection of “the equal competitive relationship between imported and domestic products”. (*footnote removed*) ... “the words of the first sentence require an examination of the conformity of an internal tax measure with Article III” by determining, first, “whether the taxed imported and domestic products are ‘like’” and, second, “whether the taxes applied to the imported products are ‘in excess of’ those applied to the like domestic products”.¹⁷⁷ With respect to the second element, the Appellate Body has found that “even the smallest amount of ‘excess’ is too

¹⁷⁶ See Trebilcock, Michael J. and Howse, Robert, *The regulation of international trade*, *ibid.*, at pp. 27, 29

¹⁷⁷ See *Appellate Body Report, Japan – Alcoholic Beverages II*, pp. 18 - 19

much¹⁷⁸. A determination of whether an infringement of Article III: 2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.¹⁷⁹

92. The foregoing decision essentially portends that a determination of the conformity of an internal tax measure with Article 3.2 of the GATT must of necessity entail a two-fold test: whether the taxed imported and domestic products are 'like' and, if so, whether the taxes applied to the imported products are 'in excess of' those applied to like domestic products.' It sums up this two-fold analysis with the proposition that a determination as to whether an infringement of Article 3.2 exists must be premised on an overall assessment of *actual* tax burdens imposed on the imported products viz a viz contrary tax rates applicable to domestic products, on the other hand.
93. Turning to the present Reference, Article 15(1)(a) of the customs Union Protocol and Article 75(6) of the Treaty are in form and substance acutely similar to the provisions of Article 3.2 of the GATT. This would underscore the pertinence of the principles laid down in the case of *Brazil – Certain Measures concerning Taxation and Charges* (supra) to the present dispute. The present Applicant is thus required to satisfactorily prove that the implementation of the impugned law resulted in *de jure* tax discrimination: that an overall assessment of the *actual* tax burdens imposed on its cigarettes yields differential and discriminatory treatment viz a viz the tax rates applicable to like cigarettes that are locally manufactured in Uganda.
94. The tax assessment notices that were adduced in evidence under paragraph 23 of Mr. Kiunjuri's Affidavit in support of the Reference reveal that 2 packages of cigarettes of customs reference 06/07/2017 C15733 and 02/08/2017 C17820 respectively were declared by the Applicant in or about July 2017, and the applicable taxes (Excise Duty and VAT) in respect thereof were assessed in the sum of Ushs. 862,706,849/= and Ushs. 132,897,503/= respectively. See Assessment Notices marked Annex 16 and 17 to Mr. Kiunjuri's affidavit. URA subsequently sought to collect additional taxes in the sum of Ushs. 294,528,000/= in respect of the package of cigarettes under Reg. No.C15733 of 07/06/2017 and Ush. 80,240,000/= under Reg. No.C16032 of 07/11/2017. See Memoranda dated 7th August 2017 and marked Annex 18 and 19 to the same deponent's affidavit. There are also 2 Payment Registration Slips on record that require payment of Ushs. 294,528,000/= under reference C15733 (06/07/2017) and Ushs. 30,680,000/= under *Reference No.C17820 of 02 AUG. 2017*'.
95. It seems quite clear to us that the batch of 1,070 packages of cigarettes that was originally taxed at Ushs. 862,706,849/= under customs reference 06/07/2017 C 15733 is indeed the same batch of cigarettes in respect of which additional taxes in the sum of Ushs. 294,528,000/= was sought under the Payment Registration Slip in Annexure 20. Our view is informed by the fact that the latter document captions the same reference C15733 under which that batch of the Applicant's cigarettes was originally assessed. The Payment Registration Slip is indicative of the assessed additional taxes. With regard to the batch of 130 packages of

¹⁷⁸ Ibid., at p. 23

¹⁷⁹ See *Appellate Body Report, Argentina – Hides and Leather, para. 11.184*

cigarettes that was initially assessed under customs reference 02/08/2017 C17820 and is reflected in Annex 17, we find that the customs reference therein does correspond to Ref. No. C17820 of 2nd August 2017 as reflected in the Payment Registration Slip in Annex 21.

96. Whereas we are constrained to underscore the need for consistency in the entries made in URA's Payment Registration Slips, we are satisfied, nonetheless, that both batches of cigarettes that were initially taxed as locally manufactured goods under customs references 06/07/2017 C15733 and 02/08/2017 C17820 respectively are the same batches of cigarettes in respect of which additional taxes in the sum of Ushs. 294,528,000/= and Ushs. 30,680,000/= are sought under the Payment Registration Slips captioned C15733 (06/07/2017) and C17820 OF 02 AUG 2017 respectively, and adduced in evidence as Annexes 20 and 21. To that extent, the alleged discrimination against the Applicant's cigarettes does pertain to 'the same' goods, as envisaged under Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol. We so hold.
97. The second aspect of the two-pronged test in *Brazil – Certain Measures concerning Taxation and Charges* (supra) relates to whether the taxes applicable to the imported products are in fact 'in excess of' those applied to like domestic products' thus passing the '*de jure*' test advocated in that legal precedent. The Payment Registration Slips in Annexes 20 and 21 represent the additional taxes payable against the Applicant's cigarettes, and depict an actual disparity in taxes arising from the re-classification in the total sum of Ushs. 325,208,000/=. This sum represents the actual tax burden due to the Applicant, which is clearly in excess of the tax applicable to like cigarettes that are locally manufactured in Uganda.
98. It is apparent that in re-classifying the Applicant's cigarettes as imported goods, the URA acted in absolute oblivion of and disregard for the provisions of Article 15(2) of the Customs Union Protocol. That legal provision succinctly forestalls the imposition of any tax liability on goods from other Partner States that is in excess of the tax imposed on similar or like domestic goods. It thus essentially enjoins EAC Partner States to extend uniform tax liabilities to each other's products. As we held earlier herein, the letter of the impugned law *per se* did not impute an obligation upon URA to apply a differential tax rate to the Applicant's cigarettes. Rather, in complete disregard for applicable Community Law, URA seemingly misconstrued the Excise Duty Act and the VAT Act to suggest that goods from EAC Partner States would correspond to the definition of imports. To that extent, URA misapplied Ugandan tax laws, stepped out of legal purview and the ambit of its legal mandate, and thus its attempt to implement the impugned law becomes tantamount to a purely administrative measure or intervention.
99. Consequently, having found that the tax liability accruing from the Payment Registration Slips was in excess of the tax applicable to like cigarettes that are locally manufactured in Uganda, we are satisfied that the Respondent's interpretation and purported implementation of section 2 of the impugned law violates Article 15(2) of the Customs Union Protocol, and is to that extent flawed and unlawful. We therefore find that the Respondent did violate Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol in so far as it sought to implement an administrative measure that discriminated

against the Applicant's goods. That administrative measure amounts to a Treaty infringement and is, to that extent, unlawful. It thus obviates the purpose for which the Treaty was promulgated in so far as it inhibits progression towards the establishment of a Customs Union or Common Market as propounded by Article 2(2) and 8(1)(c), and/ or the removal of barriers and constraints to market development as advocated by Article 127(2)(b). In the result, Issue No. 2 fails in relation to the contested enactment, but does succeed with regard to the unlawful implementation of section 2 by URA, contrary to Article 75(6) of the Treaty and Article 15(1)(a) of the Customs Union Protocol.

100. We do also find that the Respondent State's implementation of section 2 thereof did result in *de jure* tax discrimination against the Applicant's cigarettes; violated Article 15(2) of the Customs Union Protocol; was to that extent unlawful and, for the same reasons espoused above, at cross purposes with the principles and objectives of the Treaty. In the result, having also found that the administrative measure that URA sought to implement violated Article 15(1)(a) of the Customs Union Protocol, we do answer Issue No. 3 in the affirmative.

Issue No. 4: Whether the actions of the Republic of Uganda in enacting and implementing the provisions of Section 2 of the Excise Duty (Amendment) Act No. 11 of 2017 violate and/ or infringe Articles 4, 5, 6 and 32 of the Common Market Protocol, as alleged or at all.

101. Whereas in its pleadings the Applicant invoked the provisions of Articles 4, 5, 6 and 32 of the Common Market Protocol, in Submissions we understood learned Counsel for the Respondent to specifically contest the legality of the impugned law with regard to Articles 4, 5(1)(a), 6 and 32 of the Common Market Protocol. We reproduce the cited legal provisions below.

Article 4

In accordance with Articles 76 and 104 of the Treaty, this Protocol provides for the following:

1. The overall objective of the Common Market is to widen and deepen cooperation among the Partner States in the economic and social fields for the benefit of the Partner States.
2. The specific objectives of the Common Market are to:
 - (a) Accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital;
 - (b) Strengthen, coordinate and regulate the economic and trade relations among the Partner States in order to promote accelerated, harmonious and balanced development within the Community;
 - (c) Sustain the expansion and integration of economic activities within the Community, the benefit of which shall be equitably distributed among the Partner States;
 - (d) Promote common understanding and cooperation among the nationals of the Partner States for their economic and social development, and
 - (e) Enhance research and technological advancement to accelerate

economic and social development.

- 3. In order to realize and attain the objectives provided for in this Article, the Partner States shall cooperate in, integrate and harmonise their policies in areas provided for in this Protocol and in such other areas as the Council may determine in order to achieve the objectives of the Common Market.

Article 5

- 1.
- 2. For the purpose of paragraph 1 and pursuant to paragraph 4 of Article 2 of this Protocol, the Partner States agree to:
 - (a) Eliminate tariff, non-tariff and technical barriers to trade; harmonise and mutually recognize standards and implement a common trade policy for the Community.

Article 6

- 1. The free movement of goods in the Community shall be governed by the Customs Law of the Community as specified in Article 39 of the Protocol on the Establishment of the East African Community Customs Union.

Article 32

The Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community.

- 102. It was briefly argued for the Applicant that by enacting and implementing the impugned law, the Respondent State obviated its obligation to progressively harmonise tax policies and laws to remove tax distortions that impede the free movement of goods and promote investment; and similarly, negated its obligation to eliminate tariff, non-tariff and technical barriers to trade. Conversely, the Respondent sought to counteract this argument with the contention that the invoked provisions provide for the progressive harmonization of Partner States’ tax policies and laws to remove distortions, an undertaking that is ‘work in progress’ and ‘cannot happen overnight’.
- 103. It seems to us that the determination of this issue is premised on proof that the enactment and implementation of the impugned law did indeed circumvent the progressive harmonization of Partner States’ tax policies and laws, as well as the elimination of tariff, non-tariff and technical barriers to trade. This is a question of fact that must be established as such. In the instant case, we construe the obligations on Partner States that are encapsulated in Article 4(1) and (2) of the Common Market Protocol to be hinged *inter alia* on their cooperation and the harmonization of their tax policies as espoused in Article 4(3) of the same Protocol. The envisaged harmonization of tax laws and policies is expressly governed by Article 32 of the Protocol, which allows for the progressive realization of that obligation. In our considered view, proof thereof would necessitate the demonstration of what steps (if any) have been taken to date with regard to the progressive harmonization of tax laws and policies, and if indeed the Respondent State is in violation thereof. We found no such evidence on record and cannot presume that no steps whatsoever have been taken to date in that regard. We therefore find no infringement of Articles 4 and 32 of the Protocol.

104. Similarly, the obligation under Article 5(2)(a) to eliminate tariffs, non-tariff and technical barriers to trade appears to be conditional upon such cooperation between Partner States as is prescribed under Articles 2(4) and 5(1) of the Protocol. Article 5(1) essentially makes the Common Market Protocol applicable to activities ‘undertaken in cooperation by the Partner States’ to achieve the free movement of goods, labour, services and capital and to enjoy the rights of establishment and residence of their nationals within the Community as espoused in Article 2(4). It thus appears to make such cooperation an important precondition to the attainment of the obligations imposed under the Protocol. The Applicants did not furnish sufficient proof of such cooperation between the Republics of Kenya and Uganda having been the cornerstone of the commercial activity it established before us, so as to make the provisions of Article 5(2) applicable to the resultant dispute under consideration presently.
105. Whereas it was argued that the restructuring of its business operations had been premised on the promulgation of the Treaty, we take the view that the Treaty provides for the EAC integration in general terms, the details of which were subsequently ironed out in applicable Protocols. It is in that context that the framers of the Treaty deemed it necessary to make specific provision for a Common Market guided by the express provisions of the Common Market Protocol. We therefore find no proof of the infringement of Article 5(2) of the Protocol.
106. On the other hand, the provisions of Article 6(1) would appear to be a sum collection of the laws applicable to the free movement of goods. That seems to represent the crux of the present dispute; the interface between Community Law and National Laws. With utmost respect, we are constrained to observe here that URA’s interpretation and application of Ugandan tax laws to the exclusion of the Respondent State’s obligations under Community law is misconceived and not legally tenable. As we did state earlier herein, under the Vienna Convention the Partner States’ domestic laws cannot be invoked as justification for failure to perform a treaty obligation. The gravity of institutional barricades to the EAC integration process could not have been captured any better than it was in the World Bank/ *EAC Secretariat East African Common Market Scorecard 2014* as represented below:¹⁸⁰
- The 2014 Score Card notes that the laws and regulation of the Partner States continue to be a barrier to increased cross-border trade. The progress to eliminating restrictions is slow and new measures are introduced despite the provisions of the protocols. ... The 2014 Score Card notes that, although formally all Partner States have eliminated tariffs on intra-regional trade, measures of equivalent effect to tariffs still remain. ... The general consensus is that more could be done by the Partner States for the Community in order to fully realise free movement of goods within the EAC.
107. Perhaps more importantly, the EAC Treaty and attendant Protocols are effectively domesticated into Uganda’s national laws under section 3 of the East African Community Act No. 13 of 2002 and have the force of law in the

¹⁸⁰ See Aloo, Leonard Obura, *East African Community: Institutional, Substantive and Comparative EU Aspects*, Ibid. at p. 324, making reference to an *East African Common Market Scorecard 2014: Tracking EAC compliance in the movement of capital, services and goods*, (Vol. 2), The World Bank/ EAC Secretariat, p.4.

Respondent State. There is therefore no logical excuse for their circumvention by relevant state agencies. Section 3 reads:

- a. The Treaty as set out in the Schedule to this Act shall have the force of law in Uganda.
- b. Without prejudice to the general effect of subsection (1) of this section, all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty and all the remedies and procedures from time to time provided for by or under the Treaty, shall be recognized and available in the law and be enforced and allowed in Uganda.

108. Last, but by no means least, as was ably articulated by this Court in the case of *Samuel Mukira Muhochi vs. The Attorney General of Uganda*, (supra), by accepting to be bound by Treaty provisions with no reservations, Uganda (or indeed any Partner State) can no longer apply domestic legislation in ways that make its effects prevail over those of Community Law. We must point out here that in matters of Treaty interpretation, Article 33(2) of the Treaty succinctly grants supremacy to the decisions of this Court over the decisions of national courts in the following terms:

Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.

109. Consequently, a matter like the present Reference that seeks the interpretation and application of the Treaty and attendant Protocols on the legality of designated actions would fall squarely within the jurisdiction of this Court.

110. For present purposes, the Community Law espoused in Article 39 of the Customs Union Protocol, by dint of cross-reference in Article 6(1) of the Common Market Protocol, includes:

- c. Relevant provisions of the Treaty;
- d. This Protocol and its annexes;
- e. Regulations and directives made by the Council;
- f. Applicable decisions by the Court;
- g. Acts of the Community enacted by the Legislative Assembly, and
- h. Relevant principles of international law.

111. Having established the violation of Article 75(6) of the Treaty and Article 15(1) and (2) of the Customs Union Protocol under our consideration of the preceding issues, we are satisfied that the Respondent is in contravention of Article 39(a) and (b) of the Common Market Protocol. In the result, Issue No. 4 fails with regard to the claims under Articles 4, 5 and 32, but succeeds in respect of the claim under Article 6(1) of the Common Market Protocol. We so hold.

112. Finally and in summation, we did adjudge the URA's misconstruction of the impugned law to run counter to the definition of 'imports' and 'foreign country' in Article 1 and 1(1) of the Treaty and Customs Union Protocol respectively, constitute a violation of Article 2(2) and 5(2) of the Treaty and thus negate the objectives and purpose of the Treaty. In the same measure, having determined the *implementation* of section 2 of the impugned Act to contravene Article 75(6) of the Treaty, and Article 15(1)(a) and (2) of the Customs Union Protocol; section 2 is indeed in violation of both the Treaty and international law (the Protocol being an international instrument), is to that extent unlawful and does

thereby constitute an infringement of Article 30(1) of the Treaty. Quite clearly, the implementation of a law that is in violation of the highlighted Community Law amounts to the imposition of an illegal barricade to the realization of the Customs Union as advanced under Article 2(2) and 5(2) of the Treaty. Such an eventuality would be an absolute negation of the objectives of the Treaty.

113. In the result, we are satisfied that the implementation of section 2 of the Excise Duty (Amendment) Act, 2017 in the manner sought to be applied to the Applicants by the Respondent is unlawful, discriminatory and does negate the objectives of the Treaty. We do therefore answer Issue No. 1 in the affirmative.

Issue No. 5: What remedies are available to the Parties?

114. The Applicant sought Declarations that:

- i. The provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 contravene and infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.
- j. The provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017 are null and void to the extent that they infringe Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Articles 15(1) and (2) of the Customs Union Protocol, as well as Articles 4, 5, 6 and 32 of the Common Market Protocol.

115. The Applicant did also seek the following Orders:

- i. An order directing the Respondent to immediately take the necessary measures to ensure that the Applicant's rights under the Treaty are not violated by the application of the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act No. 11 of 2017.
- ii. An order that the costs of this Reference are paid by the Respondent.

116. We did not find any infringement of Articles 6(d) and (e); 7(1)(c); 75(1) and (4), or 80(1)(f) of the Treaty, neither was the alleged infringement of Articles 4, 5(2) or 32 of the Common Market Protocol established before us. We therefore decline to grant a declaration that there was contravention or infringement of the Treaty or the Common Market Protocol in respect of those legal provisions. We are similarly disinclined to grant a declaration regarding the alleged nullity of the invoked provisions of the impugned law given our findings on the absence of any Treaty or Protocol infringement in respect thereof.

117. On the other hand, having held as we have that the Applicants have sufficiently proven the infringement of Articles 1 and 75(6) of the Treaty, Articles 1(1) and 15(1)(a) and (2) of the Customs Union Protocol and Article 6(1) of the Common Market protocol by the purported implementation of the Excise Duty (Amendment) Act, we would grant a declaration to that effect as sought by the Applicant.

118. The Applicant did also seek a declaration that the provisions of section 2 are null and void to the extent that they infringe the invoked Treaty and Protocol provisions. However, the infringement that was established before this Court pertains to URA's misconstruction of section 2 of that law and not the enactment or substance of the law. In tandem with our findings, therefore, it would be

disingenuous of the Court to declare a nullity an enactment that has not been faulted. We are therefore disinclined to grant such a declaration. Nonetheless, the Payment Registration Slips seeking the payment of additional taxes, emanating as they do from the misconstruction and misapplication of section 2 of the Excise Duty (Amendment) Act by the URA, are illegal, null and void. We would, therefore grant a declaration to that effect, as well as the directional Order sought by the Applicant in that regard.

119. On the question of costs, we are mindful of Rule 111(1) of this Court's Rules, which postulates that costs should follow the event 'unless the Court, for good reason, decides otherwise'. In the instant case, where the Reference has succeeded in part with the Applicant emerging wholly successful in Issues 1 and 3, and partially successful in Issues 2 and 4, the costs awardable to the Parties might have been determined on a *pro rata* basis. However, this is a case that has canvassed matters of grave importance to the advancement of Community law and EAC intra-regional trade, which would be of significant public interest to a cross section of stakeholders within and beyond the EAC regional bloc. We would therefore exercise our discretion to order each Party to bear its own costs.

Conclusion

120. In the final result, the Reference is hereby partially allowed with the following Orders:

- k. A Declaration doth issue that the implementation of the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act, No. 11 of 2017, by the misconstruction and wrongful re-classification of the Applicant's cigarettes as 'imported goods', does contravene and infringe Articles 1 and 75(6) of the Treaty; Articles 1(1) and 15(1)(a) and (2) of the Customs Union Protocol, and Article 6(1) of the Common Market Protocol.
- l. A Declaration doth issue that the misapplication of the provisions of section 2(a) and (b) of the Excise Duty (Amendment) Act, No. 11 of 2017 by the issuance of Payment Registration Slips for additional taxes in the sum of Ushs. 325,208,000/= in respect of Applicant's cigarettes is illegal, null and void.
- m. The Respondent is directed:
 - i. With immediate effect, to rescind and withdraw the Payment Registration Slips captioned C15733 (06/07/2017) and Ref. No. C17820 of 02 AUG 2017 respectively in the total sum of Ushs. 325,208,000/=, and issued against the Applicant's 1,170 packages of soft cap cigarettes under even caption and/ or reference.
 - ii. To forthwith ensure the interpretation and application of Excise Duty (Amendment) Act, No. 11 of 2017 with due regard for and in compliance with applicable Community Law, and
 - iii. To align the Ugandan tax laws with Community Law applicable to goods from EAC Partner States.
- n. Each Party shall bear its own costs.

It is so ordered.

M. Nabakooza, S. Tusubira & M. Ijang for the Respondent

^^*^*

First Instance Division

Reference No. 8 of 2017

**Pontrilas Investments Ltd v Central Bank of Kenya, The Attorney General
of the Republic of Kenya**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ; F. Jundu, A. Ngiye, & C. Nyachae, JJ
July 4, 2019

Preliminary objection - Judicial discretion - Evidential proof of questions of law and facts – Whether Community services are established by Summit are facts requiring evidence - Doctrine of emanation of a State is a question of fact

Articles: 1,6, 7(2),8(1)(c), 9(2),(3),23, 30 (1)of the EAC Treaty

The First Respondent /Applicant, Central Bank of Kenya, filed a preliminary objection application seeking the dismissal of the Reference against it claiming that: the court had no jurisdiction as the First Respondent was a statutory body established under the laws of the Republic of Kenya, and not under the East African Community Treaty or Protocols neither was it a Partner State nor an Institution of the Community as required by Article 30(1). Furthermore; it was not listed as an institution of the Community in Article 9(3) and so could not be sued before this Court; and the principles and obligations under Articles 6, 7(2) and 8(1)(c) of the Treaty fell squarely lay with the Republic of Kenya as a State.

The Applicant opposed the application stating that a broad and liberal interpretation of the Treaty and that of national Central Banks are pivotal to the realization of the East African Community (EAC) Monetary Union. Therefore, the First Respondent should be deemed to be an institution of the Community. Alternatively, the Court should find the First Respondent an emanation of the Kenyan State as it was providing a public service under the control of the State and had special powers beyond that which result from the normal rules applicable in relations between individuals.

Held

1. A Preliminary Objection is a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.
2. Article 9(2) and 9(3) of the Treaty contain separate and distinct legal bases for determining whether or not a particular entity is an institution of the East African Community. Institutions of the Community are designated as such in Article 9(3) and those that the EAC Summit deems fit to establish. This is an ongoing process in terms of Article 9(2)
3. Whether or not the 1st Respondent is an EAC Institution can only be demonstrated by adducing appropriate evidence either in support or negation of that contention. Additionally, in order to qualify as a service under Article 9(2), the services to

East African Partner States must be such as created by the Summit as was held in *Modern Holdings* case. It would be inappropriate at this preliminary stage to make a determination on the doctrine of emanation of state.

4. Whether the services rendered by an entity are indeed created by the Summit and the question of emanation of State are questions of law and fact subject that are subject to evidential proof in terms of Article 9(2) to be canvassed and determined at the substantive hearing of the Reference. They cannot be the subject of a preliminary objection.

Cases cited

AG of Kenya v Independent Medical Legal Unit [2005-2011] EACJLR 377, Appeal No.1 of 2011
 AG of Tanzania v African Network of Animal Welfare [EACJLR] 395, Appeal No.3 of 2011
 Modern Holdings (EA) Ltd v Kenya Ports Authority [2005-2011] EACJLR 122, Ref. No.1 of 2008
 Mukisa Biscuit Manufacturing, Company Ltd v West End Distributors Limited (1969) EA 696
 The Secretary General of EAC v Rt. Ho. Margaret Zziwa, EACJ Appeal No. 7 of 2015

Editorial Note: Appeal 3 of 2020 is pending in the Appellate Division

RULING

A. Introduction

1. The instant Reference, No. 8 of 2017, was filed by Pontrilas Investments Limited ('the Applicant') on 31st August, 2017. The thrust of the Reference is the Applicant's contention that the Respondents breached their obligations under the Treaty for the Establishment of the East African Community, ('the Treaty') and in particular Articles 6, 7(2) and 8(1)(c) thereof, as well as the Protocol for the Establishment of the East African Monetary Union ('the Protocol') as regards supervision of Imperial Bank of Kenya Limited and actions related thereto.
2. The First Respondent is the Central Bank of Kenya, and the Second Respondent is the Attorney General of the Republic of Kenya. The said Respondents filed Responses to the Reference, on 30th January, 2018 and 18th January 2018 respectively.
3. By a Notice of Preliminary Objection, also filed on 30th January, 2018, the First Respondent prayed that the Court do dismiss the Reference as against it, with costs, on the following grounds:
 - a. That this Court lacks jurisdiction over the First Respondent;
 - b. That this Court lacks jurisdiction to determine and grant the reliefs sought;
 - c. That the Reference is time barred;
 - d. That the Reference is bad in law and has been filed contrary to the provisions of the Treaty;
 - e. That the Applicant lacks *locus standi* to file the subject Reference;
 - f. That the Reference is based on an illegality;
 - g. That the Reference is an abuse of Court process;
 - h. That the Reference is therefore incompetent, fatally defective and does not lie and the same ought to be struck out or dismissed with costs.
4. At the Scheduling Conference held on 13th June, 2018, the Court directed that the above Preliminary Objection be heard and determined first, and for purposes of the Preliminary objection, the Parties do file written submissions limited to

one question namely: ‘Whether the First Respondent had been properly sued, was properly before the Court, and the Court thus has jurisdiction over it.’ Effectively, the several objections set out in the Notice of Preliminary Objection thus collapsed into one objection.

5. At the hearing of the Preliminary Objection, the Applicant was represented by Prof. Edward Fredrick Ssempebwa and Mr. Ladislaus Rwakafuuzi, while Mr. James Ochieng Oduol appeared for the First Respondent, and Mr. Charles Mutinda and Ms. Lauren Kitubi for the Second Respondent.

B. First Respondent’s Submissions

6. The First Respondent relied on its written submissions and in particular, submitted that the question of Jurisdiction is paramount and must be determined at the earliest opportunity. It referred us to the case of *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited (1989) eKLR*, which had been cited with approval by this Court in *Modern Holdings (EA) Limited vs. Kenya Ports Authority, EACJ Ref. No.1 of 2008*.
7. More recently the Supreme Court of Kenya in the matter of *The Interim Independent Electoral Commission (2011) eKLR* quoted with approval, the words of Nyarangi, JA in the said case of *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited (Supra)*, thus:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.

8. Nyarangi, JA further stated:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statue, Charter, or Commission under which the Court is constituted and may be ended or restricted by like means. If no restrictions or limit is imposed, the Jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters which the particular court has cognizance or as to the areas over which the Jurisdiction shall extend, or may partake of both these characteristics.

9. The Supreme Court of Kenya in the *Interim Independent Electoral Commission (supra)* thus concluded that ‘jurisdiction flows from the law, and the recipient court is to apply the same, with any limitation embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by ways of endeavors to discern or interpret the intentions of Parliament, when the wording of the registration is clear and there is no ambiguity.’
10. Mr. Ochieng Oduol did also make reference to the decision of the Appellate Division of this Court in *Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No.1 of 2011* where, borrowing from the jurisprudence of the European Court of Justice, it was held:

It is a well-established principle of law that the European Court of Justice

can only act within the limits of the powers conferred upon it by the existing treaties or any inter conventions. Its jurisdiction must therefore be from specific provisions and does not extend beyond the defined area.

11. Applying the authorities cited above to the Treaty, and particularly Articles 23 and 30 which deal with the Court's jurisdiction, the First Respondent submitted that whereas in the instant Reference the Applicant is a legal person resident in a Partner State, as envisaged by Article 30(1) of the Treaty, the First Respondent was neither a Partner State nor an Institution of the Community as required by the said Article 30(1).
12. The First Respondent further argued that in so far as the Applicant had in its pleadings acknowledged that the First Respondent was a statutory body established under the laws of the Republic of Kenya, and not under the Treaty or Protocol, the First Respondent was not an entity within the ambit of the provisions of Article 30(1) of the Treaty, that could be competently sued as a Respondent before this Court as it was neither a Partner State nor an Institution of the Community. It relied upon the decision of this Court, in *Modern Holdings (EA) Limited vs. Kenya Ports Authority (supra)* to contend that it too was neither listed among the institutions of the Community under Article 9(3) nor was it created by the Summit under Article 9(2) of the Treaty.
13. In *Modern Holdings*, the Court concluded that:

KPA is definitely not among the institutions of the Community created under Article 9(2), or a serving institution of the East African Community appearing on the above list. As such, KPA is not one of the Respondents envisaged under Article 30 of the Treaty. KPA is a statutory authority created under Section 3 of the KPA Act --- it was created by the Republic of Kenya, a Partner State, and not by the Summit.
14. It was the contention of the First Respondent, that the principles and obligations under Articles 6, 7(2) and 8(1)(c) of the Treaty, and of the Protocol squarely lay with the Republic of Kenya as a State, and the First Respondent was therefore not a proper and competent respondent under Article 30 of the Treaty.
15. As regards the doctrine of Emanation of a State (which as is discussed later in this ruling, is a principal plank of the Applicant's opposition to the instant Application), the First Respondent urged that, the doctrine could not be invoked to maintain a claim against the First Respondent before this Court, as that party was not subject to the Court's jurisdiction under Article 30(1) of the Treaty.
16. The First Respondent consequently sought that the Preliminary Objection be upheld and the Reference as against it be struck out with costs.

C. Applicant's Submissions

17. In turn, the Applicant's submissions in opposing the Preliminary Objection fell into two distinct categories. Firstly, the Applicant urged the Court to take a broad and liberal interpretation of the Treaty and hold that by virtue of its functions and role in the Community through the Monetary Union Protocol, the First Respondent should be deemed to be an institution of the Community, in terms of Article 9(2) of the Treaty. This first hub of the Applicant's submission rests largely on the envisaged role to be played by the First Respondent, as well as the Central Banks of other Partner States, to enable the Partner States to

fulfill their obligations under the Treaty, and specifically, the Monetary Union Protocol. Evaluating the First Respondent's statutory role alongside the Treaty and Protocol obligations of the Second Respondent and other Partner States, it was the Applicant's contention that to the extent that the national Central Banks are pivotal to the realization of a functional Monetary Union, the First Respondent as one such Central Bank should be deemed to be an institution of the Community.

18. In response to the First Respondent's argument that it is not expressly named in Article 9(3) as an institution of the Community, the Applicant contended that, the Treaty provision was not exhaustive but rather, the institutions of the Community could be deduced from the functions they perform. In a nutshell, it was the Applicant's submission on this limb that in so far as the Central Banks of the Partner States had been placed in a pivotal role with regard to the establishment and operation of the Monetary Union, they were now regional institutions clothed with international/ regional corporate personality.
19. The Applicant addressed the doctrine of emanation of the state under the second limb of its submissions. Whereas under the first limb, the Court had been invited to interpret the Treaty broadly and thus find that the Central Bank of Kenya is an institution of the Community, under the second limb the Applicant advanced the alternative argument that the Court should find the Central Bank of Kenya to be an emanation of the Kenyan State. The Applicant referred us to the case law of *Foster vs. British Gas PLC c. 2188/89 (1990) ECR I-3313*, where the European Court of Justice defined emanation of the state 'a body whatever its legal form which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond that which result from the normal rules applicable in between individuals.'
20. Acknowledging that emanation of the State is not a concept provided for by the Treaty for the Establishment of the East African Community, we understood the Applicant to argue that it was a necessary development of Community Law that was intended to be integrative and should accordingly be given effect by this Court.

The Applicant urged the Court to over-rule the Preliminary Objection and proceed to hear the matter on its merits.

D. Second Respondent's Submission

21. The Second Respondent filed written submissions on several of the original points of objection listed in the First Respondent's Notice of Preliminary Objection dated 23rd January, 2018. In his oral highlights at the hearing of the 'consolidated' Preliminary Objection, Counsel for the Second Respondent focused on the issue of jurisdiction, as directed by the Court at the Scheduling Conference.
22. It was the Second Respondent's contention that the First Respondent was not an institution of the Community in terms of the Treaty and therefore the Court had no jurisdiction over it; and further, the First Respondent being a creation of the Laws of Kenya, only the national courts of Kenya had jurisdiction over it. In essence, the Second Respondent supported the First Respondent's Objection

and urged the Court to strike the latter off the Reference.

E. The Courts Determination

23. Having carefully considered to the Parties' submissions, it is the considered view of the Court that prior to a substantive consideration of the said submissions at this stage, it is imperative that the Court confirms that what is before it, is indeed a preliminary point of law that would be properly determined as a Preliminary Objection.
24. Whereas the matter under consideration was raised and argued by all the Parties as a Preliminary Objection, the Court is alive to the importance of proper procedure in the judicial process.
25. In *Attorney General of the Republic of Kenya vs Independent Medical Legal Unit*, (*supra*), the Appellate Division of this Court held:

The improper raising of points by way of Preliminary Objections does nothing but unnecessarily increase costs and, on occasion confuse the issues. The Court must therefore, insist on the adoption of the proper procedure for entertaining applications for Preliminary Objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will instead, treat as preliminary objections, only those points that are pure law; which are unstained by facts or evidence, especially disputed points of facts or evidence or such like.
26. This position was underscored in *The Secretary General of the East African Community vs. Rt. Hon. Margaret Zwiwa*, *Appeal No. 7 of 2015* where the Court cited with approval the following exposition in *Mukisa Biscuit Manufacturing, Company Limited vs. West End Distributors Limited (1969) EA 696* (per Newbold, P):

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.
27. The question of what would constitute a proper preliminary objection was further addressed in *Attorney General of Tanzania vs. African Network for Animal Welfare (ANAW) EACJ Appeal No.3 of 2011*, where the Appellate Division of this Court held that a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and assessment of testimony it 'should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigations on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined, and a finding of fact then made by the Court.'
28. In the instant case, the First Respondent argued that as matter of both fact and law, it is not an institution of the Community in terms of Article 9 of the Treaty and therefore cannot be a Respondent sued in this Court, such as is envisaged in Article 30 of the Treaty. Article 9(2) and (3) provides as follows:
 2. The institutions of the Community shall be such bodies, departments and

services as may be established by the Summit.

3. Upon the entry into force of this Treaty, the East African Development Bank established by the Treaty Amending and Re-enacting the Charter of the East African Development Bank, 1980 and the Lake Victoria Fisheries Organisation established by the Convention (Final Act) for the Establishment of the Lake Victoria Fisheries Organisation, 1994 and surviving institutions of the former East African Community shall be deemed to be institutions of the Community and shall be designated and function as such.
29. In their respective submissions, much was made by both Respondents of the fact that the First Respondent is an entity created by Article 231 of the Constitution of Kenya, 2010 as well as the Central Bank of Kenya Act, and is therefore not and cannot be an institution of the Community.
30. We take the view that, as a matter of law, institutions of the Community would firstly be such institutions as are designated as such in Article 9(3) of the Treaty. Article 9(2), on the other hand, envisages that the Summit will from time to time as it deems fit or necessary establish various bodies, departments and services as institutions of the Community. This clearly is an ongoing process. At any given time, therefore, including at the time of filing or hearing the instant Application, it cannot be discerned, by reading the said Article whether or not a particular entity is an institution of the Community having been so established by the Summit in terms of Article 9(2). Whether or not an entity has been so established, can only be demonstrated by adducing appropriate evidence either in support or negation of that contention.
31. It is clear to us that Article 9(2) and 9(3) are separate and distinct legal bases under the Treaty for determining whether or not a particular entity is an institution of the Community, in terms of Article 1 thereof, which provides ‘institutions of the Community’ means the institutions of the Community established by Article 9 of this Treaty.’ An entity will thus be determined to be an institution of the community by one or the other of these bases. In the case of Article 9(2), such determination by the Court is a question of fact that would require proof of the Summit having established the entity as an institution of the community.
32. In the instant Application, the First Respondent placed great reliance on this Court’s decision in *Modern Holding (E.A) Limited vs Kenya Ports Authority* (supra). In that matter, the issue under consideration was identical to that in question presently; namely the determination of an institution of the Community for purposes of Article 30 of the Treaty thus giving rise to a consideration of Article 9. The Court held:

Mere fact of rendering the nature of services it renders at Mombasa Port, namely serving the East African Partner States does not *ipso facto* make it an institution of the Community. In order to qualify as a service under Article 9(2) of the Treaty, the services must be such a service created by the Summit.
33. We hold that to be correct position in law. However, we hasten to add that a determination as to whether the services rendered by an entity are indeed created by the Summit would be a question of fact that is subject to proof as such.
34. Whereas in *Modern Holdings* (supra) this Court correctly found that in

terms of Article 9(2) of the Treaty, a service can only be an institution of the Community if so established by the Summit, it is our view that the question of whether or not a service has been so established is a question of fact that must be proved by evidence.

35. In the interest of clarity of the law and guided by the said decisions of the Appellate Division of this Court in *Attorney General of Republic of Kenya vs. Independent Medical Leal Unit (supra)*, *The Secretary General of the East African Community vs. Rt. Ho. Margaret Zziwa (supra)* and *Attorney General of Tanzania vs. African Network of Animal Welfare (ANAW) supra*, we reiterate that whether or not an entity is an institution of the Community under Article 9(2), is a question of both law and fact, the latter requiring evidential proof. When therefore a party bases an application on a contention that it is or is not an institution of the Community, in terms of the said Article 9(2), this requires evidential proof, and cannot rightly be the subject of a preliminary objection.
36. Against the jurisprudential background referred to above, it becomes abundantly clear that the question as to whether or not the First Respondent is an institution of the Community would require proof of affirmation or rebuttal under the precincts of Article 9(2) of the Treaty. In the same vein, the issue as to whether or not the services provided by the First Respondent are services created by the Summit and therefore services provided by an institution of the Community under Article 9(2) is a question of evidence that cannot be conclusively disposed of as a preliminary point of law.
37. We have considered the Applicant's argument relating to emanation of the state, as well as the First Respondent's response on the same. It is our considered view, that, having concluded as we have the question before us, is question of both law and fact, and therefore not a proper preliminary point of law, it would be inappropriate at this stage to make a determination on the doctrine of emanation of state. This seems to us to be an issue to be canvassed and determined at the substantive hearing of the Reference, if the First Respondent chooses to challenge the court's jurisdiction over it, at the said hearing.
38. We do therefore overrule the present Preliminary Objection; we order that Reference No. 8 of 2017 be heard on its merits, and urge the Parties (should they be so inclined) to address the issue of the First Respondent's *locus standi* therein as a question of law and fact.
39. We make no order as to costs.

F. Ssempebwa & L. Rwakafuuzi, Counsel for the Applicant

O. Oduol Counsel for the First Respondent

C. Mutinda & L. Kitubi for the Second Respondent

First Instance Division

Reference No. 9 of 2017

Hon. Justice Malek Mathiang Malek

v

The Minister of Justice of the Republic of South Sudan (Attorney General of the Republic of South Sudan)

and

The Secretary General of the East African Community

Coram: M. Mugenyi, PJ; F. Ntezilyayo* & C. Nyachae, J

Delivered by Video Conference on July 24, 2020

Rule of law - Good governance - Republican decree – Transparency- Due process- Whether removal from judicial service complied with municipal laws- State sovereignty versus Treaty obligations - Cause of action

Articles 6(d), 7(1) (b), 7(2), 27(1), 29(1), 30(1) (2), 71(1) (2) of the Treaty – Sections: 48(1) (2), (3); 53(6), (7), 55 61(a) Judiciary Act, 2008, South Sudan - Rule 127(1) of EACJ Rules of Procedure, 2019

The Applicant served as a Justice in the Court of Appeal of South Sudan until the formation of “The Committee of Justices and Judges” which organized a strike demanding, *inter alia*, the resignation of the Chief Justice of South Sudan. Subsequently, on 12th July, 2017, the President of the Republic of South Sudan (RSS) issued a Republican Decree No.100/2017 for the removal of some Justices and Judges of the Judiciary including the Applicant for contravening the Transitional Constitution, 2011 of RSS. In this Reference, the Applicant averred *inter alia* that: the independence of the Judiciary from the Executive is guaranteed under Article 124(1) of the Constitution; the immunity of Justices and Judges is guaranteed under Article 124(7); and the President has no powers to remove a Justice of the Court of Appeal. Therefore, the 1st Respondent State violated its Constitution and Sections 48(1)(2), (3); 53(6),(7), and 55 of the said Judiciary Act 2003, which provides that a complaint against a Justice or a Judge is presented to the President of the Supreme Court for investigation culminating in a decision of a Board of Discipline, which decision has to be confirmed by the Judicial Service Council. The unlawful removal also breached Articles 6(d), 7(1)(b) and 7(2) of the Treaty.

The applicant also alleged that 2nd Respondent failed to investigated or otherwise verify the veracity of the removal of judges as per Article 71(1)(2) of the Treaty and to fulfill obligations under Article 29(1). Thus, the Applicant sought declaratory orders against both Respondents and costs.

In reply, the 1st Respondent submitted that: the Reference was improperly brought against the Minister of Justice and Constitutional Affairs (Attorney General) yet the impugned act, was a Presidential act; the President enjoys immunity from any suit and before this Court; and the said Judges violated the Constitution, perverting

due process of law; and by their actions, they had lost their right to constitutional protection and thus their removal was in line with the Constitution and applicable laws.

The 2nd Respondent contended that: there was no Act, regulation, directive, decision or action attributable to the 2nd Respondent; and the Applicant did not demonstrate that the 2nd Respondents, was aware of RSS's action prior to the filing of the Reference. There was no cause of action against the 2nd Respondent.

Held

1. The issue before this Court is not the legality or otherwise of the activities of the Justices and Judges Committee, but the compliance or otherwise of the President's action vis-à-vis the Constitution and laws of South Sudan and the provisions of the Treaty. The 1st Respondent did not controvert the Applicant's affidavit evidence that the President failed to follow the process prescribed by law prior to issuing the impugned Decree.
2. State sovereignty cannot take away the precedence of Community law and cannot be a defence or justification for non-compliance with Treaty obligations. Actions and laws must conform with requirements of the Treaty (*Samuel Mohochi case*).
3. Article 6(d) of the Treaty was promulgated with a specific aim, namely to foster the rule of law. The Treaty also enjoins a Partner State to govern its people in accordance with the principles of good governance including adherence to the principles of democracy protection of human and peoples' rights. The activities of the Partner States must be transparent, accountable and undertaken within the confines of both the municipal laws and the Treaty (*Henry Kyarimpa, Appeal 4 of 2014*). By issuing the impugned Decree, the 1st Respondent's violated both the Constitution of South Sudan and the provisions of its Judiciary Act of 2008, falling short of the principle of rule of law breaching Articles 6(d) and 7(2) of the Treaty. Thus a declaration is used that Republican Decree No.100/2017 for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, 2017 AD" dated 12th July 2017 is in violation of the Constitution of RSS and Articles 6(d) and 7(2) of the Treaty
4. The Applicant has not shown that the 2nd Respondent was aware or ought reasonably to have been aware of the impugned Decree and the actions flowing there from prior to the filing of the Reference, so as to trigger the obligations under Article 29(1). Upon receipt of the Reference, the 2nd Respondent acted expeditiously to write to the 1st Respondent State and call for a report.

Cases cited

Democratic Party v Secretary General EAC & Ors [2012-2015] EACJLR 32, Ref. No. 2 of 2012
 EACSO v AG of Burundi, EACJ Ref. 2 of 2015
 East Africa Law Society v The AG of Burundi & Ors [2012-2015] EACJLR 466, Ref. 1 of 2014
 Henry Kyarimpa v The AG of Uganda, EACJ Appeal No. 6 of 2014
 Hon. Sitenda Sebalu v Secretary General of EAC & Ors [2005-2011] EACJLR 160, Ref. 1 of 2010
 James Katabazi & Ors v Secretary General of EAC [2005-2011] EACJLR 51, Ref. 1 of 2007
 Samuel M. Mohochi v The AG of Uganda [2005-2011] EACJLR 274, Ref. No. 5 of 2011
 The AG of Burundi v Secretary General of EAC, EACJ Appeal 2 of 2019

JUDGMENT

A. Introduction

1. This Reference was brought under Articles 6(d), 7(1)(b), 7(2), 27(1), 29(1), 30(1)

- (2), and 71(d) of the Treaty for the Establishment of the East African Community (“the Treaty”), Rules 24(1)(2) and (3) of the East African Court of Justice Rules of Procedure, 2013 (“the Rules”), The Vienna Convention on the Law of Treaties, 1969 (“the Vienna Convention”), and the inherent powers of the Court. The Reference sought to challenge the action of the President of the Republic of South Sudan in removing the Applicant herein from the position of Justice of the Court of Appeal of South Sudan, vide ‘The Republican Decree No.100/2017 for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan’ dated 12th July 2017 for being in contravention of the Constitution of the Republic of South Sudan and the Treaty, specifically Articles 6(d) and 7(2).
2. Hon. Justice Malek Mathiang Malek (“the Applicant”) is a citizen and resident of the Republic of South Sudan (a Partner State of the East African Community) who formerly served as a Justice in the Court of Appeal of South Sudan. He, together with a number of other Judges, formed “The Committee of Justices and Judges” that steered a strike demanding, *inter alia*, the resignation of the Chief Justice of South Sudan. Following the strike, on 12th July, 2017, the President of the said Partner State issued a Republican Decree for the removal of some Justices and Judges of the Judiciary of South Sudan, including the Applicant.
 3. The First Respondent is the Attorney-General of the Republic of South Sudan, whose office has been sued in its capacity of Principal Legal Advisor of the Republic of South Sudan.
 4. The Second Respondent is the Secretary General of the East African Community, whose office has been sued in its capacity as the Principal Executive Officer of the Community, head of the East African Community Secretariat and Secretary to the Heads of State Summit of the Community.
 5. At the hearing hereof, the Applicant was represented by Mr. William Ernest, the First Respondent by Mr. Bieng Piek Kol, and the Second Respondent was represented by Ms. Christine Mutimura of the Office of the Counsel to the Community (CTC).

B. Applicants’ Case

6. The Applicant’s case is set out in his Statement of Reference lodged in this Court on 13th September 2017; his affidavit dated 13th September 2017; the Applicant’s written submissions; as well as the highlights thereof. It is the Applicant’s contention that in issuing the Republican Decree of 12th July 2017, the President of the Republic of South Sudan purported to exercise powers that he did not have under the Constitution of South Sudan and accordingly, by so doing, the First Respondent State violated its Constitution, as well as the provisions of Articles 6(d), 7(1)(b) and 7(2) of the Treaty.
7. In particular, it was the Applicant’s case that:-
 - i. The Court of Appeal of the Republic of South Sudan is structured under Article 123(b) of the Transitional Constitution of 2011, read together with Section 7(b) of the Judiciary Act, 2008.
 - ii. The Independence of the Judiciary from the Executive is guaranteed under Article 124(1) of the Transitional Constitution, 2011.
 - iii. The respect to Judiciary at all levels of legislative and executive arms is guaranteed under Article 124(5) of the Transitional Constitution, 2011.

- iv. The salaries, allowances, privileges, post service benefits, tenure and other conditions and terms of service of judicial offices are constitutionally stipulated and regulated by law.
 - v. The immunity of Justices and Judges is guaranteed under Article 124(7) of the Transitional Constitution of South Sudan.
 - vi. Under Article 134(2) of the Transitional Constitution, the Justices and Judges can only be removed on the recommendation of the Judicial Service Commission.
 - vii. The President of the Republic of South Sudan has no powers whatsoever to remove a Justice of the Court of Appeal, such as the Applicant herein.
 - viii. The President's purported removal of the Justices of the Court of Appeal, the Applicant inclusive, is not only unconstitutional; it is illegal and a breach of Articles 6(d) and 7(2) of the Treaty. It amounts to interference in the independence of the Judiciary since it instills fear, inhibiting the judiciary's performance of its functions as by law required.
 - ix. The Second Respondent herein, being the head of the Secretariat of the Community, failed to undertake investigations or otherwise verify the veracity of the above matters as provided for under Article 71(1)(2). He also failed to fulfill his obligation under Article 29(1) of the Treaty.
8. The Applicant seeks the following reliefs (reproduced verbatim):-
- a) A DECLARATION THAT the act of the President of the Republic of South Sudan of removing the Applicant herein from the position of Justice of the Court of Appeal, vide the Republican Decree No.100/2017 for the removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, 2017, AD; dated 12th July 2017 is in contravention of the Constitution of the Republic of South Sudan and is a breach of the Treaty Establishing the East African Community, specifically Articles 6(d) and 7(2).
 - b) A DECLARATION THAT the President of the Republic of South Sudan has no exclusive powers of removing a Justice of the Court of Appeal from office, the Applicant herein inclusive.
 - c) A DECLARATION THAT the act of the President of the Republic of South Sudan of removing Justices of the Court of Appeal and Judges of the High Court, First Grade County Judges and Second Grade County Judges is in contravention of the Constitution of the Republic of South Sudan and applicable laws, and is in breach of the Treaty Establishing the East African Community in Articles 6(d) and 7(2).
 - d) A DECLARATION THAT the Secretary General's failure to investigate, collect information from, and submit his findings to the Republic of South Sudan is an infringement of Articles 29(1) and 71(1)(d) of the Treaty for the Establishment of the East African Community.
 - e) A DECLARATION THAT the Secretary General has failed to fulfil his obligations under Articles 29(1) and 71(1)(2) of the Treaty.
 - f) Award costs of this Reference to the applicant.

C. First Respondent's Case

9. The First Respondent's case is set out in the Response to the Reference lodged

in this Court on 24th April 2019, as well as its written submissions and the highlights thereof. It was the First Respondent's case that the removal of Justices and Judges (including the Applicant) by the President of South Sudan was legal and consistent with the Constitution of the Republic of South Sudan. It was further asserted that the issuance by the President of the Republican decree to remove the Justices and Judges did not violate any provision of the Treaty.

10. In particular, it was the First Respondent's case that:-

- a. The Reference was improperly brought against the Minister of Justice and Constitutional Affairs (Attorney General) of the Republic of South Sudan as the impugned act, *to wit*, the Republican Decree No.100/2017, was a Presidential act but the President of the Republic of South Sudan, enjoys immunity from suit, even before this Court.
- b. The removed Justices including the Applicant were so removed (correctly so) for involving themselves in executive affairs instead of judicial affairs and, in any event, by forming the Committee of Justices and Judges and calling for the resignation of the Chief Justice, the said Justices and Judges violated the Constitution of the Republic of South Sudan and sought to pervert the due process of law. By their behaviour and actions, therefore, they had lost their right to constitutional protection and their removal was in line with the Constitution of the Republic of South Sudan, and other applicable laws.

D. Second Respondent's Case

11. The Second Respondent's case is set out in its Response to the Statement of Reference lodged in this Court on 1st November 2017, as well as its written submissions and highlights thereof. The Second Respondent's case essentially is that the Reference does not disclose any cause of action against that office. In support of this position, the said Respondent submitted that:-

- a. For the purposes of Article 30 of the Treaty, through which he approaches this Court, the Applicant has failed to prove that there is any Act, regulation, directive, decision or action that is an infringement of the provisions of the Treaty and attributable to the Second Defendant.
- b. The Reference does not demonstrate that the Second Respondent was in any way aware of the actions occasioned on the Applicant by the Partner State prior to the filing of the instant Reference.
- c. In compliance with his obligations under Article 29 of the Treaty, when the impugned actions of the Partner State came to its attention upon the filing of the instant Reference, the Second Respondent did take action by initiating inquiries on the same.

12. The Second Respondent prayed that the Court be pleased to dismiss the Statement of Reference against it with costs.

E. Issues for Determination

13. At a Scheduling Conference held on 12th March 2019, the Parties framed the following issues for determination:

- i. Whether the removal of the Applicant from the position of Judge of the Court of Appeal of the Republic of South Sudan vide "Republican Decree

- No.100/2017 for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan” was lawful in respect to the Transitional Constitution of the Republic of South Sudan, 2011; the Judiciary Act 2008, the Judicial Service Council Act, 2008 and Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
- ii. Whether there is a cause of action against the 2nd Respondent; and
 - iii. Whether the Applicant is entitled to remedies sought.

F. Court’s Determination

14. Having carefully listened to the Parties and considered the pleadings before us, we wish at the onset to make two observations:
- a. The instant Reference was instituted under the East African Court of Justice Rules, 2013. Since then, the Court’s Rules have been revised, the applicable Rules now being the East African Court of Justice Rules, 2019. In terms of Rule 136 of the latter Rules, we shall apply the 2019 Rules, “without prejudice to the validity of anything previously done provided that if and so far as it is impracticable to apply the (2019) Rules, the practice and procedure heretofore shall be followed.”
 - b. In writing this judgment it has come to our attention that in the Scheduling Notes, under the heading ‘Issues For Determination,’ the impugned Decree is in error referred to as ‘Republican Decree No. 277/2016 for the Promotion of Justices and Judges of the Judiciary of the Republic of South Sudan, 2016 AD.’ From the pleadings, it is clear that the impugned Decree is ‘Republican Decree No.100/2017 For The Removal of some Justices And Judges in the Judiciary of the Republic of South Sudan, 2017 AD.’
15. We thereby deem the error to be corrected, so that the first issue for determination shall be:
- Whether the removal of the Applicant from the position of Justice of the Court of Appeal of the Republic of South Sudan vide “Republican Decree No.100/2017 for the Removal of Justices and Judges of the Judiciary of the Republic of South Sudan, 2017 AD was lawful in respect to the Transitional Constitution of the Republic of South Sudan, 2011; the Judiciary Act 2008, the Judicial Service Council Act, 2008 and Articles 7(d) and 7(2) of the Treaty For The Establishment of the East African Community.
16. On that premise, we now revert to a determination of the issues.

Issue No. 1: Whether the removal of the Applicant from the position of Justice of the Court of Appeal of the Republic of South Sudan vide “Republican Decree No.100/2017 for the Removal of Justices and Judges of the Judiciary of the Republic of South Sudan, 2017 AD was lawful in respect to the Transitional Constitution of the Republic of South Sudan, 2011; the Judiciary Act 2008, the Judicial Service Council Act, 2008 and Articles 7(d) and 7(2) of the Treaty For The Establishment of the East African Community.

17. Simply put, the Applicant’s grievance is that, by issuing the Republican Decree that removed him and other Justices of the Court of Appeal of South Sudan from

office, the President infringed the Transitional Constitution of the said Partner State, as well as the Treaty. It was the Applicant's case that there was no formal complaint against him; the President had no powers to effect the said removal, and the Applicant was not given an opportunity to be heard. These contestations being at the core of the Applicant's case, they call for a consideration of the applicable provisions of the Respondent State's laws and the Treaty, on the one hand, as well as the factual process adopted in the making of the impugned decision, on the other.

18. We find it appropriate to make reference to the operative part of the impugned decree titled "The Republican Decree No.100/2017 for the removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, 2017 AD." It states as follows:-

In exercise of the powers conferred upon me under Article 134(2) the Transitional Constitution 2011 (as amended) read together with Section 61(a) of the Judiciary Act, 2008, I, Salva Kiir Mayardit, President of the Republic of South Sudan, do hereby issue this Republican Decree for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, with effect from 12th July 2017.

19. Article 134(2) of the said Transitional Constitution 2011 (as amended) provides as follows:-

Justices and Judges may be removed by an order of the President for gross misconduct, incompetence and incapacity and upon the recommendation of the National Judicial Service Commissions.

20. Section 61(a) of the said Judiciary Act provides as follows: -

Reasons for Termination of Service

The service of any Justice or Judge shall be terminated for any of the following reasons -

- a) removal or dismissal
- b) resignation
- c) retirement; or
- d) death.

21. From the Applicant's submissions, we understood him to contend that before recourse is made to the provisions referred to by the President in the Decree as set out above, it is necessary that the procedure set out elsewhere in the Judiciary Act of 2008 has been complied with. In particular, the Applicant referred us to Section 48(1)(2) and (3); Section 53(6) and (7), and Section 55 of the said Act, which sections collectively set up a procedure whereby a complaint against a Justice or a Judge is presented to the President of the Supreme Court, who then causes investigations to be carried out, culminating in a decision of a Board of Discipline, which decision has to be confirmed by the Judicial Service Council. Ultimately, the decision of the said Judicial Service Council is what is confirmed and enforced by the President of the Republic of South Sudan.

22. It was the Applicant's contention that none of the latter procedures were followed, thus making the decision and action of the President irredeemably flawed, a violation of the Constitution and law of the Republic of South Sudan. This violation of the Partner State's law, the Applicant opined, placed the said Partner State in breach of its obligations under Articles 6(d) and 7(2) of the Treaty.

23. The Applicant referred us to the decision of this Court in *Simon Peter Ochieng & Another vs. THE Attorney General of Uganda, EACJ REF. NO. 11 OF 2013*, where it was held:
- We hasten to point out that, within the context of the EAC jurisdiction, Partner States would be governed by their national constitutions --- stated differently, the Executive must be able to demonstrate a lawful authority for its actions, whether common law, or statutory law.
24. As can be seen from the foregoing, the Applicant based his case primarily on the process set out in the Constitution, as well as the law for the removal of a Justice.
25. On its part, the First Respondent did not deem it necessary to address these processes nor did it demonstrate its compliance with them, beyond asserting that it did not violate either the law of South Sudan or the Treaty. In its Response to the Reference and in submissions, the First Respondent placed emphasis on two issues.
- a. That the impugned actions in question were Presidential actions in respect of which the President of South Sudan had immunity from suit, whether in the Courts of the said Partner State or indeed in this Court. For this proposition, the said Respondent sought to rely on Article 103 of the Transitional Constitution of the Republic of South Sudan.
 - b. The First Respondent went to great lengths to seek to justify the President's actions on the basis of the alleged actions and utterances of the Committee of Justices and Judges of which the Applicant was a member.
26. On the submission regarding the President's immunity from suit before this Court, while responding to questions from the Bench, Counsel for the First Respondent correctly conceded that the President's action in issuing the Decree was an act of the Partner State for the purposes of Article 30 of the Treaty, and therefore this Court did have jurisdiction to consider whether or not that action constituted a violation of the Treaty. Article 30(1) of the Treaty provides as follows:
- Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.
27. As regards the second issue above, we are fully persuaded by the submission of learned Counsel for the Applicant that the issue before this Court is not the legality or otherwise of the activities of the Justices and Judges Committee, but a determination on the compliance or otherwise of the President's action with the Constitution and laws of South Sudan, as well as the provisions of the Treaty. This is the approach that was adopted by this Court in *EAST AFRICA LAW SOCIETY vs. THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI AND ANOTHER, EACJ REFERENCE NO.1 OF 2014*.
28. The First Respondent has not challenged the Applicant's submissions as regards the process and requirements for the removal of a Justice in terms of the Constitution and laws of the Republic of South Sudan. Nor indeed has it controverted the Applicant's affidavit evidence that the President of the Republic of South Sudan failed to follow the said process prior to issuing the impugned

Decree. It (the First Respondent) merely maintained that the impugned action of the President was consistent with that Partner State's Constitution.

29. In its written submissions, the First Respondent states:

As for the Treaty for the Establishment of the East African Community, the Republic of South Sudan as a Partner State, has never violated Articles 6(d) or 7 (2) of the Treaty --- but exercising its mandatory powers like any other member of the community. The Republic of South Sudan is committed and will remain committed to the Treaty.

30. It is now trite law that where a Partner State is shown to have violated its own Constitution or domestic laws then, *ipso facto*, that State falls afoul of the rule of law principle in Articles 6(d) and 7(2) of the Treaty.

31. Articles 6(d) and (7)2 of the Treaty provide as follows:-

Article 6

The fundamental principles, that shall govern the achievement of the objectives of the Community by Partner States shall include:

- a)
- b)
- c)
- d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, general equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples Rights.

Article 7

1.
2. The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

32. In the case of *HENRY KYARIMPA vs. THE ATTORNEY GENERAL OF UGANDA, EACJ APPEAL NO.6 OF 2014*, the Appellate Division of this Court held:

The framers of the Treaty and its signatories intended that the Principles in Articles 6 and 7 as well as the undertakings to implementation in Article 8 should have that value and meaning to themselves and to all citizens within the borders of the Partner States forming the EAC. They are therefore justiciable and are meant to bind all organs of the EAC including the Governments of the Partner States.

33. The Court went further:

In a nutshell, the activities of the Partner States must be transparent, accountable and undertaken within the confines of both the municipal laws and the Treaty.

34. In considering the definition and import of the rule of law principle in Articles 6 and 7 of the Treaty, and its application in the context of domestic laws, the Court in *JAMES KATABAZI & 21 OTHERS vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY, EACJ REFERENCE NO.1 OF 2007*

quoted with approval from *Wikipedia, The Free Encyclopedia* as follows:-

Perhaps the most important application of the rule of law is that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus the rule of law is hostile both to dictatorship and to anarchy.

35. Measured against this Treaty standard and expectation, the actions of the First Respondent in issuing the impugned Decree clearly fell short, leading to the conclusion that it violated the rule of law principle set out in Articles 6 and 7 of the Treaty.
36. The impugned Decree does not on the face of it make any reference to a recommendation by the Judicial Service Council to the President for the removal of the Justices. There is also no evidence to show that this very specific and integral provision of Article 134(2) of the Constitution of South Sudan was complied with. Additionally, the uncontroverted evidence before this Court is that the Republic of South Sudan failed to comply with the specific and mandatory requirements provided for in the Judiciary Act, 2008 prior to the issuance of the impugned Decree.
37. In its Response to the Reference, the First Respondent averred that in issuing the impugned Decree the Republic of South Sudan was not violating Articles 6(d) and 7(2) of the Treaty, but was 'exercising its mandatory powers.' We understood this to be a reference to the sovereignty of the Partner State. However, in *SAMUEL MUKIRI MUHOCHI vs. THE ATTORNEY GENERAL OF UGANDA, EACJ REFERENCE NO. 5 OF 2011* this Court considered the issue of Partner State's sovereignty viz a viz their treaty obligations and held:

Sovereignty, therefore, cannot take away the precedence of Community law, cannot stand as a defence or justification for non-compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty.
38. Further, the Appellate Division of this Court had this to say in *ATTORNEY GENERAL OF RWANDA vs. RUGUMBA, EACJ APPEAL NO. 1 OF 2012*. It is manifestly plain from a reading of Article 6(d) that the EAC Treaty was promulgated with a specific aim, namely to foster the Rule of Law. Also the EAC Treaty clearly enjoins a Partner State to govern its people in accordance with the principles of good governance including adherence to the principles of democracy, the rule of law, protection of human and peoples rights in accordance with the African Charter on Human and Peoples Rights.
39. On the basis of the evidence before us, we are satisfied that the First Respondent, by its issuance of the impugned Decree, violated both the Constitution of South Sudan and the provisions of its Judiciary Act of 2008. This, in turn places the First Respondent in breach of Articles 6(d) and 7(2) of the Treaty. We so hold.

Issue No. 2: Whether there is a cause of action against the Second Respondent.

40. It was the contention and submission of the Applicant, that he has a cause of action against the 2nd Respondent herein, arising from the latter's alleged failure

to comply with his obligations under Articles 29(1) and 71(1)(d) of the Treaty. These provide as follows:

Article 29(1)

Where the Secretary General considers that Partner State has failed to fulfil an obligation under this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned, for that Partner State to submit its observations on the findings.

Article 71(1)

- i.
- ii.
- iii.
- iv. The secretariat shall be responsible for:-the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the community that appears to merit examination.

41. The Applicant submitted that prior to the filing of the instant Reference, the Second Respondent had not taken any action to verify or investigate the matters raised in this Reference, particularly the actions of the President of South Sudan in issuing the impugned Decree.

42. On his part, the Second Respondent contends that there is no cause of action against him in terms of Article 30 of the Treaty given that there is no “Act, regulation, directive, decision or action that is unlawful or is an infringement of the provisions of the Treaty.” In any event, the Second Respondent argued that he was unaware of the impugned Decree and its consequences until the filing of the instant Reference; but upon being so aware, he had made inquiries seeking a comprehensive report from the Partner State.

43. In the case of *FORUM POUR LE RENFORCEMENT DE LA SOCIETE CIVILE (FORSC) & OTHERS vs. THE ATTORNEY GENERAL OF THE REPUBLIC OF BURUNDI & THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY, EACJ REFERENCE NO.12 OF 2016*, the Court considered the nature of the Second Respondent’s obligations under Article 29 (1) of the Treaty. It was held:

This Court has had many occasions to address the question of the cause of action against the Secretary General. It has consistently found a cause of action against the Secretary General to have been sufficiently established where the matter relates to the violation of Article 29(1) and associated Articles of the Treaty. *See SITENDA SEBALU vs. THE SECRETARY GENERAL OF THE EAC & ATTORNEY GENERAL OF UGANDA, EACJ REFERENCE NO. 1 OF 2010, THE EAST AFRICAN LAW SOCIETY vs. ATTORNEY GENERAL OF BURUNDI & THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY, EACJ REFERENCE NO. 1 OF 2014, and DEMOCRATIC PARTY vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY & 4 OTHERS, EACJ REFERENCE NO. 2 OF 2012.*

44. The Court went further to quote from the case of *JAMES KATABAZI & 21 OTHERS vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY & ANOTHER, EACJ REFERENCE NO. 1 OF 2007* as follows:-

The Secretary General is required to “submit his or her findings to the Partner State concerned”. It is obvious to us that before the Secretary General is required to do so, she or he must have done some investigation. From the unambiguous words of that sub-Article there is nothing prohibiting the Secretary General from conducting an investigation on his/her own initiative. Therefore, the glaring answer to the second issue is: Yes the Secretary General can on his own initiative investigate such matters. But the real issue here is not whether he can but whether the Secretary General, that is, the 1st Respondent, should have done so. It was in this regard that there was heated debate in the preliminary objection on whether or not the Secretary General must have intelligence of some activity happening in a Partner State before he undertakes an investigation..... We are of the decided opinion that without knowledge the Secretary General could not be expected to conduct any investigation and come up with a report under Article 29(1).

45. In the *FORSC* case, the Court cited with approval the case of *EAST AFRICAN CIVIL SOCIETY ORGANIZATION FORUM (EACSOFF) vs. THE ATTORNEY GENERAL OF BURUNDI & 2 OTHERS, EACJ APPEAL NO. 4 OF 2016* where the Court did not find the Secretary General accountable for alleged violation of duties and held:

Whereas the Secretary General’s power and functions are clearly spelt out in Articles 67 and 71 of the Treaty, we have seen no evidence that he has breached any of his duties in the context of this Reference. We reiterate that the Reference is predicated upon a specific decision of the Constitutional Court of Burundi issued on 5th May, 2015 with attendant events. What was the role of the Secretary General in that matter? None whatsoever.

46. In the instant Reference, the Applicant has not shown that the Second Respondent was aware or ought reasonably to have been aware of the impugned Decree and the actions flowing therefrom prior to the filing of the Reference, so as to kick-start the obligations under Article 29(1). It is noted that the Second Respondent acted expeditiously upon receipt of the Reference to write to the First Respondent State and call for a Report.

47. Consequently, we find that the Applicant has not established a case that the Second Respondent defaulted on his obligations under the Treaty. We so hold.

Issue No. 3: Whether the Applicant is entitled to the Remedies sought.

48. The remedies sought by the Applicant were set out in paragraph 8 of this judgment. As regards the First Respondent, it is our finding above that the said Respondent State violated its own Constitution and laws, which violation in turn constitutes a breach of the Treaty. We are thus inclined to grant the first declaration sought. It is our considered view that the said declaration encapsulates the further declarations sought under paragraph 8(b) and (c) hereof.

49. As stated earlier in this judgment, we are unable to agree with the Applicant as regards his claim against the Second Respondent. We therefore decline to grant the declarations sought under paragraph 8(d) and (e) above.

50. On the question of costs, Rule 127(1) of the Court’s Rules of Procedure provides

that costs shall follow the event unless the Court for good reason decides otherwise. We find no reason not to abide by the general rule on costs. In any event, we find fortitude in the decision of *THE ATTORNEY GENERAL OF BURUNDI vs. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY & ANOTHER*, EACJ APPEAL NO. 2 OF 2019, where the rule that costs should ordinarily follow the event was emphatically reinforced.

F. Conclusion

51. In the result, we hereby allow the Reference as against the First Respondent with the following orders:
- i. A DECLARATION be and is hereby issued, that the act of the President of the Republic of South Sudan of removing the Applicant from the position of Justice of the Court of Appeal vide “*Republican Decree No.100/2017 for the Removal of some Justices and Judges in the Judiciary of the Republic of South Sudan, 2017 AD*” dated 12th July 2017 is in violation of the Constitution of the Republic of South Sudan and a violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.
 - ii. We award costs to the Applicant as against the First Respondent.
 - iii. We do also award costs to the Second Respondent as against the Applicant.

It is so ordered.

*[Hon. Justice Dr. Faustin Ntezilyayo resigned from the Court in February 2020 but signed this judgment in terms of Article 25(3) of the Treaty.]

W. Ernest, Counsel for 1st Respondent

B. Kol for the 2nd Respondent

C. Mutimura for 2nd Respondent

Λ*Λ*Λ*

First Instance Division

Reference No. 13 of 2017**Prof. Elias Bizuru v The Inter-University Council for East Africa**

Coram: M. Mugenyi, PJ; F. Ntezilyayo, DPJ*; A. Ngiye, C. Nyawello & C. Nyachae, JJ

Delivered by Video Conference on September 28, 2020

Recruitment - Whether the process was transparent - Regional public policy on due diligence checks -Partner State reservation - Freedom to contract employee of choice - Costs

Articles: 6(d), 30(1), of the Treaty - Section 9(a) Inter-University Council for East Africa Act, 2009 - Rule 127 EACJ Rules of Procedure, 2019

In October 2016, the Inter-University Council for East Africa (IUCEA), an institution of the East African Community, advertised the vacant position of Chief Research and Innovation Officer through their website. The Applicant, a resident of Burundi, was interviewed on 27th February 2017 and thereafter, the Respondent requested for supplementary documents including the academic verification document of the university where the Applicant had completed his PhD degree. On 21st September 2017, the Respondent informed the Applicant that he had not been selected for the post. Aggrieved, the Applicant, sued the Respondent claiming the recruitment process lacked transparency; and being the best candidate as indicated in the Minutes, he should have been appointed to the position. He sought a declaration that the decision of IUCEA's Executive Committee of 27th August, 2017 infringed Article 6(d) of the Treaty and should be nullified.

In response, the Respondent submitted that the recruitment process was conducted in accordance with the Treaty, the IUCEA Staff Rules and Regulations and the East African Community Council of Ministers' directives with regard to due diligence checks. Information was received from the Republic of Burundi that the Applicant was sponsored for PhD studies the condition that he would return and teach at the University of Burundi. Having failed to honour this condition and opted to teach in the Republic of Rwanda. Therefore, in the light of this information, the IUCEA Executive Committee was under no obligation to abide by the results of the interview as the Applicant lacked the moral credibility to be appointed to the position and despite being the best candidate. Moreover, the Applicant was kept abreast with each stage of the recruitment process therefore could not claim that the said process lacked transparency.

Held

1. Whereas transparency is one of the fundamental principles of the Community specified in Article 6(d) of the Treaty, the parameters entailed in the concept of transparency are not outlined. Nonetheless, transparency means being open and clear so that the other party to a transaction sees everything that matters; lack of guile and no attempt to hide damaging information.

2. There was communication to the Applicant at and about each stage of the process. The intervention of the Republic of Burundi, does not negate the transparency of the recruitment process. Rather, it represents regional public policy of the East African Community whereby all candidates for vacancies within the Community (including its organs and institutions) would be subjected to a due diligence check prior to appointment. This includes securing the endorsement of a candidate's home country. Since the due diligence yielded an objection from a Partner State, a contrary decision by the IUCEA was not sustainable.
3. The notion of freedom of contract is such that an employer is at liberty to execute a contract with a party (employee) of choice, subject to the terms of the engagement process. In the instant case, the Council of Ministers having designated due diligence checks as an integral part of the recruitment process, the Respondent State was at liberty to express its reservations and the IUCEA was obliged to abide by the said objection. Therefore there was no lack of transparency.
4. The Applicant having failed to prove his case on the balance of probabilities, the Reference is dismissed with costs to the Respondent.

Cases cited

Schuller v Roback (2012) BCSC
Gold v Gold (1993) BCCA

Editorial Note: A Notice of Appeal was filed on October 22, 2020

JUDGMENT

A. Introduction

1. This Reference was brought under Articles 6(d) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty'), challenging the decision of the Respondent rescinding his offer of appointment by the Inter-University Council for East Africa (IUCEA), an institution of the East African Community. The Reference is premised on the allegation of lack of transparency in the recruitment process.
2. The Applicant is a resident of Bujumbura, Burundi and thus resident within the East African Region for the purposes of Article 30(1) of the Treaty. The Respondent is the Inter-University Council for East Africa sued in its own name as an institution of the Community, for the purposes of the same Article 30(1).
3. At the trial the Applicant was represented by Mr. Janvier Bayingana, while Dr. Anthony Kafumbe appeared for the Respondent.

B. Background

4. In October 2016, the IUCEA advertised the position of Chief Research and Innovation Officer through their website. In response to that advertisement, the Applicant emailed his application with all supporting documents on 10th October 2016.
5. The first written response from the IUCEA was on 21st February 2017, when the Applicant received an email message informing him that he had been shortlisted for an interview that had been scheduled for 27th February 2017. The said institution sent him an electronic air ticket for that purpose. He did

subsequently participate in the interview as scheduled.

6. On 26th April 2017, the IUCEA required him to submitted supplementary documents, which were duly supplied. In addition, there was the academic verification document submitted by the university where he completed his PhD degree. That submission was done with the Applicant's approval.
7. On 21st September 2017, the Applicant received a letter of regret from the IUCEA Executive Committee informing him of that he had not been selected for the post. As a result, the Applicant filed this Reference in the Court.

C. Applicant's Case

8. The Applicant's case is set out in the Statement of Reference; the Affidavit in support of the Reference; in his written submissions, and in the oral highlights thereof made during the hearing.
9. It is the Applicant's case that there was no transparency in the recruitment process in respect of the position of Chief Research and Innovation Officer in the IUCEA. The thrust of his case is that, having emerged the best candidate in the interviews as indicated in the Minutes thereof, he should have been appointed to the advertised position. However, he subsequently received a letter of regret from the IUCEA Executive Committee informing him that he had not been selected for the job.
10. The Applicant questions the transparency of the IUCEA Executive Committee decision of 27th August, 2017 that ignored his performance in the interviews to deny him an offer of employment.
11. The Applicant seeks the following Reliefs, reproduced verbatim:
 - (i) To declare the IUCEA Executive Committee decision of 27th August, 2017 an infringement of the Treaty of EAC.
 - (ii) To nullify the IUCEA Executive Committee decision of 27th August, 2017.
 - (iii) To reimburse the applicant the costs associated with this Reference (to be determined at the closure of the proceedings by the Applicant).

D. The Respondent's Case

12. Similarly, the Respondent's case is set out in the Response to the Statement of Reference; the Affidavit in support thereof; its written submissions, and in the oral highlights thereof made during the hearing. It is the Respondent's case that the impugned recruitment process was conducted in accordance with the Treaty, the IUCEA Staff Rules and Regulations and the EAC Council of Ministers' directives with regard to due diligence checks in EAC recruitment processes. It is the Respondent's contention that although the Applicant was the best interviewed candidate, he was not given an offer of employment because he failed the due diligence test. He was thus sent a regret letter.
13. Affidavit evidence was adduced by Ms. Jolly Atuhaire Kamwesigye, the Principal Human Resource Officer of the IUCEA, to the effect that under section 9(a) of the Inter-University Council for East Africa Act of 2009 the IUCEA Executive Committee has the final decision on the recruitment of staff. At its 24th meeting held on 28th June 2017, the Executive Committee acted on a due diligence check undertaken on the Applicant to decline to make him an offer of appointment.
14. In his submissions, learned Counsel for the Respondent disputed the Applicant's

allegation of non-transparency in the impugned recruitment process on the premise that there had been consistent communication with the Applicant at each stage of the process right up to the letter of regret. From the Respondent's point of view, this consistency serves as evidence of transparency, as what is required is the taking of reasonable steps in the circumstances to keep the Applicant informed of the developments in the process.

15. It was the Respondent's contention that the Applicant lacked the moral credibility for appointment to the position sought. Indeed, paragraph 4 of the Respondent's written submissions sums up its intervention in the recruitment process as follows:

During the approval process for the Applicant's appointment, which is a preserve for the Executive Committee under the IUCEA Act, 2009, the Republic of Burundi protested the Applicant's appointment on account of moral credibility. The Republic of Burundi asserted that it had fully sponsored the Applicant for PhD studies on condition to return and teach at the University of Burundi, a condition the Applicant breached and instead sought another teaching job in the Republic of Rwanda. The averment is that the Applicant was given a PhD scholarship in understanding that he was to return and resume teaching in the University of Bujumbura .

16. On that ground, the Counsel for the Respondent maintains that Articles 6(d) has never been breached, and thus there is no case against his client.

E. Issues for Determination

17. At the Scheduling Conference held on 21st September 2019, the Parties framed the following issues for determination:

- (i) Whether the decision of the Respondent not to appoint the Applicant to the position of the Chief Research and Innovation Officer was an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community; and
- (ii) Whether the parties are entitled to the reliefs sought.

F. Court's Determination

Issue No. 1: Whether the decision of the Respondent not to appoint the Applicant to the position of the Chief Research and Innovation Officer was an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community.

18. It was the Applicant's submission that there was no transparency in the impugned recruitment process, particularly at the point in time when he was served with the regret letter conveying the decision not to appoint him to the said position. From his perspective, the decision declining his appointment to the position vied for rendered the process non-transparent and, accordingly, constitutes a violation of Article 6(d) of the Treaty. To support his position, learned Counsel for the Applicant relies on Article 6(d) of the Treaty, but invokes no case law in support of his allegations.
19. Conversely, it was the contention of the learned Counsel for the Respondent that, under section 9(a) of the Inter-University Council for East Africa Act, the

IUCEA Executive Committee was under no obligation to abide by the results of the interview given that the feedback from the Respondent State in response to due diligence checks on the Applicant had yielded a credibility question. Further, in so far as the Applicant had been kept abreast with each stage of the recruitment process right to the point of the emailing of the regret letter, it could not be argued that the said process had been non-transparent. Likewise, the Respondent relies on Article 6(d) but invokes nothing from the jurisprudence of the Court or from elsewhere.

20. We have carefully considered the rival arguments of the Parties. The facts as stated by them point to the abortion of the recruitment process prior to an offer of employment to the Applicant. It is thus a pre-contractual dispute. From those facts, we deduce the dispute to have arisen only at the last stage of the recruitment process, when the Applicant received the email that communicated the decision of the IUCEA Executive Committee declining to make him an offer of appointment. It is this decision that the Applicant thinks is tainted with non-transparency and, thus, alleged to violate Article 6(d) of the Treaty. On the other hand, the Respondent disputes the alleged non-transparency in the entire process.

21. We deem it necessary to reproduce Article 6(d) of the Treaty, as well as restate our understanding of the notion of transparency. Article 6(d) reads:

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(i)

(j)

(k)

(l) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

22. The Treaty does not specify the parameters entailed in the concept of transparency. In the absence of an authoritative definition or exposition, we resort to the usual import of the term. In simple terms 'transparency' means not hiding anything that matters in the situation. Put in another way, it means being open and clear so that the other party to a transaction sees everything that matters. This shade of meaning is reflected by *Black's Law Dictionary*¹⁸¹ in the following quotation:

Transparency. Openness; clarity; lack of guile and attempt to hide damaging information. The word is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organizations interact with the public.

23. According to this definition, transparency comprises four parameters:

- a) openness,
- b) clarity,
- c) lack of guile, and
- d) attempt to hide damaging information.

¹⁸¹ 8th edition

24. As *Black's Law Dictionary* is an authoritative legal work of reference, its definition can be adopted in the absence of a definition from a relevant legislation or relevant case-law. It provides default definitions where both the legislation and case-law are silent on the matter. We do therefore adopt this definition along with the parameters it sets out.
25. In this Reference, the following facts have been established. First, there was communication at and about each stage of the process. At the tail end of this communication, the Applicant was informed of the decision to decline him appointment with the IUCEA. Secondly, at the end of the process and before the formal offer of employment, the Republic of Burundi entered a protest on grounds of moral credibility. As a result, the IUCEA Executive Committee communicated to the Applicant that his application for the advertised position had not been successful. Thus, it is an issue of freedom of contract in that the offeror is free to rescind a potential offer in light of the information availed at the pre-contract offer stage.
26. By comparing the parameters of the concept of transparency set out in paragraphs 22 and 23 above against the facts of this case, we are led to the finding that the parameters from (a) to (c) are reflected by the first stage of the communication between the parties. The second stage, relating to the intervention of the Republic of Burundi, in our considered opinion does not negate the transparency of the recruitment process. Rather, it represents regional public policy of the East African Community whereby all candidates for vacancies within the Community (including its organs and institutions) would be subjected to a due diligence check prior to appointment. This includes securing the endorsement of a candidate's home country. That due diligence having yielded an objection from the Respondent State, a contrary decision by the IUCEA was not sustainable.
27. Consequently, in relation to this issue, we find that Article 6(d) has been misconceived, and does not apply since the matter relates to freedom of contract whereby a party is free to execute contractual relations with a party of choice. The notion of freedom of contract is similarly applicable to employment contracts such that an employer is at liberty to execute a contract with a party (employee) of choice, subject to the terms of the engagement process. In the instant case, the Council of Ministers having designated due diligence checks as an integral part of the recruitment process, the Respondent State was at liberty to express its reservations and the IUCEA was obliged to abide by the said objection. We therefore find no lack of transparency in the impugned recruitment process. Accordingly, we answer this issue in the negative.

Issue No.2: Whether the parties are entitled to the reliefs sought.

28. The Applicant has sought the reliefs highlighted in paragraph 11 above. Since the sole substantive issue has been resolved in favour of the Respondent, the reliefs sought in clauses (i) and (ii) thereof are clearly untenable.
29. On the question of costs, Rule 127 of this Court's Rules posits that costs should follow the event unless the Court, for good reason, decides otherwise. In *Schuller vs. Roback (2012) BCSC* (British Columbia Supreme Court) 8, citing with approval *Gold vs. Gold (1993) BCCA* (British Columbia Court of Appeal) 82, the following factors informed judicial discretion in departing from the

general rule:

When the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of the Court. ... Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

30. In the instant Reference, the Applicant has failed to prove his case on the balance of probabilities. Therefore, we see no good reason to depart from the principle that costs follow event, and we make our order accordingly.

G. Conclusion

31. In the final result, we hereby dismiss this Reference with costs to the Respondent.

It is so ordered.

*[Hon. Justice Dr. Ntezilyayo resigned from the Court in February 2020 but signed this Ruling in terms of Article 25(3) of the Treaty.]

J. Bayingana, Counsel for the Applicant

A. Kafumbe, Counsel for the Respondent

^^*^

Appellate Division

Appeal No. 1 of 2017**Manariyo Désiré v The Attorney General of the Republic of Burundi**

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica Mugenyi PJ, Hon. Isaac Lenaola, DPJ, and Hon. Justice Audace Ngiye , J dated 2nd December, 2016 in Reference Number 8 of 2015]

Coram: E. Ugirashebuja, P; L. Nkurunziza, VP; E. Rutakangwa, A. Ringera and G. Kiryabwire, JJ.A.

November 28, 2018

Jurisdiction ratione personae - Concordant intention of State Parties- Enforceable rights of legal and natural persons - Restriction on locus standi - Good faith test - Literal interpretation - Broad, purposive interpretation - Appropriate Treaty effect - Whether Appellant was a resident in a Partner State - Principle of animus revertendi not applicable - Intratextual review - Undifferentiated attribution of State action - Disproportionate access to justice - Standard of proof - Public interest litigation

Articles: 6 (d), 7(2), 27, 30 (1), 86, of the Treaty - Article 15(1) EAC Common Market Protocol - Article 14 African Charter - Articles: 31, 32, 33 Vienna Convention on the Law of Treaties, 1969 - Article 2 ILC Draft Articles on Responsibility of States, 2001- Rule 43, EACJ Rules Procedure, 2013

The Appellant, a citizen of Burundi purchased three parcels of land in Bujumbura one of which was sold to him by one Simon Nzopfabushe. The parcels were consolidated and surveyed by the Land Registry, Regional Office Bujumbura. Two years later, all 3 sellers of the land and the Appellant appeared before the *Tribunal de residence* of Musaga, in Bujumbura, to procure from that Tribunal an authenticated single agreement based on the Private Sale Agreements. They executed a single attested affidavit (*Acte de notoriété*) number 356/91 of 27th July 1999 and the Appellant obtained a Certificate of Title for the consolidated plot of land. Subsequently, the Appellant subdivided and sold the parcels to new buyers. The Certificate of Title Appellant was surrendered to the Registrar of Lands for annulment and, as required by Burundian law, and new Certificates of Title were issued to the new buyers.

In 2010, Simon Nzopfabushe filed case RCC 25153 against the Appellant for the parcel of land he had sold and the Tribunal of First Instance (*Tribunal de grande Instance*) of Bujumbura issued a judgment in favour of the said Simon Nzopfabushe without affording the Appellant a hearing or considering his written submissions which were on record. Thereafter, on 29th October 2013, the Court of Appeal confirmed the judgment of the Tribunal of First Instance so the Appellant filed a petition before the cassation chamber of the Supreme Court, raising the Court of Appeal's refusal to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999. The Cassation Chamber of the Supreme

Court rejected all the legal grounds invoked in the Applicant's petition and upheld the judgment of the Court of Appeal 24th June 2015 and the Appellant's Counsel was notified on 21st September 2015.

The Appellant brought a Reference to the Trial Court averring that the failure of the Respondent State's organs to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 executed by the Respondent State's own organs and was a failure of the Respondent to abide by its commitment under the Treaty to the principles of the rule of law, good governance and the recognition and protection of his right to property and to the peaceful enjoyment of property. He sought *inter alia*: a Declaration that the Respondent's actions and omissions are unlawful and an infringement of Article 6 (d) and 7(2) of the Treaty; Article 14 of the EAC Common Market Protocol; and Article 14 of the African Charter; and an Order directing the Respondent to restore the property rights of the Applicant. He annexed the Attested Affidavit, its English translation, a copy of the Notification of the Judgment the Supreme Court with its English translation, and a copy of the Judgment with its English translation.

The Respondent claimed that the Trial Court had no jurisdiction to entertain the Reference and it was time barred.

The Trial Court while dismissing the case found *inter alia* that: Appellant, the evidentiary threshold of proof was not met as: the property laws of Burundi were not availed to the Court and thus no inferences could be drawn as regards inconsistency of such laws with international human rights standards, unequal enforcements of the law, non-supremacy of the law, or inequality before the law; the record of proceedings were also not availed ; and there no sufficient evidence of the abuse of the Applicant's rights to be heard furthermore, the Applicant did not discharge his duty to present evidence that was conclusive proof of the elements of the rule of law principle. Additionally, the Appellant did establish any nexus between the authentic notarised deeds and Attested Affidavits, and, accordingly, the legality of the Supreme Court's decision on the issue of the authenticity and probative value of the Attested Affidavit could not be faulted; and the Appellant had relinquished all legal title to the disputed property to new buyers and had no proprietary rights. On appeal, the Appellant averred that the Trial Court erred *inter alia* by: holding that the Appellant did not provide sufficient proof of Treaty violation; misapprehending that in the Burundian legal system, any Attested Affidavit constituted genuine evidence of an agreement between parties and the content could only be challenged by taking a special action for forgery; failing to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999; belatedly requiring the Applicant to produce the record of proceedings of the Supreme Court of Burundi and laws of Burundi that the Applicant was not invoking; inappropriately applying *exceptional gravity* as a standard of proof of claim in a Reference that simply involved failure to recognise individual property rights; belatedly, and *suo motu*, in its Judgment, questioning the *locus standi* of the Applicant, an issue which the Respondent had never raised; omitting to exercise its inherent power, even in an adversarial system, to seek from the parties any information the lack of which it was going to base its judgment, especially in a case in which the facts were uncontested; and failing to provide a remedy to violations of the Applicant's rights after the Court had found that the impugned judgment of the Supreme Court depicted, *inter alia*,

“a cavalier approach to an extremely serious judicial function. The Appellant also relied on the principle of *Animus Revertendi*; “The intention of returning averring that a man retains his domicile, if he leaves it *animo revertendi*”. Even if one is out of the country but has intention to return, his/her absence should not be used to curtail his/her right to a means of redress by any national or international court or tribunal.

The Respondent argued that: the Appellants Affidavit indicated that he was a resident of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America, and not a resident of any of the EAC Partner State as required by Article 30(1) of the Treaty. Thus, the lacked jurisdiction *ratione personae* to entertain the Reference.

The Appellant also submitted that the issue of residence was brought up for the first time by the Respondent in his submissions in reply at the appellate hearing. He argued that this issue had not been pleaded, or raised as an objection or even argued at the Trial Court. The Respondent therefore should not be allowed to belatedly change his position and rely on new points that had not been pleaded or traversed in the Trial Court. Furthermore, it could not have been the intention of the framers of the Treaty to exclude some citizens residing outside the Community the right to access the Court, while at the same time allowing the same right to foreigners. If this had been the intention, citizens this would have been expressly prescribed the Treaty.

The Appellate Division introduced the issue of jurisdiction on its own motion *proprio motu* due to a statement on the Judgment of the Trial Court that the Appellant’s affidavit of 18th November 2015 indicated that he was ordinarily resident in the United States.

JUDGMENT

E. Ugirashebuja, P; L. Nkurunziza, VP; E. Rutakangwa JA

Held

1. The word jurisdiction is used as a unitary concept to denote three essential elements namely: *jurisdiction ratione materiae* (subject matter), *ratione personae* (*locus standi*), and *ratione temporis* (temporal condition). The absence of any of the above essential elements of jurisdiction would disavow this Court the mandate to entertain a dispute.
2. Correct interpretation of a Treaty is the one that deciphers the parties’ concordant will or intention. While the International Law Commission’s *Draft Articles on the Law of Treaties* clarify that the articles were designed to appreciate the meaning which the parties may have intended to attach to the expressions that they employed in a document. Interpretation under the *Vienna Convention on the Law of Treaties* aims at giving effect to the intention of the parties as expressed in the words used and in the light of the surrounding circumstances. The text must be presumed to be the authentic expression of intentions of parties. This Court can either subscribe to a broad or a narrow interpretation of a given term of a treaty in accordance with the boundaries established by the intention of the parties.
3. It was not the intention of the parties to the EAC Treaty to give the term

“resident in” a special meaning which differs from its ordinary meaning and usage. And neither can we give it a meaning which departs from the ordinary meaning since doing so would depart from the mandate of this Court which is to ascertain the intention of the parties to the treaty when engaging in interpretation.

4. The word “resident in” in Article 30 (1) is used as an adjective, it means living or staying in a place. This would lead to the conclusion that the intention of the drafters of the EAC Treaty was to restrict *locus standi* to persons “living” or “staying” in a Partner State of EAC and not to all citizens including those who don’t “live” or “stay” within any Partner State of the EAC. In the light of its ordinary meaning, the word “resident” as used in the EAC Treaty cannot be construed to mean that it was intended by the drafters of the Treaty to engraft “non-resident citizens” of EAC Partner States as part of the phrase “...any person who is resident in a Partner State...”.
5. Even though the EAC Treaty does not define the term “resident”, a review of Article 86 of the Treaty makes it clear beyond doubt that “resident in” as used in Article 30 does not include “all citizens” regardless of whether they are resident or not as is claimed by the Appellant. Where a “citizen” of any of the Partner State of the EAC is not a “resident in” any of the EAC States, then this Court is disavowed of the jurisdiction *ratione personae* to deal with the case.
6. When interpreting a treaty, the assumption should be that the parties in expressing their intention, they do so in such a manner that no norm expressed logically contradicts another and that no part of the treaty should be rendered redundant. Therefore, even though the EAC Treaty does not define the term resident, a review of Article 86 of the Treaty makes it clear beyond doubt that “resident in” as used in Article 30 does not include “all citizens” regardless of whether they are resident or not as is claimed by the Appellant.
7. The distinction of “persons residents in” and “citizens of” a Partner State in Article 86 (b) dispels any lingering doubt that the term “resident in” in Article 30 (1) was not meant to include “all citizens” including those who are not “resident in” an EAC Partner State. To include those who are not resident in a Partner State would result in reducing the distinction made in Article 86(b) to redundancy or inutility. The Court declined to render the distinction made in Art. 86 (b) otiose, thereby offending the principle that all parts of a treaty, if possible must be given effect.
8. A people-centred approach to cooperation and integration does not necessarily counter the intention of parties to the EAC Treaty to intend to grant *locus standi* to a certain set of citizens before the EACJ and not others. It is not unusual for parties to treaties to establish courts and restrict *locus standi* in one way or another. Restriction of *locus standi* persons is not absurd and does not necessary go counter to the broad aspirations of treaties. Where parties to a treaty have restricted *locus standi* that restriction should be interpreted restrictively for that is what the partner states have intended however broad other sections of the treaty may be interpreted. Thus while some sections of a treaty may be interpreted broadly and purposively others may be interpreted restrictively depending on what parties of that particular treaty intended the sections to mean.
9. From the statement in the Affidavit the Trial Court rightly concluded that: ‘the

Applicant's (Manariyo) affidavit of 18th November 2015 does indicate that he is ordinarily resident in the United States of America. The moment the Trial Court concluded that the Appellant was a resident in a State other than the one envisaged in Art. 30 (1), it should have proceeded to engage the judicial handbrake and divest itself from entertaining the merits of the matter for want of jurisdiction *ratione personae*. The notion that the Appellant has "the intention to return" ("*Animus revertendi*") has no place in the provisions of Art. 30 (1) for purposes of granting such a person *locus standi* before the EACJ. The Appellant was not a "resident in" any of the EAC States and this Court is disavowed of the jurisdiction *ratione personae* to deal with the case. Since the Court has no jurisdiction to entertain the Reference, it is precluded to rule on the merits of the Case.

Cases cited

Alcon International Ltd. v The AG of Uganda & Ors [2012-2015] EACJLR 430, Appeal No. 3 of 2013
 Angella Amudo v Secretary General of EAC [2012-2015] EACJLR 592, Appeal No. 4 of 2014
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 Plaxeda Rugumba v Secretary General of EAC & Anor [2005-2011] EACJLR 226, Ref. No. 8 of 2010
 The East African Law Society & Ors v AG of Kenya & Ors [2005-2011] EACJLR 68, Ref. No. 3 of 2007
 Shindler v United Kingdom (19840/09), (2014) 58 E.H.R.R. 5
 EACSOFF v The AG of Burundi, EACJ Appeal 4 of 2016

JUDGMENT

Introduction

1. This is an Appeal brought before this Appellate Division of the East African Court of Justice [EACJ] by Manariyo Désiré [the "Appellant"] against the Judgment of the First Instance Division of this Court (hereinafter referred to as "the Trial Court") dated 2nd December, 2016, arising out of Reference No. 8 of 2015, by which the Trial Court dismissed the Reference and held that each party bear its own costs.
2. The Appellant, Manariyo Désiré sued the Respondent, the Attorney General of Burundi, in his capacity as the legal representative of the Republic of Burundi (hereinafter referred to as "Burundi"); before the Trial Court in respect of a Judgement of the Cassation of the Supreme Court of the Republic of Burundi in *Case Number RCCB 303* delivered on 24th June 2015 (hereinafter referred to as the "impugned Judgement").
3. The Appellant was represented by Mr Donald Omondi Deya, Advocate; and the Respondent by Mr. Nestor Kayobera, Principal State Counsel;

Background

4. The Appellant who is a citizen of Burundi brought to the Trial Court a Reference under Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol on the Establishment of the East African Community Common Market ("the Protocol"); Article 14 of the African Charter on Human and Peoples' Rights ("the African Charter"); and Rules 1(2) and 24 of the East African Court of Justice Rules of

Procedure, 2013 (“the Rules”).

5. The Reference was against the Attorney General of the Republic of Burundi who was sued as the legal representative of the State of Burundi.
6. In the Reference, the Appellant who was the Applicant in the Trial Court, pleaded as follows: he bought three (3) parcels of land in Bujumbura, Burundi, including a piece of land that was sold to him by one Simon Nzopfabarushe; he subsequently consolidated the 3 parcels of land and had them surveyed by the Land Registry, Regional Office Bujumbura; two years later, all 3 sellers of the land and himself (as buyer) appeared before the Tribunal of Residence (*Tribunal de residence*) of Musaga, in Bujumbura, to procure from that Tribunal an authenticated single agreement, based on the Private Sale Agreements; the three sellers and himself executed a single attested affidavit [*Acte de notoriete*], number 356/91 of 27th July 1999 before the said Tribunal of Residence, in respect of all parcels of land; the law and practice in Burundi at the time was that the attested affidavit would be handwritten by the Registrar of the Tribunal, then the parties and their witnesses would either sign and/or thumbprint it, and it would then be signed by the President as well as the Registrar of the Tribunal; the Attested Affidavit would also indicate that the parties showed the Private Sale Agreement to the Tribunal; the said affidavits are kept in the Registry of the Tribunal, in a Register, in the form of a bound book which cannot be removed; and all of the above was duly done in respect of the 3 parcels of land that the Appellant had purchased, including the one he had purchased from Simon Nzopfabarushe.
7. The Appellant further pleaded that he obtained from the Registrar of Lands [*Conservateur des Titres Fonciers*] a Certificate of Title for the consolidated plot of land which he thereafter subdivided and sold the resulting subdivisions to new buyers. The Appellant also pleaded that he subsequently surrendered his Certificate of Title aforesaid to the Registrar of Lands, and, as required by Burundian law, the Registrar annulled it and kept the said original Certificate of Title and issued new Certificates of Title to the new buyers.
8. The Appellant further pleaded as follows: (i) at some point in 2010, Simon Nzopfabarushe filed a case against him in respect of the same parcel of land he had sold to him in the Tribunal of First Instance (*Tribunal de grande Instance*) of Bujumbura in case Number n.c.16.839 and the said Tribunal issued a judgment in favour of the said Simon Nzopfabarushe without affording the Appellant a hearing or considering his written submissions which were on record; (ii) he appealed the Tribunal decision to the Court of Appeal [*Cour d' Appel*] of Bujumbura in Case no. R.C.A 42/2012 seeking reversal of the judgment of the Tribunal and specific recognition of his legitimate property rights, he produced in that Court the authenticated Sale Agreement, that is the Attested Affidavit [*Acte de Notoriete*] number 356/99 of 27th July 1999, the Court inquired from him and Simon Nzopfabarushe whether its own verification of the copy of the Attested Affidavit produced by the Appellant with the Tribunal of Residence of Musaga would be dispositive of the case and both of them replied in the positive, whereupon the Court of Appeal judges visited the seat of the Tribunal on 30th July 2013 and actually verified the copy of the Attested Affidavit Number 356/99 of 27th July 1999 that the Appellant had produced in Court conformed to the relevant original page of the Register; (iii) thereafter the Court, without any basis

in law, demanded the original Private Sale Agreement between the Appellant and Simon Nzopfabarushe despite the fact that the authenticated Sale Agreement was already on record, and had been verified, and that it was sufficient for the purpose, and on 29th October 2013, the Court of Appeal confirmed the judgment of the Tribunal of First Instance; (iv) In the premise, the Appellant filed a petition before the cassation chamber of the Supreme Court, invoking several grounds of violations of Burundian Law by the Court of Appeal, and in particular the refusal by the Court of Appeal to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999; and (v) On 21st September 2015; a Court bailiff served on the Appellant's Counsel in Burundi the notification of the judgment of the cassation chamber of the Supreme Court dated 24th June 2015, in RCC 25153, in which it rejected all the legal grounds invoked in the Applicant's petition and upheld the judgment of the Court of Appeal.

9. The Appellant further pleaded that he had made all diligent efforts to enable the Respondent to fulfil its obligations towards protecting his property rights within the Respondent State but the Respondent had not discharged its obligation to do so.
10. The Appellant clarified that the Reference was not an Appeal from the decisions of the Respondent State's courts but was a Reference for the Respondent to fulfil its obligations to the Appellant in accordance with the Respondent State's commitments under Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and Article 14 of the African Charter.
11. The Appellant also pleaded that the Reference was founded on the failure of the Respondent to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 executed by the Respondent State's own organs and was premised on the failure of the Respondent to abide by its commitment under the Treaty to the fundamental and operational principles, and specifically the principles of the rule of law, good governance and the recognition and protection of human rights of the Appellant, especially his right to property and to the peaceful enjoyment of property that he lawfully owned.
12. The Appellant prayed for the following reliefs:
 - (a) A Declaration that the Respondent's actions and omissions are unlawful and an infringement of Article 6 (d) and 7(2) of the Treaty; Article 14 of the protocol; and Article 14 of the African Charter;
 - (b) A Declaration that the Respondent has violated the property rights of the Appellant and his heirs or assigns, and in so doing has violated the commitment that it has made under the Treaty, the Protocol and the African Charter;
 - (c) An Order directing the Respondent to restore the property rights of the Applicant and his heirs or assigns;
 - (d) An Order directing the Respondent to appear and file before this Court not later than 60 days from the date of the judgement a progress report on remedial mechanisms and steps taken towards the implementation of the Orders issued by the Court;
 - (e) An Order that the costs of and incidental to the Reference be met by the Respondent; and
 - (f) That the Court be pleased to make such further or other orders as may be

just, necessary or expedient in the circumstances.

13. The Appellant annexed to the Reference a copy of the Attested Affidavit [*Acte de notoriété*] Number 356/99 of 27th July 1999 along with its English translation, a copy of the Notification of the Judgment of the Cassation Chamber of the Supreme Court dated 24th June 2015 in RCC 25153 along with its English translation, and a copy of the Judgment of the Cassation Chamber of the Supreme Court along with its English translation.
14. The Respondent in its Response to the Reference lodged in the Trial Court on 7th March 2013 did not traverse the matters of fact pleaded by the Appellant, or the steps taken by the Appellant to ventilate his grievance in the Courts of Burundi or the legal and probative value of the Attested Affidavit, and it did not cast any doubt on the authenticity of the annexures to the Reference.
15. The Respondents defence was that: -
 - (a) The Reference was time barred as the decision of the Supreme Court complained of was made on 21st June 2015 but the Reference was lodged on 20th November 2015, more than the two months provided for under Article 30(2) of the Treaty to file any matter in the Trial Court;
 - (b) The Trial Court had no Appellate jurisdiction to determine matters already decided by the Supreme Court of Burundi as that would contravene Articles 27(2) and 30(3) of the Treaty;
 - (c) The Order sought in the prayers (a), (b) and (c) of the Reference constituted an appeal against the decisions of the Courts and Tribunals of the Republic of Burundi contrary to the Treaty; and the declaratory Orders sought in prayers (d), (e) and (f) were also unfounded and ought to be dismissed.
16. The Respondent prayed that the Reference be dismissed with costs.
17. In a short Rejoinder to the Response, the Appellant pleaded that time was to be computed from the date of service on the Appellant of the judgment of the Cassation Chamber of the Supreme Court, rather than from the purported date of delivery of the judgement of the Cassation Chamber of the said Court, rather than from the purported date of delivery of the judgment, which, the Appellant had neither notice nor knowledge of and that the Court had jurisdiction to entertain the Reference.
18. At the Scheduling Conference held on 13th June 2016 in the Trial Court, the parties in their Scheduling Conference Notes agreed on the following points: -
 - (a) Sometime in 1997, the Appellant alleged, he bought three parcels of land from Mr. Nzopfabushe Simon, Mr. Habonimana Andre and M/s Niyonzima Scholastique.
 - (b) On 27th July 1999, the Tribunal of residence of Musaga [*Tribunal de residence*] made an Attested Affidavit, No. 356/99 in respect of the above transactions.
 - (c) In 2010, Mr. Nzopfabushe Simon filed a case before the Tribunal of the High Instance [*Tribunal de Premiere Instance*] of Bujumbura against the Appellant laying a claim on the property on the land he had sold to the Appellant through an authenticated Act in 1999.
 - (d) On 20th February 2012, the High Instance Court ruled in favour of Mr. Nzopfabushe Simon.

- (e) The Appellant appealed to the Court of Appeal seeking a reversal of the judgment of the High Instance Tribunal in case number RCA 42/2012.
 - (f) The Court of Appeal dismissed the Appellant's Appeal on 29th October, 2013 confirming the Judgment of the Tribunal of High Instance.
 - (g) The Appellant then filed a Petition before the Cassation Chamber of the Supreme Court. The Petition was dismissed on 24th June 2015.
 - (h) The Appellant's lawyer received the Notification of Judgment of the said Cassation Chamber of the Supreme Court on 21st September and filed his Reference on 20th November, 2015.
17. In the same Scheduling Conference, the following issues for determination by the Court were agreed-
- (i). Whether the Reference was time barred.
 - (ii). Whether the Respondent violated Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and /or Article 14 of the African Charter;
 - (iii). Whether the Respondent's failure to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 is unlawful and violates the Appellants rights.
 - (iv). Whether the Applicant's rights to peaceful enjoyment of property was violated.
 - (v). Whether the Applicant was entitled to the remedies sought.
18. The Trial Court after hearing the Parties determined the issues framed for trial as follows:
- (a) The Reference was filed within the time prescribed by law for the judgment complained of dated 24th June 2015 was conveyed to and received on behalf of the Appellant on 21st September 2015 and the Reference was filed on 20th November 2015, a date which was within the period of two (2) months prescribed by Article 30 of the Treaty.
 - (b) The Court had jurisdiction to entertain and determine the Reference for the reason that it was averred in the pleadings that the matter complained of constituted an infringement of Articles 6(d) and 7(2) of the Treaty as well as Article 15(1) of the Protocol and, accordingly, the Court did have jurisdiction to consider the adjudication process and the resultant Judgement of the Supreme Court of Burundi with a view to determining whether they contravened Burundi's obligations under Article 6(d) and 7(2) of the Treaty. In so holding, the Court was not usurping or undermining the Appellate jurisdiction of the Burundi Supreme Court for the reason that the Court's review was not an Appellate review but a trial *de novo* in the context of the Treaty obligation the Court was requested to enforce.
 - (c) The Appellant had not satisfactorily proved the violation of the principles of the rule of law and good governance enshrined in Articles 6(d) and 7(2) of the Treaty, or of his property rights as protected by Article 15(1) of the Protocol and/or Article 14 of the African Charter for the following reasons.
 - (i). There was nothing in the Reference to suggest that effective mechanisms, processes and institutions through which the citizens may exercise their legal rights are non-existent in Burundi, so as to

impute lack of good governance. On the contrary, the Appellant had an opportunity to submit a dispute to the right institution-the-judiciary-for determination. The existence of the necessary governance framework for the resolution of the dispute in Burundi could not therefore be questioned and the Respondent could not be faulted in that regard;

- (ii). With respect to the rule of law principle and the property rights of the Appellant, the evidentiary threshold of proof was not met for several reasons. First, the property laws of Burundi were not availed to the Court and thus no inferences could be drawn as regards inconsistency of such laws with international human rights standards, unequal enforcements of the law, non-supremacy of the law, or inequality before the law. Secondly, the Appellant did not avail the Court with the record of proceedings which was pivotal in proving unfairness, bias or arbitrariness in the application of the law as an indication of lack of independence or procedural impropriety, or whether the Burundi Supreme Court administered Burundian Law in an outrageous way, in bad faith, with wilful neglect of duty, or conducted the proceedings in blatant violation of the substance of natural justice such as would engender international liability. Third, the laws of Burundi that the Appellant sought to invoke to show the Supreme Court's lack of adherence to the rule of law were not availed to the Court. Fourth, there was no sufficient evidence of the abuse of the Applicant's rights to be heard and availed an opportunity for cross examination of witnesses as pleaded. And fifth, the Applicant did not discharge his duty to present "evidence that was fully conclusive" in proof of the elements of the rule of law principle.
- (iii). In the absence of the record of proceedings, the Court could not determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether the resultant decision was iniquitous and thus engendered the Respondent State's legal liability for a decision may only be rendered iniquitous, and therefore, susceptible to international liability where it is the culmination of such procedural defects as would make it impossible to be just.
- (iv). The Appellant did not detail with specificity and/or avail to the Court the property laws he considered to have been contravened by the impugned judgment with the result that no nexus was established between the authentic notarised deeds and Attested Affidavits, and, accordingly, the legality of the Supreme Court's decision on the issue of the authenticity and probative value of the Attested Affidavit could not be faulted. In the result, and there having been no Reference to any Burundian property law that would engender the Appellant's proprietary interest in the disputed property, his claims to the said property remained unproven.
- (v). In any event, the Appellant having averred in the Reference that

he had subdivided the consolidated parcel of land and sold them out to new buyers and that his Certificate of Title to the Property had been annulled and new Certificate of Title issued to the new buyers, it followed that Appellant had relinquished all legal title to the disputed property to new buyers and, accordingly, he had no proprietary rights reserved to himself which could be violated contrary to Article 15(1) of the Protocol and Article 14 of the African Charter which could be restored to him.

(vi). The matters canvassed in the Reference were of grave importance to the advancement of Community Law and, thus, it was just to order that each party should bear its own costs.

19. In the result, the Reference was dismissed with an order that each party bears their own costs.

C. Appeal to the Appellate Division

20 The Appellant being partially aggrieved by the above decision of the Trial Court initiated an Appeal by lodging a Notice of Appeal and a Memorandum of Appeal on 30th December 2016 and 30th January 2017 respectively. In the Memorandum of Appeal, the Appellant contended that the Trial Court erred in law: -

- (1) By holding that the Applicant/Appellant did not provide sufficient proof of violation of Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and/or Article 14 of the African Charter in a Reference that was, essentially, uncontested on the merits by the Respondent.
- (2) By holding that the Respondents' failure to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 was either not proven or was not in violation of the rights of the Applicant or his heirs or assigns.
- (3) By misapprehending the pleadings and submissions of the Applicant, which make it very clear that the Applicant was faulting the Respondent for non-compliance with its international obligations, based on non-compliance with its national legal system; specifically that it was the "failure of the Respondent to recognize the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 executed by the Respondent State's own organs" under the Burundian legal system which constituted a failure of the Respondent to abide by its commitment, under the Treaty, the Protocol and the African Charter.
- (4) By misapprehending the Pleadings and Submissions of the Applicant which made it very clear that the Applicant was not attacking any specific law of the Respondent State, contrarily, the Applicant was attacking the Judgement of the Supreme Court of Burundi, specifically the refusal by the Respondent State, through that Judgment, to recognize the legal and probative value of the Attested Affidavit, which had been executed in accordance with the legal system applicable in the Respondent State at that time.
- (5) By misapprehending the Submissions of the Applicant by stating that the Applicant had addressed the Court at length on the alleged non-compliance of the impugned judgment with Burundian Law No. 1/004 of

- 9 July 1996 while in fact the Applicant in his submissions (at Paragraph 54 thereof) had merely referred to Article 46 of the said Law No. 1/004, only by way of illustration of the general principle accepted in the Burundian legal system, according to which any authenticated deed/Attested Affidavit constitutes genuine evidence of an agreement between parties to it; and the content of such an authenticated deed/Attested Affidavit could only be challenged by taking a special action for forgery.
- (6) By declaring that the Applicant had tendered insufficient evidence yet the Respondent did not deny, contest or contradict the Affidavit and documentary evidence of the Applicant; in so doing the Court failed to recognise and/or decide that the Applicant's evidence was admitted uncontroverted and unchallenged.
 - (7) By, belatedly, in its judgment, requiring the Applicant to produce the full record of proceedings of the Supreme Court of Burundi, as well as the laws of Burundi, while with regard to the laws, the Applicant was not invoking any specific enacted law, but a general principle of law that even the Respondent State did not contest; and while with regard to the record of proceedings, the judgment of the Supreme Court was fully self-explanatory on the way the Court determined the matter.
 - (8) By questioning, *suo motu*, the accuracy of the Applicant's assertions that the Respondent never challenged. In doing so, the Court favoured the Respondent, by raising a problem where there was none, and by basing its final disposal of the Reference on its own unfounded doubt, to the detriment of the Applicant.
 - (9) By inappropriately applying a standard of proof occasioned by charges/claims against a State that are of "*exceptional gravity*" to a Reference that simply involved the failure to recognise individual property rights.
 - (10) By holding that the Respondent did not violate Articles 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and/or Article 14 of the African Charter.
 - (11) By holding that the rights of the Applicant or his heirs or assigns to peaceful enjoyment of property were not violated.
 - (12) By, belatedly, and *suo motu*, in its final Judgment, questioning the *locus standi* of the Applicant, an issue which the Respondent had never raised, and which, in any case, the Court should have considered in terms of admissibility of the Reference, and not in terms of its merits.
 - (13) By failing or omitting to exercise its inherent power, even in an adversarial system, to seek from the parties any information the lack of which it was going to base its judgment, especially in a case in which the facts were uncontested.
 - (14) By holding that the Applicant was not entitled to the remedies sought.
 - (15) By failing to provide or prescribe a remedy to violations of the Applicant's rights which the Court itself had expressly recognized when it found that the impugned judgment of the Supreme Court of the Respondent State depicted, *inter alia*, "a cavalier approach to an extremely serious judicial function", "an unreasoned judgment that is quite dismissive of the issue raised on appeal", "a blatant disregard for the due process of the law", "a

clear injustice to the parties to the dispute” and “unacceptable judicial conduct and wilful neglect of the (Supreme) Court’s duty.”

21. The Appellant asked the Court:

- (a) To set aside the judgment and Order of the Trial Court dated 2nd December, 2016;
- (b) To grant the orders prayed for in the Reference;
- (c) To allow the Appeal with costs in the Trial Court and in the Appeal; and
- (d) To make such further or other orders as the Court deemed just in the circumstances.

22. At the Scheduling Conference of the Appeal, the Court upon scrutiny of the physical address of the Appellant as stated in the Reference and in the supporting Affidavit thereto and having taken note of some fleeting remark by the Trial Court that the Applicant’s affidavit of 18th November 2018 indicated that the Appellant was ordinarily resident in the United States of America, raised, *suo motu*, the issue of the Court’s jurisdiction *ratione personae*. In light of the Court’s concern and bearing in mind the grounds of Appeal proffered by the Appellant himself, the following issues were framed for determination by the Court:

- (1) Whether the Court had jurisdiction *ratione personae* to entertain the Reference.
- (2) Whether the Trial Court erred in law in finding that the Respondent did not violate or infringe Article 6(d) and 7(2) of the Treaty, Article 15(1) of the Protocol; and/or Article 14 of the African Charter.
- (3) Whether the Trial Court erred in law and/or committed a procedural irregularity by questioning *suo motu*:-
 - (a) The accuracy of the Appellant’s assertions which were not challenged by the Respondent, and/or
 - (b) The *locus standi* of the Appellant;
- (4) Whether the Trial Court erred in law and/or committed a procedural irregularity by failing or omitting to exercise its inherent power to seek from the parties any information they lacked and which would have been decisive in the success of the Reference;
- (5) Whether the Trial Court erred in law or committed a procedural irregularity by failing to provide or prescribe a remedy for the violation of the Appellant’s rights to due process as recognised by the Trial Court;
- (6) Whether the Trial Court erred in law by finding that the Appellant was not entitled to the remedies sought.

23. After the Scheduling Conference, the parties in compliance with the Court’s directions filed their respective written submissions and on 15th May, 2018 they appeared before the Court and highlighted those submissions.

24. We propose to deal with the above issues sequentially.

The Parties’ Submissions

ISSUE No. 1. Whether or not the Court had Jurisdiction *ratione personae* to entertain the Reference

Appellant’s Submissions

25. Counsel for the Appellant submitted that his understanding of jurisdiction *ratione personae/locus standi* is that the Court must make a determination on 3

points :

- 1) Whether a petitioner to this Court is a “ legal or natural person”
- 2) Whether the subject matter of the petitioner’s complaint (in the reference or other pleading) concerns “the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community (...) on the grounds that such Act, regulation , directive, decision, or action is unlawful or is an infringement of this Treaty; and
- 3) Whether the subject matter of the Petitioner’s complaint has been reserved under the Treaty to “any institution of a Partner State”.

To buttress his argument he referred this honourable Court to the case of *Attorney General of Tanzania Vs Anthony Calist Komu, Appeal No 2 of 2015*, [paras.49-50; 58-64].

26. Counsel for the Appellant averred that Mr Manariyo Desire is a natural person, and a Citizen of the Republic of Burundi, a Partner State in the East African Community, and that he owns property in the respondent State but also has disposed some of the property that he owned therein, which is the subject matter of this Appeal. It is the case for the Appellant in its written submissions, that he has been sued, and has defended himself, in the national Courts of the Respondent State all the way to its highest Court, the Supreme Court of Burundi. He contended that neither in the national litigation, nor in the proceedings before the First Instance Division of this Court, nor indeed in instant Appellate proceedings, did the Respondent challenge the nationality, nor any other aspect of the jurisdiction *ratione personae*, with regard to the Appellant.
27. In his “Additional Submissions to the Rejoinder on the Issue of Appellant’s Residence”, the Appellant avers that the “Respondent is raising the issue of Residency for the first time in his Submissions in Reply at an appellate proceeding”.
28. He further contends that “the Partner States could not have intended to exclude part of the citizens from the right to access the EACJ, while allowing the same right to foreigners” and that “excluding EAC citizens residing outside the Community from access to the Court would be against the object and purpose of the EAC Treaty and of Article 30 (1) of the Treaty itself”. In a similar vein, he states that “if the Partner States intended to limit their citizens’ rights they would have expressly said so.
29. The Appellant also relies on the principle of *Animus Revertendi* which is defined in the *Black’s Law Dictionary* as “The intention of returning. A man retains his domicile, if he leaves it *animo revertendi*”. He avers that: “...even if one is out of the country but has intention to return, her absence should not be used to curtail her right to a means of redress by any national or international court or tribunal” and that “The proof of the ‘the intention to return’ is the fact that the Appellant has expressly asserted that he is a national of Burundi; that he owns property therein; that he has rights as well as obligations and potential liabilities therein; and that he has *de jure* political protection.” He further argues that this “can only be construed to mean that the Appellant has surrendered none of these rights or obligations, and has exercised his freedom to leave his country, and retained all his rights to return to his country and indeed to assert the same rights even when he is resident abroad”.
30. The Appellant argues that the practice and jurisprudence of this Court clearly

shows that “not only has it sometimes assimilated ‘residents’ to ‘citizens’ without focussing on the residency of the later, but also it has granted access before it, to natural or legal persons residing outside the Community”. He holds that in the case of the East African Law Society and others v. The Attorney General of Kenya and Others, for instances, the Court “seems to have understood the terms ‘residents’ and ‘citizens’ to mean the same thing. He further points out that in the practice of this Court while determining its jurisprudence *ratione personae*, it “has referred only to the citizenship of the Applicant, without focussing on/specifying their residency” which, “shows that what is important above all is the citizenship of the Applicant, wherever might be his/her actual residency” and that this “...would suggest that in the end, the term ‘resident’ used in Article 30 (1) of the Treaty would cover all EAC citizens regardless of where they reside, and also foreigners residing within the Community” (see a host of cases cited by the Appellant in his “Additional Submissions to the Rejoinder on the Issue of Appellant’s Residence” para. 70). He also advances that in some cases such as *Patrick Ntege and Others v. The Attorney General of Uganda and Others, the Union Trade Centre (UTC) Limited, Claimant v. The Attorney General of Rwanda, Respondent and Succession Makuza Desire, Succession Nkurunziza Gerard & Ngofero Tharcisse, Interveners*, this Court “has recognized its jurisdiction *ratione personae* even when the Applicant, a citizen of a Partner State, was presumably residing outside the Community”.

31. The Appellant contends that “any further determination of this issue would require an assessment of facts...” which the Appellate Division “might not be well placed to do” and that “[i]n principle, a determination of the residency of a litigant will require contestation of facts that would show where the litigant resides, what is her domicile, what is her nexus with a Partner State and so on”. In support of his contention, the Appellant resorts to the *Angella Amudo* case where the Court stated that: “Questions of fact are exclusively decided at the level of the First Instance Division. They are not appealable to the Appellate Division.”

Respondent’s Submissions

32. On his part, Counsel for the Respondent argued that the Treaty is more than clear that Legal and natural persons shall only be resident in a Partner State in order to refer any matter for determination by this Honourable Court, and not just a national of a Partner State as it is in this Appeal. He stated that Article 30(1) of the Treaty provides that” Subject to the provisions of Article 27 of this Treaty , any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision, or action of a Partner State or an Institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is infringement of the provision of the Treaty” .
33. In the same vein, Counsel for the Respondent argued that as it clearly transpired in the Affidavit sworn in by the said, Manariyo Désiré from page 14 to 17 of the Record of Appeal, the Appellant is a resident of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America, and not a resident of any of the EAC Partner State.
34. Counsel for the Respondent also argued that in *Angella Mudo Vs The Secretary*

General of the East African Community, Appeal No. 4 of 2014, paragraph 43, this Honourable Court held that “ On a fundamental issue like that of jurisdiction a Court can *Suo Motu* , raise it and decide the case the ground of jurisdiction without even hearing the parties”. He further pointed out that in para 44 of the aforementioned case, the Court held that “Jurisdiction does not originate in the consent of the parties and acquiescence. It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited jurisdiction to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such Court or Tribunal has acted without jurisdiction”. Therefore, he argued that the applicable law in determining whether or this honourable Court has jurisdiction *ratione personae* is Article 30(1) of the Treaty for the Establishment of the East African Community and nothing else: the Legal and/or natural person referring any matter for determination by this honourable Court has to be resident of a Partner State and not just a national of that Partner State.

35. Counsel further argued that it is a general principle that “he who alleges must prove”, and he contended that the Applicant has to prove that he is a resident of any of the EAC Partner States, and that failure to do so, this Honourable Court should rule that it lacks jurisdiction *ratione personae* to entertain the Reference.

Court’s Determination

36. This Division of this Court has held in *Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare [EACJ Appeal No. 3 of 2011]* that:

“Jurisdiction is a most, if not the most fundamental issue that the Court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without Jurisdiction, a Court cannot even take the proverbial first Chinese step in its judicial journey to hear and dispose of the case.”

Further, this Division has clearly demonstrated in the *Angella Amudo v. The Secretary General of the East African Community [Appeal No. 4 of 2014]* that the Court can on its own motion raise a question of Jurisdiction and determine it.

Far from the assertion by the Appellant that the “Respondent is raising the issue of Residency for the first time in his Submissions in Reply at an appellate proceeding”, it is we who introduced the issue of jurisdiction in our own motion after our curiosity was aroused by the statement on the Judgment of the Trial Court that “in fact the affidavit of 18th November 2015 does indicate that he (the Applicant/Appellant) is ordinarily resident in the United States...”. True to the statement, in the abovementioned affidavit, the Appellant (the Applicant) avers that he is “...of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America”.

Hence, the reason why we seek to dispose of the issue of jurisdiction which was raised by this Division *proprio motu*.

37. This Division extensively dealt with the conceptualization of jurisdiction for purposes of the adjudication of cases in the EACJ in the *Alcon International LTD. V. The Attorney General of Uganda and Others [EACJ Appeal No. 3 of 2013]*. Suffice it to say that the Appellate Division of this Court noted that the word

jurisdiction “...is used as a unitary concept to denote three essential elements which enable the Court to operate” which are namely: *jurisdiction ratione materiae* (subject matter), *ratione personae* (locus standi), and *ratione temporis* (temporal condition). The absence of any of the above essential elements of jurisdiction would disavow this Court the mandate to entertain a dispute.

38. The jurisdictional element in question is whether the Appellant had the *locus standi* (jurisdiction *ratione personae*) to institute the Reference in this Court. The entry door for any legal or natural person such as the Applicant in this case to institute a reference is provided for in Article 30 (1) of the EAC Treaty which states:

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

39. In order for us to resolve the question of whether the Appellant who was the Applicant in the Trial Court had the *locus standi* to institute the reference in this Court, we shall first decipher the meaning of who is a resident for purposes of Article 30 of the EAC Treaty. Then we shall proceed to determine whether the Appellant falls under that category of natural persons who are considered as “residents in a Partner State”. As has always been the case when this Court has been faced with a question of interpretation, we shall resort to the *Vienna Convention on the Law of Treaties (VCLT)* which provides us with the toolkit for interpretation of the EAC Treaty, especially in its Art. 31-33. The relevant provision of the VCLT is Article 31 which provides:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (c) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (d) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

40. It is useful to remember here, that when engaging in the exercise of treaty interpretation, the starting point is that treaties are creatures of concordant will of states. A correct interpretation of the Treaty is therefore the one that deciphers the parties' concordant will or intention. Even though the VCLTs, in its Articles 31-33 does not expressly mention the parties' intent, the commentary accompanying the International Law Commission's (ILC) *Draft Articles on the Law of Treaties* does clarify that the articles were designed to appreciate the "meaning which the parties may have intended to attach to the expressions that they employed in a document." (ILC, *Draft Articles on the Law of Treaties with Commentaries*, Yearbook of International Law Commission (YBIL) 18 (1966), Vol. 2, 89). The ILC further reiterated recently that interpretation "must seek to identify the intention of the parties" (See, *Commentary on Draft Conclusion 3* in ILC, *Report of the International Law Commission on the Work of its 65th Session*, UN Doc A/68/10 (2013), 27). The Commission further held, that "the text must be presumed to be the authentic expression of intentions of parties" (see, ILC, YBIL, *supra*, 220). According to A. Mc. Nair, interpretation under the Vienna rules aims at "giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances" (see, A. Mc. Nair, *The Law of Treaties*, repr. 2003, 365). The consequence of this is that, a court such as ours can either subscribe to a broad or a narrow interpretation of a given term of a treaty in accordance with the boundaries established by the intention of the parties.
41. The immediate question that comes to our mind is whether the term "resident" as used in Article 30 (1) is clear enough if given its ordinary meaning and whether that meaning will be in harmony with the "object and purpose" of the EAC Treaty.
42. The starting point of our analysis is the language of the Treaty itself. The provision that "Any person who is resident in a Partner State." does seem to suggest that *locus standi* is granted to a person who is resident within the territory of East Africa. The use of "resident in" seems to make it a requirement that the person should ordinarily reside within any of the EAC Partner State. In the *Plaxeda Rugumba v. The Secretary General of the East African Community and the Attorney General of Rwanda*, Ref. 8 of 2010, the Trial Court interrogated whether Plaxeda Rugumba was a "resident in" and held that:
- "It cannot be denied that the Applicant is a person who is resident in a Partner State as defined by the Treaty. In her Reference, she stated that she is a Ugandan of Rwandan extraction and a natural elder sister of the Subject. She added that her address is in Kampala Uganda and no party has raised issues with those facts.
- It is very clear that Plaxeda Rugumba was determined to be a "resident in" one of the EAC Partner State on the basis of her address in Kampala Uganda and not on the basis of her citizenship and as a result, the Trial Court went further to determine that "in terms of *locus standi* therefore, and from the facts pleaded the Applicant is fit and proper person to file the reference. We agree with this exposition of the law.
43. Moreover, the word "resident in" in Article 30 (1) is used as an adjective. When a word is used as an adjective, it describes an attribute of a noun. The word

“resident” when used as an adjective means “living or staying in a place” (see *Cambridge Dictionary* at <https://dictionary.cambridge.org/dictionary/english/resident> last visited on the 9th July 2018). Hence, the adjectival use of the word “resident” in Article 30 (1) would lead to the conclusion that the intention of the drafters of the EAC Treaty was to restrict *locus standi* to persons “living” or “staying” in a Partner State of EAC and not to all citizens including those who don’t “live” or “stay” within any Partner State of the EAC. In other words, “Any person” as envisaged in Article 30(1) has to have the attribute of being a “resident (living or staying) in a Partner State”.

44. Certainly, in the light of its ordinary meaning, the word “resident” as used in Art. 30 (1) of the EAC Treaty cannot be construed to mean that it was intended by the drafters of the Treaty to engraft “non-resident citizens” of EAC Partner States as part of the phrase “...any person who is resident in a Partner State...”.
45. From the above it is very clear that it was not the intention of the parties to the EAC Treaty to give the term “resident in” a special meaning which differs from its ordinary meaning and usage. And neither can we give it a meaning which departs from the ordinary meaning since doing so would depart from the mandate of this Court which is to ascertain the intention of the parties to the treaty when engaging in interpretation.
46. The preceding finding is supported by the following argument which will point to the same conclusion. The intratextual review of the EAC Treaty provides further clarity of the context within which the term was construed. The intratextual review of the EAC Treaty entails establishing the use of the phrase “resident in” within the Treaty text since the text is the primary starting point for interpretation. In other words, as has been expressed above the text must be presumed to be the authentic expression of the intentions of the parties, and, therefore the starting point is the elucidation of the meaning of the text. Further, when interpreting a treaty, it is widely accepted that the assumption should be that the parties in expressing their intention, they do so in such a manner that no norm expressed logically contradicts another and that no part of the treaty should be rendered redundant. (see, for example, *Dispute Concerning Navigational Rights and Related Rights [Costa Rica v. Nicaragua]*, Judgment, 13 July 2009, ICJ Reports [2009] 213, at 239, para. 54; and,
47. Even though the EAC Treaty does not define the term “resident”, a review of Article 86 of the Treaty makes it clear beyond doubt that “resident in” as used in Article 30 does not include “all citizens” regardless of whether they are resident or not as is claimed by the Appellant. Article 86 of the EAC Treaty provides in pertinent parts: Article 86

Movement of Capital

The Partner States shall in accordance with the time table to be determined by the Council, permit the free movement of capital within the Community, develop, harmonise and eventually integrate their financial systems. In this regard, the Partner States shall:

(a)...

(b) ensure that the citizens of and persons resident in a Partner State are allowed to acquire stocks, shares and other securities or to invest in enterprises in the other Partner States (underlining ours);

and

(c) ...

The distinction of “persons residents in” and “citizens of” a Partner State in Art. 86 (b) of the EAC Treaty dispels any lingering doubt that the term “resident in” in Article 30 (1) was not meant to include “all citizens” including those who are not “resident in” an EAC Partner State. An interpretation of the term “resident in” in Article 30 (1) to also mean all citizens including those who are not resident in a Partner State of the EAC would result in reducing the distinction made in Article 86(b) to redundancy or inutility. It is our view that the distinction made in Article 86 (b) is not redundant and inutile and therefore “resident in” in Art. 30 (1) does not include citizens who are not “resident in a Partner State” of the EAC. We decline to render the distinction made in Art. 86 (b) otiose, thereby offending the well-settled principle that all parts of a treaty, if possible must be given effect.

48. Based on the foregoing, we conclude that where a “citizen” of any of the Partner State of the EAC is not a “resident in” any of the EAC States, then this Court is disavowed of the jurisdiction *ratione personae* to deal with the case.

49. Before we depart from this point, we deem it necessary to make a distinction between the interpretation in this case where we have relied on the ordinary meaning of the term “resident in” and the context within which it is used and other two cases which this Court has declined to use the ordinary meaning of the words applied.

50. In the *Tom Kyahurwenda Preliminary Ruling (Case Stated No. 01 of 2014)* this Court departed from using the ordinary meaning of the words in Article 34 of the EAC Treaty because it could have led to “to a result which is manifestly absurd or unreasonable”. The Court held in para. 35 of the Preliminary Ruling as follows:

‘The Court deems it important to distinguish the application of the Treaty from interpretation of the same as found in Article 34. Whereas, as we held above, interpretation is the preserve of this Court, the same is not necessarily the case for the application of the Treaty by the national courts to cases before them. It would defeat the purpose of preliminary reference mechanism if the Court’s interpretation of Article 34 of the Treaty extended to “application of treaty provisions”. The purpose for the mechanism is for the national courts to seek interpretation of the Treaty provisions in order that they may then apply them to a case at hand. Hence, to interpret Article 34 as requiring “application of the Treaty provision” to be excluded from the purview of national courts would “lead to a result which is manifestly absurd or unreasonable”. In this regard, Article 32 (b) of the Vienna Convention on the Law of Treaties cited above acknowledges an absurdity exception to the literal interpretation of any Treaty.’

51. In a similar vein, in *The East African Law Society and 4 Others V The Attorney General of Kenya and 3 Others Reference No. 3 of 2007*, even though the Court did not expressly use the term absurdity exception, it was categorical that “... having regard to the purpose of the provisions, namely to ensure compliance with provisions of the Treaty and to provide for empowerment of *inter alia* any resident

to seek judicial adjudication where there is allegation of non-compliance, we are inclined to the view that a restrictive interpretation would defeat that purpose”. Any other interpretation which would have been restrictive and considered that “institutions” as used in Article 30 (2) as excluding “organs” would have led to an absurd result for only “organs of the Community” can under the Treaty make act(s), regulation(s), directive(s), decision(s) or undertake action(s) which can be challenged on the basis that it/they is/are “unlawful” or “an infringement of the provisions of the Treaty” and not institutions as defined in the EAC Treaty.

52. Counsel to the Appellant is of the view that any interpretation of the term “resident in” which excludes citizens (even those non-resident in any of the Partner States) would lead to absurd results. On the contrary, the exclusion of non-resident citizens from the exercise of certain rights, such as the right to vote by some national laws has not been found to lead to absurd results by the European Court of Human Rights. In *Shindler v. United Kingdom* (19840/09), (2014) 58 E.H.R.R. 5, the court reasoned “the residence of a citizen is not ... an arbitrary measure of connection with a country: far from it, residence is a relevant, rational and practicable criterion for assessing the closeness of the links between a British citizen and the UK (see also, *Doyle v. United Kingdom*, 30158/06, [2007] ECHR 165; *Melnychenko v. Ukraine* (17707/02), (2006) 42 E.H.R.R. 39). In the context of the above cases involving the United Kingdom, non-resident citizens who have not registered to vote in the UK for the last 15 years are not eligible to vote whereas qualifying commonwealth citizens who are resident in the UK are allowed to vote.
53. Counsel to the Appellant also argues that an interpretation that would exclude citizens of EAC partner states who are not resident in any of those states would run counter to the object and purpose of the EAC Treaty. We agree with Counsel to the extent that the object and purpose of the Treaty is a people centred approach to co-operation and integration as enumerated in the Preamble, Articles 5, 6 and 7 and elsewhere in the Treaty. However, a people-centred approach to cooperation and integration does not necessarily counter the intention of parties to the EAC Treaty to intend to grant *locus standi* to a certain set of citizens before the EACJ and not others. It is not unusual for parties to treaties to establish courts and restrict *locus standi* in one way or another. The EAC treaty itself has a restriction other than that of one being a resident in one Partner State which is the two months’ time limitation for legal and natural persons to institute a case whereas the same limitation does not apply to references by Partner States. In the context of the European Court of justice (ECJ), Anthony Arnall, is of the view that “If the Court took a liberal approach on the question of the category of acts susceptible to review and the status of the European Parliament (which was not mentioned in the Treaty before its amendment) in annulment proceedings, its attitude to standing of private parties has on the whole been very restrictive” (see Anthony Arnall, *The European Union and its Court of Justice*, 2006, Oxford University Press, at p. 69) despite the fact the purpose and objective of the European Union as espoused in its legal framework is further promotion of integration of the Union which is broadly similar to that of EAC. The ECJ has pronounced that there is no place for public interest litigation within the context of the European Union Treaty (See, *Greenpeace and Others v. Commission Case T-585/93* [1995]

ECR II-2205). In the African Court of Human and Peoples Rights, even though the purpose and objective of the African Charter of Human and Peoples' Rights is broadly preservation of fundamental human rights enumerated in the Charter, standing has been restricted to only individuals and NGOs of parties to the Charter who are also parties to the Protocol on the Establishment of the African Court of Human and Peoples' Rights and have made a declaration accepting competence of the Court to deal with cases instituted by individuals and NGOs. In as far as the Caribbean Court of Justice, the *locus standi* of private entities is restricted to "Nationals of a Contracting Party... with special leave of the Court" under circumstances provided for in Article XXIV on "*Locus Standi of Private Entities*" in the Agreement Establishing the Caribbean Court of Justice). It should be noted the Contracting Parties of the Caribbean Community do not require special leave of the Court to appear as parties in proceedings before the Court. The Southern African Development Community Tribunal is envisaged to be an *inter-state* dispute settlement court in the new Protocol establishing the Tribunal thereby effectively disavowing legal and natural persons' *locus standi* in the Court despite the purpose and objectives of the Community which are broadly similar to those espoused by the East African Community. All the above examples of practices of other regional courts illustrate that restriction of *locus standi* persons is not absurd and does not necessary go counter to the broad aspirations of treaties. And where parties to a treaty have restricted *locus standi* in whatever form, that restriction should be interpreted restrictively for that is what the partner states have intended however broad other sections of the treaty may be interpreted. In other words, some sections of a treaty may be interpreted broadly and purposively whereas others may be interpreted restrictively depending on what parties of that particular treaty intended the sections to mean. Indeed, according to some commentators, the EACJ has consistently in its case- law broadly and purposely interpreted Articles 6 (d) and 7 (2) to resolve cases which have human rights aspects while on the other hand it has restrictively construed the two months limitation "enabling governments to defeat several suits raising credible allegations of human rights violations" (See, the analysis of the *Katabazi v. Secretary General of the East African Community and Attorney General of the Republic of Uganda*, EACJ, Reference No. 1 of 2007, 1 November 2007, *Independent Medical Unit v. Attorney General of Kenya*, EACJ, Reference No. 3 of 2010, 29 June 2011, *Omar Awadh and 6 Others v. Attorney General of Uganda*, EACJ Appeal No. 2 of 2012 in J. Alter, J. Gathii and L. Helfer, "Backlash against International Courts in West, East, and Southern Africa: Causes and Consequences", *The European Journal of International Law*, vol. 27 no. 2, at p. 306).

54. From the foregoing, there is nothing in the text, structure, history, subsequent practice in the application of the EAC Treaty by the Partner States, and subsequent protocols which were ratified by the EAC member states that leads to the conclusion that "resident in" was intended to include citizens who are do not have a physical presence in any of the Partner States of the EAC and that it would not lead to an absurd result interpreting Article 30 of the EAC Treaty as disavowing such citizens *locus standi* before the EACJ.
55. We now turn to the question whether Desire Manariyo (the Appellant) is a

“person resident in” any of the EAC Partner States and hence has *locus standi* to institute a reference in the EACJ hinged on Art. 30(1) of the EAC Treaty.

56. Although the question of “who is resident” in EAC Partner States appears to be a factual question as rightly averred by Counsel for the Appellant, which can only be determined by the Trial Court as per Art. 35 B of the EAC Treaty, the Record of Appeal before us is unique. It includes significant and unrebutted evidence that the Appellant is not a person who “resides in” any of the EAC Partner State for purposes of Art. 30 of the EAC Treaty which we have extensively established in the foregoing paragraphs and hence has no *locus standi* to institute a reference before this Court. In the normal scheme of things, where the Appellate Division of this Court has determined an appealed question of law but is unable to finally determine the outcome of the case due to the necessity of re-examining the facts, then this Division has been impelled to remit the case to the trier of facts (the Trial Court) [see, *The East African Civil Society Organizations’ Forum (EACSO) v. The Attorney General of the Republic of Burundi*]. However, where this Division has enough evidence in the Record to make a determination, this Division has done so to such an extent that it can correct the errors of the Trial Court itself in the interest of expeditious justice. (See *Margaret Zziwa v. The Secretary General of EAC, Appeal No. 2 of 2017* at para.80)
57. We have sifted through the Record and it is undisputed that in the Affidavit in support of Mr. Desire Manariyo’s Reference, he states that he is: “...of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America”. It is from the statement in the Affidavit that the Trial Court rightly concluded that: “[i]n fact, the Applicant’s (Manariyo) affidavit of 18th November 2015 does indicate that he is ordinarily resident in the United States of America...”. There is no other possible conclusion that the Trial Court could have or can arrive at in the light of the Affidavit in support of the Reference deposed by the Applicant (now Appellant) with regards to which State he is “resident in”. And from the Affidavit in support of the Reference as well as the Judgement of the Trial Court, the State within which the Appellant (Applicant then) “resides in” is not a Partner State of the EAC. And the logical sequence thereof is that the Appellant did not have the *locus standi* to launch the Reference. Hence, the moment the Trial Court concluded as it did that Mr. Manariyo is a resident in a State other than the one envisaged in Art. 30 (1), it should have proceeded to engage the judicial handbrake and divest itself from entertaining the merits of the matter for want of jurisdiction *ratione personae*.
58. The illogic in part of the Appellant contention is palpable. The notion that the Appellant has “the intention to return” (“*Animus revertendi*”) has no place in the provisions of Art. 30 (1) for purposes of granting such a person *locus standi* before the EACJ. Article 30(1) is very clear that only persons “resident in” any of the Partner States of EAC and not those who intend to be “residents in” the said States are granted *locus standi*.
59. Another baffling contention of the Appellant is that the practice and jurisprudence of this Court clearly shows that “not only has it sometimes assimilated ‘residents’ to ‘citizens’ without focussing on the residency of the later, but also it has granted access before it, to natural or legal persons residing outside the Community”. This contention is at its best a colossal misconception of the cases relied upon

by Counsel to the Appellant or at its worst a deliberate misinterpretation of the cases to create a smokescreen to cover the fact that the Appellant is not a “resident in” any of the Partner State and consequently disavowed the *locus standi* before the EACJ under Art. 30 (1) of the EAC Treaty. The Appellant has colossally misconceived the practice of the Court by relying on a number of cases and wrongly concluded that the issue of residency is of less importance. However, the contrary seems to be true as shall be demonstrated forthwith.

60. In all the cases that the Counsel to the Applicant has mentioned, the Affidavits in their support have clearly indicated that they are residents in one of the EAC Partner State. In the *Christopher Mtikila v. The Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community and Others*, the Affidavit of Mr. Mtikila clearly states that “the Applicant is Mr. Christopher Mtikila, a natural person and citizen and resident of Dar Es Salaam Tanzania (which is a Partner State of EAC)” ; In the *Emmanuel Mwakisha Mjawasi and 748 Others v. The Attorney General of the Republic of Kenya*, the Affidavit states that “the Applicants are adult male and female East Africans of sound mind currently residing within the Partner State of Kenya...” ; In the *Timothy Alvin Kahoho v. The Secretary General of the East African Community*, the Affidavit states that “the Applicant is a natural persons (sic) resident of Dar Es Salaam and Citizen of Tanzania...” ; In the *Rwenga Etienne and Moses R. Marumbo v. The Secretary General of the East African Community*, the Affidavit states that “the Applicants are natural persons, adult citizens of the Republic of Rwanda and the United Republic of Tanzania respectively” and that “they are resident in their respective Partner States”. The same can be said of all other cases cited by the Counsel to the Applicant which share the same strand of mentioning which Partner State of the EAC they are “resident in”.
61. From a rather similar misperception reference point, the Counsel to the Appellant cites the case of *United Trade Centre (UTC), Claimant v. The Attorney General of Rwanda, Respondent and Succession Makuza Desire, Succession Nkurunziza Gerard & Ngofero Tharcisse, interveners*, and rightly states that the Application was brought by the Company registered in Rwanda (a Partner State of the EAC) but the original Application was prompted by Mr. Tribert Rujugiro Ayabatwa who is not a resident in any of the Partner State. What is blatant is that the Case was instituted by UTC (a legal Person incorporated in a Partner State of the EAC) which is the starting point for determining *locus standi*, and we fail to comprehend how this case supports the contention of the Applicant. In a similar vein, Counsel to the Applicant invokes the Case of *Patrick Ntege and others v. The Attorney General of Uganda and Others* and claims that “the Applicants were operating in South Sudan (which was not a Partner State at the time the Reference was instituted) and presumably residing there”. In our considered view, there is nothing in the Affidavit in support of the Reference that can lead one to make a presumption that the Applicants were resident in South Sudan at the time the Reference was instituted. The Affidavit states that Mr. Patrick Ntege Walusimbi (Applicant) is of M/S C/O Rwakafuuzi & Co Advocates , Kampala, Uganda (A Partner State of the EAC).
62. Based on the foregoing, we are convinced that the practice at the EACJ clearly demonstrates that Applicants have in the affidavits in support of their references

indicated the Partner State of the EAC in which they “reside in” contrary to what Counsel for the Appellant wants us to believe.

63. We therefore come to the conclusion that Mr. Manariyo is not a “resident in” any of the EAC States and that this Court is disavowed of the jurisdiction *ratione personae* to deal with the case. Since we have no jurisdiction to entertain the Reference, we are precluded to rule on the merits of the Case.

Costs

64. This Court has on numerous occasions followed the general rule that costs follow the event. However, for this particular case, the issue of jurisdiction which in the end determined the Appeal was raised *suo moto* by this Division and not the Parties. We therefore think that the just order to make is that each party should bear its own costs of the Appeal.

Conclusion

65. In the final result, the Appeal is dismissed with each party bearing its own costs.

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DISSENTING JUDGMENT

A. Ringera and G. Kiryabwire, JJ. A

Held

1. Ordinarily in international treaties, enforceable rights are between contracting states. However, nothing stops contracting states to expand those enforceable rights to persons as has happened in the EAC Treaty which confers enforceable rights to legal and natural persons. Given the past history of the EAC, the Treaty was *inter alia* deliberately crafted to benefit East Africans, to allow them challenge any form of infringement and to allow the private sector to play a leading role in socio-economic activities.
2. This Court is a pivotal organ in the attainment of the Treaty objectives thus the Court is “required to exercise its mandate under Article 23(1) with due cognisance of the fundamental principles enshrined in Articles 6 and 7. “It cannot have been envisaged by the framers of the Treaty that access to justice would include unequal or disproportionate access thereto...” It could not have been the intention of the framers of the Treaty that access to justice under the Treaty would be unequal or disproportionate (Steven *Dennis* case)
3. The principle of good faith stating in Article 31 Vienna Convention prevents an excessively literal interpretation of a term by requiring consideration of its context and of other means of interpretation such as the object and purpose of a treaty. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effect, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted. (*ILC Commentary, Timothy A. Kahoho* case)
4. It is clear from the provision of Article 30 that the residents of the Partner States are vested with the right to access this Court for the purpose of challenging any form of infringement of provisions of the Treaty. The Majority have suggested that if the Partner States had wanted all citizens, whether resident in or out of

their territory, to have access to this Court then Article 30 (1) of the Treaty they would have used words like “any person who is a resident of a Partner State” and not “Any person who is resident in a Partner State.” In our view, this amounts to unequal and disproportionate access to justice as concerns foreign nationals on the one hand and East African citizens on the other hand. The situation is worse when it is considered that on that reasoning, citizens of EAC Partner States residing outside the Community would have lesser rights of access to their regional Court than their fellow citizens who are physically present within the Community. Such a conclusion can only be the result of an excessively literal interpretation of the Treaty.

5. The word “resident” can be used as an adjective or a noun. As an adjective it refers to a class of persons “living or staying in a place” while as a noun it signifies a class of persons “who lives or has their home in a place”; thus it is possible to have a main or non-main residence. For purposes of Article 30 (1) it would have been useful to have the *travaux préparatoires* of the Treaty to resolve this definitely but its absence notwithstanding, we take the view that the wider meaning of residence, that is to say not being physically present in a Partner State, would better meet the object and purposes of the Treaty.
6. For a Burundian citizen who has the right of residence in Burundi and property there not being able to vindicate his rights under Articles 6(d) and 7(2) of the Treaty and Articles 15(1) of the Common Market Protocol simply because at the time of filing his Reference he was not physically present in Burundi or other Partner State of the EAC is to unjustifiably constrict the reasonable and logical exercise of benefits powers and rights under the Treaty. It means that EAC citizens’ resident outside any Partner State lack the flexibility to meet its objects and purpose of a people centred integration in which the people of East Africa have certain direct benefits enforceable at law by themselves and even by strangers.
7. This does not pass the good faith test of treaty interpretation and a broad and purposive interpretation of the term “any person who is a resident in a Partner State” in Article 30 of the Treaty should be adopted in order to meet the purposes, objectives and principles of the Treaty. Thus, any person resident in a Partner State inclusive of any citizen who by virtue of law has the right to reside in a Partner State has a right to file a Reference to vindicate their rights. Therefore, the Trial Court had jurisdiction to entertain the reference.
8. With regard to the Appellant’s complaint that the Trial Court misapprehended his case, the judgement demonstrates that the Trial Court understood that the Appellant was not challenging the impugned Supreme Court Judgment’s inconsistency with the internal law of Burundi *per se*, but, the Respondent state’s non-compliance with its international obligations under the Treaty and the African Charter.
9. The Appellant did not prove his case on a balance of probability because: firstly, the averments in the Reference and Supporting Affidavit were part of the Burundi legal system and they constituted authentic evidence of the agreement between the parties and were not statements of facts. They were statements of the law of Burundi for which it was necessary to either it was codified in the legal instruments of the country; or it was a custom or practice having the force of law

in Burundi; or it was espoused in either the jurisprudence of the highest courts of that country or in the juristic works of legal Scholars of eminence in books or in journals of reference; or expert evidence on the law of the country was adduced at the trial. Such proof could only be made by producing to the Court either the instruments or publications bespeaking to such matters or expert evidence on the legal system. They were not matters to be proved by the word of a party or his Counsel however solemnly expressed.

10. The Appellant failed to discharge his burden of proving that the Supreme Court of Burundi failed to acknowledge the legal and probative value of the Attested Affidavit in violation of the law or principles of law in Burundi. Had the Appellant's case hinged on the conduct of proceedings in the Burundi Supreme Court rather than the resulting Judgment and its effect, the reasoning of the Trial Court in decrying the non-production of the record of proceedings would have been faultless.
11. The Trial Court erred in the limited view it took that the rule of law principle in the Treaty could not be said to be violated unless it was shown that the Burundian Judiciary had acted in a manner which could be categorised as a blatant, notorious or a gross miscarriage of justice. All that was required to engender international responsibility of the State was a finding that the impugned decision was inconsistent with Burundi's international obligation under Articles 6(d) and 7(2) of the EAC Treaty as read with the protocol and the African Charter.
12. Treaty interpretation is akin to constitutional interpretation in that a treaty should be interpreted as a whole and not section by section as would an Act of parliament. The Framers of the Treaty could not have contemplated Partner States granting property rights (in stocks, shares and other securities) in their states to citizens of and residents in other Partner States and at the same time by reason of Article 30 (1) deprive those citizens not resident in a Partner State access to this Court to enforce and protect those same rights granted to them under the same Treaty. This in our view would be another absurdity which can be avoided by a correct interpretation of the Treaty.
13. The normal standard of proof in the civil causes canvassed before the Court is on the balance of probabilities, also referred to as the preponderance of evidence. The Trial Court erred in calling for evidence which was fully conclusive in proof of the elements of the rule of law violated which was derived from a claim against a state involving criminal charges of exceptional gravity. Adopting the wrong standard of proof would have been material if on a proper appreciation of the case, it could be concluded that had the Trial Court applied the normal standard of proof, it would have arrived at a different conclusion.
14. The averments in the Reference and the depositions in the Reference in the Supporting Affidavit to the effect that Attested Affidavits were part of the Burundi legal system and constituted authentic evidence of the agreement between the parties were not statements of facts they were statements of the law of Burundi. To prove that a particular proposition is a principle of law or is part of the legal system of a particular country it could be established by: legal instruments of that country; custom or practice having the force of law in that country; jurisprudence of the highest courts of that Country or in the juristic works of legal Scholars of eminence in books or in journals of reference; or

expert evidence on the law of the country is adduced at the trial. The Appellant did not adduce such evidence and fell short of proving that the Respondent state failed to recognise the legal and probative value of the Attested Affidavit of 27th July 1996 and thereby infringed the rule of law principle in Articles 6(d) and 7(2) of the Treaty.

15. With respect to the Appellant's grievance that the Trial Court erred in law by requiring the Appellant to produce the full record of proceedings in the Supreme Court of Burundi to enable the Trial Court to evaluate the conduct of those proceedings, the Trial Court erred. It is evident that the Appellant's Reference was grounded on the alleged failure of the Respondent state through the Judgment of its Supreme Court to apply Burundian Law and deviation from a principle of the Burundian legal system by failing to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 and not in the conduct of the proceedings by that Court. Thus, the production of the record of proceedings was unnecessary.
16. International Law does not differentiate between wrongful acts of different organs or institutions of the State. The governing principle is undifferentiated attribution of State action. It matters not whether it is an executive, legislative, or a judicial act or omission which is complained of. Two, the act or omission need only be wrongful to engender international responsibility of the State. There is no general requirement that it should be shown to have been outrageous, done in bad faith or with wilful neglect, or to be a blatant miscarriage of justice. International responsibility derives from an act being attributable to the state which is contrary to the Treaty Rights of another State. The Trial Court erred in the limited view it took that the rule of law principle in the Treaty could not be said to be violated unless it was shown that the Burundian Judiciary had acted in a manner which could be categorised as a blatant, notorious or a gross miscarriage of justice. All that was required to engender international responsibility of the State was a finding that the impugned decision was inconsistent with Burundi's International obligation under Articles 6(d) and 7(2) as read with the protocol and the African Charter.
17. The Appellant's complaint on *locus standi* was predicated on a misapprehension of the substance of the Trial Court's Judgment. The Trial Court's finding that the Appellant had no vested proprietary interest in the land subject matter of the Reference was the inevitable sequel to the finding that the Appellant had not proved satisfactorily that the Attested Affidavit on the legal and probative value claimed under the legal system of Burundi. The finding was not a finding of the Appellant's want of *locus standi* strictly speaking and the criticism that the Trial court raised the issue *suo motu*, is in our view, a mischaracterization of the Trial Court's conclusion on that aspect of the matter. Ultimately, the conclusion of the Trial Court that the Appellant had not established the alleged violation or infringement of Articles 6(d) and 7(2) of the Treaty is upheld.

Cases cited

- AG of URT v African Network for Animal Welfare [2012-2015] EACJLR 573, Appeal No. 3 of 2014
 AG of Uganda v Tom Kyahurwenda [2012-2015] EACJLR 450, Case Stated No. 1 of 2014
 AG of Uganda v East African Law Society & Anor [2012-2015] EACJLR Appeal No. 1 of 2013
 Doyle v United Kingdom 30158/06 (2007) ECHR 165
 Henry Kyarimpa v AG of Uganda, EACJ Appeal No. 6 of 2014

Patrick N. Walusimbi & Ors v AG Uganda & Ors [2012-2015] EACJLR 323, Ref. 8 of 2013 (Distinguished)
 Phosphates in Morocco Case P.C.I.J, Series A/B, No. 74, p. 121
 Shindler v United Kingdom (1984/09) (2014) 58 EHRR 5
 Steven Deniss v AG of Burundi & Ors, EACJ Ref. No. 3 of 2015
 Timothy A. Kahoho v Secretary General EAC [20012-2015] EACJLR Appeal No. 2 of 2013
 The Democratic Party v Secretary General EAC & Ors [2012-2015] EACJLR 559, Appeal No. 1 of 2014
 The East African Law Society & Ors v AG of Kenya & Ors [2005-2011] EACJLR Ref. No 3 of 2007
 Union Trade Centre Ltd v AG of Rwanda & Ors, EACJ Appl 9 of 2014 (Distinguished)
 Union Trade Centre Ltd v AG of Rwanda, EACJ Appeal No. 1 of 2015
 United States Diplomatic & Consular Staff in Tehran Case 1979 I.C.J. Rep. 21; (1980) I.C.J. Rep. 3

DISSENTING JUDGMENT

A. Introduction

1. We have the misfortune to differ with the judgment which the majority of the Court have delivered holding that the First Instance Division of this Court (“the Trial Court”) lacked Jurisdiction *ratione personae* to entertain the Reference subject matter of this Appeal on the ground that the Appellant was not resident in a Partner State of the Community at the time of filing the Reference because he was then not physically residing in Burundi.
2. For reasons which we shall set out in full when determining the aspect of the Appeal dealing with the Court’s jurisdiction, we think that the majority in finding that the Appellant was not physically resident in a Partner State have not only adopted a literal and narrow interpretation of Article 30 (1) of the Treaty for the Establishment of the East African Community (“the Treaty”) which does not commend itself to our minds, but have also misapprehended the pleadings and the facts as deposed in the Appellant’s affidavit in support of the Reference. With the greatest of respect, we shall show that the method of interpretation adopted by the majority, which takes a narrow and restrictive interpretation of the Treaty was rejected in the very early days of this Court and therefore amounts to a retrogressive and backward move in Treaty interpretation for this Court.
3. Having taken that view of the matter, our Judgment will accordingly deal with both the jurisdictional issue and the substantive merits of the Appeal.

B. Background

4. We have looked at facts as stated in the majority decision which provide the necessary background to this appeal and find that we are substantially in agreement with them and find that there is no need for us to duplicate them in our judgment as well. However for ease of reference, we shall remind ourselves of the issues agreed for resolution in this appeal which are:
 - (1) Whether the Court had jurisdiction *ratione personae* to entertain the Reference;
 - (2) Whether the Trial Court erred in law in finding that the Respondent did not violate or infringe Article 6(d) and 7(2) of the Treaty, Article 15(1) of the Protocol; and/or Article 14 of the African Charter;
 - (3) Whether the Trial Court erred in law and/or committed a procedural irregularity by questioning *suo motu*:-
 - (b) The accuracy of the Appellant’s assertions which were not challenged by the Respondent, and/or
 - (c) The *locus standi* of the Appellant;
 - (4) Whether the Trial Court erred in law and/or committed a procedural

irregularity by failing or omitting to exercise its inherent power to seek from the parties any information they lacked and which would have been decisive in the success of the Reference;

- (5) Whether the Trial Court erred in law or committed a procedural irregularity by failing to provide or prescribe a remedy for the violation of the Appellant's rights to due process as recognised by the Trial Court; and
 - (6) Whether the Trial Court erred in law by finding that the Appellant was not entitled to the remedies sought.
5. We shall now deal with the above issues sequentially.

C. Our Analysis and Determination

Issue Nov.: Whether The Trial Court Had Jurisdiction *Ratione Personae* To Entertain The Reference.

6. The majority holds that the Trial Court did not have jurisdiction *ratione personae* to entertain the Reference because the Appellant was not physically residing in a Partner State and was, because of that, not a "...resident in a Partner State..." for purposes of Article 30 (1) of the Treaty.
7. In our opinion the holding by the majority that the Trial Court lacked jurisdiction to entertain the Reference following a fleeting remark in the Trial Court's Judgment (para. 19) that "...In fact, the Applicant's Affidavit of 18th November 2015 does indicate that he is ordinarily resident in the United States of America..." (...which we shall show was not even correct) and therefore for that reason, the Appellant was not physically resident in any one of the Partner States of the Community is erected on a literal and narrow interpretation of Article 30 (1) of the Treaty which does not commend itself to our minds for several reason which are set out below.
8. Article 30(1) of the Treaty for ease of reference provides:

"...Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or an infringement of the provisions of this Treaty..."
9. Before we give our specific reasons for this dissent we wish to recall, *albeit* briefly, the arguments of the parties on this issue.

Appellant's Submissions

10. Counsel for the Appellant argued that the Trial Court indeed did have jurisdiction *rationae personae* to entertain the Reference. He submitted that according to Shabtai Rosenne: *The Law and Practice of the International Court* [1920-2005], Vol. II Chapter 9, *jurisdiction rationae personae* means "...the ability of the parties to appear before the court as applicants or respondents or in any other capacity...". He further submitted that, in his understanding, this Court in *Attorney General v Anthony Calist Komu* [EACJ Appeal No. 2 of 2015,] held that three tests had to be fulfilled to meet the requirements for the existence of *jurisdiction rationae personae* namely:
 - (i). Whether a petitioner is a "legal or natural person";

(ii). Whether the subject matter of the Petitioner's complaint (in the Reference or other pleading) concerns "the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community (...) on grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the Treaty; and

(iii). Whether the subject matter of the Petitioner's complaint has been reserved under the Treaty "to an institution of a Partner State".

Counsel argued that the Appellant met all the required tests as set out in the *Anthony Calist Komu Decision (Supra)* and therefore had the ability to appear before the Trial Court.

11. Counsel submitted that the Appellant is a natural person and a citizen in the Republic of Burundi, a Partner State. He further argued that the test had been met because the Appellant owned property in the Partner State which had been the subject of an infringement of the Treaty. He further submitted that the Appellant had litigated this dispute in the national courts of Burundi all the way to the Supreme Court. The Appellant further litigated this dispute at Trial Court and in none of the Courts was there a challenge to his nationality and or the Court's *jurisdiction ratione personae*. Counsel also argued that the Appellant's complaint has not been reserved to any other institution of the Partner States by any provision of the Treaty.
12. With regard to the issue of the Appellant's residence, counsel for the Appellant submitted that this was an issue brought up for the first time by the Respondent in his submissions in reply at the appellate hearing. He argued that this issue had not been pleaded, or raised as an objection or even argued at the Trial Court. The Respondent therefore should not be allowed to belatedly change his position and rely on new points that had not been pleaded or traversed in the trial Court. On this argument he relied on the case of *Attorney General of Tanzania V African Network for Animal Welfare (ANAW) [Appeal No. 3 of 2014]*.
13. He submitted nonetheless that it could not have been the intention of the framers of the Treaty to exclude some of the citizens residing outside the Community the right to access the Court, while at the same time allowing the same right to foreigners. He argued that if it was the intention of the Partner States to limit the rights of their citizens they would have expressly done so in the Treaty.
14. Counsel for the Appellant further relied on the principle of *Animus Revertendi* which according to Black's Law Dictionary means "The intention of returning. A man retains his domicile, if he leaves it *animus revertendi*..." This principle, he argued, protects the rights of one who leaves his/her domicile with the intention to return and assures that person that no matter how long the absence, domicile will not be lost. In support of the Appellant's intention to return to Burundi, Counsel for the Appellant argued that the Appellant had asserted that he is a Burundi national; that he owns properties therein; that he has rights as well as obligations and potential liabilities therein and that he has *de jure* political protection. He argued that in the absence of any evidence to the contrary the Appellant had not surrendered any of the above rights or obligations and had exercised his right to leave his country and at the same time had retained his rights to return to his country.
15. Counsel for the Appellant also pointed to what he referred to as the practice and

jurisprudence of this Court where sometimes the term “residents” was assimilated to “citizens” without focusing on the residency of the later. He contended that the Court had also granted access before it, to natural or legal persons residing outside the Community. He contended that this jurisprudence would suggest that in the end, the term “resident” used in Article 30 (1) of the Treaty would cover all EAC citizens regardless of where they reside, and foreigners residing in the Community. He specifically referred to the following cases:

- i. *Patrick Ntege and others V the Attorney General and others*;
- ii. *Union Trade Centre (UTC) Limited V The Attorney General of Rwanda and Succession Makuza Desire, Succession Nkurunziza Gerard & Ngofero Tharcisse, Interveners*. In this matter, even though the company was registered in Rwanda, the original application to the court was filed by Mr. Tribert Ayabatwa, the Majority shareholder, a Rwandan national, who did not reside in any Partner State.

16. Counsel for the Appellant further submitted that to establish whether or not the Appellant was a resident in a partner State would require an assessment of the facts to show where the Appellant resides which this court held in the case of *Angella Amudo V the Secretary General of the EAC [Appeal No. 4 of 2014]* it does not do as “...questions of fact are exclusively decided at the level of the 1st Instance Division. They are not appealable to the Appellate Division”.

17. When asked what interpretation this Court should give Article 30(1) of the Treaty, Counsel for the Appellant called for a broad and purposive interpretation to meet the purposes, objectives and principles of the Treaty. In his view such an interpretation would lead to the conclusion that citizens of a Partner State irrespective of their physical location have *locus standi* before the Court.

Respondent’s Submissions

18. Counsel for the Respondent submitted that the Appellant lacked jurisdiction *rationae personae* because he could not prove that he was a resident of any Partner State as provided for under Article 30(1) of the Treaty. Counsel argued that under Article 30(1) of the Treaty, it was not enough that the Appellant was a natural person and a citizen of a Partner State. The Appellant also had to be resident in a Partner State. He further submitted that the sworn affidavit of the appellant (pages 14 to 18 of the Record of Appeal) shows that he is a resident of 40 Alder Street, Apt box 9, Portland, Maine 04101, in the United States of America. Counsel argued that the onus was on the Appellant to prove that he was a resident of a Partner State and he had failed to do so.

19. Counsel submitted that the issue of jurisdiction was fundamental and the Court could raise it *Suo Moto* without even hearing the parties as was decided by this Court in the case of *Angella Amudo Vs The Secretary General of the East African Community [EACJ Appeal No. 4 of 2014]*. In this case therefore lack of jurisdiction *rationae personae* could be raised at any time.

20. Counsel for the Respondent argued that the Appellant (at pages 14 to 17 of the record of Appeal) in his sworn affidavit stated that he is a resident of 40 Alder Street, Apt Box 9, Portland, Maine 04101, in the United States of America and is not a resident of any EAC Partner States.

21. Counsel further submitted that there is a legal principle that “he who alleges

must prove” and so if the Appellant insisted that he is a resident of a Partner State then that was for him to prove.

Our Determination

22. The difference in opinion giving rise to this dissent stems from the long established principles espoused by this Court on the issue of Treaty interpretation from which the majority opinion appears to depart. Such principles can be derived from the earlier decisions of this Court and also from academic writings on the said decisions. We shall start by a review of those principles.

23. We begin by reminding ourselves of the role and status of this Court in the community. As was held by this Court in the case of *Attorney General of Tanzania vs. African Network for Animal Welfare [EACJ Appeal No. 3 of 2011]*:

“The Partner States have freely and voluntarily bound themselves in the Treaty to observe a variety of express undertakings and obligations based on common objectives and principles. The Treaty therefore is an international agreement. In furtherance of this agreement by the Partner States, Article 23(1) establishes the Court and provides that it “...shall be a judicial body which shall ensure the adherence to the law in the interpretation and application of and compliance with this Treaty...”

Furthermore, in the case of *Attorney General of Uganda vs The East African Law Society and another [EACJ Appeal No. 1 of 2013]*, this Court held that it is a supranational Court and therefore in its work it is obliged to rely on its own Rules of Procedure; international conventions of a general nature (like the Vienna Convention on the Law of Treaties); as well as the practice and jurisprudence of similar International Judicial Tribunals.

24. The earliest discussion relating to Article 30 of the Treaty can be found in the Reference of *The East African Law Society and 5 others V The Attorney General of the Republic of Kenya and 4 others [Reference No 3 of 2010]* (hereinafter referred to as “The East African Law Society Case”). In that case, this Court then sitting as the only division at the time pointed to the unique and progressive approach of the Treaty when compared to other international treaties as to the question of locus standi. It stated:

“...Ordinarily at international law, a treaty between and among states, like a contract protects interests of or creates rights for the parties thereto and imposes duties and obligations on the parties to it. Neither another State that is not a party, nor a legal or natural person, may directly claim any interest or right under it, notwithstanding that that other State or person derives benefit from the implementation and operation of the Treaty. However, nothing prevents the State Parties to a treaty to vest in any person or other State an enforceable right...”

The point being made is that ordinarily at international law, international treaties and enforceable rights thereunder are between contracting states. However nothing stops contracting states to expand those enforceable rights to persons. In the case of the EAC, the Treaty in a progressive move conferred enforceable rights to legal and natural persons as well.

25. The rationale for the Treaty extending enforceable rights to legal and natural persons is well articulated in *The East African Law Society Case* (Supra). While

clearly rejecting a call by counsel for the Respondent in that case to give a strict interpretation to Article 30 of the Treaty, the Court held:

“...It is clear from the provision of Article 30 that the residents of the Partner States are vested with the right to access this Court for the purpose of challenging any form of infringement of provisions of the Treaty. Several provisions in the Treaty lend weight to the view that this was a deliberate provision to ensure that East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty. The following excerpts from the Treaty in particular, stand out to illustrate that deliberate intent. First, in the Preamble to the Treaty, the fourth recital recalls and highlights that one of “the main reasons that contributed to the collapse of the (previous) East African Community” in 1977, was “lack of strong participation of the private sector and civil society in the cooperation activities”; and the eleventh recital records that the parties to the Treaty “are resolved to create an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities”...

The Court clearly made a finding that given the past history of the EAC the Treaty was *inter alia* deliberately crafted to benefit East Africans, to allow them challenge any form of its infringement and to allow the private sector to play a leading role in socio-economic activities.

26. The Court further held:

“...Secondly, Article 7 provides: “1. The principles that shall govern the practical achievement of the objectives of the Community shall include: (a) people-centered and market-driven co-operation;” In our view, therefore, it would be a negation of that deliberate intent to bar the reference on the ground that the applicants had no capacity to bring a reference challenging a sovereign function of the Partner States. Lastly, we are not persuaded by the respondents urging that we give to article 30, a narrow interpretation...”

This finding defines in many ways the long standing interpretation of the Treaty in a progressive and purposive approach. So in this particular case, in order to give full effect to the purpose of the Treaty, the Court interpreted the word “Institutions of the Community” in Article 30 of the Treaty to include “Organs” of the Community.

27. Furthermore, this Court has acutely been aware of its role within the East African Community especially on the question of access to justice and articulated it in the case of *Steve Deniss vs Attorney General of Burundi and five others [Reference No. 3 of 2015]* where it held:

“...the over-riding purpose of the Treaty can be deduced from its long title, namely, the establishment of the East African Community. However, the objectives of the Community so established by the Treaty are set out in detail in Article 5 thereof. The principles governing the achievement of the said objectives are then laid out in Articles 6 and 7 of the Treaty. This Court is a pivotal organ in the attainment of the Treaty objectives. It is thus required to exercise its mandate under Article 23(1) with due

cognisance of the fundamental principles enshrined in Articles 6 and 7. It cannot have been envisaged by the framers of the Treaty that access to justice would include unequal or disproportionate access thereto...”

We agree with this holding of Trial Court that it could not have been the intention of the framers of the Treaty that access to justice under the Treaty would be unequal or disproportionate.

28. The Vienna Convention on the Law of Treaties 1969 (hereinafter referred to as the “Vienna Convention”) in Article 31(1) and (2) provides for the need to interpret treaties in “good faith” and states:

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

2. The context for the purpose of the interpretation of a Treaty shall comprise, in addition to the text, including its preamble and annexes;...”

It is clear therefore that whereas the terms of a treaty are to be interpreted in good faith in accordance with their ordinary meaning, such meaning must be one that resonates with their context and is informed by the treaty’s objects and purposes. In a nutshell, a good faith contextual and purposive approach is to be adopted in Treaty interpretation. In the matter of the *Attorney General of Uganda and Tom Kyahurwenda [Case Stated No. 1 of 2014]*, this Court held that the Vienna Convention reflects pre-existing customary international law and can be applied as valid canons of interpretation of treaties such as the EAC Treaty. In the earlier decision of this Court in the case of *The Democratic Party vs The Secretary General EAC and 4 others [EACJ Appeal No. 1 of 2004]*, this Court held that it would be illogical and absurd if the Court, itself a creature of a Treaty, did not apply the provisions of the Vienna Convention.

29. The Good Faith principle of treaty interpretation was espoused by this Court in the case of *Timothy Alvin Kahoho vs The Secretary General of the EAC [Appeal No. 2 of 2013]*. In that case, this Court cited with approval the text in the Commentary on the 1969 *Vienna Convention on the Law of Treaties* by Mark E. Villiger, Martinus Nijhoff Publishers, 2009 at page 426, where use of the principle of Good Faith was explained as follows:

“Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context (N.9) and of other means of interpretation. In particular, good faith implies consideration of the object and purpose of a treaty (N.12). It plays a part in establishing the ‘acceptance’ in sub para. 2(b) (N.19) and in evaluating subsequent practice as in sub para. 3(b) (N.22). Finally, good faith assists in determining recourse to the supplementary means of interpretation in Article 329 (q.v.,N.11).”

It follows therefore that a Good Faith interpretation does not import a simple literal interpretation of words and terms as would be had from a dictionary, but rather a consideration of those terms and words in light of the object and purpose of the Treaty. Context under Article 31 of the Vienna Convention includes text as well as preamble and annexes for the purpose of interpretation.

30. The reason for not applying an excessively literal interpretation of a term was further discussed by this Court in the *Timothy Alvin Kahoho* case (*supra*). The

first is that:

“...Consideration of a Treaty’s objective and purpose, together with good faith will assure the effectiveness of the terms of that Treaty...”

Secondly, an overly literal and strict reading of the terms of the Treaty may drastically constrain and unjustifiably constrict the reasonable and logical exercise of powers under the Treaty. Thirdly, flexibility in interpretation is needed if the Treaty is to achieve its entire scope in terms of its objective and purpose. It was for the above reasons that this Court adopted a more liberal, purposive and functional approach to interpretation.

31. Furthermore this Court in the *Timothy Alvin Kahoho* case (Supra) also noted the danger of having several interpretations to a Treaty and relying on the *International Law Commission (ILC) Report* of 1966 agreed with the text in that Report that:

“[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effect, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted – [see *YBILC 1966 II 219, para.6*]”.

32. In this matter a lot of emphasis and argument has centred on the wording “Any person who is resident in a Partner State...” in Article 30 of the Treaty. The invocation therefore of the words “...any person who is resident in a Partner State...” in Article 30 of the Treaty as a bar for the Appellant to bring a reference to the First Instance Division of this Court and to subsequently launch an appeal to this Court must be carefully looked at in their context and in light of the objects and purpose of the Treaty. First, with respect to matters factual, we wish to observe that Counsel for the Respondent in his written submissions stated that the Appellant swore an affidavit that he is “...a resident (sic) of 40 Alder Street, Apt box 9, Portland, Maine in the United States of America...”. In our view, that does not *ipso facto* mean that the Appellant is not a resident of any EAC Partner State as Counsel for the Respondent would have it.
33. It is important to clarify that the word “resident” can be used as an adjective or a noun (<https://dictionary.cambridge.org/dictionary> for the word “resident”). As an adjective it will refer to a class of persons “living or staying in a place” while as a noun it will signify a class of persons “who lives or has their home in a place”; thus it is possible to have a main or non-main residence. For purposes of Article 30 (1) it would have been useful to have the *travaux préparatoires* of the Treaty to resolve this definitely (*acte clair*); but we do not. We note, not without a little sadness, that all efforts by counsel for the Appellant to trace those documents at the EAC have been futile. The absence of the aid of the *travaux préparatoires* notwithstanding, we take the view that the wider meaning of residence, that is to say not being physically present in a Partner State, would better meet the object and purposes of the Treaty.
34. In this case, the affidavit cited by Counsel for the Respondent and which formed the basis of the Trial Court’s fleeting remark about the Appellant’s residence, does not state nor does the Appellant depone that he is “...a resident of Portland in the United States of America...”. The Appellant simply states that he is “of 40 Alder Street, Apt box 9, Portland, Maine in the United States of America” This erroneous description of the Appellant’s legal residence by Counsel for the

Respondent is fatal to his argument that the Appellant is resident in Portland. The Appellant on the other hand is however categorical in paragraph 1 of his affidavit that he is a "...Burundian male...". Furthermore the Appellant as Applicant in his Reference in the First Instance Division of this Court was clear that he is a citizen of Burundi, a Partner State of the EAC, and that his address for service shall be "...care of his Advocate Mr. Donald Omondi Deya, Advocate of ... Arusha, in the United Republic of Tanzania...". This is the same type of pleading that is found in the affidavit of *Mr Patrick Ntege in the Patrick Ntege* case (Supra) which involved Applicants operating in South Sudan (which at the time was not a Partner State). Secondly, with respect to the matter of interpretation, we think that a simple analogy to drive the point home may be made with a citizen of America who is ordinarily resident in Portland but who for purposes of work is resident in a EAC Partner State. Such a person can file a Reference under Article 30 of the EAC Treaty. On the other hand, the Appellant who is a citizen of Burundi (with a consequential legal right to be resident in Burundi) but for some reason happens to be residing in Portland, USA cannot in the meaning the majority have given to the term "any person who is a resident in a Partner State" file a Reference under Article 30 of the Treaty because at the time of filing the Reference the Applicant is not physically present in a Partner State. The Majority have also suggested that if the Partner States had wanted all citizens whether resident in or out of their territory to have access to this Court then in Article 30 (1) of the Treaty they would have used words like "...any person who is a resident of a Partner State..." and not "Any person who is resident in a partner State...". In our view, that clearly amounts to unequal and disproportionate access to justice as concerns foreign nationals on the one hand and East African Citizens on the other hand under the Treaty. The situation is worse when it is considered that on that reasoning Citizens of East African Community Partner States residing for any reason outside the Community would have lesser rights of access to their regional Court than their fellow citizens who are physically present within the East African Community.

35. Such a conclusion can only be the result of an excessively literal interpretation of the Treaty. For a Burundian citizen who has the right of residence in Burundi and actually has property there not being able to vindicate his rights as he has requested for under Articles 6(d) and 7(2) of the Treaty and Articles 15(1) of the Protocol simply because at the time of filing his Reference he was not physically present in Burundi or other Partner State of the EAC is to unjustifiably constrict the reasonable and logical exercise of benefits powers and rights under the Treaty. It further means that the Treaty by reason of Article 30 with respect to EAC citizens resident for whatever reason outside any Partner State in the context of the Treaty, lacks the flexibility to meet its objects and purpose of a people centred integration in which the people of East Africa have certain direct benefits enforceable at law by themselves and even by strangers. This in our considered opinion cannot and does not pass the test of interpreting the Treaty in Good Faith as provided for under Article 31 of the Vienna Convention. On our part, we agree with Counsel for the Appellant that a Good Faith broad and purposive interpretation of the term "any person who is a resident in a Partner State" in Article 30 of the Treaty should be adopted in order to meet the purposes,

objectives and principles of the Treaty. Adopting such an interpretation, we hold that any person resident in a Partner State inclusive of any citizen who by virtue of law has the right to residence in a Partner State has a right to file a Reference to vindicate his or her rights under Article 30 of the Treaty.

36. It is our view that treaty interpretation is akin to constitutional interpretation in that a treaty should be interpreted as a whole and not section by section as would an Act of parliament. To illustrate this point we look at Article 86 of the Treaty on the “Movement of Capital” which provides:

“...The Partner States shall in accordance with the time table to be determined by Council, permit the free movement of capital within the Community, develop, harmonise and eventually integrate their financial systems. In this regard, the Partner States shall:

(a)...

(b) ensure that the citizens of and persons resident in a Partner State are allowed to acquire stocks, shares and other securities or to invest in enterprises in other Partner States; and

(c) ...”

Here a literal meaning of the words “citizens of” and “persons resident in” a Partner State would suggest that citizens of Partner States where ever they may be residing should be allowed to move and invest their capital in other Partner States.

37. It is our considered view that the Framers of the Treaty could not have contemplated Partner States granting property rights (in stocks, shares and other securities) in their states to citizens of and residents in other Partner States and at the same time by reason of Article 30 (1) deprive those citizens not resident in a Partner State access to this Court to enforce and protect those same rights granted to them under the same Treaty. This in our view would be another absurdity which happily can be avoided by a correct interpretation of the Treaty.

38. We do not however agree with Counsel for the Appellant when he submitted that the cases of *Patrick Ntege (Supra)* and *Union Trade Centre (Supra)* pointed to what he referred to the practice and jurisprudence of this Court where sometimes the term “residents” was assimilated to “citizens” without focusing on the residency of the later. Both those cases did not involve citizens or corporations of Partner States said to be resident outside the territory of a Partner States and are therefore distinguishable.

39. We are alive to the decisions by the European Court of Human Rights that Member States can under their domestic laws restrict the exercise of certain rights for non-resident citizens like the right to vote is done in the United Kingdom [*Shindler V United Kingdom (1984/09) (2014) 58 EHRR 5*] *Doyle V United Kingdom 30158/06 (2007) ECHR 165*] even though qualifying commonwealth citizens who are resident in the UK are allowed to vote. However we find that this is not the Treaty position in EAC.

40. Academic and other writers have also had a chance to look at how courts interpret Treaties. David S. Jonas and Thomas N. Saunders writing on the subject “*The Object and Purpose of a Treaty: Three Interpretive Methods*” in the *Vanderbilt Journal of Transnational Law* (Vol 43 May 2010 No 3), identify 3 schools of treaty interpretation. First is the textualist school which looks at the treaty text

and its literal meaning. Secondly is the subjective school which primarily looks at the aim and intention of the parties. Finally the teleological school which first ascertains the object and purpose of the treaty then interprets it so as to give effect to that object and purpose. The authors suggest that the Vienna Convention is a compromise of all three approaches. According to them, treaty interpretation must rely primarily on the terms of a treaty while context and the treaty's object and purpose must inform its meaning. They however point out that the actual practice of interpretation has largely depended on the particular court in question.

41. Taking the European Union as an example, Anthony Arnall in his book *"The European Union and its Court of Justice"* observes that the European Court of Justice (ECJ) has taken a very restrictive approach for granting access to it by private parties and has no place for public interest litigation. The author writes:
- "...if the Court took a liberal approach on the question of the category of Acts susceptible to review and on the status of the European Parliament in annulment proceedings, its attitude to groundings of private parties has on the whole been more restrictive..."

The author then goes on to attribute this judicial self-restraint to the floodgate argument (the fear of being swamped with cases).

42. On the other hand Philomena Apiko of the European Centre for Development Policy Management (<https://ecdm.org/>) in his paper *"Understanding the East African Court of Justice"* points to how the court has actively ensured that the overall operational principles and objectives of the Treaty are enforced even where there has been debate over whether it had no express jurisdiction to do so; like in the area of human rights and trade. This suggests that this Court has always had a more liberal approach than the ECJ when it comes to the enforcement of Treaty rights. This position is well supported by another writer Ally Possi in his article *"The East African Court of Justice: Towards effective protection of human rights in East African Community"* (Max Planck Yearbook of United Nations Law, Vol 17. 2013). In that article, Ally Possi has pointed to the use by this Court of its interpretative jurisdiction in several cases to ensure that the Treaty principles and objectives are enforced. Other writers like Richard Frimpong Oppong (Asst Professor Faculty of Law, Thompson Rivers University, Canada) in his book *Legal Aspects of Economic Integration in Africa* Cambridge University Press (2011) (Para 5.4.1) points at the important role individual have to play in economic integration and any integration without them "suffers from inertia". He goes to write:

"...A key role to enhancing individuals' roles in economic integration is to grant them direct or indirect access to community institutions including the courts..."

Oppong however notes that of all regional courts the EACJ has the most liberal standing rules which save for the two month limitation period under Article 30 (2) of the EAC Treaty may lead to a flood of cases coming in. Prophetically he then goes on to state that standing under Article 30 of the EAC Treaty will have to be defined in a manner that:

"...balances the competing interests of member States, national courts, individuals and the ultimate goals of the community..."

All these writers point to a liberal and purposive approach that this Court has always adopted.

43. However there is no evidence as yet, that the approach of this Court to treaty interpretation when compared with that of the ECJ and other regional courts has led to the apprehended floodgate theory and should not in any way be viewed as a negative consequence of this Court's approach to Treaty interpretation.
44. Indeed where the Partner States have expressly restricted access to the Court and the Court's jurisdiction like in the two month time limit within which to file a reference under Article 30 (2) of the Treaty and or where an act, regulation, directive, decision or action has been reserved to an institution of a Partner State under Article 30 (3) of the Treaty then this Court has on the whole taken a restrictive approach to its application of these provisions with several filed references being dismissed for noncompliance with these provisions. Therefore the Court has always been mindful of the textual and subjective approach to interpreting the Treaty.
45. In the premise, our conclusion is that the Trial Court had jurisdiction to entertain the reference and accordingly Issue No. 1 is answered in the affirmative.
46. In the result, the Appeal has to be determined on the merits, a task to which we now turn.

Issue No.2: Whether the Court erred in law finding that the Respondent did not violate or infringe Article 6(d) and 7(2) of the Treaty; Article 15(1) of the Common Market Protocol; and/or Article 14 of the African Charter on Human and People's Rights.

Appellant's Submissions

47. The pith and marrow of the Appellant's case was that the Respondent State through the decision of its Supreme Court violated its own law and in so doing violated the Treaty. To support that contention, Counsel for the Appellant attacked the Judgment of the Trial Court on six broad fronts as summarised below.
48. The first front of attack was that the Trial Court erred in law by misapprehending his pleadings and submissions which had made it clear that he was faulting the Respondent for non-compliance with its international obligations, based on non-compliance with its national legal system. The Appellant drew our attention to Paragraph 62 of the Judgment appealed against which he claimed substantiated his complaint.
49. Counsel for the Appellants in further support of this front of attack submitted that the Trial Court erred in law by misapprehending the pleadings and submissions of the Appellant which had made it clear that the Appellant was not attacking any specific law of the Respondent state, but the judgment of the Supreme Court which had failed to apply a general principle of law and to recognise the legal and probative value of the Attested Affidavit which had been executed in accordance with legal system applicable at the material time. Paragraphs 62, 76, 81 and 83 of the Trial Court's judgment were invoked in attempted substantiation of the complaint. The Appellant's Counsel argued that in referring to the legal system of Burundi and the law and practice applicable in the country at the time, he was

referring not just to Burundi's enacted laws, but also its customary rules, general principles of law, and accepted practices. He argued that his contention on the legal and probative value of the Attested Affidavit executed by the Respondent State's Tribunals of residence rested on a general principle of Burundian Law, according to which an authenticated act, like an Attested Affidavit, is the genuine evidence of the content of the agreement between parties and can only be challenged through a judicial action for forgery. The Appellant stressed that the focus in attacking the Judgment of the Supreme Court was not law No. 1/004 of 9th July 1996 (which applied specifically to notarised deed executed by private notaries) but on the general principles applicable in the Burundian legal system to all authenticated acts.

50. The second front of attack was that the Trial Court erred in law by holding that the Appellant did not prove the violation of the rule of law principle enshrined in Article 6(d) and 7(2) of the Treaty. In that regard, the Appellant's Counsel referred to and criticised Paragraphs 76 and 82 of the Trial Court Judgment wherein the said court found that (i) the Appellant had not availed to the Court any Property Laws and, accordingly, any inferences of unequal enforcement of the law, non-supremacy of the law or inequality before the law remained unproven and were therefore unsustainable, and (ii) the onus lay with the Appellant to present 'evidence that was fully conclusive' in proof of the elements of the rule of law and the Appellant had failed to discharge that onus for the reason that he had presented no evidence beyond the impugned judgement of the Supreme Court.
51. Counsel for the Appellant reiterated that the Appellant was not attacking any specific law and, accordingly, non-production of Burundi's Property Laws was not material. Counsel argued that what the Appellant was required to establish were three elements, namely, (i) that the Respondent failed to recognise the legal and probative value of the Attested Affidavit No. 359/99 of 27th July 1999; (ii) that execution of the Attested Affidavit by the Tribunals of residence was part of the legal system of Burundi; and (iii) that in Burundi's legal system, authenticated deeds like Attested Affidavits executed by the Tribunals of Residence constituted genuine evidence of the agreement between the parties to them and that the contents thereof could only be challenged by taking special action for forgery, which was not the case in the instant matter. The Appellant's Counsel contended that the Appellant had proved those elements as elucidated below.
52. With regard to the proof of the allegation of the failure of the Respondent state to recognise the legal and probative value of the Attested Affidavit, the Appellant's Counsel submitted that the proof lay in the judgment of the Supreme Court of Burundi and the Attested Affidavit both of which were produced as attachments to the Reference. He further pointed out that the Respondent state did not challenge the production or question the veracity of either the said impugned Judgment or the Attested Affidavit.
53. With respect to the proof of the allegation that the execution of Attested Affidavits by Tribunals of Residence was part of the legal system of Burundi at the material time, the Appellant's Counsel placed reliance on the averments in the Reference, the Affidavit in support of the Reference and his own submissions in the Trial Court. Counsel pointed out that in its submissions, the Respondent never denied or contested the fact that the execution of Attested Affidavits by

the Tribunals of Residence was part of its legal system at the material time and that, to the contrary, the Respondent recalled in its submissions that during the scheduling conference on 13th June 2016, both parties agreed that on 27th July 1999, the Tribunal of residence of Musaga made an attested affidavit No. 356/99 in respect of the transactions questioned in the Burundi Courts. The same was also an agreed point at the Scheduling Conference on 9th May, 2017 before the Appellate Division. In further strengthening of this part of the argument, Counsel submitted that the Respondent had not in any way challenged any of the facts, evidence or documents as narrated and produced by the Appellant and, accordingly, his facts, evidence and documents were deemed to be admitted. Counsel further submitted that according to a well-known general principle of law, also applicable in international adjudication, uncontested allegations or admitted facts did not require further proof and the issue of burden of proof did not arise. Counsel invoked in aid the authority of the Permanent Court of International Justice and the International Court of Justice in the respective cases of *Case concerning certain German interest in Polish Upper Silesia [PCIJ: Series A, No. 7] 73*, and *Fisheries Case (United Kingdom V. Norway [ICJ Reports, 1951] 140* for the proposition that factual assertions which are not disputed by the adverse party need not be proved. Counsel also invoked Rule 43 sub rule (1) of our Court's Rules which provides that "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 opposite party in the pleading."

54. Regarding the proof of the allegation that in the Respondent's legal system, authenticated deeds like Attested Affidavits executed by the Tribunals of Residence constitute genuine evidence of the agreement between the parties to them and that the contents of such Affidavit can only be challenged by taking a special action for forgery, the Appellant's Counsel submitted that (i) from the narrative of facts in the Reference, the whole purpose of the process before the Tribunal of Residence of Musaga was to authenticate the sole Agreement between the parties; (ii) the Respondent had not contested the legal and probative value attached to those Attested Affidavits; (iii) in international law undisputed facts do not require further proof; (iv) Indeed the Respondent could not have challenged the legal and probative value of Attested Affidavits because, as the Appellant's Counsel pleaded in his submissions, that was an accepted general principle of Burundian Law, one whose manifestation, by way of illustration, was Article 46 of the Law No. 1 of 9th July, 1996 on the organization and functioning of the notary profession and the notaries statute, which provided that "the notarised deeds prepared in conformity with the provisions of that law shall be authentic and the findings therein may be subject to challenge only by taking an action for forgery."
55. Counsel for the Appellant also drew the Court's attention to Paragraphs 57, 58 and 59 of his submissions in the Trial Court the purport of which was that the Supreme Court of Burundi could not contest the authentic legal and probative value of the Attested Affidavits while recognizing the legal probative value of notarised deeds considering that notarised deeds are made by registered private notaries, while the Attested Affidavit, like the one in issue in the matter at hand, were made by a State Organ, namely, a Tribunal. Counsel wondered how one

could accord legal and probative value to a notarised deed made by a private notary and yet deny the same to an Attested Affidavit. Counsel submitted that in avoiding to pronounce itself on the legal and probative value of the Attested Affidavit in issue, the Respondent state through the decision of one of its organs, the Supreme Court, violated the principle of rule of law and the principle of protection of human rights enshrined in Article 6(d) and 7(2) of the Treaty, read together with Article 15(1) of the Protocol and Article 14 of the African Charter.

56. The third front of attack was that the Trial Court erred by requiring the Appellant to produce the full record of proceedings. Counsel for the Appellant drew our attention to Paragraphs 80, 81 and 84 of the Judgment appealed from in which the Trial Court held that the record of proceedings would have enabled it to evaluate the conduct of proceedings against Burundi's substantive and procedural law so as to determine the Supreme Court's adherence to the rule of law, or to determine whether the Supreme Court administered Burundian Law in an outrageous way, in bad faith, with wilful neglect of their duties, or conducted the proceedings in blatant violation of the substance of natural justice such as would engender international liability, and, in the result, the Trial Court was unable to determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether or not the resultant decisions was iniquitous and thus engendered the Respondent state's legal liability. Counsel for the Appellant contended that the judgment of the Supreme Court of the Respondent state contained sufficient evidence of the way the court dealt with the matter before it, and it was not necessary to produce the full record of proceedings for that purpose. In his view, the failure of the Respondent state to recognise the legal and probative value of the Attested Affidavit in question was self-evident in the Judgment of the Supreme Court and was conclusive evidence. It was also his view that the full record of proceedings would not have shown anything more, since what was at stake was the way the Supreme Court determined the matter. Counsel submitted that the sufficiency of the Judgment of the Supreme Court as evidence was further demonstrated by the fact that the Trial Court itself was able to find on the basis thereof all the irregularities it did and to conclude there from that they constituted on the face thereof, an internationally wrongful act attributable to the Republic of Burundi as manifest in Paragraphs 40-42 and 83 of the Trial Court's Judgement. In his opinion, the production of the full record of proceedings would only have been necessary if the Appellant was seeking from the Trial Court an appeal or review of the judgment of the Supreme Court, which was not the case.

57. The fourth front of attack was that the Trial Court erred in law by applying a standard of proof occasioned by charges against a state that were of exceptional gravity to a Reference that simply involved the failure to recognise individual property rights. Counsel for the Appellant referred to Paragraph 68 of the Trial Court's Judgment to highlight the Standard of proof applied by the Trial Court. Counsel pointed out that in the *Bosnia and Herzegovina vs. Serbia and Montenegro [ICJ Reports, 2007]* case which the Trial Court relied on for the position that international claims against states must be proved by evidence that is fully conclusive, the charge was one of exceptional gravity in that the Respondent state was accused of genocide – the most serious crime one can

imagine, a charge far removed in gravity from the instant one of failure to recognize individual property rights. Counsel urged that the common standard of proof for charges which are not of exceptional gravity is on the balance of probability or preponderance of evidence. Counsel rounded up this front of attack by contending that the Respondent state, which best knew its legal system, had not denied any of the relevant facts and such conduct should be considered sufficient evidence of the Appellant's allegations on the status of the Respondent's national legal system.

58. The fifth front of attack was that the Trial Court erred in holding that the way in which the Burundian Judiciary administered Burundian law did not violate the rule of law principle. Counsel for the Appellant pointed out that in Paragraphs 32, 33, 36, 77, 79, 84 and 87 of its impugned judgment, the Trial Court took the position that the action(s) of a judicial organ of a state could only be categorised as wrongful acts for the purpose of state responsibility where they reflect, blatant, notorious and gross miscarriage of justice for having been done in an outrageous way, in bad faith, with wilful neglect of duty, or in blatant violation of the substance of natural justice. Counsel submitted that those standards which were adopted by the Trial Court from Mexican claims trials in the cases of *B.E. Chattin (USA) Vs United Mexican State [1927 UNRIAA, Vol. IV] 282* and *Ida Robinson Smith Putnam (USA) Vs United Mexican States [1927 UNRIAA, Vol. IV] 151* were now obsolete and are superseded by the modern principles of International Law as reflected in the International Law Commission (ILC) Rules on International Responsibility of States, 2001, according to which any internationally wrongful act will generate international responsibility of a State even if it is not outrageous, done in bad faith or with wilful neglect, or whether or not it reflects a blatant, notorious or gross misconduct of justice. Counsel drew our attention to the provision Draft Article 2 of the *ILC Draft Articles on State Responsibility, 2001* which reads:

“There is an internationally wrongful act of a state when conduct consisting of an action or omission . . . constitute a breach of an international obligation of the state.”

He pointed out that the wrongful act is not qualified in any way. Counsel pointed out that the formulation of the applicable rule is consistent with international jurisprudence as propounded by both the I.C.J and its predecessor, the permanent Court of International Justice in the *case of United States Diplomatic and Consular Staff in Teheran (United State of America v Iran [ICJ Reports, 1980]* and *Phosphates in Morocco Case [PCIJ Reports, 1938, Series A/B, No. 74]*. Counsel for the Appellant further argued that International Law, as reflected in the ILC Draft Articles, does not make any distinction between wrongful act made by the Executive or Legislative branches of the state on the one hand, and wrongful acts committed by the State's Judiciary on the other hand. As far as actions complained of are attributable to the State, all of them are internationally wrongful acts and generate the international responsibility of the State concerned, Counsel contended.

59. In the alternative, Counsel for the Appellant argued, if there was a requirement for the Appellant to prove that the Supreme Court of Burundi administered Burundian Law in an outrageous way, in bad faith, with wilful neglect of duty,

or conducted the proceedings in blatant violation of the substance of natural justice, it was clear from the Judgment of the Trial Court that it had found that the Supreme Court of Burundi's Judgment had depicted "a cavalier judicial approach" which was a violation of the rule of law principle.

60. The sixth front of attack was that the Trial Court erred in law in holding that the rights of the Appellant or his heirs or assigns to peaceful enjoyment of property were not violated. In that regard, Counsel for the Appellant drew our attention to Paragraphs 88 and 90 of the Trial Court's Judgment. In those Paragraphs, the Trial Court decried the Appellant's non-disclosure of the specific laws which were allegedly contravened by the Supreme Court Judgment and the consequential non-establishment of a nexus between authentic notarised deeds and Attested Affidavits, and concluded that without such non-disclosure and nexus, it was unable to fault the legality of the Supreme Court's decision on the issue.
61. Counsel for the Appellant argued that the Appellant was not complaining of specific laws of Burundi but about the Supreme Court Judgment's violation of the Rule of Law Principle in the Treaty by dint of the Court's failure to recognise the legal and probative value of the Attested Affidavit No. 356/99 of 27th July, 1999 contrary to the general principle of law in Burundian Law according to which an authenticated act is genuine evidence of the agreement between the parties and cannot be challenged, except by taking a special action for forgery which was never undertaken; with the consequence that the Supreme Court violated the property rights of the Appellant. According to Counsel for the Appellant, the proof of the Appellant's Property rights was the Attested Affidavit itself which showed that at the material time, he bought the land in question as part of a triple transaction that was immortalised in a single Attested Affidavit. In further argument, Counsel for the Appellant contended that the Respondent state did not challenge that the sale occurred but to the contrary, the sale was admitted in the Respondent's submissions, in the Section on points of Agreement during the scheduling conferences in both the Trial Court and in the Appellate Division. He also contended that the Trial court itself had in Paragraph 92 of the Judgment implicitly recognised that the Appellant had in the past property rights on the parcel of land in question which he subsequently alienated by subdivision and sale to new buyers.

Respondent's Submissions

62. Counsel for the Respondent submitted that the Trial Court lacked Jurisdiction *ratione personae* to entertain the Reference and thus the Appeal was academic. He also took the stand that the Appellant had not passed the tests established by the Court in the case of *Angella Amudo vs The Secretary General of the East African Community*, EACJ Appeal No. 4 of 2014 [Unreported] and *Simon Peter Ochieng and Another vs The Attorney General of the Republic of Uganda*, EACJ Appeal No. 4 of 2015 [unreported]. Those tests were that it was for the Appellant to identify and establish what the alleged error of law was and how it would invalidate the decision complained of. We understood the gist of Counsel for the Respondent's submission to be that the Appellant had not identified the error(s) of law in the impugned Judgment or established them and/or demonstrated that such errors invalidated the Judgment of the Trial Court. Counsel fully supported

the Judgment of the Trial Court and implored us to dismiss the Appeal with costs.

63. The above submission by Counsel to the Respondent was expressed to apply to not only issue number 2 but also to issue numbers 3, 4, 5 and 6. We will accordingly not reproduce the Respondent's submissions when we deal with the other issues.

Our Determination

64. We have read the record of Appeal and weighed the rival submissions. Having done so, we have taken the following view of the matter.
65. The submissions made on behalf of the Appellant have with commendable lucidity and in detail identified the errors of law allegedly made by the Trial Court. The real issue for determination therefore is whether those alleged errors have been established and if so, whether a different conclusion would have been made by the Court but for those errors. We bear in mind and reiterate here that the cardinal complaint of the Appellant is that the Trial Court erred in law in finding that the Respondent did not violate or infringe Articles 6(d) and 7(2) of the Treaty, Article 15(1) of the Common Market Protocol and/or Article 14 of the African Charter. Indeed, all the six fronts of attack against the conclusion of the Trial Court are no more than sub-issues of that cardinal complaint. We now turn to an examination of those sub-issues.
66. The first alleged error of law with respect to the issue under consideration is that the Trial Court misapprehended the pleadings and submissions of the Appellant and thereby approached the case on a wrong basis. The foundation of this complaint is that the Trial Court understood the Appellant case to be one questioning the Supreme Court of Burundi's infringement or violation of specific internal laws whereas the Appellant's grievance was that the Supreme Court had failed to apply a general principle of law known in the Burundian legal system as it stood at the material time that all authenticated acts constituted genuine evidence of an agreement between the parties thereto unless voided for forgery, a situation which did not exist in this case.
67. In our view, the Appellant's complaint that the Trial Court misapprehended his case cannot be examined only in the context of the specific passages of the Judgment chosen by Counsel for illustration, namely, paragraphs 62, 76, 81 and 88, but must be considered in the context of the said Judgment as whole. Now, when we examine the complaint in the context of the judgment as a whole, we find the same to be devoid of merit for the following reasons. The concise statement of the Appellant case was twice made in the judgment. The first statement is in Paragraph 9. It is in these terms: -

“The Reference is premised on the failure of the cited Court in the Republic of Burundi to acknowledge the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999, despite it having been executed by State Organs.”

The second statement is in Paragraph 37 and is in the following terms:-

“In a nutshell, the Applicant faults the Supreme Court decision that is in issue presently for misapplying the law of Burundi; not providing the reason that underscored its conclusions depriving him and possibly other

Burundi and EAC nationals of their land, and for creating legal uncertainty by not providing adequate guidance on the legal and probative value of Attested Affidavits.”

To our minds, those two Paragraphs demonstrate eloquently that the Trial Court perfectly understood the Appellant’s case, which was that the Supreme Court of Burundi’s Judgment complained of had failed to acknowledge the legal and probative value of the Attested Affidavit, and thus misapplied the law of Burundi and thereby deprived the Appellant of his property rights. And in Paragraph 62, the Trial Court made it clear that in its understanding, the Appellant was not challenging the impugned Supreme Court Judgment’s inconsistency with the internal law of Burundi *per se*, but rather, faulted the Respondent state for non-compliance with its international obligations under the Treaty and the African Charter. In our opinion, the reference to the Appellant’s non proof of the Property Laws of Burundi went to the reason(s) why the Trial Court held against the Appellant in light of the Court’s comprehension of the Appellant’s case as demonstrated above. The validity of those reasons is not germane to the issue of the Trial Court’s misapprehension of the Appellant’s case and will accordingly be examined where they are pertinent.

68. With respect to the charge that the Trial Court erred in holding that the Appellant did not prove the violation of the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty, it is apposite to concretize the said principle. The Trial Court in Paragraph 71 of the Judgment adopted the definition of the principle of the rule of law principle encapsulated in a Report of the (UN) Secretary General on *the Rule of law and Transitional Justice in conflict and post conflict societies* [UN Docs/2004/616 92004] which was rendered in the following words:

“It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.”

We entirely agree with the above formulation of the concept and principle of the rule of law and would endorse it for application in this Court in appropriate cases.

69. In the context of Article 6(d) and 7(2) of the Treaty, the principle of rule of law means that a Partner State, through the instrumentality of its officials, organs and institutions at whatever level of the State, is accountable and subject to the law which should be publicly promulgated and the state should ensure that such law is equally enforced and independently adjudicated. A Partner State should also take measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, separation of powers, legal certainty, avoidance of arbitrariness, as well as procedural and legal transparency in its system.
70. It is apparent from the submissions made on behalf of the Appellant that his

complaint was not with respect to any property law of Burundi but with the Supreme Court's failure to recognise the legal and probative value of Attested Affidavits, and specifically Affidavit No. 359/99 of 27th July, 1999. According to Counsel, such Affidavits, unless invalidated for forgery in proceedings for that express purpose, constitute genuine evidence of the Agreement between the parties in Burundi's legal system and their legal and probative value is an accepted principle of Burundi law. Counsel for the Appellant had referred the Trial Court to Law no. 1/004 of Burundi which he contended was but an exemplification of the principle in Burundian Law that notarised acts have the effect he had submitted. Counsel's argument was that if a notarised deed prepared by private person's conferred authenticity on the facts stated therein, then by parity of reasoning, an Attested Affidavit which is made by a public official such as the Tribunal of Residence should confer the same character on the facts stated therein.

71. The Supreme Court of Burundi dealt with the matter of Attested Affidavits at Page 3 of its Judgment as follows:

“Article 46 of the Law No. 1/004 of 9th July 1996 on the organisation and functioning of the Notary Profession and the Notaries Statute provides that notarised deed prepared in conformity with the provisions of the present law shall be authentic. The findings therein may be subject to challenge only by taking action for forgery. It follows from this provision that the notarised deed has evidential value that confers undisputed character on the facts evoked and established by the notary except where the authenticity is challenged for forgery.

This argument is legally baseless because Law No. 1/004 of 9th July, 1996 on the Organisation and functioning of the Notary Profession and the Notaries Statute does not confer authenticity to the Attested Affidavit established by the Tribunals of residence [*Tribunaux de residence*].”

72. The Trial Court after setting out the above passage from the Judgement of the Supreme Court delivered itself as follows at Paragraph 90:

“Without the benefit of other internal laws that might have established the nexus between authentic notarised deeds and Attested Affidavit, we are unable to fault the legality of the Supreme Court's decision on that issue. Needless to say, the onus was on the Applicant to establish this nexus and prove its case to the required standard. In our considered view, he fell short of the standard of proof that was required of him.”

73. Now, the crux of this aspect of the Appeal is whether the Trial Court erred in law in finding that the Appellant had not established that the Supreme Court of Burundi's Judgment could be faulted for not complying with the rule of law principle that the laws of the country must be certain and should be applied equally for the reason that the Appellant had not availed to the Trial Court the Property Laws of Burundi which might have established the nexus between authentic notarised deeds and Attested Affidavits and, consequently, the Trial Court could not establish whether the Supreme Court ignored the legal and probative value of the Attested Affidavit No. 359/99 of 27th July, 1999.

74. In International Courts such as the EACJ, as in National Courts, the burden of proof is on whoever asserts a fact or proposition of law essential to the success of

his/or her case. This rule of adjective law is subject to an exception which covers admissions, presumptions, judicial notice and estoppel as may be appropriate (see *Union Trade Centre Limited (UTC) V The Attorney General of Rwanda*, [Appeal No. 1 of 2015] [unreported] and *Henry Kyarimpa v The Attorney General of Uganda*, [Appeal No. 6 of 2014] [unreported]). And we are in agreement with the submissions of Counsel for the Appellant that the normal standard of proof in the civil causes canvassed before our Court is on the balance of probabilities, also referred to as the preponderance of evidence. In this connection, we again agree with Appellant's Counsel that the Trial Court erred in calling for evidence which was fully conclusive in proof of the elements of the rule of law violated. The Trial Court derived such a standard from the cases of *Bosnia & Herzegovina vs. Serbia & Montenegro* (Supra) which related to claims against a state involving criminal charges of exceptional gravity. The charge against the Republic of Burundi in this case was obviously not in that league.

75. We next ask whether the Trial Court's error of law in adopting the wrong standard of proof was material. In our view, it would have been so only if on a proper appreciation of the case, it could be concluded that had the Trial Court applied the normal standard of proof, namely, on a balance of probability, it would have arrived at a different conclusion. We shall thus answer the question definitively when we consider below whether the Appellant had proved his case on a balance of probability.
76. We further agree with the submissions of Counsel for the Appellant that what he was required to prove to succeed in his contention in the Reference that the State of Burundi, through its Supreme Court's decision, had violated the rule of law principle was that (i) execution of Attested Affidavits by the Tribunals of residence was part of the legal system of Burundi, (ii) in the Burundi legal system authenticated deeds like Attested Affidavits so executed constituted genuine evidence of the agreement between the parties to them and the contents thereof could only be challenged by taking special action for forgery, and (iii) the Respondent state, through the decision of the Supreme Court complained of, failed to recognise such legal and probative value with respect to Attested Affidavit No. 359/99 of 27th July, 1999. To that end, the Appellant contended that he had proved that the execution of Attested Affidavits was part of the legal system of Burundi and that such instruments constituted authentic evidence of the agreement between the parties thereto by his statements in the Reference and his supporting affidavit which were not contradicted by the Respondent, and also by the admissions and concessions of the Respondent in the Scheduling Conference Notes in both the Trial Court and the Appellate Division. As regards, the non-recognition of the legal and probative value of the said instruments, it was the Appellant's case that the proof thereof was to be found in the Judgment complained and the Attested Affidavit by themselves without further ado.
77. On a careful consideration of the matter we have come to the conclusion that the Appellant did not prove his case to the requisite standard of proof, namely, on a balance of probability for the following reasons. First, the averments in the Reference and the depositions in the Reference in the Supporting Affidavit to the effect that Attested Affidavits were part of the Burundi legal system and they constituted authentic evidence of the agreement between the parties thereto

were not statements of facts. They were Statements of the law of Burundi. As statements of law, they were not amenable to the general principle of law in adversarial proceedings which is encapsulated in Rule 43 of the Rules of this Court that factual averments which are admitted or deemed to be admitted need not be proved. And obviously statement of law by a party in his pleadings, in his affidavit or in his submissions, or howsoever else conveyed to the Court and however eloquently so are not binding on the Court. They remain no more than a party's or Counsel's view of the law. In our considered opinion, to prove that a particular proposition is a principle of law or is part of the legal system of a particular country, it is necessary to establish that it is either codified in the legal instruments of that country; or it is a custom or practice having the force of law in that country; or it is espoused in either the jurisprudence of the highest courts of that Country or in the juristic works of legal Scholars of eminence in books or in journals of reference; or expert evidence on the law of the country is adduced at the trial. And such proof can only be made by producing to the Court either the instruments or publications bespeaking to such matters or expert evidence on the legal system. They are not matters to be proved by the word of a party or his Counsel however solemnly expressed. The Appellant did not do anything of the sort. That being so, he did not obviously establish that the Attested Affidavits had the legal or probative value he claimed. In the premises, we are of the persuasion that the Appellant failed to discharge his burden of proving that the Supreme Court of Burundi failed to acknowledge the legal and probative value of the Attested Affidavit in violation of the law or principles of law in Burundi. And that is all the more so when cognizance is taken of the Supreme Court's categorical rendition that law no. 1/004 of 9th July 1996 on the organization and functioning of the Notary Profession and Notaries Statute does not confer authenticity to the attested Affidavits established by Tribunals of residence. In the premises, we uphold the Trial Court's findings that the Appellant having failed to avail to it any property laws or otherwise establish a nexus between authenticated deeds and Attested Affidavits, he fell short of proving that the Respondent state failed to recognise the legal and probative value of the Attested Affidavit of 27th July 1996 and thereby infringed the rule of law principle in Articles 6(d) and 7(2) of the Treaty.

78. With respect to the Appellant's grievance that the Trial Court erred in law by requiring the Appellant to produce the full record of proceedings in the Supreme Court of Burundi for the purpose of enabling the Trial Court to evaluate the conduct of those proceedings against Burundi's substantive and procedural law so as to determine the Supreme Court's adherence to the rule of law, or to determine whether the Supreme Court administered Burundian law in an outrageous way, in bad faith, with wilful neglect of duty, or in breach of the rules of natural justice such as would engender international liability, we accept the Appellant's submission that the Trial Court erred in so demanding for the full record for the simple reason that it is evident that the Appellant's Reference was grounded on the alleged failure of the Respondent state through the Judgment of its Supreme Court to apply Burundian Law and deviation from a principle of the Burundian legal system by failing to recognise the legal and probative value of the Attested Affidavit Number 356/99 of 27th July 1999 and not in the conduct

of the proceedings by that Court. In those circumstances, the production of the record of proceedings was wholly unnecessary. Having said that, we must also say that had the Appellant's case hinged on the conduct of proceedings in the Burundi Supreme Court rather than the resulting Judgment and its effect, the reasoning of the Trial Court in decrying the non-production of the record of proceedings would have been faultless.

79. With respect to the complaint that the Trial Court was in error in holding that the actions of a judicial organ of a state could only be categorised as wrongful acts for the purpose of state responsibility where they reflect blatant, notorious and gross miscarriage of justice for having been done in an outrageous way, in bad faith, with wilful neglect of duty, or in blatant violation of the substance of natural justice, we completely agree with the excellent submissions by Counsel for the Appellant that the holding of the Trial Court is without support in international law as it stands today. The Trial Court's view was informed by the decisions of the Mexican claims commissions in the cases of *B.E Chattin (USA) vs United Mexican States (supra)* and *Ida Robinson Smith Putnana (USA) Vs United Mexican States (supra)*. In our considered opinion, those decisions are not expressive of modern international law. In that regard, we recall that this Court held in the *Henry Kyarimpa Case (Supra)* that the law of state responsibility is well articulated in the International Law Commission's (ILC) *Draft Articles on responsibility of States, 2001* which we held to be a codification of customary international law. Draft Article 2 provides that:-

“There is an internationally wrongful act of a state when a conduct consisting of an action or omission . . . constitutes a breach of an international obligation of the State.”

Two things are clear from this provision. One, International Law does not differentiate between wrongful acts of different organs or institutions of the State. The governing principle is that of undifferentiated attribution of State action. It matters not whether it is an executive, legislative, or a judicial act or omission which is complained of. Two, the act or omission need only be wrongful to engender international responsibility of the State. There is no general requirement that it should be shown to have been outrageous, done in bad faith or with wilful neglect, or to be a blatant miscarriage of justice.

80. The above view is fortified by a number of authorities cited by Counsel for the Appellant. In *Phosphates in Morocco Case (supra)*, the Permanent Court of International Justice held that international responsibility derives from an act being attributable to the state which is contrary to the Treaty Rights of another State. And in the *United States Diplomatic and Consular Staff in Tehran Case (supra)*, the International Court of Justice opined that in order to establish the responsibility of the Islamic Republic of Iran:

“First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under the Treaties in force or under any other rules of international law that may be applicable.”

It is thus patently clear that it is the objective contradiction between the impugned act or omission of the State and its obligation(s) under International Law which

gives rise to its international responsibility.

81. In the above premise, we find and hold that the Trial Court erred in the limited view it took that the rule of law principle in the Treaty could not be said to be violated unless it was shown that the Burundian Judiciary had acted in a manner which could be categorised as a blatant, notorious or a gross miscarriage of justice. All that was required to engender international responsibility of the State was a finding that the impugned decision was inconsistent with Burundi's International Obligation under Articles 6(d) and 7(2) as read with the protocol and the African Charter.
82. We do not therefore consider it necessary or desirable to deal with Counsel for the Appellant's alternative submission that if there was a requirement for proof of a blatant, notorious and gross miscarriage of justice such proof was evident in the Supreme Court's impugned Judgment which was criticised by the Trial Court quite trenchantly. The reason for our declining that invitation is that the Appellant's Reference was not founded on the manner in which the Supreme Court of Burundi had conducted itself but on its alleged failure to apply Burundi's internal law.
83. As regards the complaint that the Trial Court erred in finding and holding that the rights of the Appellant or his heirs and assigns to peaceful enjoyment of property were not violated, we only need to state that as the alleged property rights were predicated on the alleged legal and probative value of an Attested Affidavit in the Burundi legal system, a claim which we have found to be unproven, the holding of the Trial Court could not in justice or logic be faulted.
84. The upshot of our consideration and determinations so far is that we agree with the Trial Court that the Appellant fell far short of discharging his evidential burden and accordingly the Trial Court was not in error in finding that the Respondent did not violate or infringe Article 6(d) and 7(2) of the Treaty; Article 15(1) of the Protocol; and/or Article 14 of the African Charter.
85. In the result, issue no. 2 is answered in the negative.

Issue No.3: Whether the Trial Court erred in law and/or committed a procedural irregularity by questioning, *suo motu*, the accuracy of the Appellant's assertions which were not challenged by the Respondent and/or the *locus standi* of the Appellant.

Appellant's Submissions

86. The Appellant's complaint is that Trial Court held that he had not proved his case with regard to both the violation of the rule of law principle and his property rights by questioning the Appellant's averments regarding the Respondent's own legal system which the Respondent state had not challenged, and which it had therefore admitted.
87. Counsel for the Appellant submitted that the Respondent state knew its own legal system better than anyone else and had it found that the averments of the Appellant on the Burundi legal system were wrong, it would certainly have challenged them. He faulted the Trial Court for questioning *suo motu*, the accuracy of the Appellant's submissions which were not challenged by the Respondent. Counsel submitted that, in the circumstances, the Trial Court

favoured the Respondent by raising a problem where there was none and finally disposing of the matter on its own unfounded doubt.

88. Counsel for the Appellant also complained that the Trial Court in finding that there was no evidence of any subsisting proprietary interest vested in the Appellant had in effect questioned his *locus standi*, an issue which was not raised by the Respondent.
89. Counsel submitted that the Trial Court erred in law and/or committed a procedural irregularity by questioning *suo motu*, the *locus standi* of the Appellant. In his view, such an issue should have been considered in terms of admissibility of the Reference and not in terms of the merits of the case. Furthermore, Counsel argued, the Trial Court in questioning the Appellant's *locus standi* contradicted itself for it had held that the Appellant had established a cause of action or sustainable claim against the Respondent on the basis that he was contending that his property rights had been violated as a result of a Supreme Court decision that allegedly contravened Articles 6(d) and 7(2) of the Treaty.

Respondent's Submissions

90. The Respondent's submission, which is captured at Paragraph 40 herein in respect of issue no.2, was meant to be the answer to issue numbers 3, 4 and 5. That submission was to the effect that (i) the merits of the Appeal were an academic exercise unworthy of the court's time as the Trial Court lacked jurisdiction *ratione personae* to entertain the Reference, and (ii) the Appellant had not demonstrated that the Trial Court had committed an error of law or a procedural irregularity and that such error or irregularity affected the outcome of the Appeal.

Our Determination

91. Having considered the above arguments, we take the following view of the matter.
92. The Appellant alleged definite errors of law and procedural irregularity on the part of the Trial Court, and thus this Appeal has passed the threshold test for consideration on the merits. And we have found in issue no. 1 that the Court had jurisdiction *ratione personae*. We must therefore examine the merits of the Appellant's complaints under this issue.
93. We are of the persuasion that the Appellant's complaints are on a careful consideration of the Judgement of the Trial Court devoid of merit. The Complaint about the Trial Court questioning the Appellant's averments regarding the legal system of Burundi when those assertions were not denied by the Respondent State is misconceived. We have stated elsewhere in this Judgment that the notion of implied admissions by dint of the law of pleadings applies only to factual averments. We have also stated that the Appellant's averments about the legal system of Burundi and legal principles were not factual averments but averments of law which were not binding on the Trial Court. Consequently, we hold that the Trial Court did no err in law as alleged by questioning such averments and delving into their proof or otherwise. With respect to the complaint about the Appellant's *locus standi*, we find the same to be predicated on a misapprehension of the substance of the Trial Court's Judgment. The said Court's finding that the

Appellant had no vested proprietary interest in the land subject matter of the Reference was the inevitable sequel to the finding that the Appellant had not proved satisfactorily that the Attested Affidavit he relied on had the legal and probative value he claimed it to have under the legal system of Burundi. The finding was not a finding of the Appellant's want of *locus standi* strictly speaking and the criticism that the Trial court raised the issue *suo motu*, is in our view, a mischaracterization of the Trial Court's conclusion on that aspect of the matter. With regard to the alleged contradictions in the Trial Court's Judgment, we find none. The Court was logical in its conclusions and expressed them lucidly. We find no contradiction whatsoever between a finding that a cause of action is disclosed and a finding that an alleged right is not established.

94. In the result, issue no. 3 is answered in the negative.

Issue No.4: Whether the Court erred in law and/or committed a procedural irregularity by failing or omitting to exercise its inherent power to seek from the parties any information the lack of which would have been decisive to the success of the Reference.

Appellant's Submissions

95. This issue is predicated on the Trial Court's insistence that the Appellant ought to have produced the property laws of Burundi and the proceedings before the Supreme Court of Burundi to enable it determine the Appellant's contention that the Respondent had contravened the rule of law principle in Articles 6(d) and 7(2) of the Treaty as well as his property rights under Article 15(1) of the Protocol and/or Article 14 of the African Charter.

96. Counsel for the Appellant argued that if the Trial Court had a doubt on whether the execution of the Attested Affidavits by Tribunal of residence was part of the Respondent state's legal system at the relevant time, and whether according to the Burundian legal system such authenticated deeds have a special legal and probative value which can only be questioned through the special action for forgery, the Trial Court should have used its inherent power to ask both parties to provide the information it needed. Counsel contended that as a matter of principle any International Court has the inherent power to require such additional evidence from the parties in the interest of justice. He drew our attention to the Rules of the International Court of Justice, the African Court on Human and Peoples' Rights, and our own Rule 1(2) which provides that –

“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.”

97. Counsel further submitted that the Trial Court ought to have requested any further or better information from either or the parties in order to render substantive justice in the case.

98. The Respondent did not argue this issue separately.

Our Determination

99. Although we are in no doubt that the Trial Court had the inherent power and discretion under Rule 1(2) to call for additional evidence to meet the interest of

justice, the onus was on the Appellant to prove his case by calling such evidence as was relevant. The Trial Court cannot in fairness be criticized for not coming to the aid of the Appellant by invoking its inherent power to plug the gaps in the Appellant's case. In any case, procedural irregularities can only be committed where there is deviation from a prescribed practice and procedure. We observe that there is no prescription in the Rules for the Trial Court to call for additional evidence or substantiation of asserted legal propositions.

100. In the result, issue no. 4 is answered in the negative.

Issue No. 5: Whether the Court erred in law or committed a procedural irregularity by failing to provide or prescribe a remedy for the violations of the Appellant's rights to due process as recognized by the court

Appellant's Submissions

101. Counsel for the Appellant submitted that the Trial Court erred in law and/or committed a procedural irregularity by failing to provide or prescribe a remedy for the violations of the Appellant's rights to due process as recognised by the said Court.

102. Counsel supported his arguments by reference to the findings and observations of the Trial Court with respect to the impugned Judgment of the Burundi Supreme Court in Paragraphs 40, 41, 42, 83 and 84 of its Judgment. He submitted that the Trial Court's finding amounted to blatant, notorious and gross miscarriage of justice but the Court failed or neglected to draw the only logical conclusion therefrom, namely, that the Respondent State had violated its obligation to abide by the principles of rule of law as prescribed by Articles 6(2) and 7(2) of the Treaty and that the Appellant was entitled to seek a remedy.

103. Counsel further submitted that the Trial Court erred in law in finding an internationally wrongful act relating to the rule of law principle and attributable to the Respondent State and then concluding that there wasn't sufficient proof of the violation of the rule of law principle and there was no remedy to be granted to the Appellant.

104. The Respondent did not argue this issue separately.

Our Determination

105. It is necessary to set out *in extenso* the Paragraphs of the Trial Court's Judgment referred to by Counsel for the Appellant for a proper appreciation of the sting of his argument.

106. In the said Paragraphs, the Trial Court dealt with the matter as below:

"40. We have carefully considered the impugned judgment, as well as the rival submissions of the parties in this matter. Without delving into intrinsic considerations of the merits of the said judgment viz a viz the principles of good governance and rule of law, at its face value we observe that the judgement depicts a cavalier approach to an extremely serious judicial function. As a basic requirement and in accordance with the principles of judicial conduct enumerated above, judgements should depict the laws or legal arguments that underscore their conclusions, stated in a coherent

and logical manner. However, the judgement in issue presently depicts an unreasoned judgment that is quite dismissive of the issues raised on appeal. It does not explain the court's deference to one position as against another; neither does it clarify the scope of the subject matter in issue before it.

41. We are mindful of the possibility that judgements from countries of civil law background might take on a different form from those originating from common law jurisdictions. However, we take the view that the Bangalore Principles that provide minimum standards of judicial office holders are universal in outreach and application and are applicable to both civil and common law jurisdictions. On that premise, in the absence of coherent legal justification for the conclusions arrived at, a cursory glance at the impugned judgment would suggest a blatant disregard to due process of the law; as well as an apparent indifference to the universal standards of judicial practice embodied in the Bangalore Principles of Judicial Conduct. In our view, this is a clear injustice to the parties to the dispute.
42. We are, therefore, satisfied that the impugned decision of the Burundi Supreme Court would prima facie amount to wrongful practice that is attributable to the Republic of Burundi under Article 4(1) of the ILC Articles on State Responsibility. We so hold.
83. With regard to the impugned judgment itself, we do find that the refusal or omission by any court to provide the legal reasoning and justifications that underscore its conclusions does constitute unacceptable judicial conduct and wilful neglect of the court's duty. Where such court is the apex court of the land, such an unconventional approach to adjudication entails an unacceptable affront to recognized standards of judicial conduct in so far as it negates the opportunity to coherently lay down stare decisis to guide the lower courts. Nonetheless, we do recognize that a decision may only be rendered iniquitous and, therefore, susceptible to international liability where it is the culmination of such procedural defects as would make it impossible for it to be just. See *B. E. Chattin* (supra).
84. In the instant case, in the absence of the record of proceedings, we are unable to determine the extent of the Supreme Court's alleged non-compliance with Burundi's legal regime so as to make a justifiable finding on whether or not the resultant decision was iniquitous and thus engendered the Respondent State's legal liability. We do, therefore, find that the Applicant has not satisfactorily proved the violation of the principle of rule of law enshrined in Articles 6(d) and 7(2) of the Treaty. We so hold."
107. It is evident from those findings and observations that in the view of the Trial Court, the Judgment of the Burundi Supreme Court depicted a cavalier approach to the judicial function, it was unreasoned, it was a blatant disregard for the due process of the law, it was indifferent to the universal standards of judicial practice, it was a clear injustice to the parties, and it was in totality tantamount to a wrongful practice that was attributable to the Republic of Burundi.

108. In those premises, the Appellant's complaint that the only logical conclusion by the Trial Court should have been that, by that decision, the Respondent infringed the rule of law principle in Articles 6(d) and 7(2) of the Treaty and a remedy ought to have been provided would *prima facie* appear to be unassailable.
109. However, in our considered opinion, the argument is, on a close examination of the pleadings in the Reference built on quick sand. We say so for we have repeated time without number in this Judgment that the Appellant's complaint in the Reference was that the Supreme Court of Burundi failed to recognise the legal and probative value of the Attested Affidavit No. 356/99 of 27th July 1999 as an authenticated deed in the Burundian legal system and by so doing contravened the internal law of Burundi and consequently the Treaty. And the pertinent relief sought was that such actions and omission were unlawful and an infringement of Articles 6(d) and 7(2) of the Treaty; Articles 15(1) of the Protocol and Article 14 of the African Charter. Nowhere in the pleading did the Appellant complain of a violation of his rights to due process of the law or any of the matters that the Trial Court has so eloquently adverted to in the aforesaid cited passages. In our adversarial system of litigation, it is settled law that the Courts will not grant a relief which is not prayed for and that the reliefs prayed for must emanate from the pleadings. In the instant matter, it is clear that the Appellant was praying this Court to fault the Trial Court for declining to grant relief which was neither prayed for nor emanated from the pleadings. That prayer could not pass legal muster. The Appellant's arguments though academically sound must be and are rejected by us by reason of the matter having not been pleaded and argued.
110. We are nonetheless constrained not to pass this matter without observing that had the matter been pleaded and argued before the Trial Court, the Trial Court's *obita dictum* on the manner in which the Supreme Court of Burundi handled the matter before it could have amounted to a breach of the Treaty on the ground that the principle of the Rule of law sanctified in Articles 6(d) and 7(2) of the Treaty does not countenance a cavalier approach to the judicial function, it does not contemplate unreasoned decisions which are in essence an exemplification of arbitrariness, it does not rejoice in a blatant disregard for the due process of the law, it calls for deference to the universal standards of judicial practice, and it is hostile to clear injustice to the parties.
111. In other words our dismissal of the Appellant's challenge to the Trial Court's Judgment under this limb is not to be construed as a finding that the reasoning of the Trial Court in the Paragraphs highlighted was not sound. On the contrary, it is solid reasoning which is manifestly justified by a cold logical appraisal of the impugned Judgment of the Supreme Court of Burundi and we entirely agree with the Trial Court's judgment. What we are positing is that such reasoning, flowing as it does, not from the pleadings in the Reference but from Trial Court's academic appreciation of the import of the rule of law principle in the Treaty is strictly speaking *obiter dicta* and, as such, cannot be used by the Appellant as a peg for relief.
112. We have said enough to answer issue no. 5 in the negative.
Issue No. 6: Whether the Trial Court erred in law by finding that the Applicant was not entitled to the remedies sought.
113. The Trial Court held that the Appellant did not prove infringement of either

Articles 6(d) or 7(2) of the Treaty; or Articles 15(1) and 14 of the Protocol and African Charter respectively; and that no property rights attributable to the Appellant were established. It accordingly declined to grant orders for the restoration of the Appellant's Property Rights or a progress report in respect thereof.

114. Needless to state, we could only find that the Trial Court erred as alleged if, and only if, we ourselves had come to a different conclusion. Now, from our answers to issue numbers 2, 3, 4 and 5, it is evident that we have upheld the ultimate conclusion of the Trial Court that the Appellant had not established the alleged violation or infringement of Articles 6(d) and 7(2) of the Treaty. The Common Market Protocol is part of the Treaty by dint of Article 151 which provides that protocols are an integral part of the Treaty. And of course, the African Charter on Human and Peoples Rights is not for application in this Court as an independent international legal instrument but as an integral part of the Treaty by dint of Article 6(d) of the Treaty which empowers the Court to apply that Charter as part of the community's human and peoples' rights regime.
115. In short, the answer to issue no. 6 is in the negative.

Costs

116. The Appellant prayed for costs here and in the Trial Court and the Respondent prayed that we dismiss the Appeal with Costs.
117. In its impugned Judgment, The Trial Court declined to make any Order for costs against the Appellant despite his Reference having failed on the ground that the matters canvassed therein were of grave importance to the advancement of community law. The Trial Court deemed it just to order each party to bear its own costs.
118. We are of the same mind with the Trial Court. We will accordingly order that each party bears its costs here and below.

D. Conclusion

119. The upshot of our consideration of this Appeal is that the same is dismissed with no Order as to Costs.

It is so ordered.

D. Deya Counsel for Appellant

N. Kayobera for the Respondent

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Appellate Division

Appeal 2 of 2017**Hon. Dr. Margaret Zziwa v The Secretary General of the East African Community**

[Appeal from the judgment of the First Instance Division (M. Mugenyi, PJ.; I. Lenaola, DP); F. Ntezilyayo, F. Jundu and A. Ngiye, JJ.) dated 3rd February 2017 in Reference No. 17 of 2014]

Coram: E. Ugirashebuja, P.; L. Nkurunziza, VP.; E. Rutakangwa, A. Ringera, and G. Kiryabwire, JJ.A.
May 25, 2018

Internationally wrongful acts attributable to the Community - Separation of powers not a shield from judicial scrutiny for transgressions - Natural justice - Effectiveness of EAC Laws - Jurisdiction to reinstate the Speaker of EALA - Appropriate relief - Assessment of Compensation - Special Damages with interest - Costs for two Counsel

Articles: 23(1), 27(1) 35A, 53, 56 of the Treaty - Rule 9(6) EALA's Rules of Procedure - Articles: 3, 4, 6, 31, 33, 34, 35, 36, 38 Draft Articles on the Responsibility of International Organizations, 2011

Following the Appellant's removal as Speaker of the East African Legislative Assembly (EALA) on 26th November 2014, the Appellant filed several references including *Amended Reference No. 17 of 2014*, contesting the legality of her removal and seeking declarations *inter alia* that: the sitting of the Assembly on 26th November 2014, without the Speaker, violated multiple provisions of the EAC Treaty including Articles 53 and 56 and the Rules of Procedure of the EALA; subsequent sittings not presided over by the elected Speaker were *ultra vires* and of no legal consequence; and that the Committee on Legal, Rules and Privileges was improperly constituted as a majority of its members were also complainants and witnesses against the Applicant and their participation breached the rules of natural justice. The Appellant also sought: general, exemplary and special damages plus an order for reinstatement.

In its judgment, the Trial Court found that: there was no legal basis for the suspension of the Speaker; that the election of a Temporary Speaker contravened Article 56 of the Treaty; that by presiding over a House whose sole business was the removal of the Speaker, the Appellant breached Rule 9(6) of EALA's Rules of Procedure; and that the proceedings and findings of the Committee on Legal, Rules and Privileges, breached the Treaty, Rule 9 of the Assembly's Rules of Procedure plus the rules of natural justice. However, the Trial Court declined to reinstate the Appellant to office and to award damages. Full costs were also declined as the Appellant had flouted EALA's Rules of Procedure.

Being partially aggrieved, the Appellant filed this appeal averring that: the Trial Court erred in law in holding: that the Court had no mandate under the Treaty to reinstate the Appellant or to award special and general damages; the Appellant breached Rule

9(6) of the Assembly's Rules of Procedure by presiding over the proceedings of the Assembly for her removal from office on 1st April and 4th June 2014; and that despite finding that the Appellant had partly succeeded in the Reference only partial costs were awarded. Additionally, the Appellant averred that reinstatement was available as a remedy and that the doctrine of separation of powers must give way to the principle of checks and balances in appropriate cases.

The Respondent averred that reinstatement as a remedy was not available to the Appellant, and given the doctrine of separation of powers, to grant it would be a usurpation of the Assembly's powers and an imposition of a Speaker not appointed by the House.

Held

1. The Court is the guardian of the Treaty and it is the Court's duty to ensure that the Partner States and other duty bearers march in step with the Treaty and any breaches thereof are remedied as may be appropriate in the circumstances.
2. The Appellant's conduct prior to such removal was legally wholly irrelevant as it could not in law be a defence or justification for the alleged violation of the Treaty by the Assembly. Furthermore, such conduct was not and could not be pleaded as a basis for any counter-claim by the Respondent as the Rules do not contemplate any counterclaim in a Reference. The introduction by the Respondent of the Appellant's conduct with respect to the Assembly's proceedings in April and June 2014 was a red herring that resulted in waste of precious judicial time in both this Court and the Trial Court.
3. The full effectiveness of EAC Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief through appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes. Articles 23(1) and 27(1) of the Treaty do not confine the Court's mandate to mere Treaty interpretation and the making of declaratory orders but confer on the Court, being an international judicial body, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty.
4. Treaties do not usually prescribe the international responsibility of parties thereto or the consequences of breach of that responsibility. Depending on whether the violation of international responsibility complained of was by a state or an international organization, the principles of law applicable are found in laws of state responsibility or the responsibility of international organizations. The East African Community is created by the Treaty and is an international organization and possesses international legal personality. On the basis of Articles 3, 4, and 6 of *Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011*, EALA's removal of the Appellant as Speaker was an internationally wrongful act which is attributable to the Community and entails the Community's international responsibility.
5. The Treaty, having provided a right, it is for the Court to provide such remedies as may be appropriate in each individual case. The legal consequences to be visited upon the Community in consequence of a breach of its international obligation to a person resident in a Partner State may, in appropriate cases, include cessation, reparation, which may take the form of restitution, or compensation,

satisfaction, or similar, or other remedies.

6. The actions complained of by the Appellant are attributable to the Community and the functional independence of any offending organ from the other organs is immaterial. EALA violated Article 56 of the Treaty in removing the Appellant from office and that conduct is attributable to the Community in international law, the Community cannot invoke the doctrine of separation of powers to bar the Court from ordering the Appellant's reinstatement on the basis that matters of election and removal of the Speaker are within one of its organ's exclusive mandate. The doctrine of separation of powers cannot in either international law or internal law shield any Community organ or institution from judicial scrutiny for any transgression of the Treaty or other Community laws.
7. The Trial Court erred in law in holding that it did not have the mandate to reinstate the Appellant. However, it was a matter of public knowledge and was common ground that the Assembly of which the Appellant could have been reinstated came to an end in June 2017. In those circumstances, reinstatement was moot at the time of the Trial Court's Judgment and the Court would be acting in vain to so order.
8. The remedy of compensation, damages in internal law, is very firmly established in international law, and is available for the Community's breach of its Treaty obligations where a claimant establishes that the Act, regulation, directive, decision or action of the Community complained of has caused such claimant a loss which is financially assessable. To the extent that the Trial Court declined to award damages on the basis that it could not find justification in its interpretative jurisdiction of the Treaty under Articles 23(1) and 27(1) or the Rules, it misdirected itself and erred in law.
9. There is no difference in principle between the action of unlawful dismissal of an employee and unlawful removal from office of an elected official. Both are legal wrongs remediable by compensation. As the gravamen of the Appellant's case is unlawful removal from office, the compensation should cover the financially assessable loss. The Appellant's removal from office as Speaker was breached of Article 56 of the Treaty and this entailed compensation for consequential loss.
10. Assessment of compensation is a factual inquiry and the Trial Court erred in law by omitting to discharge its mandate of assessing compensation due to the Appellant. While this the case should have been remitted back to the Trial Court for assessment of compensation, given the convoluted nature of the litigation and the delays that might ensue before the final disposal of the matter, the Court assessed the financial loss suffered by the Appellant as US\$ 114,000.
11. As a regional international Court, this Court has jurisdiction and discretion to award interest on compensation. Interest on the liquidated claim was granted at the rate of US\$ six percent per annum payable from the date of filing of the Amended Reference until payment in full.
12. Costs are in the discretion of the court; 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 representatives, the nature of the litigants, the nature of the proceedings or the nature of the success.

13. The Trial Court was not certain that the Appellant's conduct of presiding over the Assembly's sitting on 1st April and 4th June 2014 triggered the events leading to her removal from office. The alleged conduct was a red herring and was an irrelevant factor. The Trial Court, in taking it into account in exercising its discretion, thus exercised its discretion improperly.
14. The Trial Court exercised its discretion improperly, in depriving a successful party of its costs. This was a complex matter, cutting a new path in Treaty interpretation, application and compliance. The Appellant was entitled to costs both in this Court and in the Trial Court. Since the Appellant was represented by Counsel from two different law firms in Kampala, Uganda, the Court certified the case as appropriate for costs for two Counsel to be awarded.

Cases cited

- Andrea Francovich & Anor v Italy (1991) ECR I- 5357
 Benjamin L. Malfoy v United African Company Ltd [1962] AC 152
 Clive Ferrera & Ors v Powell O.M. Levin & Ors, Constitutional Court Case of South Africa, No. CCT 5/45
 Chandaria v Ghadially [1962] EA 501
 Hon. Martin N. Wambora v The Speaker of the County Assembly of Embu, HCK, Petition No. 2 of 2014
 Hon. Michiel Dapianlong & Ors v Chief (Dr.) J.C. Dariye & Anor, Supreme Court of Nigeria SC 39 of 2007
 Hon. Miria Matembe & Ors v AG of Uganda, Constitutional Petition No. 02/2005
 Islamic Republic of Iran v. United States of America, ICJ Case A-19
 Owayo v Aduda [2007] 2 KLR 140
 Reparation of Injuries Suffered in Service of the U.N., Advisory Opinion, 1949 I.C.J. 174 (Apr. 11)
 S. S. Wimbledon, United Kingdom v Germany, 1923 P.C.I.J. (ser.A) No. 1 (June 28)
 Twinobusingye Severino v AG of Uganda, Constitutional Petition No. 47 of 2011

JUDGMENT

A. Introduction

1. This is an Appeal by Dr. Margaret Zziwa ("the Appellant") against the Judgment of the First Instance Division of this Court ("the Trial Court") dated 3rd February 2017 whereby the Trial Court partially allowed the Amended Reference filed in the Trial Court on 24th February 2015 and ordered each party thereto to bear their own costs.
2. The Respondent to the Appeal is the Secretary General of the East African Community. In the Trial Court, the Appellant was the Applicant and the Secretary General to the East African Community was still the Respondent.
3. The Appellant is, in this Court, as she was in the Trial Court, represented by Mr. Justin Semuyaba, duly instructed by Semuyaba Iga & Co. Advocate of Kampala, Uganda and Mr. Jet John Tumwebaze, duly instructed by the firm of Kampala Associated Advocates of Kampala, Uganda. The Respondent is, in this Court, as it was in the Trial Court, represented by Mr. Stephen Agaba, duly instructed by the Counsel to the Community.

B. Background

4. The factual background of this Appeal is comprehensively summed up in the Judgment appealed from and is with minor, albeit pertinent, modifications outlined herein below.
5. The Appellant who was a member of the East African Legislative Assembly ("EALA") from the Republic of Uganda was in June 2012 elected as the Speaker of EALA.
6. Sometime in early 2014, the idea of her removal from the office of Speaker was

mooted by some members of the Assembly. On 20th March 2014, possibly to prevent such a move, Mbidde Foundation Ltd filed *Reference No. 3 of 2014 (Mbidde Foundation Ltd v The Secretary General of The East African Community and The Attorney-General of Uganda)*, contesting the procedure prescribed for the removal of the Speaker for allegedly violating the provisions of the Treaty for the Establishment of the East African Community (“the Treaty”). The same Applicant also filed an Application for interim orders pending the determination of the Reference, to wit, *Application No. 5 of 2015*.

7. On 26th March 2014, a Notice of intention to move a Motion for the removal of the Appellant from the Office of Speaker was formally lodged with the Clerk to the Assembly.
8. The Clerk forwarded the said Notice to the Assembly on 27th March 2014. On the same day, the Clerk received a Motion detailing the grounds for the removal of the Appellant. That Motion was included in the Assembly’s Order Paper and brought to the Appellant’s attention on 31st March 2014.
9. On 1st April 2014, the Motion was presented to the Assembly Plenary but before it could be referred to the Committee on Legal, Rules and Privileges, a member of the Assembly raised a point of order invoking the Assembly’s *Sub judice* Rule given the pending determination of *Reference No. 3 of 2014* by the Trial Court. Following the ensuing debate, the Appellant ruled that the Assembly could not proceed with the motion and adjourned the House *sine die*.
10. The Appellant subsequently filed *Reference No. 5 of 2014 (Margaret Zziwa v The Secretary General of the EAC)* challenging her intended removal for allegedly violating Treaty provisions that guaranteed her a right to fair hearing. The Appellant also filed *Application No. 10 of 2014*, in which she sought interim orders restraining the EALA from investigating or removing her from office pending the determination of the above Reference. That Application was subsequently consolidated with the earlier *Application No. 5 of 2014* and the consolidated Applications were dismissed by the Trial Court.
11. On 20th May 2014, prior to any further deliberation on the Motion for the Appellant’s removal from office, three members of the Assembly from Tanzania withdrew their signatures from the Motion, a move which was followed by one member from Kenya on 2nd June 2014. Against that background, on 4th June 2014 when the matter of the Appellant’s removal from office arose in the re-called Assembly, the Appellant ruled that the Motion had lapsed given that under the EALA Rules of Procedure, such a Motion required the signatures from the Tanzanian members of the Assembly.
12. Following the above events, the *Consolidated References Nos. 3 and 5 of 2014* were, by consent of the Parties, withdrawn on 15th August 2014.
13. Notwithstanding the above events, in November 2014, fresh actions were initiated to remove the Appellant from office. On 26th November 2014, 32 members of EALA convened in the designated Assembly Chambers in Nairobi; summoned the Clerk to ‘preside over the Assembly’; allegedly locked the Appellant in her office; elected a ‘Temporary’ Speaker to preside over the Motion for the Appellant’s removal; referred the said Motion to the Assembly’s Committee on Legal, Rules and Privileges for investigation, and suspended the Appellant from the office of Speaker of the Assembly.

14. The Appellant contested the legality of the foregoing actions through *Amended Reference No. 17 of 2014* filed in the Trial Court in which she sought a permanent injunction against her removal from office. The said Amended Reference was expressed to be brought under Articles 4(1) and (3), 5, 6(d), 7(2), 8(1) (c), 23, 27(1), 29, 30, 33, 37, 38, 39, 44, 53(3), 56, 71, and 73 of the Treaty and Rules 1(2), 17, 21, 24, 84 and 85 of the East African Court of Justice Rules (“the Rules”). Additionally, *vide Application No. 23 of 2014*, the Appellant unsuccessfully sought interim orders to forestall the reconvening of the Assembly to consider the Committee report. On 17th December 2014, the Assembly commenced censure proceedings which culminated in the Appellant’s removal from the Office of Speaker on 19th December 2014.
15. On 24th February 2015, the Appellant filed in the Trial Court an Amended Reference in which she contested the legality of her said removal from office and sought the following reliefs:
- (a) A declaration that the purported sitting of the Assembly on 26th November 2014 without the elected Speaker of the Assembly violated Articles 53 and 56 of the Treaty and the Rules of Procedure of the Assembly.
 - (b) A declaration that the said sitting and any subsequent sittings not presided over by the elected Speaker and actions of members of EALA were *ultra vires*, illegal, unlawful, procedurally wrong, null and void and of no legal consequence.
 - (c) A declaration that the Committee on Legal, Rules and Privileges was improperly constituted for the purpose of this particular matter as a majority of its members were also accusers/petitioners/complainants and witnesses against the Applicant and thus their participation in the Committee constituted a breach of the rules of natural justice, specifically the rule against bias.
 - (d) declaration that the proceedings of the Committee violated the rules of natural justice and its report is null and void and that the alleged grounds of misconduct listed in the Motion were manifestly frivolous and constituted a violation of Article 53(3) of the Treaty.
 - (e) A declaration that the ruling of the Speaker of 4th June 2014 and the Ruling of the Court of 15th August 2014 disposed of the impeachment Motion and whoever was aggrieved should have appealed to the Court and an Order quashing the actions of the EALA in removing the Applicant from the office of the Speaker.
 - (f) A declaration that the removal of the Applicant from office was *ultra vires* the Treaty, Rules of Procedure of the Assembly and rules of natural justice.
 - (g) An award of General Damages for the embarrassment, inconvenience, pain, mental anguish and reputational damage.
 - (h) An award of aggravated and/or exemplary and punitive damages for the wanton conduct of the members of EALA.
 - (i) An award of special damages in the form of loss of earnings of a salary of USD 6,700 per month and Housing allowance of USD 3,000 per month, plus other allowances and financial benefits.
 - (j) Interests on the sums awarded from the date of the removal of the Applicant from the office of Speaker until payment in full.

- (k) An Order of reinstatement of the Applicant, Rt. Hon. Margaret Zziwa, to the office of Speaker of the EALA.
 - (l) A permanent injunction restraining and prohibiting the Respondent and directing the EALA from considering a non-existing impeachment Motion.
 - (m) Any other reliefs and/or remedies that the Court deems fit.
 - (n) An order that the Respondent shall pay all the costs of this Reference.
16. At the Scheduling Conference held by the Trial Court on 6th May 2015, the following issues were framed for the Court's determination:
- (a) Whether the Assembly's Rules of Procedure were followed by EALA in the suspension of the Applicant from the Office of Speaker, and whether the proceedings were null and void and ought to be set aside.
 - (b) Whether the appointment/election of a Temporary Speaker was in conformity with the Treaty and the Assembly's Rules of Procedure.
 - (c) Whether the actions, proceedings and findings of the Committee on Legal, Rules and Privileges, and the eventual removal of the Applicant as Speaker by the Assembly were in conformity with the provisions of Article 53 and 56 of the Treaty, the Rules of Procedure, as well as the rules of natural justice.
 - (d) Whether the grounds for the removal of the Speaker presented to and investigated by the Committee on Legal, Rules and Privileges were the grounds envisaged under Article 53 of the Treaty.
 - (e) Whether the Applicant was entitled to the remedies sought.
17. Upon consideration of the Amended Reference, the evidence adduced and the submissions of Counsel for the Parties, the Trial Court answered the issues framed as follows: -
- (a) There was no legal basis for the suspension of the Speaker of EALA by the Assembly. Issue No. (1) was answered in the negative.
 - (b) The election of a Temporary Speaker contravened Article 56 of the Treaty and was devoid of legal basis. Issue No. (2) was answered in the negative.
 - (c) There was a breach of Rule 9(6) of EALA's Rules of Procedure by the Appellant by dint of her presiding over a House whose sole business was her removal from office.
 - (d) The actions, proceedings and findings of the Committee on Legal, Rules and Privileges, and the eventual removal of the Appellant as Speaker by the Assembly were in breach of the provisions of Articles 53 and 56 of the Treaty, and Rule 9 of the Assembly's Rules of Procedure, as well as rules of natural justice. Issue No. (3) was answered in the negative.
 - (e) Most of the grounds for removal of the Speaker presented to and investigated by the Committee on Legal, Rules and Privileges were grounds envisaged under Article 53 of the Treaty. Issue No. (4) accordingly succeeded in part and failed in part.
18. With respect to the remedies sought in the Amended Reference, the Trial Court pronounced itself as follows: -
- (a) With regard to prayers (a), (b), (c) and (d), Declarations were issued that (i) the purported sitting of the Assembly on 26th November 2014 without the elected Speaker was unlawful to the extent that it violated

- Article 56 of the Treaty and the Assembly's Rules of Procedure; (ii) the Committee on Legal, Rules and Privileges, in allowing members of the Assembly who initiated the Motion for removal of the Applicant to sit and determine whether she should in fact be removed, violated the basic rules of natural justice; and (iii) the Report of the Committee on Legal, Rules and Privileges was invalid.
- (b) With respect to prayers (e) and (k), the same were refused on the grounds that quashing the actions of EALA and reinstating the Applicant would offend one of the principles in Article 6(d) of the Treaty, namely, democracy and the rule of law which necessarily included the principle of separation of powers.
 - (c) With respect to prayers (g), (h), (i) and (j) which sought special and general damages and interest thereon, the same were refused on the grounds that (i) there was no legal provision in the Rules for the award of damages as a remedy; (ii) given the interpretative jurisdiction of the Court depicted in Articles 23 and 27 of the Treaty, the issuance of declarations on Treaty compliance or the lack thereof was deemed to be a sufficient remedy; and (iii) the authorities cited by the Applicant in support of an award for damages were irrelevant as they related to dismissal of employees from service whereas the Applicant was not an employee of EALA but an elected Speaker whom the members had the mandate under Article 53 of the Treaty to remove.
 - (d) With regard to the prayer for costs, the same was refused on the ground that the Applicant had flouted Rule 9(6) of EALA Rules of Procedure by presiding over a matter in her own cause, which conduct, "quite possibly" could have triggered the events the subject matter of the Reference.

C. The Appeal to the Appellate Division

19. The Appellant being partially dissatisfied with the above decision of the Trial Court initiated an Appeal by contemporaneously lodging a Notice of Appeal and a Memorandum of Appeal on 7th April 2017. She proffered the following grounds of Appeal, namely;
- (a) The Learned Justices of the East African Court of Justice (First Instance Division) erred in law in holding that they did not have the mandate under Articles 23 and 27 of the Treaty and/or any other provisions of the Treaty to reinstate the Appellant as Speaker of the East African Legislative Assembly.
 - (b) The Learned Justices of the East African Court of Justice (First Instance Division) erred in law in holding that the Appellant breached Rule 9(6) of the East African Legislative Assembly Rules of Procedure by presiding over the proceedings for her removal on 1st April and 4th June 2014.
 - (c) The Learned Justices of the East African Court of Justice (First Instance Division) erred in law when they held that there was no legal provision in the Treaty and the Rules of Procedure of the East African Court of Justice 2013 for the Court to base upon to award special and general damages.
 - (d) The Learned Justices of the East African Court of Justice (First Instance Division) erred in law when they held that the Appellant had been

successful in three (3) out of five (5) issues and partly succeeded on the other two issues and would thus have been entitled to 3/5 of the costs but declined to award the Appellant costs.

20. The Appellant asked the Court:

- (a) To allow the Appeal;
- (b) To partially vary the judgment of the Trial Court and to quash the impugned actions/decisions of EALA;
- (c) To reinstate the Appellant as Speaker of the EALA;
- (d) To grant the Appellant special and general damages as pleaded in the Reference;
- (e) To grant the Appellant the costs of the Appeal and of the Reference;
- (f) To grant such consequential, further or other order(s) as it may deem just and equitable for the implementation of any order on special and general damages and costs and the Secretary General of the East African Legislative Assembly makes appropriate arrangements for payment of those damages and costs [*sic*].

21. At the Scheduling Conference of the Appeal, the grounds were consolidated into the following issues:

- 1) Whether the Trial Court erred in law in holding that the Court did not have the mandate under Articles 23 and 27 of the Treaty and any other provisions of the Treaty to reinstate the Appellant as the Speaker of the Assembly.
- 2) Whether the Trial Court erred in law in holding that the Appellant breached Rule 9(6) of the Assembly's Rules of Procedure by presiding over the proceedings of the Assembly for her removal from office on 1st April and 4th June 2014.
- 3) Whether the Trial Court erred in law in declining to award the Appellant general and special damages as prayed in the Reference.
- 4) Whether the Trial Court erred in declining to award the Appellant the costs of the Reference.

22. After the Scheduling Conference, the Parties in compliance with this Court's Directions filed their written submissions and on the 13th February 2018, they appeared before the Court and highlighted those submissions at some length.

23. We propose to deal with the above issues sequentially.

Issue No. (1) : Whether the Trial Court erred in law in holding that the Court did not have a mandate under Articles 23 and 27 of the Treaty and any other provision of the Treaty to reinstate the Appellant as the Speaker of the Assembly.

Appellant's Case.

24. Counsel for the Appellant submitted that it was evident from the plain reading of Articles 23(1) and 27(1) of the Treaty that the Court is not limited to the interpretation of the Treaty only but has a mandate to ensure compliance therewith and adherence to law. Accordingly, Counsel argued, the Trial Court having found that the conduct of EALA with respect to the Appellant violated Article 56 of the Treaty and all its actions were null and void, it followed that

it should have ordered reinstatement of the Appellant as part of its mandate of ensuring compliance with the Treaty and adherence to the law. Counsel further argued that the effect of nullifying the Assembly sitting of 24th November 2014 and all consequential actions was that the Appellant legally held the office of the Speaker of EALA and the Court should have confirmed the same.

25. In support of his submissions, Counsel for the Appellant cited *Benjamin Leornard Malfoy v United African Company Ltd [1962] AC 152* where Lord Denning posited that:

“if an act is void, then it is a nullity in law. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado. Though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad”.

Counsel pointed that in similar vein, the Supreme Court of Nigeria in *Federal Civil Service Commission v Laoye [1990] LRC 451* had made a declaration that the unlawful dismissal of the respondent was void and of no legal effect and the respondent was still an employee of the appellant and should, therefore, be reinstated as such without prejudice to his entitlements or promotions which might have accrued to him during the period of his dismissal. Counsel also relied on *Hon. Michiel Dapianlong & 5 Others V Chief (Dr.) Joshua Chibi Dariye & Another SC 39 of 2007*, where the Supreme Court of Nigeria affirmed the Court of Appeal decision to restore and reinstate a State Governor who had been wrongly removed.

26. Counsel for the Appellant strongly criticized the Trial Court's reasons for not making an order of reinstatement. He submitted that the principle of checks and balances should not be struck down by the sword of separation of powers. He submitted that by invoking the rule of law principle of separation of powers to decline to order EALA to reinstate the Appellant, the Trial Court in effect abdicated its cardinal responsibility of ensuring compliance with the Treaty. In his view, the rule of law value enshrined in Article 6 (d) entails ensuring that the Treaty is properly applied and complied with by all as breach of the same was likely to lead to disputes and threaten the very existence of the East African Community.
27. In support of the submission that the doctrine of separation of power must give way to the principle of checks and balances in appropriate cases, Counsel for the Appellant drew the Court's attention to the following authorities from domestic courts. In *Twinobusingye Severino V Attorney-General [Constitutional Petition No. 47 of 2011]*, the Constitutional Court of Uganda delivered itself as follows: -
- “...a mechanism of checks and balances was built in the Constitution to ensure that no single organ of the State acts in contravention of the Constitution without being stopped by the rest of the other two organs, or any of them. Otherwise when everything is normal and in accordance with the Constitution, the internal management of the organs of State is a no-go area for the others. For example, the judiciary has no powers to interfere or question methods of internal management and running of the affairs of Parliament unless a complaint is raised by an aggrieved person in courts of law”.

And in *Hon. Martin Nyaga Wambora v the Speaker of the County Assembly of Embu [Petition No. 2 of 2014]*, the High Court of Kenya opined as follows: -

“This Court is alive to the doctrine of separation of powers which is part and parcel of our constitution’s architectural design but we are also of the view that it is the responsibility of the Court to ensure that each state organ complies with the Constitution and the law. Where a citizen alleges a contravention of his constitutional rights, the Court has a duty to investigate and determine that complaint so long as it is justiciable.”

Respondent’s Case

28. Counsel for the Respondent supported the Trial Court’s holdings that the doctrine of separation of powers (which is a key element in the rule of law principle) made it a preserve of the Assembly to elect and remove a Speaker as per Article 53 of the Treaty, and, accordingly, reinstatement as a remedy was not available to the Appellant, as to grant it would be a usurpation of the Assembly’s powers by the Court for it would be an imposition of a Speaker not appointed by the House. Counsel invoked in aid the authority of the Court of South Africa in *Hugh Glenister v President of South Africa and 12 Others CCT 41/08* where that esteemed court delivered itself as follows: -

“Court must be conscious of the vital limits on judicial authority and the constitutional design to leave certain matters to other branches of government. They too must observe the Constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.”

29. Counsel for the Respondent further submitted that in any event the remedy of reinstatement is overtaken by events and no longer available as the Appellant is no longer a member of EALA and as per Article 53 of the Treaty, no one can serve as a Speaker of EALA if he/she is not an elected member of the Assembly. Counsel also submitted that at the time of the judgment by the Trial Court, another Speaker, namely, Honourable Kidega, had been elected and, accordingly, the prayer for reinstatement was moot. Counsel cited the case of *Hon. Miria Matembe & Others vs Attorney General of Uganda [Constitutional Petition No. 02/2005]* where the Court had been presented with a Petition challenging a Bill of Parliament which at the time of deciding the Petition had been withdrawn from the floor of Parliament. The court held:

“...the petition was largely overtaken by events when the Bill was withdrawn from the floor of Parliament. Thirdly, even if the Bill had not been withdrawn, we are sceptical as to whether the orders sought by the petitioners would be enforceable or effectively implemented. It is a well established principle that a court of law will not issue an order which is unenforceable and also would not act in vain.”

Appellant’s Submissions in Reply

30. Counsel for the Appellant emphasized that since the Trial Court found that the Appellant was unlawfully removed from office and that such an action was of

no legal consequence, an order of reinstatement would only have confirmed an existing legal position.

31. Lastly, Counsel submitted that since the term of office of the Assembly had now expired and the Appellant could no longer be reinstated to her job, the Court should use its wide discretion to award the Appellant exemplary, punitive and general damages for the illegal actions of her removal from office.

The Court's Determination

32. The Court has carefully read the Record of Appeal and considered the written and oral submissions by the learned advocates of the Parties. Having done so, the Court takes the following view of the matter.

33. We reject the submissions of the Respondent that the prayer for the reinstatement of the Appellant was moot or overtaken by events as at the date of Judgment by the Trial Court. We do so for the following reasons. The Record shows that the Appellant was suspended from office on 26th November 2014, she filed the Reference on 10th December 2014, Hon Kidega was elected as Speaker to replace her on 19th December 2014, the Amended Reference was filed on 24th February 2015, the Judgment of the Trial Court was delivered on 23rd February 2017, and the life of the Assembly ended in June 2017. Clearly, at the time of the Judgment appealed from, the life of EALA had not come to an end and, accordingly, an order for the Appellant's reinstatement would not have been moot.

34. The more substantial issue is whether the Trial Court had the mandate, power, or jurisdiction to grant the remedy of reinstatement. In that regard, the import of Articles 23(1) and 27(1) of the Treaty and the doctrine of separation of powers in light of the provisions of Article 56 of the Treaty were elaborately debated by Counsel before us. Article 23(1) provides as follows:

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

And Article 27(1) provides as follows:

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty”.

35. Having read those provisions, the Court accepts the submissions by Counsel for the Appellant that its mandate is not limited to only interpretation of the Treaty. The Court is the guardian of the Treaty and is charged with ensuring adherence to the law in the application of and compliance with the Treaty. In plain language, it is the Court's duty to ensure that the Partner States and other duty bearers under the Treaty march in step with the Treaty and any breaches thereof are remedied as may be appropriate in the circumstances. In that regard, the Court takes inspiration from the Opinion of the European Court of Justice in *Andrea Francovich and Danila Bonifaci v Italy* (1991) ECR I- 5357 to the effect that:

“full effectiveness of European Community Rules would be impaired and the protection of the rights which they grant be weakened if individuals are unable to obtain redress when their rights are infringed by a breach of Community law for which a member state can be held responsible.”

Being thus inspired, we are of the firm opinion that the full effectiveness of

East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws. Otherwise such laws would be no more than pious platitudes. In the present circumstances, the Trial Court having found that the proceedings for the removal of the Appellant as Speaker were *null and void* and that, accordingly, her removal was illegal and in breach of the Treaty, it followed, in our view, that in the eyes of the law she continued to hold the office of Speaker and the Court could not but order her reinstatement as part of its mandate to ensure adherence to the law and compliance with the Treaty. In short, we hold that Articles 23(1) and 27(1) of the Treaty do not confine the Court's mandate to mere Treaty interpretation and the making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its jurisdiction, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty. In so holding, we are not unaware of the Trial Court's finding that nothing in the Treaty or in the Rules conferred on the Court a power to grant the remedy of reinstatement. In that regard, we completely disagree with the Trial Court's view for the reasons set out below.

36. The East African Community (the Community) is created by the Treaty and is obviously an international organization. As such, it possesses international legal personality. The leading authority for the proposition that International organizations possess international legal personality is the opinion of the International Court of Justice in the case of *Reparation for injuries suffered in the service of the United Nations, Advisory Opinions, ICJ Reports, 1949, p.174*. The international legal personality of the Community may in any event be deduced from Article 4 of the Treaty itself. The consequence of the Community possessing international legal personality is that it bears rights and duties at international law and is responsible for the non fulfillment of its obligations.
37. Article 9(4) of the Treaty is pertinent and provides as follows:

“The organs and institutions of the Community shall perform the functions, and act within the limits of the powers conferred upon them by the Treaty.”
38. Treaties usually do not prescribe the international responsibility of parties thereto or created thereby, or the consequences of breach of that responsibility. Depending on whether the violation of international responsibility complained of was by a state or an international organization, the principles of law applicable are found in the body of law known as state responsibility or the responsibility of international organizations. In the instant matter, the breach of Treaty is by EALA, an organ of the Community, and, accordingly, the appropriate law is the law on the responsibility of international organizations. In that respect, the Court is of the considered opinion that the governing principles are those expressed by the International Law Commission (ILC) in its *Draft Articles on the Responsibility of International Organizations, with Commentaries, 2011*. The draft articles detail the international responsibility of international organizations in articles 3,4, and 6 which are in Part Two, and the legal consequences for the breach thereof in articles 30,31,33,34,35 and 36 which are in Part Three.
39. Draft articles 3,4 and 6 posit the law as follows:

- “3. Every internationally wrongful act of an international organization entails the international responsibility of that organization.
4. There is an internationally wrongful act of an international organization when conduct consisting of an act or omission:
- (a) is attributable to that organization under international law; and
 - (b) constitutes a breach of an international obligation of that organization.
- 6(1). The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
- (2) The rules of the organization apply in the determination of the functions of its organs and agents.”
40. From the circumstances of this matter and bearing the content of the above draft articles in mind, it is clear to the Court that EALA’s removal of the Appellant as Speaker in contravention of the Treaty was an internationally wrongful act which is attributable to the Community and accordingly entails the Community’s international responsibility. The legal consequences of such breach would, if the complainant were a State or another international organization, be cessation and non-repetition (Article 30) and/ or reparation (Article 31). Article 34 makes it clear that reparation may take the form of restitution, compensation and satisfaction, either singly or in combination. We repeat for a reason which will be self evident below that Articles 30, 31, 33, 34, 35 and 36 are all in Part Three of the Draft Articles.
41. Draft Article 33 provides as follows:
- “1. The obligations of the International organization set out in this part may be owed to one or more states, to one or more organizations, or to the international community as a whole, depending in particular to the character and content of the international obligation and on the circumstances of the breach.
 - 2. This part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a state or an international organization.”
42. The Court apprehends the provision of Draft Article 33 to mean this: where a primary rule of international law (such as the Treaty) entitles an actor in international law who is not a state or an international organization to invoke the international responsibility of an international organization, the legal consequences are not to be sought in the ILC Draft Article 30 or 31 but are left to be determined by the Tribunal before which such responsibility is invoked in accordance with the primary rule.
43. Article 23 of the Treaty has conferred on this Court the duty to ensure adherence to the law in the interpretation, application and compliance with the Treaty. And Article 30 thereof has given any person who is resident in a Partner State the right to directly invoke the international responsibility of the organization created by the Treaty, namely, the East African Community, on his or her own account without the intermediation of the state to which he or she is a national. The Treaty itself (not unusually) has not prescribed the nature and form of the international

responsibility resulting from a breach thereof. In those circumstances, we are of the considered opinion that the Treaty having provided a right, it is for the Court to provide such remedy or remedies as may be appropriate in each individual case. In our view, the legal consequences to be visited upon the Community in consequence of a breach of its international obligation to a person resident in a Partner State may, in appropriate cases, include cessation (usually known as injunction in internal law), reparation (which may take the form of restitution, or compensation), satisfaction, or similar, or other remedies.

44. In the above premise, the Court finds and holds that the lamentation by the Trial Court that it had no power under the Treaty or the Rules to grant the remedy of reinstatement (it would be restitution in international legal parlance) was without justification in the Treaty itself or in the law of responsibility of international organizations.
45. The Court next asks whether the remedy should have been refused in deference to the doctrine of separation of power. The Court rejects the Trial Court's holding to that effect for two reasons. First, and most weighty, from the international law perspective, which is the applicable law in this matter, the actions complained of are attributable to the Community itself and the functional independence of any offending organ from the other organs is immaterial. The EALA having violated Article 56 of the Treaty in removing the Appellant from office and that conduct being attributable to the Community in international law (as was determined by the Trial Court), the Community cannot invoke the doctrine of separation of powers to bar the Court from ordering her reinstatement on the basis that matters of election and removal of the Speaker are within one of its organ's exclusive mandate. Secondly, the Court is in complete agreement with the jurisprudence from the superior courts of the Partner States cited to us from which may be distilled the principle that the doctrine of separation of powers is only sacrosanct where the independent organs of the State concerned are acting within the law. Any State organ or institution that marches out of step with the law, is liable to be brought in line by the courts with the sword of checks and balances. In the premise, the doctrine of separation of powers could not and cannot in either international law or internal law (which is not relevant in the case at hand) shield any Community organ or institution from judicial scrutiny for any transgression of the Treaty or other Community laws.
46. In short, the Court finds that the Appellant's reinstatement was not moot at the time of the Trial Court's Judgment, the Court had the mandate under the Treaty to grant the remedy, and the doctrine of separation of powers could not and did not preclude that remedy.
47. The upshot is that Issue No. 1 is answered in the affirmative.

Issue No. 2: Whether the Trial Court erred in law in holding that the Appellant breached Rule 9(6) of the Assembly's Rules of Procedure by presiding over the proceedings of the Assembly for her removal from office on 1st April and 4th June 2014

Appellant's Submissions

48. Counsel for the Appellant submitted that the Trial Court erred in law in finding

that the Appellant breached Rule 9(6) of the Rules of Procedure of the Assembly for the reasons that the same was not pleaded by the Respondent, it was not framed as an issue for trial, parties did not lead evidence on it, and they did not address the Court on it in their submissions. Counsel pointed out that under Rule 53(1) (a) of the Rules, the Court is enjoined to conduct a Scheduling Conference to agree on, *inter alia*, issues for determination by the Court and that when the same was done on 6th May 2015, the issue of breach of Rule 9(6) by the Appellant was not framed as an issue for trial; a fact acknowledged by the Trial Court in its own Judgment.

49. Counsel further submitted that the Trial Court in any event misapplied the facts and came to the wrong conclusion that the proceedings of the Appellant's removal from office had commenced and therefore the Appellant was in breach of Rule 9(6) by presiding over the proceedings of her removal. In substantiation of the contention, Counsel argued that had the Trial Court looked at the Hansard of the House (as it was entitled to and should have done as per the decision of the Appellate Division in *The Secretary General of EAC v Rt. Hon. Margaret Zziwa [Appeal No. 7 of 2015]*, it would not have come to the erroneous conclusion that the proceedings for the Appellant's removal had commenced on 1st April 2014 and therefore the Appellant had breached Rule 9(6) by presiding over proceedings of her removal. Counsel submitted that the Motion was never tabled and therefore the proceedings never commenced. Counsel pointed out that a closer look at the Hansard of 1st April 2014 and the Hansard of 26th November 2014 would have supported the Appellant's evidence that the Motion was interrupted on 1st April 2014 but was only later tabled on 26th November 2016 when the mover of the Motion, Hon. Peter Mathuki, was recorded as saying "I wish now to lay the Motion on the table for removal of the Speaker of the East African Legislative Assembly from office. I wish to table it now."
50. Counsel for the Appellant further submitted that the Trial Court erred in law in choosing to adopt the definition of "Tabling" from the United Kingdom's Parliament website in disregard of the definition of "table" as enshrined in the Rules of EALA and thereby arrived at the wrong conclusion as to when the Motion was tabled. Counsel for the Appellant relied on several decisions from the courts of the Partner States of Uganda, Tanzania and Kenya for the propositions that parties and the courts are bound by the pleadings and issues framed, relief not founded on the pleadings will not be given, and it is not open to the Court to base a decision on an un-pleaded issue except where it appears from the course followed at the trial that the un-pleaded issue had been left to the Court for decision.
51. Counsel for the Appellant also argued that Rule 9(6) was not an issue in the Amended Reference and that the matter of the Appellant's conduct in April and June 2014 were resolved by the withdrawal by consent of the Reference No. 3 and No. 5 of 2014. Counsel further argued that in November 2014, when the Appellant was suspended thereby precipitating the filing of the Amended Reference in February 2015, the issue of the motion to impeach the Appellant was no longer live.

Respondent's Submissions

52. Counsel for the Respondent submitted that contrary to the contention of Counsel for the Appellant, the issue of the Appellant's breach of Rule 9(6) of the EALA Rules of Procedure was very pertinent and the Respondent raised it in pleadings, led evidence on it and addressed it in submissions. With respect to the evidence on the issue, Counsel drew the Court's attention to pages 776 - 777, 853 - 854, 960 and 1024 of the Record of Appeal and with respect to the submissions, the Court's attention was drawn to the content of submissions at pages 383-384 and 456 of the Record of Proceedings.
53. Counsel also defended the Trial Court's resort to the United Kingdom's Parliamentary Practice and submitted that it correctly applied the law to the facts of the case and judiciously arrived at the conclusion that the Appellant breached Rule 9(6) of the Assembly Rules of Procedure by presiding over the proceedings for her removal from office on 1st April and 4th June 2014.

Appellant's Reply

54. In reply, Counsel for the Appellant reiterated his submissions on the importance of pleadings and contended that where the Parties have signed a joint Scheduling Conference Memorandum, they are bound by it. He submitted that the evidence of the Appellant and her witnesses on the issue was irrelevant as the fact of the lapse of the Motion for removal of the Appellant from the office of Speaker on the 1st April and 4th June 2014 was an agreed fact and, accordingly, there was no need for the proof or disproof of such a fact at the trial.
55. Finally, Counsel submitted that where the law gives a definition of a word or term as used in the Statute, one must assign that word or term that same meaning and not any other meaning from another jurisdiction.

The Court's Determination

56. The Court's review of the Pleadings, the Conference Scheduling Notes, the Written Submissions and the oral highlights thereof disclose that the matter of the Appellant's breach of Rule 9(6) of the Assembly's Rules of procedure, which provide that "the Speaker in respect of whom proceedings for removal have commenced shall not preside over the proceedings" was not pleaded by any party and it was not an issue framed for trial at the Scheduling Conference. It was nonetheless extensively canvassed in evidence and the submissions of the parties.
57. Now, it is trite law that parties are bound by their pleadings, that no relief will be granted by a court unless it is founded on the pleadings, and that it is not open to the Court to base a decision on an un-pleaded issue unless it appears from the course followed at the trial that the un-pleaded issue had been left to the Court for decision in the matter at hand. It is clear to the Court that no relief was granted by the Trial Court based on that un-pleaded issue. However, the relief of costs which was claimed by the Appellant was denied on the basis of the Trial Court's finding on that un-pleaded issue. Now, could it be said that from the course followed at the trial the issue was left to the Trial Court for decision? From the submissions of Counsel for the Respondent, it is clear that the issue was raised as a bar or hurdle to the Appellant's quest for the reliefs sought on the premise that she had misconducted herself and should not, therefore, benefit

from her own wrong. From the Appellant's submissions it is equally clear that the position was taken that the matter was un-pleaded and ought not to be dealt with, and if dealt with, the Trial Court should answer it in the negative on the premise that the proceedings for the Appellant's removal from office had not commenced in April or June 2014 when the contentious rulings by her were made because the motion for her removal had not been moved in the Assembly. Looking at the matter from that perspective, this Court finds that the issue of the Appellant's breach of Rule 9(6) of EALA's Rules of procedure was implicitly left to the Trial Court's determination. Accordingly, we cannot fault the Trial Court for addressing and determining the issue. The Court hastens to add that if the Appellant's complaint about the Trial Court's determination of that issue was hinged on its un-pleaded status, this Appeal, on that point, would have been best framed as a point of procedural irregularity, which it was not.

58. With respect to the substantive merit of this ground of Appeal, it is apposite to set out how the Trial Court dealt with the matter. In Paragraphs 74 and 75 of the Judgment appealed against, the Trial Court delivered itself as follows on the commencement of proceedings for the removal of the Speaker:

“74 . . . the commencement of such proceedings would ensue once the motion was, formulated and duly tabled in the Assembly, ready to be moved. It begets logic that at that point the presiding speaker would have been sufficiently placed on notice that a motion for impeachment has commenced.

75. We do not accept the proposition advanced by learned Counsel for the Applicant that Parliamentary proceedings entail debate in respect of a motion, only commencing once a motion has been moved, seconded and tabled.”

59. With respect to the conduct of the Speaker, the Trial Court at Paragraph 77 delivered itself as follows:

“77 In the instant case, it would appear that on 1st April 2014, the Applicant Presided over a House the sole business of which was her removal from office. It bespoke an obvious conflict of interest and clearly offended the rules of natural justice for the Applicant to have presided over and made decisions in her own cause. In our considered view, it was precisely such a mischief that Rule 9(6) sought to avert. We do, therefore, find that there was a breach of Rule 9(6) of the Assembly Rules of Procedure by the Applicant.”

60. The Court entirely agrees with the conclusions of the Trial Court in those Paragraphs and finds no error of law in the finding that the Appellant breached Rule 9(6) of the Assembly's Rules of Procedure by presiding over the proceedings of the Assembly for her removal from office on 1st April and 4th June, 2014. Issue No. 2 is, accordingly, answered in the negative.

61. Before proceeding to the determination of the next issue, the Court wishes to make some observations on the correct approach to adjudication in adversarial systems of litigation such as we have in this Court. The purpose of adjudication is to determine live disputes between the parties. Those disputes are obviously captured in the pleadings and formulated as issues for trial and they must be relevant to the reliefs sought by the parties. In the instant matter, it was obviously unsurprising that no relief sought in the Reference was founded on the Appellant's

conduct as Speaker on the 1st April and 4th June, 2014. Everything revolved on her alleged illegal removal from office in the proceedings of November and December 2014 which culminated in the decision of 19th December, 2014 to remove her from office. The live issue in the Amended Reference was whether the Appellant had been removed from office in breach of Article 56 of the Treaty. Her conduct prior to such removal while emotionally and, perhaps, morally relevant, was legally wholly irrelevant as it could not in law be a defence or justification for the alleged violation of the Treaty by the Assembly. Furthermore, such conduct was not and could not be pleaded as a basis for any counter-claim by the Respondent as the Rules do not contemplate any counterclaim in a Reference. Putting on our legal spectacles, the Court clearly sees the introduction by the Respondent of the Appellant's conduct with respect to the Assembly's proceedings in April and June 2014 as a red herring. It was much ado about nothing. It has nonetheless resulted in waste of precious judicial time in both this Court and the Trial Court. The Court expresses the hope that in the future, red herrings will be spotted early, promptly ignored, and all guns aimed at the real targets.

Issue No. 3: Whether the Trial Court erred in law in declining to award the Appellant general and special damages as prayed in the Reference

Appellant's submissions

62. Counsel for the Appellant submitted that the provisions of Articles 6, 7, 8, 23, 27, 30 and 44 of the Treaty read together conferred sufficient legal authority to the Trial Court to entertain matters relating to Treaty interpretation, application, compliance, infringement and violations and consequent award of compensation and/or damages. Counsel cited this Court's decision in Reference for a Preliminary Ruling under Article 34 of the Treaty made by the High Court of the Republic of Uganda in the proceedings between the *Attorney General of the Republic of Uganda and Tom Kyahurwenda [case stated No. 1 of 2014]* (hereafter "*Tom Kyahurwenda case*") for the proposition that damages and compensation could be awarded by the national courts for a Partner State's breach of Treaty obligations. Counsel also invoked the academic opinion of Professor Edward F. Ssempebwa in his *East African Community Law*, at p.81 paragraph 7:154 on liability for compensation for breach of Community law where the learned author opines as follows: -

"East African Community law would be greatly strengthened if it were to follow the European jurisprudence on State liability for its breach. The leading authority in European law is *Andrea Francovich and Danila Bonifaci v Italy (1991) ECR I- 5357* in which the ECJ considered whether an individual could sue a State for damages due to its failure to implement a directive. The Court held that the "full effectiveness of community rules would be impaired and the protection of the rights which they grant would be weakened if individuals are unable to obtain redress when their rights are infringed by a breach of Community law for which a member State can be held responsible."

63. Counsel for the Appellant further submitted that the Trial Court reasoned wrongly when it took the view that because the Appellant as a Speaker was

elected by peers who had the mandate under Article 53 of the Treaty to remove her, and as general damages are awarded as a matter of discretion, the Appellant could not be awarded general damages, as to do so would be to allow her to benefit from her own wrong of contravening Rule 9(6) of the Assembly's Rules of Procedure, which action might have triggered other actions, some of which were patently unlawful.

64. Counsel for the Appellant also presented the Appellant's case as a human rights violation case properly sounding in the international human rights instruments to which the Treaty makes reference and submitted that these instruments require the provision of effective remedies for breach of human rights. Counsel cited jurisprudence from the European Court of Justice to demonstrate that violations of human rights enshrined in the European Convention for the protection of Human Rights and Fundamental Freedoms were redressed by awards of general damages.
65. With respect to the nature and quantum of damages, the Appellant placed reliance on her submissions in the Trial Court and faulted the said Court for declining to be persuaded by those submissions on the basis that the authorities relied upon related to dismissal of employees from service and the damages awarded were thus for unlawful dismissal.

Respondent's Submissions

66. Counsel for the Respondent submitted that the Trial Court arrived at the correct decision in not allowing the Appellant to benefit from her role in the impasse that dogged the Assembly and led to her removal as Speaker by awarding her general damages. Counsel contended that whether or not to award general damages fell within the discretion of the Court and the Trial Court had exercised its discretion judiciously in denying the Appellant general damages and there was, accordingly, no need to interfere with the discretion of the Trial Court. In that regard, Counsel argued, the Appellate Court can only interfere with a finding of the Trial Court on damages where the impugned decision was based upon a wrong principle of law or the amount was so high or low as to make it an entirely erroneous estimate of damages. Reliance was placed on the Supreme Court of Uganda decision in *General Parts (U) Ltd and Haruna Semakula vs The Non Performing Assets Recovery Trust*, [Civil Appeal No. 9 of 2005].
67. Counsel for the Respondent also supported the Trial Court's conclusion that the authorities relied upon by the Appellant in support of an award for general damages were irrelevant as the said cases related to dismissal of employees from employment whereas the Appellant was not an employee of EALA. Counsel further invited the Court to confirm that in the circumstances, the declaration made by the Trial Court in favour of the Appellant was a sufficient remedy.
68. With respect to aggravated damages, Counsel for the Respondent relied on the Ugandan authorities in both the Court of Appeal and the Supreme Court to the effect that such damages are awardable only where the Court finds the acts of the offender not only unlawful but degrading, callous and inflicting exceptional harm. Counsel submitted that in the instant case, the conduct of the Appellant herself was inconsistent with the requirements of her high office and in part corresponded to the grounds of misconduct envisaged under Article 53(3) of the

Treaty for the removal of a Speaker.

69. With respect to special damages, Counsel for the Respondent submitted that it was trite law that special damages cannot be recovered unless specifically proved. Counsel submitted it was for the Appellant to prove the legal basis for the special damages claimed. In his view, the Appellant's claim for special damages was misconceived in that it wrongly equated removal from the office of Speaker with dismissal from employment. He pointed out that even after the Appellant's removal as Speaker, she continued to serve as a member of EALA with all the benefits due to her *qua* member.

Appellant's Submissions in Rejoinder

70. In reply, Counsel for the Appellant submitted that the Trial Court having found the Respondent to have breached the Treaty in removing the Appellant from office, it should have awarded damages, and by refusing to do so on the basis that she had contravened Rule 9(6) of the EALA Rules, the Trial Court had acted upon a wrong principle of law. Counsel argued that the issue of breach of Rule 9(6) was not before the Trial Court for trial, and the Appellant who was found to have been removed from office in complete disregard of the law clearly deserved to be awarded general damages.
71. With respect to aggravated damages, Counsel for the Appellant submitted that this was a classic case in which such an award was due to the Appellant. The blatant breach of the law by law makers, the ill treatment of the Appellant which caused exceptional harm to her reputation and her family must be condemned by the Court through an award of aggravated damages, Counsel contended.
72. With regard to special damages, Counsel for the Appellant submitted that special damages were specifically pleaded and proved in the oral and documentary evidence. Counsel drew the Court's attention to pages 764 –765 of the record of proceedings and exhibit p.36 which was a letter written by the Clerk of EALA regarding the financial entitlement of the Speaker.

The Court's Determination

73. The Court commences its determination of this issue by recalling in brief that the Trial Court declined to award the relief of damages on the grounds that (i) there was no provision in the Court's Rules for the award of damages as a remedy, and given the interpretative jurisdiction of the Court as depicted in Articles 23 and 27 of the Treaty, the issuance of declarations on Treaty compliance or the lack thereof had been deemed to be a sufficient remedy to the parties; (ii) general damages are awarded as a matter of judicial discretion and considering the Appellant's contravention of Rule 9(6) of the Assembly's Rules of Procedure an action which might have triggered other actions, some patently unlawful, she could not be seen to benefit from her role in the procedural impasse that dogged the Assembly; and (iii) the authorities cited by the Appellant for award of damages concerned dismissal of employees from service whereas the Appellant was not in the shoes of an employee dismissed from service as she was elected by peers who had the mandate under the Treaty to remove her.
74. The Court's review of the submissions by Counsel for the parties reveals that the following questions call for answers. First, whether the remedy of damages is in

principle available in the East African Court of Justice. Secondly, if it is, what is the nature of damages that may be awarded. Thirdly, the quantum of such damages in this case. Fourthly, whether interest on damages should have been awarded and the rate thereof.

75. On whether the remedy of damages could have been granted by the Trial Court, the Court is perfectly clear that it could. We reiterate our holding in paragraph 43 above that the legal consequences to be visited upon the Community in consequence of a breach of its international obligation to a person resident in a Partner State may, in appropriate cases, include cessation (usually known as injunction in internal law), reparation (which may take the form of restitution or compensation), satisfaction, or similar, or other remedies. Accordingly, the Court holds that to the extent the Trial Court declined to award damages on the basis that it could not find justification therefor in its interpretative jurisdiction of the Treaty under Articles 23(1) and 27(1) or the Rules, it misdirected itself and erred in law. The remedy of compensation (usually known as damages in internal law) is very firmly established in international law, and is available for the Community's breach of its Treaty obligations where a claimant establishes that the Act, regulation, directive, decision or action of the Community complained of has caused such claimant a loss which is financially assessable.
76. With regard to the Trial Court's second reason for declining to award damages, namely that general damages are in the discretion of the Court and the Court would not exercise such discretion in favour of the Appellant who had contravened Rule 9(6) of the EALA Rules, this Court is of the opinion that whereas such may be the practice and jurisprudence of the municipal courts in tort claims, there is no authority that was cited to us, and we know not of any, that the same principle applies in international tribunals with respect to claims for compensation for breach of Treaty obligations. We accordingly find and hold that the reasoning of the Trial Court was without foundation in international law.
77. With regard to the relevance of the authorities cited by Counsel for the Appellant in support of his submissions for an award of damages, we agree with the Trial Court that the same were obviously concerned with awards to employees unlawfully dismissed from service. We however find the Trial Court's distinction of them on the basis that the Appellant was not an employee of the Assembly, as she was an elected official, specious. To our minds, there is no difference in principle between the action of unlawful dismissal of an employee and unlawful removal from office of an elected official. In this Court's view, both are legal wrongs remediable by compensation. In the instant matter, the Appellant's removal from office as Speaker was found by the Trial Court itself to be a breach of Article 56 of the Treaty. That wrong entailed compensation for consequential loss.
78. In short, we conclude that the Trial Court erred in law in declining to award the Appellant compensation. We next consider the matter of assessment of the compensation claimed.
79. Assessment of compensation being a factual inquiry is obviously within the competence of the Trial Court (see the East African Court of Appeal decision in *Chandaria v. Ghadially* [1962] EA 501). It is also the law that the Trial Court should, even if it were minded to dismiss the suit on liability, consider

the quantum of compensation it would have awarded had it made a finding of liability in favour of the Appellant (see the decision by the Kenyan Court of Appeal in *Owayo v. Aduda* [2007] 2KLR 140, 156). That approach is the correct one and is anchored on the sound reasoning that should the finding that there is no liability and, accordingly, compensation should not be awarded, be reversed by the Appellate Court, the latter Court is entitled to benefit from the Trial Court's factual findings on the quantum thereof.

80. In the instant matter, the Trial Court omitted to discharge that mandate of assessing compensation. Ordinarily, that omission would on a successful appeal on the availability of the remedy, impel this Court to remit the case back to the Trial Court for assessment of compensation. However, given the convoluted nature of this litigation and the delays that might ensue between such an order and the final disposal of the matter, the Court has in the interest of expeditious justice decided, not without some hesitation, to exercise its inherent power and assess the compensation due to the Appellant.
81. The Court takes the view that as the gravamen of the Appellant's case is unlawful removal from office, the compensation should cover the financially assessable loss. We say so without forgetting that the Appellant's Counsel endeavored at length to present the case also as one of breach of the Appellant's human rights for which general damages should have been awarded. In that respect, we say at once that Counsel's argument was disingenuous for, from our detailed consideration of the pleadings, it is evident that the Reference was not pleaded with particularity, or at all, as a human rights cause. Little wonder then that the Respondent's Counsel did not respond to it as a human rights cause and the Trial Court too did not consider and determine it as such.
82. As regards the financial loss suffered by the Appellant in consequence of the Respondent's breach of Article 56 of the Treaty, the Appellant pleaded a monthly loss of salary of \$7,100, housing allowance of \$3,000, responsibility allowance of \$300, entertainment allowance of \$350, communication allowance of \$600, education allowance per child (4) per annum of \$1,200, gratuity of 25% of the basic salary in the sum of \$450, and allowances during plenary sitting divided into six sessions and totaling 80 days on the basis of a sitting allowance per day of \$200. She prayed for interest on the above amount at 24% per annum from the date of unlawful removal from office till payment in full. At the trial, it emerged that the Appellant continued receiving a salary and allowances as a member of EALA despite the loss of office as Speaker. She testified that after her removal from office in December 2014 as Speaker, her salary from January 2015 was reduced by three thousand eight hundred dollars. That evidence was not contradicted. In the circumstances, the Court finds and holds that the financially assessable loss suffered by the Appellant in consequence of her unlawful removal from office was Three Thousand Eight Hundred Dollars per month (\$3,800 per month). It was agreed during the oral highlighting of the Parties' submissions that the life of the Assembly of which the Appellant had been removed as Speaker ended in June 2017. That being the case, the Appellant's quantifiable loss was One Hundred and Fourteen Thousand Dollars (\$114,000) calculated as follows: \$3,800x30 months (i.e. January 2015 to June 2017 both months inclusive).
83. With respect to interest on the said damages, the Court observes that Article 38

of *ILC draft Articles on the responsibility of international organizations* provides as follows:

- “1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be so set as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”

84. The above article is in identical terms with Article 38 of the *ILC draft articles on State responsibility*. Indeed the commentary to the above article states as follows:

“The rules contained in Article 38 on the responsibility for internationally wrongful acts with regard to interest are intended to ensure application of the principle of full reparation. Similar considerations in this regard apply to international organizations. Therefore both paragraphs of article 38 are here reproduced without change.”

The *ILC commentary* on the above Article 38 on responsibility of states for internationally wrongful acts states in part as follows at Page 269:

“Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence. In the *S. S. Wimbledon*, the Permanent Court awarded simple interest at 6% per annum as from the date of judgment, on the basis that interest was only payable from the moment when the amount of the sum due has been fixed and the obligation to pay has been established.” . . . The experience of the Iran – United States claims Tribunal is worth noting. In *Islamic Republic of Iran v. United States of America (Case A-19)*, the full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each chamber and related “to the exercise. . . of the discretion accorded to them in deciding each particular case.”

85. The Court takes inspiration from the above jurisprudence and concludes that, as a regional international Court, it has the jurisdiction and discretion to award interest on compensation. With respect to the date from which interest should be awarded, the Court takes inspiration from the jurisprudence referred to in the *ILC Commentary* which is congruent with the decision of the East African Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd. (No. 2) [1970] EA 469* where that Court held that:

“. . . where a person is entitled to a liquidated amount . . . he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment”

In the present case, the Appellant’s claim for loss of earnings was obviously in the nature of a liquidated claim rather than general damages at large to be assessed by the court. Accordingly, we hold that interest shall be paid from the date of filing of the Amended Reference until payment in full. As regards the rate thereof, we consider that as this is not a commercial cause and further that the currency of payment is American dollars, a rate of six (6) percent per

annum is a fair one. The Court will so decree.

86. The upshot of our consideration of this part of the Appeal is that Issue No. 3 is answered partially in the affirmative. It is a categorical yes in so far as special damages are concerned, and It is a negative in so far as general, aggravated and/or exemplary damages are concerned but for different reasons. And the Appellant will be awarded interest on the sum of American Dollars One Hundred and Fourteen Thousand (\$114,000) at the rate of six (6) per centum per annum from the date of the filing of the Amended Reference in the Trial Court till payment in full.

Issue No. 4: Whether the Trial Court erred in declining to award the Appellant the Costs of the Reference

Appellant's Submissions

87. Counsel for the Appellant submitted that costs are awarded at the discretion of the Court in accordance with Rule 111(1) of the Rules and they follow the event. He pointed out that the Appellant was the successful party as the Trial Court had concluded that she was successful in three (3) of the five (5) issues framed and would be entitled to 3/5 of the costs. Counsel cited several authorities from the superior Courts of Kenya and Uganda all of which discuss the principles on which costs are to be awarded and from which may be distilled the principle that a successful party is not to be denied costs except on the basis that the matter was of public interest or his or her conduct disentitled such party to costs. Counsel also invoked the authority of this Court in *Alcon International Ltd V Standard Chartered Bank of Uganda & 2 Others [EACJ Appeal No. 3 of 2013]* where the Court held that in an appeal against the Trial Court's order on costs, the proper question was whether the Trial Court had exercised its discretion judiciously in declining to give costs to the successful party. Counsel submitted that in denying the Appellant costs on the basis of her conduct in presiding over the Assembly's proceedings in April and June 2014, the Trial Court exercised its discretion improperly as those matters were not pleaded or framed as an issue for determination.
88. Counsel for the Appellant prayed that the Trial Court's order on costs be set aside and the Appellant be awarded costs with a certificate for two Counsel.

Respondent's Submissions

89. Counsel for the Respondent submitted that though the basic rule is that costs follow the event, the matter was ultimately in the discretion of the Court. He relied on the case of *Angella Amudo v The Secretary General of the East African Community, [Taxation Reference No. 3 of 2016]* where the Court held:

“Regarding costs, Rule 111 of the Rules provides that costs shall follow the event. The Rules also grant the Court discretion to determine whether any party is entitled to costs.”

Counsel also invoked the authority of the Constitutional Court of South Africa in the case of *Clive Ferrera and Others v Powell Oliver M Levin & Others [Constitutional Court Case No. CCT 5/45]* where that Court pronounced itself on the issue of costs as follows:

“The Supreme Court has, over the years, developed a flexible approach

to costs which proceeds from two basic principles; the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second is that the successful party should, in general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants, and the nature of the proceedings.”

Counsel also invoked the Kenyan Court of Appeal decision in *Karanja v Kabugi & Another* [1976-1985] E.A. 165 wherein it was held that:

“A successful party should not be deprived of his costs unless his conduct has led to the litigation which, but for his conduct, might have been averted. Where no reasons are given for departing from the general rule that costs follow the event, an appellate court will interfere if satisfied that the order is wrong.”

90. Counsel for the Respondent submitted that the Trial Court had found that the conduct of the Appellant had triggered the events that led to her removal as Speaker and that was a sufficient and judicious reason to depart from the principle advanced in Rule 111 that costs follow the event. Counsel submitted that in the premise, the Trial Court rightly declined to grant an award of costs to the Appellant.

Appellant’s Reply to the Respondent’s Submissions

91. Counsel for the Appellant submitted that the Trial Court had not exercised its discretion judiciously for the reasons that, first, in denying her costs, it apportioned blame for the litigation as if this was a tort claim, and secondly, by the time the Motion to remove the Appellant from office was filed with the Clerk of EALA on 27th March 2014, the Appellant had not breached Rule 9(6) and therefore her conduct could not have triggered anything or led to litigation. Lastly, during the oral highlights, Counsel submitted that the relevant conduct that could disentitle a successful party from costs was conduct during the trial of the case, such as failure to bring witnesses on time or at all.

The Court’s Determination

92. The Court entirely agrees with the postulation of the principles governing the award of costs by the Constitutional Court of South Africa in the case of *Clive Ferreira and Others V. Powell Olives M. Levin & Other (Supra)*. If we may paraphrase it in our own words, the principles are these: costs are in the discretion of the court; 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 representatives, the nature of the litigants, the nature of the proceedings or the nature of the success. Those are the guiding principles to the court deciding at first instance on whether to

award costs.

93. Once the matter moves to the appellate level, the pertinent consideration is whether the trial court exercised its discretion judicially in declining to give costs to the successful party.
94. The reasons the Trial Court gave for declining to award costs to the Appellant are elaborated at Paragraph 117 of the Judgment appealed from in the following words:
- “In the instant case, as we have stated herein, although not specifically framed as an issue for determination, the Applicant herein did flout Rule 9(6) of the Assembly’s Rules of Procedure by presiding over a matter in her own cause. Quite possibly this conduct on her part, as the steward of the Assembly, could have triggered the unfortunate series of events that have been the subject of this Reference. We do find that to constitute sufficient, judicious reason for this Court to depart from the principle advanced in Rule 111 that costs follow the event.”
95. Having weighed the rival submissions, the Court is persuaded that the Trial Court exercised its discretion improperly in denying the Appellant her costs. The Court is not moved by the submission by Counsel for the Appellant that the Appellant’s conduct in presiding over the Assembly’s proceedings concerning her removal as Speaker contrary to Rule 9(6) of the Assembly Rules of Procedure could not be factored into the exercise of the Court’s discretion because it was not pleaded or framed as an issue for Trial. Obviously, the conduct of parties or their representatives that might incline a court to deny costs to a successful party would not be conduct which was material to the case at trial and which therefore was expected to have been pleaded. It is conduct which manifests itself in the course of the litigation. What has moved this Court is the consideration that proceedings for the removal of the Appellant as Speaker and which culminated with her illegal removal from office were not precipitated by her action of presiding over the Assembly’s sitting on 1st April and 4th June 2014. The proceedings for her removal were mooted before those events and crystallized into a motion for her removal which was filed with the Clerk on 27th March, 2014 and subsequently reactivated in November 2014. It could not therefore be objectively stated that her conduct on those dates led to litigation in the form of either *Reference No. 5 of 2014* or *Reference No. 17 of 2014* as amended in 2015. Furthermore, and in any event, the Court observes that even the Trial Court itself was not certain that the Appellant’s conduct triggered the litigation. The Trial Court’s conclusion was that “quite possibly” such conduct “could have” triggered the unfortunate series of events the subject matter of the Reference. In our view, and we have said so at Paragraph 70 above, the Appellant’s alleged conduct was a red herring. And it was definitely not conduct in the Reference or conduct that gave rise to the Reference. In the premise, it was an irrelevant factor, and the Trial Court, in taking it into account in exercising its discretion, thus exercised such discretion improperly.
96. Having concluded that the Trial Court exercised its discretion improperly, in depriving a successful party of its costs, we are constrained to answer Issue No. 4 in the affirmative.

E. The Remedies

97. The Appellant prayed that the Appeal be allowed, that the judgment of the Trial Court be partially varied and the impugned actions and/or decisions of EALA be quashed, the Appellant be reinstated as Speaker of EALA, the Appellant be granted special and general damages as pleaded in the Reference, the Appellant be granted the costs of the Reference and of the Appeal, and that the Court gives such consequential, further or other orders as may be just and equitable for the implementation of any order on damages and costs.

98. The Respondent prayed the Court to dismiss the Appeal with costs and make such other orders as it deemed fit.

99. We now proceed to consider the remedies sought in sequence.

(1) Allow/Disallow the Appeal

100. As the Court has determined issue numbers 1, 3, and 4 in favour of the Appellant and found issue number (2) to have been inconsequential, it is apparent that the Appeal succeeds and is allowed.

(2) Variation of the judgment of the Trial Court

101. This prayer is inextricably linked with prayers (3), (4), and (5) and cannot be considered without addressing the latter. It is accordingly deferred.

(3) Reinstatement of the Appellant as Speaker of EALA

102. In its determination at Paragraphs, 44, 45, and 46, the Court has concluded that the Trial Court erred in law in holding that it did not have the mandate to reinstate the Appellant. However, it is a matter of public knowledge and is common ground that the Assembly of which the Appellant could have been reinstated came to an end in June 2017. In those circumstances, reinstatement is now moot and the Court would be acting in vain to so order. The prayer therefore cannot be granted.

(4) Special and General Damages

103. From the Court's analysis and determinations at Paragraphs 75, 76, 77, 78, 81, 82, 83, and 85 it is clear that the Court's conclusions are that (i) the Trial Court had the jurisdiction to and could have granted the remedy of damages, (ii) general damages were not an appropriate remedy in the circumstances of the case, (iii) special damages were proved in the sum of One Hundred and Fourteen thousand Dollars (\$114,000), and (iv) interest should be paid on that amount at the rate of six (6%) per cent per annum from the date the Amended Reference was filed in the Trial Court till payment in full.

(5) Order on Costs

104. It is clear that the Appellant has substantially succeeded in this Appeal. Indeed, only in respect of Issue No. 2 has the Court returned a negative verdict. However, we have said that that issue was a red herring in the Trial Court and ought not to have been entertained on any proper consideration of the Reference. In the premise, we find that the Appellant is entitled to her costs both in this Court and in the Trial Court.

105. As regards certification for two Counsel, the Court notes that Counsel for the Respondent did not oppose the prayer. And the Court itself is of the persuasion that this was a complex matter, cutting a new path in Treaty interpretation, application and compliance. And the Court further takes notice that both here and below, the Appellant was represented by Counsel from two different

law firms in Kampala, Uganda. In the result, we would certify the case as appropriate for costs for two Counsel in this Court and below.

106. It is evident from the conclusions in paragraphs 102, 103, 104, and 105 that the judgment of the Trial Court stands to be varied to the extent that (i) the finding by the Trial Court that it had no jurisdiction to grant the remedy of damages will be set aside and substituted with a finding that the Trial Court had the jurisdiction or mandate to grant that remedy, and an order that the Appellant be awarded compensation in the sum of USD 114,000 with interest thereon at 6 per cent per annum from 24th February 2015 till payment in full; and (ii) the order on costs will be set aside and substituted with an order that the Appellant do be granted the costs of the Reference and of the Appeal, and that such costs are certified for two counsel.

(6) Further or Other Reliefs

107. In view of our findings and conclusions above, it is neither expedient nor necessary to grant the further or other orders sought by the Appellant as they would serve no useful purpose.

F. Conclusion

108. The upshot of the Court's consideration of this Appeal is that:

- (1) The Appeal be and is hereby allowed with costs here and below with a certificate for two Counsel.
- (2) The judgment of the Trial Court be and is hereby partially varied by:
 - (i) affirming orders (a) (b) (c) therein,
 - (ii) setting aside order (d) therein
 - (iii) adding the following further order and numbering it as (d):

“the Appellant be and is hereby awarded special damages in the sum of American Dollars One Hundred and Fourteen Thousand (\$114,000) together with interest thereon at six (6) percent per annum from 24th February 2015 till payment in full.”
- (3) The Appellant's prayer for reinstatement as the Speaker of the East African Legislative Assembly be and is hereby declined.

It is so ordered

J. Semuyaba & J. J. Tumwebaze, Counsel for the Applicant

S. Agaba, Counsel for the Respondent

Appellate Division

Appeal No. 4 of 2017**Johnson Akol Omunyokol v Attorney General of the Republic of Uganda**

[Appeal from “an Order” of the First Instance Division at Arusha, Tanzania, dated 5th September 2017 (Monica K. Mugenyi, PJ.; Isaac Lenaola, DPJ.; Faustin Ntezilyayo, Fakihi Jundu and Audace Ngiye, JJ.) in Reference No. 01 of 2015.]

Coram: E. Ugirashebuja, P.; L. Nkurunziza, VP; E. Rutakangwa, A. Ringera and G. Kiryabwire, JJ.A.

August 24, 2018

Statutory tests of an appeal - Record of Appeal must contain a judgment, order or ruling - Whether the appeal was competent - Jurisdiction suo motu

Articles: 1, 35A of the Treaty - Rules: Rule 53(1), (a), 68(5), 69, (1), (2), 77, 78 (2), 88(1) EACJ Rules of Procedure, 2013

The Scheduling Conference for Reference 1 of 2015 was held and finalised by the Trial Court on 14th June 2017. Thereafter, when the case came up for hearing on 5th September 2017, Counsel for the Appellant made an oral application requesting for the inclusion of two further issues for determination however, the Trial Court declined the request. In this Appeal, the Appellant challenged the Trial Court’s refusal to incorporate the issues proposed claiming that this was an error in law and that omission of the issues would be fatal to his case. As part of the Record of Appeal, the Appellant included the Scheduling conference notes and trial transcripts.

The Respondent submitted that: there was no judgment or order made by the Trial Court on 5th September 2017 from which an appeal could arise therefore the Appeal was premature and incompetent. Moreover, there was no error in law or procedural irregularity.

Held

1. In the East African Community jurisprudence an appeal lies to the Appellate Division only to challenge a judgment or an order of the First Instance Division of this Court, Article 35A. *It is a condition precedent that to exercise a right of appeal, a judgment or an order of the Trial Court must be in existence. A judgment includes a ruling, an opinion, an order, a directive or a decree of the Court. The judgment, order or a ruling with the reasons of the Trial Court must be included in the Record of Appeal.*
2. On 5th September 2017, the Trial Court did not give a formal order or ruling the trial proceeded as scheduled. The hearing note and proceedings of verbal exchanges of 5th September 2017 are not appealable under Article 35A of the Treaty. The onus of producing a judgment or an appealable order was on the Appellant. By producing scheduling conference notes or trial transcripts, the Appellant failed to discharge that duty. Therefore, the Court has no jurisdiction.
3. Jurisdiction is so fundamental that it can be raised at any stage either by the

parties or *suo motu* by the court and no consent or acquiescence can confer on a court or tribunal with limited jurisdiction to act beyond that jurisdiction, or estop the consenting party from subsequently maintaining that such Court or Tribunal has acted without jurisdiction. The Appeal was misconceived wanting on account of lack of jurisdiction and was therefore be struck out.

Cases cited

Angella Amudo v The Secretary General of EAC [2012-2015] EACJLR 592, Appeal No.4 of 2014
 Attorney General of Rwanda v Plaxeda Rugumba [2012-2015] EACJLR 204, Appeal No. 1 of 2012
 City of Gardena v Rikuo Corp. (2011)192 Cal. App. 4th 595,601
 Dona Point Safe Harbor Collective v Superior Court (City of Dona Point) (2010) 51 Cal. 4th 1, 5
 Griset v Fair Political Practice Com'n (2001) 25 Cal. 4th 688,696)
 Attorney General of Kenya v Independent Medical Legal Unit [2005-2011] EACJLR 377, Appeal No. 1 of 2011
 Lavine v. Jessup (1957) 43 cal. 2d 611
 R.v Sheppard, 2001 S.C.C.26 , [2002] 1 S.C.C.R. 869
 The Secretary General of EAC v and Rt. Hon. Margaret Zziwa, EACJ Appeal No. 7 of 2015
 Olson v Cory (1983) 35 Cal.3d 390,398)
 Simon Peter Ochieng & Anor v Attorney General of Uganda, EACJ, Appeal No.4 of 2015

JUDGMENT

A. Introduction

1. This Appeal was lodged by Johnson Akol Omunyokol (“the Appellant”) purporting to challenge the “decision/Ruling and orders” of the First Instance Division [“ the Trial Court”] dated “5th September 2017” in the Reference No. 01 of 2015, in respect of an “oral Application made by Counsel for the Appellant in court that day of 5th September 2017 to include two pertinent issues for Court’s determination one way or the other and conduct of the Scheduling Conference held on 14th of June 2017”.
2. The Appellant Johnson Akol Omunyokol, is a Ugandan citizen resident in Kampala in the Republic of Uganda. He represented himself in the Appeal. The Respondent is the Attorney General of the Republic of Uganda, represented in the Appeal by Ms Christine Kaahwa (Ag. Director of Civil Litigation), Ms Gorreti Arinaitwe (Senior State Attorney) and Ms Imelda Adong (State Attorney).

B. Background

3. As shown in Para 1 above, this Appeal was lodged by Johnson Akol Omunyokol (“the Appellant”) purporting to challenge the ”decision/Ruling and orders“ of the First Instance Division [“the Trial Court”] dated “5th September 2017” in the Reference No. 01 of 2015, in respect of an ” oral Application made by Counsel for the Appellant in court that day of 5th September 2017 to include two pertinent issues for Court’s determination one way or the other and conduct of the Scheduling Conference held on 14th of June 2017”.
4. The Appellant found the alleged refusal by the Trial Court to incorporate his proposed issues in the list of agreed issues for determination to be fatal to his case, hence this Appeal.
5. In his Memorandum of Appeal, the Appellant raised six grounds of complaint. At the Scheduling Conference held on 18th February 2018, the said six grounds were consolidated into 3 main Issues, namely:
 1. Whether the Appeal is competent.
 2. Whether the Trial Court erred in law by not including two issues, namely;

(i):

“whether it was lawful for the Government of Uganda (Supreme Court) to award the Appellant salary arrears using an obsolete salary scale of 1998 when he was dismissed at a salary scale of UGX 247,542/= per month thereby violating Articles 158 (1) and 254(2) of the Uganda Constitution hence breaching Uganda’s internal laws and the Treaty in Articles 6(d)” and (ii): “Whether it was lawful for the Government of Uganda (Supreme Court) to award the Appellant salary or emoluments prospectively up to the year 2024, the year he would officially retire thereby illegally and constructively retiring the Appellant from service without following the Public Service Commission Regulations 45, Articles 257(5) of the Uganda Constitution hence breaching Uganda’s internal laws and the Treaty creating the East African Community in Articles 6(d) and 7(2).”

3. What reliefs are available to the Parties.

C. The Parties’ Submissions.

6. Addressing the First issue on whether the Appeal is competent, the Appellant submitted that it was a misconceived and misplaced issue which was set to digress from the crux of the matter. He added that the Appeal cannot be incompetent because according to him, it was lodged within the time frame prescribed by law. In that regard, the Appellant cited Rule 78 (2) of the East African Court of Justice Rules of Procedure, 2013, (“the Rules”) and took the stand that the decision appealed from was dated 5th September 2017 and the fact that he lodged the Notice of Appeal on 19th September 2017 shows, according to him, that both the Notice of Appeal and the Memorandum of Appeal were lodged in time. The Appellant concluded that the Appeal is competent.
7. On the Second Issue, the Appellant relied on the provisions of Rule 53 (1) (a) of the Rules and pointed out that the purpose of a Scheduling Conference before the Trial Court is to ascertain points of agreement and disagreement. To him, it is a denial of one’s rights for a court to lock out a litigant from framing pertinent issues for the Court’s resolution and to do so would result in issues that are central to the controversy before court going unattended and thus appellant’s rights would remain undetermined.
8. The Appellant cited our decision in *Angella Amudo v. The Secretary General of the East African Community, Appeal No.4. of 2004* in support of his argument that the Trial Court committed a procedural irregularity, wherein it was decided that: “a court of law commits an error of law or procedural error when it: - Acts irregularly in the conduct of 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, ignores a party’s pleadings, etc.”
9. The Appellant in his Rejoinder Submission sought further reliance in the *Angella Amudo case* (supra) by submitting that “denying the Appellant to frame the two pertinent issues for court consideration made the First Instance Division of this Court to commit an error of law by acting irregularly in conduct of proceeding or hearing leading to a denial or failure of due process ...” In bolstering his contention, the Appellant referred us to the case of Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare (ANAW),

Appeal No.3 of 2011.

10. Although, no point of preliminary objection has been raised as an issue in this Appeal, the Appellant, relying on Rules 41(1), (2) and Rule 53 of the Rules, pointed out that an issue of a preliminary objection should be raised by giving 7 days written notice to the other party and the Court. He further submitted that the Respondent, having failed to comply with this mandatory requirement, he had waived the right to be heard thereon and the matter of time limitation was not pleaded by the Respondent and therefore it should be disallowed. In that regard, the Appellant cited *Reference No. 1 of 2014, Christopher Mpozayo and The Attorney General of the Republic Rwanda, Reference No. 6 of 2014, Human Awareness and Promotion forum (HRAPF) versus Attorney General of Uganda and the Secretariat of the Joint United Nations Programme in HIV/AIDS (Amicus Curiae)*.
11. The Appellant prayed that this Appeal be allowed and “the orders” of the Trial Court dated 5th September 2017 disallowing the Appellant’s application be set aside and the Appellant also be allowed to frame the two issues for determination by the Trial Court. He further prayed for costs of the Appeal.
12. On Issue No. 1, Counsel for Respondent succinctly submitted that there was no judgment or order in Reference No. 1 of 2015 made by the Trial Court on 5th September 2017 from which an appeal could arise and consequently, the instant Appeal was premature and incompetent.
13. Regarding the Second Issue, it was Counsel for Respondent’s Submission that the Scheduling Conference in the Trial Court was held on 14th June 2017 and the Court fixed the case for hearing on 5th September 2017. However, Counsel for Respondent criticized the Appellant for not proceeding with the hearing as scheduled by the Trial Court, instead of going back to re-open a concluded Scheduling Conference by making proposals to include other issues.
14. Regarding the errors of law and procedural irregularity committed by the Trial Court as alleged by the Appellant, Counsel for Respondent submitted that Trial Court neither erred in law nor committed any procedural irregularity by not including issues proposed by the Appellant. Counsel maintained that there was no need of additional issues to be adopted by the Trial Court as long as the issues for determination were framed and agreed upon by Counsel for both parties at the Scheduling Conference on 14th June 2017 and the said issues were capable of determining conclusively the matter before the Trial Court.
15. Counsel for Respondent further asked the Court to disregard submissions on matters that were not agreed upon as issues for determination at the Scheduling Conference of this Appeal held on 18th February 2018.
16. As regards the Third Issue on Remedies, Counsel for Respondent invited this Court to strike out the Appeal with costs.

D. Court’s Determination

17. It is common ground that what the Appellant brought before us are Scheduling conference notes that he wanted to amend by including what he alleged to be two pertinent issues for determination, namely; “(i.) Whether it was lawful for the government of Uganda (Supreme Court) to award the Appellant salary arrears using an obsolete salary scale of the year 1998 when he (the Appellant) was

dismissed from service at a salary scale of UGX 247,542/= per month instead of the current salary scale of UGX 1,177,688/= per month thereby violating articles 158 (1) and 254 (2) of the Uganda Constitution hence breaching Uganda's internal laws and the Treaty creating the East African Community in Article 6(d) and 7(2), and (ii.) Whether it was lawful for the Uganda Government (Supreme Court) to award the appellant salary or emoluments prospectively up to the year 2024 the year when the Appellant would officially retire thereby illegally and constructively retiring the appellant from service without following the Public Service Commission regulation 45, Article 257(5) of the Uganda Constitution hence breaching Uganda's internal laws and the Treaty creating the East African Community in Articles 6(d) and 7(2) respectively.”

18. However, as correctly argued by Counsel for the Respondent, in our respectful finding, the Appellant has failed to show which judgment or order of the Trial Court he is appealing from. The sole document he produced and which is deemed to be the basis of the Appeal is the interaction between the Appellant and his Counsel on the one hand and the learned Principal Judge and Deputy Principal Judge on the other hand, on 5th September, 2017 before the trial commenced on how the proposed two issues could be merged with the issues earlier agreed on at the Scheduling Conference on 14th June, 2017.
19. Before we embark on the disposal of this Appeal, we think it necessary to first look at the established jurisprudence governing the right of appeal. “The right to appeal is wholly statutory” as it was reiterated in the case of *Dona Point Safe Harbor Collective v Superior Court (City of Dona Point) (2010) 51 Cal.4th 1,5*. This authority holds that “no appeal can be taken except from an appealable order or judgment, as defined in the Statutes and developed in the case law...” (See *City of Gardena v Rikuo Corp. (2011)192 Cal.App.4th 595,601, quoting Lavine v. Jessup (1957) 43 cal. 2d 611,613*).
20. The above authorities are also relevant in the East African Community context in as far as an appeal has to meet the statutory tests as provided for under Article 35A of the Treaty for the Establishment of the East African Community (“the Treaty”) read together with Rule 77 of the Rules.
21. In order to address properly the above statutory requirements and jurisprudence in relation to a right of appeal, we bear in mind that in the East African Court of Justice, the Appellate Division's mandate is to entertain an appeal from a judgment or an order of the First Instance Division as per Article 35A of the Treaty which is mirrored in Rule 77 of the Rules.
22. For ease of reference, Article 35A 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) Ground of lack of jurisdiction; or
 - (c) Procedural irregularity.
23. The above Treaty provision as well as Rule 77 of the Rules clearly indicate what can be appealed against to the Appellate Division, namely:
 - i. A judgment of the First Instance Division or
 - ii. Any order of the First Instance Division.
24. Whenever a party is dissatisfied with a judgment or an order of the First Instance

Division, he/she is entitled to an appeal before the Appellate Division provided that such judgment, order or ruling is wanting on account of “points of law, grounds of lack of jurisdiction; or procedural irregularity” (See Angella Amudo, *supra*).

25. On numerous occasions this Court has determined appeals falling under the provisions of Article 35A. The Court has been clear in all those circumstances that an appellant is bound to include a judgment, an order or a ruling with the reasons of the Trial Court in the Record of Appeal in exercising his right of appeal. (See Angella Amudo, ANAW cases [*supra*], The Secretary General of the East African Community and Rt. Hon. Margaret Zziwa (Appeal No. 7 of 2015), Simon Peter Ochieng and John Tusiime v. Attorney General of Uganda (Appeal No.4 of 2015), Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, EACJ, Appeal No. 1 of 2012, Independent Medical Legal Unit And Attorney General of the Republic of Kenya, EACJ, Appeal No. 1 of 2011, etc.
26. It follows from the foregoing that it is a condition precedent, for an appellant to exercise a right of appeal before the Appellate Division that a judgment or an order of the Trial Court must be in existence.
27. The Treaty is so clear that there cannot be any confusion whatsoever between a judgment and a scheduling conference nor an order and a Scheduling conference for the purpose of an appeal. The Treaty in Article 1 defines the word “judgment” as follows:
 - “judgment” shall where appropriate include a ruling, an opinion, an order, a directive or a decree of the Court”.
28. The Supreme Court of Canada has recognized a common law duty to provide “adequate” reason for judgment and has stated that the giving of reasoned judgment is central to the legitimacy of judicial institutions in the eyes of the public (see *R. V Sheppard*, 2001 S.C.C. 26 at para 5 [2002] 1 S.C.C.R. 869).
29. Rule 68 (5) of the Rules provides for the contents of a judgment of the Court to include among others the date on which it is read, the names of the judges participating in it, the names of the parties,...the concise statement of the facts, the reasons for such decision,...”.
30. Rule 88 (1) of the Rules provides for the content of the Record of Appeal by clarifying unmistakably that the Record of Appeal shall contain, inter alia, the following documents:- “...
 - e) the judgment or reasoned order
 - f) the decree or order”;
 - ...”

Rule 2 defines a decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit.

And Rule 69 reads as follows;

- “(1) Every decision of the Court shall be embodied in an order.
- (2) An order...shall be dated as of the date the decision was delivered and shall contain the particulars of the case and specify clearly, the relief granted...”

31. From the above provisions and authorities, the question to be posed is whether taking into account the circumstances of the instant Appeal before us, the verbal

exchanges of 5th September 2017 can be appealable under Article 35A of the Treaty. The answer to this pertinent question is unarguably in the Negative because no formal order or ruling was given by the Trial Court on that day. Instead, the trial proceeded as scheduled. In that regard, and remembering that it is trite law that “He who alleges must prove”, the onus of production of a judgment or an appealable order lies on the Appellant. The Appellant has not discharged that onus for he has not included any such order in the Record of appeal; nor did he show us any such order for our perusal and necessary directions.

32. The circumstances before us have to be distinguished from a scenario where a judgment or an order basically appealable, was made and does exist but is not incorporated in the Record of Appeal because of lack of due diligence of the Appellant and a scenario whereby a judgment has only not been produced but also cannot be obtained at all because it does not exist.
33. In this instant case before us, there is no judgment or order of the Trial Court at all which the Appellant wants to reverse by way of appeal. The hearing notes relied on by the Appellant are neither a judgment nor an order capable of being challenged by way of appeal before the Appellate Division within the contemplation of Article 35A. It follows therefore that there is nothing to warrant the jurisdiction of this Court to entertain this Appeal.
34. We take inspiration from *Griset v Fair Political Practice Com’n* (2001) 25 Cal. 4th 688,696) where it was posited that: “if a judgment or Order is not Appealable, the Appellate Court has no jurisdiction. Even if the Parties do not raise the issue, if there is any doubt whether the appeal is from an appealable judgment or order, the court is “duty bound” to consider it on its own motion.” (See *Olson v. Cory* (1983) 35 Cal. 3d 390,398).
35. Based on the foregoing authorities, the inference to be drawn in the instant Appeal under scrutiny, is that, although the parties have vehemently dedicated their arguments on the question of the procedural irregularity or error of law by the Appellant on one hand and incompetent appeal by the Respondent on other hand, the nature of the Appeal before us raises, on the face of it, a fundamental question of jurisdiction.
36. It is the established jurisprudence of this Court that a fundamental question such as that of jurisdiction can be raised at any stage either by the parties or *suo motu* by the court (see *Angella Amudo Supra*).
37. It is obvious that none of the parties raised the issue of jurisdiction. However, this Court considers it appropriate to raise it, in as far as jurisdiction... “is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited jurisdiction to act beyond that jurisdiction, or can estop the consenting Party from subsequently maintaining that such Court or Tribunal has acted without jurisdiction...” (See *Angella Amudo case supra*).
38. It is evident in the Appeal under scrutiny, that there is no judgment or an order of the Trial Court. It is so obvious that there is no need for it to be established or demonstrated that as far as the trial hearing notes, strongly relied on by the Appellant in prosecuting this purported appeal cannot be equated to a judgment or an order of the Trial Court which would trigger the requirements set out in Article 35A of the Treaty and Rules 68 (5), 88(1), 69(1) and (2) of the Court Rules of Procedure as demonstrated above for the Appellant to put the house in

order to move an appeal before this Division.

39. In this Appeal, it was the duty of the Appellant to include in the Record of Appeal the impugned judgment or order of the Trial Court if one existed in order to clothe this Appellate Division with jurisdiction to entertain the Appeal.
40. We have established that in the East African Community jurisprudence an appeal lies to the Appellate Division only to challenge a judgment or an order of the First Instance Division of this Court and not scheduling conference notes or trial transcripts as it is the case in this Appeal. For that reason, the Appeal is totally misconceived, and wanting on account of lack of jurisdiction of this Division. The Appeal misconceived as it is, ought to be struck out and there is no need to entertain it on merits. The pending Reference in the Trial Court should proceed to its logical conclusion.
41. With regard to costs, since this Appeal is struck out on account of lack of jurisdiction of this Division and that it has been raised suo motu by the Court itself, we find it appropriate and just to order each party to bear its own costs in this Appeal.

E. Conclusion

42. **The upshot of our consideration of this Appeal is that:**
- (a) The Appeal is struck out.
 - (b) Each Party shall bear its own costs of the Appeal.

It is ordered accordingly.

Applicant appeared in Person

C. Kaahwa, G. Arinaitwe & I. Adong, Counsel for the Respondents

^^*