



**IN THE EAST AFRICAN COURT OF JUSTICE  
APPELLATE DIVISION  
AT ARUSHA**

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

**APPEAL NO. 02 OF 2019**

**BETWEEN**

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

**AND**

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

**AND**

**HON. FRED MUKASA MBIDDE .....INTERVENER**

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

## **DISSENTING JUDGMENT OF LIBOIRE NKURUNZIZA, V.P**

### **A. INTRODUCTION**

1. I opted to differ with the judgment which the majority of the Court delivered in respect of this Appeal.
2. The Appeal is against the Judgment of this Court's First Instance Division ("the Trial Court"), dated 2<sup>nd</sup> July 2019 in Reference No. 2 of 2018 whereby the Trial Court dismissed the Reference and ordered each Party to bear its own Costs.
3. The Appellant is the Attorney General of the Republic of Burundi in his capacity as the representative of the Republic of Burundi (the Applicant in the Trial Court), represented by Mr. Diomède Vyizigiro and Mr. Pacifique Barankitse.
4. The Respondent is the Secretary General of the East African Community, represented in this Appeal by Dr. Anthony Kafumbe, the Counsel to the Community.
5. The Intervener is Fred Mukasa Mbidde, a member of the East African Legislative Assembly hereinafter referred to as ("EALA" or the Assembly). He is represented in this Appeal by Mr. Justin Semuyaba, Mr. Don Deya, and Mr. Nelson Ndeki.

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## **B. BACKGROUND**

6. Following the election of the 4<sup>th</sup> Speaker of EALA held on 18<sup>th</sup> December 2017, the Republic of Burundi filed before the East African Court of Justice ("the Court") Reference No.2 of 2018 challenging the irregularity of the said election on account that Mr. Martin Ngoga, from the Republic of Rwanda, was alleged to have been elected the Speaker of the Assembly without the required legal quorum as envisaged by the Treaty for the Establishment of the East African Community ("the Treaty") and the Rules of Procedure of the East African Legislative Assembly ("EALA Rules of Procedure" or Rules of the Assembly).
7. Pursuant to Article 23(3) of the Treaty, the Reference was determined at the first instance by the First Instance Division of this Court (the "Trial Court").
8. Before the Trial Court, the Applicant (Attorney General of the Republic of Burundi, now the Appellant) challenged the election of the Speaker of the 4<sup>th</sup> Assembly on the ground that the said election was conducted in violation of Articles 6(d), 7(2), 53(1) and 57(1) of the Treaty and Rule 12 of the Rules of procedure of the Assembly.

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9. In fact, the election of the Speaker of the 4<sup>th</sup> Assembly was held on 18<sup>th</sup> December, 2017 without participation of the Elected Members from the Republic of Burundi and the United Republic of Tanzania in as far as they did not participate in the voting.
10. In support of the Reference, Counsel for the Applicant (now the Appellant) filed two Affidavits. In the first one, he averred that the election of the Speaker had to be governed by Rule 12 (1) which requires a quorum of half of all Elected Members of the Assembly and which quorum should be composed of at least one third of the Elected Members from each Partner State. It was further averred that due to non participation of EALA Elected Members from the Republic of Burundi and the United Republic of Tanzania in the voting, Hon. Martin Ngoga was not properly elected as Speaker due to lack of the requisite quorum.
11. The Second Affidavit named "Supplementary Affidavit" contained averment disclosing in extenso the names of EALA Elected Members from the Republic of Burundi and United Republic of Tanzania (all Elected Members from the two Partner States), who were not present at the time of voting and further, in the same Supplementary Affidavit, Counsel for the Applicant prayed for an Order for restitution of salary and other emolument received by the Hon. Martin Ngoga, from the date of election (19<sup>th</sup> December 2017) up to the re-election of a New Speaker of the 4<sup>th</sup> Assembly.

12. By way of Affidavit sworn by Mr. Christophe Bazivamwo, Deputy Secretary General, on 2<sup>nd</sup> March 2018, the Respondent contended that the required quorum for the purpose of election of the Speaker, is two thirds of all Members of the Assembly stipulated in Rule 6 (c) of the EALA Rules of Procedure. He vehemently opposed the reliance and relevance of Rule 12(1) in the said process of election of the Speaker and contended also that the election of the Speaker did not require a quorum.
13. Honourable Fred Mukasa Mbidde, intervened in the Proceedings with leave of the Court pursuant to Article 40 of the Treaty and Rule 36 of the East African Court of Justice Rules of Procedure, 2013 ("the Court Rules"). He supported the Respondent and averred in his statement of intervention that the requisite quorum in the election of the Speaker is not governed by rule 12(1) and that the Speaker was elected on quorum provided for under Rule 6(c).
14. Before the Trial Court, the Parties raised two issues for determination of the Reference, namely:
  - i. Whether Honourable Speaker of the 4<sup>th</sup> Assembly was elected in accordance with the Treaty and the Rules of Procedure of the Assembly.*
  - ii. Whether the Applicant is entitled to remedies sought.*

15. The Trial Court held that the requisite quorum applicable in the impugned election of the speaker is stipulated in Rule 12 (1) but dismissed the Reference with no Order to Costs.
16. Dissatisfied with the Judgment of the Trial Court, the Applicant (now the Appellant) appealed to this Appellate Division on the following ground:

“1. That the Honourable Learned Judges of the First Instance Division of the Court erred in Law and committed procedural irregularity by ruling that they would construe quorum to pertain to members in and at a sitting of the House and not Members outside the House’s sitting albeit within the precincts of the House and at the same time deciding not to be satisfied that the election of the Speaker contravened Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly’s Rules of Procedure;

2. That the Honourable Learned Judges of the First Instance Division of the Court erred in Law and committed procedural irregularity by not using powers entrusted to them under Rule 1(2) of the Court’s Rules of Procedure and just decided not order production of evidence from both the Respondent (who is an ex officio of the Assembly) and the intervener (who is a Member of the Assembly) that the quorum was reached during the election of the Speaker of the 4<sup>th</sup> Assembly;

3. That the Honourable Learned Judges of the First Instance Division of the Court erred in Law and committed procedural irregularity by just deciding erroneously that affidavits sworn by Counsel of the Applicant are defective and contradict themselves by saying that the absence of evidence in support of the Reference would not itself vitiate the entire Reference;

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

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

17. The Appellant prayed for the following Orders, namely:

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

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

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

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

18. Intervener cross appealed under Rule 94 of the Court's Rules of Procedure and raised the following grounds:

1. THAT this Honourable Court be pleased to review Paragraphs 85, 86 and 87, of Judgment delivered by First Instance Division of the East African Court of Justice dated the 2<sup>nd</sup> of July 2019 at Arusha giving an order that the Reference be dismissed and declining to award costs to the Respondent and the Intervener for the proceedings in Reference No. 2 of 2019.
2. THAT consequent upon the above this Honorable Court does correct the order made on the 2<sup>nd</sup> July 2019 by setting aside the order declining to award costs to the Respondent and the Intervener for the proceedings in Reference No. 2 of 2019.
3. THAT further consequent upon the above this Honourable Court does not grant the costs to the Respondent and the Intervener for the proceedings in Reference No. 2 of 2019.
4. THAT further consequent upon the above this Honourable Court does grant the costs to the Respondent and the Intervener for the proceedings of Appeal from The Judgment of the First Instance Division of the East African Court of Justice at Arusha by Hon. Lady Justice Monica K. Mugenyi (Principal Judge) Hon. Dr. Justice' Faustin Ntezilyayo (Deputy Principal Judge), Hon. Justice Fakihi A. Jundu (Judge), Hon. Dr. Charles O. Nyawelo (Judge) and Hon. Justice Charles Nyachae (Judge) dated 2<sup>nd</sup> July in Reference No. 2 of 2018.
5. THAT this Honourable Court be pleased to dismiss the Appeal with costs.



6. THAT this Honourable Court does give such consequential, further or other order(s) as it may deem just for the implementation of the payment of the abovementioned costs by the Appellant.
19. Although Intervener raised the above several grounds of cross Appeal, only one ground could be depicted, namely that he was dissatisfied in part of the Judgment, on issue of costs. He contended that the Trial Court would have awarded the Respondent and Intervener Costs for the Reference.
20. At the Scheduling Conference of this Appeal held on 14<sup>th</sup> November 2019, the above grounds of Appeal and the Cross-Appeal were consolidated into the following issues for determination, namely:

**I. Whether the Trial Court erred in Law or committed a procedural irregularity by striking out the affidavits sworn by the Counsel for the Applicant in the Reference;**

**II. Whether the Trial Court erred in Law or committed a procedural irregularity by not invoking Rule 1 (2) of the Court's Rules to order production of evidence from the Respondent and the Intervener on the fact of quorum during the election of the Speaker of the 4<sup>th</sup> Assembly;**

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

**IV. Whether the Trial Court erred in Law by declining to award the costs of the Reference to the Respondent and to the Intervener;**

**V. What remedies are the Parties and the Intervener entitled to.**

**C. APPELLANT'S SUBMISSIONS.**

21. Counsel for the Appellant, in his Submissions, started with **Issue III**, namely: **Whether the Trial Court erred in Law and/or committed a procedural irregularity in not finding that the Speaker of the 4<sup>th</sup> Assembly of EALA was elected in contravention of Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure** and pointed out that on account of uncontested facts that Members from the Republic of Burundi and United Republic of Tanzania did not participate in voting of the 4<sup>th</sup> Speaker of the Assembly, and that

the Trial Court unequivocally held that the sitting in which the Speaker of the 4<sup>th</sup> Assembly was elected, would undoubtedly be governed by Rule 12(1) of the Rules of Procedure of EALA, all that taken together, the Trial Court failed to draw a conclusion on legal aspect it had already established (indeed violation of Article 57(1) of the Treaty and Rule 12(1) of the Rules of EALA. In support of their contentions, Counsels for the Appellant cited **Timothy Kahoho v Secretary General of EAC** [2012-2015] EACJLR, 412.

22. Counsel for the Appellant argued together **Issues No.I** and **Issue No. II**, namely: **Whether the Trial Court erred in Law or committed a procedural irregularity by striking out the affidavit sworn by the Counsel for the Applicant in the Reference and whether the Trial Court erred in Law and/ or committed a procedural irregularity by not invoking Rule 1(2) of the Court's Rules to order the production of evidence from the Respondent and the intervener on the fact of quorum during the election of the Speaker of the 4<sup>th</sup> Assembly.**
  
23. It is also the Appellant's contention that in absence of a formal application from any Party, there is no way the Trial Court could have lawfully expunged the Affidavits sworn by the Counsel for the Applicant in the Reference. He further averred that even if the Trial Court could have found a legal basis to expunge the sworn

affidavits, looking at the circumstances underlying the case, the Trial Court, pursuant to Rule 1(2), would not have permitted the Applicant's right to access to justice.

24. Regarding **Issue No. IV, whether the Trial Court erred in law by declining to award the costs** of the Reference to the Respondent and Intervener, it is the Appellant's Submission for each Party to bear its own costs. He relied on this Court established jurisprudence and equated this Reference which involved interpretation of the provisions of the Treaty to a public interest litigations. He submitted that this Court has constantly held each party to bear its own costs in public litigation and accordingly, Counsel for the Appellant prayed each party to bear its own cost.

#### **D. RESPONDENT'S SUBMISSIONS**

25. Regarding **Issue No. I, whether the Trial Court erred in Law or committed a procedural irregularity by striking out the Affidavits sworn by the Counsel for the Applicant in the Reference**; Counsel the Respondent contended that there was no error of law or procedural irregularity committed by the Trial Court by striking out the impugned Affidavits. He further averred that this Appeal does not meet the requirements of Article 35A of the Treaty and contended that it should be rejected.

26. On **Issue No. II**, whether the Trial Court erred in law or committed a procedural irregularity by not invoking Rule 1 (2) of the Court's Rules to order production of evidence from the Respondent and the Intervener on the fact of quorum during the election of the speaker of the 4<sup>th</sup> Assembly, Counsel for Respondent conceded that the Trial Court is vested with inherent power under Rule 1(2) of the Rules but contended that the Trial Court could not have exercised it in as far as the Applicant did not invoke it.
27. On **Issue No. III**, whether the Trial Court erred in Law and/or committed a procedural irregularity in not finding that the Speaker of the 4<sup>th</sup> Assembly of EALA was elected in contravention of Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure, Counsel for Respondent contended that the Applicant failed to discharge the burden of proof. He Further argued that the Applicant having failed to prove his case as expected, the Trial Court rightly held that they were not satisfied that the election of the Speaker did not contravene Articles 53(1) and 57(1) of the Treaty.
28. Regarding **Issue No. IV**, whether the Trial Court erred in Law by declining to award the costs of the Reference to the Respondent and to the Intervener which encompasses the Cross-Appeal, Counsel for the Respondent contended that the

Applicant's evidence was struck out on legal technicalities after the Respondent had gone to a great length to contest it and therefore, he contended that the Trial Court should have awarded costs to the Respondent and Intervener.

29. In summary, Counsel for the Respondent prays this Appeal be dismissed with costs to the Respondent and Intervener.

#### **E. INTERVENER'S SUBMISSIONS**

30. Submitting on **Issue No. II, whether the Trial Court erred in law or committed a procedural irregularity by not invoking Rule 1 (2) of the Court's Rules to order production of evidence from the Respondent and the Intervener on the fact of quorum during the election of the Speaker of the 4<sup>th</sup> Assembly**, Counsel for the Intervener submitted that the Trial Court did not commit a procedural irregularity by striking out the impugned Affidavits sworn by the Counsel for the Appellant. He also opposed the Appellant's contention that the Trial Court could have ordered the Respondent and Intervener's production of evidence to prove the observance of the requisite quorum. He went further to argue that it would be unfair, unjudicial practice which calls for abuse of Court process.

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31. Regarding **Issue No. III, whether the Trial Court erred in Law and/or committed a procedural irregularity in not finding that the Speaker of the 4<sup>th</sup> Assembly of EALA was elected in contravention of Articles 53(1) or 57(1) of the Treaty, or Rule 12(1) of the Assembly's Rules of Procedure**, it is the contention of Counsel for the Intervener that the Respondent and Intervener were successful parties in the Trial Court and should have been awarded costs
32. In short, Counsel for Intervener supported the Appellant's contention that the Applicant (now the Appellant) failed to discharge the burden of proof and submitted therefore that the Trial Court did not commit a procedural irregularity or an error of law in the impugned Judgment and prays this Court to dismiss the Appeal and allow the Cross - Appeal with costs.

#### **F. DETERMINATION**

33. This Appeal is aimed at challenging the process of the election of the Speaker of the 4<sup>th</sup> Assembly on account that the said process was in contravention with the relevant provisions of the Treaty and the Rule of Procedure of the Assembly "EALA" which set out the requisite quorum for the election of a Speaker of the Assembly. It appears to be a rare if not the first Reference brought by a Partner State under Article 28 of the Treaty. The Reference was referred to this Court by

a Partner State of the East African Community (the Republic of Burundi) seeking before this Court the EALA compliance with the Treaty and its Rules of Procedure.

34. For ease of reference, Article 28 of the Treaty Provides as follows:

***A Partner State which considers that another State or an organ or Institutions of the Community has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court for adjudication.***

35. In this Appeal, it is obvious that Attorney General of the Republic of the Republic of Burundi had referred the matter before the Trial Court on account of the alleged undue process which occurred in the voting of the Speaker of the 4<sup>th</sup> Assembly held on 18<sup>th</sup> December 2017, on the basis that there was no quorum stipulated under Rule 12(1) of the Rules of Procedure of the Assembly.

36. In analyzing the instant Appeal, it is imperative to look at the statutory tests which also constitute the conditions precedent for an appeal before this Division (Appellate Divisions) to succeed. In this regard, the relevant and governing provision is **Article 35A** of the Treaty which provides the grounds of appeal as follows:

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***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.***

37. The above grounds governing an Appeal before the Appellate Division of this Court have also been established in the East African Court of Justice jurisprudence in numerous cases. The grounds substantiated in Article 35 of the Treaty have been clarified in this Court established jurisprudence.
38. In the famous case of **Angela Amudo and The Secretary General of the East African Community** [2012-2015] EACJLR 592, this Court held that a Court commits an error of law when it:
- “(a) Misapprehends the nature, quality, and substance of the evidence: see, for instance, **Peters v Sunday Post** [1958] EA 424; **Ludovick Sebastim V R**, (CAT) Criminal Appeal No. 518 of 2007 (unreported); or
  - (b) Draws wrong inferences from the proven facts: See, **Trevor Price & Another vs. Raymond Kiesel** [1957] EA 752, **Wynn Jones Mwambo v Weadoa Petro Aaron** [1966] EA 241;  
...”
39. In **Angela Amudo case (Supra)**, it was further clarified that a Court commits a procedural irregularity when it:-

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

40. In **Attorney General of the United Republic of Tanzania v African Network for Animal Welfare (ANAW) EACJ Appeal NO3 of 2014**, this Court held *inter alia* that:

*"...procedural irregularity attach to a denial of due process (i.e fairness of proceeding or hearing)."*

41. Contrary to the Respondent's strong contention on this Court lack of jurisdiction to entertain this Appeal, looking at the Issues for determination raised by both Parties and Intervener at the Scheduling Conference held on 14<sup>th</sup> November 2019, It is more than obvious that this Appeal does not have an aspect which can warrant lack of jurisdiction of this Court and therefore, there is no need to dwell on issue of lack of jurisdiction of this Court to entertain this Appeal.
42. It is a common ground and also the Appellant's contention that the requisite quorum that should have governed the election of the 4<sup>th</sup> Speaker is Rule 12 (1) of the Rules of EALA. The Respondent and

Intervener had vehemently opposed the relevance of the unique rules which governs the quorum of the Assembly. After having scrutinized the *litis contestatio* between the Parties and Intervener, the Trial Court arrived at a legal conclusion eminently valid that the quorum of the Assembly is governed by Rule 12(1) of the Rules of Procedure of the Assembly.

43. For avoidance of doubt, it is more than necessary to cite some of the paragraphs in the impugned Judgment where the Respondent's and Intervener's contentions on the quorum which was applied at the time of election of the Speaker, were absolutely rejected by the Trial Court. In other words, the paragraphs are part and parcel of the holding of the Trial Court on the question of requisite quorum that should have governed the election of the Speaker. Those are essentially paragraph 41 and paragraph 42 which respectively read as follows:

***"Rule 12(1) clearly and ambiguously makes provision for the quorum of the House or the Committee of the whole House, making no reference whatsoever to sittings of the Assembly. To that extent does not distinguish between sittings of the House for the purposes of the election of a Speaker and other sittings of the House. It simply applies to all sittings of the House or the Committee of the whole House. Accordingly, we are unable to fathom the legal basis for***

*the position that the said legal provision pertains to all other sittings of the House, save for the first sitting that elects the Speaker....."* (See paragraph- 41 of the impugned Judgment).

44. The Trial Court went further to find and hold in paragraph 42 that:

*"... in so far the House is interpreted in Rule 1 to mean the Assembly, which as we have held earlier is designated in the Treaty as the totality of the East African Legislative Assembly, we draw the inference that the election of the Speaker of the House would ensue in a fully constituted Assembly or a sitting of the whole House. Such a sitting would undoubtedly be governed by the provision on quorum that is unequivocally stipulated in Rule 12(1) of the Assembly's Rules. Consequently, we do find that Rule 12 (1) is indeed applicable to the impugned election of the Speaker that is before us presently. We so hold"* (emphasis is mine).

45. The above holding would mean and indeed means that the Respondent's reliance on a Rule other than Rule 12(1) as requisite quorum in the impugned election was and is in fact misconceived and untenable. This was sufficient for the Trial Court to draw a legal inference that under these circumstances, the election of the

Speaker was conducted in violation of the Treaty provisions and the Rules of Procedure of the Assembly.

46. In light of the above, a question which can be posed is whether the Applicant (now the Appellant) successfully established the lack of the requisite quorum in the impugned election of the Speaker? Or whether the above holding would imply or qualify the Respondent and intervener the winners as believed and contended by both Respondent and Intervener?
47. In the instant Appeal, Counsel for the Appellant rightly contended that Counsel for the Respondent and Counsel for Intervener failed to rebut the requisite quorum which had to govern the election of the Speaker.
48. For ease of reference, Rule 12 (1) of the EALA Rules, which governs quorum of the Assembly, provides as follows:  

***"The quorum of the House or of the Committee of the Whole House shall be half of the elected Members and such quorum shall be composed of at least one third of the Elected Members from each Partner State."***
49. It is obvious that the ordinary meaning of above Rule makes mandatory the participation, the presence of at least (a minimum) of one third of the Elected Members from each Partner State. It follows

that a quorum which, in absence of the required representation from each Partner State, is composed of a half of the elected Members of the Assembly or even more such as two thirds of EALA Members or even further more, would not meet the test for the requisite quorum as envisaged under the Treaty read together with Rule 12 (1) of the Rules of Procedure of the Assembly. In other words, reading of the Rules of the Assembly, this Rule which governs quorum takes clearly and absolutely into account one third of the Elected Members from each Partner State (rule 12(1)) and therefore, representation from each Partner State (one third of the Elected Member from each Partner State) was mandatory in the impugned election. It follows that whenever a question of requisite quorum of the Assembly is under scrutiny, to depart from Rule 12(1) of the Rules of Procedure of the Assembly leads to a quorum that is not envisaged by the Treaty or by the Rules of the Assembly.

50. The above Rule 12(1) which governs quorum in the Assembly is consistent with the Article 57(1) of the Treaty which clearly sets the guidelines on the quorum in the Rules of Procedure of the Assembly as follows:

**“Subject to this Article, the rules of procedure of the Assembly shall make provision as to the number and composition of elected members that shall constitute a quorum of the Assembly.”**

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51. The Rule of the Assembly governing the quorum was made pursuant to the above Treaty provision and, as made it clear by the Rules of the Assembly, the word **number** is construed to refer to the total number of Elected Members of the Assembly present for the event and the word **composition** refers, for the purpose of quorum, to the mandatory representation by each Partner State which has to be present.
52. In the impugned Judgment, especially in paragraph 23, the Respondent vehemently opposed the application and relevance of the said Rule (Rule 12 (1) that *"...Rule 12(1) was inapplicable to the present case given that the Speaker had been elected in an informal sitting of the Assembly's Rules of Procedure..."* Such contention was totally misconceived in the impugned election. It was also misconceived for the Respondent and Intervener to purport that there is equation of Presence of the elected Members from the Republic of Burundi and the United Republic of Tanzania within the precincts of the House to presence in a sitting of the House for the purposes of quorum. The Interpretation of the term quorum as used in the Rules of Procedure of the Assembly, they would construe quorum *"to pertain Members in and not Members outside the House's sitting..."* as it was held by the Trial Court on Paragraph 75 of the impugned Judgment.

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53. Unless, it is proved to the contrary, the above quotations would have been treated as an admission that the required quorum was not taken into account in the voting of the Speaker of the 4<sup>th</sup> Assembly.
54. In light of the above, as rightly pointed out by the Appellant, there was no need of further evidence under these circumstances for the Trial Court to find and to hold that there was lack of due process in election of the Speaker on account of quorum. After having found and held that the election of the Speaker was to be governed by 12(1), that fortifies the valid and attractive contention of Counsel for the Appellant who contended that the holding was sufficient for the Trial Court to reach a decision that election of the Speaker of the of the 4<sup>th</sup> East African Legislative Assembly was conducted without due process and therefore, he was elected in violation of Article 57(1) of the Treaty and Rule 12(1) of the Rules of the Assembly. Accordingly, **Issue No.III** is answered in the Affirmative.
55. As regard to **Issue No. I** and **Issue No. II**, Contrary to the contention of Counsel for the Respondent and Counsel for Intervener that the Appellant failed to discharge the burden of proof, Could the Trial Court have not been persuaded by the above legal inference which ought to have directly been drawn, the Trial Court could have even explored, although it was not necessarily mandatory because the Issue on requisite quorum was at length and sufficiently discussed, the margin of appreciation which was still available such as to invoke suo motu Rule 1(2) of the 2013 Rules of Procedure of



the Court to give an opportunity to the Respondent and Intervener to rebut the right and successful contention of the Appellant on the requisite quorum which had to govern the impugned election of the Speaker of the 4<sup>th</sup> Assembly for the following reasons:

- Firstly, the burden of proof in litigation like this one requires a burden of proof on balance of probability.
- Secondly, the civil nature of this litigation would not require at all the burden of proof which is beyond reasonable doubt in as far as such burden which is beyond schedule of reasonable doubt is required in criminal cases which is not the case before this Court.
- Thirdly, contrary to the contention of Counsel for the Respondent, the Rule does not put any restriction (such an application) to the Court to exercise the said inherent power under Rule 1(2).

56. Be that as it may, the Appellant had established that the requisite quorum which the Trial Court confirmed. In fact, Counsel for the Respondent and Counsel for Intervener failed to rebut the same. The reliance on technicalities invoked by the Trial Court was a departure not only to the Issues for determination as raised by the Parties before the Trial Court but also constituted a denial of due process. **(See ANAW case Supra).**

57. It is also the Appellant's contention that the decision of the Trial Court to expunge the first Affidavit in support of the Reference was

unfair and aimed at a denial of justice. The Record shows clearly that it is the first Affidavit which supported the real controversy on quorum and the second one which mainly discloses the source of information was filed after having obtained the leave of the Trial Court. Counsel for Respondent and Counsel for intervener opposed the Appellant's contention mainly on basis that the affidavits were sworn by the same Counsel.

58. The Court committed a procedural irregularity in not availing an opportunity to the parties to have as an issue for determining the technicalities raised *suo motu* and which vitiated the entire Reference. If the Court had intended to dwell in this matter on the basis of the technicalities, the said issue would have been formally raised for determination and it should have been raised in *limine litis* (see **Johnson Akol Omunyokol and Attorney General of the Republic of Uganda [Appeal No.4 of 2017]**). Having failed to do so amounted to the Trial Court's procedural irregularity. Under the circumstances of the instant Appeal, fairness would have dictated the Trial Court to table an issue relating to technicalities which, in its mind would end up to vitiate the entire Reference in as far as none of the parties had raised it as one standing issue and no application for striking out any document was made either by the Respondent or Intervener.
59. The Trial Court after having rejected the Counsel for the Respondent's contention on requisite quorum, for Respondent and Intervener to prove the contrary and win the case, they had to show that the process of the election of the Speaker was not only regular but also meet the expectation of a regular but also a transparent election, such as to show the relevant provision applied

in the said process, the composition and number of the Elected Members from each Partner States; who were present in voting, willingness to table the real and credible evidence which underlined the process. Failure to do so raises a fundamental question to whether there was due process or whether the process observed the required standards of transparency. This coupled by the misconceived contention that the election of the Speaker did not require any quorum, the inference to be drawn was that the election process of the Speaker under scrutiny did not take into account the right provision governing the quorum and in result, a conclusion of contravention of 12(1) and Article 57 of the Treaty ought to have been drawn otherwise, the contrary ought to absolutely require the Trial Court to shift the burden of proof to the Respondent and Intervener for purposes of opposing the right and true allegations of the Appellant.

60. The question which can be posed now is whether, it was proper or legitimate, taking into account circumstances before us, to expunge the Affidavits sworn by the Applicant (now the Appellant) in support of the Reference.
61. The Trial Court, acting on its own motion dismissed the Reference on technicalities. As it was clarified in the above finding, the Parties should have been accorded the opportunity to have same raised in one and comprehensive issue and file Submissions on it. That has not been done by the Trial Court which opted *suo motu* to expunge the Affidavits in support of the Reference. That constituted a procedural irregularity committed by the Trial Court.
62. A decision to expunge the affidavits would negate even the successful legal controversy on the relevant provision governing the quorum and which basically constitutes the position of the law. Having failed on the governing law on quorum, logically, the

inference which ought to have been drawn by the Trial Court would have been that the Respondent infringed the provision the Treaty governing the quorum in the election of the Speaker of the 4<sup>th</sup> Assembly.

63. It is a trite law that he who alleges must prove. In the instant Appeal the Appellant did bear the onus of proof and has discharged it. As clearly mentioned elsewhere in above paragraphs, the burden of proof in this case of civil nature is on balance of probability or preponderance of evidence as opposed to the criminal cases where the standard of proof is beyond reasonable doubt. To that extent, the evidential proof does not need to be beyond schedule of doubt but rather to establish a *litis contestatio* was enough sufficient to move the Court. In other words, where the standard required is balance of probabilities, a court of law has to weigh up the evidence and decides which version is most probably true. To go beyond reasonable doubt was not the required standard in this appeal.
64. Taking into account all the above considerations, and looking at Affidavit deposed on 17<sup>th</sup> January 2018 and the Supplementary Affidavit deposed on 11<sup>th</sup> July 2018 which are on Record of Appeal and which exhaustively disclosed the source of information that EALA Members from the Republic of Burundi and the Members from the United Republic of Tanzania (all of them) did not participate in voting of the Speaker of the 4<sup>th</sup> Assembly, considering the fact that the Respondent and Intervener failed on the relevant provision governing the quorum, a legal implication can be easily drawn to the effect that this was sufficient evidential proof to call upon the Respondent to rebut the same in availing the applicable law in order to ensure that not only the transparency of the election but also to establish due process in the said election rather than to invoke technicalities on account of hearsay evidence. This onus of proof

would be the same to Intervener who, under Article 40 of the Treaty, intervenes in a very limited manner, namely to table evidence supporting or opposing the arguments of a party to the case. The above consideration would even meet the test of the postulation of the law under Article 40 which restricts the intervention on evidence and substantiates also that which matters whenever there is an intervention is that the additional submission should be able to assist the Court in reaching a correct determination. **(See Australian Conservation Foundation v South Australia (1988) 53SASR 349).**

65. If the intervener's Submission is merely repetitive of the submissions of one or another of the parties, as it was in the instant case, efficiency would require that intervention be denied. **(See the Australian case Supra).**

66. **In Attorney General of the Republic of Rwanda and Plaxeda Rugumba [EACJ], Appeal No. 1 of 2012**, when this Court had to adjudicate on averment by the advocated by the Attorney General of the Republic of Rwanda that the Reference was filed out of time and that it ought to have not been entertained by the Trial Court, although the Affidavit contained hearsay such as **"they were told"** this Court did not question the Affidavits. It was even further held that... *"It is our view that, in these circumstances, it is the Appellant (the then Respondent in the Trial Court) who had the burden to show when the sister and the wife of the subject knew the date the subject was detained ...."* In short, this Court did not dwell on technicalities which were to involve hearsay evidence. That reasoning would have equally applied in the instant case.

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67. In addition, it is better to reiterate that it was not proper for the Trial Court to dispose of the matter on technicalities which were not raised as an issue for determination by the Parties. A question on technicalities has to be raised as an issue in order to give an opportunity to the Parties to file submissions on the issue and it had to be raised in *limine litis* (see **Johnson Akol Omunyokoi case Supra**). Having failed to do so amounts to the Trial Court's procedural irregularity. Under the circumstances of the instant Appeal, in absence of one standing issue on technicalities among the issues for determination on Record, as held everywhere in the previous paragraphs, fairness would have dictated the Trial Court to table an issue relating to those technicalities which, in its mind, would aim at vitiating the entire Reference, in as far as none of the Parties and even Intervener had raised it and no application for striking out any document was made either by the Respondent or Intervener.
68. Taking the real controversy in this Appeal, in my opinion, the decision to expunge the affidavits sworn by Counsel for the Appellant was unfair and constituted a denial of justice for the following reasons:
- the alleged hearsay evidence was no longer a hearsay in as far as Counsel for the Appellant had took a further step to disclose the source of information by providing the names of the Elected Members of the Assembly from the Republic of Burundi and the

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- United Republic of Tanzania who did not participate to the voting of the Speaker of the 4<sup>th</sup> Assembly held on 18<sup>th</sup> December 2017;
- It would cause injustice to the parties, if all the affidavits which do not strictly conform even to the Rules of procedure to be rejected all together with parts which are not offended (**See the Supreme Court of Uganda Judgment in Election petition No.1 of 2001**);
  - It is a new trend in modern Constitutions of various countries including the East African Community Partner States that courts of law should administer justice without undue to technicalities and that any rule of procedure should be used as handmaidens of justice but not to defeat it;
  - There is nothing barring an advocate from swearing an affidavit especially where the matter deponed are agreed or purely legal positions (Rule governing the quorum in the instant case which is purely to be unveiled in the Treaty read together with the Rules of the Assembly);
  - Rule 55(3) (d) of our Court Rule of Procedure of 2013 reiterates the position of the new trend which requires to administer substantive justice without undue regard to technicalities.

In light of the above considerations and findings, **Issue No. I** and **Issue No. II** are answered in the affirmative.

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## **COSTS**

69. It is obvious that in this Appeal and before the Trial Court the Respondent and Intervener have failed on all the Issues. In fact, they have failed several issues raised as point of objection which, in the EAC context, were not even within the mandate of the Intervener. This coupled with the fact that the contention of both Respondent and Intervener such as non application of Rule 12 (1) which was misconceived in this instant case and more importantly the postulation of Article 40 of the Treaty which limits an intervention to evidence supporting or opposing the arguments of a party to the case, all this taken together substantiates that the Respondent and Intervener did succeed on none of the Issues.

In addition, the matters canvassed in the impugned Judgment were of grave importance to the advancement of the Community law and this Court has constantly exercised its discretion not to award Costs. That was a good and sufficient reason in the EAC context for the Trial Court to depart from the principle that costs follows event as stipulated under Rule 111 of the Court's Rules of Procedure, 2013. Accordingly, the cross-Appeal has not succeeded. Each party shall bear its own Costs.

### **Issue No 5. What remedies are the parties entitled to.**

70. In light of all the above considerations and findings, it is evident that the election of the Speaker of the 4<sup>th</sup> Assembly was conducted in violation of 57(1) of the Treaty and Rule 12 (1) of the Assembly which govern the quorum of the Assembly. Its legal implication is that the related prayers sought by the Appellant are accordingly granted, save Costs and the prayer of restitution of



salaries and other emoluments earned by the Speaker for the reason that under international law, the matter complained of, namely (violation of the Treaty and Rules of the Assembly) before the Trial Court and in this Appeal are not attributable to a Member of the Assembly or the alleged Speaker but attributable to the Community itself (**See Draft Article on the Responsibility of International Organization with Commentaries, 2011**).

### **CONCLUSION**

71. For the reasons discussed above:
- a. The Appeal is allowed. Accordingly, the election of the Speaker of the 4<sup>th</sup> Assembly was conducted in violation of Article 57 (1) of the Treaty read together with Rule 12 (1) of the Rules of procedure of the Assembly, for want of the requisite quorum.
  - b. The Cross Appeal is disallowed with no order to Costs.
  - c. Each Party and Intervener shall bear its own costs.

**IT IS SO ORDERED.**

**DATED, DELIVERED AND SIGNED AT ARUSHA THIS 25<sup>th</sup> DAY OF JUNE 2020.**

  
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Liboire Nkurunziza

**VICE-PRESIDENT**