



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

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

APPEAL NO. 1 OF 2018

BETWEEN

ISMAEL DABULE & 1004 OTHERS APPELLANTS

AND

**THE ATTORNEY GENERAL OF THE REPUBLIC OF
UGANDA.....RESPONDENT**

[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. Dr. Faustin Ntezilayo, DPJ, Hon. Justice Fakihi A. Jundu, Hon. Justice Audace Ngiye and Hon. Justice Charles O. Nyawello, dated 28th November, 2018 in Reference No. 5 of 2016]

FEBRUARY 25, 2020

JUDGMENT OF THE COURT

A. Introduction

1. This appeal arises from the decision of the First Instance Division in Reference No 5 of 2016 which was filed 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 East African Court of Justice (EACJ) Rules of Procedure, 2013 (hereinafter referred to as "the Court Rules"). It was filed by Ismail Dabule and 1004 Others, residents of Uganda ("the Appellants") against the Attorney General of Uganda ("the Respondent").
2. Reference No. 5 was dismissed by the First Instance Division ("the Trial Court") for lack of cause of action. Being dissatisfied with the said decision, the Appellants have now appealed to this Court. The Appeal was filed on February 7, 2019.
3. At the hearing of the appeal, the Appellants were represented by Mr. Richard Omongole, Advocate; and the Respondent by Ms. Margaret Nabakooza, Principal State Attorney; and Ms Imelda Adongo and Mr. Ojambo Bichachi, State Attorneys.

B. Background

4. Following the overthrow of the government of President Idi Amin Dada in Uganda, in 1979, a law was enacted freezing the accounts of various people who were associated with the regime.
5. In 1979 the National Consultative Council of Uganda enacted the Banking Act Amendment Statute No. 18 of 1980 introducing sections 26 A and 26 B which gave the Minister power to make Legal Notices No. 2 and 3 of 1982 and 2 and 3 of 1984 freezing the Appellants' bank accounts.
6. Pursuant to the Banking Legal Notice No. 2 of 1982 and Legal Notices No. 2 and 3 of 1984, the then Minister of Finance instructed the Bank of Uganda to take over the Appellants' personal and business accounts in various commercial banks in Uganda and to freeze them. The Bank of Uganda had all the Funds transferred to itself.
7. On February 3, 1995, the then Minister of Finance instructed the Banks to defreeze the said accounts. The Advocate for the Appellants wrote to the Bank of Uganda on March 21, 2003 asking the Bank to implement the Minister's decision.
8. The appellants then filed Constitutional Petition No. 2 of 2004, in the Constitutional Court of Uganda, **Ismail Dabule and two (2) Others v The Attorney General and Bank of Uganda**, seeking a de-freezing order, compensation for the continued

freezing of the accounts in question and payment of principal amounts and interest. The Constitutional petition was dismissed by the Constitutional Court on September 14, 2007.

9. Being dissatisfied with the decision of the Constitutional Court, the Appellants lodged an appeal to the Supreme Court of Uganda, Appeal No. 3 of 2007. The appeal was dismissed by the Supreme Court on October 30, 2015.
10. Following the decision of the Supreme Court the Appellants filed a reference in the Trial Court contending that the continuous refusal by the Government of Uganda to release the Appellants' funds was a violation of Articles 6(d) and 7(2) of the of the Treaty.
11. On November 28, 2018, the Trial Court dismissed the reference before it with costs to the Respondent. The basis of the decision was that the matter was not properly before the Court as there was no cause of action.

Proceedings before the Trial Court

12. Pursuant to a Scheduling Conference held on September 11, 2017 the following issues were agreed upon by the parties:-
 1. *Whether the reference is time-barred.*
 2. *Whether the Applicants have locus standi.*
 3. *Whether the Ugandan Government's alleged continued refusal to allow the Applicants access to their frozen funds*

or its equivalent to date, is a violation of Articles 6(d) and 7(2) of the Treaty.

4. *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.*
5. *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.*
6. *Whether the Applicants are entitled to the remedies sought.*

12. Issue No. 2 was subsequently conceded by the Respondent. It was therefore not considered in the judgment.

C. Decision by the Trial Court

13. In relation to issue No. 1 as to whether or not the reference is time barred, the Trial Court did not make a finding on the same. According to the Trial Court, before considering whether or not the Reference was time barred, the Court had to determine whether there is a sustainable cause of action. Hence the issue of limitation was never considered.
14. The Trial Court concluded that there was no cause of action as there was no live dispute. It was of the view that the action or decision that initially gave rise to the Applicants' cause of action would have been the decisions vide Legal Notices Nos.

2 and 3 of 1984 to freeze their accounts. However, that decision was subsequently reversed vide the Minister of Finance's letter dated 3rd February 1995.

15. The Trial Court was of the considered view that since there was no clarification on the legal position on the the unfrozen accounts, as was claimed by the Applicants and in the absence of any other evidence to the contrary, the circumstances of the case did not support the Applicant's allegations of a violation of Ugandan National Law by the Respondent; a violation of the Treaty had not been established on account of the purported breach of Ugandan national laws; and the Applicants had made reference to non-existent court decisions.

16. The Trial Court concluded that as there was no live dispute before it, it would be an exercise in futility to purport to determine the residual issues in the Reference. The Court's finding was that there was no cause of action. In the result Reference No. 5 was dismissed with costs to the Respondent.

D. Appeal to the Appellate Division

Grounds of Appeal

17. The Appellants raised 8 grounds of Appeal in the Memorandum of Appeal filed which are reproduced hereunder:-

- 1. That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred*

in law and fact in holding that the Appellants' Reference was not properly before them.

- 2. That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law and fact in holding that the Appellants did not establish what Ugandan National Law was contravened by the Respondent.*
- 3. That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law and fact in holding that neither the Constitutional Court nor the Supreme Court of Uganda pronounced itself on the legal position governing the Appellants' frozen accounts.*
- 4. That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law and fact in holding that the circumstances of the case did not support the Appellants' allegations of violation of Uganda National Law and the East African Community Treaty by the Respondent.*
- 5. That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law and fact in holding that the Reference was premised on the false premise on non-existent court decisions.*

6. *That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law and fact in failing to grant the declarations sought by the Applicants / Appellants.*
7. *That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) erred in law and fact when they dismissed Reference No. 5. of 2016 with costs.*
8. *That the learned Justices of the East African Court of Justice (First Instance Division Holden in Arusha) failed to properly evaluate the evidence on record and thereby arrived at a wrong decision which occasioned a miscarriage of justice.*

18. The Appellants' Counsel prayed for the following orders:-

- (a) *The Appeal be allowed.*
- (b) *The Judgment of the East African Court of Justice (First Instance Division) be varied /quashed.*
- (c) *The Appellants be granted costs of Reference No. 5 of 2016 as well as costs in this appeal.*
- (d) *This Honourable Court makes such consequential or further Order(s) as it may deem just and equitable.*

Issues

19. The following issues were agreed upon by the parties during the Scheduling Conference which was held on 14th May, 2019.

1. *Whether or not the First Instance Division erred in law in finding the reference was not properly before it for want of cause of action.*
2. *Whether the First Instance Division committed a procedural irregularity in failing to determine whether the reference was time barred.*
3. *Whether or not the appellants are entitled to costs.*

Issue No. 1 : *Whether or not the First Instance Division erred in law in finding the reference was not properly before it for want of cause of action.*

Appellants' case

20. The refusal by the Government of Uganda to return the Appellants' money even after the order for de-freezing the accounts was made and after the National Courts observed that the Appellants were free to access their money, was a failure by the Government of Uganda to act in accordance with the provisions of the Treaty especially Articles 6(d) and 7(2) which

calls upon the Partner States to adhere to the rule of law and all other principles of good governance.

21. The Trial Court was wrong in deciding that that there was no cause of action. Its conclusion that no national law was infringed was incorrect. The Appellants' rights were being violated by the insistence of the Government of Uganda to hold on to the money. The African Charter on Human and Peoples' Rights and Article 36 of the Constitution of the Republic of Uganda guarantees the right to property.

22. The Trial Court wrongly concluded that there was a non-existent court decision. Both the supreme Court of Uganda and the Constitutional Court made a very critical observation that the Appellants should access their money. The observations made by the Court in resolving a certain issue constituted a decision of the Court. The Supreme Court stated that this was a matter which called for an investigation by an ordinary court to know who was to blame while appreciating that the appellants had a genuine grievance for redress.

23. The very fact that the Appellants' bank accounts have been frozen by the Government of Uganda and the refusal to pay the same to the appellants is enough to create a cause of action as the appellants' money is still being held.

24. Even though the Court has inherent powers under Rule 1 (2) of the Court Rules this power has to be exercised judiciously.

25. The Counsel for the Appellants concluded that there was a cause of action, as there was a basis for the Appellants to demand their money. Failure by the Government of Uganda to respond, was a violation of the Treaty, and the Uganda National Laws were breached. The first issue should be answered in the affirmative.

Respondent's case

26. The Trial Court rightly held that the Reference was not properly before the Court for want of cause of action. The National Courts, that is the Supreme Court and the Constitutional Court of Uganda had not reached any decision ordering the Respondent to release the money. The Appellants were simply referred to seek redress in the ordinary courts in Uganda. The position would have been different if the Government had failed to comply with the orders made by the National Courts.

27. The Appellants still have the burden of proving their case with regard to alleged continuous freezing of its accounts in the ordinary courts in Uganda. Since the Reference was premised on a non-existent Court decision, there was no contravention of any Ugandan Law by the Respondent. Therefore, there was no live dispute and cause of action by the Appellants.

28. The assertion by the Appellants that the Respondent's action or inaction of refusing to return the Appellant's money after the National Courts had said they were free to access their accounts constituted a cause of action is misconceived. The Appellants'

attempt to enforce their rights in the ordinary courts failed, as their case was dismissed. There is no cause of action. Therefore, issue No. 1 was correctly answered in the negative.

Issue No. 2 : *Whether the First Instance Division committed a procedural irregularity in failing to determine whether the reference was time barred.*

Appellants' case

29. The Appellants did not get a fair trial as the Trial Court did not proceed with the issues which were agreed upon during the Scheduling Conference but raised its own issue without giving the parties the opportunity to address the new issue raised by the Court. The issue relating to cause of action should have been included as one of the issues to be considered. This should have been done at the Scheduling Conference. Therefore, there was a procedural irregularity.

30. The Trial Court committed a procedural irregularity by failing to make a determination as to whether or not the Reference was time barred. The Trial Court was duty bound to make a decision on issues which were agreed upon by the parties and approved by the Court during the Scheduling Conference. The issue on cause of action was not raised at the Scheduling Conference nor was a preliminary objection raised by the Respondent during trial that there was no cause of action. This issue was raised by the Court in the judgment. The parties were not given a chance to address the Trial Court on

the said issue. The issue of limitation was never adjudicated upon, even though it was raised as an issue.

31. Failure to determine an existing issue on limitation, and introducing a new issue without giving a chance to the parties to address it was a procedural irregularity. Counsel for the Appellant relied on **Alcon International versus Standard Chartered Bank & Others**, Appeal No. 2 of 2011.

32. In the light of the **Alcon** case (supra), the First Instance Court failed to resolve the issues framed and created a completely new issue basing its decision on it.

33. The First Instance Court failed to comply with the requirements under Rule 68 (5) of the Court Rules. It is a requirement under the Rules that the contents of a judgment must include points for determination.

34. In the **Alcon** case (supra) reference was made to Rule 43(1) of the Court Rules on the allegations of facts made by a party on pleadings.

35. Rule 41(1) provides for a party to raise a preliminary objection but this was not done by the Respondent and no indication was given that the Respondent intended to do so. This was a procedural irregularity.

36. Article 35A (c) clearly states that a procedural irregularity can be raised as a ground of appeal. This Court should therefore overturn the decision of the Trial Court on this ground as well.

Respondent's case

37. The Trial Court committed no procedural irregularity in failing to determine whether the Reference was time barred. The Trial Court properly addressed the issue of cause of action. It was pertinent for the Court to consider whether or not there was a cause of action before considering whether or not the suit was time barred. Counsel for the Respondent made reference to page 16 of the judgment where the Trial Court said:-

"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"

38. The Court had unfettered powers and discretion to make a decision on cause of action even if the issue on cause of action had not been framed for determination during the Scheduling Conference and not considered during the trial. The Court cannot fold its hands where it is apparent from the pleadings on record that no cause of action existed. The Court clearly indicated that it was fully aware that the issue on cause of action was not raised. The issue on limitation could not be considered once the Court reached a finding that there

was no live dispute / and or cause of action. It would have been futile to proceed with the limitation issue.

39. The Counsel for the Respondent relied on the case of **Legal Brains Trust (LBT) Limited versus The Attorney General Uganda** 2012-2015 EACJ LR p.237 where it was decided that a Court will not hear a case in the abstract, one which is purely academic or speculative in nature with no underlying facts.

40. No procedural irregularity was committed. The Trial Court's finding that there was no cause of action disposed the whole Reference and any other proceedings would have been an academic exercise. The case of **Alcon International Limited** (supra) is not applicable to the present appeal. Issue No. 2 should therefore be answered in the negative.

Issue No. 3 : *Whether or not the Appellants are entitled to costs.*

Appellants' case

41. In relation to the third and final issue, that is whether or not the appellants are entitled to costs, Counsel for the Appellants made reference to Rule 111(1) of the Court Rules which provides that costs in any proceedings follow the event unless the Court shall for good reasons order otherwise. Reliance was made on the case of **East African Civil Society Organization Forum versus the Attorney General of the Republic of Burundi & 2**

Others, Appeal No. 4 of 2016, where it was held that the Court has a wide discretion in granting what is considered as an appropriate remedy. The Court should award costs as in the **Alcon** case (supra) as the Appellants were successful.

42. The Appellants should be awarded entire costs and not partial as suggested by the Counsel for the Respondent.

Respondent's case

43. With regard to issue No. 3 in relation to costs, Counsel for the Respondent submitted that the Appellant has failed to demonstrate that the Trial Court erred in any way in its decision. The Appeal should therefore be dismissed with costs. In the event that the appeal is allowed by the Court, the Appellants should only be granted a portion of the costs since issue No. 2 was not in their pleadings, and was not raised by them. It was also not in the Memorandum of Appeal.

Analysis and Determination by the Court

44. The jurisdiction of this Court to hear appeals is derived from Article 35 A of the Treaty, which provides as under:-

"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 irregularities”.

45. Having considered the written submissions, oral arguments and the authorities cited by Counsel for both the Appellants and Respondent, we shall commence by considering issue No. 1 which is *whether or not the First Instance Division erred in law in finding that the Reference was not properly before it for want of cause of action.*
46. Upon a close scrutiny of the record, it is evident that the issue relating to cause of action was not raised at the Scheduling Conference.
47. The Trial Court therefore introduced a novel issue relating to cause of action, that is, there was no live dispute between the parties.
48. This new issue was introduced on the reasoning that that the Court Rules provide sufficient latitude to interrogate a point of law on its own motion. According to the Trial Court, it could invoke the inherent powers of the Court under Rule 1(2) of the Court Rules, which provided sufficient latitude for a court to interrogate a point of law not raised.
49. The Trial Court concluded that the Reference before it was based on non-existent court decisions; the Applicants having failed to establish what, if any, Ugandan National law was

contravened by the Respondent, and therefore there was no cause of action.

50. According to **Black's Law Dictionary**, Tenth Edition, cause of action is defined as follows:

"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."

51. This Court in its various decisions has defined cause of action as follows:-

In the case of the **Republic of Rwanda and Union Trade Centre Limited (UTC) and 1. Succession Makuza Desire, 2. Succession Nkurunziza Gerard and 3. Ngofero Tharcisse**, Appeal No. 2 of 2018 it was held that a cause of action, in the jurisprudence of this Court, exists where there is a contention that the matter complained of violates the national law of a Partner State, or infringes any provision of the Treaty. This Court concluded that a cause of action in respect of a Treaty is different from a cause of action at common law whereby the persons seeking relief will have to demonstrate a right or interest that has been violated and the liability of the Defendant. The Court relied on **Prof. Peter Anyang' Nyong'o v the Secretary General of the East African Community & Others** [EACJ Ref No. 1 of 2010] and **British American Tobacco (BAT) v The Attorney General of Uganda** [EACJ Application No. 13 of 2017. See Also **Auto Garage v Motoko** [1971] EA 514.

52. Now, the central issue for consideration and decision is whether or not the findings and judgment of the Trial Court was valid in law. With respect, we do not think so. The Trial Court made findings on a point of law which was not part of the pleadings, and /or on an issue not agreed upon by the parties for determination by the Court. It is not in dispute that the issue relating to cause of action was not pleaded and the said point of law was raised for the first time in the judgment. This means the parties were not given an opportunity to address the trial court on the matter.

53. We are alive to the fact that this issue could have been raised at any time. However, we think there was need for the parties to be given the opportunity to address the Court. The issue on cause of action which is the basis of the decision of the Trial Court was not an issue that was canvassed by the parties during trial.

54. In **Lever Brothers Ltd v Bell** [1931] KB 557 at page 583, Scrutton LJ adverted to the necessity of adhering to pleadings. He stated thus:-

"The practice of the courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading."

55. **Mulla** in his book on **the Code of Civil Procedure** Vol. II, 15th Edition at page 1432 stated as follows:-

"If the Court amends an issue or raises an additional issue, it should allow a reasonable opportunity to the

parties to produce documents and lead evidence pertaining to such amended or additional issue”.

(See **Mire Artan Ismail v Sofia Njati**, Court of Appeal of Tanzania (CAT), Civil Appeal No. 75 of 2008 unreported).

56. We have no doubt in our minds that this is a correct view in line with *audi alteram partem* rule of natural justice which requires the court to adjudicate over a matter by according the parties a full hearing before deciding the matter in dispute or issue on merit.

57. In **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at p. 1055 Lord Diplock had this to say:-

“Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating his answer to it.”

58. It is trite law that the parties are bound by their own pleadings. It was therefore not open to the Trial Court to disregard the pleadings in order to reach a conclusion that it might have thought was just and proper without affording the parties an opportunity to be heard. In **Blay v Pollard & Morris** [1930] 1 KB 628 at p.634 Scrutton J., held as follows:-

“Cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the Court decided upon was raised by itself without involving the parties and in our considered opinion, it was not supposed to take such a course.”

59. We think it is clear that a court is duty bound to decide a case on the issues on record and that if there are other questions to be determined they must be placed on record.

60. In the case of **Farrel v Secretary of State** [1980] 1 All ER 166 HL at p. 173 Lord Edmund Davies made the following observations:-

“For the primary purpose of pleadings remain, and it can still prove of vital importance. That purpose is to define the issues and thereby inform the parties in advance of the case they have to meet and so to enable them to take steps to deal with it”.

61. The decision of the court should be based on the issues which are agreed upon by the parties, and if this is not done it results in miscarriage of justice. The situation becomes worse if it departs from the issues agreed upon.

62. Even though the point of law raised by the Trial Court was one on cause of action, prudence required that the Court notify the parties on the new issue and avail them the opportunity to

address the court on the issue. The function of pleadings is to give fair notice of the case which is to be made so that the opposite party may direct his evidence to the issue disclosed. The Scheduling Conferences as provided under the Court Rules are supposed to accord parties an opportunity to narrow down issues to be considered at the time of the hearing.

63. The Trial Court wrongly concluded that the new issue raised was a point of law which it could raise under the inherent power of the Court, relying on Rule 1(2) of the Court Rules.

64. Rule 1(2) provides as under:-

"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."

65. **Black's Law Dictionary** defines inherent power as:-

"Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grant..."

66. The extent of the inherent powers of the court was clearly set out in **Halsbury's Laws of England**, 4th Edition Vol 37 Para. 14. It was stated as follows:-

*“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law. It is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating proceedings, by preventing the abuse of process and by compelling the observance of the process... In sum, it may be said that inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being **the reserve or fund of powers, a residual source of powers**, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to **ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them**”.* [Emphasis provided].

67. Through an analysis of the various case laws it has been established that inherent powers of the Court must be exercised only for the ends of justice to be met or to prevent abuse of the

process of the court as long as it is not in contravention of any other existing law or provision.

68. In **Ram Chand and Sons Sugar Mills v. Kanhayalal** [1966] the Supreme Court of India held that the Court would not exercise its inherent power under S.151 of the Civil Procedure Code (CPC) if it was inconsistent with the powers expressly or impliedly conferred by other provisions of the Code.

69. In the case of **K.K. Velusamy v. N. Palaanisamy**, [2011] the Supreme Court of India stated as follows in relation to section 151 of the Civil Procedure Code:-

“(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) *The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court."*

70. Therefore, inherent powers can only be exercised if it is necessary to do so in order to meet the ends of justice or to prevent the abuse of the process of the Court.

71. We are of the firm view that the circumstances of this case did not call for the invocation of inherent powers of the Court.

72. As the Appellants have alleged a violation of both Ugandan National law and the Treaty, the Reference disclosed a cause of action. The holding by the Trial Court that there was no cause of action was manifestly erroneous.

73. In view of what we have stated hereinabove, it *follows as the night follows day* that issue No. 1 is answered in the affirmative.

74. In relation to the second issue, as to *whether the First Instance Division committed a procedural irregularity in failing to determine whether the Reference was time barred*, we would like to make the following observations:-

75. As rightly pointed out by the Counsel for the Appellants, issue No. 2 was not determined by the Trial Court. Even though it was

amongst the six (6) issues agreed upon by the parties, the same was not considered at all. The decision of the Trial Court was based on the issue which was introduced by the Trial Court itself in the judgment.

76. It is trite law that the parties are bound by their own pleadings. It was therefore not open to the Trial Court to disregard the pleadings in order to reach a conclusion that it might have thought was just and proper without affording the parties an opportunity to be heard. (See **Blay v Pollard & Morris** (supra)).

77. We think it is clear that a court is duty bound to decide a case on the issues on record and that if there are other questions to be determined they must be placed on record. The decision of the court should be based on the issues which are agreed upon by the parties, and if this is not done it results in miscarriage of justice. The situation becomes worse if it departs from the issues agreed upon.

78. In **Alcon International Limited and the The Standard Chartered Bank of Uganda, The Attorney General of Uganda and Registrar of the High Court of Uganda**, [Appeal No. 2 of 2011] it was held that failure by the Trial Court to consider the issues raised contravened Rule 68 (5) of the Court Rules. All the issues raised in the Scheduling Conference had to be decided upon by the Trial Court.

Rule 68 (5) provides as follows:-

"The judgment of the Court shall contain :-

(f) the points for determination;

(g) the decision arrived at;

(h) the reasons for that decision;"

79. In view of the failure by the Trial Court to consider whether or not the Reference was time barred which was an issue framed by the parties during the Scheduling Conference, we find that the Trial Court committed a procedural irregularity. We therefore answer issue No. 2 in the affirmative.

Issue No. 3: *Whether or not the appellants are entitled to costs.*

80. In general, the principle is that costs follow the event. This means that the costs of an action are usually awarded to the successful party (litigant). However, any award of costs is at the discretion of the Court. Rule 111 (1) of the Court Rules provides that costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order. See **Kiska Ltd v De Angelis** (1969) EA. 6.

81. In **Devram Manji Daltani v Danda** (1949) EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

82. See also **Hussein Janmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd** [1967] EA p. 287 where the Court held inter-alia:-

“The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause.”

83. In the case of **Supermarine Handling Services Limited v Kenya Revenue Authority**, Civil Appeal No. 85 of 2006 the Court of Appeal of Kenya stated thus:-

“Costs of any action or other matter or issue shall follow the event unless the court or Judge for good reasons otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover is left to the discretion of a Judge who tried, his case, the discretion is a judicial discretion, and if it be so its exercise must be based on facts. If however there be some grounds to support the exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance”.

84. We have carefully considered the rival submissions of the parties on the issue of costs. Having done so we think the pertinent question to ask in this appeal is whether this Court will be exercising its jurisdiction judiciously in declining to award costs to the successful party. See **Alcon International Ltd v Standard**

Chartered Bank of Uganda and Others [EACJ 2012-2015 p. 430 at p. 449].

85. The short answer to that is that it would be doing so in view of the principle on costs. We therefore answer the third issue in the affirmative.

86. We would like to mention in passing that Counsel for the Appellant while making oral submissions stated that we have the option of stepping into the shoes of the Trial Court, and finalize the case by considering the issues. With due respect, the Court Rules do not give the Appellate Division concurrent jurisdiction with the Trial Court. This would be contrary to the spirit of Article 23(3) of the Treaty read together with Article 35 A of the Treaty. Therefore this Court cannot take up issues not considered during the hearing of the Reference and resolve them on appeal as invited by the Advocate for the Appellants, hence we decline to do so.

Conclusion

87. Under the Court Rules 2019, which came into effect on February 1, 2020 the Appellate Division is given general powers under Rule 120, which is reproduced as under:-

“The Court may in dealing with any appeal, confirm, reverse, or vary the judgment of the First Instance Division or remit the proceedings to it with such directions as may be appropriate or order a new trial where it is manifest that a miscarriage of justice has occurred and to make any

incidental or consequential orders including orders as to costs”.

88. In the result, we allow the appeal with costs. We hereby quash the judgment of the Trial Court dated 28th November, 2018 and set aside the dismissal order. The Reference is remitted back to the Trial Court with directions to proceed with the hearing of the case by considering all the issues raised at the Scheduling Conference which was held on 11th September, 2017. We also grant the Appellants costs in the Trial Court incurred up to 28th November 2018 when the Reference subject matter of this appeal was determined.

89. The costs in the Trial Court shall be taxed after the determination of the remitted Reference.

ORDERS ACCORDINGLY.

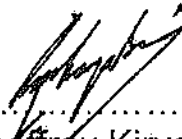
DATED AND DELIVERED at Arusha this ^{25th} ...day of February 2020


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Emmanuel Ugirashebuja
PRESIDENT

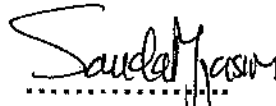

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Liboire Nkurunziza
VICE PRESIDENT



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Aaron Ringera
JUSTICE OF APPEAL



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Geoffrey Kiryabwire
JUSTICE OF APPEAL



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Suda Mjasiri
JUSTICE OF APPEAL