



**IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
FIRST INSTANCE DIVISION**



*(Coram: Yohane B. Masara, PJ; Audace Ngiye, DPJ; Charles O. Nyawello,
Charles Nyachae & Richard W. Wejuli, JJ)*

REFERENCE NO.1 OF 2020

EAST AFRICAN LAW SOCIETY..... APPLICANT

VERSUS

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

25TH MARCH, 2022

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. This Reference was filed by **the East African Law Society** ("the Applicant"), an umbrella regional association of the East African Community countries law societies, against the **Secretary General of the East African Community** ("the Respondent") on 23rd January 2020. It was made under Articles 6, 7, 9(1) and (2), 13, 14, 15, 16, 30, 67, 69(1), 71(1)(a), (b), (d), (k), (l) and (m) & 71(4) of the Treaty for the Establishment of the East African Community ("the Treaty").

2. The Applicant prays for the following orders:

- a) **A declaration that the conduct of the 39th Ordinary Meeting of the Council on or about the 28th November 2019 was unlawful and in violation of Article 13 of the Treaty for lacking quorum due to absence of the Attorneys General who are permanent/mandatory members of the Council;**
- b) **A declaration that the resolutions, directives and orders flowing from the unlawful gathering of the 39th Ordinary meeting of the Council on or about the 28th November 2019 lack force of the law and are void;**
- c) **A declaration that the *Ad Hoc* EAC Service Commission is not an institution under Article 9 of the Treaty and lack mandate to proceed as**

mandated by the 39th Ordinary meeting of the Council;

d) A declaration that any act performed by or decision taken by the *Ad Hoc* Service Commission in pursuit of the Council resolution from the 39th Ordinary meeting (of the Council) is void;

e) A declaration that the Respondent and the Counsel to the Community acted in breach of the Treaty by failing to properly advise the Council on lack of quorum and subsequent invalidity of a meeting where Attorneys General were not present;

f) Any other order that the Honourable Court considers expedient in the circumstance; and

g) Costs be borne by the Respondent.

3. The Applicant filed an Affidavit in support of the Reference, deposed by one Hannington Amol, the Chief Executive Officer of the Applicant.

4. The Respondent filed a Response to the Statement of Reference on 12th March 2020 which was supported by the affidavit attested by Michel Ndayikengurukiye, a Principal Legal Officer at the East African Community Secretariat.

B. REPRESENTATION

5. Mr. Dan Ameyo, learned Advocate, represented the Applicant during hearing. The Respondent was represented by Dr Anthony Kafumbe, Counsel to the Community.

C. THE APPLICANT'S CASE

6. It is the Applicant's case that on or about 28th November, 2019, the East African Council of Ministers (hereinafter "the Council") conducted its 39th Ordinary Meeting in Arusha, Tanzania, without a quorum; that is without the participation of the Attorney Generals of the Partner States, who are mandatory members of the Council as per Article 13 of the Treaty.
7. That the said meeting purported to make and in fact reached several binding resolutions. One of the resolutions was creating an institution of the Community; namely, the *Ad hoc* EAC Service Commission to take on permanent duties of recruiting staff for the Community.
8. That Court is therefore asked to find the Reference merited and grant orders enumerated in paragraph 2 above.

D. THE RESPONDENT'S CASE

9. In reply, the Respondent contested all the claims made by the Applicant. It is the view of the Secretary General that at all material times, the Council, including the 39th Meeting of the Council was seized of quorum. That the Council pursuant to Article 15(2) of the Treaty determined its Rules of Procedure, wherein matters of Quorum were settled.
10. That the Council at its 30th Meeting held on 28th November 2014 established an *Ad hoc* Service Commission to carry out certain functions regarding professional and general staff, and any matters that may be delegated to it by Council. That its establishment was *ad hoc*; thus, not in contravention of Article

9(2) relating to powers of the Summit to establish institutions of the Community.

11. The Respondent therefore prayed that the Court holds that the Reference is not merited and, in any case, it is time barred.

E. POINTS OF AGREEMENT

12. Parties were in agreement that:

- a) The Council is a Policy Organ of the Community established by the Treaty;
- b) The Attorneys General of the Partner States are members of the Council;
- c) The Council established an Ad hoc Service Commission in 2014; and
- d) The Court has jurisdiction to determine the matter.

F. ISSUES

13. During the Scheduling Conference held on 14th September, 2020, the following issues for determination were agreed upon:

- a) Whether the 39th meeting of the Council lacked quorum because of the absence of some Attorneys General of the Partner States thus breaching Article 13 of the Treaty;
- b) If so, whether the resolutions, directives and orders flowing from the 39th Ordinary Meeting of the Council are valid;

- c) **Whether the Council of Ministers has indefinitely extended the tenure of the *Ad hoc* EAC Service Commission thereby breaching the Treaty;**
- d) **Whether the *Ad hoc* EAC Service Commission has been empowered as an institution without following the provisions of Article 9(2) of the Treaty; and**
- e) **Whether the Parties are entitled to the remedies sought.**

G. DETERMINATION OF THE ISSUES

14. Evidence for and against the Reference proceeded by way of filing of affidavits. Parties also filed written submissions and highlighted them in Court on 22nd November, 2021. Hereunder, we will address the Parties' evidence and submissions on each of the issues agreed and the Court's decision thereon.

ISSUE NO.1: Did the 39th meeting of the Council lack quorum because of the absence of some Attorneys General of the Partner States thus breaching Article 13 of the Treaty?

15. According to the Applicant's Statement of Reference, the Affidavit in support thereof, its written submissions and the submissions highlights in Court, the fact that the 39th meeting of the Council of Ministers was conducted without the participation of all the Attorneys General of the Partner States, the same was illegal as it contravened the provisions of Article 13 of the Treaty for lack of quorum.

16. That the Attorneys General are an integral part of the Council and must be present in every meeting of the Council for there to be a quorum. According to the Applicant, there has been a repeated violation of Article 13 of the Treaty as, with the exception of the Attorney General of the Republic of Burundi, most Council meetings have proceeded without the participation of the honourable Attorneys General.
17. Submitting on the issue, Counsel for the Applicant opted to combine it with the second issue. He emphasised that according to Article 13 of the Treaty, Partner States representation in the Council has to mandatorily include not only Ministers responsible for the East African Community Affairs but also Attorneys General. In his view, Council will not be duly constituted in the absence of its mandatory membership and that the functions of the Council as set out under Article 14 of the Treaty, can only be exercised when the Council's membership, in particular, the mandatory members set out in Article 13(a) and (c) are in attendance.
18. Mr Ameyo made reference to the decision of this Court in **Calistus Andrew Mwatela & Others vs. the East African Community, EACJ Application No. 1 of 2005**; which, in his view, led to the amendment of the Treaty in 2006 making Attorneys General permanent members of the Council. To prove that Attorneys General did not attend the 39th meeting of the Council, the learned Advocate referred to a Report of the meeting (Ref: EAC/CM/39/2019) which was attended and signed by ministers responsible for East African Community Affairs only. He concluded that, as there was no representation of the

Article 13(c) mandatory members of the Council and as there was no evidence that they were either notified of the meeting and sent apologies, or evidence that they were in Arusha on the date of the meeting, the meeting lacked quorum which was necessary to transact their business legally; hence, whatever was transacted in that meeting was void ab initio.

19. During the submission highlights, Mr Ameyo conceded that for the purposes of a quorum, not all persons referred to in Article 13 of the Treaty have to be present from all Partner States. In one of his responses in that respect he stated:

“...if an Attorney General is unable to attend in person and delegates responsibility to another officer, that delegation itself makes the Attorney General present but there is no evidence on record (a) that there was an invitation to all the Attorneys General (b) that any Attorney General sent a representative to represent him/her in the Council meeting. We would not have any objection if any of the Attorneys General had delegated attendance to any of their officers.”

(Emphasis added)

20. Mr Ameyo further submitted that before Article 13 of the Treaty was amended, it was only Ministers responsible for regional cooperation who were mandatory members to be present and transact the business of the Council. That, unfortunately the Rules of Procedure for the Council were not amended in line with the amended Article 13 of the Treaty, thus the Rules are in conflict with the Treaty. He invited the Court to resolve the

inconsistences in line with Article 31 of the Vienna Convention on the Law of Treaties, which requires treaties to be interpreted in good faith. That the internal rules applicable in the instant case are contained in the Amended Treaty. In this respect the learned Counsel invited the Court to align itself with the jurisprudence of this Court spelt out in East African Law Society & Others vs. the Attorney General of the Republic of Kenya & Others, EACJ Reference No. 3 of 2007; Timothy Alvin Kahoho vs. the Secretary General of the East African Community, EACJ Appeal No. 2 of 2013 and The Attorney General of the United Republic of Tanzania vs. African Network for Animal Welfare, EACJ Appeal No. 3 of 2011.

21. In reply, Dr Kafumbe vehemently opposed the assertions made by the Applicant. He asserted that attendance of all Attorneys General is not a prerequisite for Council meetings to have a quorum. Dr Kafumbe further disputed the allegations that it has only been the Attorney General of the Republic of Burundi who attends Council Meetings. That other Attorney General have also attended and in some cases Solicitors General and senior officers have also attended.

22. It was the Respondent's view that quorum of the Council is governed by the Rules of Procedure of the Council made pursuant to Article 15(2) of the Treaty which enjoins the Council to:

“...determine its own procedures including that for convening its meetings, for the conduct of business thereat and at other times, and for the rotation of the

office of the Chairperson among its members who are Ministers responsible for regional co-operation in the Partner States.”

23. Dr Kafumbe added that as long as Partner States abide by the Rules of Procedure on quorum, which requires each Partner State to be represented by a Minister, the absence of all or any Attorney General from the meeting of the Council cannot make such a Meeting illegal or inconsistent with Article 13 of the Treaty. That, Partner States are at liberty to constitute their delegations depending on the agenda. Further, that quorum is the minimum number of people required to make a Meeting valid. Thus, it is not possible to have all those Ministers and Attorneys General prescribed under Article 13 of the Treaty to attend all meetings of the Council.
24. Dr Kafumbe urged the Court to make a distinction between *composition* of the Council as canvassed under Article 13 of the Treaty and *quorum* spelt out under Rule 11 of the Rules of Procedure of the Council. That considering all the evidence tendered, the 39th Meeting of the Council was properly constituted as there was *quorum* which is all Partner States representation.
25. Dr Kafumbe agreed with Mr Ameyo that the Rules of Procedure of the Council do not make reference to Attorneys General but added that they cannot be said to be inconsistent with Article 13 of the Treaty.
26. Dr Kafumbe also urged the Court to note that for proper discharge of its mandate the Council has established a Sectoral

Council on Legal and Judicial Affairs for legal advice where necessary, and that meetings of the Council are preceded by a session of Coordination Committee and that of Senior Officials where Solicitors general and other lawyers attend.

27. Regarding the decision in **Calist Mwatela vs. the East African Community** case and the subsequent amendments to Article 13 of the Treaty, Dr Kafumbe stated that the amendments to include Attorneys General in the composition of the Council were for the purposes of properly constituting the Sectoral Council on Legal and Judicial Affairs and not that they could give legal advice at the meetings of the Council as alleged by the Applicant.
28. The Respondent's Counsel disputed the Applicant's submissions that the 39th meeting of the Council was only attended by the persons who signed its Report. That it is not possible for all Ministers/Attorneys General in attendance to sign the report. That it is the prerogative of a Partner State to designate one of its Ministers to sign the Report on its behalf.
29. We have dispassionately considered the rival evidence and submission made by the parties regarding this issue. We are not persuaded to agree with the Applicant regarding the quorum of the 39th Ordinary Meeting of the Council. We will explain our reasons hereunder.
30. The only evidence that was submitted to prove the absence of the Attorneys General in the said meeting is an extract of the Report of the Council of Ministers in which there are names of Ministers/Cabinet Secretary who signed the Report on behalf of

their respective Partner States. The extract annexed in the Statement of Reference does not include a list of all the participants of the 39th meeting of the Council. We expected the Applicant to avail the full Report, including a list of attendees to that meeting. We find it difficult to agree with the Applicant that, as none of the six signatories of the Report is an Attorney General, therefore there was no Attorney General in attendance in the meeting.

31. At the request of the Court, the Respondent agreed to avail some documents relating to the 39th Meeting of the Council. Documents supplied included the full Report of the Meeting, the List of Participants and the Background Paper which preceded the convening of the meeting. In the List of Participants (which in our view may not have included all participants) there are 96 names of persons who participated in the said meeting. Of particular interest to this issue, is the participation of the Deputy Solicitor General, Commissioner (Principal Legislation) and Senior State Attorney (all from the office of the Attorney General, Republic of Uganda) and Director Coordination and Advisory Services (Attorney General's Office) and Senior State Attorney (Ministry of Justice) from the United Republic of Tanzania.
32. We were also informed from the pleadings and submissions of the Applicant (also confirmed by Dr Kafumbe) that the delegation of Burundi comprised of the Minister of Justice/Attorney General.
33. The participation of one Attorney General and several representatives of Attorneys General from some Partner States

in the 39th meeting of the Council defeats the argument made by learned Counsel for the Applicant.

34. In addition, we understood Mr Ameyo to be of the view that it would be sufficient to have representatives of Attorneys General and Ministers responsible for East African Community Affairs for the purpose of quorum. We are unable to fathom the reasons that prompted the Applicant to bring up the issue of lack of quorum in the 39th Meeting of the Council, having conceded in the Statement of Reference that the meeting was attended by the Attorney General from the Republic of Burundi. Responding to questions from the Bench, Mr Ameyo readily conceded that he had not participated in the drafting of the pleadings that may explain why the pleadings and the submissions by the Applicant could not tally.

35. Notwithstanding what we have explained above, we do agree with Dr Kafumbe that attendance of all or some of the Attorneys General is not a prerequisite for holding of a Council Meeting. As rightly submitted, Article 15 of the Treaty allows the Council to regulate its own procedures, including that of conducting its Meetings. The Rules of Procedure of the Council provides a minimum threshold for holding of Council meeting. The same provides in Rule 11 as follows:

“The quorum of a session of the Council shall be all Partner States representation.”

36. Representation is defined in Rule 2 in the following words:

“Partner State representative(s)/representation means the Minister or Ministers designated by a Partner State as its representative in the meetings of the Council.”

37. It follows therefore that once a meeting of the Council is attended by a Minister from each Partner State designated as a representative of a Partner State, the Meeting is legally constituted. We should add, however, that the omission to include the Attorney’s General in the Rules of Procedure of the Council, much as it may not have an effect in the legality of the Council meetings and its consequential resolutions, it may have adverse effects in meetings of the Sectoral Council on Legal and Judicial Affairs where the Rules of Procedure for the Council apply.

38. We are further in agreement with learned Counsel for the Parties that the decision in **Calist Mwatela vs. the East African Community** (Supra) was pivotal; in the sense that, it was a catalyst for the amendments effected in Article 13 of the Treaty to include the learned Attorneys General as members of the Council. In the **Calist Mwatela** case the Court was asked to consider the validity of the establishment of the Sectoral Council on Legal and Judicial Affairs in its first meeting. The composition of the said Sectoral Council was the Attorneys General of the Partner States. The Court made the following observation:

“We agree with the counsel for the applicants that the Council is empowered under Article 14 to establish Sectoral Councils from among its members only. Membership of the Council under the same Article is

restricted to Ministers and the Treaty defines a Minister as follows: "Minister" in relation to a Partner State, means a person appointed as a Minister of the Government of that Partner State and any other person, however entitled, who, in accordance with any law of that Partner State, acts as or performs the functions of a Minister in that State...

Furthermore, although the Attorney General of Uganda is, by virtue of Article 119 of the Constitution of the Republic of Uganda, a Cabinet Minister and consequently qualified to be a Member of the Council, the Attorney General of Tanzania is not. From our reading of Article 54(1) and (4) of the Constitution of the United Republic of Tanzania the Attorney General of Tanzania is not a Minister. In the case of Kenya, however, though the Constitution does not designate the Attorney General as a Minister, the Interpretation and General Provisions Act includes the Attorney General in the definition of a Minister. On the basis of that law it appears to us that for the purposes of the Treaty the Attorney General of Kenya is a Minister as "a person who in accordance with a law of [Kenya] acts as or performs the functions of a Minister in [Kenya]".

So, for purposes of the Treaty the two Attorneys General, of Kenya and Uganda, are Ministers. However, for the Sectoral Council to be properly constituted it must comprise the representatives of all

Partner States. This is underlined by Rule 11 of the Rules of Procedure for the Council of Ministers which provides: *"The quorum of a session of the Council shall be all Partner States representation."* This must apply to the Sectoral Councils since the decisions of the Sectoral Councils are deemed to be those of the Council of Minister under Article 14(3)(i) of the Treaty. In the circumstances we find that the establishment of the Sectoral Council was inconsistent with the provisions of Article 14(3)(i)." (Emphasis added)

39. The above decision clearly ruled out representation at Council meeting level. To cement this, the Court at paragraphs 37 and 38 had this to say:

"That argument was advanced in an effort to bolster the issue as to whether it is the prerogative of the Partner States to designate such persons as they deem fit to represent them at lawfully convened meetings of either the Council or the Sectoral Council. It is quite clear that the formulation of Council rules has followed faithfully the provision of Article 13 of the Treaty and it is not understood in what manner whatsoever, the Council Rules can be said to permit representation at those meetings by persons other than those expressly determined in strict compliance with Article 13 of the Treaty. We therefore have no hesitation in reiterating that the meeting of 13th to 16th September 2005 was not a lawful meeting of a Sectoral Council and that the decisions it handed down in

respect of the two Bills was not valid decision of the Sectoral Council.

Before we conclude on this aspect of the case, there is a matter to which we would draw attention that though the composition of the Council is established under Article 13 of the Treaty, the total membership is not readily ascertainable, since it is only the membership of Ministers responsible for regional cooperation which is static and ascertainable. We were informed during arguments that membership of additional Ministers is determined by the agenda of a particular meeting of the Council. We would have thought that a more transparent way of knowing the composition of Council Members should have been evolved and put in place by now. This is good sense and good law since it will avoid uncertainty which usually degenerates into disputes such this one before the Court. (Emphasis added)

40. We have no hesitation to agree with Counsel for the Respondent that the amendments to Article 13 of the Treaty were geared at complying with the decision in **Calist Mwatela** case regarding the composition or membership of the Council, including Sectoral Councils. We do not import anything from the said judgment that would suggest that quorum in Council Meetings has to include all Members that the Court proposed that they be ascertained. We believe that the inclusion of Attorneys General in Article 13(c) of the Treaty was to make those Attorneys General not defined as ministers in their

domestic legislation to attend and transact in Council and Sectoral Councils as fully fledged members. We do not see anything to suggest, as contended by Counsel for the Applicant, that their attendance to Council meetings was a prerequisite to legalise such meetings.

41. We answer the first issue in the negative, in the sense that the 39th Meeting of the Council did not lack quorum and did not breach Article 13 of the Treaty because of the absence of some Attorneys General of the Partner States.

ISSUE NO. 2: Whether the resolutions, directives and orders flowing from the 39th Ordinary Meeting of the Council are valid

42. Counsel for the parties argued this issue along with the first one above. It was the Applicant's case that because the 39th Ordinary Meeting of the Council lacked quorum to transact its business legally, whatever was transacted in that meeting was void ab initio. That as Attorneys General were members of the Council following the amendments to Article 13 of the Treaty, their absence in a Council meeting, such meeting is not duly constituted and whatever it does is a nullity.

43. That view was opposed by the Respondent. Dr Kafumbe was categorical that the 39th Ordinary Meeting of the Council was properly constituted and all the business transacted thereat are lawful. He went on to state that as all Partner States were represented by one or more persons spelt out under Article 13 of the Treaty, the said meeting had a quorum sufficient to conduct its business legally.

44. We agree with Dr Kafumbe. Having resolved that the 39th Ordinary Meeting of the Council was properly constituted in accordance with the Treaty and the Rules of Procedure of the Council, and there being no evidence to suggest that any illegality occurred during the transactions to vitiate the Meeting's outcomes, we have no hesitation to conclude that the resolutions, directives and orders flowing from the 39th Ordinary meeting of the Council are valid. The issue is therefore resolved in the affirmative.

ISSUE NO. 3: Has the Council of Ministers indefinitely Extended the Tenure of the *Ad hoc* EAC Service Commission thereby breaching the Treaty?

And

ISSUE NO. 4: Has the *Ad hoc* EAC Service Commission been Empowered as an Institution without following the provisions of Article 9(2) of the Treaty?

45. In the written submission supporting the Reference, the Applicant combined the two issues, both relating to the *Ad hoc* EAC Service Commission. It is the contention of the Applicant that, while it is true that the Council pursuant to Article 14 of the Treaty has the mandate to establish an *Ad hoc* Service Commission, it has no mandate to extend the mandate of the said Commission indefinitely. That, such mandate belongs to the Summit under Article 9(2) of the Treaty. According to the Applicant, in the 39th Ordinary Meeting of the Council, the Council made several resolutions one of them being

empowering the *Ad hoc* Service Commission to take on permanent duties of recruiting staff, a mandate which could only be performed by an Institution (of the Community) established under Article 9(2) of the Treaty. Further, that failure by the Summit to assent to the establishment of the East African Community Service Commission Act, 2011 does not in any way justify the decision by the Council to indefinitely extend the mandate of the *Ad hoc* Service Commission.

46. During the submission highlights, Counsel for the Applicant had the following to say about the *Ad hoc* Service Commission:

“The Council transacted business under rules that were inconsistent with the Treaty and the Council in that particular meeting therefore empowered an institution called the *Ad hoc* Service Commission, a mandate that it does not have, whose original mandate had in fact lapsed...that the creation of that institution was itself inconsistent with the power of the Council as set out in the Treaty and therefore even the institution that was created and given additional powers in that illegal meeting of the Council cannot itself have legality ...that body is without legal, stable and validity in our Treaty...” (Emphasis added)

47. We must say that this latter submission is rather troubling. It manifestly deviates from the Applicant’s pleadings and the written submissions thereof. In the affidavit in support of the Reference attested by Hannington Amol, the Applicant did not raise the issue of legality of the establishment of the *Ad hoc*

Service Commission. Paragraphs 12, 13 and 14 of the said affidavit are reproduced hereunder:

“12. By way of example, the Council established an *Ad hoc* Service Commission at its 30th Ordinary Meeting, with specific mandate to report back to the Council. The *Ad hoc* Commission did carry out its duty and reported back to Council.

13. Without following the due process set out under Article 9 of the Treaty, the Council has been expanding the mandate of the *Ad hoc* Commission to the extent that the *Ad hoc* Commission now has no fixed mandate nor defined timeframe within which it should accomplish the work. In short, the *Ad hoc* EAC Service Commission now exists in perpetuity and for all purposes, save that it is illegal and contravenes the Treaty, operates as an institution under Article 9 of the treaty.

14. I believe that the Council does not have a mandate to confer unlimited mandate and time on an *Ad hoc* Commission, and that only a process sanctioned by the Summit under Article 9(2) of the Treaty can lawfully set up an institution of the Community.”

48. Further, in the written submissions filed on 27th November, 2020, the Applicant is quoted to have stated as follows:

“While it is true that the Council pursuant to Article 14 of the Treaty has the mandate to establish an *Ad hoc*

Service Commission, it has no mandate to extend the mandate of the Commission indefinitely. The mandate to do so belongs to the Summit under Article 9(2) of the Treaty.”

49. It is expected that a party, during the submission highlights, will not deviate from the pleadings and the written submissions already in the Court records. Such deviation, in our view, is meant to either mislead the Court or a sign that what was pleaded is in fact untrue. We wish to further reiterate the legal maxim that parties are bound by their pleadings. We will therefore proceed to determine the two issues on the basis of the pleadings and the written submissions, Mr Ameyo’s contradictory highlights notwithstanding.
50. The Respondent, on the other hand, did not share the Applicant’s view regarding the establishment and functioning of the *Ad hoc* Service Commission. That the Council, in its 30th Ordinary meeting held in November, 2014, established the *Ad hoc* Commission in the exercise of its mandate under Article 14 of the Treaty. That the Commission was to undertake certain tasks on behalf of the Council. That the Commission was established pursuant to terms of reference and is not a permanent institution as alleged. The functions assigned to it, according to Dr Kafumbe are: to approve job advertisements; conduct shortlisting exercises; conduct interviews and recommend suitable candidates for appointments; make recommendations to the appointing authority on staff disciplinary matters; and handle any other matter as may be delegated to it

by the Council. That those duties were yet to be accomplished and that the Council retains the right to do away with it.

51. Regarding whether the *Ad hoc* Commission has been empowered as an institution of the Community, it was Dr Kafumbe's submission that the *Ad hoc* Commission is an ad hoc body and has not been established pursuant to Article 9(2) of the Treaty nor has the Council attempted to usurp the powers of the Summit to establish Institutions of the Community. He submitted further that the Council has been at the forefront to ensure that an EAC Service Commission is established since 2011. That once established, the EAC Service Commission will be responsible for all staff matters within the Community. However, the Act establishing the East African Community Service Commission was yet to be ratified. That the *Ad hoc* Service Commission was nothing other than a stop gap measure pending establishment of a permanent body.

52. During the highlights of the written submissions, Dr Kafumbe informed the Court that the Council has since discontinued mandating the *Ad hoc* Service Commission to undertake the recruitments. That it did so at its 42nd Extra Ordinary meeting held in May 2021. We were, however, not availed with a copy of that decision.

53. We have keenly considered the rival positions taken by the parties regarding these two issues. We take note of the fact that the contested *Ad hoc* Service Commission was established by the 30th Ordinary Meeting of the Council held in November, 2014. It continued operating and discharging its functions as

assigned by the Council up to the time of the 39th Meeting of the Council, in November 2019. It had existed for about 5 years when this Reference was filed. Unlike what was contended by the Applicant, we were not referred on the specific time frame within which it was to exist. The Concept note prepared for the constitution of the *Ad hoc* Service Commission was not made available. We therefore cannot with precision determine the duration that it was to exist and whether that period was indefinitely extended as alleged.

54. We note that parties were in agreement that the Council has powers, in discharge of its mandate, to establish bodies such as it did when it established the *Ad hoc* Service Commission. We understood the point of contention to be whether, having established such bodies, it could extend their mandate indefinitely and whether such bodies are in fact institutions of the Community in disguise. Reference was made to Article 14 of the Treaty which provides as follows:

“ARTICLE 14

Functions of the Council

- 1. The Council shall be the policy organ of the Community.**
- 2. The Council shall promote, monitor and keep under constant review the implementation of the programmes of the Community and ensure the proper functioning and development of the Community in accordance with this Treaty.**

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;**
- b) initiate and submit Bills to the Assembly;**
- c) subject to this Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and the Assembly;**
- d) make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty;**
- e) consider the budget of the Community;**
- f) consider measures that should be taken by Partner States in order to promote the attainment of the objectives of the Community;**
- g) make staff rules and regulations and financial rules and regulations of the Community;**
- h) submit annual progress reports to the Summit and prepare the agenda for the meetings of the Summit;**
- 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;

j) establish the Sectoral Committees provided for under this Treaty;

k) implement the decisions and directives of the Summit as may be addressed to it;

l) endeavour to resolve matters that may be referred to it; and

m) exercise such other powers and perform such other functions as are vested in or conferred on it by this Treaty.

4. The Council may request advisory opinions from the Court in accordance with this Treaty.

5. 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 or directives shall come into force on the date of publication unless otherwise provided therein.” (Emphasis added)

55. We have no doubt in our mind, that the decision to establish the *Ad hoc* Service Commission was made pursuant to the powers vested to the Council. We were not told whether the duties assigned to the said *Ad hoc* Service Commission were duties vested to any institution other than the Council. We are aware that recruitment of officers and staff of the EAC Secretariat is the duty of the Council. Article 70 of the Treaty provides:

“1. There shall be such other officers and staff in the service of the Community as the Council may

determine.

2. All staff of the Secretariat shall be appointed on contract and in accordance with staff rules and regulations and terms and conditions of service of the Community.

3. The salaries, job design and other terms and conditions of service of the staff in the service of the Community shall be determined by the Council.”

56. We were not informed whether the assignment of the staff recruitment duties in 2014 and the subsequent years to the said *Ad hoc* Commission was against the existing Staff Rules and Regulations. We thus cannot under any stretch of imagination begin to assume the illegality that is not supported by evidence.

57. Furthermore, the imputation of “*an institution of the Community*” on the said Ad Hoc Service Commission is unsubstantiated. The Treaty defines an Institution of the Community in Article 2 as “*the Institution of the Community established by Article 9 of this Treaty.*” Article 9(2) of the Treaty states as follows:

“The Institutions of the Community shall be such bodies, departments and services as may be established by the Summit.”

58. Simply put, an institution of the Community has to be a body, department or service established by the Summit. This Court has had occasions to discuss what an institution of the

Community entails. In Modern Holding (EA) Limited vs. Kenya Ports Authority, EACJ Reference No. 1 of 2008, the Court held:

“The mere fact of rendering the nature of service it renders at Mombasa port, namely, serving the East African Partner States and citizens, 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 service must be such a service created by the Summit.”

59. The decision in Modern Holding (EA) Limited has been affirmed in a number of decisions of the Court. In Pontrilas Investments Ltd vs. Central Bank of Kenya, The Attorney General of the Republic of Kenya, EACJ Reference No. 8 of 2017 the Court reaffirmed its position regarding the manner which an institution of the Community is created. It stated:

“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.” (Emphasis added)

60. We hold that to be the correct position of the law. An institution of the Community cannot be assumed. There must be tangible evidence to the satisfaction of the Court that the said institution is in fact an institution of the Community established by the Summit pursuant to its powers under Article 9(2) of the Treaty. We must add that, where the allegation is that a body has been empowered as an institution of the Community, as in this case, the applicant should provide evidence that the duties assigned to such an institution are in fact duties that ought to be performed by an already established institution of the Community. As there was no such evidence, there is no basis for the Applicant to impute that title to the *Ad hoc* Service Commission mandated by the Council to discharge duties that the Council has power to perform. Likewise, in the absence of clear timelines given to the said *Ad hoc* Service Commission, we are unable to hold that the extension given to it (if any) was inordinate or, to use the Applicant’s own words, indefinite. Consequently, we cannot hold that the Council breached any provision of the Treaty thereof.

61. We therefore answer issues 3 and 4 in the negative.

ISSUE NO. 5 Are the Parties Entitled to the Reliefs Sought?

62. The Applicant sought a number of declaratory orders and other reliefs as highlighted in Paragraph 2 of this judgement. On the other hand, the Respondent prayed that all claims made against it by the Applicant be dismissed with costs. In our determination

of the issues, we disagreed with the Applicant in almost all claims made. Consequently, we are unable to grant any of the reliefs sought.

63. Ordinarily, we would be inclined to grant costs to the successful party, in this case, the Respondent. However, taking into consideration the nature of the dispute and the parties herein, it is our considered opinion that granting costs against the Applicant will not be in the interest of justice. We deem this case to be a public interest litigation brought to Court by a body which is an important stakeholder to the Court and the Community at large. The Applicant has an observer status in the Community pursuant to Article 3 of the Treaty. We, thus, order that costs shall lie where they fall.


H. CONCLUSION


64. In the result, the Reference is found to be unmerited. We dismiss it in its entirety. The dismissal notwithstanding, in Paragraph 37 hereinabove we noted that there is an omission to include the Attorneys General in the Rules of Procedure of the Council. Much as it may not have an effect in the legality of the Council meetings and its consequential resolutions, it may have adverse effects in meetings of the Sectoral Council on Legal and Judicial Affairs where the Rules of Procedure for the Council apply. We advise that the Rules of Procedure of the Council be amended to incorporate the amendments made in Article 13 of the Treaty.

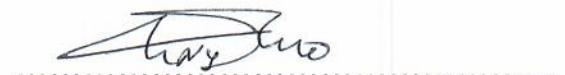
65. Finally, considering the circumstances of the matter herein and in the exercise of our judicial discretion, we direct that each party bears their own costs.

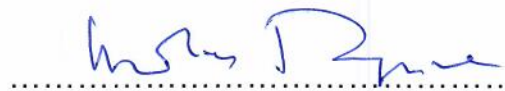
66. It is so ordered.


Dated, signed and delivered in Arusha this 25th day of March, 2022


.....
Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE


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Hon. Justice Audace Ngiye
DEPUTY PRINCIPAL JUDGE


.....
Hon. Justice Dr Charles O. Nyawello
JUDGE


.....
Hon. Justice Charles Nyachae
JUDGE


.....
Hon. Justice Richard W. Wejuli
JUDGE