



IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA, TANZANIA

APPELATE DIVISION

**(Coram: Geoffrey Kiryabwire, VP; Sauda Mjasiri; and Kathurima
M'Inoti, JJA.)**

APPEAL NO 6. OF 2020

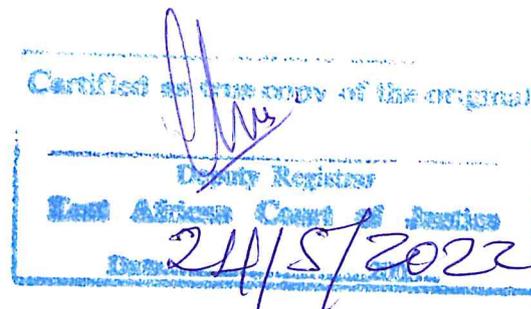
BETWEEN

PROF. BIZURU ELIAS..... APPELLANT

AND

**INTER-UNIVERSITY COUNCIL FOR
EAST AFRICA (IUCEA)..... RESPONDENT**

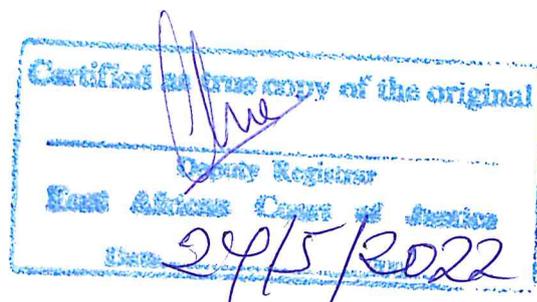
*[Appeal from the Judgment of the First Instance Division at Arusha
(Monica Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Audace Ngiye; Charles
Nyawello; and Charles Nyachae, JJ.) dated 28th September, 2020 in
Reference No. 13 of 2017]*



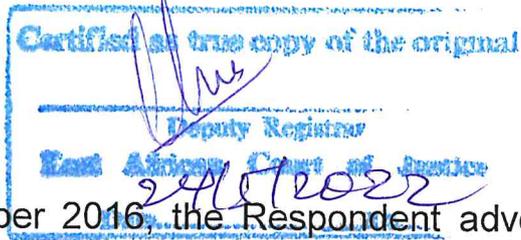
JUDGMENT OF THE COURT

INTRODUCTION

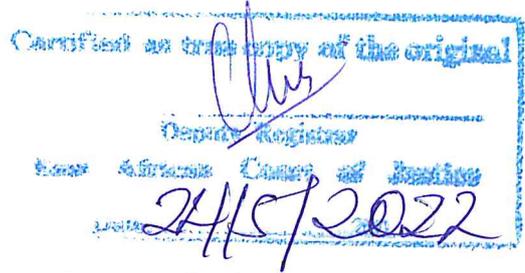
1. **Prof. Bizuru Elias (the Appellant)** is aggrieved by the Judgment of the First Instance Division of this Court (the Trial Court) dated 28th September 2020 arising from **Reference No. 13 of 2017** in which the Trial Court dismissed his Reference with costs.
2. The Appellant is a citizen of the Republic of Burundi resident in Bujumbura in the said Republic. He is represented in this appeal by Mr. Bayingana Tuyisenge Janvier, Advocate.
3. **The Respondent** is the **Inter-University Council for East Africa (IUCEA)**, a body corporate established by the **Inter-University Council for East Africa Act, 2009**. The Respondent is also an institution of the **East African Community** within the meaning of **Article 9(2)** of the **Treaty for the Establishment of the East Africa Community (the Treaty)** and is responsible for among other things, coordinating the development of higher education and research, promoting internationally comparable higher education, and developing quality assurance processes in the region. The Respondent is represented in this appeal by its Senior Legal Officer, Mr. Alex Mukunzi Ruharo, on behalf of the Counsel to the Community.



BACKGROUND



4. On 10th October 2016, the Respondent advertised a vacancy in the office of Chief Research and Innovation Coordination Officer and invited applications from qualified candidates. Under the East African Community quota system for employment, the position was only on offer to citizens of the Republic of Burundi.
5. The advertisement set out, among other things, the qualification, competencies, and work experience of prospective applicants, as well as other details relevant to the position, such as the grade, job purpose, duties and responsibilities, key performance indicators and terms and remuneration.
6. The Appellant was interested in the advertised position and submitted his application by email. By a letter dated 21st February 2017, the Respondent advised him that he had been short-listed for interview on 27th February 2017, in Kampala, Uganda.
7. The Appellant duly attended the interview at the Respondent's expense (air ticket and accommodation expenses). Subsequently the Respondent requested and obtained from the Appellant certificates of good conduct and verification and certification of his academic documents.
8. However, following information received from the Republic of Burundi on the Appellant's moral fitness during the conduct of due diligence, by a letter dated 22nd August 2017 the Respondent informed the Appellant that after careful review of his candidacy and deliberations by IUCEA Executive Committee, he was not selected for the position.



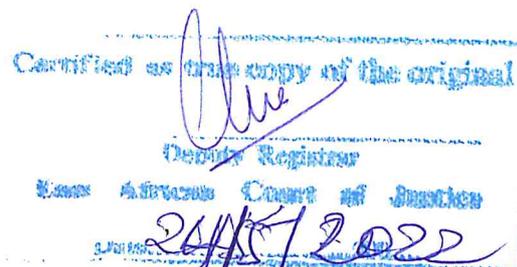
REFERENCE TO THE TRIAL COURT

9. On 17th November 2017 the Appellant filed a Reference in the Trial Court challenging the decision of the Respondent not to offer him the job he had applied for. He averred that the Respondent's decision violated the principle of good governance due to its lack of transparency, and was therefore in breach of **Article 6(d)** of the **Treaty**.
10. Accordingly, the Appellant prayed for remedies as follows:
- a. *A Declaration that the decision of the Respondent's Executive Committee dated 27th August 2017 was an infringement of the Treaty,*
 - b. *An order nullifying the said decision of 27th August 2017, and*
 - c. *Costs of the Reference.*
11. In its Response to the Reference dated 13th December 2017, the Respondent denied the Appellant's averments and pleaded that the Reference did not disclose any cause of action.
12. The Respondent further averred that it strictly complied with the **Treaty**, the Respondent's **Staff Rules and Regulations**, decisions of the Respondent's Executive Committee, and the directives of the **EAC Council of Ministers** relating to conduct of due diligence in recruitment of staff.
13. Lastly, the Respondent pleaded that whilst the Applicant had emerged the best candidate at the interviews, he failed the due

diligence test and that the Respondent was transparent because it was in communication with the Appellant at all stages of the application.

14. Accordingly, the Respondent prayed the Trial Court to dismiss the Reference with costs and make such other orders as it may deem fit.

DECISION OF THE TRIAL COURT



15. At the Scheduling Conference before the Trial Court, the parties framed two issues for determination, namely:
 - a. Whether the decision of the Respondent not to appoint the applicant to the position of Chief Research and Innovation Officer was an infringement of **Article 6(d)** of the **Treaty**; and
 - b. Whether the parties are entitled to the reliefs sought.
16. After hearing the Reference, on the first issue, the Trial Court found that there was communication between the Respondent and the Appellant at all stages of the application and that while conducting due diligence, the Republic of Burundi protested the moral fitness of the Appellant, which the Respondent took into account in deciding not to offer the position to the Appellant.
17. The Trial Court further found that consideration by the Respondent of the protest by the Republic of Burundi did not negate the fundamental principle of transparency set out in **Article 6(d)** of the **Treaty** because due diligence checks prior to appointment, including

endorsement of a candidate by his or her home country was a regional public policy of the Community.

18. The Court added that in the circumstances of the Reference, freedom of contract, under which a party is free to enter into contractual relations with another party of choice rendered **Article 6(d)** of the Treaty inapplicable. The Trial Court therefore answered the first issue in the negative.
19. On the second issue, the Trial Court relied on **Rule 127** of the **East African Court of Justice Rules, 2019**, and the decision in **Schuller v Roback** [2012] BCSC 8 and found that there was no good reason to depart from the principle that costs follow the events. The Court thus answered the second issue as well, in the negative.
20. Accordingly, the Trial Court ultimately dismissed the Appellant's Reference with costs.

APPEAL TO THE APPELLATE DIVISION

21. The Appellant was aggrieved by the decision of the Trial Court and preferred the present appeal, in which he proffered two grounds of appeal, contending that the Trial Court erred in law and fact by:-
 - a. Holding that the decision of the Respondent not to appoint him was not an infringement of the principle of transparency under **Article 6 (d)** of the **Treaty**; and
 - b. Awarding costs of the Reference to the Respondent.
22. The Appellant therefore asked the Court to:



- a. *Declare that the decision of the Respondent's Executive Committee of 27th August 2017 infringed the Treaty;*
- b. *Nullify the decision of the Respondent's Executive Committee of 27th August 2017 and order the appointment of the Appellant to the position of Chief Research and Innovation Officer;*
- c. *Award the Appellant damages caused by the Respondent's illegal decision; and*
- d. *Award the Appellant costs incurred in both the Trial and this Court.*

23. At the Scheduling Conference of the Appeal held on 18th May 2021, the parties, with the assistance of the Court, framed the following issues for determination:-

- a. *Whether the Trial Court erred in law when it held that the Respondent did not contravene **Article 6(d)** of the Treaty when it refused to appoint the appellant to the position of Chief Research and Innovation Officer after he had emerged as the best candidate; and*
- b. *Whether the parties are entitled to the remedies sought.*

ISSUE NO 1. Whether the Trial Court erred in law when it held that the Respondent did not contravene Article 6(d) of the Treaty when it refused to appoint the Appellant to the position of Chief Research and Innovation Officer after he had emerged the best candidate.

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THE APPELLANT'S CASE



24. In his written submissions and oral highlights, **Mr. Bayingana**, learned counsel for the Appellant, submitted that the Trial Court erred in law by misinterpreting and misapplying **Article 6(d)** of the Treaty. He contended that the transparency underlined by the Treaty required the Respondent to offer the advertised position to the Appellant who had emerged the best candidate during the interviews. He added that the entire recruitment process was not characterised by transparency because the Respondent's letter of regret did not inform the Appellant the reason why he was not selected.
25. Counsel further submitted that the objection raised by the Republic of Burundi was irrelevant to the application and that allowing a Partner State to raise objections to a candidate's suitability made it possible to appoint a poor candidate or to eliminate the best candidate without genuine reasons.
26. It was the Appellant's further submission that the Trial Court erred in law by ignoring the fact that the Respondent neither notified him of the adverse allegations by the Republic of Burundi nor afforded him an opportunity to be heard on those allegations. He contended that this was in breach of the rules of natural justice which rendered the Respondent's decision not to employ him null and void.
27. The appellant also disputed the factual basis of the objection by the Republic of Burundi to the effect that he had breached his scholarship agreement and failed to serve the Republic of Burundi upon completion of his studies abroad. He submitted that after completing his further studies, he returned to Burundi and was appointed a lecturer at

the University of Burundi and subsequently undertook other assignments in Burundi.

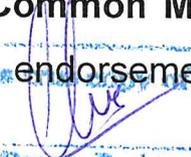
28. We must, however, note at this early stage that these are disputes involving facts which the Treaty under Article 35A prohibits us from venturing into, unless it is contended that the Trial Court misapprehended the evidence, thus making it an issue of law. (See **Angella Amado v. Secretary General of the East African Community**, Appeal No. 4 of 2014). That, however, is not the case here.

29. Regarding the finding by the Trial Court that **Article 6(d)** of the **Treaty** was inapplicable because of the doctrine of freedom of contract, the applicant assailed the conclusion, submitting that freedom of contract had no application in the recruitment process of the Community.

30. The appellant further criticised the Trial Court for relying on **Black's Law Dictionary** on the meaning of "transparency" and relied on the Judgment of this Court in **Henry Kyarimpa v. Attorney General of the Republic of Uganda**, Appeal No. 6 of 2014 on the dictates and value of observance of the rule of law in EAC regional integration.

THE RESPONDENT'S CASE

31. On its part, the Respondent defended the decision of the Trial Court as consistent with the Treaty and in line with the practice of other regional blocks such as the **African Union** and the **Common Market for Eastern and Southern Africa (COMESA)**, where endorsement by a Partner State is a condition precedent to recruitment.


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32. The Respondent submitted that it had acted transparently because it kept the appellant updated throughout the recruitment process, until the end when it sent him the letter of regret.

33. Regarding the information received about the Appellant from the Republic of Burundi during the conduct of due diligence, the Respondent submitted that it was the regional public policy of the Community as set out in **EAC/CM 35/ Directive 72** that EAC organs and institutions must conduct due diligence for successful candidates before confirmation of appointment. The Respondent cited **Article 72** of the Treaty, which requires staff of the Community to refrain from any action that may adversely reflect on their position as international civil servants, and submitted that the conduct of due diligence was not inconsistent with the Treaty requirement for transparency.

34. The Respondent relied on **Section 9(d)** of the **Inter-Universities Council of East Africa Act, 2009** and submitted that it was the Executive Committee of the Council that was responsible for recruitment of the staff and that the Committee comprised among its members a representative of the head of authority responsible for higher education in each Partner State. It was further submitted that under **Section 10(d)** of the same Act, a university or Government representative from each Partner State must be present to form quorum in a meeting of the Committee. In the Respondent's view, in the context of recruitment of staff, those provisions were intended to offer Partner States an opportunity to raise objections on the suitability of applicants from their home countries and it was also pursuant to those provisions that the representative of the Republic of Burundi objected to the Appellant's appointment on account of his having breached an

undertaking he had signed with the Government pertaining to his PH.D scholarship.

35. Next, the Respondent submitted that the dispute presented by the Appellant to the Trial Court was not justiciable because the Appellant's complaint did not challenge the legality of an Act, statute, regulation, directive, decision or action based on a national law of a Partner State. It was contended that the Appellant did not adduce any evidence to show that the protest by the Republic of Burundi was a violation of a national law, and in any event, in the absence of a decision of a national court declaring the intervention by Burundi illegal, the Trial Court could not have entertained the dispute.

36. Lastly the Respondent defended the Trial Court for making reference to **Black's Law Dictionary** and referred to several other cases like **James Katabaazi & 21 Others v Secretary General of the East Africa Community & Another**, Ref. No. 1 of 2007, where the Court had similarly relied on the same dictionary and learned articles. It was submitted that reference to scholarly material is an accepted practice in international courts and tribunals and therefore, the Trial Court did not err.

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THE COURT'S ANALYSIS AND DETERMINATION

37. As we understand it, the Appellant's complaint as regards Issue No. 1 has several strands. The first strand is that the Trial Court misinterpreted and misapplied the tenor and import of **Article 6(d)** of the Treaty. It is in that regard that he also complains about reliance by the Trial Court on the doctrine of freedom of contract and **Black's Law Dictionary** in its effort to elucidate the concept of transparency.

38. In the second strand the Appellant faults the Trial Court for holding that the Respondent did not violate transparency and therefore **Article 6(d)** of the **Treaty**, even though the Respondent:-

- a. Failed to appoint him after he emerged the best candidate at the interviews;
- b. Conducted due diligence and entertained a protest by the Republic of Burundi, which was irrelevant;
- c. Failed to afford him an opportunity to be heard on the protest by the Republic of Burundi; and
- d. Failed to give him reasons for failure to appoint him.

39. It is apposite to set out **Article 6(d)** of the **Treaty** for ease of reference. **Article 6** sets out the Fundamental Principles of the Community as follows:-

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

(a)...

(b)...

(c)...

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



40. As is patently clear, under **Article 6(d)** of the Treaty, adherence to ‘transparency’ is one of the several elements of good governance, the others being adherence to democracy, the rule of law, accountability, gender equality, etc. [See also, **United Nations Economic Commission for Asia and Pacific**, “**What is Good Governance?**”, www.unescap.org and **Council of Europe**, “**12 Principles of Good Democratic Governance**”, www.coe.int.]

41. It cannot be gainsaid that the fundamental principles set out in **Article 6(d)** of the Treaty apply not only to the Partner States but also to the Community and its institutions, as an international organisation created by the Treaty and possessing international legal personality. [See **Hon. Dr. Margaret Zziwa v. The Secretary General of the East African Community**, Appeal No. 2 of 2017 and **Alice Nijimbere v. Secretary General of the East African Community**, Appeal No. 1 of 2016].

42. It is also noteworthy that by dint of **Article 30** of the Treaty on which the Appellant’s Reference was based, any person resident in a Partner State is entitled to refer to the Court for determination whether any Act, regulation, directive, decision or action of a Partner State or an institution of the Community is unlawful or is an infringement of the Treaty. In **Alice Nijimbere** (supra), this Court accepted as plain and indisputable that the Community is bound by the fundamental principles in **Article 6(d)** of the Treaty. The Court expressed itself thus at paragraph 51:-

“The Appellant begins by stating the obvious. This is that the Respondent as head of the Community’s Secretariat (the administrative organ) has a duty ‘to comply on a daily basis, with the fundamental principles that govern the achievement

of the objectives of the Community by the Partner States.’ We should admit forthwith that we are in full agreement with her on this unarguably correct statement of fact.”

43. For that reason, we immediately reject as devoid of merit the Respondent’s contention that the Reference before the Trial Court was not justiciable and that for the Appellant to sustain the Reference, the same had to be based on challenge of the legality of an Act, statute, regulation, directive, decision or action based on a national law of a Partner State or on a decision of a national court declaring the action in question illegal. **Article 30** of the Treaty imposes no such strictures and the Court has no basis for importing or foisting such manifest limitations that are contrary to the express provisions of the Treaty. Indeed, to accept, particularly the second proposition, would be akin to making recourse to this Court subject to exhaustion of local remedies, a view that the Court has loudly rejected as contrary to the provisions of the Treaty. See, **Prof. Peter Anyang’ Nyong’o & 10 Others v. Attorney General of the Republic of Kenya & Others**, Reference No. 1 of 2006.

44. Turning to the question of violation of the transparency provisions of the Treaty, the Trial Court, properly in our view, grappled with the meaning of the term “transparency”. It is important to set out the Trial Court’s approach in this respect. The Court held:-

“The Treaty does not specify the parameters entailed in the concept of transparency. In the absence of an authoritative definition or exposition, we resort to the usual import of the term. In simple terms ‘transparency’ means not hiding anything that matters in the situation. Put in another way, it means being open and clear so that the other party to a

transaction sees everything that matters. This shade of meaning is reflected by Black's Law Dictionary in the following quotation:-

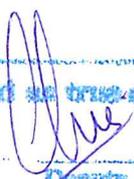
"Transparency. Openness; clarity; lack of guile and attempt to hide damaging information. The word is used of financial disclosures, organisational policies and practices, lawmaking, and other activities where organisations interact with the public."

45. The Court accepted that working definition and it is the one that it used to determine the Reference. Pausing here briefly, we note that the Appellant, although questioning the Court's reliance on **Black's Law Dictionary**, does not challenge the definition of transparency as set out in the dictionary and accepted by the Trial Court. In fact, he has neither propounded, nor proffered a different or alternative definition, meaning, or understanding of the term transparency.

46. On our part, we find no fault with the definition of transparency that the Trial Court adopted. It is, for example, quite consistent with the attributes of openness as understood by the **Council for Europe** and the **United Nations Economic and the Social Commission for Asia and Pacific** (supra). The latter defines 'transparency' as follows:-

"Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media."

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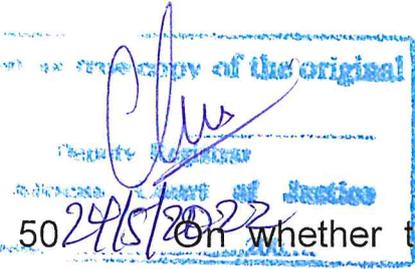
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47. The Trial Court explained why it had to have recourse to **Black's Law Dictionary** to appreciate the meaning of the term it was dealing with. The Court noted that in the absence of definition in the Treaty or relevant legislation and case law, it would give the word its natural meaning and could further have recourse to the dictionary as an authoritative legal work of reference. In so doing we note that the Court's approach was neither novel nor erroneous.
48. Our Law Reports are replete with examples where the Court has had recourse to dictionaries and similar works to decipher the meaning of words and phrases. If any examples are required, the following random examples should put the matter to rest:- **Attorney General of the Republic of Kenya v. Prof. Anyang' Nyong'o & 10 Others** (supra) (reliance on **Black's Law Dictionary** and **Halsbury's Laws of England**), **Henry Kyarimpa v Attorney General of the Republic of Uganda** (supra) (reliance on **Black's Law Dictionary** and **Encyclopedia of Public International Law**); **Alice Nijimbere v. Secretary General of the East African Community** (supra) (reliance on **The Oxford Advanced Learner's Dictionary** and **Merriam-Webster Dictionary**); **Attorney General of the Republic of Kenya v. Independent Medico-Legal Unit**, Appeal No. 1 of 2011 (reliance on **Halsbury's Laws of England**); and **Attorney General of the Republic of Kenya v Martha Wangari Karua & 2 Others**, Appeal No. 4 of 2021 (reliance on **Black's Law Dictionary** and **Stroud's Judicial Dictionary of Words and Phrases**).
49. We are therefore satisfied that as regards the Trial Court's reliance on **Black's Law Dictionary** and appreciation of the meaning of 'transparency', the Appellant's complaint has no merit and we accordingly reject it.

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On whether the Respondent adhered to transparency in the recruitment process as demanded by the Treaty, the Trial Court found as a fact that the Respondent kept in communication with the Appellant at all stages of the application, save at the tail end of the process when, during due diligence, the Republic of Burundi of raised an objection. It is common ground that the Respondent neither informed the Appellant of the information it had received from the Republic of Burundi nor asked him to respond to the information. The Trial Court excused that omission on the basis of freedom of contract, but the Appellant submits that it was a violation of transparency and hence of the Treaty, because first, it was irrelevant, second, the Respondent did not afford him an opportunity to be heard, and lastly, the Respondent did not give him the reasons why he was unsuccessful.

51. On the conduct of due diligence in the recruitment of staff in the Community, it should be noted that under **Article 14 (1)** of the Treaty, the **Council** is the policy-making organ of the Community, and further that **Article 14 (3) (g)** specifically requires the **Council** to make staff rules and regulations of the Community. As correctly submitted by the Respondent, pursuant to the Council's policy-making power, in its **35th Meeting** held between 30th March to 4th April 2017, the Council directed the EAC Secretariat and all relevant Institutions to be conducting due diligence for successful candidates before confirmation of their appointments. (See **EAC/CM 35/Directive 72**). The Appellant did not demonstrate that policy decision to be unreasonable or *ultra vires* the powers of the Council under the Treaty.

52. On account of the powers vested in the Council by **Article 14** of the Treaty, we are not persuaded that conduct of due diligence on a

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prospective employee is irrelevant or *per se* a violation of transparency. The **Black's Law Dictionary, 10th Edition, Thomas Reuters, 2014** defines due diligence thus:-

“The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.”

We accept and adopt that definition of due diligence.

53. Employers seeking to recruit a member of staff, the Respondent included, are reasonably and legitimately expected to satisfy themselves that the prospective employee meets the prescribed professional and character or moral qualifications, and to confirm the authenticity of any supporting documents or statements to that effect, submitted by a potential employee. This is clearly what happened when post-interview the Respondent sought, among others, certificates of good conduct and verification and certification of the Appellant's academic documents. We cannot therefore perceive how an employer who undertakes to confirm that a prospective employees satisfies all the stipulated competencies and qualifications, can be said to be engaged in irrelevancies or to violate transparency as understood in **Article 6(d)** of the Treaty.

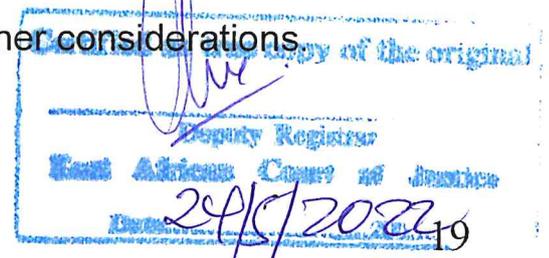
54. The Appellant further submits that having emerged the best candidate at the interviews, he ought to have been offered the position without much ado. In view of what we have stated above, it is obvious to us that determination of the successful candidate was not to be based exclusively on the candidate's performance at the interview. Indeed, the **Report of the Interview Panel** which the Appellant relies upon to prove that he had emerged the best candidate at the

interviews, did not recommend his immediate appointment. Aware that the conduct of due diligence was an integral part of the recruitment process, the Panel recommended to the Executive Committee as follows, on page 4 of the report:-

“3. [To] direct IUCEA Secretariat to undertake due diligence for the recommended candidate before the offer is given to him.”

55. This brings us to the question whether the requirement of adherence to transparency obliged the Respondent to hear the Appellant on information received by it in the course of conducting due diligence. It is axiomatic that ordinarily a person ought not to be condemned, or a prejudicial decision taken against him or her, without an opportunity to be heard. Where an allegation is made against a party, he or she must be afforded an opportunity to respond, challenge, or explain the allegation. That will normally be the case where the person in question is facing a criminal charge, disciplinary action, or similar proceeding likely to adversely affect vested or crystallised rights.

56. It must however, be borne in mind that in some instances, the right to a hearing or the duty to disclose information may be legitimately limited depending on the circumstances of the case, without constituting a violation of transparency. We are persuaded whether or not an action is in violation of transparency is to be determined on a case by case basis, taking into account the nature of the action complained of, the nature of information sought to be disclosed, the reasonableness and justification for the non-disclosure, whether a party stands to lose already accrued or vested rights, among other considerations.



57. This reality has been accepted for a long time. For example, in *Paul Wallis Furnell v. The Whangarei High School Board, Privy Council*, Appeal No. 1 of 1972, the Council reasoned as follows regarding the right to be heard:-

“It has often been pointed out that the concepts which are indicated when natural justice is involved or referred to are not comprised within certain hard and fast and rigid rules. (See speeches in Wiseman v. Boneman [1971] A.C. 297). Natural justice is but fairness writ large and juridically. It has been described as “Fair play in action.” Nor is it a leaven to be associated only with judicial or quasi-judicial decisions. But as pointed out by Tucker, L. J. in Russell v. Duke of Norfolk [1949] 1 A.E.R. 109 at 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.” (Emphasis added).

58. In that Judgment, the Privy Council cited some obvious examples where the right to be heard is not entertained, such as where a decision maker has to decide whether there is a *prima facie* case to charge or prosecute a suspect. In such cases, there is no requirement for the decision maker to hear the suspect before deciding on the *prima facie* case. Nor is a teacher marking a student's script required to hear the student before deciding that the student has failed the examination.

59. In the particular circumstances of this Appeal, we perceive a recruitment process, which may ultimately lead to a contract of employment, an integral part of which is mutual trust and confidence, to be one such exception, where non-disclosure of information of a

privileged or confidential nature, received during the conduct of due diligence, is not necessarily a violation of transparency.

60. Pursuant to the power we have already alluded to vested in the Council by **Article 14** of the Treaty, **the Council** made the **East African Community Staff Rules and Regulations, 2006** which make detailed provisions on, among other things, recruitment, discipline and dismissal of members of staff. On the disciplinary process, for example, **Regulations 90 to 93** provide elaborate procedures which entitle employees to the right to know the complaints or charges against them, the right to be heard, the right of access to adverse evidence, the right to cross-examine adverse witnesses, the right to call witnesses, the right to put forward a defence, the right to a decision and the reasons therefor, the right of appeal and the right to be represented by a legal practitioner.

61. The Regulations do not grant any such or corresponding rights to applicants for employment that would entitle them to demand presentation or disclosure of any adverse information gathered during conduct of due diligence, to confront the sources of such adverse information, to be given reasons why they have not been successful, or a right of appeal once the application for employment is unsuccessful. This we believe is deliberate and founded on rational, reasonable, and legitimate grounds that appreciate the difference between an employee and an applicant for employment. The two cannot simply be treated as one and the same thing, and we believe it was in that context that the Trial Court cited the principle of freedom of contract, which we do not find to have been in error.

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62. This however, does not mean that the Respondent has a carte blanche in how it conducts its staff recruitment. As we have already pointed out, the Respondent, as an international legal personality bearing rights and duties in international law, has an obligation, on daily basis, to conduct its affairs in strict compliance with all its policies, laws, regulations and in particular in compliance with the provisions of Article 6(d) of the Treaty, in so far as they are relevant and applicable. [See Margaret Zziwa v Secretary General of the East African Community (supra).

63. Turning to this Appeal, we take cognisance of the fact that the Appellant was not yet an employee of the Respondent with vested or accrued rights and entitlements that would have demanded a hearing before they were taken away or adversely affected. He was an applicant for employment which the Respondent could or could not offer depending on various valid reasons. We have not seen anything on record that would persuade us that the information received by the Respondent from the Republic of Burundi was irrelevant, irrational or in bad faith. We note too, from the record, that the Respondent did not even state the information from the Republic of Burundi was the reason or the only reason why it did not offer the advertised position to the Appellant. However broadly one may wish to construe the principle of adherence to transparency, we do not take the principle, in the circumstances of this case, to demand from the Respondent disclosure of information that comes to its attention in the process of conducting background check and due diligence in recruitment of staff. In the same vein, we reject the contention that the Respondent was obliged to give the Appellant reasons why his application was not successful. To impose such conditions on the Respondent would be to equate an

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applicant for employment with an employee, with the same privileges and rights.

64. Accordingly, we answer Issue No. 1 in the negative.

ISSUE NO. 2 - Whether the Parties are entitled to the Remedies sought.

APPELLANT'S CASE

65. On the second issue, the appellant submitted that he was entitled to earn a salary of **US\$ 5,771** per month with effect from March 2017 until determination of this appeal. He accordingly urged the Court to award him that amount, together with costs both in the Trial Court and in this Court.

RESPONDENT'S CASE

66. On the second issue, the Respondent submitted that the Trial Court did not commit any error when it awarded the Respondent costs of the Reference because, by dint of **Rule 127** of the Rules of the Court, costs follow the event, unless the Court decides otherwise for good reason. It was contended that in the Reference before it, the Trial Court did not find any good reason to depart from the practice of awarding costs to the party who had substantially succeeded and therefore its decision in that respect cannot be faulted. Citing **Gold v. Gold** [1993] 82 B.C.L.R. (2d) 180, the Respondent submitted that the discretion to depart from awarding costs to the successful party must be exercised judiciously.

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67. The Respondent concluded by submitting that the Appellant had not established any basis for this Court to interfere with the decision of the Trial Court and was, therefore, not entitled to the remedies that he had sought.

THE COURT'S ANALYSIS AND DETERMINATION



68. On this issue, the Appellant asks this Court to award him **US\$ 5,771** per month, being the salary that he could have earned with effect from March 2017 until the date of determination of this appeal. He also prays for costs, both in the Trial Court and in this Court. The Appellant did not elucidate these prayers with cogent submissions or arguments. On its part, the Respondent contends that the Trial Court did not err in awarding it costs against the Appellant because the Respondent was the successful party and by virtue of **Rule 127** of the Rules of the Court, costs follow the event. The Respondent did not address the Appellant's claim for award of US\$ 5,771 per month.

69. We have carefully perused the Appellant's Reference in the Trial Court. The claim for **US\$ 5,771** per month from March 2017 was neither pleaded by the Appellant, nor addressed or decided by the Trial Court. Being in the nature of special damages, the Appellant was obliged to specifically plead that particular claim and prove it strictly, by evidence by production of documentary or other suitable evidence. It is for this reason that **Rule 36 (2) (b)** of the **East African Court of Justice Rules, 2019** requires parties to specifically plead every matter which, if not specifically pleaded would undermine a fair trial by taking the opposite party by surprise. See **Angela Amudo v. Secretary General of the East African Community**, Claim No. 1 of 2012, **Timothy Alvin Kahoho v. Secretary General of the East African Community**,

Reference No. 1 of 2012, and **Grand Lacs Supplier S.A.R.L & Others v Attorney General of the Republic of Burundi**, Reference No. 6 of 2016.

70. Having failed to specifically plead or strictly prove the alleged special damages, we have no basis for awarding that particular remedy in this Appeal.

71. On the question of costs, the Trial Court relied on **Rule 127** of the Rules of the Court to the effect that costs follow the event, unless the Court, for good reason, directs otherwise. The Trial Court found that there was no good reason to depart from the general rule on costs because the Appellant had failed to prove his Reference.

72. We take note of the fact that the Appellant's reference was not frivolous. It was the first time that the Court was being invited to shed light on the extent and limits of **Article 6(d)** of the Treaty as far as it relates to adherence to transparency. In **Attorney-General of the United Republic of Tanzania v Anthony Calist Komu**, Appeal No. 2 of 2015, this Court stated as follows regarding costs in public interest litigation:-

"Where a case has been instituted by a public- spirited person and it is arguable and raises significant issues as to the interpretation and future application of the Treaty provisions, this Court exercises its discretion not to award costs against this kind of litigant when he or she loses the Reference."

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73. Similarly, in **Simon Peter Ochieng & Another v. Attorney General of the Republic of Uganda**, Appeal No. 4 of 2015, the Court took a similar approach when it reiterated:-

“On the Issue of costs, we recall that it is our established jurisprudence that this Court has consistently exercised its discretion not to award costs in litigation involving public interest. The same reasoning will be applied in the instant Appeal.”

74. Taking all the above into account and in particular the circumstances of this Appeal, we are satisfied that the order that best recommends itself as regards costs is for each party to bear its own costs.

DISPOSITION

1. The upshot of our consideration of the Appellant’s Appeal is that:-
 - a. The Appeal is dismissed; and
 - b. Each party to bear its own costs.

IT IS SO ORDERED

DATED, DELIVERED, AND SIGNED in Arusha on this^{24th} day of May 2022.

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Deputy Registrar
Law Officers Court of Justice
Date: 24/5/2022


.....
Geoffrey Kiryabwire
VICE PRESIDENT


.....
Sauda Mjasiri
JUSTICE OF APPEAL


.....
Kathurima M'Inoti
JUSTICE OF APPEAL


.....
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Deputy Registrar
East African Court of Justice
Date 29/1/2022