



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

**(Coram: Nestor Kayobera, P.; Sauda Mjasiri, VP; Anita Mugeni,
Kathurima M'Inoti and Cheborion Barishaki, JJ.A.)**

APPEAL NO. 06 OF 2022

(Arising from Reference No. 1 of 2020)

BETWEEN

THE EAST AFRICA LAW SOCIETYAPPELLANT

AND

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

[Appeal from the Judgment of the First Instance Division of the East African Court of Justice at Arusha by Justice Yohane B. Masara (Principal Judge), Justice Audace Ngiye (Deputy Principal Judge), Justice Dr. Charles Nyawello, Justice Charles Nyachae, and Justice Richard Wejuli, (JJ.) dated 25th March, 2022 in Reference No. 1 of 2020].



JUDGMENT OF THE COURT

INTRODUCTION

1. This is an Appeal from the decision of the First Instance Division of this Court (hereinafter referred to as the “Trial Court”) arising out of Reference No. 1 of 2020 dated 25th March, 2022. The Trial Court dismissed the Reference and held that each party bears its own costs.
2. The Appeal was filed by the East African Law Society, an umbrella Regional Association of the East African Community Countries Law Societies (“the Appellant”), against the Secretary General of the East African Community (“the Respondent”).
3. It is the Appellant’s case that the Meeting of the East African Council of Ministers (“the Council”) which took place on the 28th November, 2019 was unlawful and in violation of Article 13 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “the Treaty”) for lack of quorum due to the absence of all the Attorneys General of the Partner States, who are permanent/mandatory members of the Council.
4. The Appellant also complained that the Trial Court erred in law by subjecting the provisions of Articles 13 and 14 of the Treaty to the Rules of Procedure of the Council of Ministers (the Rules of Procedure).
5. The Respondent opposed the Appeal. According to the Respondent, the Appellant’s claim has no basis as it was not a prerequisite for all the Attorneys General to attend the meetings of the Council and that the Council has the mandate under Article 15(2) of the Treaty to determine its own Rules of Procedure.



6. The Appellant was represented in this Appeal by learned Counsel, Mr. Francis Gimara, SC, and Mr. Lastone Gurume, while the Respondent was represented by Dr. Anthony Kafumbe, Counsel to the Community.

BACKGROUND

7. On 18th November, 2019, the Council held its 39th Ordinary Meeting in Arusha, Tanzania. According to the Appellant, the said meeting was held without the required quorum, that is, without the participation of all the Attorneys General of the Partner States who are mandatory members of the Council in accordance with Article 13 of the Treaty.

THE REFERENCE

8. The Reference was filed by the Appellant on 23rd January, 2020, under Articles 6, 7, 9(1), and (2), 13, 14, 15, 16, 30, 67, 69(1), 71(1) (a), (b), (d), (k), (l) & (m) and 71(4) of the Treaty.

9. The Appellant sought the following Declarations and Orders at the Trial Court:-

(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 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 lacks 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 circumstances; and

(g) costs be borne by by the Respondent.

FINDINGS BY THE TRIAL COURT

10. Four issues were considered by the Trial Court. These issues, which were agreed upon by the parties and approved by the Trial Court during the Scheduling Conference held on 14th September, 2020, were:-

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.

11. The Trial Court, in its judgment dated 25th March 2020, dismissed the Reference. The Court found that the 39th Meeting of the Council of Ministers was conducted properly and did not breach Article 13 of the Treaty because of the absence of some Attorneys General from the



Partner States. The Trial Court disagreed with the Appellant in almost all claims it had made and consequently the Court did not grant any of the reliefs sought by the Appellant. On costs, as we have already stated, the Trial Court directed each party to bear its own costs because the Reference was a public interest matter.

12. That decision resulted in Appeal No. 06 of 2022, *The East African Law Society v. The Secretary General of the East African Community*.

THE APPEAL

13. The Appellant raised twelve(12) grounds of appeal in its Memorandum of Appeal, namely:-

(a) *that the Honourable learned Justices of the First Instance Division erred in law in misapprehending and wrongly interpreting the provisions of Articles 13 and 14 of the Treaty for the Establishment of East African Community ("the Treaty") by holding in error that Attorneys General of the Partner States are not required for purposes of the constitution or meetings of the Council of Ministers;*

(b) *that the Honourable learned Justices of the First Instance Division erred in law in rendering a decision that has resulted in subordination of express provisions of Articles 13 and 14 of the Treaty to the Council of Ministers' Rules of Procedure by erroneously finding that the quorum of meetings of Council of Ministers as set out in the said Rules of Procedure excluded the Attorneys General as part of the quorum when the Treaty has in fact included the latter as mandatory members of the Council of Ministers;*

(c) *that the Honourable learned Justices of the First Instance Division correctly found that the Council of Ministers' Rules of Procedure illegally omitted to include Attorneys General of Partner States as Council Members, but erred in law in further finding on the same matter that the non-inclusion of the Attorneys General only affected legality of the Sectoral*



Committee meetings and not the meetings of the Council of Ministers;

- (d) that the Honourable learned Justices of the First Instance Division erred in law in misinterpreting pertinent provisions of the Treaty and introducing irrelevant distinctions between the Sectoral Committees and the Council of Ministers, and in mixing up the issue of representation of Partner States in Council meetings versus representation in Sectoral Committee meetings;
- (e) that the Honourable learned Justices of the First Instance Division erred in law in finding that the Attorneys General could designate representatives to a Council of Ministers meeting when in fact the Treaty makes them mandatory members and do not allow for such delegation, and the presence of such delegates rendered the proceedings of the 39th Ordinary meeting unlawful and contrary to the Treaty;
- (f) that the Honourable learned Justices of the First Instance Division erred in law in misapprehending the provisions of Articles 13 and 14 of the Treaty and erroneously finding that only the presence of a Minister from Each Partner State designated as a representative of a Partner State was sufficient for purposes of a Council meeting, thereby misapplying the Treaty and rendering worthless the Treaty provisions that designated the Attorneys General of the Partner States as mandatory members of the Council of Ministers;

(g) that the Honourable learned Justices of the First Instance Division erred in law in finding that the 39th Ordinary Meeting of the Council of Ministers had a quorum and was validly conducted in the absence of all Attorneys General representing the Partner States;

(h) that the Honourable learned Justices of the First Instance Division erred in law in finding that the proceedings and resolutions of the 39th Meeting of the Council of Ministers were valid when the same were arrived at in an illegal manner and in violation of Articles 13 and 14 of the Treaty;

(i) that the Honourable learned Justices of the First Instance Division of the Court erred in law and acted unfairly and unjustly in finding that the illegality of the EAC Ad Hoc Commission was not an issue for determination by the Court



when in fact it was expressly pleaded in the Statement of Reference and was framed as an issue for determination;

- (j) that the Honourable learned Justices of the First Instance Division erred in law in finding that the EAC Ad Hoc Commission, while not an institution under Article 9 of the Treaty could discharge functions allocated to it by the Council of Ministers as long as those functions were not under the mandate of another institution or organ of the Community, an erroneous and unlawful finding that in effect grants the Council of the Ministers extra – legal powers to establish institutions or bodies outside of Article 9 of the Treaty;
- (k) that the Honourable learned Justices of the First Instance Division erred in law in finding that the EAC Ad Hoc Commission did not have a defined time frame within which to discharge its mandate when in fact the uncontested facts placed on record were that the EAC Ad Hoc Commission had had its terms extended from time to time and indefinitely thus making it a permanent institution and not an Ad Hoc body, and thus constituting an illegal usurpation of power by the Council of Ministers under Article 9 of the Treaty; and
- (l) that the Honorable learned Justices of the First Instance Division erred in law in generally misapprehending the substance of the Reference, misinterpreting the law, and drawing erroneous inferences from proven facts, and has thus rendered unfair, wrong and unjust decision deserving to be corrected pronto by the Honourable Justices of the Appellate Division.

14. The Appellant prayed that the Court grant the following orders:-

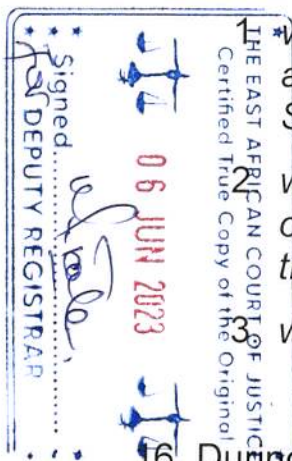
- (a) that this Appeal be allowed and the Judgment of the First Instance Division be set aside on the above grounds and substituted with the following orders herein below:-
- (b) a declaration that the 39th Ordinary Meeting of the EAC Council of Ministers lacked quorum, and decisions and resolutions made thereat are illegal and in violation of the Treaty;
- (c) a declaration that the Council of Ministers acted illegally and against Article 9 of the Treaty by establishing and indefinitely extending the term of the EAC Ad Hoc Commission;



- (d) a declaration that the decision of the Council of Ministers at the 39th Ordinary meeting to extend the term of the EAC Ad Hoc Commission was illegal and violated the Treaty;
- (e) a declaration that the Attorneys General of the Partner States are members and mandatory members of the Council and are all required to attend a Council meeting for it to have a quorum and to make legitimate decisions;
- (f) a further declaration that the Council of Ministers' Rules of Procedure are illegal and contrary to the Treaty to the extent that they excluded Attorneys General as members of the Council;
- (g) that the costs of this appeal be borne by the Respondents; and
- (h) such other order that this Honourable Court considers just and fit for the circumstances.

ISSUES FOR DETERMINATION

15. A Scheduling Conference was held on 9th August, 2022. The following issues were agreed upon by the parties and approved by the Court:-



- 1. whether the Trial Court erred in law by holding that the attendance of all or some Attorneys General of the Partner States is not a prerequisite for a Council Meeting;
- 2. whether the Trial Court erred in law by subjecting the provisions of Articles 13 and 14 of the Treaty to the Rules of Procedure of the Council of Ministers; and
- 3. what remedies are available to the parties?

16. During the Scheduling Conference, it was also agreed by the parties that the order prayed for by the Appellant under paragraph C, **“a Declaration that the decision of the Council of Ministers at the 39th Ordinary Meeting to extend the term of the EAC Ad Hoc Service Commission was illegal and violated the Treaty”** would no longer be

pursued. Mr. Francis Gimara, Counsel for the Appellant submitted that after conferring with Dr. Kafumbe, Counsel for the Respondent, it was agreed that the said prayer was no longer viable as the issue had been overtaken by events and was therefore moot because the *Ad Hoc* Service Commission was no longer in place. That position was also stated in paragraph 52 of the Judgment of the Trial Court.

ISSUE NO. 1 - WHETHER THE TRIAL COURT ERRED IN LAW BY HOLDING THAT THE ATTENDANCE OF ALL OR SOME ATTORNEYS GENERAL OF THE PARTNER STATES IS NOT A PREREQUISITE FOR A COUNCIL MEETING.

APPELLANT'S CASE

17. Mr. Lastone Gurume learned Advocate argued the Appeal on behalf of the Appellant. He submitted that the Appeal has been validly lodged before the Court in accordance with Article 35 A of the Treaty and in line with **Simon Peter Ochieng & Another v. Attorney General of the Republic of Uganda**, EACJ Appeal No. 4 of 2015 and **Angella Amudo v. Secretary General of the East African Community**, EACJ Appeal No. 4 of 2014.

18. Counsel submitted on issue No. 1 that the Trial Court erred in law by holding that the attendance of all or some of the Attorneys General of the Partner States is not a prerequisite for holding a meeting of the Council. He submitted that this issue concerns the composition of the Council of Ministers under Article 13 of the Treaty as amended versus the Rules of Procedure, which have provisions under Rule 11 on quorum. Counsel submitted that Article 13 of the Treaty provides for a clear composition, which includes under paragraph (c), the Attorneys



General of Each Partner State, in very specific terms. According to Counsel, the Rules of Procedure are not in consonance with Article 13.

19. Regarding the 39th Ordinary Meeting of the Council of Ministers that was held on 18th November 2019, it was submitted that the composition required under Article 13 of the Treaty was not complied with and that the attendance of all the Attorneys General of Partner States is a prerequisite in order to have a proper Council Meeting. In Counsel's view the Council of Ministers cannot adopt its own Rules of Procedure allowing any representative, or delegate of an Attorney General or Solicitor General to attend so as to meet the requirements of the quorum. The said Council Meeting was therefore not properly constituted.

20. Counsel referred to Rule 3 of the Rules of Procedure which provides for the composition of the Council of Ministers and submitted that the provisions are not in tandem or in line with Article 13 which provides specifically that the Attorneys General of each Partner State are permanent members and have to participate in the Council Meetings.

For that reason, he submitted, the Trial Court wrongly applied the decision in **Calist Andrew Mwatela & 2 Others v. The East African Community**, EACJ Application No. 1 of 2005 because that decision clearly emphasized the need for the addition of the Attorneys General as members of the Council. Counsel asserted that there has been a continuous omission or refusal by the Council of Ministers to amend the Rules of Procedure to conform with the Treaty as amended, which has left the issue of quorum to be defined according to the Council's thinking and not in conformity with the Treaty.

21. Counsel further submitted that Article 13 of the Treaty was amended specifically following the decision in **Calist Andrew Mwatela & 2 Others**



v. **The East African Community** (supra) and therefore, in the meeting held on November 18, 2019 which was after the amendment of the Treaty, the composition requirement is different. Counsel referred to Article 13 of the Treaty as amended and submitted that the use of the word “**shall**” as regards composition of members of the Council meant that the attendance of the Attorneys General was mandatory.

22. It was counsel’s further submission that the Rules of Procedure should be amended to bring them in line with Article 13 of the Treaty. He emphasized that Article 13 of the Treaty does not provide for delegation and that the attendance of the Attorneys General is a prerequisite and mandatory.

23. Counsel referred to the **Vienna Convention on the Law of Treaties, 1969** as regards the interpretation of Treaties, and submitted that Article 31(1) requires Treaties to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of the objective and purpose.

24. Counsel also relied on the case of **Richard Marx, Lisa and Casto Del Amo Martinez v. European Parliament**, Case No. T-182/94 where the European Union Court of First Instance found the number of voters (staff) for short of the quorum which would have been obtained on the basis of the list of voters updated by the administration and therefore annulled the election.

25. Counsel submitted that there is a need to consider the weight of the Rules of Procedure against the Treaty because the Rules seem to give a leeway on how quorum can be determined, yet quorum under the Rules is based on composition of the Council before amendment of the Treaty when the Attorneys General were not members of the Council.



26. Counsel made reference to paragraphs 31 and 32 of the Judgment of the Trial Court which referred to the list of documents produced by the Respondent regarding participation in the impugned meeting of the Council by the Deputy Solicitor General, Commissioner (Principal Legislation) and Senior State Attorney (all from the office of the Attorney General Republic of Uganda) and Director of Coordination and Advisory Services (Attorney General's Office and Senior State Attorney (Ministry of Justice) from the United Republic of Tanzania and the Minister for Justice/Attorney General from Burundi. According to Counsel, there was no full representation of Attorneys General as required under Article 13 of the Treaty. Counsel submitted that according to Article 13(c), a meeting will not be properly constituted in the absence of the Attorneys General and that under Article 13(c) of the Treaty, the Attorneys General must appear in person and cannot delegate their participation. Accordingly, Counsel submitted that the 39th Meeting of the Council was convened without the required quorum.

27. Lastly, Counsel submitted that under Article 23(1) of Treaty, the Court is required to ensure adherence to the Treaty and that the Treaty

has not expressly provided for delegation of powers by the Attorneys General

RESPONDENT'S CASE

28. Dr Anthony Kafumbe for the Respondent commenced his submissions by requesting the Court to adopt all the pleadings and submissions on record filed by the Respondent. Counsel submitted that appeals before this Court are regulated by Article 35 A of the Treaty and Rule 86 of the Court Rules of Procedure and that in that context, it is presupposed that there is a point of law in issue, procedural irregularity or lack of jurisdiction. According to him, in the instant Appeal none of



the above is in issue which supports the Respondent's position that the Appeal is not merited. Counsel relied on **Angella Amudo v. Secretary General of the East African Community** (supra) in support of the contention. He further submitted that there was no error, misapprehension or any irregularity in the proceedings of the 39th Ordinary Meeting of the Council of Ministers and invited the Court to dismiss this Appeal for want of merit.

29. Counsel supported the findings of the Trial Court in their entirety and submitted that the Trial Court took into account all the issues raised, the documents availed to the Court and the case law and came to the right conclusion and decision. He urged the Court to uphold the Judgment of the Trial Court because the Council had the requisite quorum.

30. On the first issue regarding whether the attendance of all or some of the Attorneys General is a prerequisite for holding Council Meetings, counsel submitted that it is not necessary that Attorneys General, some or all of them attend Council Meetings. He contended that what the framers of the Treaty did in Article 13, was to provide for the composition of the Council and that in his view, membership was distinct and different from quorum and that is why the Treaty provided for the two

issues separately.

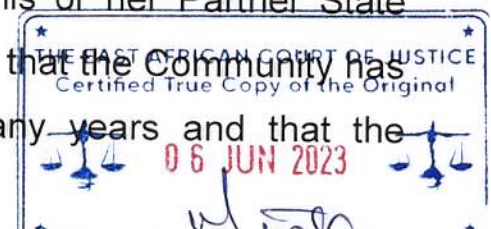
31. Counsel referred to the functions of the Council in Article 14 of the Treaty and submitted that the Council is a policy organ of the Community and that matters of policy such as consideration of the budget of the Community do not require the mandatory attendance of the Attorneys General. He further submitted that it would add no value to make it mandatory for Attorneys General to be in attendance for consideration of the budget or for purposes of submitting Annual Progress Reports. Counsel contended that representation at meetings of



the Council should be determined on the basis of the agenda of the meeting and that if all the Attorneys General have to attend all meetings, the work of the Council would be constrained.

32. It was Counsel's further submission that the Council has constituted a Sectoral Council on Legal and Judicial Affairs to provide specialized legal advice to meetings of the Council when required, thus further demonstrating that the attendance of the Attorneys General at Council meetings was not mandatory. He contended that making members of the Council mandatory attendees of the Council Meetings would render the Sectoral Council on Legal and Judicial Affairs irrelevant and redundant. In his view, the function of the Council is to deal with matters of policy and not legal matters and that is why quorum under the Rules of Procedure does not include the Attorneys General. He submitted that the Council would have a quorum even in the absence of Attorneys General.

33. Addressing the case of **Calist Andrew Mwatela & 2 Others v. The East African Community** (supra) relied upon by the Appellant, Counsel submitted that Article 13 of the Treaty was amended not for the purpose of quorum but to enable some of the Attorneys General who were not Ministers, like the Attorney General of the United Republic of Tanzania who is not a Minister, to properly constitute the Sectoral Councils. He added that the amendment was necessary to enable the Council to establish Sectoral Councils whose members were members of the Council. Counsel submitted that the quorum for Partner States representation is clearly defined and that the requirement is the presence of a Minister who can clearly bind his or her Partner State when decisions are being taken. He contended that the Community has been working under this arrangement for many years and that the

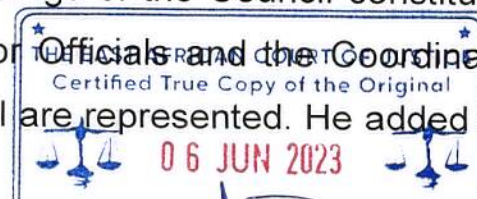


Appellant, which has had an observer status in the Community for a long time, just came up with this argument out of the blue. In Counsel's view the law is very clear because Article 13 of the Treaty only makes reference to membership and not quorum.

34. On quorum, Counsel submitted that it means the minimum acceptable level of individuals with a vested interest needed to make the proceedings of a meeting valid under a Charter. In his view, it is a minimum level of interest or attendance required before an official meeting or action can take place. In the context of the EAC, which is an organization of seven Partner States that are sovereign, counsel submitted that quorum is interest based and intended to ensure that all Partner States have a say in the affairs of the Community.

35. Counsel relied on the case of **Attorney General of Burundi v. Secretary General of the East African Community**, Reference No. 2. of 2018 and submitted that rule 11 of the Rules of Procedure prescribes that the quorum of a Meeting of the Council shall be all Partner States representation and that rule 2 defines Partner States' representation to mean the Minister or Ministers designated by a Partner State as its representative in meetings of Council. In his view, this means that as long as there is a Minister representing a Partner State, then there is quorum for the meeting. Counsel distinguished the decision of **Richard Marx, Lisa and Casto Del Amo Martinez v. European Parliament** (supra) as it relates to registration based quorum which is not applicable to the East African Community, where decisions are made by consensus and quorum is interest based.

36. Counsel further submitted that Meetings of the Council constitute a number of sessions such as, the Senior Officials and the Coordination Committee where the Attorneys General are represented. He added that



Council Meetings do not begin with Ministerial Sessions but are preceded by meetings of Senior Officials and Coordination Committee and even the Rules of Procedure state that the Ministers may be accompanied by officials and advisors. He urged that if there are any legal issues, the Council has established the Sectoral Council on Legal and Judicial Affairs where such matters are taken if there is need. Counsel noted that the lower sessions of the Council are attended by representatives of the Attorneys General.

37. Lastly, counsel submitted that the 39th Ordinary Meeting of the Council was validly conducted and that the contention by the Appellant that whatever was decided by the said Meeting was null and void has no basis. He argued that the Appellant was inviting the Court to take a decision on matters that happened in 2019 and had already been implemented. Counsel submitted that the practice of the Community is that not all Ministers are able to sign the Report of the Council and therefore, failure to sign should not be a basis to imply that those who signed were the only Ministers in attendance. Accordingly, Counsel urged the Court to uphold the decision of the Trial Court.

COURT'S ANALYSIS AND DETERMINATION

38. The Appellant is challenging the findings of the Trial Court that the attendance of all or some Attorneys General is not a prerequisite for Meetings of the Council. The Appellant contends that the 39th Ordinary Meeting of the Council was illegal, lacked quorum and was in violation of Article 13 of the Treaty because it was conducted without the presence of the Attorneys General of some of the Partner States. The Respondent, on its part, fully supports the decision of the Trial Court and



states that the attendance of the Attorneys General in Meetings of the Council is not mandatory.

39. The starting point, as far as Issue No 1 is concerned, should be appreciation of the actual provisions of the Treaty as regards the membership of the Council and the quorum for the conduct of its meetings. Article 13 sets out the membership of the Council in the following terms:-

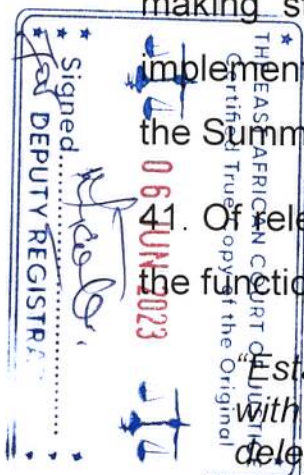
“The Council shall consist of:

- a. the Minister responsible for East African Community affairs of each Partner State;*
- b. Such other Minister of the Partner States as each partner State may determine;*
- c. The Attorney General of each Partner State.”*

40. Article 14 of the Treaty declares the Council to be the policy organ of the Community and sets out the Council’s functions to include making policy decisions; initiating and submitting Bills to the Assembly; giving directions to Partner States and institutions of the Community (save the Summit, the Court and the Assembly); making regulations, issuing directives, taking decisions, making recommendations and giving opinions per the Treaty; considering the budget of the Community; making staff and financial rules and regulations of the Community; implementing decisions and directives of the Summit and submitting to the Summit annual progress reports; among other similar functions.

41. Of relevance to this Appeal is Article 14 (3) (i) which provides one of the functions of the Council to be to:-

*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 decisions of such Sectoral*



*Councils shall be deemed to be decisions of the Council.”
(Emphasis added).*

42. Before it was amended on 20th August 2007, Article 13 of the Treaty provided as follows:

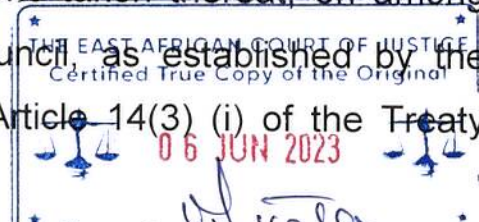
“The Council shall consist of the Ministers responsible for regional co-operation of each Partner State and such other Ministers of the Partner State as each Partners State may determine.”

As is pertinently clear, before the said amendment, Attorneys General, by virtue of their offices as Attorneys General in the Partner States, were not members of the Council. The Attorneys General were members of the Council only where they were, in addition to being Attorneys General, Ministers in the Partner States. The Treaty defines “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.”

Thus, whether or not one is a Minister qualified to attend a Meeting of the Council depends on whether he or she is appointed by a Partner State as a Minister of Government or is allowed by the laws of the Partner State to discharge the duties and functions of a Minister.

43. The background to the amendment of Article 13 in 2007 was the decision of this Court in **Calist Andrew Mwatela & 2 Others v. The East African Community** (supra), rendered when only three States were Parties to the Treaty. The Applicants challenged the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs held on 13th to 16th September 2006 and decisions taken thereat, on among others, the ground that the Sectoral Council, as established by the Council of Ministers, was in violation of Article 14(3) (i) of the Treaty

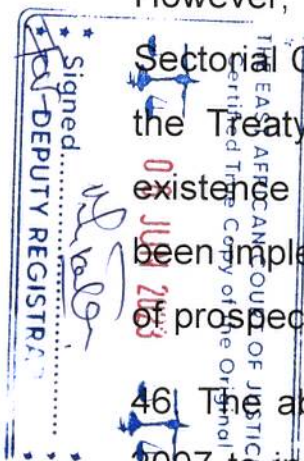


because the Sectoral Council had among its members Attorneys General who were not members of the Council of Ministers.

44. The Applicants in **Calist Andrew Mwatela & 2 Others v. The East African Community** (supra) contended that there were variations and differences among the then three Partner States as regards the offices of Attorneys General and Ministers of Justice and Constitutional Affairs. They argued that while the Attorney General of the Republic of Uganda was also designated as a Minister, those of the United Republic of Tanzania and the Republic of Kenya were not Ministers. For that reason, they maintained that the two Attorneys General were not members of the Council. They also contended that the meeting in question was invalid because the Attorney General of Uganda attended in person but those of Tanzania and Kenya sent representatives, who were not Ministers.

45. The Court found that the Attorneys General of Uganda and Kenya were Ministers under the laws of their respective Partner States, but that of Tanzania was not. Accordingly, the Court concluded that the Sectoral Council on Legal and Judicial Affairs was not constituted in accordance with Article 14(3) (i) of the Treaty because not all its members were members of the Council of Ministers as demanded by the Treaty. However, the Court declined to nullify decisions already taken by the Sectoral Council, even though it was not constituted in accordance with the Treaty. The Court noted that the Sectoral Council had been in existence since 2001 and had taken a number of decisions which had been implemented. Accordingly, the Court opted instead for the doctrine of prospective rather than retrospective annulment.

46. The above decision is what led to the amendment of the Treaty in 2007 to include Attorneys General of the Partner State as members of the Council so as to cure the omission noted by the Court. Accordingly,



the real issue raised in **Calist Andrew Mwatela & 2 Others v. The East African Community** (supra) and addressed by the amendment to the Treaty, was ensuring that the Sectoral Council on Judicial and Legal Affairs was constituted by members of the Council of Ministers in accordance with Article 14(3) (i) of the Treaty. The rationale for the amendment was therefore not to make Attorneys General members of the Council of Ministers purely from their offices as Attorneys General in the Partner States.

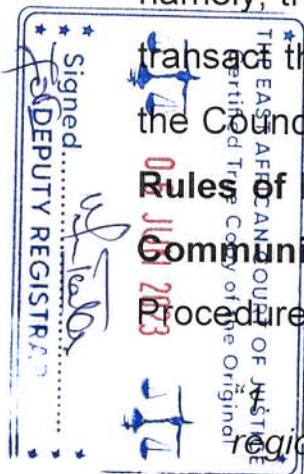
47. As regards meetings of the Council, they are provided for in Article 15 of the Treaty. The pertinent parts provide as follows:-

“1. The Council shall meet twice in each year, one meeting of which shall be held immediately preceding a meeting of the Summit. Extraordinary meeting of the Council may be held at the request of a Partner State or the Chairperson of the Council.

*2. **The Council shall determine its own procedure including that for convening its meetings**, for the conduct of business thereat and at other times, and for the rotation of the office of Chairperson among its members who are Ministers responsible for regional co-operation in the Partners States.” (Emphasis added).*

48. There cannot be any dispute that by the above provision the Treaty has vested in the Council the power to determine how its meetings shall be conducted, including determination of the quorum of its meetings, namely, the minimum number of its members who are required to validly transact the business of the Council. Pursuant to the powers vested in the Council by Article 15(2) of the Treaty, in 2001 the Council made the **Rules of Procedure for the Council of Ministers of the East African Community**. On composition of the Council, rule 3 of the Rules of Procedure provides:-

The Council shall consist of the Ministers responsible for regional co-operation of each Partner State and such other



Ministers of the Partner States as each Partner State may determine.

2. The Ministers may be accompanied to the Council meetings by officials and advisers.

3. The Council may invite observers to its meetings.”

49. We must observe that under rule 3(1) of the Rules of Procedure, membership of the Council reflects the membership of the Council as it was under Article 13 of the Treaty before amendment of the Treaty in 2007. It cannot be gainsaid that the Rules of Procedure must, as far as **membership** of the Council is concerned be consistent with the Treaty, which is a higher legal norm. In this regard, the Rules of Procedure required to be amended to bring them in line with the Treaty as regards membership of the Council, once the Treaty was amended. We shall say more on this question in Issue No. 2.

50. We agree with the Respondent, which we also find from the record was conceded by the Appellant before the Trial Court, (See page 8 of the Judgment of the Trial Court) that there is a world of a difference between membership of an organisation and its quorum for purposes of conducting its meetings. **Black’s Law Dictionary**, 10th Edition, Thomson Reuters, 2009 defines quorum as follows:-

“The smallest number of people who must be present at a meeting so that official decisions can be made; specifically, the minimum number of members (a majority of all the members, unless otherwise specified in the governing documents) who must be present for a deliberative assembly to legally transact business.”

51. Similarly, in **Attorney General of Burundi v. Secretary General of the East African Community**, Reference No. 2 of 2018 the Court held that:



“...quorum represents the minimum number of members of an assembly that must be present at any sitting so as to validate the proceedings of a meeting.”

52. While membership determines the persons who legitimately constitute the organisation, quorum addresses the question of the number of the members of the organisation who are required for it to lawfully transact its business. The rules on quorum are informed by the eminently practical, pragmatic, and common sense appreciation that in the ordinary course of human endeavour, it is not practical to expect each and every member of the organisation to be available and to attend all and sundry meetings of the organisation. The rules on quorum therefore prescribe the irreducible minimum number of the legitimate members of the organisation who should be present for the organisation to hold a valid meeting. The rules on quorum will vary from organisation to organisation and will depend on, among others, the character of the organisation, number and classes of members, the nature of the business to be transacted, etc.

53. In this appeal, it is clear that the Treaty has validly vested in the Council the power to determine the quorum of its meetings, and by dint of Rule 11, the Council has prescribed the quorum. That rule provides:-

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

Rule 2 of the Rules of Procedure defines “Partner State representative(s)/representation” to mean:-

“The Minister or Ministers designated by a Partner State as its representative in the meetings of the Council.”

54. To determine whether or not a meeting of the Council has the requisite quorum, the determinant factor is Article 15(2) of the Treaty as read with Rule 11 of the Rules of Procedure, rather than Article 13 of the



Treaty which provides for membership of the Council. Accordingly, we are satisfied that, to the extent that membership of the Council of Ministers is a separate and distinct question from quorum of the meetings of the Council, Rule 11 of the Rules of Procedure (on quorum of the Council) is not inconsistent with Article 13 of the Treaty (on membership of the Council). Unless it is expressly provided, there is no requirement that all members of an organisation must constitute the quorum for purposes of its meetings.

55. The Appellant made what, on the face of it, looked like a formidable argument, namely that the Attorneys General were made members of the Council to ensure that there was legal input in the deliberations of the Council. Accordingly, Attorneys General must attend all meetings of the Council. To that argument the Respondent replied that the Council is primarily a policy organ which deals with such issues as budget and making financial and staff regulations, among others.

56. As we have already noted, the Treaty has mandated the Council to make its own rules of procedure and the Rules of Procedure made by the Council have not deemed it necessary to make the Attorneys General compulsory members for purposes of quorum.

57. Secondly, as we have seen from the decision of **Calist Andrew Mwatela & 2 Others v. The East African Community** (supra), which led to the amendment of the Treaty, the overriding concern was not to ensure that the Attorneys General were per se members of the Council. Rather, it was to ensure that the Sectoral Council on Judicial and Legal Affairs was properly constituted under Article 14(3)(i) of the Treaty by persons who were also members of the Council of Ministers. This is a critical consideration in appreciating the context, object and purpose of

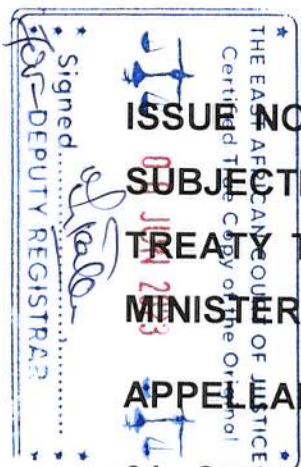


the Amendment of the Treaty for purposes of Article 31(1) of the **Vienna Convention on the Law of Treaties, 1969**.

58. Lastly, before meetings of the Council, the Attorneys General would have met in the Sectoral Council on Judicial and Legal Affairs where they are integral members, to address any legal issues that arise in matters that will be considered by the Council of Ministers. By dint of Article 143(i) of the Treaty, decisions of the Sectoral Council on Judicial and Legal Affairs are deemed to be decisions of the Council of Ministers. Taking the above into account, the Appellant's argument is not as formidable as it seemed at first.

59. We also take note, that even though the attendance of all or any of the Attorneys General of the Partner States was not required for purposes of quorum of the meetings of the Council, the meeting in question in this Appeal was actually attended by the Attorney General of the Republic of Burundi.

60. For the foregoing reasons, we answer Issue No. 1, namely whether the Trial Court erred in holding that the attendance of all or some Attorneys General of the Partner States is not a prerequisite for a Council meeting, in the negative.



ISSUE NO. 2 - WHETHER THE TRIAL COURT ERRED IN LAW BY SUBJECTING THE PROVISIONS OF ARTICLE 13 AND 14 OF THE TREATY TO THE RULES OF PROCEDURE OF THE COUNCIL OF MINISTERS
APPELLANT'S CASE

61. On Issue No. 2, Counsel for the Appellant submitted that the Trial Court erred in law by subjecting the provisions of Article 13 and 14 of

the Treaty to the Rules of Procedure. According to Counsel, this is an issue of interpretation and determination of what takes precedence between the Treaty and the Rules. Counsel added that the Trial Court held that because the Treaty empowers the Council of Ministers to adopt its own Rules of Procedure, therefore the Council meeting was properly conducted. In his view, the Trial Court committed an error of law and wrongly interpreted that the Rules of Procedure take precedence over Articles of the Treaty.

62. Counsel next made reference to Article 31(1) of the **Vienna Convention on the Law on Treaties 1969**, which requires a treaty to be interpreted in good faith in accordance with the ordinary meaning of the terms of the Treaty in their context and in light of the object and purpose. He also cited **Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare**, EACJ Appeal No. 3 of 2011 and submitted that the purpose of the Treaty should not be undermined by a narrow and restrictive reading of its provisions.

63. Counsel contended that with the amendment of Article 13 of the Treaty, the composition of the Council must comply with the requirements of the Treaty and extend to the Attorneys General the same rights and obligations expected from Ministers of the Partner States, otherwise there would have been no purpose of amending Article 13 of the Treaty in order to include the Attorneys General. He concluded that the provisions of Article 13 and 14 of the Treaty cannot be subjected to Rules of Procedure which are subordinate to the provisions of the Treaty.

64. Counsel further submitted that the Trial Court erred in law by holding that it was up to the Council to determine the quorum of its meetings following the Rules of Procedure. In his view, following the

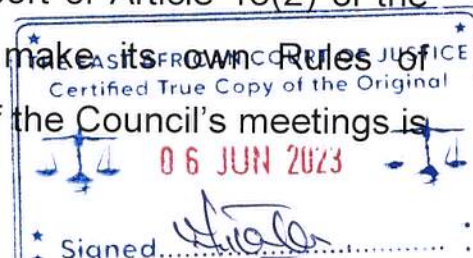
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DEPUTY REGISTRAR
06 JUN 2023
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amendment of Article 13 of the Treaty, the Rules of Procedure ought to have been amended in order to align them with the provisions of the Treaty. He relied on **Advisory Opinion No. 1** of 2015 where the Court upheld provisions of the Treaty over inconsistent provisions of the Staff Rules and Regulations, 2006, as well as the Court's decision in **Peter Anyang 'Nyong'o & Others v. Attorney General of Kenya**, Reference No. 1 of 2006, where the Court held that provisions of the Treaty override subsidiary rules and regulations.

65. Counsel concluded by submitting that the supremacy of the Treaty has always been upheld by the Court and that the Trial Court erred in taking a different approach on the amendment of Article 13 of the Treaty where the provisions of the Treaty were interpreted in a manner implying that they were subject to Rules of Procedure. In his view that was an error because the Rules of Procedure cannot supersede the Treaty itself. He contended that it was not the intention of the Summit to validate the amendment of Article 13 of the Treaty in a manner which was to create vagueness and absurdity in interpretation.

RESPONDENT'S CASE

66. On this issue, Counsel for the Respondent submitted that there was no error in law and the Trial Court did not subject the provisions of Article 13 and 14 of the Treaty to the Rules of Procedure of the Council. In his view, what the Trial Court did was to examine the Treaty provisions on composition of the Council as spelt in Article 13 of the Treaty and then appreciated the import of Article 15(2) of the Treaty which empowers the Council to make its own Rules of Procedure pursuant to which the quorum of the Council's meetings is set.



67. Counsel submitted that there is no contradiction between the Treaty and the Rules of Procedure as asserted by the Appellant. He contended that the Court ably distinguished between Membership of the Council as set out in Article 13 of the Treaty and the minimum number of Members required to enable the Council to legally conduct its business as prescribed in the Rules of Procedure of Council. He added that there was nowhere in the record where the Trial Court compared the Treaty to the Rules of Procedure of the Council.

68. According to Counsel Article 13 is very clear because it provides for membership of the Council while quorum is a very different matter which is the minimum number of people required to transact business legally. To find out about quorum, Counsel submitted, one has to look at Article 15(2) of the Treaty.

68. Counsel contended that Article 15(2) of the Treaty empowers Council to make its own Rules of Procedure and that Council exercised its powers under that provision to prescribe a quorum among other things. Counsel added that Rule 11 of the Rules of Procedure provides that a quorum constitutes all Partner States representation while Rule 2 provides that Partner States representation means a Minister or Ministers designated by a Partner State as its representative to the Council. Furthermore, representation is defined under Rule 2 of the Rules of Procedure, which states that representation means a Minister or Ministers designated by a Partner State as its representative of the Council at the Council Meeting.

69. In Counsel's view, even if there is need to amend the Rules of Procedure, it would not be in respect of quorum because the issue of quorum is well settled. Therefore, according to him, a Council

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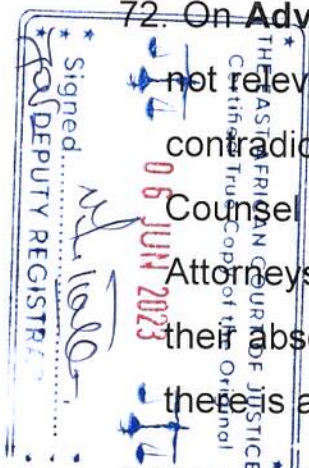
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Meeting without the representation of the Attorneys General is not null and void.

70. Counsel relied on Articles 31 (a) and 31 (b) of the **Vienna Convention on the Law of Treaties 1969** and submitted that it was consistent with the Community's practice, namely that as long as the Partner States are represented at ministerial level, the Council will convene and transact its business. Accordingly, and in his view the 39th Ordinary Meeting of the Council was not void and he invited the Court to take the practice into account.

71. Next, Counsel submitted that the Trial Court gave Article 13 of the Treaty its ordinary meaning taking into account that Article 15(2) of the Treaty allows the Council to make its Rules of Procedure, without constraining it by making it mandatory for Attorneys General to attend Council Meetings as a prerequisite for a quorum. He contended that the amendment of Article 13 of the Treaty made it possible for Council to establish the Sectoral Council on Legal and Judicial Affairs without any risk of legal challenges.

72. On **Advisory Opinion** No. 1 of 2015, Counsel submitted that it was not relevant to the matters in issue in this Appeal and that there is no contradiction between the Treaty and the Rules of Procedure. Counsel concluded by submitting that there was no dispute that Attorneys General are members of the Council but it is also clear that their absence from any meeting of the Council was not fatal, provided there is a quorum.



COURT'S ANALYSIS AND DETERMINATION

73. Counsel for the Appellant strongly argued that the provisions of Article 13 and 14 of the Treaty were wrongly subjected to the Rules of

Procedure of the Council of Ministers. He contended that once Article 13 was amended in 2019 making the Attorneys General of each Partner State a member of the Council of Ministers under Article 13 (c) of the Treaty, the Rules of Procedure should have reflected the amendment of the Treaty. This position was opposed by the Counsel for the Respondent who submitted that Article 15(2) of the Treaty empowers the Council of Ministers to determine its own procedures. He contended that Article 15(2) of the Treaty has not been amended and therefore the Council did not commit any irregularity by applying its Rules of Procedure which do not require the presence of all the Attorneys General. According to the Respondent's Counsel, the Council of Ministers is a policy organ and all the legal issues are handled by the Sectoral Council.

74. It is common ground between the Appellant and the Respondent that in the event of a conflict between the Treaty and the Rules and Regulations made under it, the Treaty must prevail over the Rules and Regulations. This is consistent with the basic principle that being a higher legal norm, the Treaty must prevail, not only against inconsistent laws of the Partner States, but also any inconsistent Rules and Regulations made under the Treaty. (See Article 8(4) of the Treaty). As regards the Rules and Regulations they must cede way to the Treaty simply because they derive their validity from the Treaty.

75. **In Rusagara & Another v. Attorney General of Rwanda**, Consolidated Applications No. 5 and 22 of 2020, the Court held as follows:-

"The Court's Rules of Procedure or a contradictory definition contained in legal jurisprudence would not waive the express provisions of the Treaty, which is the Community grundnorm."



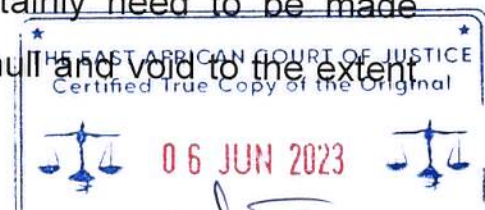
76. Earlier in **Advisory Opinion No. 1 of 2015** relied upon by the Appellant, this Court held as follows:

“Given the above inconsistency between the Treaty and the Staff Rules, which are made pursuant to the provisions of Articles 14(3) (g) and 70(3) of the same Treaty, the Staff Rules must – to the extent of the inconsistency – yield to the primacy of the provisions of the Treaty.”

77. The crux of this issue however, is whether there is really any inconsistency between Articles 13 and 14 of the Treaty and the Rules of Procedure, and whether the Trial Court erred in law by giving primacy to the Rules of Procedure over the Treaty. As we have pointed out, Article 13 provides for membership of the Council of Ministers, Article 14 the functions of the Council while the impugned Rules of Procedure of the Council provide for quorum of the Council.

78. In issue No. 1 we have already concluded that membership and quorum of the Council are two distinct and separate issues. The Rules of Procedure on quorum have been made pursuant to powers donated by Article 15(2) of the Treaty and they address a different issue, namely quorum, which is different from the matters provided for in Article 13 and 14 of the Treaty.

79. The only obvious contradiction that we perceive is between Article 13 of the Treaty as amended and rule 3(1) of the Rules of Procedure. Both provide for membership or composition of the Council, but while the Treaty includes the Attorneys General as members of the Council of Ministers, rule 3(1) does not. This clear inconsistency arises from the fact that the provisions of rule 3(1) as they are presently, antedate the amendment of the Treaty in 2007. They certainly need to be made consistent with the Treaty, otherwise they are null and void to the extent of the inconsistency.



80. But the issue in this appeal is not membership of the Council as such, but whether the meeting of the Council held on 28th November 2019 was unlawful due to lack of *quorum* by reason of absence of the Attorneys General, who are mandatory members of the Council. Having already concluded that composition of the Council and quorum of the Council are two different issues and that as provided in the Rules of Procedure, to form quorum of the Council does not require attendance of all its members, there is no basis for holding that the Trial Court gave primacy to the Rules of Procedure over the Treaty. On the issue in contention in the Reference before the Trial Court, Articles 13 and 14 of the Treaty address different issues from those addressed by the Rules of Procedure as regards quorum. Accordingly, on the issue of quorum which is validly regulated by the Rules of Procedure, there is no inconsistency between the Treaty and the Rules of Procedure.

81. Accordingly, we answer Issue No. 2 in the negative.

ISSUE NO. 3: WHAT REMEDIES ARE AVAILABLE TO THE PARTIES?

APPELLANT'S CASE

82. On this issue, Counsel for the Appellant prayed for all the remedies that the appellant had sought. He relied on **Margaret Zziwa v. Secretary General of the East African Community** (supra) where it was held that the Court is the guardian of the Treaty and is charged with ensuring its application and compliance with it. It was also emphasised that the Court has a duty to afford litigants effective reliefs.

83. Counsel also made reference to **Attorney General of Rwanda v. Union Trade Centre**, EACJ Appeal No. 10 of 2020 where the Court



reiterated the legal consequences of breach of the Treaty by an International organization, like the Community. He cited **The Rainbow Warrior** case, 82 I.L.R (1990) on non-monetary compensation especially where a moral or legal damage had been occasioned.

84. On costs, Counsel made reference to the principle laid down in **Margaret Zziwa v. Secretary General of the East African Community** (supra) that costs follow the event and that a successful party may only be deprived of costs in exceptional circumstances.

RESPONDENT'S CASE

85. Counsel for the Respondent submitted that the Appellant is not entitled to any remedies. He contended that there is no basis for the Court to find that the Council Meeting held on 28th November, 2019 was unlawful and in violation of Article 13 of the Treaty or for the Court to make the declarations, orders and /or awards sought by the Appellant.

86. In Counsel's view the Trial Court was correct in holding that the meeting had a quorum consistent with the Rules of Procedure of the Council and that whereas the Attorneys General are members of the Council, they need not be in attendance to constitute a quorum of the Meetings of the Council. Accordingly, and on the basis of the foregoing the Respondent prayed that this Appeal be dismissed in its entirety with costs, because the Appellant was not entitled to any of the declarations and reliefs sought.

87. Regarding costs, Counsel submitted that according to rule 127 of the Rules of the Court, costs in any proceedings follow the event, unless the Court for good reasons, otherwise orders. He submitted that because the Appellant had not proved any of the grounds of appeal this Appeal, should be dismissed in its entirety with costs to the Respondent.

Signed: *[Signature]*
DEPUTY REGISTRAR
THE EAST AFRICAN COURT OF JUSTICE
OFFICE OF THE CLERK OF THE COURT
Nairobi, Kenya
09 JUN 2022

COURT'S ANALYSIS AND DETERMINATION

88. The Appellant has prayed for a number of declaratory orders and reliefs as indicated hereinabove in paragraphs A – H of its Memorandum of Appeal. The Respondent, on its part, prayed that all reliefs and remedies sought by the Appellant be dismissed with costs.

89. Given our findings on **Issues Nos. 1 and 2**, the Appellant has not succeeded in this Appeal and is therefore not entitled to any of the reliefs sought.

COSTS

89. In relation to costs, we have carefully considered the rival submissions of the parties, and we take the following view on the matter. According to Rule 127 (1) of the Rules of the Court, 2019:-

“costs in any proceedings follow the event unless the Court shall for good reason otherwise order.”

90. The question to ask ourselves in this matter is whether or not we should exercise our judicial discretion in awarding costs. We entirely agree with the observations made by the Trial Court that this is a public interest litigation, hence each party should bear its own costs.

DISPOSITION

91. In view of our findings hereinabove, this Appeal is hereby dismissed in its entirety. Each party is directed to bear its own costs in this Court and in the Trial Court. Order accordingly.



DATED, DELIVERED AND SIGNED at ARUSHA on this 31st day of May, 2023.

Nestor Kayobera
31.05.2023

.....
Nestor Kayobera
PRESIDENT

Sauda Mjasiri
.....
Sauda Mjasiri
VICE PRESIDENT

Anita Mugeni
.....
Anita Mugeni
JUSTICE OF APPEAL

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

Cheborion Barishaki
.....
Cheborion Barishaki
JUSTICE OF APPEAL

★ THE EAST AFRICAN COURT OF JUSTICE
Certified True Copy of the Original
06 JUN 2023
Signed.....