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2005 - 2011

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INTRODUCTION

The jurisprudence on Community Law has steadily grown since the inception of the East African Court of Justice. The main objective of the East African Court of Justice Law Report (EACJLR) is to publicize the cases decided by the Court in a user friendly manner. This volume contains cases decided by the Court from the very first ruling in 2005 to 2011. Each case contains a summary together with a guide to the legal instruments and cases cited followed by a complete and unabridged ruling or judgment. However, the report does not include all references filed during the reporting period.

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December 2015

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OF HUMAN RIGHTS AND HUMANITARIAN LAW

SWEDEN

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Rules of Procedure for the Coordination Committee of the East African Community, 2000
Rules of Procedure of the Parliament of Uganda 2006
The East African Community Customs Management Regulations of 2006
The East African Community Common Market (Free Movement of Persons) Regulations, Annex 1
The East African Court of Justice Rules of Procedure

ABBREVIATIONS

A.C.	Appeal Cases
AG	Attorney General
All E.R.	All England Reports
Ch.	Chancery Division
DPJ	Deputy Principal Judge, EACJ
E.A.	East Africa Law Reports
EAC Treaty	The Treaty for the Establishment of the East African Community
EAC	East African Community
EACA	East African Court of Appeal
EACJ	East African Court of Justice
EALA	East Africa Legislative Assembly
ECJ	European Court of Justice
ECR	European Court Reports
H.C.C.C	High Court Civil Case
H.C.C.S	High Court Civil Session
ICJ	International Court of Justice
J	Judge
JA	Justice of Appeal
JJA	Justices of Appeal
JJ	Justices/ Judges
K.B.	King's Bench Division
K.L.R.	Kenya Law Reports
Misc.	Miscellaneous
P	President of the EACJ
PCIJ	Permanent Court of International Justice
PJ	Principal Judge, EACJ
SG	Secretary General
TLR	Tanzania Law Reports
U.L.R	Uganda Law Reports
v	versus
VP	Vice President, EACJ
WTO	World Trade Organization
W.L.R.	Weekly Law Reports

Application No 1 of 2005

Calist Andrew Mwatela, Lydia Wanyoto Mutende and Isaac Abraham Sepetu And East African Community

Moijo M. ole Keiwua P, Joseph Mulenga VP, Augustino S. L. Ramadhani J, Kasanga Mulwa J, Joseph S. Warioba J
October 4, 2006

Actions inconsistent with the Treaty-East African Legislative Assembly mandate-Invalid actions - Private Members Bill - Sectoral Council on Legal and Judicial Affairs-Prospective annulment- Whether decisions taken by the Sectoral Council were null and void or binding on EALA

Articles 13, 14 (3) (c) 15 (2), 16, 59(1), 14(3)(i) and 151 of the Treaty for the Establishment of the East African Community, - Rules 1 (2) and 20 of the East African Court of Justice Rules of Procedure, 2004

In November 2004, four Private Member's Bills were pending in the East African Legislative Assembly. During the 9th meeting of the Council of Ministers held on 24th November 2004, Council decided that policy-oriented Bills with implications on the Partner States' sovereign interest and budgetary aspect of the Community should only be submitted to the Assembly by the Council and not through Private Member's Bills. Council then assumed responsibility for the Bills namely: the East African Community Trade Negotiations Bill (2004); The East African Community Budget Bill ; The East African Immunities and Privileges Bill ; and The Inter-University Council for East Africa Bill and requested the Assembly to postpone debate on the Trade Negotiations Bill pending the conclusion of a study into its implications. Meanwhile, the Inter-University Council Bill was submitted to the Sectoral Council on Legal and Judicial Affairs for legal input.

After review, the Sectoral Council decided that protocols, within the meaning of Article 151 of the Treaty, rather than legislation enacted by the Assembly, were sufficient to provide for the Inter-University Council and for immunities and privileges for the Community and it advised Council to withdraw the two Bills from the Assembly.

The Applicants who were members of EALA brought this Reference challenging the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs held on 13th to 16th September 2005 and the decisions taken in relation to Bills pending before the East African Legislative Assembly. They claimed that the report of the Sectoral Council meeting was null and *void ab initio* and all decisions, directives and actions contained in or based on it are null and void.

They also questioned the lawfulness of the decisions of the Council and whether they were binding on the Assembly

Held:

1. The Court held that the establishment of the Sectoral Council was inconsistent with the provisions of Article 14(3) (i) and the meeting of 13th to 16th September 2005 was not lawful meeting and that the decisions of the meeting were *ipso facto* invalid.
2. Since the purported Sectoral Council had been in place from 2001 and had made decisions, the doctrine of prospective annulment was applied and the Court's decision to annul the Sectoral Council would not have retrospective effect.
3. The Council had no power to take over Bills without observing the Assembly Rules and decisions of the Council had no place in areas of jurisdiction of the Summit, Court and the Assembly.
4. The Assembly's permission must be sought to withdraw a Bill irrespective of whether the Bill in question had been a Private Member's Bill or a Community Bill.
5. As a creature of the Treaty, the Assembly can only have competence on matters conferred upon it by the Treaty. The Assembly has no power to legislate on matters on which the Partner States have not surrendered sovereignty.

Cases Cited:

Defrenne v Sabena [1981] All E. R. 122;
India in Golak Nath v the State of Punjab [1967] AIR 1643
Linkletter v Walker Warden 381 US [1965] 618;
Uganda v Commissioner of Prisons ex-parte Matovu [1966] EA 645

Judgment

1. This is a reference under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty), instituted on 7th December 2005 by three Members of the East African Legislative Assembly, namely: Calist Andrew Mwatela, Lydia Wanyoto Mutende and Isaac Abraham Sepetu (the applicants), in an application by Notice of Motion pursuant to rules 1 (2) and 20 of the East African Court of Justice Rules of Procedure (the Court Rules). The respondent is the East African Community which under Article 4 of the Treaty, is a body corporate with inter alia power to sue and be sued in its own name.
2. In their application, the applicants challenge the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs (the Sectoral Council) held on the 13th to 16th September 2005 and the decisions taken by the said meeting in relation to Bills pending before the East African Legislative Assembly (the Assembly), and they seek an order by the Court that the report of the Sectoral the Council meeting held on 13 to 6 September 2005 is null and void *ab initio* and all decisions, directives and actions contained in or based on it are null and void.
3. In the response to the application the respondent opposes the application and supports the validity of the Sectoral Council's impugned decisions. Both parties to the application opted to rely on the pleadings and the supporting affidavits and the reports and correspondence which were annexed thereto and so no oral evidence was adduced.
4. It was common ground that what gave rise to the dispute were four Private Member's

Bills, which in November 2004 were pending legislation in the Assembly. The Bills are the East African Community Trade Negotiations Bill (2004) (the Trade Negotiations Bill), The East African Community Budget Bill (the Budget Bill), The East African Immunities and Privileges Bill (the Immunities and Privileges Bill) and The Inter-University Council for East Africa Bill (the Inter-University Council Bill).

5. The Council of Ministers (the Council) at its meeting held on 24thNovember 2004, decided that policy oriented Bills such as those that have implications on the Partner States' sovereign interest and on the budgetary aspect of the Community, ought to be submitted to the Assembly by the Council under Article 14 (3) (b) of the Treaty as opposed to being submitted as Private Member's Bills under article 59 of the Treaty. The Council therefore decided to assume responsibility for the four pending Bills for consideration and submission to the Assembly. We were not able to ascertain the extent of consultation that took place between the Council and the Assembly before the Council decided to assume responsibility over the Bills. But we found out that in November 2004 and again in February 2005, the Chairperson of the Council requested and the Assembly agreed to postpone debate on the Trade Negotiations Bill.
6. During the budget debate in the May 2005 session of the Assembly, some issues connected with the pending Private Member's Bills were raised as a result of which the Chairperson of Council proposed a joint meeting between the Assembly and the Council. Before that meeting was held, the Council held its 10th meeting on 4th to 8th August 2005, at which it decided that development of legislation on trade negotiation be stayed pending conclusion of a consultancy study into all implications of such legislation, and that the Inter-University Council Bill be submitted to the Sectoral Council for legal input and subsequent submission to the Assembly.
7. The joint meeting, referred to as the High Level Retreat, was held at Ngurdoto the Mountain Lodge on 10 and 11 August 2005. At the conclusion of the meeting, the Chairperson undertook that the revised Inter-University Council Bill and the Immunities and Privileges Bill would be submitted to the Assembly session due to start on 19th November 2005 However , the said Bills were not submitted to the Assembly as undertaken by the Chairperson because the Sectoral Council decided otherwise.
8. The Sectoral Council held a meeting on 13 to 16 September 2005, at which it decided that protocols, within the meaning of Article 151 of the Treaty, rather than legislation enacted by the Assembly, were sufficient to provide for the Inter-University Council and for providing immunities and privileges for the Community. Apparently a Protocol for the establishment of the Inter-University Council was concluded on 13th September 2002, and had been ratified by Tanzania and Uganda and only awaited ratification by Kenya; and a draft Protocol on immunities and privileges for the Community, its organs and institutions and persons in its service was in process of consultation and had been considered by the Permanent Secretaries in February 2005.
9. The Sectoral Council observed that the contents of the Bills were respectively similar to the provisions of the said Protocols and accordingly it decided to advise the Council to withdraw the two Bills from the Assembly. In furtherance of these

decisions, the Sectoral Council (a) urged that the Ministers of the Partner States responsible for Foreign Affairs should urgently meet to consider and conclude the Protocol on Immunities and Privileges so as to bring it into force by 1st January 2006; and (b) requested that the Chairperson of the Council should inform the Speaker of the Assembly of these decisions. Two things followed.

10. On 16th September 2005 the Secretary General of the Community wrote to the Speaker informing him, inter alia, that the Council had decided to withdraw from the legislative business of the Assembly the Immunities and Privileges Bill and the Inter-University Council Bill. Secondly according to the Official Report of Proceedings of the Assembly, on 27th September 2005, Mr. John Koech, a Member of the Council, apparently on behalf of the Chairperson, made a Ministerial Statement from the floor of the Assembly, recalling the Council decision at its 9th Meeting held on 24th November 2005, to assume responsibility of the four Bills, its subsequent request to the Speaker to defer consideration of the Bills until policy input by the Council had been finalized and also gave an update to the Assembly on the current position of each Bill.
11. In a nutshell he said that after receiving comments by the Partner States on the Bills and subjecting the Bills for appropriate policy input by the Sectoral Council, the Council was requesting that development of legislation on trade negotiations be stayed pending conclusion of consultation with Partner States on a consultancy study report; and that the Community Budget Bill be stayed pending submission of the Partner States' comments on it to relevant Sectoral Committees.
12. He also disclosed that it was the view of the Partner States that both the Immunities and Privileges Bill and the Inter-University Council Bill be withdrawn from the Assembly because in either case a Protocol within the meaning of Article 151 of the Treaty is sufficient. The Ministerial statement was not well received and after some uncomplimentary reactions, the Assembly resolved to have a substantive debate on the Ministerial statement at sometime in the future. However, no Motion was subsequently moved to initiate a debate on the matter. Instead, on 7th December 2005, the applicants filed this application which the respondent opposed as we indicated earlier.
13. At the hearing, the applicants were represented by a team of counsel led by Professor F.E. Ssempebwa and consisting of Mr. D.W. Ogalo, Mr. M. Marando, Mr. M.S Kaggwa and Mrs S.N.Bagalaaliwo while the respondent was represented by a team led by Mr. W. Kaahwa, Counsel to the Community, and consisting of Ms Makena Muchiri, Deputy Chief State Counsel (Kenya), Mr. S.N. Tuimising, Senior State Counsel (Kenya), and Ms Isabelle Waffubwa, Legal Officer of the Community. The East African Law Society, with leave of the Court, appeared in the application as amicus curiae and was represented by Mr. Tom Nyanduga, President of the Society, Mr. Don Deya, Chief Executive Officer of the Society, Mr. Alex Mgongolwa and Mr. Nassoro Mohammed who are members of that Society.

The Issues

14. A scheduling conference in terms of Rule 52 of the Court Rules was held on 15th June 2005 at which time two sets of issues were submitted by the parties. With the help of

the Court the issues were merged as follows:

i. Whether the meeting held between 13 and 16 September 2005 was a meeting of Sectoral Council on Legal and Judicial Affairs as envisaged in the Treaty?
ii. Whether Protocols are legally sufficient in regard to immunities and privileges and for the formal establishment of Inter-University for East Africa Council so as to render the enactment of the Community's Acts for those purposes unnecessary.
iii. Whether the Inter-University Council for East Africa Bill 2004 and the East African Community and Privileges Bill 2004 were properly withdrawn from the Assembly.
iv. Whether or not under Article 59 a Member could move in the Assembly the East African Community Trade Negotiations Bill 2004, East African Immunities and Privileges Bill 2004, and the Inter-University Council for East Africa Bill 2004.
v. Whether the decisions of the Council are binding on the Assembly under Article 16 of the Treaty.
vi. Whether the introduction of a Bill under Rule 64 (5) of the Assembly Rules of Procedure constitutes the initiation of the legislative process under those Rules.
vii. Whether or not the decision taken by the Council at its 10th Meeting held on 4to 8 August 2005 on the East African Trade Negotiations Bill 2004 is lawful and in accordance with the provisions of the Treaty.
viii. Whether or not the decision taken by the Sectoral Council at its meeting on 13to 16 September 2005 on the East African Community Immunities and Privileges Bill 2004 and the Inter-University Council for East Africa Bill, 2004 is lawful and in accordance with the provisions of the Treaty.
ix. Whether the decisions of the Sectoral Council are binding on the Assembly.
x. Whether the Council followed the rules of the House to withdraw Bills.
xi. Whether the Council met to make the decision that was communicated to the Speaker by the Secretary General.
xii. Whether the decision of the Sectoral Council was consistent with its mandate.
xiii. Whether the Sectoral Council on Legal and Judicial Affairs by virtue of their decisions taken on September 13 to 16 2005 purported to discharge functions bestowed upon the Assembly.
xiv. Whether the Council and Sectoral Council on Legal and Judicial Affairs have usurped the powers of the Counsel to the Community, Council of Ministers and the East African Court of Justice as provided under the Treaty.
xv. Whether the decisions of the Council and those of the Sectoral Council curtailed or interfered with the Assembly's functions.
xvi. Whether the withdrawal of the Bills by the Council of Ministers as an organ of the Community is subject to the Assembly's Rules.
xvii. Whether it is obligatory for Council of Ministers to meet so as to communicate the decisions of the Sectoral Council to the Assembly having directed the Chairperson of the Council through the Secretary General.
xviii. Whether the Partner States have the Prerogative on who should attend organ meetings like those of the Council and Sectoral Council.

15. In their respective addresses to the Court, counsel argued the issues in clusters because they realized, quite correctly in our view, that many of the issues touched on the same

or related points. Unfortunately they did not configure the clusters uniformly and so in considering and determining the issues in this judgment we are not able to follow the order counsel followed in addressing the Court. We find it more expedient to consider the issues under the following broad headings:-

(a) Establishment of the Sectoral Council and its meeting of September 2005
(b) Status of the contentious Bills
(c) Relationship of the Council and the Assembly on legislation

16. The applicants' challenge of the validity of the Sectoral Council is two pronged. First they contend that the Sectoral Council was not established as envisaged under, or in accordance with the provisions of the Treaty. Secondly, they contend that the meeting held on 13th to 16th September 2005 was not a properly constituted meeting of the Sectoral Council. The two contentions are grounded on
    1) The provisions of Article 14 of the Treaty,
    2) The decision of the Council at its 1st Meeting to set up the Sectoral Council,
    3) The attendance list of the meeting of the Sectoral Council held on 13 to 16 September 2005
17. In his submissions on the composition of the Sectoral Council, Professor Ssempebwa pointed out that the Treaty prescribes membership of the Council to consist of Ministers responsible for regional co¬operation in each Partner State "and such other Ministers of Partner States as each Partner State may determine"; and that under Article 14 , the Treaty empowers the Council to establish "from among its members" Sectoral Councils to deal with matters that the Council may delegate or assign to them. He argued that when in its 10th Meeting held on 8to 13 January 2001, the Council adopted a recommendation to constitute meetings of Attorneys¬ General of the Partner States into the Sectoral Council on Legal and Judicial Affairs, it acted ultra vires its said power because it thereby established a body that was not composed of members of the Council.
18. Professor Ssempebwa further submitted that the Council was not empowered to establish a Sectoral Council from among persons other than its members. He contended that save for the Attorney General of the Republic of Uganda who is designated a Minister under the National Constitution, the Attorney General of the Republic of Kenya and the United Republic of Tanzania are not similarly designated Ministers, and consequently for the purposes of the Treaty those two were not members of the Council.
19. In the alternative, he submitted that even if it is held that the Sectoral Council was lawfully established, the meeting held on 13 to 16 September 2005 was not a lawfully constituted meeting of the Sectoral Council. He referred to the report of that meeting in which it is indicated that only the Attorney General of Uganda attended in person while the Attorney General of Kenya was represented by the Solicitor General and the Attorney General of Tanzania was represented by the Deputy Attorney General/ Permanent Secretary, Ministry of Justice and Constitutional Affairs, both of whom were clearly not Ministers.
20. Professor Ssempebwa referred to two principles of interpretation of treaties. One is that the words of a treaty must be given their natural meaning unless that would lead to some unreasonable or absurd result. The other is the principle of effectiveness

which is that in interpreting a Treaty the Court must ascertain its objective and give effect to it. He submitted that the objective of the Treaty in creating the Council was to create a strong policy making organ of the Community composed of persons with authority from the Partner States to make binding decisions. The Treaty does not leave room for bureaucrats taking over decision-making at that level.

21. On the other hand, in his opening address at the hearing, Mr. Kaahwa, the learned Counsel to the Community, while acknowledging that the Treaty is the ground norm of the integration process for the Community, from which all other legal instruments in the Community derive, subsist and draw legality, and whose provisions must be strictly adhered to, stressed that the Treaty establishes a framework of organs and institutions entrusted with specific mandates whose execution must be guided by adherence to the rule of law and the principles of harmonization. He also stressed that the Community functions on basis of consensus as its survival depends on goodwill of the Partner States and harmonious working relationship with the organs and institutions and on their agreeing on all aspects of the Community's development. He urged the Court to have these matters in mind in answering the issues before it.
22. In the response to the application, the respondent maintains that the Sectoral Council meeting held on 13 to 16 September 2005 was validly convened and constituted and that its decisions are valid. In reply to Professor Ssempebwa's first contention, Mr. Kaahwa argued at length that the Attorney General l of Kenya and Tanzania fit within the Treaty definition of "Minister" and are therefore potential members of the Council.
23. In the course of the submissions Mr. Kaahwa as Counsel to the Community informed the Court from the bar that membership of the Council is not static. In practice, the full membership is only ascertainable at the time of meetings, when each Partner State determines its representation depending on the agenda of the particular meeting. He argued that by virtue of Article 13 of the Treaty, each Partner State retains an executive prerogative to designate its representative(s) on the Council in addition to its Minister responsible for regional co¬operation. He submitted that the exercise of that prerogative may not be inquired into by the Court and cited the case of *Uganda vs. Commissioner of Prisons ex-parte Matovu [1966] EA 645.*
24. He also submitted that the prerogative has been preserved by the Council Rules of Procedure made under Article 15 (2) of the Treaty. He maintained that in due exercise of that prerogative, Kenya and Tanzania designated their respective Solicitor-General and Deputy-Attorney General /Permanent Secretary to represent their Attorney General l at the meeting of the Sectoral Council, notwithstanding that they are not Ministers.
25. In our view, Professor Ssempebwa's first contention is a departure from the pleadings in this Reference. Throughout the pleadings what was in issue was the composition of the meeting held on 13 and 16 September 2005. All the averments in part 'A' of the Reference are concerned with the session of the Sectoral Council held on 13 to 16 September 2005. Indeed when the respondent pleaded in paragraph 5 of its Response that the Council had established the Sectoral Council at its 1st Meeting, the applicants retorted in paragraph 3 of their Reply to the Response thus: "With regard to paragraph 5 of the Response, the applicants take note that the Council

may have established Sectoral Councils as resolved in pages 28 – 34 of Annex 'A' to the Response. The Applicants aver, however, that the establishment of such Sectoral Council does not touch on the issues raised in the Reference as the individuals who sat on 13– 16 September 2005 are not members of the Council under Article 14 (3) (i) of the Treaty."

26. As a result, issue 1 as framed, expressly relates to that session and we take it that issue 18 also relates to the same session. However, the question whether the Sectoral Council was established in accordance with the provisions of the Treaty is a legal one and was canvassed fully. Therefore, we have to determine it though it did not feature in the pleadings. We agree with the counsel for the applicants that the Council is empowered under Article 14 to establish Sectoral Councils from among its members only. Membership of the Council under the same Article is restricted to Ministers and the Treaty defines a Minister as follows: "Minister" in relation to a Partner State, means a person appointed as a Minister of the Government of that Partner State and any other person, however entitled, who, in accordance with any law of that Partner State, acts as or performs the functions of a Minister in that State;
27. According to the record of the 1st Meeting of the Council held on 8 to 13 January, 2001 the delegations of the Partner States included their respective Ministers responsible for regional cooperation and several others of divers portfolios. We take it that those other Ministers were the ones each Partner State designated as Members of the Council under Article 13. We note that the delegation of Uganda included the Attorney General but those of Tanzania and Kenya did not.
28. It was at that Meeting that the Council agreed to designate the Meeting of the Attorney General l of the Partner State as the Sectoral Council though there is no indication that the Attorney General l of Kenya and Tanzania were Members of the Council.
29. Furthermore, although the Attorney ¬General of Uganda is, by virtue of Article 119 of the Constitution of the Republic of Uganda, a Cabinet Minister and consequently qualified to be a Member of the Council, the Attorney General of Tanzania is not. From our reading of Article 54(1) and (4) of the Constitution of the United Republic of Tanzania the Attorney General of Tanzania is not a Minister. In the case of Kenya, however, though the Constitution does not designate the Attorney General as a Minister, the Interpretation and General Provisions Act includes the Attorney General in the definition of a Minister. On the basis of that law it appears to us that for the purposes of the Treaty the
30. Attorney General of Kenya is a Minister as "a person who in accordance with a law of [Kenya] acts as or performs the functions of a Minister in [Kenya]". So, for purposes of the Treaty the two Attorney General l, of Kenya and Uganda, are Ministers. However, for the Sectoral Council to be properly constituted it must comprise the representatives of all Partner States. This is underlined by Rule 11 of the Rules of Procedure for the Council of Ministers which provides:
"The quorum of a session of the Council shall be all Partner States representation."
This must apply to the Sectoral Councils since the decisions of the Sectoral Councils are deemed to be those of the Council of Minister under Article 14(3)(i) of the Treaty.
31. In the circumstances we find that the establishment of the Sectoral Council was inconsistent with the provisions of Article 14(3)(i). However, since the purported

Sectoral Council has been in place from 2001 and by now has, undoubtedly made a number of decisions, which would be unwise to disturb, we are of the considered opinion that this is a proper case to apply the doctrine of prospective annulment. We order that our decision to annul the Sectoral Council shall not have retrospective effect.

32. We think that the doctrine of prospective annulment which has been applied in various jurisdictions is good law and practice. See *The Court of Justice for European Community in Defrenne vs. Sabena [1981] All E. R. 122;US Court of Appeals 5 Circuit in Linkletter vs. Walker Warden 381 US [1965] 618; and the Supreme Court of India in Golak Nath vs. The State of Punjab [1967] AIR 1643.*
33. As for the second contention by Professor Ssempebwa, we note from Annex 'A' to the Reference, which is a report of the meeting of the Sectoral Council on Legal and Judicial Affairs held on September 13– 16th 2005, that the participants were the Attorney -General / Minister of Justice and Constitutional Affairs of Uganda, the Deputy Attorney General / Permanent Secretary, Ministry of Justice and Constitutional Affairs of Tanzania representing the Attorney General and the Solicitor General of Kenya also representing the Attorney General. However, by the Treaty the Partner States bound themselves in Article 13 and 14 to be represented in the Council by their respective Ministers responsible for regional cooperation and other Ministers only and thereby delimited the prerogative of a Partner State in determining its representation on the Council. In the circumstances the decisions in *Uganda vs. Commissioner of Prisons ex-parte Matovu (supra)* is not applicable to the facts of this case.
34. We note that the Treaty does not provide for the members of the Council or Sectoral Council to be represented at meetings by non¬-members. We think that this was deliberate to avoid distortion of the elaborate structural hierarchy of representation of the Partner States at the different levels in the organizational framework of the Community. Clearly if members of the Coordinating Committee, which reports to Council, are allowed to represent members of the Council or the Sectoral Council at their meetings, the objective of separation of functions of the two organs would be defeated.
35. We therefore do not see any justification for the respondent's attempts to make in roads into the very clear words of Article 13 of the Treaty that, Ministers of the Partner States can appoint persons who are not Ministers to attend meetings of Sectoral Councils or those of the Council purportedly on their behalf. It is not in dispute that the Deputy Attorney General of Tanzania and the Solicitor General of Kenya are not members of the Council.
36. We would also like to dispose of the attempt to confuse the purport of Article 15 (2) of the Treaty by reading into it a stipulation that discretion still remains in the Partner States to send to the meetings of Council and those of Sectoral Councils persons who are not Ministers contrary to the requirement of Article 13 of the Treaty. Article 15(2) is concerned with meetings of the Council and determination of procedure at those meetings. The Council Rules define the expression "Partner State representatives/representation" to mean a Minister designated to represent such a State in the meetings of the Council. We do not therefore see how Article 15 (2) and

the Council Rules can be relied upon to show that there is a discretion still left for the Partner States to send persons who are not Ministers to the Council or Sectoral Council meetings.

37. That argument was advanced in an effort to bolster the issue as to whether it is the prerogative of the Partner States to designate such persons as they deem fit to represent them at lawfully convened meetings of either the Council or the Sectoral Council. It is quite clear that the formulation of Council rules has followed faithfully the provision of Article 13 of the Treaty and it is not understood in what manner whatsoever, the Council Rules can be said to permit representation at those meetings by persons other than those expressly determined in strict compliance with Article 13 of the Treaty. We therefore have no hesitation in reiterating that the meeting of 13 to 16 September 2005 was not a lawful meeting of a Sectoral Council and that the decisions it handed down in respect of the two Bills was not valid decision of the Sectoral Council.
38. Before we conclude on this aspect of the case, there is a matter to which we would draw attention that though the composition of the Council is established under Article 13 of the Treaty, the total membership is not readily ascertainable, since it is only the membership of Ministers responsible for regional cooperation which is static and ascertainable. We were informed during arguments that membership of additional Ministers is determined by the agenda of a particular meeting of the Council. We would have thought that a more transparent way of knowing the composition of Council Members should have been evolved and put in place by now. This is good sense and good law since it will avoid uncertainty which usually degenerates into disputes such this one before the Court.
39. Having held, as we have, that the meeting was not a lawful meeting of Sectoral Council on legal and Judicial Affairs and that the decisions of the meeting was not a lawful meeting of a Sectoral Council on Legal and Judicial Affairs and that the decisions of the meeting were ipso facto invalid, it is unnecessary to consider if the said decisions are consistent with its mandate (issue 12) and binding on the Assembly (issue 9) and whether the Sectoral Council purported to discharge the functions of the Assembly (issue 13) or usurped the powers of the Council, the Court and/or Counsel to the Community (issue 14). We also find that it would be futile to discuss whether the council met and whether it was obligatory for it to meet in order to make the decisions which were communicated to the Speaker by the Secretary General (issues 11 and 17). In any case it is apparent from the affidavit of Amanya Mushega, the then Secretary General, that the decisions he communicated to the Speaker were made by the purported Sectoral Council meeting alone.
40. We would also recall the fact that the issue as to whether Protocols are legally sufficient to render legislation unnecessary (issue 2) was one of those decisions of the meeting of the Sectoral Council held on 13 to 16 September 2005 which meeting, we have found elsewhere in this judgment, not to have been held as required by the Treaty.
41. In view of that finding, this Court would not like to go into that question of sufficiency or otherwise of Protocols because to do so would be to encroach onto the jurisdiction of the Assembly.

    It is also obvious that because they are invalid, the decisions of that meeting cannot

be deemed to be decisions of the Council under Article 14(3) (i) of the Treaty. In his letter to the Speaker, the Secretary General deemed them to be Council decisions because he assumed wrongly that they were valid. In the Ministerial Statement to the Assembly, Mr. John Koech, did not give as a reason for withdrawal or stay of the Bills that they were decisions of the Council. In respect of two Bills he said Council was requesting for postponement and in respect of the other two he asserted that it was the view of the Partner States that they should be withdrawn.

42. Issues 3, 6, 10 and 16 concern the introduction and withdrawal of Bills from the Assembly. The debate in the Assembly is contained in the Hansard of 27th September 2005 when the Speaker directed that it was up to the owners of the Bills, to decide whether to continue with the Bills in the Assembly or let the Council takeover the Bills. Thereupon the issue was shelved for debate on a future occasion. We would here refer to Mr. Kaahwa's helpful concession on behalf of the respondent that the Assembly Rules also bind the Members of the Council who are Members of the Assembly.

43. We also see that under Article 59 (1) of the Treaty any Member of the Assembly may introduce a Bill. This shows that the Council does not have exclusive legislative initiative in the introduction of Bills in the Assembly. In that connection, we appreciate the difficulty faced by the Assembly upon receipt of the letter by the Secretary General which made it quite clear that the matter in controversy between the Assembly and the Council had reached an impasse and had to come to Court for the opposing views on the interpretations of the Treaty to be resolved. Mr. Marando drew our attention and we agree with him, and since it was also conceded by the respondent in argument before us, that the Inter-University Bill as well as the Immunities and Privileges Bill had undergone the First Reading, and had in our view, become property of the Assembly.

44. Accordingly, we see no basis, upon which the view that the four Bills had been taken over by the Council, can be supported because the Treaty has not bestowed any power on the Council to take over Bills without observance of the Assembly Rules and we hold that the only lawful way of withdrawing Bills which have become property of the Assembly, as the four Bills had become, is under Rule 34 of the Assembly Rules which provides for a Motion to be introduced in the Assembly for that purpose. The Motion requirement is because the four Bills which were Private Members Bills; were introduced into the Assembly by means of Motions. In its relevant parts Rule 34 says: 34 (1) A motion or an amendment to the motion may be withdrawn at the request of the mover by leave of the House or Committee before the question is put.

45. We therefore find that the appearance before the Assembly of Mr. Koech, a Member of Council on behalf of the Chairperson, without more, is ineffective as a means of withdrawing the Bills, in that a bare statement which was not a Motion to withdraw any of the Bills does not accord with the requirement of Rule 34 aforesaid and so in our opinion, was the letter dated 16th September 2005 addressed by the Secretary General to the Speaker of the Assembly. We accept that once a Bill is in the Assembly, its permission must be sought to withdraw such a Bill. The permission requirement applies irrespective of whether the Bill in question had been a Private Member's Bill or a Community Bill. Issue 5 is whether the decisions of the Council are binding on

the Assembly under Article 16 of the Treaty.

46. The issue arose because of the respondent's contention that the decision of Council given pursuant to Article 14 of the Treaty override the bar stipulated in Article 16 thus: "other than the Summit, the Court and the Assembly within their areas of jurisdictions." The respondent further submitted that because of the all embracing power of the Council under Article 14, the Assembly is bound by the Council decision to withdraw the Bills.
47. However, the applicants dispute that contention on the basis of Article 49 (1) of the Treaty which is on the Assembly's functions and also drew attention to Article 14 (3) (b) of the Treaty which has as one of the functions of the Council the initiation of legislation; but the Article does not imply that the Council has the power to withdraw Bills at will unless in terms of the Assembly Rules.
48. Mr. Ssempebwa examined Article 16 of the Treaty which provides that decisions of the Council bind other organs and institutions of the Community "other than the Summit, the Court and the Assembly within their jurisdiction". He emphasized those words which he said are meant to underscore the separate and independent jurisdictions of these organs of the Community. The matter at issue in this respect is withdrawal of Bills which have become the property of the Assembly and therefore within its jurisdiction.
49. We would like to draw attention to the provisions of paragraph (3) (c) of Article 14 which provides: " For purposes of paragraph 1 of this Article, the Council shall; (c) Subject to this Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and Assembly."
50. We are of the firm view that the combined effect of explicit provisions in Article 14 (3) (c) and Article 16 is dispel any notion that the decisions of the Council albeit on policy issues bind the Assembly in respect of any matter within its jurisdiction. We think the interpretation of Article 16 of the Treaty is a core issue underlying this application and would refer to it in its entirety not only to deal with the opposing assertions of the parties but to bring to light certain inelegancies detected in the Table of Contents of that Article, its heading in the body of the Treaty and finally its actual contents. Article 16 is as follows:
51. Subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly in their area of jurisdictions, and those to whom they may under the Treaty be addressed.
52. There is a variance between what the Table of Contents of the Treaty has for Article 16 as "Effect of Regulations, Directives, Decisions and Recommendations of the Council" together with the heading of the Article which also has the word "recommendations" included while the body of Article 16 does not include that word "recommendations". This is obviously an inelegant drafting which should be corrected either to eliminate the word "recommendations" from the Table of contents and from the heading of the Article or amend the Article to include that word in the body of the Article as well because it will one day lead to some uncertainty which should be avoided by a corrective amendment.

53. We see sense in the applicants' submission that since the Assembly is a representative organ in the Community set up to enhance a people centred co¬operation, its independence under Article 16 of the Treaty should be preserved because the Treaty has not endowed the Council with any power to interfere in the operation of the Assembly. We agree and it is our view that Article 16 of the Treaty does not bear the meaning ascribed to it by the respondent in which it contended that decisions of Council bind the Assembly, Article 16 of the Treaty notwithstanding. In light of Articles 14 and 16, we have come to the conclusion that decisions of the Council have no place in areas of jurisdiction of the Summit, Court and the Assembly. Issue 4 is whether or not under Article 59 of the Treaty a member could move in the Assembly the Trade Negotiations Bill, the Immunities and Privileges Bill, and the Inter-University Council Bill.
54. The Respondent pleaded in paragraph 9 of the Response as follows: ¬"At its 9th Meeting held on 24 November 2004, the Council decided that policy oriented Bills such as those that have implications on the Partner States' sovereign interests and on the budgetary aspects of the Community ought to be submitted to the Legislative Assembly by the Council under Article 14.3(b) of the Treaty as opposed to being proposed or introduced by any member of the Assembly under Article 59 of the Treaty. The Council, therefore, assumed responsibility for "The East African Community Trade Negotiations Bill, The East African Community Budget Bill, The East African Community Immunities and Privileges Bill and The Inter-University Council for East Africa Bill as Council Bills for consideration and submission to the Legislative Assembly."
55. In paragraph 10 of the response the Respondent pleaded that protocols can sufficiently provide for immunities and privileges for the Community and also for the Inter-University Council for East Africa. Issues 2 and 4 arose from the above pleadings by the Respondent. Article 59 States:
    1) Subject to the rules of procedure of the Assembly, any member may propose any motion or introduce any Bill in the Assembly: Provided that a motion which does not relate to the functions of the Community shall not be proposed in the Assembly, and a Bill which does not relate to a matter with respect to which Acts of the Community may be enacted shall not be introduced into the Assembly.
    2) The Assembly shall not:
    I. Proceed on any Bill, including an amendment to any Bill that, in the opinion of the person presiding, makes provision for any of the following purposes:
    II. For the imposition of any charge upon any fund of the Community;
    III. For the payment, issue or withdrawal from any fund of the Community of any moneys not charged thereon or the increase in the amount of any such payment, issue or withdrawal;
    3) For the remission of any debt due to the Community; or Proceed upon any motion, including any amendment to a motion, the effect of which, in the opinion of the person presiding, would be to make provision for any of the said purposes.
56. There is no doubt that Article 59 provides for introduction of Private Member's Bills. It is also clear to us that both paragraphs (1) and (2) provide restrictions to the general power of legislation by the Assembly. The proviso to paragraph (1)

prohibits the introduction of any motion in the Assembly which does not relate to the functions of the Community and does not relate to a matter with respect to which Acts of the Community may be enacted. Paragraph (2), on the other hand, prohibits the Assembly from proceeding with any Bill which imposes a charge on any fund of the Community. It is abundantly clear to us that the prohibition under the two paragraphs apply to any member of the Assembly, both the members and also the Council when introducing Bills in the Assembly.

57. Therefore the question is not whether or not in view of Article 59 (1) the three Bills or any one of them could be moved by a member but whether they could be moved in the Assembly at all. To be able to determine that question would have required us to delve into the provisions of the Bills in great detail. Since we have elsewhere in this judgment found that the Bills are still pending before the Assembly and fortunately that is the view of all the parties to the reference, we deem it wise not to make such an investigation as to whether the Bills are within the ambit of Article 59 (1) or not. The proper course to take, we think, is to leave it for whoever is aggrieved with any of the Bills, in the context of Article 59, when they are taken on again in the Assembly, to raise the matter in the Assembly.
58. We will, however, make some general observations on the submissions of the parties regarding the provisions of Article 59. In their submission on issue 4 the Applicants submitted that under Article 59 which provides for Private Member's Bills, there is no restriction on introduction of Bills based on policy orientation and that apart from Bills that impose a charge on the fund of the Community or issue or withdrawal from any fund of the Community or the remission of any debt due to the Community, a member of the Assembly may introduce any Bill. With great respect we do not share that view.
59. We have already stated that the proviso to Article 59(1) prohibits the introduction of any motion in the Assembly which does not relate to the functions of the Community or does not relate to a matter with respect to which an Act of the Community can be enacted. We have also stated that the prohibition applies to both the Council and any member.
60. The respondent's contention in paragraph 9 of the Response was not confined simply to policy oriented Bills but it went on to describe them as "those that have implications on the Partner States sovereign interests." What it means is that the competence of the Community is restricted to matters which are within its jurisdiction. Any matter which is still under the exclusive sovereignty of the Partner States is beyond the legislative competency of the Community. The Assembly is a creature of the Treaty like the other Organs of the Community and such an Organ can only have competence on matters conferred upon it by the Treaty.
61. The Assembly has no power to legislate on matters on which the Partner States have not surrendered sovereignty. Issue 7 is whether or not the decision taken by the Council at its 10th Meeting held on 4 to 8 August 2005 on the East African Community Trade Negotiations Bill is lawful and in accordance with the provisions of the Treaty. We have already held that the Bill was not withdrawn from the Assembly.

    All that the Council did was to seek a stay of the debate while a study on the development of trade legislation is being undertaken and concluded. We therefore

find that the decision of the Council in this respect is within its powers under Article 14 of the Treaty and no fault may be ascribed thereto.

62. We would like, while commending all counsel who appeared and addressed us in this case, especially to commend the very useful and helpful submissions addressed to us by Counsel for the *amicus curae* who very ably and conscientiously assisted the Court without any attempt to side with any other party in the reference. The Court, as a friend of the amicus curiae, was guided accordingly. On costs, Professor Ssempebwa urged the Court to what orders to make in the event his clients' Application succeeds.
63. He indicated that the applicants are content with an order that their disbursements be paid by the respondent and would not insist on an order for full costs in their favour. That is because the applicants see their application being for the general public good and interest in the East African Region and any litigation of this kind should be encouraged especially by the Community which should show the way by indemnifying these applicants on their disbursement and any future litigants against costs occasioned by such litigation. The applicants, as we can see it, have succeeded in almost all their prayers Though Mr. Kaahwa had urged that costs should follow the event, we find Professor Ssempebwa's submission acceptable to us.
64. We therefore award costs of the application to the applicants and leave them to restrict their bill of costs and for the taxing officer to limit the taxation thereof to those disbursements.

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East African Court of Justice
Reference No. 1 of 2006

Prof. Peter Anyang' Nyong'o , Abraham Kibet Chepkonga, Fidelis Mueke Nguli, Hon. Joseph Kamotho, Mumbi Ngaru, George Nyamweya, Hon. John Mumyes, Dr. Paul Saoke, Hon. Gilbert Ochieng Mbeo, Yvonne Khamati, Hon. Rose Waruhiu

And

Attorney General Of Kenya , Clerk of The East Africa Legislative Assembly, Respondent Secretary General Of The East African Community And Abdirahin Haitha Abdi, Sarah Godana Talaso, Christopher Nakuleu

And

Abdirahim Haitha Abdi, Sarah Godana Talaso, Christopher Nakuleu, Rueben Onserio Oyondi, Safina Kwekwe Tsungu, Catherine Ngima Kimura, Clarkson Otieno Karan, Augustine Chemonges Lotodo, Gervase Buluma Kafwa Akhaabi, Hon. Uhuru Kenyatta, Hon. William K.S. Ruto & Hon. Billow Kerrow- Interveners

Moijo M. ole Keiwua P, Joseph N. Mulenga VP, Augustino S. L. Ramadhani J, Kasanga Mulwa J, Harold R. Nsekela J
March 30, 2007

Doctrine of estoppel – Election of the East African Legislative Assembly members - Electoral College - Interveners - Uniformity in treaty application - Whether the reference disclosed acause of action within the meaning of Article 30 of the Treaty- whether an election was undertaken within the meaning of Article 50 of the Treaty – Whether the Kenya's Election of Members of the Assembly Rules 2001 complied with the EAC Treaty

Articles: 6, 30, 50 of the Treaty for the Establishment of the East African Community.- The Treaty for the Establishment of the East Africa Community,(Election of Members of the Assembly) Rules 200, Kenya, The Vienna Convention on the Law of Treaties, 1969

In 2001, the Kenya National Assembly, pursuant to Article 50 of the Treaty, determined its own procedure for election of the nine members of the East African Legislative Assembly embodying the principle of proportional representation.
On 26th October 2006, the National Assembly, acting through its House Business Committee, in accordance with its Standing Orders and the election rules, went through a process of electing nine members. The claimants' averred that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravened Article 50 of the EAC Treaty in so far as no election was held nor debate allowed in Parliament on the matter. They sought an interpretation of Article 50 of the Treaty and other orders.

Held:

1. The Kenya National Assembly Rules which do not allow election directly by citizens or residents of Kenya or their elected representatives are null and void for and contrary to the letter and spirit of the Treaty.
2. Article 50 of the Treaty constitutes the National Assembly of each Partner State into an electoral college for electing the Partner State's nine representatives to the East African Legislative Assembly. The National Assembly of Kenya did not undertake or carry out an election within the meaning of Article 50 of the Treaty as the election rules infringed Article 50. Thus, an interim injunction was granted restraining the 3rd and 4th respondents from recognizing the nine nominees as duly elected members of the Assembly until disposal of the reference.
3. The doctrine of estoppel cannot be raised against the operation of statute or invoked to prevent an inquiry into an alleged infringement of the Treaty.

Cases cited:

Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen, [1963] ECR 1
Amminstrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629
Auto Garage v Motokov, (No.3) (1971) EA 514
Flaminio Costa v ENEL [1964] ECR 585
Indira Sawhney v Union of India, JT (1999) (9) SC 557: (2000) 1 SCC 168
Ismail Serugo v Kampala City Council & Attorney General; Constitutional Appeal No.2/98)
Jaramogi Oginga Odinga vZachariah R. Chesoni & Attorney General, High Court of Kenya, Miscellanous Application No.602
of 1992
Maritime Electric Co. Ltd v General Dairies Ltd., (1937) 1 All ER 748
R v Secretary of State for Transport, ex p. Factortame Ltd. (No.2) [1991] 1 A.C. 603
Southend-on-Sea Corporation v Hodgson (Wickford) Ltd., (1961) 2 All ER 46
St. Aubyn (LM) v. A.G. (1951) 2 All ER 473
T. Tarmal Industries v Commissioner of Customs and Excise (1968) EA 471

Judgment

1. This is a reference under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty), in which the above named claimants seek to invoke this Court's jurisdiction under Article 27 of the Treaty. The contend that the process in which the above named 1st 2nd and 3rd interveners were deemed to be elected as Kenya's nine members of the East African Legislative Assembly (the Assembly), and the rules made by the Kenya National Assembly and invoked for effecting the said process infringe the provisions of Article 50 of the Treaty. They make diverse prayers, but we need refer to only the pertinent ones with which this judgment is concerned and which we would paraphrase as follows,
   1) That this Court interprets and applies Article 50 of the Treaty to the said process

and rules and declares them to be void;

2) That costs of the reference be awarded to the claimants.

We consider the rest of the prayers are not maintainable under Article 30.

2. Background Under Article 2 of the Treaty, the contracting parties, namely the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, (the Partner States) established among themselves an East African Community (the Community) and under Article 9 established diverse organs and institutions of the Community. One of the eight organs established under the Treaty is the East African Legislative Assembly (the Assembly), which is the legislative organ of the Community. It consists of twenty ¬seven elected members and five ex officio members. Article 50 of the Treaty provides that the National Assembly of each Partner State shall elect nine members of the Assembly in accordance with such procedure as it may determine. The Article also stipulates that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election.
3. When the first Assembly was due to be constituted in 2001, the National Assembly of Kenya, "in exercise of the powers conferred by Article 50(1) of the Treaty" made The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001" (the election rules). The first nine members of the Assembly, whose term expired on 29th November 2006 were elected under those rules.
4. On 25th and 26th October 2006, pursuant to the election rules, the House Business Committee of the National Assembly deliberated upon lists of names presented to it as persons that were nominated by the three parliamentary political parties entitled to nominate candidates for election to the Assembly. The parties are the Kenya African National Union (KANU), the Forum for the Restoration of Democracy – People (FORD – P), and the National Rainbow Coalition (NARC). All together, five lists were presented to the Committee. Two lists, of three nominees each, were from KANU; one list of one nominee only, was from FORD – P. Each of the other two lists contained five nominees of NARC. One was submitted by the party leader through the Clerk to the National Assembly as provided by the election rules. The other was presented to the Committee, in its afternoon session on 25th October, by the Government Chief Whip.
5. The Committee unanimously approved the only nomination from FORD – P. In the course of the deliberations, KANU withdrew one of its lists and the Committee approved, also unanimously, the three nominees on the remaining list. Finally, with regard to the nominations from NARC, the Committee considered the two lists and then, according to its minutes, "resolved to consider the list submitted by the Government Chief Whip for purposes of nomination…" Although it is not expressly stated in the minutes, and no reasons therefor were recorded, the Committee thereby impliedly rejected the nominees on the list submitted by the party leader of NARC, except for one Gervase Buluma Kafwa Akhaabi who was on both lists.
6. On 26th October 2006, the Committee, after amending the previously approved list of KANU nominees, approved : – Tsungu Safina Kwekwe, Kimura Catherine Ngima, Karan Clarkson Otieno, Lotodo Augustine Chemonges, Akhaabi Gervase, Bonaya Sarah Talaso, Nakuleu Christopher, Abdi Abdirahin Haither, and Reuben Onserio

Oyondi. As "duly nominated to serve" in the Assembly and "further resolved that the list be tabled before the House" in accordance with the Election Rules.

7. The list was accordingly tabled in the National Assembly on that day in a Ministerial Statement by the Vice President of the Republic of Kenya, as Leader of Government Business in the National Assembly and Chairman of the House Business Committee. Thereafter the names were remitted to the 3rd Respondent as members of the Assembly elected by the National Assembly of Kenya.
8. On 9th November 2006, nearly three weeks before the 2nd Assembly was due to commence, the claimants filed the reference in this Court with an ex parte interlocutory application for an interim injunction to prevent the said nine persons from taking office as members of the Assembly until determination of the reference.
9. By order of the Court the interlocutory application was heard inter partes on 24th and 25th November 2006. The Court delivered its ruling on the application and on two objections raised therein on 27th November 2006, in which *inter alia*, it granted the interim injunction restraining the 3 and 4 respondents from recognizing the nine nominees as duly elected members of the Assembly until disposal of the reference.

Parties to the Reference

10. All the claimants are resident in Kenya. In the reference, the and 2 claimants are stated to be suing as officials of the Orange Democratic Movement (ODM) and the 4 and 5 claimants are stated to be suing as officials of the Liberal Democratic Party (LDP). The 3, 6 and 7 claimants are stated to be suing as officials of NARC, Democratic Party (DP) and Forum for Restoration of Democracy in Kenya (FORD – K) respectively. But despite highlighting the stated official capacities in the pleading, nothing significant turned on them during the trial and therefore, in this judgment, we consider the said claimants in the same individual capacities as the 8, 9, 10 and 11 claimants.

    It should be mentioned, however, that the 3, 9, 10 and 11 claimants were the NARC nominees on the list submitted by the party leader, which was inexplicably rejected by the House Business Committee.
11. Six respondents were initially cited in the reference. At the hearing of the aforesaid interlocutory application the 2, 5,and 6 respondents objected to their being joined to the case, and the Court upheld the objection in its ruling delivered on 27th November 2006, on the ground that the only matters whose legality the Court had to determine were those done by Kenya as a Partner State through its National Assembly. They were struck out, leaving the three respondents named above.
12. Following the interim injunction, which took immediate effect, the nine affected nominees and the KANU party filed separate applications under Article 40 of the Treaty and r.35 of the Court Rules, for leave to intervene in the reference. By a consolidated consent order dated 17th January 2007, leave to intervene limited to supporting the respective cases of the claimants or the respondents was granted. The 1st interveners are the three KANU nominees, the 2nd is the nominee of FORD – P and the 3rd interveners are the five persons approved by the House Business Committee as the NARC nominees. The 4th interveners are officials of KANU party.

Pleadings and Issues

13. There are numerous averments in the reference, many of which are unnecessary, notwithstanding counsel's explanation that their purpose is to show the full context of the claimants' case. With due respect to learned counsel, we are constrained to observe that much of the "over pleading" has led to some degree of confusion in regard to the jurisdiction of this Court and the claimants' cause of action.
    Be that as it may, in our view, the claimants' core pleading that leads to the prayers we referred to at the beginning of this judgment is captured in two paragraphs, which read thus –
    "29 It is the contention of the claimants that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravenes Article 50 of the East African Community Treaty in so far as no election was held nor debate allowed in Parliament on the matter. 30. The claimants also contend that any such rules that may have been invoked by the Kenya National Assembly which do not allow election directly by citizens or residents of Kenya or their elected representatives is null and void for being contrary to the letter and spirit of the Treaty."
14. In a nutshell, the response of the 1st respondent is premised on the following four propositions as basic pleas, namely, that –
    - » In 2001, the Kenya National Assembly, pursuant to Article 50 of the Treaty, determined its own procedure for election of the nine members of the Assembly in form of the election rules, which embody the democratic principle of proportional representation.
    - » In October 2006, the National Assembly, acting through its House Business Committee, in accordance with its Standing Orders and the election rules, went through the process of electing the nine members to the 2nd Assembly. Neither the election rules nor the process of electing the nine members constitute an infringement of the Treaty or are otherwise unlawful.
    - » The reference does not disclose a cause of action.
15. The 3 and 4 respondents plead jointly that no cause of action is disclosed against them as they were not privy to the activities of the Kenya National Assembly about which the reference complains. In the alternative they plead that the cause of action, if any, ceased when they obeyed the interim injunction, which had been the purpose for their being made parties in the case.
16. Out of these pleadings, the Court framed the following three broad issues –
    1) Have the complainants disclosed any cause of action within the meaning of Article 30 of the Treaty?
    2) Was an election undertaken within the meaning of Article 50 of the Treaty?
    3) Do the Kenya Election Rules i.e. The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001, comply with Article 50 of the Treaty?

Evidence

17. The main facts relied on by all the parties, most of which are outlined in the background section of this judgment, are not in controversy. Only one witness, Yvonne Khamati,

the 10th Claimant, gave oral evidence and was cross examined at length by counsel for all the parties. We hasten to observe, however, that the lengthy questioning of the witness appeared to be more for eliciting from her some desired evidence than for challenging the veracity of her testimony. Even the uncommon mode of adducing evidence of a speech made by Hon. Norman Nyagah, the Government Chief Whip, through her producing a DVD recording of the speech, for the Court to view and hear, was not challenged. The rest of the evidence was adduced by affidavits.

18. At the scheduling conference, it was intimated that the 1st respondent would object to the Hansard copies annexed to the reference being used in evidence. This appears to have prompted the claimants to adduce affidavits from Members of Parliament who participated in the proceedings reported in the said Hansard copies. During the trial, however, the course of objecting to the use of Hansard was not pursued, and counsel for all the parties, including the respondent, referred to the copies annexed to their respective pleadings without objection.
19. In view of our finding that the evidence material to the issues for determination is not contentious, it is unnecessary to discuss it in any detail. Where necessary, we shall consider the evidence that is not reflected in the background section of the judgment, as we discuss the framed issues.
20. The Advocates for the claimants, the 1st respondent and the 1st interveners filed written submissions. In addition, the respective counsel for all the parties as well as for the *amicus curiae* made oral submissions at the hearing.

Applicable principles

21. The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions. In Article 23, the Treaty provides –
"The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty."
It then provides thus in Article 27(1)-"The Court shall initially have jurisdiction over the interpretation and application of this Treaty."
22. The Treaty, being an international treaty among three sovereign states, is subject to the international law on interpretation of treaties, the main one being "The Vienna Convention on the Law of Treaties". The three Partner States acceded to the Convention on different dates; (Uganda on 24 June 1988, Kenya on 9 November 1988 and Tanzania on 7 April 1993). The Articles of the Convention that are of particular relevance to this reference are Article 26 that embodies the principle of *pacta sunt servanda*, Article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and Article 31, which sets out the general rule of interpretation of treaties. Article 31 reads –
    1) A treaty shall 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 its object and purpose.
    2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
        a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

There shall be taken into account:

a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,
b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,
c) Any relevant rules of international law applicable in the relations between the parties.

4. "A special meaning shall be given to a term if it is established that the parties so intended."

23. Learned counsel for the claimants urged that in addition to seeking guidance from the Vienna Convention in interpreting the Treaty, the Court should, in respect of Article 50 of the Treaty, apply what he referred to as the principle of equivalence, which ensures that in the interpretation and application of rights and obligations created under a treaty there is equivalence in the states that are bound by the treaty.
24. In other words, treaty provisions must be uniformly interpreted and applied in the states that are parties to the treaty. For the 1st respondent on the other hand, the Court was urged to exercise its jurisdiction with care bearing in mind the historical perspective of the Treaty with particular reference to the recitals in its preamble in which the Partner States recall the causes of the collapse of the former East African Community in 1977 and in which they resolve to act in concert to strengthen their cooperation adhering to fundamental and operational principles set out in the Treaty.
25. In apparent support of this submission learned counsel for the 3rd interveners stressed the fundamental principle in international law of sovereign equality of states, under which any matter over which a state does not expressly relinquish sovereignty, remains within its sovereignty. A state cannot lose sovereignty over any matter by implication of international law.

Submissions on Issue No.1

26. The claimants' submission on the first framed issue is that the averments in the reference show a cause of action within the meaning of Article 30 of the Treaty. They argue that the claimants are competent to make the reference since they are legal and natural persons resident in East Africa. The reference and the supporting documentary evidence, shows that the contentious nominations were made pursuant to Article 50 of the Treaty as were the election rules under which the nominations were done. The election rules and the process of the nominations and approval of the nominees as members of the Assembly are "regulations, decision and action" of a Partner State whose legality is contestable under Article 30. In the reference, the claimants ask the Court to interpret Article 50 relative to the said process and rules and to determine if the process and the rules infringe the Article. They contend that this is therefore, a justiciable cause of action. They also reiterate that this Court has jurisdiction to determine the reference and to grant the prayers made therein.
27. On the other hand the 1st respondent submits that the claimants have not disclosed

any cause of action under Article 30 of the Treaty. In order to establish a cause of action, a litigant must have locus standi. The litigant must have sufficient interest in the subject matter upon which a court is to adjudicate. Secondly, the litigant must be seeking a remedy in respect of a legal right, which has been infringed or violated.

28. According to the 1st respondent there are two view points of the issue of locus standi in the instant reference. First, from a strict perspective, since the subject matter of the reference, namely whether the election of Kenya's members of the Assembly was undemocratic and unlawful, is a matter of public interest, the only person that has locus standi as the protector of public interest, is the Attorney General of the Republic of Kenya. Secondly, from a broader perspective, the, 4 and 7 claimants, being members of the National Assembly, may claim to have locus standi on the ground that they have personal interest to ensure that the National Assembly elects strictly in accordance with Article 50. That approach, however, should be avoided as it would make a mockery of democracy to allow them to refer to the Court an issue that they lost to the majority in a democratic debate in the House.
29. The 1st respondent also maintains that the claimants failed to show that they have a right conferred by the Treaty, which was contravened. Article 30 does not confer any right on any of the claimants. It is only a procedural provision for enforcing rights conferred under other provisions of the Treaty. If Article 30 is interpreted to confer a right on every resident of the Partner State, the Court would be turned into an institution of resolving philosophical discussion and speculation and cease to be a court of law. Since under Articles 34 and 52 the Treaty vests interpretation jurisdiction in the national courts also, the substance of the reference should be dealt with by the High Court of Kenya under Article 52. If this Court rules on the legality of the contentious election it would be usurping the power of the High Court of Kenya.
30. In support of the foregoing submissions, learned counsel for the 3rd interveners, also contended that the claimants do not have a cause of action maintainable in this Court, which is an international court. Their grievance raises the question whether the 3rd interveners were elected to the Assembly. The Treaty expressly provides in Article 52 that when that question arises, it shall be determined by the relevant institution of the Partner State. The claimants did not seek remedy from the High Court or other institution of the Republic of Kenya. Under the principles of international law, they cannot access this Court before exhausting the local remedy provided by the Treaty itself.
31. Learned counsel for the 3rd and 4th respondents, stressed that both under the pleadings and in the evidence no claim was made against either of the two respondents. They were not alleged to be persons whose activities gave rise to the reference. They were not shown to have infringed a right conferred on the claimants by the Treaty. No nexus was established linking the 3rd and 4th respondents to the activities complained of in the reference. The claimants did not disclose, let alone prove, any cause of action entitling them to a claim and an award against the two respondents. Although, in the interlocutory application for injunction they were properly joined, they ought to have been discharged after compliance with the injunction order.
32. Further, the 3 and 4 respondents contend that they cannot be party to the reference because they are neither a Partner State nor an institution of the Community whose

acts or regulations are referred to the Court under Article 30.

Finding on Issue No. 1

33. From the submissions, we discern the following five grounds upon which the contention of nondisclosure of a cause of action is based, i.e that-
    - » the claimants failed to show the essential elements of a cause of action, namely, that their rights or interests were violated or infringed upon;
    - » Article 30 does not create any right; it creates a forum for adjudication of rights vested by other provisions of the Treaty;
    - » the substantial question raised in the reference, whether the 3rd interveners are elected members of the Assembly, is not within this Court's jurisdiction;
    - » the claimants have not exhausted the local remedy provided by the Treaty; and
    - » in the case of the 3rd and 4th respondents, it is not shown that they are liable for the matters, which are subject of complaint in the reference.
34. A cause of action is a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy. In *Auto Garage vs. Motokov, (No.3) (1971) EA 514, a decision of the Court of Appeal for East Africa, Spry V.P.*, described a common law cause of action at p.519 D thus –
    "if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible."
35. That description sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However, a cause of action created by statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the statute or legislation which creates it.
36. This reference is not an action seeking remedy for violation of the claimants' common law rights. It is an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Treaty provides for a number of actions that may be brought to this Court for adjudication. Articles 28, 29 and 30 virtually create special causes of action, which different parties may refer to this Court for adjudication. Under Article 28(1) a Partner State may refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under Article 28(2) a Partner State my also make a reference to this Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is ultra vires or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under Article 29 the Secretary General may also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State.
37. Article 30 provides –
    "Subject to the provisions of Article 27 of this Treaty, any person resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on

the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

38. It is important to note that none of the provisions in the three Articles requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference. We are not persuaded that there is any legal basis on which this Court can import or imply such requirement into Article 30.
39. In the respondent's written submissions, and in the supplementary oral submissions by the learned Deputy Solicitor General of Kenya a number of authorities were cited in support of the contentions that the claimants had no locus standi and/or had not disclosed a cause of action. Unfortunately no copies were availed to the Court despite undertaking to do so. One that we are able to comment on is the decision of the High Court of Kenya in *Jaramogi Oginga Odinga vs. Zachariah R. Chesoni & Attorney General, Misc.Appl. No.602 of 1992*, a copy of which was availed by counsel for the 6th respondent at the hearing of the interlocutory application. In that case, the High Court of Kenya held that section 60 of the Constitution of the Republic of Kenya does not confer any right to a litigant nor create a cause of action. By way of analogy, it is argued that Article 30 ought to be interpreted in the same way. We do not need to discuss the decision in any detail. We respectfully agree with that interpretation. But we hasten to point out that the provisions of section 60 of the Constitution of Kenya are not similar or comparable to the provisions of Article 30 of the Treaty. The section only vests jurisdiction, albeit unlimited jurisdiction, in the High Court of Kenya. The court held –

    "The court's unlimited powers ought to be and are used with judicial restraint and only in situations where ends of justice may be defeated by failing to exercise them. To use these inherent or residual powers, the court must be satisfied on grounds placed before it that the powers should indeed be used. That, in our opinion, is what section 60(1) provides for. It does not create causes of action or courses to follow in those actions."
40. In Article 30, however, the Treaty confers on any person resident in a Partner State the right to refer the specified matters to this Court for adjudication and as we have just said, by the same provision it creates a cause of action.
41. Section 60 of the Kenya Constitution, is comparable to provisions of the Treaty that only vest jurisdiction without creating causes of action, like Articles 27, 31 and 32, which respectively vest in this Court jurisdiction to interpret the Treaty, to hear and determine disputes between the Community and its employees and to hear and determine arbitration disputes in specified circumstances. We find a more plausible comparison with Article 30 of the Treaty to be in Article 137 of the Constitution of the Republic of Uganda, which in clause (1) vests in the Constitutional Court the jurisdiction to interpret the Constitution and in clause (3) confers on any person the right to petition that court on an allegation that any Act of Parliament or other law, or any act or omission by any person or authority is inconsistent with, or contravenes the Constitution, for a declaration to that effect. The Supreme Court of Uganda has in several decisions held that the Article thereby creates a cause of action. see *Ismail Serugo vs. Kampala City Council & Attorney General; Constitutional Appeal No.2/9.*

42. Turning back to the claim in this reference, we note that the claimants make no secret of the fact that they were prompted to bring this reference by what the claim to be unlawful substitution of the 3 interveners for the 3rd , 9th, 10th and 11th complainants as the NARC nominees and the resultant deeming of the former as elected members of the Assembly. Those circumstances *per se raise* the question whether the 3rd interveners are elected members of the Assembly and the question is squarely within the parameters of Article 52(1), which provides – "Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question."
43. Needless to say, this provision also creates a cause of action under the Treaty. However, it is the one cause of action under the Treaty over which this Court has no jurisdiction. Obviously, that is why the 1st respondent persistently seeks to strait jacket this reference into the parameters of Article 52(1), to cushion the initial argument that this Court has no jurisdiction over the reference, and additionally to contend that no cause of action triable by this Court is disclosed.
44. We should mention at this juncture that the same argument is reiterated in submissions on the second framed issue, presumably in an effort to show that it is a non¬issue. There, it is argued that the fact of the election is not disputable, and that the substantive dispute arises from the two lists of nominees submitted by NARC's party leader and party whip, respectively. Four of the nominees on the party leader's list who were not elected, claim that they were the rightful nominees who should have been elected instead of the 3rd interveners who were on the party whip's list. That dispute is not within the ambit of Article 30. Basically, it is a dispute on who should have submitted the NARC party nominees, which dispute should have been solved through the internal party mechanism. Outside the party, it is, at most, a dispute as to whether the 3rd interveners were lawfully elected and should have been referred to the High Court of Kenya under Article 52.
45. But, under whatever context, the arguments turn round to one central theme, namely that the Court ought not to determine this reference. In our view, the subtle variation introduced in submissions by learned counsel for the 3rd interveners that the Court had jurisdiction to grant the interim injunction and to hear the reference but has no jurisdiction to grant the remedies prayed for, makes no material difference. We shall dispose of the said theme here and will not return to it under any other framed issue.
46. We agree that if the only subject matter of the reference were those circumstances surrounding the substitution of the 3rd interveners for the said four claimants, this Court would have no jurisdiction over the reference. In paragraphs 29 and 30 of the reference, however, the claimants have referred to the Court two other issues, which we consider to be the core and material pleadings for purposes of the reference. It is those pleadings that disclose the special causes of action, which evoke this Court's jurisdiction under the Treaty. And it is only those pleadings that will be subject of adjudication in this reference. While it is apparent that the reference of the two issues is an after thought, in our considered opinion it is not tantamount to abuse of court process as submitted by the 1st respondent.

47. In the ruling delivered on 27th November 2006, we held that the Court has jurisdiction to hear and determine the reference. We find no reason to review that decision. Whatever we say on the matter hereafter is to provide the details of our reasons for the decision as we undertook to do in the said ruling.
48. Under Article 33(2), the Treaty obliquely envisages interpretation of Treaty provisions by national courts. However, reading the pertinent provision with Article 34 leaves no doubt about the primacy if not supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty. For clarity, it is useful to reproduce here, the two Articles in full. Article 33 provides –
    1. Except where jurisdiction is conferred on the Court by the Treaty, disputes in which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.
    2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of the national courts on a similar matter."

And Article 34 provides –

"When a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question."

49. The purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.
50. Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor is there any other provision directly conferring on the national courts jurisdiction to interpret the Treaty. Article 30 on the other hand, confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. We therefore, do not agree with the notion that before bringing a reference under Article 30, a litigant has to "exhaust the local remedy".In our view there is no local remedy to exhaust.
51. We would express reservations about the supplementary or alternative notion that a litigant who fails to secure relief from the national courts under Article 52 would have recourse to this Court to seek the same relief.
52. Lastly, the 3rd and 4th respondents were not joined for being privy to the actions of the Republic of Kenya or for any wrong they did. They were joined, as learned counsel rightly concedes, because of the relief sought by the claimants, namely the prayer that they be restrained in the terms set out not only in the interlocutory application but also in the reference. The submission would have made more sense if it came prior to the hearing of the reference. Accordingly we answer issue no.1 in the affirmative.

Submissions on Issue No.2

53. The main thrust of the claimants' submissions on the second and third issues is that no election, within the meaning of Article 50 of the Treaty, was undertaken and that the election rules do not provide for election. The process provided for by the election rules and what actually transpired amount to the antithesis of an election.
54. The claimants maintain that the expression "shall elect" as used in Article 50 can only mean "shall choose by vote". That is the ordinary meaning as defined in several dictionaries, and as it is understood and practiced not only in all three Partner States, but also in international democratic practice worldwide. Under the Constitution and electoral laws of Kenya that govern the elections of the President, and of the Speaker, Deputy Speaker and Members of Parliament, election means election through voting. The provision in the Treaty that "the National Assembly shall elect" therefore, does not import a concept that is unknown to or that differs from that envisaged and practiced by the Republic of Kenya.
55. The affidavit evidence shows that three parliamentary political parties, namely NARC, KANU and FORD¬K, submitted to the House Business Committee names of persons nominated for election as members of the Assembly. On 26th October 2006, the Chairman of the House Business Committee simply tabled in the National Assembly a list of names of nine persons stated to be nominated by the said political parties. That list did not include the names of the 3rd, 9th , 10th and 11th claimants who had been validly nominated as NARC nominees because at the initiative of Hon. Norman Nyagah, the Government Chief Whip, the House Business Committee had replaced them with the names of the 3rd interveners. As stipulated by the election rules, the nine persons were thereby deemed to be elected by the National Assembly.
56. Significantly, when introducing the nine names to the House, the Vice President, who is also Leader of Government Business, said, as his predecessor had said on the equivalent occasion in 2001, that the nine persons were "appointed". Both leaders knowing the difference between "elected" and "appointed", used the latter word because what had transpired in the House Business Committee was not an election but an appointment of the nine persons. Besides, this was consistent with what the said Government Chief Whip said in his speech recorded on the DVD, bragging immediately prior to the process that only he would name those to be sent to the Assembly. All that goes to show that what transpired was not an election by the National Assembly, but was at best "an appointment" by the Government controlled House Business Committee.
57. The submissions on this issue, for the respondent and the supporting interveners, may be summarized as follows. The words "election" and "elect" as used in Article 50 do not necessarily connote choosing or selecting by voting. They are not defined in the Treaty. *Black's Law Dictionary* defines "election" as –
"the process of selecting a person to occupy an office (usually a public office)"
58. Furthermore, though under Article 6 of the Treaty the Partner States are committed to adhere to "democratic principles", no specific notion of democracy is written into the Article or the Treaty. Besides, while Article 50 provides for the National Assembly of each Partner State to elect nine members of the Assembly, it gives no directions on how the election is to be done, except for the stipulations that the nine must not

be elected from members of the National Assembly and that as far as feasible, they should represent specified groupings. Instead, it is expressly left to the National Assembly of each Partner State to determine its procedure for the election. This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. The essence of the provision in Article 50 is that "the National Assembly of each Partner State shall elect … nine members of the Assembly … in accordance with such procedure as [it] may determine."

59. Learned counsel for the 1st interveners, supplements this submission with the argument that the power and discretion of the National Assembly under Article 50(1) is so unfettered that the National Assembly may determine a procedure of election that excludes itself from actual or physical voting. In exercise of that power and discretion, the Kenya National Assembly determined its procedure in 2001 by making the election rules, which must be respected.
60. It is not in dispute that only entitled parliamentary political parties nominated candidates for election and submitted their names to the House Business Committee. Being satisfied that they were qualified to be elected and that they complied with the terms of Article 50, the House Business Committee approved nine of the nominees on 26th October 2006 and on the same day tabled their names before the National Assembly. Thereupon, by virtue of the election rules, the nine nominees were deemed to be elected by the National Assembly. The Speaker confirmed that the process was conducted in accordance with the election rules. The process is a mode of democratic election by proportional representation as practiced not only in Kenya but also in several other democratic countries.
61. The question that the Court should have been appropriately asked to consider is whether the process conforms to the conditions stipulated in Article 50. However, the question did not arise since it was neither alleged, let alone proved, that any of the nine elected persons was not qualified nor that the specified representations, namely representations of various political parties, shades of opinion, gender and other special interest groups were not achieved.
62. Learned counsel for the 2nd intervener supplemented the submissions in support of an affirmative answer to the second framed issue, with the contention that a proper interpretation of Article 50 is not to consider the meaning of the expression "to elect" in isolation but as one with the procedure that Article 50 empowers the National Assembly to determine. For the purpose of Article 50 therefore, an election means the process determined by the National Assembly as set out in the election rules. If the Court undertakes the task of giving dictionary meaning to the expressions "to elect" and "an election" it will be assuming the role of making rules of procedure, which is the preserve of the National Assembly.

Finding on Issue No.2

63. The first step towards answering the second framed issue is to resolve the conflict of two basic concepts on the import of Article 50 that underlie these submissions. One concept is that the Article imposes on each National Assembly the function of electing nine members of the Assembly from the respective Partner States, with a discretionary power to determine the procedure it will follow in executing that function. The other

concept is that the Article confers on the National Assembly of each Partner State the responsibility, with unfettered discretion, to determine how the nine members of the Assembly from the respective Partner States are to be elected. To find out which of the two concepts reflects the correct object and purpose of Article 50 as intended by the parties to the Treaty, we have to consider the provisions of the Article in the context of the Treaty as a whole.

64. However, in view of paragraph 3(b) of Article 31 of the Vienna Convention, it is necessary to consider first if Kenya's practice in its application of Article 50 since 2001, establishes any agreement of the parties regarding the interpretation of that Article. No evidence was adduced on the practice by the other two parties in their application of Article 50. However, from the differences between the election rules and the equivalent rules of procedure adopted by the National Assemblies of Tanzania and Uganda, copies of which were availed to Court in the course of oral submissions by counsel, it is evident, and we are able to conclude, that no agreement of the parties regarding interpretation of Article 50, can be inferred from the said practice.On the surface, the Tanzania rules provide for elaborate elections by the National Assembly, while the Uganda rules are silent on the issue of election, save that in rule 2 "election" is defined as "a process of approval of names nominated by political parties and presented to the House by the Speaker", and in rules 10 and 11 they provide for the Speaker to announce to the House the "nominations" of members of the Assembly and for the publication in the Gazette of the names of the "elected members" as soon as the Speaker announces them. Clearly, there is glaring lack of uniformity in the application of Article 50.

65. As we said earlier in this judgment, the Treaty creates eight organs of the Community. It prescribes the composition of each organ and how its membership is to be constituted. Memberships of four of the organs, namely, the Summit, the Council, the Co¬ordination Committee and Sectoral Committees are principally constituted by specified ex officio members and additional members determined by the Partner States from time to time. They are all serving officials of the Partner States. The membership of the Court, the judicial organ of the Community, consists of judges appointed by the Summit on recommendations of the Partner States. The Secretariat, the executive organ of the Community is also constituted by appointees. The Secretary General is appointed by the Summit upon nomination by a Head of State. The Deputy Secretaries General are appointed by the Summit on recommendation of the Council. And the Counsel to the Community is appointed on contract.

66. The Assembly is differently constituted. Its composition is prescribed in Article 48. It is the only organ composed of two categories of membership, namely, 27 elected and 5 ex officio members. In Article 50, the Treaty prescribes how the first category of membership is to be constituted, and qualifications of members.

Article 50 is titled – "Election of Members of the Assembly" and the full text reads –

1) The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State

may determine.

2) A person shall be qualified to be elected a member of the Assembly by the National Assembly of a Partner State in accordance with paragraph 1 of this Article if such a person:
   (a) is a citizen of that Partner State,
   (b) is qualified to be elected a member of the National Assembly of that Partner State under its Constitution, (c) is not holding office as a Minister in that Partner State,
   (d) is not an officer in the service of the Community, and
   (e) has proven experience or interest in consolidating and furthering the aims and objectives of the Community."

67. Clearly, the overriding object and purpose of Article 50 is to prescribe a special mode of constituting the first category of membership of the Assembly. This is done by providing in express, unambiguous and mandatory terms that the section of the Assembly comprising 27 members shall be constituted by members elected severally by the National Assemblies of the Partner States, each of which is entitled to elect nine members. We should observe that this is a notable departure from provisions of Articles 56 and 57 of the 1967 Treaty for East African Cooperation, under which each Partner State was mandated to "appoint nine" of the "twenty seven appointed members" of the Legislative Assembly.

68. It is also significant that unlike in respect of the other organs, the Treaty does not leave it to each Partner State to appoint or nominate for appointment or otherwise determine the members of the Assembly. In our view, according to the ordinary meaning of the expression "the National Assembly of each Partner State shall elect nine members of the Assembly", the National Assembly of each Partner State is unconditionally assigned the function of electing nine members of the Assembly. In other words Article 50 constitutes the National Assembly of each Partner State into "an electoral college" for electing the Partner State's nine representatives to the Assembly. We think that there can be no other purpose of naming the National Assembly in this regard other than to constitute it into an electoral college.

69. The rest of the provisions of Article 50 do not add to or subtract from that assignment. They only serve to leave two matters in the National Assembly's discretion. First, while the Article provides that the nine elected members shall as much as feasible be representative of the specified groupings, by implication it appears that the extent of the feasibility of such representation is left to be determined in the discretion of the National Assembly. Secondly, the National Assembly has the discretion to determine the procedure it has to follow in carrying out the election.

70. In our considered view, the decision to constitute the National Assembly of each Partner State into an electoral college was a deliberate step towards establishing a legislature comprising people's representatives. The National Assembly, being an institution of people's representatives, is next to the people themselves, the second best forum for electing such representatives. We are therefore not persuaded by the submission of counsel for the 1st interveners that the discretion of determining the procedure of electing the representatives includes an option for the National Assembly to assign the function to any other body. That submission has the effect

of extending the discretion beyond what is provided in Article 50. It also offends the well established principle articulated in the maxim: "*Delegata potestas non potest delegari*" (a delegated power cannot be delegated).

71. The next step towards answering the second framed issue is to consider what is meant by the words "election" and "elect" in the setting they are applied in Article 50 and in the context of the Treaty as a whole. The 1st respondent and the supporting interveners capitalise on the absence of any definition of those words in the Treaty and on the fact that the words are capable of bearing meanings other than choosing by vote. However, neither fact leads to any material consequence. The absence of any definition of the words in the Treaty is not ground to contend that the parties to the Treaty attached no meaning to them. The phenomenon of double or even multiple meanings of words is a common occurrence but does not prevent a court giving the word interpretation in the context it is used. In *International Law and Order by Prof. Georg Scwarzenberger, (Stevens & Sons, London 1971)*, under the Chapter on Treaty Interpretation, the learned author, commenting on Article 31 of the Vienna Convention on the Law of Treaties, which we reproduced earlier in this judgment, says at p.121 –

"In accordance with the general rule on interpretation in the Vienna Convention, the object of treaty interpretation is to give their "ordinary" meaning to the terms of the treaty in their context and in the light of its object and purpose.

Unfortunately, almost any word has more than one meaning. The word "meaning" itself has at least sixteen different meanings. Thus if parties are in dispute on any term of a treaty, each one of them is likely to consider the meaning it attaches to a particular word as the ordinary meaning in the context and in the light of the object and purpose of the treaty."

72. Fortunately, the words that are under consideration do not bear a multiplicity of meanings. It is common ground that the ordinary meanings of the words "election" and "to elect" are "choice" and "to choose" respectively; and that in the context of Article 50 the words relate to the National Assembly choosing or selecting persons to hold political positions. What is in contention is whether the parties to the Treaty intended the choice or selection to be done through a process of voting or through any other process to be determined by each of the three National Assemblies.

73. The phenomenon of multiple meanings of words makes interpretation of documents a very difficult task; but the task is not insurmountable. Rules of interpretation have been designed to ease the burden, hence the need to invoke them. Indeed, in the instant case, the contention revolves more on the intention of the parties to the Treaty than on the meaning of the words. Two trite rules of international law, which emanate from the principle of *pacta sunt servanda*, are of particular relevance here. One is that treaty provisions are presumed to have meaning and must not be construed as void for uncertainty, in the way contracts between private persons may be construed at municipal law. The other is that the parties to a treaty cannot be taken to have intended an absurdity. (See *Manual of Public International Law Edited by Prof. Max Sorensen, Uganda Publishing House Ltd*. 1968; para. 4.30 and 4.31).

74. In our view, it would lead to unnecessary uncertainty, if not to absurdity, if Article 50 were construed to mean that the parties to the Treaty intended to attach no

meaning to the words "election" and "to elect" used in Article 50, leaving it to each National Assembly to adopt its preferred meaning of the words through the rules of procedure it determines. Counsel for the interveners advanced a theory that the matter was intentionally left open ended because of differences in the level of political development of the Partner States, and in support of the theory relied on the inclusion of the principle of asymmetry among the operational principles of the Community set out in Article 7 of the Treaty. With due respect to learned counsel, we find no legal or factual basis for his perception or speculation that at the time of entering into the Treaty the Partner States were at different levels of political development. To our understanding, the operational principle of asymmetry he cited in support of his argument, relates to the acknowledged economic imbalances for whose rectification the parties have, by appropriate protocol, set a formula and time¬frame. It is not applicable to any imagined uneven political development of the Partner States.

75. We think that Articles 5 and 6 have a bearing on the subject at hand. By the Treaty, the Partner States established themselves into the Community, for the achievement of elaborate objectives set out in Article 5. For purposes of this judgment it suffices to say that the overall objective is developing and strengthening co¬operation in specified fields for the mutual benefit of the Partner States; and further establishing among themselves into several stages of integration up to a Political Federation, in order to attain inter alia raised standard of living and improved quality of life for their populations. Article 6 outlines five sets of fundamental principles that the parties chose to govern their achievement of the Community objectives. Again for the purpose of this judgment it suffices to highlight only (a) and (d), namely the principles of –
    - » mutual trust, political will and sovereign equality,
    - » good governance including adherence to the principles of democracy…..
76. Two other facts are worthy of taking into account. Ordinarily a reference to a democratic election of persons to political office is understood to mean election by voting. Secondly, in all three Partner States, the National Assembly has the function of electing its Speaker and Deputy Speaker. It executes that function by voting in one form or another.
77. The Constitution of the Republic of Kenya provides in sections 37 and 38 that the Speaker and the Deputy Speaker, respectively, shall be elected by the National Assembly. Those provisions are reiterated in the Standing Orders, which then set out elaborate procedure of conducting the election by ballot. In contrast, Order 154 provides that Members and the Chairman of any select committee shall be "nominated" by the House Business Committee unless nominated by the House on setting up the select committee. Under Order 155, the House Business Committee may "appoint" in place of a member whose membership has ceased or who is absent, another member to act. In the scenarios under Orders 154 and 155, no voting is envisaged.
78. In view of all the foregoing, we find it very unlikely that in adopting Article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect the members of the Assembly other than through voting procedure. Needless to say, an election through voting may be accomplished using such diverse

procedures as secret ballot, show of hands or acclamation. The electoral process may or may not involve such preliminaries as campaigns, primaries and/or nominations. An election may be contested or uncontested. In our considered view, the bottom line for compliance with Article 50 is that the decision to elect is a decision of and by the National Assembly.

79. The evidence before us leads to only one conclusion, namely that the National Assembly of Kenya did not undertake or carry out an election within the meaning of Article 50 of the Treaty.

Submissions on Issue No.3

80. On the third issue specifically, the claimants contend that the election rules do not meet the threshold set by Article 50, and to that extent have no bearing on the Article. In formulating the election rules, the Kenya National Assembly disregarded the limits of its discretion under Article 50. This is particularly borne out by the evidence from the Hansard reports of the debate in the National Assembly in 2001. The evidence clearly indicates that the rules were adopted notwithstanding that their inconsistency with Article 50 was articulated by a number of contributors to the debate. In that connection, during the proceedings of 26th October 2006, in the course of ruling that the National Assembly was bound by the election rules it adopted against his advice in 2001, the Speaker observed that the Kenya National Assembly was living a lie with regard to election of members of the Assembly and urged the House to re¬look at his rejected draft rules as it had a right and duty to amend inter alia rules that are not in consonance with the expectations of the public.
81. Learned counsel for the claimants urged that in interpreting the Treaty relative to the election rules, the Court must bear in mind the principle of equivalence, which requires that the Treaty be applied uniformly among the Partner States; and the principle of primacy of Community law in case of conflict with national law.
82. The 1st respondent on the other hand submits that the election rules do comply with Article 50. Under the Treaty each Partner State has the discretion to choose any democratic electoral system for the election of the members of the Assembly. The election rules made by the Kenya National Assembly establish such a democratic electoral system of proportional representation. They do not infringe Article 50 in any way and the Court should respect them.
83. The 1st interveners support the submission that the election rules were lawfully made by the Kenya National Assembly within its discretion under, and in compliance with, Article 50(1). They submit that in interpreting that Article and applying it to the election rules, the Court should take the rules as they are, and not consider whether the rejected drafts were better. The Court cannot question the validity of the rules on basis of whether they are democratic enough. They were made by the competent authority, and were adopted in a democratic manner after a detailed and focused debate. The Court may only determine if in making the rules the National Assembly complied with its mandate to determine a procedure that caters for the stipulations under Article 50.
84. In addition it is contended that the claimants are estopped from challenging the validity of the election rules, which they recognised and relied on up to the conclusion of the election.

Findings on Issue No.3

85. We should at the outset reiterate that the point we have to decide on under this issue is whether the election rules constitute an infringement of Article 50 of the Treaty. It is therefore, immaterial that the claimants or any of them may have previously regarded the election rules as valid or may have done anything or taken any step in pursuance of their provisions. We say this because it is our firm view that once a question of infringement of the Treaty is properly referred to this Court under Article 30, the question ceases to be of purely personal interest. This court would be failing in its duty under Article 23 if it refuses to determine the question on the ground of the claimant's previous conduct or belief.
86. Furthermore, it is well settled that the doctrine of estoppel cannot be raised against the operation of statute. (See *Maritime Electric Co. Ltd vs. General Dairies Ltd., (1937) 1 All ER 748; Southend on Sea Corporation vs. Hodgson (Wickford) Ltd., (1961) 2 All ER 46 and T. Tarmal Industries vs. Commissioner of Customs and Excise (1968) EA471*. Similarly in our view, estoppel cannot be invoked to prevent an inquiry into an alleged infringement of the Treaty. If the rules made in exercise of power conferred by Article 50 are ultra vires, they cannot be saved on the ground that the claimants previously regarded them as intra vires.
87. The point of inquiry under this issue is what the rules provide in regard to "election of the members of the Assembly."Consequently, the 1st respondent misses the point when he submits that through the rules the National Assembly adopted a democratic system of proportional representation. Proportional representation can be effected through nomination and/or appointment as is the case, under Article 33 of the Kenya Constitution, for the "nominated members" of the National Assembly. In any case, it is the Treaty that provides for proportional representation in the Assembly, and which directs that the representation shall be achieved by election. The critical point is not whether the rules provide for proportional representation but whether they provide for election of members of the Assembly on basis of proportional representation as provided by Article 50.
88. The election rules provide in rule 4, that the National Assembly shall elect the nine members of the Assembly "according to the proportion of every party in the National Assembly". To that extent, there is partial compliance with Article 50. However, the apparent absence of any provision to cater for gender and other special interest groups is a significant degree of non¬compliance, notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation.
89. The major deviation from Article 50 is that the election rules do not provide for the National Assembly to elect the members of the Assembly. Rule 5 provides for the nomination of candidates by the political parties and sets out the procedure for submitting nomination papers to the House Business Committee. Rules 6 and 7 then provide –

    "6. The House Business Committee shall consider the nominees of the parties delivered to it under sub ¬rule (4) of rule 5 and shall ensure that the requirements of Article 50 of the Treaty are fulfilled.

    7. Upon being satisfied that the requirements of rule 6 have been complied with, the

House Business Committee shall cause the names of nine nominees of the parties to be tabled before the National Assembly and such nominees shall be deemed to have been elected as members of the East African Legislative Assembly in accordance with Article 50 of the Treaty."

90. It is not clear if "the requirements of Article 50" mentioned in rule 6 and "the requirements of rule 6" mentioned in rule 7 are the same or different, thus making the role of the House Business Committee in the process rather uncertain. What we can deduce from the rules is that its role is to vet the nominees to ensure that they qualify to be elected and presumably that they are representative of the groupings specified in Article 50. Be that as it may, it is plain from the two rules that the nine nominees are not elected by the House Business Committee, contrary to a spirited effort by counsel for the 3rd interveners to argue that the House Business Committee is "an electoral college". If that were so, it would be unnecessary to stipulate that the nominees are deemed to be elected by the National Assembly. Indeed the use of the expression "nominees are deemed to be elected" signifies that the nominees are not elected.

91. The same learned counsel persuasively argued that the word "deem" is a good legal word in common usage. He asserted: "We deem that which in law ought to have taken place, to have taken place".

92. We agree that the word "deemed" is commonly used both in principal and subsidiary legislation to create what is referred to as legal or statutory fiction. The legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist. In *St. Aubyn (LM) vs. A.G. (1951) 2 All ER 473*, Lord Radcliffe describes the various purposes for which the word is used where, at p.498 he says –

"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

93. It is common ground that the election rules were made "in exercise of the powers conferred by Article 50(1) of the Treaty", and obviously for the purpose of implementing the provisions of the said Article. In rule 7, the legislature used the word "deemed" in order to create the fiction that upon the names of party nominees being laid on the table they would in law be elected by the National Assembly as members of the Assembly although in reality they are not so elected. The reason for creating that fiction is that Article 50 of the Treaty expressly provides that the nine members of the Assembly from each Partner State shall be elected by the National Assembly. In other words the fiction was created to circumvent an express provision of the Treaty.

94. In *Indira Sawhney vs. Union of India, JT(1999) (9) SC 557: (2000) 1 SCC 168*, a statutory declaration of non¬existent facts as existing, which was unrelated to existing facts was held to be in violation of Articles 14 and 16 of the Indian Constitution. Similarly we hold that rules made for the purpose of implementing provisions of the Treaty cannot be permitted to violate any provision of the Treaty through use of legal fiction. To uphold the legal fiction in rule 7 of the election rules would be tantamount

to upholding an amendment of Article 50, by one Partner State unilaterally. We can find no justification for doing so.

95. The dichotomy that this situation poses is as follows: The National Assembly of any democratic sovereign state has the powers of regulating its conduct through rules of procedure by whatever name called. Once made and adopted, they are binding until revoked, amended or otherwise modified by the National Assembly itself. Ordinarily what the National Assembly does in accordance with such rules is lawful and valid. However, a state, which in exercise of its sovereign power binds itself to an international treaty, may end up facing conflicting demands, namely the demand to abide by its treaty obligations and the demand to abide by its own rules that conflict with the former.

96. In the reference, the claimants plead, and in the written submissions by counsel it is reiterated, that the election rules were not gazetted or published. However it was not seriously canvassed, let alone proved, that failure to gazette or publish them rendered the rules invalid or of no legal effect. In the written submission the rules are described as "window dressing" with no bearing on Article 50, with the additional passing remark: "They have not even been gazetted or published independently". We make this observation because proof that the rules are of no legal effect would have erased or avoided the dichotomy. As it is, however, we start from the position that the rules are binding on the National Assembly and then consider if their inconsistency with or infringement of Article 50 renders them unlawful and not binding on the National Assembly.

97. As we pointed out earlier in this judgment, the Treaty provides in Article 33(2) that decisions of this Court on the interpretation of provisions of the Treaty shall have precedence over decisions of national courts on a similar matter. That provides a clear ¬cut solution in the event of conflicting court decisions. But the Treaty does not provide a similarly explicit solution to the dichotomy where a Treaty provision (say Community rule) is in conflict with a national rule.

98. We think the solution lies in the basic principle at international law, to the effect that a state party to a treaty cannot justify failure to perform its treaty obligation by reason of its internal inhibitions. It cannot be lawful for a state that with others voluntarily enters into a treaty by which rights and obligations are vested, not only on the state parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so. The principle is embodied in Article 27 of the Vienna Convention on the Law of Treaties, which reads ¬–

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

99. We were referred to several judicial decisions arising from national law that contravened or was inconsistent with European Community law, as persuasive authorities on this subject. See *Algemene Transporten Expeditie Onderneming van Gend enLoos vs. Nederlandse Administratie der Belastingen [1963] ECR1; Flaminio Costa vs. ENEL [1964] ECR 585; andAmminstrazione delle Finanze dello Stato vs. Simmenthal [1978] ECR 629.*

100. In some cases the national law in issue was in existence when the Community law came into force, while in others it was enacted after the Community law. In either

case where there is conflict between the Community law and the national law the former is given primacy in order that it may be applied uniformly and that it may be effective.

101. For purpose of illustration, it suffices to briefly describe what are commonly called the Factortame cases. Spanish fishermen who owned British registered fishing boats challenged in the British courts new English legislation for being discriminatory in breach of European Community law. They applied for an interim injunction to postpone the operation of the new legislation pending a preliminary ruling on a reference made to the European Court of Justice (ECJ) to determine if the law was contrary to Community law. The House of Lords dismissed the application on the ground that under the English law the courts cannot issue an injunction against the Crown. That decision was also referred to the ECJ which held that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting an interim relief. On basis of the preliminary ruling by the ECJ, the House of Lords in *R vs. Secretary of State for Transport, ex p. FactortameLtd. (No.2) [1991] 1 A.C. 603*, reconsidered and reversed its previous decision.

102. In the instant reference, the position of the 1st respondent and the supporting interveners appears to be on weaker ground. First, while we appreciate that the election rules were subject of a full debate touching on the provisions of Article 50, and that the rules were adopted through a democratic decision, the decision was made irrespective of the awareness of the possibility that the rules were an infringement on Article 50. Secondly it is noteworthy, that the National Assembly made the rules not in exercise of sovereignty inherent in a state, but in exercise of a discretionary power conferred on it by the Treaty. It was bound to make rules that conform to the primary purpose of the Article that conferred the power, which primary purpose is to provide for the election of nine members of the Assembly by the National Assembly of each Partner State. That purpose is defeated by the provision of rule 7 of the election rules, which provides for a fictitious election in lieu of a real election.

103. We therefore find that the election rules infringe Article 50 to the extent of their inconsistency with it, which we have identified. In the result we declare that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the Treaty, and that the election rules in issue infringe the same Article.

104. We order that the claimants shall have costs of the reference to be borne by the 1st respondent and to be taxed by the Registrar taking into account that a single applicant could have presented the reference. All other parties shall bear their own costs.

105. Before taking leave of this reference we are constrained to observe that the lack of uniformity in the application of any Article of the Treaty is a matter for concern as it is bound to weaken the effectiveness of the Community law and in turn undermine the achievement of the objectives of the Community. Under Article 126 of the Treaty the Partner States commit themselves to take necessary steps to inter alia "harmonise all their national laws appertaining to the Community".In our considered opinion this reference has demonstrated amply the urgent need for such harmonization.

106. Secondly, we also are constrained to say that when the Partner States entered

into the Treaty, they embarked on the proverbial journey of a thousand miles which of necessity starts with one step. To reach the desired destination they have to ensure that every subsequent step is directed forward towards that destination and not backwards or away from the destination. There are bound to be hurdles on the way. One such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role.

* * * *

East African Court of Justice
Application No. 1 of 2006

Prof. Peter Anyang' Nyong'o and 10 others And The Attorney General of the Republic of Kenya and 5 others

Moijo M. ole Keiwua P, Joseph Mulenga VP, Augustino S. L. Ramadhani J, Kasanga Mulwa J, Joseph S. Warioba J
November 27, 2006

Jurisdiction - Wrongful joinder of parties - Interim injunction- Prima facie case with a probability of success - whether the court could determine the reference and grant an interim injunction

Articles: 27, 30, 50, 52(1) of the Treaty for the Establishment of the East African Community - the Treaty for the Establishment of the East Africa Community (Election of Members of the Assembly) Rules 2001, Kenya

This application arose from the Applicant's Reference No.1 of 2006 that averred inter alia that the process by which the representatives of the Republic of Kenya to the East African Legislative Assembly were nominated was incurably and fatally flawed in substance, law and procedure and contravened Article 50 of the EAC Treaty.

The Applicants sought interim orders restraining the 3rd and 4th Respondents from assembling, convening, recognizing, administering oath of office or otherwise howsoever presiding over or participating in election of the Speaker or issuing any notification in recognition of any names of persons as duly nominated representatives of the Republic of Kenya to the EALA.

Held:

1. Under Article 30, of the Treaty, the Court is empowered to exercise that jurisdiction by determining the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it.
2. Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the Community.
3. The applicants were able to show that they had a prima facie case with a probability of success and that and the Applicants, EALA and the Community were likely to suffer irreparable damage if it turned out that one third of the Members of the EALA were not legally elected. Thus an interim injunction was granted.

Ruling

1. The Applicants named above have brought a reference to this Court under Article 30 of the Treaty for the Establishment of the East African Community ("the Treaty"). In the reference they contend inter alia that the process by which the representatives of the Republic of Kenya to the East African Legislative Assembly (EALA) were nominated was incurably and fatally flawed in substance, law and procedure and contravenes Article 50 of the Treaty in so far as no election was held, and aver that the Clerk to the National Assembly of Kenya, 2nd Respondent, forwarded to the Clerk to the EALA, the 3rd Respondent, an illegal list of names of Kenya's representatives. They pray that this Court be pleased –
   i) To interpret and apply the Treaty to the process of nomination and election of Kenya's representatives to the EALA;
   ii) To declare that the Rules of Election applied by the Kenya National Assembly constitute a breach of Article 50 of the Treaty and is (sic) therefore void;
   iii) To declare that the process of election, selection and/or nomination of members to the EALA by the Republic of Kenya is null and void; to declare that the and 6th and 6th Respondents have no mandate to determine persons to represent the Republic of Kenya at the EALA;
   iv) To restrain and prohibit the 3rd and 4th Respondents from assembling, convening, recognizing, administering oath of office or otherwise presiding over or participating in election of the Speaker or issuing any notification in recognition of the following persons: Messrs Clerkson Otieno Karan, Safina Kwekwe Sungu, Gervase Akhaabi, Christopher Nakuleu, Sarah Godana, Abdi Rahman Haji, Reuben Oyondi, Catherine Ngima Kimura and Augustine Chemonges Lotodo as nominated representatives of the Republic of Kenya to the EALA;
   v) To direct the Republic of Kenya through the 1st and 2nd Respondent [to] repeat its nomination and election process in compliance with Article 50 of the Treaty within reasonable time as the Court may direct; to extend time within which the Republic of Kenya will transmit names of duly elected members to the 3rd and 4th Respondents for purposes of being sworn in as members of the EALA; to make such further or other orders as may be necessary in the circumstances.
2. The reference was filed on November 2006 along with an ex parte application by Notice of Motion for interim orders inter alia that pending the hearing and determination of the motion and of the reference this Court be pleased – "to restrain and prohibit the 3rd and 4th Respondents from assembling, convening, recognizing, administering oath of office or otherwise howsoever presiding over or participating in election of the Speaker or issuing any notification in recognition of any names of persons as duly nominated representatives of the Republic of Kenya to the EALA."
3. When the Notice of Motion came up for hearing ex parte on 17th November 2006, we considered that notwithstanding its urgency, its import warranted giving the Respondents opportunity to be heard. Accordingly we ordered that the Respondents be served so that the motion is heard inter partes on 24th November 2006. The Respondents were duly served and on the fixed day, the 1st Respondent appeared in person and the rest by counsel.

4. Prior to the hearing the 1st , 2nd 5th and 6th Respondents gave notice that they would raise as a preliminary objection, this Court's lack of jurisdiction to hear and determine the reference and to grant the restraining orders prayed for. In addition the 2nd and 6th Respondents objected to their being joined as parties to the suit.
5. In view of the urgency of the application for the interim order, the primacy of the objection to the court's jurisdiction and the need to determine early who are the rightful parties to a suit, and because of constraint of time, the Court directed at the commencement of the hearing that the three issues be argued together so that the decision on them may be given in one ruling. Jurisdiction the contention that this Court lacks jurisdiction to determine the reference was premised on an argument, articulated variously by the respective counsel for the Respondents, that in substance the reference was brought to challenge the election of Kenya's nine representatives to the EALA.
6. It was stressed that "the Treaty for the Establishment of the East Africa Community (Election of Members of the Assembly) Rules 2001" (the Election Rules) under which the nine representatives were elected were the same under which the outgoing representatives were elected, and that Applicants had fully participated in the election process under the same rules without protesting their illegality. It was only after the Applicants' candidates failed to be elected that the reference was brought under the guise of seeking interpretation of the Treaty when the real purpose was to challenge the outcome of the election.
7. In his submissions, the learned Attorney General stressed that the initial jurisdiction vested in this Court under clause (1) of Article 27 of the Treaty is very restricted, and that the Court should not assume jurisdiction that is not yet vested in it or jurisdiction that is vested elsewhere.
8. He maintained that jurisdiction over the interpretation and application of the Treaty does not extend to determining questions arising from elections of members of the EALA. He pointed out that in Article 52(1) the Treaty expressly reserves the jurisdiction to determine such questions to the appropriate institutions of the Partner States.
9. Mr.Wekesa, learned counsel for the 6th Respondent, sought to crystallize the argument. He submitted that under the Court's jurisdiction vested by Article 27(1) of the Treaty, the Court was competent to consider and determine whether the Election Rules under which the National Assembly of Kenya proceeded in electing the nine representatives infringed Article 50 of the Treaty, but it was not competent to determine if elections carried out under those rules were lawful because by virtue of Article 52(1) that was the preserve of the pertinent national institution, namely the High Court of Kenya. Learned counsel invited the Court to decline to entertain the feigned reference for interpretation, which in his view was tantamount to abuse of court process.
10. It is common ground that by virtue of Article 27(1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty. Under Article 30, of the Treaty, the Court is empowered to exercise that jurisdiction by determining the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it on the ground that it is unlawful or

it infringes provisions of the Treaty. Article 27(1) provides "The Court shall initially have jurisdiction over the interpretation and application of this Treaty." And Article 30 provides –

1) "Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive decision or action of a Partner State or an institution of the community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the this Treaty." It cannot be gainsaid that in the reference the Court is called upon to determine if the process by which the Kenya's representatives to the EALA were nominated and the Election Rules under which it was undertaken are unlawful or an infringement of Article 50 of the Treaty on Election of Members of the Assembly. The Article provides in clause (1) –
2) "The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine."

11. The Applicants maintain that what transpired was not an election, and the Election Rules used did not conform to the procedure as envisaged under the said provision. On the face of it therefore, in order to determine the reference the Court has to decide what the expression "each Partner State shall elect" means and whether what transpired fits or does not fit within that meaning.
We are satisfied that this is an issue that falls within the jurisdiction of this Court.

Wrongly joined parties

12. The objections to being joined raised by the 2nd, 5th and 6th Respondents were virtually on the same ground, namely that by virtue of the provisions of Article 30 of the Treaty they were wrongly enjoined to the reference and the motion. They maintained that under that Article, only an Act, regulation, directive decision or action of a Partner State or an institution of the Community may be referred to this Court. Although they were joined in their respective official capacities, they did not come within the ambit of Article 30 of the Treaty. The 2nd Respondent was sued as Clerk to the National Assembly of Kenya. The 5th Respondent, who is the Vice President of Kenya, was sued as Leader of Government Business in the National Assembly.
13. The 6th Respondent was sued as Chairman of NARC¬-Kenya, a political party. The reason for joining the three Respondents is disclosed in paragraph 33 of the reference where the Applicants aver that the three "colluded and connived in the violation of law as they usurped the authority of the Party Leader of the Ruling Party NARC and collectively robbed Kenyans of the opportunity to decide by democratic means their representatives to the EALA."
14. Mr. Mutala Kilonzo, learned counsel for the Applicants, strenuously argued that since the natural person has the capacity to sue in this Court the natural person must

have the capacity to be sued in the same Court under the Treaty. He urged the Court to give to Article 30 an interpretation that would bring natural persons who commit misfeasance that infringe on provisions of the Treaty within the ambit of Article 30, to account for their actions.

15. With due respect to counsel for the Applicants, it appears to us that enjoining the 2nd, 5th and 6th Respondents to the reference was under a misconception. A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the Community. The alleged collusion and connivance, if any, is not actionable under Article 30 of the Treaty.
16. We think there is merit in the objections. The matters referred to this Court, whose legality it has to determine relate to the responsibility of the Republic of Kenya as a Partner State, acting by its National Assembly under Article 50 of the Treaty, to elect nine members of the EALA. Both the process of selecting the nine members whose names have been remitted to the 3rd Respondent and the Election Rules under which they were elected or selected were done by the Republic of Kenya through its National Assembly. It is for that reason that the Attorney General of Kenya was rightly made the 1st Respondent We are satisfied that the 2nd, 5th and 6th Respondents were wrongly joined to the reference and we order that they be struck off with costs.

Interim injunction

17. The clear purpose of the application for the grant of an interim injunction is to prevent the nine persons elected by the National Assembly of Kenya taking office as Members of the EALA until this Court determines whether or not the process of their election was unlawful or an infringement of the Treaty. The Applicants contend that if the injunction is not granted there would be an irreparable damage because after taking office as Members of the EALA there is no legal means for removing them even if this Court subsequently determines under the reference that the process of electing them was not lawful.
18. It is not in dispute that in absence of any restraining order, the said nine persons will be sworn ¬in along with the Members elected by the National Assemblies of Tanzania and Uganda. The 3rd and 4th Respondents have confirmed in their respective affidavits that the commencement of the second EALA will be effected on 29th November 2006 and that all the elected Members will be facilitated to take the oath of office on that day.
19. The contentious issue is what would happen if they assumed office and subsequently this Court determined in the reference that the process of their election and the Election Rules used therein were an infringement of Article 50 of the Treaty. The learned Attorney General and both Mr. Macharia and Mr. Nyaoga the learned counsel for the 2nd and 5th Respondents respectively, contended that the Applicants armed with a declaration of this Court that the process and the rules were unlawful or an infringement of the Treaty would be able by virtue of the provisions of Article 52 to move the High Court of Kenya to annul the elections.
20. However, the learned counsel for the 6th Respondent appeared to canvass a different

view more akin to that of counsel for the Applicants. He submitted that such a declaration would have no consequence on the election that has already been carried out under the Election Rules that were competently and lawfully made under Article 50 of the Treaty by the National Assembly of Kenya. He opined that the declaration would be applied to the making of future procedure for the election of Members of the EALA.

21. We are constrained to state at the outset that the enormity of this application cannot be over emphasized. The subject matter of the restraining order prayed for is the EALA, a very important organ of the Community. The implications of declining to grant the order and of granting it are grave. In an affidavit in support of the application, Fidellis Mueke Ngulli deponed that if the order is not granted not only the Applicants will suffer irreparably but also "the legitimacy of [the] EALA [will be] greatly imperiled by the unelected and irregularly wounded (sic) members from Kenya".
22. On the other hand, in their respective affidavits opposing the application, both the 3rd and 4th Respondents deponed that "the EALA in particular, and the East African Community in general stands to suffer great hardship if an injunction against the swearing in of the Members of the EALA is issued." – It is trite law within the jurisdictions of the three Partner States in the East African Community, that an applicant who seeks an interim injunction must show a prima case with a probability of success. Secondly, a court will not normally grant an interim order unless it is shown that if the order is not made the applicant is likely to suffer irreparable damage or injury.
23. We have read the pleadings and documentary annexures so far filed in Court in the reference and in the motion. We also benefited tremendously from the very able submissions by all learned counsel who addressed us. We are satisfied that the applicants have shown that they have a *prima facie case* with a probability of success.
24. This of course is subject to what pleadings the Respondents will bring in response to the reference. For obvious reasons, at this stage we would wish to refrain from discussing the merits of the case in any detail. The finding that there is a prima facie case with a probability of success is to say no more than that if the Respondents do not put up any probable defence or response the Applicants would succeed. We also think that the second criterion for the grant of an interim injunction is satisfied. It is apparent that in the present state of the law, the hearing and determination of the reference after the affected persons have taken office might not assist to prevent the alleged illegality being perpetuated.
25. We are satisfied that not only the Applicants but also the EALA and the Community itself stand to suffer irreparable damage if it turns out that one third of the Members of the EALA were not legally elected. The fact that the outgoing Kenyan Members were elected in a similar manner in 2001, should not be a source of solace but rather should be a reason to determine soon if the process is illegal and ought to be rectified.
26. Accordingly, we hereby grant an interim injunction restraining the 3rd and 4th Respondents from recognizing the following persons as duly elected Members of the EALA or permitting them to participate in any function of the EALA until the final determination of the reference, namely; Clerkson Otieno Karan, Safina Kwekwe Sungu, Gervase Akhaabi, Christopher Nakuleu, Sarah Godana, Abdi Rahman Haji,

Reuben Oyondi, Catherine Ngima Kimura, and Augustine Chemonges Lotodo .

27. In this ruling we have given our full decisions on the three issues raised in this application. We shall, however, give our detailed reasons for the same later. The costs of the application shall be in the cause.

* * * *

East African Court of Justice
Application No. 2 of 2006

Arising From EACJ Reference No.1 of 2006

George Nangale And Prof. Peter Anyang' Nyong'o & 10 Others And Attorney General of Kenya and 5 Others

Moijo M. Ole Keiwua, President, Joseph N. Mulenga Vice President, Augustino S. L. Augustino Judge, Kasanga Mulwa Judge, Harold R. Nsekela Judge
January 27,2007

Correction of judgments or orders- Discretion- Interested party- whether the extracted order embodied the Court's decision in accordance with the Rules or whether it contained grave mistakes.

Rules: 67, 68(2) of the East African Court of Justice Rules of Procedure, 2004

On 27th November 2006, this Court granted, inter alia, an interim injunction and pursuant to Rule 67 of the East African Court of Justice Rules of Procedure, the Registrar extracted and signed an order from the ruling embodying the interim injunction.
On 30th November 2006, the Applicant, who was a member of East African Legislative Assembly (EALA) representing Tanzania , applied, as an interested person, under Rule 68(2) seeking correction of the extracted order claiming that it did not correspond with the decision of the Court.

Held:
1. That some of the wording in the extracted order originated from the prayers in the Claimants' motion. This contradicted Rule 67 which requires specification of the relief granted or other determination of the case.
2. While the Court retains the discretion to refuse to correct its order in appropriate circumstances, ordinarily the Court ought to correct an order that does not correspond with the judgment it purports to embody.
3. The extracted order does not correspond to the ruling it purports to embody and should be corrected to correspond to the terms of the reliefs granted in the ruling of this Court dated 27th November 2006.

Cases cited:
Moore v Buchanan and Another (1967) 3 All ER 273

Ruling

1. On 27th November 2006, this Court delivered a ruling in an interlocutory application made under the above mentioned Reference by the above named claimants, granting, inter alia, an interim injunction. Pursuant to r.67 of the East African Court of Justice Rules of Procedure (the Court Rules), the Registrar extracted and signed an order from the ruling embodying the interim injunction.
2. By a Notice of Motion dated 30th November 2006, George Nangale, the above mentioned applicant, applied as an interested person under r.68(2) of the Court Rules, for an order that the said extracted order be corrected to correspond with the decision of the Court, which it purports to embody. The grounds of the application are that:
   1) the extracted order is wider than the ruling of the Court;
   2) the said order has paralyzed all activities of the East African Legislative Assembly (EALA) contrary to the ruling of the Court;
   3) it is in the interest of justice to allow the application.
3. The application is supported by an affidavit of the Applicant, who deponed, *inter alia*, that –
   - » He is a member of the EALA representing Tanzania;
   - » In a letter dated 27th November 2006, to all Members the Clerk to the EALA suspended the activities of the EALA on the basis of the Court order aforesaid;
   - » At a meeting addressed by the Deputy Secretaries General, the Members were informed that there was no Assembly and that there were no members of the EALA;
   - » He read the judgment (sic) of the Court and found that the said order is at variance with it.

The Claimants as well as the 3rd and 4th Respondents opposed the application on the grounds that the extracted order embodies and is not wider than the ruling.

4. Through a Replying Affidavit sworn by Patrick Gichuru Gichohi, Deputy Clerk of the Kenya National Assembly, the 1st Respondent, while conceding that the extracted order was wrongly drawn in some respects, contended that the application lacked merit in that the inability of the EALA to function arises from the ruling and not from any error in extracting the order.
5. At the hearing of the application, Mr. Ogalo Wandera, learned counsel for the Applicant highlighted the contents of the extracted order that were not part of the ruling and whose inclusion gave the extracted order an erroneously wider scope than that expressed in the ruling of the Court. He maintained that because of the inclusion of those extraneous matters the order has been applied to aspects, such as the EALA members' privileges, which were not in the Court's contemplation in its ruling. He submitted that the court ought to correct any error in its order even if it be minor, and he stressed that in the instant case the variance between the ruling and the extracted order warranted correction by expunging the extraneous contents.
6. Mr. Mutula Kilonzo S.C., learned counsel for the Claimants, submitted that the ruling and the extracted order should not be read in isolation of the prayers in respect of which the ruling was made and the interim injunction was granted. The expressions

in the order objected to by the Applicants, were the expressions employed in the prayer for the injunction. He maintained that the extracted order was on all fours with the ruling. Mr. Wanjuki Muchemi, the learned Solicitor General of Kenya, who appeared, for the 1st Respondent, associated himself with the submissions of Mr. Mutula Kilonzo and stressed that there was no disparity between the ruling and the extracted order. Mr. Kaahwa, the learned Counsel to the Community, who represented the 3 and 4 Respondents, framed two questions which the court has to consider in an application for correction of an extracted order, namely: 1)Whether the extracted order embodies the Court's decision in accordance with r.67 of the Court Rules; and 2)Whether the order contains grave mistakes. He answered the first in the affirmative and the second in the negative and submitted that there was no cause for correction of the order. He relied on *Moore vs. Buchanan and Another (1967) 3 All ER 273*, for the proposition that only a grave mistake in an order warrants correction.

7. Rule 67 of the Court Rules requires every decision of this Court to be embodied in an order and directs that such order shall –
   - » be dated as of the date the decision was delivered;
   - » contain particulars of the case; and
   - » specify clearly the relief granted or other determination of the case.
8. The decision in issue in this application is the ruling this Court delivered on 27th November 2006. The ruling relates to the Claimants' application under the Reference, for an interim injunction and to the Respondents' preliminary objections. The correction sought in this application, however, relates only to the relief of an interim injunction, which the Court granted not in the terms of the application but in the following terms

   "Accordingly, we hereby grant an interim injunction restraining the 3 and 4 Respondents from recognizing the following persons as duly elected Members of the EALA or permitting them to participate in any function of the EALA until the final determination of the reference."
9. That was followed by the list of names of the nine persons submitted to the 4th Respondent as the Members of the EALA elected by the Kenya National Assembly.
10. The part of the order extracted and signed by the Registrar relevant to this application reads as follows –

    "It Is Hereby Ordered:

    1…

    2. That pending the hearing and final determination of the reference herein, the 3rd and 4th Respondents are hereby restrained and prohibited from assembling, convening, recognizing, administering oath of office or otherwise howsoever presiding over or participating in election of the Speaker or issuing any notification in recognition of the following persons: Messrs (names of the 9 persons) as nominated representatives of Republic of Kenya to the EALA."
11. Much as we may agree with learned counsel for the Claimants and the Respondents that in substance both the order as pronounced in the ruling and as extracted amount to an interim injunction with restraints and prohibitions directed to the 3rd and 4th Respondents in respect of the nine named persons, the restraints and prohibitions are at such variance that it cannot be appropriately said that the latter was extracted

from the former in compliance with r. 67 of the Court Rules. We note the explanation volunteered by learned counsel for the Claimants that some of the wording in the extracted order originate from the prayers in the Claimants' motion. In our view that per se contradicts r.67 which requires the order to embody the decision of the Court not the pleadings or prayers of the parties. What is more, we are constrained to observe, without discussing in detail, that far from clarifying the relief granted, as required under r.67, the added wording has the tendency of confusing it.

12. The Court's power to correct errors in its judgments and orders is provided for under r.68 of the Court Rules. Sub-rule (1), provides for correction of judgments. Sub-rule (2), under which this application is brought, provides –
"An order of the Court may at any time be corrected by the Court either of its own motion or on application by any interested person if it does not correspond with the judgment it purports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as corrected."
13. Clearly, this is a discretionary power. While ordinarily the Court ought to correct an order that does not correspond with the judgment it purports to embody, the Court retains the discretion to refuse to correct its order in appropriate circumstances. In *Moore vs. Buchanan (supra)* the English Court of Appeal, applying the equivalent rules under the R.S.C., held that there was discretion to refuse to correct an error in an order "wherever something had intervened subsequently which rendered it inexpedient or inequitable to make the correction." We are of a similar view in respect of r.68 (2) of the Court Rules, and would exercise the discretion on the same criteria.
14. In the instant case, we are satisfied that the extracted order does not correspond to the ruling it purports to embody. The parties opposing the application have not shown that it would be inexpedient or inequitable to correct the extracted order so as to make it correspond to the ruling. Indeed learned counsel for the Claimants conceded that no harm would arise from the proposed correction.
15. For these reasons we allow the application and direct that the extracted order be corrected to correspond and be in the terms of the reliefs granted in the ruling of this Court dated 27th November 2006. We make no orders as to costs.

* * * *

The East African Court of Justice
Reference No. 1 of 2007

James Katabazi and 21 Others And Secretary General of The East African Community and The Attorney General Of The Republic Of Uganda

Moijo M. ole Keiwua P, Joseph N. Mulenga VP, Augustino S. L. Ramadhani J, Mary Stella Arach-Amoko J, Harold R. Nsekela J
November 1, 2007

Cause of action - Detention - Rule of law- Res judicata - Jurisdiction over human rights - Responsibilities of the EAC Secretary General - Whether deployment of agents of the 2nd respondent in the Uganda High Court premises, the re-arrest and incarceration of the applicants after bail had been granted infringed the EAC Treaty - Whether the EAC Secretary General can initiate and investigate matters falling within ambit of the Treaty.

Articles: 6, 8(1)(c), 23,27,29, 30 and 71(1) (d) of the Treaty for the Establishment of the East African Community

The Applicants were charged in the High Court with treason and misprision of treason in 2004 without bail. On 16th November 2006 when bail was eventually granted, security personnel surrounded the court, interfered with the preparation of the bail documents and rearrested the applicants. On 24th November 2006 applicants were charged before the General Court Martial with unlawful possession of firearms and terrorism which were the same charges brought before the High Court.

The Uganda Law Society challenged the interference of the court process by the security personnel before the Constitutional Court of Uganda and the constitutionality of conducting prosecutions simultaneously in civilian and military courts. The Constitutional Court ruled that the interference was unconstitutional but despite that decision, the applicants were not released from detention hence they filed this reference. They claimed that the inaction of the EAC Secretary General is an infringement of the Treaty.

Held:

1. The doctrine of res judicata did not apply in this case as the parties were not the same and could be said to have been litigating under the same title.
2. While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation.
3. The intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty.
4. While Article 71 (1) (d) applies to this reference, without knowledge the Secretary

General could not be expected to conduct any investigation and come up with a report under Article 29(1) of the Treaty.

Cases cited;
Bennett v. Horseferry Road Magistrates' Court and another [1993] 2 All ER 474
Connelly v. DPP [1964] 2 All ER 401 at 442:
Etiennes Hotel v National Housing Corporation Civil Reference No. 32 of 2005 Court of Appeal of Tanzania
Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd. [1969] E. A. 696, 700
The Republic v. Gachoka and Another, [1999] 1 EA 254

Judgment

1. This is a reference by sixteen persons against the Secretary General of the East African Community as the 1st respondent and the Attorney General of Uganda as the 2nd Respondent.
2. The story of the claimants is that: During the last quarter of 2004 they were charged with treason and misprision of treason and consequently they were remanded in custody. However, on 16th November, 2006, the High Court granted bail to fourteen of them. Immediately thereafter the High Court was surrounded by security personnel who interfered with the preparation of bail documents and the fourteen were re-arrested and taken back to jail.
3. On 24th November, 2006, all the claimants were taken before a military General Court Martial and were charged with offences of unlawful possession of firearms and terrorism. Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court. All claimants were again remanded in prison by the General Court Martial.
4. The Uganda Law Society went to the Constitutional Court of Uganda challenging the interference of the court process by the security personnel and also the constitutionality of Despite that decision of the Constitutional Court the complainants were not released from detention and hence this reference with the following complaint: The claimants aver that the rule of law requires that public affairs are conducted in accordance with the law and decisions of the Court are respected, upheld and enforced by all agencies of the Government and citizens and that the actions of a Partner State of Uganda, its agencies and the second respondent have in blatant violation of the Rule of Law and contrary to the Treaty continued with infringement of the Treaty to date.
5. The claimants have sought the following orders:
   a) That the act of surrounding the High Court by armed men to prevent enforcement of the Court's decision is an infringement of Articles 7(2), 8(1)(c) and 6 of the Treaty for the Establishment of the East African Community (The Treaty).
   b) That the surrounding of the High Court by armed men from the Armed Forces of Uganda is in itself an infringement of the Fundamental principles of the Community in particular regard to peaceful settlement of disputes.
   c) The refusal by the second respondent to respect and enforce the decision of the

High Court and the Constitutional Court is infringement of Articles 7(2), 8(1)(c) and 6 of the Treaty.

d) The continual arraignment of the applicants who are civilians before a military court is an infringement of Articles 6, 7, and 8 of the Treaty for Establishment of the East African Community.

e) The inaction and the loud silence by the first respondent is an infringement of Article 29 of the Treaty.

f) Costs for the Reference.

6. The 1st respondent in his response at the outset sought the Court to dismiss the reference on two grounds: One, that there was no cause of action disclosed against him, and two, that the affidavits in support of the reference were all incurably defective. In the alternative, the 1st respondent argued that:
   The allegations which form the basis of the Application have at no time been brought to the knowledge of the Respondent and the Claimants are, therefore, put to strict proof.
7. The 2nd respondent, on the other hand, virtually conceded the facts as pleaded by the claimants. After admitting that the claimants were charged with treason and misprision of treason, the 2nd respondent stated in his response:
   a) That on 16th November, 2005, the security Agencies of the Government of Uganda received intelligence information that upon release on bail, the Claimants were to be rescued to escape the course of justice and to go to armed rebellion.
   b) That the security Agencies decided to deploy security at the High Court for purely security reasons and to ensure that the claimants are re-arrested and taken before the General Court Martial to answer charges of terrorism and unlawful possession of firearms.
   c) That on 17th November, 2005, all the Claimants were charged in the General Court Martial with terrorism and unlawful possession of firearms which are service offences according to the Uganda People's Defence Forces Act, No. 7 of 2005.

Thus, in effect, the 2nd respondent is affirming that the acts did take place but contends that they did not breach the rule of law.

8. The claimants were represented by Mr. Daniel Ogalo, learned counsel, while the 1st respondent had the services of both Mr. Colman Ngalo, learned advocate, and Mr. Wilbert Kaahwa, learned Counsel to the Community. The 2nd respondent was represented for by Mr. Henry Oluka, learned Senior State Attorney of Uganda assisted by Mr. George Kalemera and Ms. Caroline Bonabana, learned State Attorneys of Uganda.
9. When the matter came up for the scheduling conference under Rule 52 of the East African Court of Justice Rules of Procedure (The Rules), Mr. Ngalo raised a preliminary objection that there is no cause of action established against the respondent. The pleadings of the claimants do not disclose that at any stage, the Secretary General was informed by the applicants or by anybody at all that the applicants had been incarcerated or confined or that their rights were being denied.
10. Mr. Ogalo responded by submitting that under Article 71(1)(d) of the Treaty one of the functions of the Secretariat, of which the 1st respondent is head, is:
    "the undertaking either on its own initiative or otherwise, of such investigations,

collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination Mr. Ogalo contended that it is not necessary that the respondent must be told by any person "because he can, on his own, initiate investigations".

11. The Court dismissed the preliminary objection but we reserved our reasons for doing so and we now proceed to give them. At the time of hearing the preliminary objection the Court had not reached the stage of a scheduling conference under Rule 52. It is at that conference that points of agreement and disagreement are sorted out. It was our considered opinion that the matter raised could appropriately be classified at the scheduling conference as a point of disagreement.
12. But apart from that the matter raised by Mr. Ngalo was not one which could be dealt with as a preliminary objection because it was not on point of law but one involving facts. As Law, J. A. of the East African Court of Appeal observed in *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd. [1969] E. A. 696at p. 700*:
'So far as I am aware, preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration'.
13. Then at p. 701 Sir Charles Newbold, P. added:
'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'
14. The Court of Appeal of Tanzania in *Civil Reference No. 32 of 2005, Etienne Hotel v National Housing Corporation* dealt with a similar issue and, after citing *Mukisa Biscuits* with approval, held:
Here facts have to be ascertained in all the remaining six grounds of the so called preliminary objection and that is why the respondent has filed two affidavits which have been objected to by the applicant.
We are of the decided view that grounds of preliminary objection advanced cannot be disposed off without ascertaining facts. These are not then matters for preliminary objection. So, we dismiss the motion for preliminary objection with costs.
15. Whether or not the 1st respondent had knowledge of what was happening to the complainants in Uganda can never ever be a point of law but one of fact to be proved by evidence and, therefore, it could not be a matter for a preliminary objection and hence the dismissal.
16. We may as well point out here, for the sake of completeness, that Mr Ngalo also challenged the legality of the affidavits filed in support of the reference. However, in the course of answering questions from the bench he abandoned his objection in the following terms:
Your Lordships, I am not going to pursue this point. I concede that these affidavits are sufficient for the purposes of this application.
17. Two issues were agreed upon at the scheduling conference which were:
1) Whether the invasion of the High Court premises by armed agents of the second

respondent, the re-arrest of the complainants granted bail by the High Court and their incarceration in prison constitute infringement of the Treaty for the Establishment of the East African Community.

2) Whether the first respondent can on his own initiative investigate matters falling under the ambit of the provisions of the Treaty.

18. As for the first issue Mr Ogalo submitted that the Court was called on to interpret Articles 6, 7, 8, 29 and 71 of the Treaty and implored the Court to do so by looking at "the ordinary meaning of the words used in those provisions, the objectives of the Treaty and the purposes of those articles".
19. His main plank of argument was that the acts complained of violated one of the fundamental principles of the Community as spelled out in Article 6(d), that is, rule of law. As to the import of that doctrine he referred us to *The Republic v. Gachoka and Another, [1999] 1 EA 254;Bennett v. Horseferry RoadMagistrates' Court and Another [1993] 2 All ER 474;* and a passage in *Kanyeihamba's Commentaries on Law, Politics and Governance (Renaissance Media Ltd, 2006)* p 14.
20. The learned advocate pointed out that the first complaint is the act of surrounding the High Court of Uganda by armed men so as to prevent the enforcement of the decision of the Court. The second act was the re-arrest and the incarceration of the complainants.
21. Mr. Ogalo pointed out that the acts complained of constituted contempt of court and also interference with the independence of the Judiciary. He concluded that both contempt of court and the violation of the independence of the judiciary contravene the principle of the rule of law.
22. As for the second issue Mr. Ogalo was very brief. He submitted that the 1st respondent is empowered by Article 71 (1)(d), on his own initiative, to conduct investigation, collect information or verify facts relating to any matter affecting the Community that appears to him to merit examination. The stand taken by Mr. Ogalo was that if the 1st respondent properly exercised his powers under the Treaty, he should have known the matters happening in Uganda as a Partner State and take appropriate actions. He, therefore, asked the Court to find both issues in favour of the complainants.
23. In reply Mr. Ngalo pointed out that what concerned the 1st respondent was the second issue. The learned counsel submitted that the complainants are alleging that the respondent ought to have reacted to what the 2nd respondent was doing in Uganda. However, he contended, there is no evidence that the 1st respondent was aware of those activities. He pointed out that Article 29 starts by providing "Where the Secretary General considers that a Partner State has failed …" and he argued that for the Secretary General to "consider" he has to be aware but the complainants have failed to establish that awareness.
24. As for Article 71 Mr. Ngalo submitted that it provides for the functions of the Secretariat as an institution of the Community and not as to what happens in the Partner States. For the 2nd respondent Mr. Oluka dealt with the surrounding of the High Court, the re-arrest and the continued incarceration of the complainants. The learned Senior State Attorney pointed out that all the three matters were fully canvassed and decided upon by the Constitutional Court of Uganda. Therefore, he submitted that this Court is prohibited by the doctrine of *res judicata* from dealing

with those issues again.

25. Mr. Oluka conceded that though the facts in this reference and those which were in the petition before the Constitutional Court of Uganda are substantially the same, the parties are different. In the Constitutional Petition No. 18 of 2005, the parties were The Uganda Law Society and the Attorney General of Uganda while in this reference the parties are James Katabazi and 21 Others, on the one hand, and the Secretary General of the Community and the Attorney General of Uganda, on the other hand. Nevertheless, Mr. Oluka stuck to his guns that the doctrine of *res judicata* applies to this reference.
26. He also submitted that under Article 27 (1) this Court does not have jurisdiction to deal with matters of human rights until jurisdiction is vested under Article 27(2). He, therefore, asked the Court to dismiss the reference with costs.
27. There are three issues which we think we ought to dispose of at the outset: First, whether or not Article 71 is relevant in this application. Second, whether or not the doctrine of *res judicata* applies to this reference. Last, is the issue of the jurisdiction of this Court to deal with human rights.
28. It is the argument of Mr. Ogalo that Article 71 (1) (d) imposes on the 1st respondent the duty to collect information or verify facts relating to any matter affecting the Community that appears to him to merit examination. Mr. Ngalo, on the other hand, contends that Article 71 (1) (d) sets out the functions of the Secretariat as an institution of the Community and not as to what happens in the Partner States.
    Article 71 (1) (d) provides as follows:
    The Secretariat shall be responsible for:
    a)…
    b)…
    c)…
    d) the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination.
29. Mr. Ngalo wanted to confine the functions of the Secretariat under Article 71 (1) (d) to internal matters of the Secretariat as an organ, which he erroneously referred to as an institution, divorced from the duties imposed on the Secretary General under Article 29. It is, therefore, our considered opinion that Article 71 (1) (d) applies to this reference.
30. Are we barred from adjudicating on this reference because of the doctrine of *res judicata*? The doctrine is uniformly defined in the Civil Procedure Acts of Kenya, Uganda and Tanzania as follows:
    No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
31. Three situations appear to us to be essential for the doctrine to apply: One, the matter must be "directly and substantially" in issue in the two suits. Two, parties must be the

same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of *res judicata* to operate. In the present case one thing is certain: The parties are not the same and cannot be said to litigate under the same title. Mr. Oluka himself has properly conceded that.

32. Secondly, while in the Constitutional Court of Uganda the issue was whether the acts complained of contravene the Constitution of Uganda, in the instant reference the issue is whether the acts complained of are a violation of the rule of law and, therefore, an infringement of the Treaty. Therefore, the doctrine does not apply in this reference.
33. Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No it does not have. Jurisdiction of this Court is provided by Article 27 in the following terms:
    1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty.
    2. The Court shall have such other original, appellate, human rights and other jurisdictions will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.
34. It very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*.
35. However, let us reflect a little bit. The objectives of the Community are set out in Article 5 (1) as follows:

    1. The objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.

    Sub-Articles (2) and (3) give details of pursuing and ensuring the attainment of the objectives as enshrined in sub-article (1) and of particular concern here is the "legal and judicial affairs" objective.
36. Then Article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course as provided in Article 5 (1). Of particular interest paragraph (d)which talks of the rule of law and the promotion and the protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.
37. Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in Sub-Article (1) and seals that with the undertaking by the Partner States in no uncertain terms of Sub-Article (2):

    The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy,the rule of law, social justice and maintenance of universally accepted standards of human rights.
38. Finally, under Article 8 (1) (c) the Partner States undertake, among other things:

Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty.

39. While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation.
40. Now, we go back to the substance of this reference. As we have already observed in this judgment, the 2nd respondent has conceded the facts which are the subject matter of this reference and, so, they are not in dispute. He has only offered some explanation that the surrounding of the Court, the re-arrest, and therefore, the non observance of the grant of bail, and the re-incarceration of the complainants were all done in good faith to ensure that the complainants do not jump bail and go to perpetuate insurgency.
41. Mr. Ogalo invited us to find that explanation unjustified because it was not supported by evidence. We agree with him and we would go further and observe that "the end does not justify the means".
42. The complainants invite us to interpret Articles 6(d), 7(2) and 8(1)(c) of the Treaty so as to determine their contention that those acts, for which they hold the 2nd respondent responsible, contravened the doctrine of the rule of law which is enshrined in those articles.
43. The relevant provision of Article 6(d) provides 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 peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

    The starting point is what does rule of law entail?
44. From Wikipedia, the Free Encyclopedia:

    The rule of law, in its most basic form, is the principle that no one is above the law. The rule follows logically from the idea that truth, and therefore law, is based upon fundamental principles which can be discovered, but which cannot be created through an act of will.
45. The Free Encyclopedia goes further to amplify:

    Perhaps the most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy.
46. Here at home in East Africa Justice George Kanyeihamba in *Kanyeihamba's Commentaries on Law, Politics and Governance* at page 14 reiterates that essence in

the following words:

The rule of law is not a rule in the sense that it binds anyone. It is merely a collection of ideas and principles propagated in the so-called free societies to guide lawmakers, administrators, judges and law enforcement agencies. The overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land.

47. It is palpably clear to us, and we have no flicker of doubt in our minds, that the principle of "the rule oflaw"contained in Article 6(d) of the Treaty encapsulates the import propounded above. But how have the courts dealt with it? In *The Republic v. Gachoka and Another* the Court of Appeal of Kenya reiterated the notion that rule of law entails the concept of division of power and its strict observance. In *Bennett v. Horseferry Road Magistrates' Court and Another*, the House of Lords took the position that the role of the courts is to maintain the rule of law and to take steps to do so.
48. In that appeal the appellant, a New Zealander, while living in Britain obtained a helicopter by false pretences and then fled the country. He was later found in South Africa but as there was no extradition treaty between Britain and South Africa, the police authorities of the two countries conspired to kidnap the appellant and took him back to Britain. His defence to a charge before a divisional court was that he was not properly before the court because he was abducted contrary to the laws of the two countries. That defence was dismissed by the divisional court.
49. However, on appeal to the House of Lords Lord Griffiths remarked at page 108:

'If the Court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.'

His Lordship went on: It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by. He then referred to the words of Lord Devlin in *Connelly v. DPP [1964] 2 All ER 401 at 442*:

The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.

The appeal was allowed and the appellant was let scot-free.

50. Have the facts complained of in this reference breached the sacred principle of rule of law as expounded above? Let us briefly reiterate the facts even at the risk of repeating ourselves; The complainants were granted bail by the High Court of Uganda but some armed security agents of Uganda surrounded the High Court premises pre-empting the execution of the bail, re-arrested the complainants, re-incarcerated them and re-charged them before a Court Martial. The complainants were not released even after the Constitutional Court of Uganda ordered so.
51. Mr. Ogalo left no stone unturned to persuade us to find that what the soldiers did breached the rule of law. He referred us to similar facts in the case of *Constitutional Rights Project and Civil Liberties v Nigeria, Communication 143/95, 150/96 – AHG/222 (XXXVI) Annex V p 63*. In that matter Chief Abiola, among others, was detained and the Federal Government of Nigeria refused to honour the bail granted to him by court. In the said Communication the African Commission on Human Rights had

this to say in paragraph 30 on page 67: The fact that the government refuses to release Chief Abiola despite the order of his release on bail made by the Court of Appeal is a violation of Article 26 which obliges State parties to ensure the independence of the judiciary. Failing to recognize a grant of bail by the Court of Appeal militates against the independence of the judiciary.

52. The facts in that Communication are on all fours with the present reference and we find that the independence of the judiciary, a corner stone of the principle of the rule of law, has been violated.
53. The African Commission went further to observe in paragraph 33 that:
    The government attempts to justify Decree No. 14 with the necessity for state security. While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform.
54. That is exactly what the Government of Uganda through the 2nd Attorney General, the respondent, attempted to do, to justify the actions of the Uganda Peoples' Defence Forces:
    a) That on 16th November, 2005, the security Agencies of the Government of Uganda received intelligence information that upon release on bail, the Claimants were to be rescued to escape the course of justice and to go to armed rebellion.
    b) That the security Agencies decided to deploy security at the High Court for purely security reasons and to ensure that the claimants are re-arrested and taken before the General Court Martial to answer charges of terrorism and unlawful possession of firearms.
55. We on our part are alarmed by the line of defence offered on behalf of the Government of Uganda which if endorsed by this Court would lead to an unacceptable and dangerous precedent, which would undermine the rule of law.
56. Much as the exclusive responsibility of the executive arm of government to ensure the security of the State must be respected and upheld, the role of the judiciary to provide a check on the exercise of the responsibility in order to protect the rule of law cannot be gainsaid. Hence the adjudication by the Constitutional Court of Uganda referred to earlier in this judgment. In the context of the East African Community, the same concept is embodied in Article 23 which provides:
    The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application and compliance with this Treaty.
57. We, therefore, hold that the intervention by the armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law.
58. The second issue is rather nebulous and we better reproduce it for a better comprehension:
    Whether the first respondent can on his own initiative, investigate matters falling under the ambit of the provisions of the Treaty.

Article 29(1) of the Treaty provides as follows:

Where the Secretary General considers that a Partner State has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned for that Partner State to submit its observations on the findings.

59. The Secretary General is required to "submit his or her findings to the Partner State concerned". It is obvious to us that before the Secretary General is required to do so, she or he must have done some investigation. From the unambiguous words of that sub-Article there is nothing prohibiting the Secretary General from conducting an investigation on his/her own initiative. Therefore, the glaring answer to the second issue is: Yes the Secretary General can on his own initiative investigate such matters.
60. But the real issue here is not whether he can but whether the 2nd Secretary General, that is, the respondent, should have done so. It was in this regard that there was heated debate in the preliminary objection on whether or not the Secretary General must have intelligence of some activity happening in a Partner State before he undertakes an investigation.
61. We dismissed the preliminary objection for the reason that the issue was not a point of law but one of fact requiring evidence. That evidence of whether or not the respondent had knowledge, however, was never produced by the complainants in the course of the hearing. This, therefore, is the appropriate juncture to determine whether or not knowledge is an essential prerequisite for an investigation by the respondent.
62. We are of the decided opinion that without knowledge the Secretary General could not be expected to conduct any investigation and come up with a report under Article 29(1).
63. We may as well add that it is immaterial how that information comes to the attention of the Secretary General. As far as we are concerned it would have sufficed if the complainants had shown that the events in Uganda concerning the complainants were so notorious that the 1st respondent could not but be aware of them. But that was not the case for the complainants.
64. In almost all jurisdiction courts have the powers to take judicial notice of certain matters. We are not prepared to say that what is complained of here is one such matter. However, the powers that the Secretary General has under Article 29 are so encompassing and are pertinent to the advancement of the spirit of the re-institution of the Community and we dare observe that the Secretary General ought to be more vigilant than what his response has portrayed him to be.
65. In any case, it is our considered opinion that even if the 1st respondent is taken to have been ignorant of these events, the moment this application was filed and a copy was served on him, he then became aware, and if he was mindful of the delicate responsibilities he has under Article 29, he should have taken the necessary actions under that Article. That is all that the complainants expected of him: to register with the Uganda Government that what happened is detestable in the East African Community.
66. In the result we hold that the reference succeeds in part and 2nd the claimants are to have their costs as against the respondent.

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East African Court of Justice
Reference No. 2 of 2007

Christopher Mtikila And The Attorney General of The United Republic Of Tanzania and The Secretary General of The East African Community

And

Dr. George Francis Nangale, Sylvia Kate Kamba, Dr. Waalid Aman Kabourou, Janet Deo Mmari, Abdullah A. H. Mwinyi, Dr. Gharib Said Bilal, Dr. John Didas Masaburi, Septuu Mohamed Nassor, Fortunatus Lwanyantika Masha - Interveners

Moijo M. ole Keiwua P, Augustino S. L. Ramadhani J, Kasanga Mulwa J, Mary Stella Arach-Amoko J. and Harold R. Nsekela J
April 25, 2007

Jurisdiction- East African Legislative Assembly elections - Whether the Applicant had locus standi -Whether the Court could annul the improper election of Tanzania's representatives to EALA.

Articles: 27, 30, 48 (1) (a), 50 (1) and 51(1) of the Treaty for the Establishment of the East African Community.

In 2001 the National Assembly of the United Republic of Tanzania elected nine persons to the East African Legislative Assembly two of whom were Dr. Harrison Mwakyembe and Mrs. Beatrice Shelukindo. In 2005 these two ran for and were elected Members of Parliament of the National Assembly and, pursuant to Article 51 (3) (c), they vacated their seats in the Legislative Assembly.

In March 2006, Dr. Norman Sigalla and Mrs. Hulda Stanley Kibacha were elected, to fill the two Tanzanian vacancies in EALA through by-elections in the National Assembly. In October, 2006, the National Assembly elected nine persons whose names were submitted to EALA. Dr. Sigalla and Mrs. Kibacha were unsuccessful and the Applicant claimed that their tenure had not ended and as per Article 51(1) so the National Assembly ought to have elected only seven new Members.

Since nine persons were elected, the Applicant argued that the total number of Members of the Legislative Assembly from Tanzania was eleven contrary to Article 50 (1) of the Treaty.

Held:
The Court had no jurisdiction to entertain the application seeking to annul the elections held by the National Assembly in October, 2006. Further, the declaration that two people were improperly elected and were not therefore Members of the Legislative Assembly was in the domain of the High Court of Tanzania.

Cases cited

Prof. Peter Anyang' Nyong'o and Ten Others v. A. G. of Kenya and Two Others and four Interveners, EACJ Reference No. 1 of 2006.

Ruling

1. Christopher Mtikila, the Applicant in this reference, has come to this Court under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty) and is seeking the enforcement of and, therefore, the compliance by the two Respondents of Articles 48 (1) (a) and 50 (1) of the Treaty. The Respondents are: the Attorney General of the United Republic of Tanzania (1st Respondent), and the Secretary General of the East African Community (2nd Respondent).
2. The Applicant's case is that one of the organs of the East African Community (the Community) established under Article 9 of the Treaty is the East African Legislative Assembly (the Legislative Assembly) which comprises twenty ¬seven elected Members and five ex officio Members according to Article 48 (1) of the Treaty. Article 50 (1) of the Treaty provides that each Partner State elects nine members to the Legislative Assembly.
3. Sometime in 2001 the National Assembly of the United Republic of Tanzania (hereinafter referred to as the National Assembly) elected nine persons to the Legislative Assembly two of whom were Dr. Harrison Mwakyembe and Mrs. Beatrice Shelukindo. In 2005 these two ran for and were elected Members of Parliament of the National Assembly and, pursuant to Article 51 (3) (c), they were required to vacate their seats in the Legislative Assembly. They did that.
4. The National Assembly held by elections, as it were, in March 2006, and elected Dr. Norman Sigalla and Mrs. Hulda Stanley Kibacha, to fill the two Tanzanian vacancies in the Legislative Assembly. However, in October, 2006, the National Assembly held a General Election, so to speak, and elected nine persons whose names have been submitted to take up the Tanzanian seats in the second Legislative Assembly since the re¬birth of the Community. Dr. Sigalla and Mrs. Kibacha were unsuccessful contenders in that election.
5. The Applicant argues that Article 51 (1) of the Treaty prescribes the tenure of every Member of the Legislative Assembly to be five years. So, he contends that the tenure of Dr. Sigalla and Mrs. Kibacha has not ended and, therefore, in October, 2006, the National Assembly ought to have elected only seven new Members to the Legislative Assembly. Since nine persons were elected, the Applicant argues, the total number of Members of the Legislative Assembly from Tanzania is eleven and that is contrary to Article 50 (1).
6. The Applicant has two prayers, to wit:
   a) "An order that the elections of a total of 9 persons to be members of the Assembly conducted by the National Assembly of Tanzania in October, 2006, as averred in paragraph 4 (e) hereinabove while the tenure of the 2 members elected as per paragraph 4 (c) above had not ended, was, and is, a nullity and without validity;
   b) An order prohibiting the East African Community Assembly to administer oaths/ affirmations of the 9 persons elected by the National Assembly of Tanzania in

October, 2006, as averred in paragraph 4 (e) above."

Paragraphs 2 and 3 of 1st Respondent's response to the reference aver:

(2) "That the Reference is misconceived and bad in law for it offends the express provisions of Article 52 of the Treaty of the East African Community."

(3) "That the Petitioner does not enjoy any *Locus standi* in this reference."

7. The 2nd Respondent has also submitted that the Applicant has no *locus standi*, that is, the Applicant does not have a legal right to come to Court. Paragraph 12 of the 2nd Respondent's response contends:
"Furthermore That the Applicant has no *locus standi* in the matter of elections of Tanzania's Members to the East African Legislative Assembly; to that extent Applicant's pleadings disclose no unlawful act on the part of the East African Community and no infringement of the Treaty within the meaning of Article 30 of the Treaty".
8. The nine persons elected in October, 2006, applied for and were granted leave to appear as Interveners in opposition to the application. In their notice of motion filed under Article 40 of the Treaty and Rules 17 and 35 of the East African Court of Justice Rules of Procedure (the Rules), the interveners contend in paragraphs (viii) and (ix) as follows:
"(viii) As this case is averring that Dr. Norman Sigalla and Mrs. Hulda Stanley Kibacha are persons who are still members of the East African Legislative Assembly, that the elections in the National Assembly of Tanzania be repeated so that only 7 people should be elected instead of nine, thus averring that two of the elected people were not properly elected, this matter should be determined by way of an election petition filed in the Tanzania courts pursuant to the provisions of Article 52 (1) of the Treaty for the Establishment of the East African Community, and Rules 15 and 16 of the East African Legislative Assembly Election Rules, 2001 made by the National Assembly of Tanzania in May, 2001.
(ix) This matter is a purely private matter involving two individual former Members of the 1st East African Legislative Assembly. There is no public interest involved. Hence the Applicant, Christopher Mtikila, has no *locus standi* to appear in this matter as it does not involve him or the public."
9. At the scheduling conference the parties had three points of agreement and three of disagreement. The three points of agreement were:
"(1)The Applicant is a citizen of East Africa.
(2) That in March 2006, Hulda Kibacha and Dr. Norman Sigalla were elected into the East African Legislative Assembly by the National Assembly of the United Republic of Tanzania.
(3) That in November 2006, the National Assembly of the United Republic of Tanzania elected nine (9) Members to the East African Legislative Assembly."
10. The three points of disagreement were:
1) Whether this Court has jurisdiction to entertain this reference.
2) Whether the Applicant has locus standi in this reference.
3) Whether swearing in of the Nine (9) Members elect will result into Tanzania having eleven (11) Members in the East African Legislative Assembly contrary to the provisions of the Treaty.

The first two points of disagreements are really preliminary objections. It was, therefore, agreed that the issues of jurisdiction of this Court over the matter in dispute, and the locus standi of the Applicant be determined first.

11. The Applicant was represented by Mr. Audax Kahendaguza Vedasto, learned advocate while 1st Respondent had three learned Principal State Attorneys, to wit, Mr. Matthew Mwaimu, Mr. Joseph Ndunguru, and Mr. Paul Ngwembe. Mr. Wilbert Kaahwa, learned Counsel to the Community, appeared for the 2nd Respondent. The interveners were advocated for by Mr. Mabere Marando, learned counsel.
12. Mr. Mwaimu's contention that prayer 5 (a) of the Applicant of necessity calls upon this Court to probe whether or not the nine persons elected in October, 2006, are Members of the Legislative Assembly but, he submitted that, that determination is the preserve of the High Court of Tanzania under Article 52 (1) of the Treaty. He referred us to our judgment in Reference *No. 1 of 2006, Prof. Peter Anyang' nyong'o and Ten Others v. A. G.of Kenya And Two Others and four Interveners*. Mr. Mwaimu also submitted that a person will have locus standi under Article 30 only where the Court has jurisdiction in terms of Article 27, that is, where the matter before the Court is one of the interpretation and the application of the Treaty. In this application, the learned Principal State Attorney contended, there is no issue of interpretation at all. He asked the matter to be dismissed with costs.
13. Mr. Kaahwa was very brief on locus standi. He contended that the Applicant has not shown in his pleadings sufficient connection to the electoral process in the National Assembly. The learned Counsel continued that the Applicant would have locus standi under Article 30 if he alleged an infringement of the Treaty outside the electoral process which is vested in an institution of a Partner State. In other words Mr. Kaahwa was submitting that the Applicant should have invoked the provisions of Article 52 of the Treaty. He, too, prayed that the reference should be dismissed with costs.
14. Mr. Marando drew our attention to what he called salient features in this application which were not pleaded and his two learned friends did not address. He pointed out that there are two lacunae in the Treaty. That is, the Treaty does not provide for two matters: One, the life span of the Legislative Assembly itself. The learned advocate said that the Treaty provides for the tenure of the individual Members of the Legislative Assembly only. Two, the Treaty does not provide for the process of filling up of any of the vacancies enumerated in Article 51 (3).
15. Mr. Marando further submitted that prayer 5 (a) of the Applicant requires a declaration that the election of the nine Members in October, 2006, was a nullity and without validity. This, he said, is what is referred to in East African jurisprudence as avoiding an election and that is the business of the High Court of Tanzania and not of this Court. He pointed out that the lacunae do not entitle the Applicant to the prayers he seeks in the reference.
16. Mr. Vedasto stated that this Court has jurisdiction as both Respondents, as well as the Interveners, have not disputed that the Applicant has locus standi under Article 30. He emphasized that the application is of public interest. Mr. Vedasto contended that whether or not Dr. Sigalla and Mrs. Kibacha contested the elections and took the dues which all the Members were given after the dissolution of the Legislative Assembly is

immaterial to the operation of the Treaty.

17. Mr. Vedasto went on to say that the case of the Applicant is not to question the validity of the election of any person but is to point out that there are eleven Members in the Legislative Assembly from Tanzania instead of nine. He also referred us to the judgment of this Court in *Prof. Anyang'nyong'o* where it was said that even in situations where Article 52 of the Treaty is involved this Court still retains jurisdiction if there are other issues which do not fall under Article 52.
18. In reply Mr. Mwaimu had nothing to add to what he had submitted earlier on. Mr. Kaahwa, on the other hand, conceded the existence of the *lacunae* disclosed by Mr. Marando but added that the application is not with regard to the lacunae but with regard to the membership of the Legislative Assembly which is the subject matter of Article 52 of the Treaty.
19. We are of the decided view that the first issue of whether or not this Court has jurisdiction will determine the matter and the question of locus standi need not detain us.
20. For the avoidance of doubt we have to point out that in this application it is accepted that there were elections in the National Assembly in 2001, in March and in October, 2006. So, what is before us is totally different from what was before this Court in *Prof. Anyang' Nyong'o* where the contention was that there was no election at all as prescribed under Article 50 (1) of the Treaty.
21. Admittedly, in *Anyang' Nyong'o* this Court said that it still retains jurisdiction even where Article 52 of the Treaty is applicable if there are other matters which do not fall under that Article. But the Court went on to say at page 20 of the type written judgment that:

    "In paragraph 29 and 30 of the reference, however, the claimants have referred to the Court two other issues, which we consider to be the core and material pleadings for purposes of the reference. It is those pleadings that disclose the special causes of action, which evoke this Court's jurisdiction under the Treaty. And it is only those pleadings that will be subject of adjudication in this reference."
22. Those two paragraphs provide as follows:

    (29) It is the contention of the claimants that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravenes Article 50 of the East African Community Treaty in so far as no election was held nor debate allowed in Parliament on the matter.

    (30) The claimants also contend that any such rules that may have been invoked by the Kenyan National Assembly which do not allow election directly by citizens or residents of Kenya or their elected representative is null and void for being contrary to the letter and spirit of the Treaty."

    No such complaints have been made in this application which would invoke this Court's jurisdiction.
23. As for Mr. Marando's submission we agree with Mr. Kaahwa that the application is not with regard to the lacuna but with regard to the membership of the Legislative Assembly. The Applicant's complaint is that: The tenure of Dr. Sigalla and Mrs. Kibacha is five years and that they are still Members of the Legislative Assembly until

sometime in March, 2011, and, so, last October the National Assembly should only have elected seven Members. Since nine Members were elected, then there are eleven Members from Tanzania. Hence the Applicant in his prayer 5 (a) wants us to declare those elections null and void.

24. The Applicant is saying that of the nine persons elected in October, 2006, two of them are not Members of the Legislative Assembly. It is glaringly clear to us that what the Applicant is saying can be appropriately encapsulated in the words forming the heading of Article 52 of the Treaty: "Questions as to Membership of the Assembly". This is true of at least two persons out of the nine who were elected in November, 2006. Obviously, this is the province of the High Court of Tanzania and not of this Court.

25. As Mr. Marando properly pointed out, Rule 15 of the East African Legislative Assembly Election Rules (the Tanzania Election Rules), which the Applicant produced in his list of authorities, provides:

"Pursuant to the provisions of Article 52 (1) of the Treaty, the election of the candidate as a Member of the East African Legislative Assembly may be declared void only on an election petition."

Rule 16 goes further to articulate that:

"The procedure, jurisdiction and the grounds for declaring void the election of such member, shall be the same as provided by law for election petitions in respect of members of the national parliament."

26. As we have pointed out earlier, the Applicant is striving to have Dr. Sigalla and Mrs. Kibacha to be recognized as Members of the Legislative Assembly and to drop two out of the nine persons whose names have been submitted to the Legislative Assembly. In practical terms it means that Dr. Sigalla and Mrs. Kibacha are to substitute two persons on the list of Members from Tanzania which has been submitted to 2nd Respondent.

27. We are at one with Mr. Mwaimu when he referred us to page 20 of the judgment of this Court in *Prof. Anyang' nyong'o* where it was said:

"We agree that if the only subject matter of the reference were those circumstances surrounding the 3rd substitution of the interveners for the said four claimants, this Court would have no jurisdiction over the reference."

28. In that reference four claimants averred that they had been properly nominated by their political parties within NARC but that the Chief Whip unilaterally and pompously sent in his list of names which excluded the four names. The Court said that if it was only called upon to substitute names, that is, act as if there was an election petition, the Court would not have jurisdiction. That would have been properly the domain of the Kenyan Courts. That is also the case with regard to this reference: the declaration that two persons were improperly elected and that they are not Members of the Legislative Assembly is the domain of the High Court of Tanzania and not this Court.

29. We, therefore, hold that this Court has no jurisdiction to entertain this application which seeks to annul the elections held by the National Assembly in October, 2006. We allow the preliminary objection raised and dismiss the reference with costs for one advocate for each Respondent.

* * * *

East African Court of Justice
Reference No. 3 of 2007

The East African Law Society, The Law Society of Kenya, The Tanganyika Law Society, The Uganda Law Society And The Zanzibar Law Society

And

The Attorney General of the Republic of Kenya, the Attorney General of the United Republic of Tanzania, the Attorney General of the Republic of Uganda, the Secretary General of the East African Community

Mulenga V.P., Kasanga Mulwa and Arach -Amoko JJ.
September 1, 2008

Cessation of sovereignty - Justiciability - Sovereign right of Partner States to amend the Treaty - People's participation- Prospective annulment- Whether the Treaty amendment process was proper, carried out in good faith and could be stopped.

Articles: 5, 7 (a), 26, 30, 38(2) 150 of the Treaty for Establishment of the East African Community.

On 14th December 2006, the Summit of the Heads of State of the then three Partner States in the East African Community considered and adopted amendments to several articles of the Treaty for Establishment of the East African Community. The amendments appear to have been instigated by an interim order issues by the EACJ restraining the Clerkto the East African Legislative Assembly and the Secretary General of the East African Community from recognizing 9 persons as duly elected by the National Assembly of Kenya to the East African Legislative Assembly. By 19th March 2007, the Partner States had deposited their instruments of ratification on 16th March 2007; the said amendments were published in the East African Community Gazette.

The five applicants jointly challenged the legality of the amendments to the Treaty and sought declarations that the amendment process infringed provisions of the Treaty and norms of international law and was of no legal effect.

Held:

1. Residents of the Partner States are vested with the right to access this Court and to challenge any form of infringement of provisions of the Treaty under Article 30.
2. The Partner States bound themselves to abide by the procedure specified in Article 150 in the process of amending the Treaty; they cannot therefore amend the Treaty in any other way. To that extent, the Partner States agreed to cede a degree of their respective sovereignty. Thus, the question whether the amendment process amounts to an infringement of the Treaty is justiciable and cannot be barred on the ground of

sovereignty of the Partner States.

3. The submission of proposed amendments of the Treaty to the Summit by the EAC Secretary General within five days after his communication to the Partner States was not an infringement of Article 150 (5) of the Treaty.
4. The Partner States did not engage in any serious widespread consultations on the amendments and failure to carry out consultations outside the Summit, Council and the Secretariat was inconsistent with a principle of the Treaty and constituted an infringement of the Treaty.
5. The lack of people's participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty in general, and it constituted and infringement of principles and provisions in Articles 5(3) (g), and 7(1) (a).

   i). The purpose for which Article 26 was amended constituted infringement of Article 38(2) of the Treaty. Though the infringement was not a conscious one, the infringement should not recur.

   ii). Infringement of the Treaty had no significant effect on the requirement of involvement of people in the Treaty amendment process and shall have prospective application.

Cases cited:

Barcelona Traction, Light and Power Company Limited (Belgium vs.Spain) 2nd Phase (1970) I.C.J.Reports

Benito Ang v.Judge R.G. Quilala and others: [A.M. No. MTJ-03-1476] February 4, 2003

CalistMwatela and others v. Secretary General of the EAC, Reference No.1 of 2005

Prof. Peter Anyang' Nyong'o & 10 others v. The AttorneyGeneral of Kenya & 5 others, EACJ, Reference No. 1 of 2006

Judgment

1. On 14th December 2006, the Summit of the Heads of State of the then three Partner States in the East African Community ("the Summit") considered and adopted amendments to several Articles of the Treaty for the Establishment of the East African Community ("the Treaty"). On subsequent diverse dates, the three Partner States severally ratified the said amendments to the Treaty and deposited their respective instruments of ratification with the Secretary General of the East African Community. The last of the instruments of ratification was so deposited on 19th March 2007. Meanwhile, on 16th March 2007, the said amendments were published in the East African Community Gazette.
2. In this reference, the five applicants jointly challenge the legality of the said amendments to the Treaty and seek declarations that the amendment process infringed provisions of the Treaty and norms of international law and was of no legal effect. They also seek diverse consequential orders.

Background

3. The facts leading to the reference are generally not in dispute. On 27th November 2006, this Court delivered a ruling granting an interim order in the case of *Prof. Peter*

Anyang' Nyong'o & 10 others vs. The Attorney General of Kenya & 5 others Reference No. 1 of 2006, restraining the Clerk to the East African Legislative Assembly and the Secretary General of the East African Community from recognizing 9 persons named in the order as duly elected by the National Assembly of Kenya to the East African Legislative Assembly (EALA) or permitting them to participate in any function of the EALA until the final determination of the reference. In that reference, the applicants challenged the legality of nomination of the 9 persons to the EALA on the ground that the National Assembly of the Republic of Kenya did not elect them in accordance with Article 50 of the Treaty. In apparent reaction to the Court's ruling, the Council of Ministers of the East African Community ("the Council"), at its meeting on 28thNovember 2006, considered the implications of the interim order and decided to recommend to the Summit that the matter be referred to the Sectoral Council on Legal and Judicial Affairs to study the jurisdiction of this Court and other related matters and advise on the way forward.

4. In a communiqué issued at the conclusion of its meeting at Arusha, on 30th November 2006, the Summit – "Endorsed the recommendation of the Council of Ministers to reconstitute the East African Court of Justice by establishing two divisions, a court of First Instance with jurisdiction as per present Article 23 of the Treaty and an Appellate Division with appellate powers over the Court of First Instance.
   Directed that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty.
   Directed that a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard."
5. This sparked off a flurry of activity, the highlights of which are
   - » An extraordinary meeting of the three Attorneys General of Kenya, Tanzania and Uganda held on 7th December 2006, which considered draft amendments to the Treaty in line with the said communiqué and recommended to the Council that the same be approved and submitted to the Summit pursuant to Article 150 for consideration and adoption;
   - » A meeting of the Council held at Arusha on 8th December 2006, during which the draft amendments to the Treaty approved by the meeting of the Attorneys General of the Partner States was considered and approved;
   - » Submission of the proposed amendments to the Partner States by the Secretary General of the East African Community ("the Secretary General") on 9th December 2006 and the respective replies dated 11th, 12th and 13th December 2006;
   - » The adoption of the amendments and signing of the Instrument of Adoption by the Summit on 14th December 2006;
   - » The deposit with the Secretary General of the instruments of ratification of the amendments by the Governments of Kenya on 8th January 2007, of Uganda on 26th February 2007 and of Tanzania on 19th March 2007.

The Amendments

6. Although this reference does not relate to the substance of the amendments, it is useful to note at least their import, which is –
   - » To restructure the Court into two divisions, i.e. a First Instance Division and an Appellate Division; (Article 24);
   - » To include, among the grounds for removing a judge of the Court from office, the following –

   "in the case of a judge who also holds judicial office or other public office in a Partner State, [if the judge] – is removed from that office for misconduct or due to inability to perform the functions of the office for any reason;
   or resigns from that office following allegation of misconduct or of inability to perform the functions of the office for any reason; if the judge is adjudged bankrupt or convicted of an offence involving dishonesty or fraud or moral turpitude under any law in force in a Partner State."
   And to provide for suspension of a judge who is under investigation for removal or is charged with such offence; (Article 26);
   - » To limit the Court's jurisdiction so as not to apply to "jurisdiction conferred by the Treaty on organs of Partner States"; (Art. 27 & 30)
   - » To provide time limit within which a reference by legal and natural persons may be instituted, (Article 30);
   - » To provide grounds on which appeal may be made (Article 35A); and
   - » To deem past decisions of the Court and existing judges to be decisions and judges of the First Instance Division respectively. (Article 140 A).

Subject matter of the Reference

7. The substance of the reference as pleaded by the applicants in paragraph 17 of the reference reads –
   "17.In the premises, the subject matter of this reference is that –
   a) The purported declaration of the Summit, contained in the Communiqué of 30th November 2006, was not encapsulated in an East African Gazette Notice, as expressly stipulated by Article 11 of the Treaty, and therefore the decision has no legal effect.
   b) The explicit time-lines, as well as the elaborate procedures, for treaty amendment, expressly stipulated in Article 150 of the Treaty, were and continue to be infringed, and the said amendments therefore have no legal effect. In particular –
      1) There was no written proposal from either a Partner State or the Council of Ministers as provided in Article 150(2) and (3);
      2) The Secretary General of the Community did not communicate the amendments in writing to the Partner States as provided in Article 150(3);
      3) Further the 30-day notice period prescribed in Article 150(3) was not observed;
      4) The mandatory 90-day period for Partner States' comments prescribed under Article 150(4) and (5) was not observed;
      5) There were no written comments from the Partner States as stipulated in Article 150(5);
   c) The purported ratification of the amendments by the Republic of Kenya, the

Republic of Uganda and the United Republic of Tanzania by their respective Cabinets are an infringement of Article 150(6); further they are unconstitutional, illegal and therefore of no legal effect;

d) In attempting or purporting to amend the Treaty while the Court was still seized of Treaty (sic) Reference Application Number 1 of 2006, the Partner States and the Secretariat of the Community infringed Articles 8(1)(c) and 38(2) of the Treaty. As a consequence the entire purported process of treaty amendment is vitiated and of no legal effect;

e) The Summit, Council of Ministers, Office of the Secretary General and the 3 Partner States' Attorneys General excluded all the other organs of the Community, the Partner States governments and more importantly, the people and registered interest groups of East Africa in the irregular and rushed Treaty amendment process. This infringes both the Preamble and Articles 1, 5, 6, 7, 8, 9, 11, 38 and 150 of the Treaty."

8. We should observe at the outset that although the aforesaid pleading was not amended and none of the averments therein was otherwise withdrawn, learned counsel for the applicants addressed the Court only on the averments in paragraphs 17 (b) 4) and 17(e) in the submissions under issue no.2, and on those in paragraph 17(d) in the submissions under issue no.3. No evidence was adduced in support of, and learned counsel did not canvass the averments in paragraph 17(a), 17(b) 1), 2), 3) and 5) and 17(c) obviously because they were inconsistent with the available evidence, and no counter evidence to support them was adduced. We shall therefore regard those particular averments as abandoned.
9. Although the reference is stated to be made under twelve articles of the Treaty, the only article under which any legal or natural person may bring such a reference is article 30 of the Treaty. The five applicants are legal persons. The 1st applicant is a Company limited by Guarantee, and registered in Tanzania as such and in Kenya and Uganda as a Foreign Company. Its membership consists of individual lawyers as well as five national associations of lawyers of Kenya, Tanzania, Uganda, Rwanda and Zanzibar. The 2nd, 3rd and 4th applicants are corporate entities established by national statutes of Kenya, Tanzania and Uganda respectively; and the 5th applicant is a registered society under Zanzibar legislation.
10. The four respondents are cited in the reference in their respective representative capacities, representing the Republic of Kenya, the United Republic of Tanzania, the Republic of Uganda and the East African Community, respectively.
11. The reference was filed in the Court Registry on 18th May 2007 and was followed by separate responses from all the respondents. Upon conclusion of the pleadings and in pursuance of rule 52 of the Rules of Procedure, the Court held a scheduling conference on 2nd November 2007 during which the parties inter alia framed the following issues for determination by the Court, namely –
    1) Whether the reference is properly before the Court;
    2) Whether the process of amending the Treaty was proper and lawful;
    3) Whether the said amendments were carried out in good faith;
    4) Whether the amendments as carried out can be stopped; and
    5) Whether the amendments will strengthen the Community.

12. Hearing did not proceed promptly due to several adjournments initially with a view to settlement and subsequently because of post-elections problems in Kenya. Hearing finally commenced on 7th May 2008 with oral submissions of counsel, the evidence relied on by all the parties being by affidavits filed along with the pleadings.
13. Prof. Fredrick Ssempebwa the learned lead counsel for the applicants made submissions on all the framed issues. He was assisted by Mr. Alex Mgongolwa and Mr. Donald Deya who shared the submissions in reply to submissions for the respondents. Learned counsel for the respondents shared the framed issues among themselves. Mr. Wilbert Kaahwa, learned Counsel to the Community who appeared for the 4th respondent argued issues no, 1 and no. 5 on behalf of all the respondents. Mr. Anthony Ombwayo, learned counsel for the 1st respondent, Mr. Henry Oluka, learned counsel for the 3rd respondent, and Mr. Joseph Ndunguru counsel for the 2nd respondent, did likewise respectively on issues no. 2, no. 3, and no. 4.

Submissions on Issue No.1

14. The first framed issue, namely "Whether the reference is properly before the Court" could have been taken as a preliminary objection, but the parties argued it along with the rest of the issues. Primarily, it arose from the responses of the 1st and 3rd respondents. The former pleaded that the subject matter of the reference, being the result of a decision of one organ of the Community, was not subject to review by this Court under Article 30. The latter pleaded that the reference was incompetent and misconceived because there was no dispute amongst the parties to the Treaty. Additionally, the 2nd and 4th respondents pleaded that under international law, the applicants were not competent to challenge the sovereign right of the Partner States to amend the Treaty to which they were parties.
15. Learned counsel for the respondents explained that the contention that the reference was not properly before the Court was not in respect of the Court's jurisdiction or competence to determine the reference, but rather it was in respect of the applicants' lack of capacity to bring the reference to court. On the one hand he submitted that it is a trite principle under international law, that the making of treaties, as well as the amendment thereof, is a sovereign function and a preserve of states as the contracting parties. The individual subjects of the contracting states have neither a role to play in the function nor a right to challenge the execution of the function by the contracting states. In the instant case the right to amend the Treaty by agreement of all the Partner States was reiterated under Article 150. He maintained that the applicants had no capacity to challenge the Partner States in the exercise of that right.
16. Secondly, learned counsel submitted that the reference was not properly before this Court because it lacked one of the essential elements of a reference under Article 30 of the Treaty. According to learned counsel, a reference is properly before this Court under that article only if –
    - » the applicant is a resident of a Partner State;
    - » the subject matter of the reference is "an Act, regulation, directive, decision or action of a Partner State or of an institution of the Community"; and
    - » the ground of the reference is that the challenged subject matter is an infringement of a provision of the Treaty or is otherwise unlawful.

17. He maintained that what is envisaged under the second requirement is not something done or made by the Partner States together as contracting parties or by an organ of the Community. According to learned counsel, what is envisaged is what is done or made by a single Partner State or an institution of the Community, which is unlawful or an infringement of the Treaty. Learned counsel submitted that in the instant case, the second requirement was not satisfied, in as much as the subject matter of the reference was not an Act, regulation, directive, decision or action of a single Partner State or of an institution of the Community.
18. Learned counsel urged us to interpret the provisions of Article 30 of the Treaty strictly, and not to construe them as impugned on the sovereignty of the Partner States; emphasizing that under that article, only an Act, regulation, directive, decision or action of a single Partner State or an institution of the Community may be challenged; but not that of an organ of the Community. He argued that to the extent that in this reference the applicants challenge the legality of the decision of the Summit to amend the Treaty, the reference does not fall within the ambit of Article 30 and is therefore not properly before this Court. He submitted that the decision of this Court in *Callist Mwatela and others vs. Secretary General of the EAC, Reference No.1 of 2005*, which the applicants rely on, is not a proper authority because the pertinent question, whether a directive, decision or action of an organ of the Community is justifiable under Article 30 was not raised and this Court did not pronounce itself on it.
19. While conceding that the making of a treaty, as well as the amendment thereof, is a sovereign function of state, learned counsel for the applicants, submitted that each treaty must be interpreted in the context of its objectives. He stressed that the main objective of the Treaty in the instant case is the phased integration of the Partner States into a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation. He invited the Court to take into consideration the historical context of the Treaty when interpreting its provisions. In that regard he recalled that the past failed East African Community was not people centered and noted that, in contrast, the Treaty provides in Article 7(1) (a), that the operational principles for achieving its objectives shall include "people centered and market driven co-operation". Counsel submitted that in furtherance of that principle, the Treaty confers rights on the people of East Africa and permits them to enforce those rights through this Court. In so doing and in binding themselves under Article 150 as to the procedure for amending the Treaty, the Partner States surrendered some degree of sovereignty.
20. With regard to the scope of Article 30, learned counsel recalled the Court's duty under Article 23, to ensure adherence to law in the interpretation and application of the Treaty, and the empowerment of natural and legal persons in East Africa under Article 30, to challenge any illegality in the application of the Treaty by a Partner State or institution of the Community, and submitted that Article 30 cannot be construed as excluding from such challenge, illegality by an organ of the Community.

    He invited the Court to apply the purposeful approach in interpreting the article and to hold that any Act, regulation, directive, decision or action by an organ of the Community is within the ambit of Article 30 and may be challenged under it. Learned

counsel cited as authority for that proposition, the decision of this Court in *Callist Mwatela and others vs. Secretary General of the EAC, (supra)*, where the decisions/ directives of the Council of Ministers, an organ of the Community, were successfully challenged under Article 30.

21. In reply to the submissions by the respondents' counsel, learned counsel for the applicants further pointed out that the two main arguments in support of the respondents' contention contradicted each other. Whereas on the one hand the respondents argued that the reference was incompetent for purporting to challenge the sovereign function of the Partner States, on the other hand they argued that it was incompetent for purporting to challenge the decision and action of an organ of the Community. Learned counsel maintained that the reference was brought in respect of decisions and actions of the Partner States and were therefore properly before the court as envisaged under Article 30.

Conclusion on Issue No.1

22. In this reference, the applicants do not challenge the sovereign right of the Partner States to amend the Treaty. They only contend that under Article 150 of the Treaty the Partner States bound themselves to follow a prescribed procedure in exercising that right and that a deviation from that procedure constitutes an infringement of the Treaty. They argue that in effecting the amendments in issue in the instant case, the prescribed procedure was not complied with, and that consequently the amendments amounted to an infringement of the Treaty. We agree in as much as the Partner States bound themselves to abide by a specified procedure in the process of amending the Treaty, they cannot amend the Treaty in any other way. To that extent the Partner States agreed to cede a degree of their respective sovereignty. In our view, therefore, the question whether the amendment process in issue in this reference amounts to an infringement of the Treaty is justiciable and cannot be barred on the ground of sovereignty of the Partner States.
23. Secondly, the applicants do not claim to have any inherent right to make this reference questioning the manner in which the Partner States exercised their sovereign right to amend the Treaty. They, as residents of the Partner States, rely on the right the Treaty vests in them under Article 30, which reads –

    " Reference by Legal and Natural Persons Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty."
24. Ordinarily at international law, a treaty between or among states, like any contract, protects interests of or creates rights for the parties thereto and imposes duties and obligations on the parties to it. Neither another state that is not a party, nor a legal or natural person, may directly claim any interest or right under it, notwithstanding that other state or person derives benefit from implementation and operation of the treaty. However, nothing prevents the state parties to a treaty to vest in any person or other state an enforceable right.

25. It is clear from the provision of Article 30 that the residents of the Partner States are vested with the right to access this Court for the purpose of challenging any form of infringement of provisions of the Treaty. Several provisions in the Treaty lend weight to the view that this was a deliberate provision to ensure that East Africans for whose benefit the Community was established participate in protecting the integrity of the Treaty. The following excerpts from the Treaty in particular, stand out to illustrate that deliberate intent. First, in the Preamble to the Treaty, the fourth recital recalls and highlights that one of "the main reasons that contributed to the collapse of the (previous) East African Community" in 1977, was "lack of strong participation of the private sector and civil society in the co¬operation activities"; and the eleventh recital records that the parties to the Treaty "are resolved to create an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities" Secondly, Article 7 provides –

"The principles that shall govern the practical achievement of the objectives of the Community shall include: people-centered and market-driven co-operation;"

26. In our view, therefore, it would be a negation of that deliberate intent to bar the reference on the ground that the applicants had no capacity to bring a reference challenging a sovereign function of the Partner States.
27. Lastly, we are not persuaded by the respondents' urging that we give to Article 30, a narrow interpretation that excludes from the application of the Article, infringement of the Treaty by an organ of the Community. With due respect to learned counsel, it seems to us that such a restrictive interpretation is not based on a sound ground. It is only based on the fact that no mention of infringement of the Treaty by an organ of the Community is made in Article 30. It is noteworthy that the Treaty provides for two other similar references to this Court. Article 28 authorises a Partner State to make a similar reference in respect of a failure to fulfill an obligation under the Treaty or of an infringement of a provision thereof on the part not only of another Partner State or an institution of the Community but also of an organ of the Community. On the other hand, Article 29 empowers the Secretary General, subject to direction by the Council, to make a similar reference to the Court in respect of such a failure or infringement by a Partner State only.
28. We note the disparity in the three articles depending on who is responsible for the alleged failure or infringement, but having regard to the purpose of the provisions, namely to ensure compliance with provisions of the Treaty and to provide for empowerment of inter alia any resident to seek judicial adjudication where there is allegation of non-compliance, we are inclined to the view that a restrictive interpretation would defeat that purpose.
29. We agree that in *Callist Mwatela and others vs. Secretary General of the EAC, (supra)* the subject matters of the reference were decisions and actions of organs of the Community, but no one raised the point of their justifiability. In our view, however, that is not a substantial point. Legally the organs are not corporate entities, but are components of the Community, which is the corporate body. Ordinarily, an act of an organ in discharging its functions is an act of the corporate Community. However, in areas where a function of the Partner States has not been ceded to the Community,

an organ may discharge the function in the context of "the Partner States acting together."

30. In the instant reference, the alleged infringement is in essence not the diverse individual decisions, directives or actions of the Summit or other organs of the Community set out in the reference. The alleged infringement is the totality of the process of the Treaty amendment, which amendment was, and can only be made by the parties to the Treaty, namely the Partner States, acting together through the organs of the Community. It follows that if in the amendment process the Treaty was infringed, it was infringed by the Partner States. The reference therefore cannot be barred on the ground that its subject matter are decisions and actions of organs of the Community.

    For the reasons we have set out, we find and hold that the reference is properly before this Court. Accordingly we answer issue no.1 in the affirmative.

Submissions on Issue No.2

31. The second issue revolves around the construction of Article 150 which reads –
    1) "Amendment of the Treaty
    2) The Treaty may be amended at any time by agreement of all the Partner States.
    3) Any Partner State or the Council may submit proposals for the amendment of this Treaty.
    4) Any proposals for the amendment of this Treaty shall be submitted to the Secretary General in writing who shall, within thirty days (30) of its receipt, communicate the proposed amendment to the Partner States.
    5) The Partner States which wish to comment on the proposals shall do so within ninety days (90) from the date of the dispatch of the proposal by the Secretary General. After the expiration of the period prescribed under paragraph 4 of this Article, the Secretary General shall submit the proposals and any comments thereon received from the Partner States to the Summit through the Council.
    6) Any amendment to this Treaty shall be adopted by the Summit and shall enter into force when ratified by all the Partner States."
32. As noted earlier in this judgment, Issue No.2 is: "Whether the process of amending the Treaty was proper and lawful". The thrust of the submissions by learned counsel for the applicants on this issue is that the amendment process was flawed in two respects, namely failure to abide by the mandatory time-frame prescribed under Article 150(4) and (5), and absence of adequate or any consultation of "the people" on the proposals for amendment, as envisaged under the Treaty.
33. Learned counsel contended that whether the proposal is by all the Partner States together or by any one of them or the Council, it must be processed through the stages set out in Article 150 under paragraphs (2) to (6) because they are all mandatory. He stressed in particular that the period of 90 days from the time the Secretary General communicates the proposal to the Partner States must expire before the proposal with the comments from the Partner States is submitted to the Summit through Council, even if the Secretary General receives the comments well before expiry of that period, as happened in the instant case. According to counsel, the 90 days period must not be abridged because it was prescribed for the purpose of allowing wide consultation on

any proposed amendment, in order to maintain the whole Treaty as people-centered. In this regard, he invited the Court to take judicial notice of the extensive consultation that was carried out on the proposal to "Fast-track Political Federation", and the on-going wide consultation on extension of the Court's jurisdiction.

34. On the basis of his analysis of Article 150, learned counsel argued that although in the communication to the Partner States and in the submission to the Summit the Secretary General purported to do so in accordance with Article 150(4) and (5) respectively, the submission of the proposed amendments to the Summit before expiry of the prescribed 90 days was an infringement of Article 150(5). He argued further that the undisputed fact that the amendment process from initiation to conclusion took only a few days, is sufficient proof that the consultations envisaged under the Treaty, were not carried out, and the Treaty was thereby infringed.
35. Learned counsel for the respondents submitted that the Treaty may be amended in one of two different ways. To put it in his own words, he said –
"It is trite law that a treaty can be amended in two modes. The first mode of amending a treaty is by agreement. This is an agreement by the Partner States to amend the provisions of the treaty. The second mode of amendment is as provided for under Article 150(2) to (5) of the Treaty…… that is a set out procedure for amendment of the Treaty where there is no agreement.
36. He submitted that the first mode was recognized at international law and was embodied in Article 39 of the Vienna Convention on the Law of Treaties, ("the Vienna Convention") and was reiterated in Article 150(1) of the Treaty. Initially, learned counsel contended that in the instant case the Partner States amended the Treaty by agreement, applying the first mode of amendment, when in the communiqué at the Summit meeting of 30th November 2006, the Heads of State endorsed the recommendations of the Council and issued conclusive directives –
    - » to reconstitute the East African Court of Justice into two divisions;
    - » to review the procedure for removal of judges from office; and
    - » to convene a special Summit to consider the amendments.
37. In the course of his submissions, however, without conceding that the communiqué did not constitute an effective amendment of the Treaty, learned counsel accepted that in addition to the agreement of the Partner States to amend the Treaty that is evidenced by the communiqué, there was compliance with the procedure set out in paragraphs (2) to (5) of Article 150 and in particular stressed that paragraphs (4) and (5) were not infringed.
38. 38. The substance of learned counsel's argument in regard to the timeframe set out in paragraphs (4) and (5) of Article 150 may be paraphrased thus: Where one act is required to be done within a set period and a second act is required to be done after expiry of the said set period, for purposes of doing the second act, the set period is deemed to expire when the first act is done. Learned counsel maintained that in the instant case, when the Partner States submitted their comments on the proposed amendments within the set period of 90 days, for purposes of the next step of submitting the proposed amendments with the comments to the Summit, the 90 days period was deemed to lapse upon the Secretary General receiving the last of the comments from the Partner States.

39. Consequently, according to learned counsel, the submission of the proposed amendments with the comments well before the actual expiry of 90 days did not constitute an infringement of Article 150(5) of the Treaty. In support of his argument, learned counsel referred to the cases of *Alida Singh vs. Vanel Singh (1956) RD-SC 83; Jaramogi Oginga Odinga and others vs. Zacherus Chesoni Application No.602 of 1992 (K) and David Wakairu Murathe vs. Samuel Macharia Civil Appeal No.171 of 1998 (K)*, which we did not find helpful.
40. Furthermore, learned counsel opposed the applicants' proposition that the Secretary General has to await the actual expiration of 90 days before the submission to the Summit even after all the comments are received. In his view such interpretation renders the provision absurd. Article 150 does not provide for mandatory or any consultation and therefore requiring the Secretary General after receiving all the comments to postpone submission of the same for further action would be pointless and absurd.

Consideration and conclusion of Issue No.2

41. There are two components in issue no.2, which in the interest of clarity we shall consider separately. We shall first consider whether the amendment process infringed the Treaty by reason of noncompliance with Article 150, and then consider if it infringed the Treaty in any other way.
42. We should mention at the outset that we do not agree with the submission by counsel for the respondents that Article 150 provides for two modes of amending the Treaty. In our view the provision in Article 150(1) is a general provision reiterating the position at international law as reflected in Articles 39 and 40 of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 39 substantially provides that a treaty may be amended by agreement between the parties to it. That indicates the capacity to amend not the procedure for amending. Article 40 makes that quite clear by providing that unless otherwise provided in the treaty –
    "Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
    a) the decision as to the action to be taken in regard to that proposal
    b) the negotiation and conclusion of any agreement for the amendment of the treaty."
43. In the instant case, the Treaty does not provide otherwise. Rather in paragraphs (2) to (6) of Article 150 it makes provisions for the parties to it, i.e. the Partner States, to participate in the amendment process. As we noted earlier in this judgment, the bone of contention is whether the provisions in those paragraphs were complied with in making the impugned amendments.
    In view of the abandoned pleadings we alluded to earlier in this judgment, we need focus only on the provisions in two of the paragraphs, namely paragraphs (4) and (5) of Article 150.
44. Paragraph (4) provides that the Partner States wishing to comment on proposed amendments shall do so within 90 days from the date the proposals were dispatched to them. Paragraph (5) provides that after expiration of that period (90 days), the Secretary General shall submit the proposed amendments, with any comments

thereon, to the Summit through the Council.

45. It is not in dispute that the Secretary General submitted the proposed amendments to the Summit long before expiry of the period of 90 days from the day he communicated them to the Partner States. It is indeed recorded in the Report of the 4th Extraordinary Meeting of the Summit held on 14th December 2006 that pursuant to Article 150 of the Treaty, the Summit received the proposed amendments with the comments, not through the Council, but directly from the Secretary General at that meeting. That was only 5 days after his communication to the Partner States, and therefore well before expiration of 90 days' period.

46. We have given anxious consideration to the opposing arguments on the interpretation to be placed on the expression "After the expiration of the period prescribed under paragraph 4 of this Article" appearing in paragraph (5) of Article 150. Counsel for the applicants urged that we must give it its plain ordinary meaning that translates to: "after expiration of 90 days", which is the period prescribed under paragraph 4. However, we cannot overlook the force of the argument by counsel for the respondents that to construe the paragraph as requiring the Secretary General, in mandatory terms, to await the expiry of 90 days, could lead to unreasonable if not absurd result, where the Secretary General has received the comments from all the Partner States well ahead of the expiry of that period, as happened in the instant case.

47. The Vienna Convention sets out international rules of interpretation of treaties. Article 31 that comprises the General Rule of Interpretation reads –

"1. A treaty shall 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 its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context;
   a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

48. Article 32 then provides that where, in interpreting a treaty, the application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion.

49. Taking into account the said general principle of interpretation enunciated in Article 31 of the Vienna Convention we think that we have to interpret the terms of the Treaty not only in accordance with their ordinary meaning but also in their context and in light of their objective and purpose. Primarily we have to take objective of the Treaty as a whole, but without losing sight of the objective or purpose of a particular provision. In that context, in our view, the objective and purpose of Article 150 is to stress that the Treaty, as a contract binding on all the Partner States, may be amended only if all the Partner States agree; and to regulate the procedure for processing the amendments up to conclusion.
50. With due respect to learned counsel for the applicants, we are not persuaded by his argument that the purpose of prescribing the period of 90 days in paragraph (4) is to provide for the period that every Partner State must spend undertaking unspecified consultations. When the Court sought from him clarification, he asserted that the expression "After the expiration of the period prescribed in paragraph 4" was put there for a purpose and he went on to say –
"It is in the context of the whole Treaty which is people-centered … So, our contention is that this is the period that is allowed for consultation. In actual fact, the consultation may not take place, but this was the purpose."
51. That answer exposes how the interpretation he urged for could lead to absurd results. In our view, the purpose of paragraph (4), as stated in the paragraph itself, is to limit the time for commenting on proposed amendments by any Partner State wishing to do so. In construing paragraph (5) therefore, it cannot be correct to transform that purpose into one of prescribing a mandatory period for unspecified consultations. The clear core objective and purpose of paragraph (5) on the other hand is to direct that the Secretary General shall submit the proposed amendments with the comments from the Partner States, if any, to the Summit. It appears to us that the cross reference to the period prescribed under the preceding paragraph was made upon a presupposition of the Partner States taking the whole period of 90 days to comment. In our view it does not cover the scenario where the Partner States take a shorter period to comment. We think it is more reasonable to conclude, as we hereby do, that paragraph (5) does not expressly or impliedly require the Partner States to carry out any consultations, nor does it expressly or impliedly require the Secretary General to hold the proposed amendments and comments thereon received from Partner States until expiration of the 90 days. The correct construction must be that the provision directs the Secretary General to submit them to the Summit not later than the expiry of that period.
52. Accordingly, we find that the submission of the proposed amendments to the Summit by the Secretary General within 5 days after his communication to the Partner States was not an infringement of paragraph (5) of Article 150 of the Treaty specifically.
53. We now turn to consider if by reason of failure to carry out wide consultations on the proposals for the amendments, the process constituted an infringement of the Treaty in any other way. It is useful at this point to recall the sequence of the critical events in the process.
54. Pursuant to the Summit communiqué of 30th November 2006, an Extraordinary Meeting of the Attorneys General held on 7th December considered and concluded

the draft amendments, which it recommended the Council to approve and submit to the Summit. On 8th December, the Council met and approved the draft, following which the Secretary General addressed a letter dated 9th December 2006 to the Ministers responsible for the East African Community Affairs in the three Partner States in which he wrote –

"Re: Proposals for the Amendment of the Treaty for the Establishment of the East African Community.

I have the honour to inform you that I have received proposals from the Council of Ministers for the amendment of the Treaty for the establishment of the East African Community.

The proposals are shown in Part 2 of the Report of the 12th Extraordinary Meeting (Ref EAC/CM/EX/12/2006) which is enclosed herewith. In accordance with Article 150(3) of the Treaty, I request you to facilitate your Partner State's consideration of these proposals. Given the urgency on this matter, please submit the comments to me by Monday, 11th December 2006. This will enable me submit the proposals to the Summit of Heads of State for consideration and adoption"

55. The responses were prompt. Uganda's First Deputy Prime Minister/Minister of East African Affairs replied on 11th December, intimating simply that Uganda had no objection to the proposed amendments to the Treaty. The Kenya Minister of East African Community replied on 13th December also intimating that Kenya concurred with the proposed amendments.

56. Only the Permanent Secretary of the Tanzania Ministry of East African Cooperation, who replied on 12th December, alluded to any consultation on the proposals. He wrote in part –

"We have reviewed the Report of the 12th Extraordinary Meeting… (Ref. No. EAC/CM/EX/12/2006) dated 8th December 2006 and Tanzania is in agreement with the proposals therein. Given the urgency of the matter and the professionalism shown by the Partner States Attorney Generals (sic) and the Council of Ministers, the proposals can now be submitted to the Higher Authorities for consideration.

Please note that December 9th 2006 was Tanzania's 4th Independence Day celebrations and 10th December 2006 was a Sunday, hence consultations could not have been done effectively during these days."

57. These were the only comments from the Partner States on the proposed amendments. For the purposes of paragraph (4) of Article 150, therefore, the Partner States through their responsible officials made the comments within the prescribed period of 90 days after the Secretary General's communication. The earliest was 2 days, and the latest was 4 days after the communication.

58. It is evident from the aforesaid correspondence that no serious widespread consultations on the amendments within the Partner States were intended let alone carried out. It is noteworthy that according to the record of the meeting of the Attorneys General, even communication to the Partner States under paragraph (4) was not contemplated since the recommendation was that Council should approve the draft and submit it to the Summit for consideration and adoption. It is also noteworthy that apparently the persons whose initial recommendation to make the amendments was endorsed by the Summit in its communiqué and who later approved

the Attorneys General's draft amendments to be communicated to the Partner States, are virtually the very persons who received and considered the amendment proposals in the name of the Partner States. The Kenya Minister made no pretensions about consultations when in his reply to the Secretary General he said –

"I have studied the report and the proposals therein and Kenya concurs with the proposed amendments."

59. Even in the case of Tanzania where the Permanent Secretary's reply appears to imply that after the public holiday on Independence Day and Sunday there was some consultation on Monday the 11th December, there cannot have been wide or much consultation on the drafted amendments before he sent the reply on 12th December. Needless to say that the way the matter was handled ridicules the provision for forwarding the proposed amendments to the Partner States.
60. As we observed earlier in this judgment, under Article 7 the people's participation in cooperation activities set out in, and envisaged under the Treaty, is ranked high among the operational principles of the Community. The best illustration in the text of the Treaty is Article 30 where specifically, every resident of a Partner State is empowered to access this Court for the purpose of participating in ensuring compliance with the Treaty.
61. However, neither Article 150 nor any other provision of the Treaty specifies the modality and extent of people's participation in cooperation activities in general and in the amendment of the Treaty in particular. Ideally, it would have been easier for this Court to uphold and apply the proposition that every amendment of the Treaty must involve prior consultation of the people, if the draftsman had provided the measure for determining such involvement or participation, as is done for example, in integration treaties that provide for consulting the people through referenda. Undoubtedly other forms of involving and consulting the people are also possible.
62. In this regard, we agree with learned counsel for the applicants that we should take judicial notice of two major activities subsequent to the Treaty coming into force, which were preceded by extensive consultations. We do take judicial notice of the fact that consultation on the "Zero Draft Protocol to Operationalise Extended Jurisdiction" of this Court is still on-going. We also take judicial notice of the fact that the proposal by the Summit to fast-track political federation of the Partner States was subjected to extensive consultations of diverse categories of the people in the Partner States, and ended in a determination that there was no consensus among the people to alter the sequence of stages set out in Article 5(2) of the Treaty for the gradual phasing of the integration process towards the ultimate stage of political federation. Although the two sets of consultations were not conducted uniformly, they undoubtedly reflect agreement among the Partner States that the principle of people-centered cooperation is also applicable to the Treaty amendment process.
63. In addition to these two examples mentioned by counsel for the applicants, we also take judicial notice of the consultations that preceded the conclusion of the Protocol on the Customs Union and the on-going consultations on the Common Market, which is the next stage in the integration process.
64. As we noted earlier in this judgment, the Vienna Convention provides in Article 31 that the context of a treaty includes the text as well as its preamble and annexes, and

that for the purpose of interpretation, there shall be taken into consideration inter alia –

"any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

65. In accordance with this rule, we take into consideration the said series of consultations as having established agreement among the parties to the Treaty that in seeking to apply or alter provisions of the Treaty, the people shall be consulted. As to the extent of such consultations, we think that until more elaborate modalities are evolved as the Community continues to grow, the resolve to allow participation of the private sector and civil society recited in the preamble, and the objective to enhance and strengthen partnerships with the private sector and civil society enunciated in Article 5(3) (g), provide adequate guidelines.
66. We think this is the interpretation that gives full meaning to the context of the Treaty. It is common knowledge that the private sector and civil society participated in the negotiations that led to the conclusion of the Treaty among the Partner States and, as we have just observed, that they continue to participate in the making of Protocols thereto. Furthermore, as we noted earlier in this judgment, Article 30 entrenches the people's right to participate in protecting the integrity of the Treaty. We think that construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation lamented in the preamble of "lack of strong participation of the private sector and civil society" that led to the collapse of the previous Community.
67. In conclusion we find that failure to carry out consultation outside the Summit, Council and the Secretariat was inconsistent with a principle of the Treaty and therefore constituted an infringement of the Treaty within the meaning of Article 30. Accordingly, we answer issue no.2 in the negative.

Submissions on Issue No.3

68. The argument of learned counsel for the applicants on issue no.3 may also be sub-divided in two distinct aspects. The first aspect is the particular argument that because the impugned amendments were made in reaction to the interim order of the Court in *Anyang' Nyong'o Case (supra)*, the undertaking of the amendments was an infringement of Articles 8(1) (c) and 38(2) and was *ipso facto* done in bad faith,The second aspect is the general argument that inference of bad faith ought to be drawn from the manner in which the amendments were conceived and processed and from the content of the amendments.
69. The first aspect was pleaded in paragraph 17(d) of the reference as part of the subject matter of the reference. In the pleading, however, what was referred to the Court was the assertion that "attempting or purporting to amend the Treaty while the Court was still seized of Application No.1 of 2006"infringed the Treaty and consequently vitiated the entire amendment process rendering it of no legal effect. It could as well have been argued under issue no.2. The second aspect was not part of the subject matter of the reference. It appears to have arisen from the averment in the response of the 4th respondent who pleaded in paragraph 7 that the process of amendment of the Treaty "was undertaken in utmost good faith in accordance with the Treaty...",

which begs the question whether that aspect of the issue was properly referred to the Court under Article 30. We shall dispose of the two aspects separately.

70. Article 8(1) (c) is an undertaking by the Partner States to abstain from any measures likely to jeopadise achievement of objectives of the Treaty or the implementation of its provisions. Article 38 is concerned with the principle of acceptance of the Court's decisions and in paragraph (2) it provides – "Where a dispute has been referred to the Council or the Court, the Partner States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute."

71. The contention for the applicants is that the impugned amendments were undertaken with a view to threaten and cow down the Court. Learned counsel for the applicants premised his argument on a remark appearing in the record of the meeting of the Council held on 28th November 2006, during the deliberations on the implications of the Court's interim order, to the effect that "there is need for the organs of the Community to appreciate and support each other in the discharge of the Community functions." He invited the Court to infer from this remark that the Council was unhappy and even angry with the Court order, hence the inclusion in the recommended amendments the expansion of grounds for removal of judges of the Court.

72. Much of learned counsel's argument was geared to showing bad faith. However, when asked by the Court to explain how the reaction of the Council which was ultimately endorsed by the Summit in the communiqué was likely to be detrimental to the resolution of the dispute or to aggravate it, the thrust of learned counsel's response was as follows: The decision to amend the Treaty was a reaction to the Court's interim order in *Anyang' Nyong'o* case. Both the Council and the Summit were aware that the resolution of the dispute in that case was still pending in the Court. The proposal to extend the grounds for removal of judges from the Court was calculated to intimidate the judges and consequently was likely to be detrimental to the resolution of the dispute. In his lengthy reply on issue no.3, learned counsel for the respondents did not address this aspect. In our view there is substance in the arguments of learned counsel for the applicants, particularly in the context of the surrounding circumstances, whose summary below gives a clear understanding of this conclusion.

73. It is common knowledge that at all the material times the two members of the Court from the Republic of Kenya had been victim of a lightening scoop on the Kenya Judiciary in 2003 that saw 23 judges suspended from service on general allegations of corruption. The allegations against them were to be inquired into by tribunals. Subsequently, one of the two judges of this Court was cleared of the allegations against him without their being inquired into by the tribunal. He voluntarily retired from the Kenya judiciary thereafter. The inquiry in respect of the other judge has not progressed up to the present day, 5 years down the road. Both judges were on the panel of the bench that was seized of the *Anyang' Nyong'o case (supra)*.

74. The pertinent amendment extending the grounds for removal of a judge is that under Article 26(1) (b) the Summit may remove from office –

" (b)…a Judge who also holds judicial office or other public office in a Partner State [if that judge] –

(i) is removed from that office for misconduct or due to inability to perform the functions of the office for any reason; and

(ii) resigns from that office following allegation of misconduct or of inability to perform the functions of the office for any reason;

2. Where –,

(a) …

(b) a Judge is subject to investigation by a tribunal or other, relevant authority of a Partner State with a view to his or her removal from an office referred to in paragraph 1(b); or

(c) … the Summit may, subject to paragraph 2B, suspend the Judge from the exercise of the functions of his or her office."

75. The only reasonable and irresistible inference from these provisions is that, while they may be of general application, they were designed to suit the circumstances of the two Kenya judges on this Court. The test to apply in determining if that move infringed Article 38(2) is not whether or not it intimidated or was calculated to intimidate the two judges or any other judge of the Court. The obligation under the Article is not to refrain from an act that is detrimental but from one that might be detrimental. In our considered view, given the circumstances we have just summarized, the move was capable of unduly influencing the pending judgment in *Anyang' Nyong'o case(supra)* and thereby be detrimental to the just resolution of the dispute. The fact that it did not have that effect is credit to the sense of independence on the part of the two judges together with the other judges on the panel, and to their resolve to uphold the principles of judicial integrity and judicial independence. We therefore hold that that part of the amendments constituted an infringement of Article 38(2) of the Treaty.

76. Turning to the second aspect of issue no.3, we reiterate what we have just observed that it is not part of the subject matter referred for determination under Article 30 of the Treaty. The reference was not for determination whether the amendments were made in bad faith, but rather whether the amendment process did not comply with specified provisions of the Treaty, and therefore infringed them. As submitted by learned counsel for the respondents, while in the 4th respondent's response and in three of the affidavits supporting the respondents' pleadings it was positively asserted that the amendments were made in good faith, the applicants were not assertive in their pleadings that the amendments were made in bad faith, save that in the affidavit supporting the reference there was an oblique or implicit mention of the deponent's belief that "amendments (to the Treaty) should be made in good faith".The emphasis in the reference and the supporting affidavit is that the amendment process was illegal for infringing provisions of the Treaty. Strictly therefore, the pleading in the 4th respondents' response that the amendments were made in good faith is more in the nature of "a cross-reference", which is not provided for or envisaged under Article 30. We are therefore constrained to observe for future guidance, that upon further reflection we think that we should not have allowed the framing of this issue as it was framed. However, having allowed not only the framing of the issue but also full arguments on it, we consider it prudent to make our views on it known.

77. In submitting that the impugned amendments were not carried out in good faith, learned counsel for the applicants relied on the following grounds, namely that –

- » in recommending the amendments Council was motivated by an apparent perception that the Court was not cooperating with other organs of the Community,
- » the amendments were carried out in extraordinary haste;
- » the substance of the amendments, namely restructuring the Court into two divisions and increasing grounds for removal of judges, had no relationship with the problem or mischief the Council purported to address, namely delays of Community activities due to suspension of EALA functioning resulting from the Court's interim order;
- » the way to avert the problem posed by the interim order in good faith, would have been for the Partner State concerned to concede and cause a fresh election of its representatives to EALA, without waiting for the final judgment.

78. Learned counsel for the respondents submitted that there was no straight simple definition of the expression "good faith", but that it connotes fairness and reasonableness. He stressed that at international law, states are assumed to act in good faith and consequently the courts are reluctant to impute bad faith on the part of a state unless it is well established by very clear evidence. In support of this proposition he quoted a passage in the arbitral award in the *Tacna-Arica Question, In the Matter of Arbitration between the Republic of Chile and the Republic of Peru (UN Reports of International Arbitral Awards, 2006, Vol. II 921-958)*.
79. He argued that in the instant case, the impugned amendment process was undertaken by three Partner States acting together in the Council and the Summit, which makes it more difficult to impute bad faith on the part of three States. He contended that even if it is assumed that one Partner State was irked by, and over reacted to the interim order that questioned the legitimacy of its choice of representatives to the EALA, the other two who were not party to the *Anyang' Nyong'o case (supra)* could not have been similarly affected by the interim order. He opined that apart from that order, there must have been other matters taken into consideration in deciding to amend the Treaty. He further contended that the Partner States were within their rights to consider the implications of the interim order on the functioning of the Community, so long as they abided by the Court decision as they did.
80. Furthermore, learned counsel submitted that neither infringement of a treaty provision per se nor the expeditious processing of the amendments in the instant case should be construed as acting in bad faith or as evidence thereof.
81. The reference in the *Anyang' Nyong'o case (supra)* arose from a highly politicized dispute over the determination of Kenya's nine new Members of the EALA. It is apparent that although technically the reference raised a legal issue of interpretation of the Treaty, the contesting parties viewed it in light of the political dispute and any Court decision in it, whether interim or final, was taken as a matter of victory or defeat in their political dispute. What is more, the timing of the interim order, though unavoidable, was unfortunate. It issued when the aura of that dispute was still dominant. It was literally on the eve of inauguration of the 2nd EALA when all concerned had converged on Arusha for that important event in the calendar of the Community. The order had the immediate effect of suspending the event and thereby the functioning of the EALA. That it met hostile reception from some quarters in that environment was inevitable and not surprising.

82. We agree with learned counsel for the respondents that the Council was entitled and indeed under duty to consider the implications of the interim order on the activities and functioning of the Community as a whole. The inexplicable matter, however, is that after identifying the problems resulting from the suspension of EALA activities, the Council did not come up with solutions to those problems. Instead, it recommended the restructuring of the Court, as if the Court was the problem, which recommendation had no bearing on the solution of the identified problems. It is on this dichotomy that the applicant's contention that the amendments were not made in good faith, is anchored. However, though we accept that the recommendation thus appears to be without rationale that alone cannot be sufficient proof that the amendments were not made in good faith let alone that they were made in bad faith. What constitutes bad faith?
83. The holding by the Supreme Court of the Philippines in *Benito Ang vs. Judge R.G. Quilala and others*: [A.M. No. MTJ-03-1476 February 4, 2003] [http://www.supremecourt.gov.ph/jurisprudence/2003/feb2003/am_mtj_03_1476.htm] appears to be pertinent and to provide a comprehensive answer to this not so simple a question. Judge Ynars-Santiago, with whom all the other judges on the panel concurred, said –
"Bad faith does not simply connote bad judgment or negligence; it imputes a dishonest purpose or some moral obliquity and conscious doing of a wrong; a breach of a sworn duty through some motive or intent or ill-will; it partakes of the nature of fraud.
84. It contemplates a state of mind affirmatively operating with furtive design or some motive of self-interest or ill-will for ulterior purposes"With regard to the difficulty of imputing bad faith on a State, we agree with the view expressed in the passage referred to us by learned counsel for the respondents from the arbitral award in the *Tacna-Arica Question (supra)*. At p.930 of the report, the arbitrator says – "While there should be no hesitation in finding such intent or bad faith, if established, and in holding the party guilty thereof to the consequences of its action, it is plain that such a purpose should not be lightly imputed. Undoubtedly the required proof may be supplied by circumstantial evidence, but the *onus probandi* of such a charge should not be lighter where the honour of a Nation is involved than in a case where the reputation of an individual is concerned. A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion. "
85. In *Barcelona Traction, Light and Power Company Limited (Belgium vs. Spain) 2nd Phase (1970)* I.C.J. Reports, Judge Tanaka (in a Separate Opinion) at p.159 says –
"Although the Belgian Government insists on the existence of bad faith on the part of the Spanish judiciary and puts forward some evidence concerning the personal relationship of Mr. Juan March and his group with some government personalities etc … we remain unconvinced of the existence of bad faith on the part of the Spanish administrative and judicial authorities. What the Belgian Government alleges for the purpose of evidencing bad faith of the Spanish judges concerned does not go very much beyond surrounding circumstances; it does not rely on objective facts constituting collusion, corruption, flagrant abuse of judicial procedure by the Spanish judiciary. …. It is not an easy matter to prove the existence of bad faith because it is

concerned with a matter belonging to the inner psychological process, particularly in a case concerning a decision by a State organ. Bad faith cannot be presumed."

86. We think the same must be said of the evidence, such as there was, in the instant case. It fell short of proving conclusively either the contention of the respondents that the impugned amendments were made in good faith or that of the applicants that the impugned amendments were made in bad faith. However, the former contention is helped by the presumption of fact that a State does not act in bad faith.
87. In order to rebut the presumption it was not sufficient to show that the amendments were initiated as a result of the interim order which irked officials of one Partner State, and that they were irrational because they did not address the mischief caused by the interim order. It was necessary to adduce cogent evidence leading to a compelling conclusion that all three Partner States colluded to make the amendments from such ill-motives as to intimidate or spite the Court or its judges. From the evidence as it stands, the Court has no insight on what transpired during the deliberations that led to each proposal for amendment. It is noteworthy that the only affidavit evidence adduced was from deponents who did not even claim to have had personal knowledge as participants in the deliberations that resulted into the impugned amendments. Even if the issue had been properly within the reference, therefore, the evidence would not have been sufficient to base a holding on.

Issues No.4 and No. 5

88. The last two framed issues were also not part of the subject matter of the reference for the Court's determination under Article 30, and we allude to them briefly only because we allowed argument on them. The fourth issue is "Whether the amendments as carried out can be stopped". In his submission under this issue, learned counsel for the respondents, relying heavily on the decision of the High Court of Kenya in the case of *Anyang' Nyong'o and 10 others vs. Attorney General and another*, High Court Case No. 49 of 2007, maintained that upon the amendments being ratified by the Partner States in accordance with paragraph 6 of Article 150, they took effect and therefore became part of the Treaty. He argued that as such, they were no longer amendments and could not be reversed. According to learned counsel, the position would have been different if the reference was made prior to the ratification when the amendments had not taken effect.
89. With due respect, we do not find merit in this argument. The scope of Article 30 is not limited to anticipatory infringement of the Treaty. The Article envisages this Court determining the legality of an Act that has been enacted and come into force, a regulation that has been made, a directive that has been given, a decision that has been taken and an action that has been done and concluded. If upon reference of any of these the Court finds that it is an infringement of the Treaty or otherwise unlawful it has to so hold and, depending on the nature of the infringement or unlawfulness, may grant the discretionary remedy of a declaratory judgment annulling such Act, regulation, directive, decision or action, as the case may be.
90. We reiterate that the last framed issue, namely "Whether the amendments will strengthen the Community", is also not part of the reference on the legality of the impugned amendments. Indeed, as it turned out during submissions by counsel,

there was disagreement as to whose pleadings raised it, with counsel on either side seeking to disown it because it was not material to his case. Be that as it may, it was not seriously canvassed that the impugned amendments were unlawful or infringed the Treaty because they did not strengthen the Community or vice versa. Besides, with all due respect to learned counsel, neither party was able to show definitively to what measure and in what way the amendments strengthened or weakened the Community. In essence their submissions were in the nature of speculation. In the circumstances, we make no findings on this issue.

Conclusion

91. In the result, we hold that the lack of people's participation in the impugned amendment process was inconsistent with the spirit and intendment of the Treaty in general, and that in particular, it constituted infringement of principles and provisions in Articles 5(3) (g), and 7(1) (a). We also hold that the purpose for which Article 26 was amended constituted infringement of Article 38(2) of the Treaty.
    Under paragraph 19 of the Reference, the applicants prayed for four separate declarations. Our said holding covers the declarations sought under sub¬paragraphs (a) and (b). Under sub-paragraphs (c) and (d) they pray for –
    (c) "Declaration that the entire process of amendment of the Treaty to date is unlawful and of no legal effect;
    (d) Declaration that the purported ratification processes for the said Treaty amendments employed by the[Partner States] are illegal, unconstitutional and of no legal effect".
92. Earlier in this judgment, we indicated that we would disregard as abandoned, the averment in paragraph 17(c) of the reference alleging that the ratifications of the amendments were unconstitutional, illegal and of no legal effect since at the trial it was not canvassed. Accordingly we also disregard the corresponding prayer (d) as abandoned.
93. With regard to the prayer in (c), we have considered circumstances which appear to militate against the grant of that declaration, notwithstanding our holding. First, the text of the Treaty is not explicit on the requirement of people's involvement in its amendment. We have had to consider several provisions of the Treaty in order to come to the conclusion that the failure to involve the people in the amendment constituted an infringement of the Treaty. In view of that we deduce that the infringement was not a conscious one. Secondly, we are inclined to the view that after this clarification of the law on the matter the infringement is not likely to recur. Thirdly, while we are mindful of the gravity of infringement of Article 38(2) of the Treaty, we take note of the fact that in the instant case it had no significant effect, if any. Lastly in our view, not all the resultant amendments are incompatible with the Treaty objectives, and those that are, which we shall revert to presently, are capable of rectification.
94. In the circumstances we think this is a proper case where we should invoke the doctrine of prospective annulment. As we observed in *Callist Mwatela Case, (supra)*, the doctrine is good law and practice. We should add that it is particularly beneficial for our stage of developing integration and the emerging Community jurisprudence. In the result we decline to invalidate the amendments and declare that our holding

on the requirement of involvement of people in the Treaty amendment process shall have prospective application.

95. Two other specific prayers remain. We consider that in view of our findings the order prayed for in paragraph (e) is superfluous. Lastly, on costs we order that the respondents shall jointly and severally bear the applicants' costs.

96. Before taking leave of the reference, we are constrained to draw attention of those responsible for initiating rectification of anomalies in the Treaty, to two of the amendments whose implications may have been lost in the haste.

1. By the provisions under Articles 23, 33(2) and 34, the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainty. The new
   a) proviso to Article 27; and
   b) paragraph (3) of Article 30, have the effect of compromising that principle and/or of contradicting the main provision. It should be appreciated that the question of what "the Treaty reserves for an institution of a Partner State" is a provision of the Treaty and a matter that ought to be determined harmoniously and with certainty. If left as amended the provisions are likely to lead to conflicting interpretations of the Treaty by the national courts of the Partner States.
2. Article 26 of the Treaty established a mechanism for the removal of judges for misconduct and inability to function as determined by an independent tribunal appointed by the Summit, obviously applying uniform standards. When read together with Article 43(2) it becomes apparent that the objective of the Treaty is for the judges of the Court to be independent of the Partner States they originate from. The introduction of automatic removal and suspension on grounds raised or established in the home State, and applicable to only those in judicial or public office, makes possibilities of applying un-uniform standards to judges of the same court endanger the integrity of the Court as a regional court. Under the original mechanism such grounds could be submitted for consideration at the Community level.

97. We strongly recommend that the said amendments be revisited at the earliest opportunity of reviewing the Treaty.

98. Lastly, we wish to commend the applicants for the vigilance they have demonstrated in trying to ensure the protection of the objectives of the Treaty. We also wish to thank all the counsel for all the parties in this reference for their industry in assisting us to come to a just decision.

* * * *

The East African Court of Justice
Application No 9 of 2007

Arising Out of Reference No.3 of 2007

The East African Law Society, The Law Society of Kenya, The Tanganyika Law Society, The Uganda Law Society And The Zanzibar Law Society

And

The Attorney General of the Republic of Kenya, the Attorney General of the United Republic of Tanzania, the Attorney General of the Republic of Uganda, the Secretary General of the East African Community

Moijo M. ole Keiwua P, Joseph N. Mulenga J, Kasanga Mulwa J, Mary Stella Arach-Amoko J. and Harold R. Nsekela J
July 11, 2007

Amendments to the Treaty- Interim orders- Unlawful actions- Whether the applicants had a cause of action and should be granted interim orders - Whether the challenged amendments had already entered into force

Articles 150 and 38 of the Treatyfor the Establisment of the East African Community

The Applicants filed Reference No. 3 of 2007 seeking inter alia a declaration that the amendments of the Treaty and ratification thereof by the three Partner States was illegal, unconstitutional and of no legal effect as they contravened Articles 150 and 38 of the Treaty. They also sought interim orders prohibiting the Respondents from implementing the proposed amendments to the Treaty pending the hearing and determination of the reference.

Held:
The Applicants reference raised serious questions for trial which, if not controverted, might entitle them to succeed in respect of a number of their prayers. However, since the impugned amendments to the Treaty had been implemented what had been done, even if it were unlawful, could not be undone in interlocutory proceedings. Thus the application for interim orders was dismissed.

Cases cited
Auto Garage v. Motokov (No.3) (1971) EA 514
Ex-parte Sidebotham (1880) 14 Ch D 458
Giella v Cassman Brown & Co. Ltd (1973) E.A. 358
Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd (1982)
AC617

Janata Dal v H.S. Chowdhary AIR 1993 SC 892
Kenya Commercial Finance Co.Ltd v Afraha Education Society (2001) IEA
P. Gupta v Union of India AIR 1982 SC 149
Prof. Peter Anyang' Nyongo and 10 Others v The Attorney General of Kenya and 5 Others, EACJ Reference 1 of 2006
Rev. Christopher Mtikila v The Attorney General [1995]TLR 31

Ruling

1. The above mentioned applicants have brought Reference No.3 of 2007 under Articles 1, 4, 5, 6, 7, 8, 9, 11, 27, 30, 38 and 150 of the Treaty for the Establishment of the East African Community (the Treaty); and Rules 1(2) and 20 of the East African Court of Justice Rules of Procedure. The Reference is supported by an affidavit sworn by Tom Odhiambo Ojienda, President of the East African Law Society (1st Applicant).
2. The essence of the Reference is to the effect that the amendments of the Treaty and ratification thereof by the three Partner States, namely the Republic of Kenya (1st Respondent); the United Republic of Tanzania (2nd Respondent) and the Republic of Uganda (3rd Respondent) are illegal, unconstitutional and of no legal effect since they were made in contravention of Articles 150 and 38 of the Treaty. The applicants are therefore seeking from the Court the following prayers:¬
    1) " Declaration that the process of amendment of the Treaty infringes Articles 5, 6, 7, 8, 9, 11, 38 and 150 of the Treaty, as well as peremptory norms of international law;
    2) Declaration that amendment of the Treaty shall incorporate public consultation and participation, in the same manner that was employed in negotiating the Treaty and the various Protocols under it, especially the Protocol on the Establishment of the East African Community Customs Union;
    3) Declaration that the entire process of amendment of the Treaty to date is unlawful and of no legal effect;
    4) Declaration that the purported ratification processes for the said Treaty Amendments employed by the Republic of Kenya, Republic of Uganda and the United Republic of Tanzania are illegal, unconstitutional and of no legal effect;
    5) Order that the Partner States cannot amend the Treaty without commencing a fresh process, as provided for under Article 150 of the Treaty;
    6) Order that the cost of and incidental to this Treaty Reference Application be met by the Respondents;
    7) That this Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances."
3. The Reference was filed on 18th May 2007 together with this application which was ex parte by Notice of Motion for interim orders, inter alia, that – "Pending the hearing and final determination of the instant Reference, this Honourable Court be pleased to restrain and prohibit the 1st , 2nd , 3, and 4th Respondents from formulating, publishing, enacting, ratifying, or otherwise howsoever purporting to implement the proposed amendments to the Treaty for the Establishment of the East African Community that were commenced pursuant to the Official Communiqué of the

Summit of Heads of State of the East African Community that was issued on or about 30th November 2006." In order to strike a balance between the need to hear the application expeditiously with the need to hear all the parties in view of the gravity of the issues raised in the application, the Court on its own motion directed that the application be heard inter partes and abridged the time for filing replies.

4. At the hearing of the application, Prof. Ssepembwa outlined the principles that normally guide courts when called upon to decide whether or not to grant the injunctive order sought. He submitted that the applicant should first establish a prima facie case with a probability of success. On this point, he contended that the Reference raises more than a prima facie case. The issue involved was the correct interpretation of Article 150 of the Treaty on the procedure to be followed when amending the Treaty. He added that even the respondents in their replying affidavits sworn by Ms. Njeri Mwangi, for the 1st respondent; Mr. Martin Mwambutsya for the 3rd respondent and Amb. Julius Baker Onen, for the 4th Respondent, had raised the same issue, but the parties are poles apart as regards the exact interpretation of Article 150 of the Treaty.
5. The second issue in contention is the applicants' claim that the Respondents were in breach of Article 38 of the Treaty. The Applicants allege that the respondents proceeded on the amendment of the Treaty despite the fact that the matter was still pending in Court.
6. In his view the first principle that there was a serious case before the Court had been established, but given the nature of the application before the Court, he did not go into the merits of the case at this juncture. As regards the second principle, Prof. Ssempebwa submitted that the Reference was essentially a public interest litigation which seeks to ensure the observance of the Treaty in the interest of the citizens of East Africa. He submitted that if the amendments are implemented, they will cause irreparable injury particularly to the East African Court of Justice.
7. Prof. Ssempebwa pointed out that under the amendments, the current decisions of the Court will be deemed to be decisions of the First Instance Division of the Court and therefore subject to appeal to the Appellate Division of the Court. Such a course of action will be extremely unfair and could cause irreparable harm and interfere with the smooth operation of organs and institutions of the East African Community.
8. 8. He also submitted that the amendment to Article 30 of the Treaty would curtail the jurisdiction of the Court thereby rendering it almost impotent, as he put it. There was also the question of the limitation period of two months now proposed in the amendments. The cumulative effect of all these amendments is that they would cause irreparable harm to the smooth operation of the Court to the prejudice of the people of East Africa.
9. Learned Counsel for the Respondents strongly resisted the application for an interim injunctive order. From their respective replying affidavits and the oral submissions of Ms. Kimani; Mr. Mwaimu; Mr. Oluka and Mr. Kaahwa, three issues stand out, namely;
   1) That the applicants have not disclosed any cause of action against any of the Respondents;
   2) That the applicants have not established the conditions essential to move the

Court to grant the order sought and

3) That the application has been overtaken by events since the challenged amendments have already come into force.

10. 10. It is the contention of the respondents that the applicants have not shown what rights or interest were violated or infringed upon. The two affidavits in support of the Notice of Motion were couched in generalities without disclosing the nature of the specific injury that was personal to them and which has been infringed under the Treaty. What the respondents are saying in effect is that the applicants have no locus standi to institute the Reference before the Court. They have not shown what legal right has been violated and that the respondents are liable for that violation. On the other hand, Prof. Ssempebwa submitted that the respondents in purporting to amend the Treaty contravened Article 150, thus depriving the rights of East Africans to participate in the process.

11. Consequently the applicants had the obligation to access the Court to stop this breach of Article 150 of the Treaty, among others. Our starting point in this regard is the traditional view on locus standi. In the landmark Indian case of *S.P. Gupta v Union of India AIR 1982 SC 149. Bhagwati, J.* in the course of his judgment stated as follows at page 185:"The traditional rule in regard to *locus standi* is that judicial redress is available only to a person who has suffered a legal injury of violation of his legal right or legally protected interest by the impugned action of the state or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action.

12. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born." The learned judge continued at page 190 as follows: "If no one can maintain an action for redress of such public or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed to it.

13. The Courts cannot countenance such a situation where observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened." According to the traditional view of *locus standi* as well explained above, only an aggrieved person, that is, one who has a more particular or peculiar interest of his own beyond that of the general public, can access the Court to have his rights vindicated. (see also: *Exparte Sidebotham (1880) 14 Ch D 458*).

14. Despite this apparent rigidity in the rule, Courts have somewhat relaxed the rule. For instance, in the case of *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd(1982) AC 617*, Lord Diplock had this to say at page 644 E:"It would in my view be a grave lacuna in our system of public law if a pressure group like the federation or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped." From India again, in the case of *Janata Dal v H.S. ChowdharyAIR 1993 SC*

892, the Court stated at paragraph 62:"….. the strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right of *locus standi* to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury but who is not a mere busybody or a meddlesome interloper; since the dominant object of PIL is to ensure observance of the provisions of the Constitution or the law which can be best achieved to advance the cause of the Community ….. or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in; motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict."

15. Similar sentiments were echoed by Lugakingira, J. in the High Court of Tanzania in the case of *Rev. Christopher Mtikila v The Attorney General [1995] TLR 31* at page 45 where he stated: "I hasten to emphasize, however, that standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy." In our recent decision in *Reference No.1 of 2006,Prof. Peter Anyang' Nyongo and 10 Others vs The Attorney General of Kenya and 5 Others (unreported)*, we had occasion to explain what is a common law cause of action, and cited the case of *Auto Garage v. Motokov (No.3) (1971) EA 514*. We also stated that various Articles in the Treaty including Article 30 create special causes of action which different parties may refer to this Court for adjudication.
16. The applicants herein are Bar Associations in their respective Partner States and have a duty to promote adherence to the rule of law. We are therefore satisfied that the applicants are genuinely interested in the matter complained of, that is, the alleged non-observance of the Treaty by the Respondents. We therefore hold that the applicants have *locus standi* to make this application.
17. This takes us to the second issue. The conditions for the grant of an interlocutory injunction were stated in the oft cited case of *Giella v Cassman Brown & Co. Ltd (1973) E.A. 358. Spry, V.P.* stated as follows at page 360E: ¬"The conditions for the grant of an interlocutory injunction are now well settled in East Africa.
    1) First, an applicant must show a prima facie case with a probability of success.
    2) Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.
    3) Thirdly, if the Court is in doubt it will decide the case on the balance of convenience." (followed in *Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) IEA 86 at page 89d*).
18. From the applicants affidavits in support of the Notice of Motion, the replying affidavits of the Respondents and the oral submission of the learned Counsel representing the parties, it is evident that the interpretation of Article 150 of the Treaty will be a subject matter of contest during the hearing of the Reference. We are satisfied that the totality of the facts in the affidavits discloses bona fide serious issues to be tried by the Court. At this stage we must refrain from making any determination on the merits of the

application or any defence to it. Despite this limitation, however, we are satisfied that the applicants have made out a serious question to be tried which if not controverted, might entitle the applicants to succeed in respect of a number of their prayers. The applicants have therefore crossed over the first hurdle.

19. The second pre¬condition is that the Courts' intervention is necessary to protect the applicants from the kind of injury which may be irreparable and which cannot be compensated by way of damages in the event the application is refused. Prof. Ssempebwa submitted that this was public interest litigation and therefore it was not possible to show personal loss or injury to the applicants. The aim of the Reference is to ensure the observance of the provisions of the Treaty. We have read the affidavits of Mr. Tom Odhiambo Ojienda, Mr. Alute Simon Mughwai and the replying affidavits. It is evident that the impugned amendments to the Treaty have now been implemented save perhaps the appointment to Judges of the reconstituted Court of Justice.
20. What has been done so far, even if it were unlawful, cannot be undone in these interlocutory proceedings. Whatever remains to be done by way of operationalization can be rectified if the amendments are in the end declared illegal by this Court. In the result and for the foregoing reasons, we dismiss the application for injunction. Costs to be in the cause.

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East African Court of Justice - First Instance Division
Application No. 1 of 2008

In The Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion

Johnston Busingye, PJ; Mary Stella Arach-Amoko, DPJ; John Mkwawa, J;Jean-Bosco Butasi, J; Benjamin Patrick Kubo
April 24, 2009

Consensus- The principle of variable geometry- Unanimity- whether variable geometry could be applied to guide the community's integration process- whether consensus in decision-making implied unanimity.

Articles 7 (e), 12 (3), 14(4), 15 (4), 23(1), 27, 36 and 148 of the EAC Treaty - Rule 13 of the of Rules of Procedure for the Summit of the Heads of State or Government - Rule 13 Rules of Procedure for the Council of Ministers - Rule 13 of the Rules of Procedure for the Coordination Committees- Article 2 of the EAC Protocol on Decision Making- Article 31 (1) of the Vienna Convention on the Law of Treaties, 1969.

On 19th December, 2008, Counsel to the Community filed an application seeking an advisory opinion on behalf of theCouncil of Ministers of the East African Community over several issues relating to the principle of variable geometry, flexibility in the progression of integration activities, unanimity and consensus decision-making by the Summit of Heads of State and the Council of Ministers.

Held:

1. Variable geometry is one of eight Operational Principles of the Community provided under Article 7 that govern the practical achievement of the objectives of the Community. It is a strategy for implementation that is in harmony with the requirement for consensus in decision-making if applied appropriately. It is not a decision making tool in itself but can be comfortably applied to guide the integration process. However, it should be resorted to as an exception, not as the rule.
2. In applying variable geometry, the "core" and periphery" approach should be taken into account. Partner States can agree on areas over which the principle can and cannot apply. Simultaneous implementation need not be forced upon a Partner State that is not ready just as a refusal or delay of implementation need not be used to block a Partner State or Partner States that are ready. Simultaneous implementation is impracticable in some circumstances and Partner States cannot be expected to operate within such strait jacket or one size fits all situations.
3. While achieving consensus by unanimity is a desirable ideal but, it is rarely possible. Implying that consensus in decision-making as used in the Treaty means unanimity of Partner States is a mere perception based on practice. Consensus, and not unanimity, is provided for in the Treaty and Protocol on Decision Making as the basis for decision-making. Consensus is not defined in the Treaty, the Protocol on

Decision Making and the Rules of Procedure of the various organs and its application is unclear. It does not imply unanimity as these are two different concepts. The cure for this defect does not lie in equating it, from the blue, with unanimity. Rather it lies in amending the relevant instruments.

4. Article 15 (3) of the Treaty provides how an objection in the Council of Ministers should be handled. It does not mean nor imply that consensus is synonymous with unanimity.
5. Under Article 148 consensus will be achieved as required, but for purposes of achieving that consensus the "views" of the Partner State being expelled or suspended would not count. All Partner States, except the Partner State being sanctioned, would participate in reaching the decision, irrespective of whether the views of the Partner State being sanctioned are supportive of the sanction or not. The Article does not imply that consensus is synonymous with unanimity.

Opinion

Background:

1. The genesis of the present Application for this Court's Advisory Opinion was traced to a before us to a dilemma being faced by the Council of Ministers, (hereinafter referred to as "the Council") regarding:¬
   (a) The Application of the Principle of variable geometry as provided in the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty'); and
   (b) The Application of the Principle of variable geometry vis-à-vis the requirement for consensus in decision¬-making.
2. The Court was told that, arising from the aforesaid dilemma, the Council did at its 16th Meeting held at Arusha,
   Tanzania on 13th September, 2008 make, vide item 2.7 in its Report of the meeting, a proposal in the following terms: '2.7 Proposal for requesting for Advisory Opinion of the East African Court of Justice
   2.7.1 Introduction: According to the Treaty "The Summit, the Council or a Partner State may request the East African Court of Justice to give an Advisory Opinion regarding a question of law arising from the Treaty which affects the Community". The purpose of seeking an advisory opinion is to enable the Community, its organs and institutions and the Partner States get a clear interpretation of the Treaty on matters that are contentious or not clear. To the extent that the legal position on following issues has affected the decision-making process, progress in the formulation and progress of programmes or have been challenged by other organs of the Community, it is important for the Council to seek an advisory opinion.
   2.7.2 Application of the Principal of variable geometry: The Treaty provides that one of the operational principles of the Community shall be "the principle of variable geometry which allows for progression in co¬operation among groups within the Community for wider integration schemes in various fields and at different speeds".
3. This provision, read together with the relevant interpretation of this principle in the Treaty, suggests:

a) flexibility in the progression of integration activities, projects and programmes; and
b) Progression of such activities, projects and programmes in co-operation by some of the Partner States as opposed to all the Partner States simultaneously.

4. However, this interpretation is contestable on the basis of the fundamental requirement, under the Treaty and relevant annexes, for consensus as a basis for decision-making by the Summit of Heads of State and the Council of Ministers.'
5. Stemming from the above concerns; 'The Council:
   a) directed the Secretariat to seek an advisory opinion of the East African Court of Justice on the Application of the principle of variable geometry; (EAC/CM16/Decision 11);
   b) directed the Secretariat to file a request for an advisory opinion on the application of the principal of variable geometry in the East African Court of Justice by 31st October, 2008; and (EAC/CM16/Directive 12).'

The Application:

6. Pursuant to the aforesaid directions, the Counsel to the Community did on 19th December, 2008 file the present Application under Articles 14(4) and 36 of the Treaty for the Establishment of the East African Community ("The Treaty") and Rule 75 of the East African Court of Justice Rules of Procedure.
   The jurisdiction of this Court is founded in Articles 23(1), 27, 38(3) on acceptance of judgments and 1, on the definition of 'judgment'.

Initial scheduled hearing:

7. The hearing of the Application was initially scheduled for 13th February, 2009. On that date the Applicant was represented by Mr. Wilbert T.K. Kaahwa, learned Counsel to the Community; the Republic of Kenya was represented by Mr. Anthony Ombwayo, learned Senior Principal Litigation Counsel in Kenya's Office of the Attorney General/State Law Office; the United Republic of Tanzania was represented by Mr. Sirilius Matupa, learned Assistant Director in Tanzania's Office of the Attorney¬General, aided by Ms. Mwema Punzi Juma, learned State Attorney there; while the Republic of Uganda was represented by Mr. Henry Oluka, learned Senior State Attorney.
   (a) Joinder of East African Law Society as *Amicus Curiae* (Friend of the Court): At the session of 13th February, 2009 three representatives of the East African Law Society (EALS), Mr. Alute Mughwai; Dr. Allan Shonubi, President of the EALS; and Mr. James Mwamu, Secretary General of the said Society applied to this Court, to allow the said Society to appear as *amicus curiae* vide Application No 1 of 2008.
8. There was no opposition by the Counsel to the Community, or by the Partner States represented at the session, to the Society's request and the Court granted the said request.
9. The Republic of Rwanda had, on the previous day filled submissions but was not represented in Court on 13th February, 2009. The Republic of Burundi had neither filed written submissions nor was it represented in Court. Having regard to the importance of the Application Court decided that all Partner States as well as the East African Law Society ought to be given an opportunity to make inputs into the

impending debate. Accordingly, the Court ordered all Partner States and the EALS to file and serve their written submissions by 27th February, 2009.

10. Hearing of the Application was rescheduled to 11th March, 2009 when the parties were to highlight their written submissions.

Actual hearing:

11. At the rescheduled hearing of the Application on 11th March, 2009, the Applicant Community, The Republic of Kenya and The Republic Uganda were represented by the same Counsel who had represented them on 13th February 2009; The United Republic of Tanzania was represented by Mr. Yohana Masara, learned Senior State Attorney; while the EALS was represented by learned Counsel, Mr. Donald Deya. There was no appearance for The Republic of Rwanda and The Republic of Burundi but Burundi had filed written submissions as had the rest of the Partner States and the amicus curiae. Council for the Community, the Partner States and EALS made oral highlights of their written submissions. Summaries of all the submissions made to the Court are given below for ready reference.

Submissions on behalf of the Applicant Community:

12. Based on the questions posed at the beginning in the very first paragraph of the background, Counsel to the Community framed the following as the issues in contention in respect of which this Court's Advisory Opinion is sought:
    i) Whether the principle of variable geometry is in harmony with the requirement for consensus in decision-making.
    ii) Whether the principle of variable geometry can apply to guide the integration process, the requirement on consensus in decision-making notwithstanding.
    iii) Whether the requirement on consensus in decision-making implies unanimity of the Partner States.
13. It was Applicant's Counsel's contention that this Court has jurisdiction to handle the East African Community Council of Ministers' request for an Advisory Opinion pursuant to Articles 23(1), 27 and 36 of the Treaty. He pointed out that the request is of great significance in the implementation of the Treaty and the growth and development of the Partner States' integration process for the following reasons:
    a) The request serves to enhance the Court's role as the Community's judicial organ.
    b) The outcome of the request will guide the process of decision-making which is critical to the institutional development of the East African Community.
    c) The outcome of the request will also contribute to the development of regional jurisprudence as envisioned under Articles 6, 7 and 126 of the Treaty.
14. Turning to the issue of variable geometry, Applicant's Counsel pointed out that it is an innovation of European law allowing member states to tailor their participation in the European integration process. He said that in the case of the East African Community, the principle of variable geometry has not been applied to¬date and indicated that the present Application seeks guidance on how the principle can be applied here. He reported that within the European Union, application of the principle of variable geometry allows Member States to negotiate exemptions from certain Treaty provisions and to individually apply a greater speed on some

integration processes than others, using the institutions and procedures laid down in the Treaty. He gave as one example in this regard, the opt¬out of Denmark, UK and Ireland from the European Community's provisions on free movement of persons, asylum and immigration.

15. The Applicant's Counsel submitted with particular reference to Article 7 (1) (e) of the Treaty, that the integration implied by variable geometry is essentially pragmatic and incremental; that it permits integration to proceed on the basis of progressive steps, allows smaller subgroups to move faster than the whole group and provides that many decisions can be made by majority rather than by consensus. In the latter regard, he pointed out that the European Union and the United Nations have gradually shifted from consensus decision-making to appropriate application of majority decision-making . It was Applicant's Counsel's contention that application of variable geometry principles could considerably ease some of the tensions among sub-regional integration arrangements in the Community and enhance the prospect of closer and more regional co¬operation.
16. With regard to consensus decision-making , Applicant's Counsel noted that the principle runs throughout the executive organs of the Community: for instance, in the Summit by virtue of Article 12(3); and in the Council by virtue of Article 15(4), subject to the Protocol on decision-making which enumerates vide Article 2(1) the matters on which decisions of the Council must be by consensus and provides vide Article 2(2) that all other decisions of the Council must be by simple majority, without specifying what those decisions are. Applicants' Counsel also drew attention to Article 148 providing express Exceptions to the Rule of Consensus, in matters pertaining to suspension or expulsion of a Partner State where the views of the Partner State being considered for suspension or expulsion do not count for purposes of reaching a decision on the proposed suspension or expulsion.
17. Quoting from *International Institutional Law, by Schemers G. Henry and Niels, M. Blokker*, Applicants Counsel identified the following as aims of consensus decision-making as opposed to the use of Majority rule approach:
    a) Inclusive: involving as many stakeholders as possible
    b) Participatory: soliciting the input and participation of all the parties charged with decision-making
    c) Cooperative: participants strive to reach the best possible decision for the group.
    d) Egalitarian: all members in a given group being accorded an equal opportunity to make input;
    e) Solution oriented: striving to emphasize common agreement over differences, using compromise.
18. Applicant's Counsel, however, cited the following shortcomings as afflicting consensus decision-making :
    a) Delays in arriving at a consensus: Since consensus decision-making focuses on discussion and seeks the input of all participants, it can be a time consuming process. Counsel considered this a potential liability in situations where decisions need to be made speedily or where it is not possible to canvass the opinion of all delegates in a reasonable period of time. He added that the time commitment required to engage in the consensus decision-making process can sometimes

act as a barrier to participation for individuals unable or unwilling to make the commitment.

b) Intransigence associated with determining consensus;

c) The possibility of indiscriminate vetoing of proposals that may be favoured by the majority of Partner States, which in his view may lead to the preservation of the status quo. He pointed out that in decision making bodies that use formal consensus, the ability of individuals or small minorities to block agreement gives an enormous advantage to anyone who supports the existing state of affairs; and that this could mean that a specific state of affairs can continue to exist in an organization long after a majority of members would like it to change;

d) The fact that consensus may not stand the test of usefulness when the membership of the Community increases to more than five countries;

e) Susceptibility to disruption: Giving the right to block proposals to all group members may result in the group becoming hostage to an inflexible minority or individual. Counsel added that "opposing such obstructive behaviour" construed as an attack on freedom of speech and in turn resolve on the part of the individual to defend his or her position. He concluded that as a result, consensus decision-making has the potential to reward the least accommodating group members while punishing the most accommodating;

f) Abilene/Paradox: Applicant's Counsel pointed out that consensus decision-making is susceptible to all forms of groupthink, the most dramatic being the Abilene paradox. He explained that in the Abilene paradox, a group can unanimously agree on a course of action that no individual member of the group desires because no one individual is willing to go against the perceived will of the decision-making body.

19. Finally, the Applicant's Counsel concluded his submissions with the following prayer, namely, that the Court gives an advisory opinion on:

a) the Application of the Principle of variable geometry;

b) the Application of the Principle of variable geometry vis-à-vis the requirement for consensus in decision-making;

c) Whether the requirement of consensus in decision-making implies unanimity of the Partner States.

Submission on behalf of Rwanda

20. Rwanda identified the core issues in this application as being:
To determine whether or not the principle of variable geometry and decision¬-making by consensus are in conflict.

21. It was Rwanda's submission that the two are not in conflict and that each of them caters for a different set of issues. Rwanda maintained that it is not a legal requirement under the Treaty that decision-making must be by consensus; and, in essence, that the concept of consensus has wrongly been overemphasized by the Partner States on the basis that the cooperation and integration processes are still in their infancy. It was Rwanda's submission that the principle of variable geometry gives a right to some Partner States to engage into other activities for wider integration and not to engage in integration activities of the Community and that this would negate the

objectives for which the Community was established.

22. To Rwanda, it was evident that for all integration programmes of the Community, consensus in decision making is indispensable until it is agreed between the Partner States to amend the Treaty. In Rwanda's view, the Treaty gives no flexibility to some groups and that all the Partner States must agree on each and every activity. Rwanda maintained that there are a number of activities and programmes that would need a total participation of all the Partner States, without which implementation would be difficult. In the latter regard, Rwanda noted that among the fundamental principles to govern the Community are principles of mutual trust, political will and sovereign equality; that among reasons leading to the collapse of the previous East African Community was lack of political will; that decision-making for progression of the integration programmes would highly depend on the political will of the Partner States and that, as such, the Partner States are bound by the Treaty under Article 6(a). It was Rwanda's view that issues such as delays in arriving at consensus and intransigence associated with determining consensus raised by the Council of Ministers should not be overemphasized if there is a total agreement that the provisions of Article 6(a) bind the Partner States.
23. Rwanda pointed out that under Article 8(1) (c), it is the obligation of the Partner States to abstain from any measures likely to jeopardize the achievements of those objectives or the implementation of the provisions of this Treaty.
    Rwanda noted that the Council had already initiated moves within the Sectoral Committee on Legal and Judicial Affairs to amend the Treaty. It was Rwanda's projection that the strict requirement for consensus, which, as we understood it, Rwanda considered necessary in the Community's infancy stages, is bound to be reversed in due course. Rwanda contended that since the issue of consensus is being handled by the Council through the Sectoral Committee on Legal and Judicial Affairs, the present Application to this Court is redundant.
24. In conclusion, Rwanda submitted that the principle of variable geometry is in harmony with the requirement of consensus in decision making in that the principle of variable geometry governs progression in the integration activities for some groups within the Community to engage in other activities outside the Community while the requirement of consensus in decision making caters for only activities of the Community and not otherwise. Rwanda reiterated:
    a) That the Application by the Council is redundant because the issue said to be in contention has been resolved; and
    b) That the Court should advise the Applicant that the principle of variable geometry is in harmony with the requirement for consensus in decision making.

Submissions on behalf of Burundi

25. In Burundi's submission, the principle of variable geometry may be questionable in practice in view of the mandatory requirement of decision making by consensus in all executive organs of the East African Community. To Burundi, it cannot be possible to move together and decide by consensus while it is at the same time allowed to go at different speeds. As far as Burundi is concerned, the principle of variable geometry can apply and allow the integration process only if there is a clear provision which regulates

decision making by specifying certain new required quorum of representation in meetings. Burundi maintained that in practice, there remains a controversy between application of the principle of variable geometry and the principle of decision making by consensus by all Partner States. Accordingly, Burundi was categorical that the two principles are not in harmony as far as practice is concerned.

26. With regard to the second issue, Burundi applied similar arguments as the ones just advanced above and concluded that variable geometry cannot apply to guide the integration process in light of the requirement of consensus in decision making.
27. As regards the third issue, Burundi's position was that unanimity requires complete agreement by all Partner States on discussed issues while consensus in decision-making requires flexibility in favour of quick decision making and the integration process. It was Burundi's contention, as we understood it that, in the latter event, the requirement of decision-making by consensus necessitates unanimity of all Partner States except the one which has taken an option of applying the principle of variable geometry.

Submissions on behalf of Kenya

28. Counsel for Kenya referred to various dictionary definitions of the term 'consensus' and noted that they tended towards a general agreement or majority view, not necessarily amounting to unanimity. As regards the principle of variable geometry, he submitted that it is a strategy allowing negotiations of one or more particular issues to lead to an agreement.
29. Counsel referred to the European Community and identified proponents of variable geometry as falling into two camps:
    a) Integrationists – impatient to accelerate the process of unification and unwilling to be held up by the 'slowest ship in the convoy' to ensure there is no regression to national individualism.
    b) Countries that wish to slow or halt the federal moment but are prepared to allow others to go ahead, provided they themselves can be left out of policies they consider unsuited to their national interest.
30. In further reference to the European Union, Counsel identified opponents of variable geometry as also falling into two camps:
    a) Those who fear it will be an excuse for creating a privileged inner circle, a 'top table' of decision makers from which they will be excluded.
    b) Those who suspect that their exemptions will prove transient and that sooner or later they will be sucked into an unwanted process of ever deeper integration.
31. Counsel identified, also within the European Community, a middle group comprising members from both sides of the debate, i.e. those who believe that institutionalized flexibility may lead to ultimate breakup of the European Community or to its transformation into a 'mere' free trade area.
32. Counsel noted from the formulation entitled 'close cooperation' in the Amsterdam Treaty that groups of Member States wishing to act together using the European Community's institutions could 'as a last resort' do so by qualified majority vote in the Council of Ministers, provided none of the nonparticipants exercised a veto at Head of Government level. Counsel also noted that other conditions of application of

the principle of variable geometry included the following:

a) That the participants must represent a majority of Member States.
b) A right of deferred participation by those who chose to stay out initially.

33. The same Counsel also noted from the European Community experience that practical realities on the ground led to the Luxembourg compromise, under which it was conceded that decisions affecting a vital national interest would have to be unanimous even if the Treaty specified majority voting. He added, however, that the Luxembourg compromise was virtually abolished by the 1980's in favour of majority voting. Counsel, instructively, reported that the unanimity principle still exists for:
    a) Accession to Treaties ad Treaty amendments;
    b) Appointments to the European Commission;
    c) Changes to the Community's revenue raising power;
    d) Resolution of certain disputes within the European Parliament;
    e) Common Foreign and Security Policy; and
    f) Cooperation in Justice and Home Affairs.
34. Counsel pointed out, still with reference to the European Community, that the concept of variable geometry allows countries to opt out of unwanted policies rather than being obliged to choose between vetoing them or accepting a majority verdict.
35. Turning to the East African Community, Counsel for Kenya submitted that as far as the Community's non judicial organs are concerned, their decision making process is by consensus which, in practice, has meant that there has to be complete unanimity over an issue. He wondered in the latter regard whether consensus really means complete unanimity and drew attention in this connection to *Chambers 21st Century (English) Dictionary* which defines 'Consensus' as the majority view. He acknowledged the challenges outlined by Applicant's Counsel as being associated with the requirement of consensus in decision making and proceeded to compare and contrast the principles of variable geometry and consensus in decision making.
36. He submitted that the principle of variable geometry is very different from consensus in decision making and added that variable geometry is a flexibility that permits Member States in a regional integration arrangement to pursue integration at different levels in different fields/policy areas, so long as the enhanced integration contributes to enhancing integration in the regional integration arrangements, and does not create a barrier to trade or discriminate among Member States. In Counsel's view, the principles of variable geometry and requirement of consensus in decision making can operate together if the scope of where each principle applies is clearly defined and there is no conflict in scope, otherwise the two cannot be in harmony with each other.
37. He maintained that the principle of variable geometry can guide the integration process notwithstanding the requirement of consensus in decision making, provided the scope of the policy areas in which each will apply are defined. He cited as a living example the fact that the European Community has two tracks towards integration, i.e. the body of common rights and obligations which bind all Member States within the European Community (*aquis communautaire*) and variable geometry.
38. Counsel pointed out that whereas the East African Community's Protocol on Decision-making provides that decisions on the matters specified in Article 2 (1)

shall be by consensus, the said Article 2(1) does not specifically provide whether the consensus is unanimous or general majority view. He noted the definition of consensus in Chambers 21st Century Dictionary already alluded to and also to:

a) *Black's Law Dictionary* which defines 'Consensus' as a general agreement or collective opinion; and
b) Wikipedia, The Free Encyclopedia which defines 'Consensus' as a group process that not only seeks the agreement of most of the participants, but also the resolution or mitigation of the objections of the minority.

39. Having noted that consensus is usually defined as meaning general agreement and the process of getting to such agreement, Counsel reminded this Court that in the case of the executive organs of the Community, consensus has been treated as being synonymous with unanimity. He submitted that the requirement of consensus in decision making does not necessitate Unanimity unless specifically provided for in the subject document, as in the case of Article 10 of the North Atlantic Treaty (NATO) which specifically provides that there has to be a unanimous decision.
40. Counsel observed that in the case of the European Community, the need to accommodate States with different capacities within the same international framework gradually triggered various forms of variable geometry. He, however, noted the danger of unconstrained variable geometry arising from the concern that the more the Community allows countries to pick and choose the policies they like and form into small groups of like¬minded countries, the greater the risk that some fundamental policies will not be addressed by some Member States.
41. In conclusion, Counsel for Kenya submitted that there is uncertainty as to what consensus in decision making precisely refers to and that the uncertainty is slowing down the success of the integration process as the Treaty is silent on the issue. He asked this Court to elucidate what consensus means. He noted that each country has a different rate of economic growth, different socioeconomic factors and varying national policies that it takes into consideration when deciding whether or not to vote in favour of a specific proposal. He asked the Court to advise whether consensus in decision making refers to a strict 100% majority, 2/3 majority or simple majority; and that once such clarification is made, it is of paramount importance that the Treaty is amended to reflect the Court's decision in order to eliminate confusion and uncertainty in the future. He maintained that variable geometry is an important principle that operates side by side with consensus in decision making as it accommodates each country's unique features and that as such it should be embraced by the Community and not ignored by forcing States to adopt blanket proposals which may not be best suited to their interests. He commended to this Court the sentiments of Judge Tanaka of the International Court of Justice on the same issue in the West African case of *Liberia against the Union of South Africa*, namely: 'to treat unequal matters differently according to their inequality is not only permitted but required'.
42. He urged that the Court should define the policies that each Member State must participate in without derogation, taking into consideration that the Community is developing beyond issues of economics and governance into fields such as fundamental rights and freedoms, freedom of movement and information, competition, and the like. Finally he suggested the policies which in his view should be subject to consensus

in decision-making and those which in his view should be subjected to the principle of variable geometry.

Submissions on behalf of Tanzania

43. Council for Tanzania opened his submissions by taking the adversarial position that the resolution of the Council of Ministers seeking the Courts' Advisory Opinion was not pleaded and that, therefore, it did not form part of the Application before this Court. This prompted the Court to call for the Council's resolution, which was provided and it is reproduced at the start of this Advisory Opinion. Tanzania's Counsel recited the three issues identified by the Applicant's Counsel and noted that the principle of variable geometry is captured under Article 7(1) (e) of the Treaty. He also noted the definition of the principle of variable geometry given in the interpretation Article 1 of the Treaty. He also revisited consensus in decision-making at meetings of the Council of Ministers as provided for under Article 15 of the Treaty and noted that vide Article 15 (3) a member of the Council who is a leader of his/her Partner States' delegation to a meeting of the Council may record his/her objection to a proposal submitted for the decision of the Council and that if such objection is recorded, the Council shall, unless the objection is withdrawn, refer the matter to the Summit for decision. Council submitted that this Court may, in determining whether the principle of variable geometry is in harmony with the requirements of decision-making by consensus, consider the operational principles laid down under Article 7, the fundamental principles laid down under Article 6 and the procedure for decision making which is predominantly by consensus.
44. He suggested to the Court that in determining the aforesaid question, the Court may wish to appreciate that the objectives of the Community are found in Article 5. He highlighted those objectives, laid down in Article 5(1), as: development of policies and programmes aimed at widening and deepening cooperation among Partner States in political, economic, social and cultural fields, research and technology, defence, security plus legal and judicial affairs – for the Partner States' mutual benefit.
45. Counsel pointed out that in endeavouring to fulfill the objectives in Article 5, the Partner States are guided by the fundamental principles laid down in Article 6 which include: mutual trust, political will and sovereign equality; peaceful coexistence and good neighbourliness and peaceful settlement of disputes. In his view, the operational principle of variable geometry, provided for in Article 7(1) (e), flows from the above fundamental principles, i.e. recognition of the fact that there may be in existence such groups of members in a larger integration scheme who require varied developmental speeds. He submitted that those subgroups must be afforded their pace of development into an integrated Community. He also submitted that the principle of variable geometry likewise recognizes the existence of varied areas of integration. It was his view that all the integration processes alluded to above require the forging of a common stand in attaining the larger objective. He submitted that the only mechanism that may afford members and subgroups with varied levels of developmental ability to forge a common voice is that of consensus in decision making. He drew the Court's attention to the fact that in embracing both variable geometry and consensus in decision-making in the same Treaty, the Community

need not reinvent the wheel as the European Community before it went through a windy path prior to attaining its present achievements.

46. It was Counsel's plea that this Court should recognize that the decision by the framers of the Treaty to adopt consensus in decision making was purposeful to carry on board all members in its decision-making process. He contended that the decision took into account the stark reality that each Partner is a Sovereign State and that in the Partner States' peaceful coexistence, mutual trust is of the essence. He noted that the people the Partner States represent are varied in their stages of development and that the dual mandate of the leaderships of the Partner States to the people they represent on the one hand and to the Community on the other demands that the leaderships and their people be heard and their positions respected. He submitted that the Partner States' commitment that decisions be made by consensus is in clear accord with reality on account of their commitment to have a single voice, notwithstanding their variables in terms of sizes or stages of development. Alternatively, he asked the Court to look at the two principles as standing alone, each serving a specific purpose but each complementing the other. He contended that consensus in decision-making is pivotal to the attainment of the fundamental principles in Article 6 and operational principles in Article 7 of the Treaty.

47. Revisiting the question of definition of consensus, Counsel pointed out that the Thesaurus legal dictionary gives an outline of the meaning of consensus to the effect that is connotes general agreement and contended that consensus means unanimity. Counsel urged this Court to advise that:
    a) the plain meaning of the provisions of Article 12 (3) is that decisions of the Summit shall be by consensus;
    b) the plain meaning of Article 15(3) to the effect that a member of a Partner State's delegation to a meeting of the Council of Ministers can, by recording an objection, block a proposal submitted for the Council's decision thereby necessitating referral of such proposal to the Summit, comprising the Heads of State and Government of the Partner States; and
    c) the plain meaning of the provisions of Article 15(4) that, subject to the Protocol on Decision making, the decisions of the Council shall be by consensus; indicate the intention of the Partner States to be that consensus should mean unanimity of all partner States in their decision-making . Counsel asked this Court to take note of the developments that have taken place in the Sectoral Committee on Legal and Judicial Affairs where initiative to amend the Treaty on the decision-making process of the Council has commenced; and submitted that the Council of Ministers, being a policy organ of the Community, is better placed to manage the amendments rather than the present judicial recourse. He questioned the appropriateness of the Council's decision to seek judicial recourse in what he considered a pure policy matter which it has power to address; and noted that both the process of amendment of the Treaty and the seeking of an Advisory Opinion of the Court are continuing simultaneously. He contended that the object of the present Application for the Court's Advisory Opinion is subjudice as the Council of Ministers directed that the issue of amendment of the Treaty regarding consensus in decision-making be left to the Sectoral Committee on Legal and

Judicial Affairs, which, according to Tanzania, is where the matter belongs; and submitted that this Application for the Court's Advisory Opinion is an abuse of the process of the Court.

Submissions on behalf of Uganda

48. Counsel for Uganda opened his submissions by acknowledging that the East African Community came into being on 7th July, 2000, thereby marking the beginning (rebirth) of formal collaboration of the East African countries of Kenya, Tanzania and Uganda in economic and social integration carried on informally over many years in the various fields of life in the East African region (after the collapse of the previous East African Community). He noted that the objects of the Community today stand out on a much broader vision comprising five Partner States following incorporation of Rwanda and Burundi in the East African Community bloc. He acknowledged that in pursuit of attainment of its vision of establishing an East African Customs Union, a Common Market and ultimately a Political Federation, the East African Community has set itself to ascribe to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice. He observed that in an endeavour to bring the above norms of good governance to fruition, a set of operational principles were laid down in Article 7 of the Treaty.
49. He noted that the operational principle singled out for purposes of the present Application is that of variable geometry provided for under Article 7 (1) (e) of the Treaty and contended that the said principle is subject to the fact that under the Treaty, any decision made has to be arrived at with consensus and unanimity by all parties to the Treaty.
50. Counsel revisited the issues framed for determination. He noted the definition of variable geometry in Article 1 of the Treaty. With regard to consensus, he referred to the Advanced Learners Dictionary which defines consensus as an opinion that all members of a group agree with and repeated the core issue raised in the present Application, i.e. whether the principle of variable geometry is in harmony with the requirement for consensus in decision-making.
51. He identified the Summit, Council of Ministers and Coordination Committee of the East African Community as being endowed with specific wide ranging powers to give general direction as regards attainment of the objectives of the Community and pointed out that all the three organs have adopted and passed Rules of Procedure and that the overriding fact in their meetings is that decisions at these meetings are made by way of consensus. He wondered where this leaves the principle of variable geometry and submitted that it is one of the potential avenues for actualization or implementation of policies, visions and objects for which the Treaty was established. Counsel contended that with regard to the policies formulated in each of the Community organs, each Partner State is fairly well placed to have a local feel and understanding of the course of speed or urgency with which it can implement, actuate or formulate the policies adopted in the Community. In this regard, he maintained that the East African Community has to give each Partner State a reasonable time to adopt a method of compliance agreeable to its people and posited that it is the principle of variable geometry that would allow for this.

52. Counsel submitted that the principle of variable geometry is in harmony with the requirement of consensus in decision making since variable geometry would allow each country to pace changes brought about in the Treaty at a speed and course that meets and fits unique local conditions of each specific Partner State. He contended that variable geometry is one of the operational principles to enable the East African Community established under the Treaty to achieve its mission and goals. It was his submission that consensus and variable geometry cannot be put at par or side by side; and that one has to decide on a policy or objective before arriving at variable geometry which has to take account of practical realities in the different Partner States on the mode and speed of implementation of the policy.
53. He noted that policies, once conceived, have to be discussed, culminating in decisions being taken; that Articles 12 (3) and 15 (4) provide for decisions in the Summit and Council, respectively, by consensus; and that the Protocol on Rules of the Coordination Committee is also specific in that, vide Rule 13, the recommendations of the Coordination Committee have to be agreed by consensus. It was his contention that any decision made in the organs of the Community will only be carried through with the unanimous agreement of all the Partner States and that it is only after such agreement is reached that the principle of variable geometry comes into action.
54. Counsel then proceeded to frame what he considered to be the core question arising from the present application differently, namely:
'Whether the principle of variable geometry should have an application in the process of decision making at the level of organs of the Community. In other words, can decisions between Partner States at the Summit, Council and Coordination Committee be made using variable geometry?'
55. He submitted that this question cannot be answered in this Court as in his view the Court is not the vehicle for amendment of the Treaty, nor is it a legislative organ for the Community. He acknowledged that the present application has noted the fact that there are delays in arriving at consensus, intransigence associated with determining consensus, the possibility of vetoes, the fact that there are now five Partner States, and that these factors delay decision making. It was his contention, as we understood it, that the option of variable geometry or some other principle being used in the making of decisions by the Community is one that the governing bodies and the administrators of the East African Community should consider, but not this Court.
He submitted that the principle of variable geometry can guide the integration process, notwithstanding the need for consensus in decision-making.
56. On the question whether the requirement for consensus in decision making necessitates unanimity of Partner States, Counsel referred to the definition of unanimity in the Oxford Learners Dictionary, namely, '… Complete agreement about something among a group of people…' and submitted that signatories to the Treaty are bound to depict a sense of unanimity before a decision is made and that this is the only manner in which consensus can be arrived at. He concluded that it is pertinent to have unanimity of all Partner States in decision making.

Submissions on behalf of the East African Law Society

57. Mr. Deya, Counsel for the EALS acknowledged the East African Council of Ministers as the policy making body of the Community. He noted that increased integration under the Community has faced challenges of ever complex negotiations with notable differences arising between policies of Partner States and the Community's ambitions of integration. He saw the principle of variable geometry provided for under Article 7(1) (e) as envisaging flexibility in the integration process and allowing progression in the East African Community activities by some Partner States and not all. He pointed out that due to the requirement of consensus as well as the necessity of quorum in the decision-making processes of the Organs of the Community, it has been implied that application of the principle of variable geometry may be contestable and that the principle cannot be relied on to quicken the process of integration since such decisions can be vetoed and challenged on the ground that they are not consistent with the Community Protocols.
58. Counsel for the EALS sought to borrow a leaf from comparable institutions outside the East African Community to show how the principle of variable geometry has been applied there. In this connection, he noted from the glossary of the official European Union website at: www.europa.eu that variable geometry is described as a term used to mean a method of differentiated integration which acknowledges that there are irreconcilable differences within the integration structure and, therefore, allows for a permanent separation between a group of Partner States and a number of less developed integration units. He suggested that such differences might be founded on aspects related to different sizes, different priorities, different levels of political development, and differences in economic development, culture and language which make it difficult for members to meet the criteria set for membership at the same speeds and depths, this resulting in either deeper integration or making use of 'opt-out' clauses in certain areas. He submitted that variable geometry connotes an endorsement of a 'flexible and pragmatic approach' to integration by States at different paces depending on their various determinants. He pointed out that the level of a country's commitment to the integration process is determined by the depth of its interest and that variable geometry applies where there is a lack of commonality of interests and values by the contracting parties who seek to deepen their cooperation and promote flexibility in decision making and cooperation.
59. It was the contention of Counsel that agreement on enhanced cooperation operates as multi-lateral agreements within the general principles of the original Treaty and that any member is free to decide whether or not to join initiatives beyond the original Treaty. In this connection, he pointed out that in instances where the principle of variable geometry has been applied; it accommodates countries which feel that their interests were not being served in certain situations whereas those who wish to pursue deeper international integration through multilateral agreements in that area could do so within the framework of the original Treaty.
60. He referred the Court to instances where variable geometry was applied in Europe such as The European Economic and Monetary Union, The Schengen Agreement and the European Defence Initiative.

    Counsel noted that at the heart of variable geometry in Europe lies the distinction

between:

a) The core, which includes all members have in common in their integration programmes;
b) The periphery, which contains those policies that are shared by some but not by all members of the European Community.

He submitted that variable geometry does not require all members to participate in all areas of integration and that it should not be interpreted to mean restricted membership.

61. Turning to the African continent, Counsel for the EALS pointed out that economic integration in Africa is moving the various economic blocs (pillars) toward an African Economic Community (AEC). He noted, for instance, that the Treaty of the Common Market for East and Southern Africa (COMESA) has two important innovations. Firstly, the concept of multiple speed or variable geometry provides for a group of countries to move faster in the regional economic integration process than some of the other countries or at the policy level, like at Southern Africa Development Community (SADC). He further pointed out that the preamble to the COMESA Treaty states that the parties were convinced that co¬operation at sub¬regional levels in all fields of human endeavour will raise the standards of living for the African Peoples, maintain and enhance economic stability, foster close and peaceful relations among African States and accelerate the successive stages in the realization of the proposed African Economic Community and Political Union.
62. In the case of SADC, Counsel for the EALS noted that its common agenda are based on various principles, e.g. development orientation; subsidiarity; market integration and development, facilitation and promotion of trade and investment; and variable geometry. He added that SADC has also implemented a Free Trade Area (the Southern African Customs Union – SACU) and that under the protocol establishing the SACU, Angola, the Democratic Republic of Congo and Malawi chose to opt out of this arrangement.
63. Reverting to the East African Community, Counsel for the EALS noted that neither the Treaty nor the various protocols define consensus. Relying on *Black's Law Dictionary, 8th Edition*, he contended that general consent when reached without objection is equivalent to consensus and that this implies that all parties are in agreement. He saw consensus as a decision making process that fully utilized the resources of the group and acknowledged that it is more difficult and time¬-consuming to reach than a democratic vote or an autocratic decision and complete unanimity is rarely possible.
64. He invited this Court to apply Article 31 (1) of the Vienna Convention on the Law of Treaties in interpreting the principle of variable geometry, i.e. interpret the principle in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty and in the light of its object and purpose. He urged the Court to apply the principle of harmonious construction in interpreting the principles of variable geometry and consensus in decision making. It was his submission that there is no conflict in application of the principle of variable geometry and the requirement for consensus in decision making. He pointed out that the requirement for consensus in decision-making has been stressed in the Treaty considering the history of the former Community which collapsed, inter alia, as a result of lack of political will

and mistrust. He submitted that in the short-¬term consensus in decision making is necessary in order to get all Partner States on board in the integration process.

65. It was, however, his contention that in regional organizations, decision-making by application of variable geometry should be the exception rather than the norm.
66. Counsel for the EALS further submitted that the principle of variable geometry applies to guide the integration process, the requirement of consensus in decision-making notwithstanding as in his view the requirement of decision-making is not necessarily inconsistent with the principle of variable geometry. He also urged this Court to advise the East African Community to consider amending the Treaty and Protocols to provide for application of the principle of variable geometry in specific areas of activity.
67. As to whether the requirement of consensus in decision-making necessitates unanimity of the Partner States, Counsel for the East African Law Society submitted that the words 'unanimity' and 'consensus' substantively mean the same thing.

Consideration of the Issues Raised in the Application and Opinion of the Court

68. Our Opinion on issues (i) and (ii), namely:
    i) Whether the principle of variable geometry is in harmony with the requirement on consensus in decision-making;
    ii) Whether the principle of variable geometry can apply to guide the integration process, the requirement on consensus in decision-making notwithstanding; is as follows:
69. The principle of variable geometry is defined in Article 1 of the Treaty to mean '… the principle of flexibility which allows for progression in cooperation among a subgroup of members in a larger integration scheme in a variety of areas and at different speeds.'
70. It is one of eight Operational Principles of the Community provided under Article 7 as

    'The Principles which shall govern the practical achievement of the objectives of the Community….'' Article 7(1) (e) describes it as "…the Principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds.'
71. The term consensus is not defined in the Treaty. We have, therefore, sought guidance from sources outside it.

    Wikipedia, The Free Encyclopedia, provides that 'Consensus has two common meanings. One is a general agreement among the members of a given group or community, each of which exercises some discretion in decision making and follow¬up action. The other is a theory and practice of getting such agreements. Achieving consensus requires serious treatment of every group member's considered opinion. Once a decision is made it is important to trust in members' discretion in follow¬up action. In the ideal case, those who wish to take up some action want to hear those who oppose it, because they count on the fact that the ensuing debate will improve the consensus. In theory, action without resolution of considered opposition will be rare and done with attention to minimize damage to relationships.' [Source: http://en.wikipedia.org/wiki/consensus].
72. We have also, in interpreting the principle of variable geometry and the requirement

of consensus in decision-making as used in the Treaty sought guidance from the Vienna Convention on the Law of Treaties which provides, vide Article 31, inter alia, as follows:

'Article 31: General rule of interpretation

1. A Treaty shall 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 its object and purpose.'

73. Having carefully considered the submissions of learned Counsel, the above definitions and interpretation guidelines, we opine as follows:
Variable geometry is in harmony with the requirement for consensus in decision-making if applied appropriately.
74. Consensus as applied in the Treaty and Protocols referred to in this Application is purely and simply a decision-making mechanism in Summit, Council and in the other executive organs of the Community while variable geometry as used therein is a strategy for implementation.
75. It is the Court's opinion that decisions in any of the executive organs of the Community are made with two aspects in mind. The first aspect is that a decision is made on the basis of it being consistent with the objectives of the Treaty and desirable at the time. At this level the basis of making the decision is consensus.
76. The second aspect is the implementation of what has been decided as, in our view, a decision that will not be implemented is not worth the paper on which it is written.
77. With this aspect of implementation comes the practical realities such as the vital national interests, the negotiations, the give and take and consultations that each Partner State will inevitably have to take care of for the good of the Partner State and ultimately that of the Community.
78. Consensus in making the decision will then be tailored to the elements just above highlighted and a suitable operational principle, which may well be variable geometry, will be agreed upon to govern the practical implementation of that particular decision.
79. Partner States may agree on implementation at different speeds due to different readiness levels or different priorities, some may choose to opt out of implementation altogether due to national realities, yet others may decide to 'opt out' and at a future time they will 'opt in'. All these will be agreed by the Partner States, by consensus.
80. As submitted by Counsel for the Community as well as Counsel for EALS, the principle of variable geometry has been internationally applied to deepen integration. Examples include:
    a) SADC: Under the Protocol establishing the Southern African Customs Union within the Free Trade Area of SADC, the Republic of Angola, The Democratic Republic of Congo and The Republic of Malawi chose to opt out of the Customs Union.
    b) Schengen -The 1985 Schengen Agreement, and the 1990 Schengen Convention which supplemented it, relate to the free movement of persons among the signatories and the Schengen States. Since the freedom of movement is guaranteed within the Union for all persons who are nationals of an EU Member State, it related to the intra union movement of non EU nationals wishing to move among Member States.

81. The Schengen States have also agreed to establish common controls at their external borders and adopted a common visa policy. For the signatories, the effect was to allow the removal of all internal border controls on the movement of persons for both EU nationals and non-EU nations. It implements complete freedom of movement of all persons residing in or admitted to a Schengen State. The territory without internal borders is known as the Schengen Area. Of the 15 "old" Members States at the time of negotiations, Ireland and the United Kingdom were not willing to remove controls on the intra EU movement of non EU nationals, and they retained their national border controls on the movement of persons from other EU member States.
    c) Monetary Union - Provision for a Monetary Union was formulated in the Maastricht Treaty on European Union of 1992 though the agreement was preceded by three stages and the initial Monetary Union did not come into effect until 1 January 1999. The European Economic and Monetary Union (EMU) involve adoption of a common currency (the Euro) and a common monetary policy administered by a common central bank (the European Central Bank or ECB). Member States that are not members of EMU retain their own currencies and central banks. At the time of its formation 12 of the 15 Member States opted in; the three member states that did not sign were the United Kingdom, Ireland and Denmark. Member States opting in to the EMU must meet specified conditions. They must meet a detailed set of convergence criteria and they must have their national currency in the European Exchange Rate Mechanism (ERM II) for two years.
    d) EU Social Policy agreement. A third example in the EU is the 1991 Social Policy Agreement. It set out the policy objectives for the 1889 Social Charter relating to employment and working conditions and other social policies. 11 of the then 12 Member States signed this agreement. The United Kingdom opted out (or, more accurately, did not opt in). Following the election of a new Labour Government in 1997, the United Kingdom announced that it would drop its opt out. The Social Policy Agreement was then incorporated into the Social Chapter of the EC Treaty through the Treaty of Amsterdam.
82. Looking at the three examples together, one feature is that, at the time of their formation, they involved different subsets of the members of the EU. The UK is the only country that opted out of all three. Another feature is that all involved the adoption of common policies in one policy area.
    [Source: "*The Variable Geometry Approach to International Economic Integration*" by Peter Lloyd, University of Melbourne].
83. The Principle has also been incorporated in Integration Treaties. A case in point is its incorporation in the Treaty of the European Union by virtue of Article 43 under the title "Provisions on Enhanced Cooperation." We quote a few excerpts to illustrate this incorporation:
    'Article 43: Member states which intend to establish enhanced cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and by the Treaty establishing the European Community provided that the proposed cooperation:
    a) aimes at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration;

b) respects said Treaties and the single institutional framework of the Union; does not constitute a barrier to or discrimination in trade between the Member States and does not distort competition between them;
c) respects the competences, rights and obligations of those member States which do not participate therein.'

'(i) Article 43(b)

84. When enhanced cooperation is being established, it shall be open to all member States. It shall also be open to them at any time, in accordance with Article 27e and 40b of this Treaty and with Article 11a of the Treaty Establishing the European Community, subject to compliance with the basic decision and with the decisions taken within that framework. The Commission and the member States participating in enhanced cooperation shall ensure that as many Member States as possible are encouraged to take part.'
85. The Partner States of the East African Community may wish to study, and possibly emulate some of the examples of application of these concepts to deepen integration.
86. The Court finds that the principle of variable geometry, as its definition suggests, is a strategy of implementation of Community decisions and not a decision making tool in itself. Indeed as already noted, it appears in Article 7 of the Treaty only as one of the operational principles "…that shall govern the practical achievement of the objectives of the Community…'.
87. The Court is of the opinion, therefore, that the principle of variable geometry can comfortably apply, and was intended, to guide the integration process and we find no reason or possibility for it to conflict with the requirement for consensus in decision-making.
88. It was also suggested by a number of learned Counsel, and the Court agrees, that variable geometry should be resorted to as an exception, not as the rule, as indeed institutionalized flexibility might lead to break¬up of the Community or its transformation into "a mere free trade area". Even in the European Union where its application is incorporated into law Article 43b of that law provides conditions precedent for it to apply. It reads, "…Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying relevant provisions of the Treaty."
89. Also, in applying the principle, the Community might wish to borrow a leaf from the European Union "core and periphery" approach which requires that Partner States agree on certain areas over which the principle can apply and areas over which it cannot.
90. Difficulties arise, in the Court's view, where consensus in making a decision is equated and/or juxtaposed to consensus in implementing it and is debated as one and the same issue in the process of decision-making , as Partner States will hesitate to take a decision whose simultaneous implementation they may not undertake due to their respective practical realities.
91. It is the Court's opinion, and we so advise, therefore, that for avoidance of internal conflict and a possible emergence of mistrust among the Partner States, and in accordance with the Treaty provisions above discussed, decisions should be taken

with the above two aspects in mind and simultaneous implementation thereof need not be forced upon an unready Partner just as refusal or delay of implementation thereof need not be used to block a ready Partner or Partners.

92. It is the Court's view based on the submissions that problems associated with obtaining consensus stems from hesitation to take particular decisions, not rejection thereof, as once a decision is consistent with the objectives of the Treaty there is no room left for rejecting it as such rejection would be tantamount to rejection of a particular Treaty provision. What seems to cause this hesitation is the requirement, inherent in decisions made, for simultaneous implementation by all Partner States.
93. Simultaneous implementation is impracticable in some circumstances and Partner States cannot be expected to operate within such strait jacket or one size fits all situations. Variable geometry is, therefore, intended, and actually allows, those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so.
94. As Tanaka J put it in ICJ Reports 1966, page 6 "… to treat unequal matters differently according to their inequality is not only permitted but required".
95. The upshot of the Court's above analysis of the concepts of consensus in decision-making and variable geometry is that consensus is fine at policy level. Take as an example the need for a superhighway linking Tanzania, Kenya, Uganda, Rwanda and Burundi. The mutual benefits of such a joint project are immediately clear to all the Partner States and none would require much persuasion to sign up for it. Since the project is a policy issue in line with objectives of the East African Community Treaty, there must be consensus at policy level for all Partner States to endorse the project. The policy having been agreed upon by consensus, the programme of implementation of the policy may, however, be agreed upon by the application of the principle of variable geometry bearing in mind the capacity of each Partner State to implement its portion of the task of constructing the superhighway within a given time frame. The Partner States may agree, for instance, on a 5 year time frame for all portions of the superhighway to be completed. Two Partner States with the ability to start in the first year may go ahead and start; a third partner State may be able to start its portion in the second year; while the remaining two Partner States may be able to start only from the third year. In this scenario, both concepts of consensus and variable geometry are at play in the same decision, each playing its key role i.e. consensus in deciding to build the highway and variable geometry in deciding the implementation of the programme.
96. Another illustration may be taken from a project for modernization of the fishing industries in Kenya's and Tanzania's exclusive economic zones within the Indian Ocean. The project may not be of immediate or direct interest to the land locked Partner States within the East African Community. Kenya and Tanzania may enter into bilateral arrangements to go into the project as a joint venture, in the context of the objectives of the Community with full support of the non-participating land locked Partner States.

Our Opinion on issue (iii), namely:

97. Whether the requirement of consensus in decision-making implies unanimity of the Partner States.

Wikipedia defines unanimity as follows:

'Unanimity is complete agreement by everyone. When unanimous, everybody is of same mind and acting together as one. Many groups consider unanimous decisions a sign of agreement, solidarity, and unity. Unanimity may be assumed explicitly after a unanimous vote or implicitly by a lack of objections.' [Source: http://en.wikipedia.org/wiki/unanimity].

Achieving consensus by unanimity is a desirable ideal but, in our opinion, rarely possible.

98. Consensus, and not unanimity, is provided for in the Treaty and Protocol on Decision Making as the basis for decision-making . Articles 12(3), 15(4) of the Treaty, Article 2 of the Protocol on Decision Making and Rule 13 of the Rules of Procedure of the various organs are all clear on this. The definition of both terms leaves us in no doubt that consensus does not mean unanimity.

Equating consensus to unanimity in decision making in the executive organs of the Community is a procedure that has obtained for years and it would appear from the instant Application that all has not been well.

99. We observe that, as integration deepens, different Partner States continue to have differing attachments to certain policies and their citizens continue to have differing passions towards such policies. In that environment, understandably, choices become tougher, decisions become harder and the perceived unanimity enjoyed in decision making over the years begins to be less forthcoming. This in our view explains the emergence of this debate at this particular time.

100. Implying that consensus in decision-making as used in the Treaty means unanimity of Partner States is a mere perception based on the said practice as we have shown. Such perception is, in our view, neither supported by the Treaty nor the definitions surveyed.

101. As stated above, consensus as it stands in the Treaty, the Protocol on Decision Making and the Rules of Procedure of the various organs, is undefined and its application is unclear. Articles 12 (3), in 15 (4) and 148 of the Treaty, Rule 13 of the of Rules of Procedure for the Summit of the Heads of State or Government, Rule 13 Rules of Procedure for the Council of Ministers, Rule 13 of the Rules of Procedure for the Coordination Committees, Article 2 of the Protocol on decision making simply state "consensus" plain and naked.

102. It is not defined in terms of unanimous, absolute, qualified or simple majority. It is not defined in relation to differing weights of particular decisions. It is not defined in relation to the various executive organs of the Community according to their hierarchy. If anybody was to pose the question "How is consensus applied under the Treaty and Protocol?" we are afraid the answer would be guesswork. We were not shown any answer and we found none. Little wonder therefore that this vacuum was filled by unanimity. Consequently, the Court is of the opinion that the cure for this defect does not lie in equating it, from the blue, with unanimity. Rather it lies in amending the relevant instruments.

103. Further, it is our considered opinion, from the above discourse, that consensus does not mean unanimity either from ordinary English meanings or from legal dictionaries and it does not imply unanimity when used in the Treaty, the Protocol on Decision Making or the Rules of Procedure of the various organs. They are two different concepts.

a) Whether Article 15(3) of the Treaty implies that consensus is synonymous with unanimity

Article 15(3) was raised during submissions as evidence that consensus as used in the Treaty refers to unanimity. The Article provides that: "…A member of the Council who is the leader of his or her Partner State's delegation to a meeting of the Council, may record his or her objection to a proposal submitted for the decision of the Council and, if any such objection is recorded, the Council shall not proceed with the proposal and shall unless the objection is withdrawn refer the matter to the Summit for decision."

104. With due respect, this Court finds Article 15(3) to be a specific provision on how an objection in the Council of Ministers is handled. Suffice it to state that the position of the Treaty as we construe it is that either such objection is withdrawn and a decision is taken in Council or it is not withdrawn and the Council takes a decision to refer the matter to the Summit 'for decision'. In the Summit, that decision will be made by consensus in accordance with Article 12 (3). Either way a decision will be made, by a competent organ of the Community, by consensus.

105. The import of Article 15 (3), therefore, in the Court's view, is to provide the above recourse only and neither means nor implies that consensus is synonymous with unanimity.

b) Whether the exception to consensus created by Article 148 of the Treaty implies unanimity

106. During the hearing, the exception created by Article 148 was raised as evidence that consensus as used in the Treaty actually refers to unanimity because of the title and content of the said Article which reads:

"Exception to the Rules of Consensus

Notwithstanding the provisions of paragraph 3 of Article 12 of this Treaty, the views of the Partner State being considered for suspension or expulsion shall not count, for the purposes of reaching a decision under the provisions of Articles 146 and 147 of this Treaty."

107. The Court, with due respect, does not agree with this interpretation. The import of Article 148 is that consensus will be achieved as required, but for purposes of achieving that consensus the "views" of the Partner State being expelled or suspended will not count.

108. In other words, all Partner States, except the Partner State being sanctioned, will participate in reaching the decision. And this is, in the Court's view, irrespective of whether the views of the Partner State being sanctioned are supportive of the sanction or not. It does not imply even here, that consensus is synonymous with unanimity and we advise accordingly.

c) The reported amendment of the Treaty

109. It was reported during submissions that there is a parallel process of amending the

Treaty to take care of the issue of the decision¬-making process in the Community's executive organs. In particular the United Republic of Tanzania and the Republic of Rwanda submitted that this was purely a policy matter to be addressed by the Council rather than the Court; and that this application was not only redundant but also sub judice and an abuse of Court process.

110. The Court was not given any evidence, and it did not find any, that the two processes might be inconsistent or incompatible with each other and that the Application is an abuse of the process of this Court. The Court considered the above submission and is of the view that the process of amending the Treaty reported to be underway in the Executive Organs of the Community, as well as this Application for an Advisory Opinion are perfectly compatible. The application was brought to this court on a directive of the Council, the very organ reported to be overseeing the said amendment. It was properly brought and the Court has jurisdiction. It is our considered view also that the reported amendment process is not "*subjudice*" as the term refers to a Court process that is pending "before the Court or Judge for determination" (see *Black's Law Dictionary, 8th Edition, page 1466*).

111. Conclusion: In conclusion we answer issues (i) and (ii) in the affirmative and issue (iii) in the negative. We advise accordingly.

* * * *

East African Court of Justice
Reference No.1 of 2008

Modern Holdings (EA) Limited And Kenya Ports Authority

Johnston Busingye, PJ; Mary Stella Arach -Amoko DPJ; John Mkwawa J, Jean Bosco Butasi J Benjamin Patrick Kubo J
February 12, 2009

Court's lack of capacity - Jurisdiction over institutions of the Community - Whether the Respondent could be had be sued be fore the Court - whether the Court hadjurisdiction to entertain the reference

Articles: 9 (2) 23(1), 27 and 30, of the EAC Treaty, Rule 20 of the EACJ Rules of Procedure 2004- the East African Community Customs Management Act of 2004 - East African Community Customs Management Regulations of 2006

The Applicant , a company incorporated and registered in the United Republic of Tanzania and carrying on business of importing a range of products, imported twenty one containers of assorted Masafi fruit juices and mineral water through the port of Mombasa in December 2007 and January 2008. These were perishable goods with a limited shelf life.

The consignment could not be cleared from the port, which is managed by the respondent, within the stipulated time due to the post election violence in Kenya which disrupted the operations at the port at the time. When operations resumed, the Applicant expected that the consignments would be cleared as a matter of priority given their perishability.

Without the Applicant s consent, the Respondent contracted and had warehoused the consignment at the Makupa Transit Shade Ltd (MATS). Which had no contractual obligation with the Applicant. The respondent then insisted that the Applicant clears its consignment through MTS Ltd and so the Applicant was unable to enjoy the customs warehouse rent waiver granted by the Government of Kenya and its tax agencies. In addition, the Respondent required the Applicant to clear twenty one containers be cleared within three days which as a logistically impossible demand and all containers could not be cleared within that period. Contrary to the waiver, the Respondent insisted that all customs warehouse rent should be paid in full and thus the Applicant suffered loss as the products became unfit for human consumption.

Held:

1. The Respondent was not among the institutions of the Community created under Article 9 (2), or a surviving institution of the East African Community. It was created by the Republic of Kenya, a Partner State, and not by the Summit.
2. The mere fact of rendering services at Mombasa port and serving the East African

Partner States and citizens does not ipso facto make it an institution of the Community as the service must be such a service created by the Summit under Article 9 (2) of the Treaty.

3. The reference was not properly before the Court due to lack of capacity of the respondent under Article 30 of the Treaty and the court had no jurisdiction to entertain this reference.

Cases cited:

Anyang' Nyong'o and Others v The Attorney General of The Republic of Kenya and Others, EACJ Reference No. 1 of 2006

Christopher Mtikila and Others v The AttorneyGeneral of the United Republic of Tanzania, EACJ Reference No.2 of 2007

Katabazi and Others vs The Attorney Generalof The Republic of Uganda and The Secretary General of the East African Community, EACJ Reference No.1 of 2007

Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd [1969] E.A 696 at 700 Others, Reference No.3 of 2008

Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [KLR] 1

The East African Law Society and Others v The Attorney General of the Republic of Kenya, EACJ Reference No 3 of 2007

Ruling

1. The Claimant is a company incorporated and registered in the United Republic of Tanzania, having its residence and registered offices at Sokoine Road, Arusha, Tanzania. It has perpetual succession, a common seal and power to sue and be sued in its corporate name. At the material time, it was an importer and sole distributor of Masafi products, which include high quality fruit juices and mineral water in the East Africa Region. The products were imported from a company called Masafi Mineral Water Co. (LLC) based in the United Arab Emirates.
2. The Respondent, Kenya Ports Authority (KPA) is a statutory corporate body, established under the provisions of section 3 of the Kenya Ports Authority Act (KPA Act), Cap. 391 Laws of Kenya. Its headquarters are at Mombasa, Kenya. Its duties are *inter alia*, to act as a warehouse provider and to store goods for persons making use of Kenyan ports. In addition, the Respondent has the statutory obligation to determine, impose and levy rates, fares, charges, dues or fees for its services or for use, by any persons, of its facilities.
3. The Claimant filed the reference in this Court on the 25th September 2008, under Article 30 of the Treaty for the Establishment of the East African Community (herein referred to as "the Treaty"), Rule 20 of the East African Court of Justice Rules of Procedure, the East African Community Customs Management Act of 2004, and the East African Community Customs Management Regulations of 2006.
4. In the reference, the Claimant avers that it imported 21 x 40ft containers of assorted Masafi fruit juices and mineral water which landed at the Mombasa port on diverse days in December 2007 and January 2008. The Claimant further avers that the consignment could not be cleared from the port within the stipulated time due to the

post election violence experienced in Kenya during the aforementioned period which disrupted the operations at the port. It avers that the Respondent was fully aware that the consignments consisted of perishable goods with limited shelf life and in order to cover for the period lost due to the disruptions of port operations, it was imperative and legitimately expected that the clearance of the Claimant's consignments would be effected as a matter of top priority on resumption of port operations.

5. The Claimant contends that in recognition of this fact, and in the East African Community spirit, the Kenya Revenue Authority (KRA) in accordance with Regulation 85 of the East African Community Customs Management Regulations of 2006 recommended on the 28th April 2008 to the Minister for Finance a waiver of customs warehouse rent of 80%. It avers further that on the 8th May 2009 (he must have meant 2008), the Government of Kenya acted on the recommendation and waived 80 % of the customs warehouse rent up to 13th March 2008. The Complainant complains that unknown to it and without its consent, and/or without justification, the Respondent had warehoused its consignment at the Makupa Transit Shade Ltd. (MTS Ltd.), an entity contracted and/or which entered into some arrangement with the Respondent, but which had no contractual obligation with the Claimant.
6. The Claimant avers that the Respondent unlawfully and unjustifiably insisted that the Claimant must clear its consignment through MTS Ltd, with the direct consequence that the waiver granted by the Government of Kenya and its tax agencies could not be enjoyed by the Claimant. The Claimant added that the said company imposed unreasonable clearance conditions that all twenty one (21) containers be cleared within three (3) days with a verbal waiver of 90% of the customs warehouse rent, making it logistically impossible to clear the consignments within the imposed duration apart from only six (6) out of the twenty one (21) containers. The Complainant contends that, MTS Ltd, after the expiry of the three (3) days period refused to allow the Claimant to remove the rest of the consignments, notwithstanding the arrival of nine (9) trucks from Tanzania and an additional six (6) trucks sourced locally to transport the said containers, unless and until the customs warehouse rent was paid in full, thereby overriding the waiver granted by the Kenya Government.
7. The Claimant contends further that the Respondent and/or its agent MTS Ltd, arrogantly and blatantly ignored and/or unreasonably refused to comply with the directive issued by the Government of Kenya. It avers that through no fault of its own and as a direct consequence of the Respondent acting in cohorts with MTS Ltd, it has suffered colossal pecuniary losses in that:
    - All products in the aforesaid containers have expired and are no longer fit for human consumption ;
    - It's sales and distribution agreement dated 12th October 2008 with Mineral Water Co[LLC], a high quality and reputable juice supplier ,has been terminated with no option for renewal;
    - Its bank guarantee of US $ 1,000,000 was utilized by Masafi Mineral Water Co.(LLC) to liquidate outstanding invoices;
    - Bankers withdrew credit facilities, and threatened to foreclose on its collateral so as to realize security;
    - Its reputation as a trading entity has been gravely injured and eroded;

- It incurred expenses in hiring fifteen (15) trucks, nine (9) of which came from Tanzania to carry the consignments;
- It incurred expenses in purchasing air tickets, on road transport , hotel accommodation and meals in following up clearance of the aforesaid consignments from the custody of the Respondent;
- It incurred unnecessary demurrage charges which continue to be incurred at a rate of US $ 50 per day; and
- It lost profit due to failure to deliver the consignments, and interest on monies borrowed from banks to pay its creditors.

8. Consequently, the Claimant claims from the Respondent and prays for the following orders from the Court:

"(1) A declaration that the decision and the action of the Respondent in refusing to clear and release the Claimant's consignments is unlawful and an infringement of the letter and spirit of the Treaty and The East African Community Customs Management Act and Regulations.

(2) A declaration that no further customs warehouse rent is payable to the Respondent by the claimant on the 15 containers in their custody, whose contents and/or products have expired.

(3) Loss of the consignment through expiry of the product.	$ 819,554
(4) Loss of profit for January to June 2008	$ 1,395,816
(5) Special damages	$ 22,500,000
(6) Interest on borrowed funds up to June 2008	$ 28,749
(7) Expenditure on following up clearance	$ 75,000
Sub Total	**$ 24,819,119**

(8) Loss of profit for the remaining period of the sales and distribution agreement which is 31.12.2010, at a rate of $ 232,636 per month for 30 months from 01.07.2008 totaling $ 6,979,080

(9) General damages to be assessed by the Court together with interest thereon at rates to be determined by the Court.

(10) Interest on items (3),(4),(5),(6)&(7) herein above and/or the decretal sum from 01.07.2008 to the date of full payment at commercial rates and/or such rates as this Honourable court may deem fit to grant.

(11) Any other relief that this Honourable Court may deem fit to grant.

(12) Costs of this reference be borne by the Respondent in any event."

9. In its response filed on the 27th November 2008, the Respondent admitted the description of the parties, its statutory duties under the KPA Act, the objectives of the Treaty as stated in the last four recitals of the preamble as cited, the purpose of the promulgation of the East African Community Customs Management Laws, namely, to facilitate trade and business in the Partner States, the importation of the cargo by the Claimant on the dates and in the quantities stated as well as their intended destination. The Respondent, however, denied each and every allegation contained in the reference as though the same were set out verbatim and traversed seriatim. It described the reference as frivolous, vexatious and a grave abuse of the process of the Court, and urged the Court to dismiss the same in *limine*.

10. The response also gave notice of a preliminary objection seeking the dismissal *in limine* of the reference on the grounds that:
    (i) This honourable Court lacks the jurisdiction to entertain the nature of the matter contained in the reference.
    (ii) The Respondent lacks the capacity to be sued as a legal person in this honourable Court.
    (iii) The applicant lacks the *locus standi* to bring the reference before the Court.
11. When the reference came before the Court on 20th January 2009 for scheduling conference, the Court ruled that the preliminary objection be dealt with straightaway, since it was a fundamental point of law which could, if upheld, dispose of the reference at this stage of the proceedings. The Court was alive in taking this step, to the observation made by Law,J.A of the then E.A Court of Appeal in *Mukisa Biscuits Manufacturing Co Ltd – vs - West End Distributors Ltd [1969] E.A 696* at 700 where he stated that:
    "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court,…."
12. Additionally, this Court took cognizance of the fact that jurisdiction is basic to its adjudicatory function, such that if jurisdiction is challenged and made an issue, it ought to be addressed and determined forthwith. The rationale for this was aptly summed up by Nyarangi, J.A. of the Kenya Court of Appeal (as he then was) in *Owners of Motor Vessel "Lilian S"- vs- Caltex Oil (Kenya) Ltd [KLR] 1* when he stated at page at page 14:
    "…. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest possible opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence…."
13. Submissions were made by Mr Geoffrey Imende and Mr Paul Muite, Counsel for the Respondent and Claimant, respectively. The Court reserved its ruling on the issue till 12th February 2009.
14. The bone of contention from the submissions of both learned Counsel is the jurisdiction of this Court to entertain the reference and the capacity of KPA as a Respondent. Spirited submissions were made before this Court on behalf of both parties.
15. The Respondent's Counsel submitted that KPA lacks the capacity to be sued in this Court as a legal person because it is not an institution of the Community. Article 30 of the Treaty provides that a complaint must be against an Act, regulation, directive, decision or action of a Partner State or an institution of the Community. The Treaty defines an institution of the Community in Article 9 (2) of the Treaty as such bodies, departments, and services as may be established by the Summit. KPA was not established by the Summit, it was established by the Republic of Kenya, a Partner State, under the provisions of section 3 of the KPA Act. It was his submission

therefore that this Court has no jurisdiction to entertain and determine this reference.

Counsel for the Respondent abandoned ground (iii) of his objection.

16. Learned Counsel for the claimant on his part maintained that this Court has jurisdiction to entertain and determine this reference. He submitted that Article 30 of the Treaty is not specific as to who should be a respondent in a reference brought by legal or natural persons under the said Article. He argued further that in the event that the Court accepts the argument by the Respondent's Counsel that the said Article only applies to Partner States and institutions of the Community as respondents, KPA can be classified
17. As an institution of the Community by virtue of Article 9 (2) of the Treaty because the said sub-Article refers to "services". He pointed out that under Article 93 of the Treaty which obligates the members of the Community to co-operate in the development and promotion of port services, the word "services" is used several times and that at the time the Summit signed the Treaty, the said Article 93 was part and parcel of the Treaty, and that therefore KPA is a service of the Partner States and the Community.
18. Counsel for the Claimant also stated that one of the reasons why he resorted to this Court is the failure by the Republic of Kenya to establish a tax appeals tribunal to which he would have referred the matter before this Court for adjudication.
19. After due consideration of the submissions, it is the Court's view that the issues for determination are:
    (a) Whether the Court has jurisdiction to entertain the matter complained of in the reference.
    (b) Whether the Respondent has the capacity to be sued in this Court.
20. The Court is in agreement with Mr. Imende that in this case the two issues are intertwined and is of the view that the matter revolves around the interpretation of Article 30 read together with Article 27 of the Treaty.
21. The jurisdiction of the Court is conferred by the Treaty. The Treaty describes the role and jurisdiction of the Court in two distinct but clearly related provisions. In Article 23(1), the Treaty provides:
22. "1.The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the Treaty."
    It then provides thus in Article 27(1):
    "The Court shall initially have jurisdiction over the interpretation and application of this Treaty."
23. The Treaty also makes provision for reference by natural or legal persons to the Court under Article 30 on which the preliminary objection is based. It reads:
    "Reference by Legal and Natural Persons
    1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner state may refer for determination by the Court, the legality of any Act, regulation, directive, decision, or action of a Partner State or an institution of the Community on the ground that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."
24. The Treaty, being an international treaty among five sovereign states, namely, Kenya, Uganda, Tanzania, Rwanda and Burundi, is subject to the international law on interpretation of treaties, the main one being "The Vienna Convention on the Law of

Treaties".

Article 31 of The Vienna Convention on the Law of Treaties sets out the general rule of interpretation of treaties as follows:

"1. A Treaty shall 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 its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation.

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

25. This rule has been applied by this Court in for instance, *Prof. Peter Anyang' Nyong'o and Others - vs – The Attorney General of The Republic of Kenya and Others, Reference No. 1 of 2006; and in The East African Law Society and Others - vs - The Attorney General of the Republic of Kenya and Others, Reference No.3 of 2008*.

26. The Court has been proactive in the interpretation and application of the Treaty. For instance in *Katabazi and Others - vs - The Attorney General of The Republic of Uganda and The Secretary General of the East African Community, Reference No.1 of 2007*, a similar preliminary objection was raised by Counsel for the Respondents on the grounds that the reference was a human rights issue, and that the Court had no jurisdiction under Article 27 (2) of the Treaty in the absence of a protocol to operationalise the Court's extended jurisdiction. The Court had no difficulty in overruling the preliminary objection in question because that complaint did not only involve the interpretation of the Treaty, but was also basically against the Republic of Uganda, a Partner State of the Community. That case is distinguishable from the instant one in that the Respondent KPA is not a Partner State of the Community.

27. The Court has also declined to entertain matters where it has no jurisdiction. (See: *Christopher Mtikila and Others – vs - The Attorney General of the United Republic of Tanzania, Ref No.2 of 2007*).

28. In *Prof. Anyang' Nyongo and Others – vs – The Attorney General of the Republic of Kenya and Others, Ref. No.1 of 2006*, the Court struck out the reference against three individuals for lack of capacity. The Respondents were sued as the Clerk to the National Assembly of Kenya, Leader of Government Business of the National Assembly of Kenya and the Chairman of NARC Kenya, a political party, respectively.

Counsel for the applicants had argued that since a natural person has the capacity to sue in this Court a natural person must also have the capacity to be sued in the same Court under the Treaty. He had urged the Court to give Article 30 of the Treaty an interpretation that would bring natural persons who commit misfeasance that infringe provisions of the Treaty within the ambit of Article 30 to account for their actions. This is what the Court held at page 7 of the ruling dated 27th November, 2006:

"With due respect to Counsel for the Applicants, it appears to us that enjoining the 2nd , 5th and 6th Respondents to the reference was under a misconception. A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the Community. The alleged collusion and connivance, if any, is not actionable under Article 30 of the Treaty.

29. We think there is merit in the objections. The matters referred to this Court, whose legality it has to determine relate to the responsibility of the Republic of Kenya as a Partner State, acting by its National Assembly under Article 50 of the Treaty, to elect nine members of the EALA. Both the process of selecting the nine members whose names have been remitted to the 3rd Respondent and the Election Rules under which they were elected or selected were done by the Republic of Kenya through its National Assembly. It is for that reason that the Attorney General of Kenya was rightly made the 1st Respondent."
30. Applying the above principles to the matter before us, and we find the language of Article 30 plain and clear. As we have demonstrated earlier on in this ruling, and it is not in contention by both parties:
31. Article 30 makes provision for reference by any natural and legal person; who is resident in a Partner State; in respect of the legality of any Act, regulation, directive, decision, or action of a Partner State or an institution of the Community; on the grounds that such Act, regulation, decision or action is unlawful or is an infringement of the provisions of this Treaty.
32. Article 9 (2) contains the following definition of institutions of the Community:
"2. The institutions of the Community shall be such bodies, departments and services as may be established by the Summit."
33. The institutions of the Community are enumerated under Article 9 (3). These are:
-The East African Development Bank, The Lake Victoria Fisheries Organization and surviving institutions of the former East African Community which are defined as follows on page 10 of the Treaty:
"surviving institutions of the former East African Community" means the East African Civil Aviation Academy, Soroti, the East African Development Bank, the East African School of Librarianship and the Inter-University Council for East Africa."
34. KPA is definitely not among the institutions of the Community created under Article 9 (2), or a surviving institution of the East African Community appearing on the above list. As such KPA is not one of the respondents envisaged under Article 30 of the Treaty.
35. KPA is an authority created under section 3 of the KPA Act as a statutory body with

perpetual succession, a common seal and power to sue and be sued in its corporate name. It was created by the Republic of Kenya, a Partner State, and not by the Summit. The "Summit" means the Summit established by Article 9 of Treaty. Members of the Summit consist of Heads of State or Government of Partner States. The mere fact of rendering the nature of the services it renders at Mombasa port, namely, serving the East African Partner States and citizens, does not ipso facto make it an institution of the Community. In order to qualify as a service under Article 9 (2) of the Treaty, the service must be such a service created by the Summit.

36. Further and in respect of the submission by learned Counsel for the claimant based on Article 93 of the Treaty, the Court finds that the obligation to promote the development of efficient and profitable sea port services enumerated in the said Article is an obligation of the Partner States. In this particular case, the obligation lies squarely on the shoulders of the Republic of Kenya, and not on other implementers along the way like KPA. In sum, therefore, the reference is not properly before this Court due to lack of capacity of KPA as a respondent under Article 30 of the Treaty.
37. Finally an allegation was levelled against the Republic of Kenya by Counsel for the Claimant that the Claimant had to resort to this Court due to failure by the Republic of Kenya in setting up a tax appeals tribunal to deal with disputes such as the one before this Court. With due respect to learned Counsel, we are unable to make any finding on this issue because the Republic of Kenya was not a party to this reference and the statement was from the bar.
38. Based on the above reasons, we hold that this Court has no jurisdiction to entertain this reference. We accordingly uphold the preliminary objection raised by Counsel for the Respondent and dismiss the reference with costs to the Respondent.

* * * *

East African Court of Justice – First instance Division
Application No 4 of 2009

Attorney General of Kenya And Prof. Anyang' Nyong'o & 10 others

Johnston Busingye, PJ
October 16, 2009

Christmas vacation and Court Vacation - Court's unfettered discretion to extend time – Delay in lodging an application must be sufficiently explained - The right of a litigant to enjoy the fruits of judgment – Whether the application was made in good faith.

Rule 4 of the East African Court Rules of Procedure, 2004

Upon the conclusion of Reference No.1 of 2006, the Respondents were awarded costs which were taxed on 19th December 2008. In January 2009, the Respondents Advocate demanded settlement of the decretal sum but the same was still pending in April 2009 when the Applicant filed this application seeking an extension of time to file a Reference contesting the Taxing Officer's decision. This was ninety days after the Bill of costs was taxed. The Applicant gave several reasons for the delay including: the Christmas vacation and consultations with the other government branches.

The Respondents opposed the application asking the court to examine whether the Applicant had sufficiently and in good faith explained the delay.

Held: The Court's discretion is exercisable on the basis of evidence and sound legal principle; and that the duty of placing the necessary evidence before the Court to enable it exercise its discretion is on the applicant. In order to justify a Court in extending the time, there must be some material upon which the Court can exercise its discretion. It must be discernible that the application is made in good faith and the reasons plausible and candid to pass the test of sufficiency. There was, inordinate, unreasonable and wanton delay and the explanations offered were insufficient, less than candid and, in places, highly improbable. The Applicant in this case did not discharge this duty, the application lacked merit and was dismissed.

Cases Cited:
Ambunda vs Tanzania Harbours Authority (Civ. App. No. 164 of 2005), TZCA
Bogetutu Farmers v Mohamed Hassan Yonis H.C.C.C No. 154 of 1992
Boney M. Katutumba v Waheed Karim, Civil Application No.27 of 2007
Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil Application No. NAI 225 of 1997
Mohamed & Muigai Advocates vs Kang'ethe & Company Advocates H.C.C.C. No.234 of 1999
Mwangi v. Kenya Airways [2003] KL P.56
Paul Njoroge vs The Attorney General and others, High Court of Kenya, Misc case no.90 of 2004

Ratman vs Cumara Samy (1965) I WLR 10
Samuel Ondieki V Samwel Mageto (2006) KLR
Zam Nakumansi vs Suleman Lule Civil , Supreme Court of Uganda, Application No. 02 of 1999

Ruling

1. The Applicant is the Attorney General of the Republic of Kenya. He is represented by Mr. Antony Oteng'o Ombwayo Senior Principal Litigation Counsel, Attorney General's Chambers, Kenya.
   The Respondents are Hon. Peter Anyang – Nyong'o and ten others. They are represented by Mr. T. J. Kajwang and Ms Judith Sijeny of Kilonzo & Co. Advocates.
   This is an application to enlarge time brought under Rule 4 of the Rules of this Court.

Background

2. The facts which gave rise to this application are that this Court, in its judgment of 30th March 2007 in Reference No.1 of 2006, ordered that the claimants (who are the respondents in the present application) "shall have costs of the Reference to be borne by the 1st Respondent and to be taxed by the Registrar taking into account that a single applicant could have presented the reference."
3. Subsequently the Bill of Costs was lodged and taxed. The Ruling on Taxation was delivered on the 19th December 2008 by the Registrar of this Court, as Taxing Officer by virtue of Rule 113 of the Rules of this Court.
4. On the 6th January 2009 the Attorney General of the Republic of Kenya, the applicant in this application, communicated the contents of the Taxation Ruling to the Clerk of the National Assembly of Kenya, advised the Clerk on the available options at law and sought instructions on the way forward.
5. On the dates of 12th and 22nd January 2009 the claimants, through Kilonzo and co. Advocates, sent written demands to the Attorney General and the Clerk to the National Assembly, respectively, seeking amicable settlement of the decretal sum or else recovery proceedings would issue.
6. On the 3rd April 2009 the applicant filed the present application to enlarge time so he could file, out of time, a Reference on Taxation under Rule 114 of the Rules of this Court. Rule 114 provides that a Reference on Taxation may be made within 14 days. This Reference is sought to be filed about 90 days after the Ruling on Taxation was delivered hence the application to extend time.
7. The application is supported by the affidavit of Senior Principal Litigation Counsel, Attorney General's Chambers Antony Oteng'o Ombwayo sworn on 13th March 2009. The grounds on which the application is based, as appear in the Notice of Motion, as well as in Mr. Ombwayo's affidavit, may be summarized as follows:-
   1) That the application could not be filed in time due to Christmas vacation that was being observed by the Staff of the East African Court of Justice and the Registry was not manned,
   2) That the delay in filing the application was occasioned by hardship,
   3) That consultations between the office of the Attorney General, the Clerk to the

National Assembly of Kenya and the Treasury delayed the filing of the application,
4) That time be extended due to the public interest in the case,
5) That the Respondents are not persons of mean resources and therefore no prejudice will be occasioned to them if the extension is granted.
6) That the Reference is merited as the amount awarded by the Court is excessive and not founded on any legal basis hence the same ought to be reviewed.

Hearing in Court

8. At the hearing Mr. Ombwayo, for the Applicant, relying on two affidavits and oral arguments submitted that the two main grounds of this application are inability to file due to Christmas vacation and inability to file the application due to tragedies that befell his family necessitating his personal intervention at home. He also told the Court that there were consultations between the office of the Attorney General and that of the Clerk to the National Assembly and the Treasury over this matter which also delayed the filing of the Reference.
9. Canvassing the first of the grounds, learned Counsel submitted that it was within his knowledge that between 15th December and 5th January the entire staff of the East African Community go on Christmas vacation. Therefore, he submitted, part of the 14 days expired when the court was on vacation.
10. On the second ground Counsel submitted that "after the vacation" on 10th January 2009 his younger brother was attacked by thugs and he had to travel to his rural home to attend to his treatment as a facilitator. He told Court that "in the same month of January" another brother of his was also attacked and again he had to personally intervene back at home. He told the Court that during that time he could not engage in the preparation of this application to be brought before the Court.
11. After his main grounds he raised a few more. On the consultations ground Counsel submitted that there were some consultations between the offices of the Attorney General and that of the Clerk to National Assembly over possible settlement of and who should pay the costs and this led to some delay in the filing of the Reference.
12. On the public interest ground, Counsel submitted that since the award made is to be paid from the consolidated fund, itself public money, the public in Kenya stands to lose colossal sums of money due to the inordinately high award and invited the Court to take into account the greater public interest as opposed to private interest.
He submitted further that the Kenyan public will suffer irreparably if the money is paid without the Government being able to challenge the taxing officer's award.
13. On prejudice, Counsel specifically argued that the respondents had not commenced Execution Proceedings as provided by Rule 74 of the Rules of the Court, order 28 rule 3 of the Civil Procedure Act, Chapter 21 Laws of Kenya and section 21 of the Government Proceedings Act Chapter 40 of the Laws of Kenya, and therefore, he argued, it would do them no harm if this extension is granted because it would not be interrupting any execution process.
14. On resources of the parties issue Counsel specifically referred to the 1st Claimant in Reference No. 1 of 2006, Prof. Anyang Nyong'o and, matching him with the "single Claimant" mentioned in the judgment, submitted that he is a Cabinet Minister who will not suffer any prejudice "as a Cabinet Minister is not a man of mean resources."

15. On the merit of the Reference Counsel submitted that the amount awarded of 1.3m$ was inordinately high, was not founded on any legal basis and did not reflect costs for one claimant especially on the instruction fees.
Counsel cited authorities like *City Council of Nairobi vs Intercity Utility Services Ltd (Civil application No.35 of 2007), Samuel Ondieki vs Samuel Mageto Civil Application No. 266 of 200, Wasike vs Khisa and Another Civil Appeal No. NAI 248 of 2003 and Wasike vs Swala Civil Application No. NAI, 150 of 1983* to support his submissions that this Court has unfettered discretion to extend time, that he had put enough material before Court to enable it exercise this discretion judicially and not capriciously, that there is sufficient public interest in this case to warrant extension of time and enable review of the award and that the reference was merited.
16. Mr. T.J. Kajwang, for the Respondents, relying on the affidavit of Ms Sijeny and on oral arguments, opposed the application. He concurred, though, with Counsel for the Applicant on the matters the Court will consider in determining extension of time as including length of delay, explanation of the delay, arguability of the reference, merits of the reference, prejudice to the other party, public importance of the matter, general interest of justice, application made in good faith and sufficiency of the reasons advanced. He did not dispute the length of the delay. He invited the Court to examine whether the applicant had sufficiently, and in good faith, explained the delay in filing the application.
17. First he contended that Counsel was confusing Christmas day, official holidays, Court vacation and computation of time. He argued that Christmas day is an official holiday within the meaning of Article 2 of the Rules, that Court vacation is a vacation determined by the President and published in the Gazette as provided by Rule 19 and that under Rule 3 periods shall (b) include official holidays, Sundays and Saturdays and (c) shall not be suspended during Court vacations. He urged the Court to find that Counsel for the Applicant had not based his arguments on all or any of the above rules and therefore had not sufficiently explained his grounds of delay due to "Christmas vacation."
18. On the family tragedies issue Counsel argued that Mr. Ombwayo had not put anything on record to help him prove the truth of what he was saying. He enumerated the many unanswered questions around this ground such as which is the vacation after which the tragedies happened, on which dates did the attacks happen, when did Mr. Ombwayo travel to his rural home, when did he return to office, what was the seriousness of the attacks, and what was the evidence was on record to support what he was saying. Counsel contended that these are very legitimate questions without whose answers the Court was unable to determine whether there was sufficient or any explanation on this ground. Relying on *Wasike V. Khisa & Another Civil Appeal No. NA1 248 of 2003* Counsel told Court that it was the applicants duty to provide evidence to support the grounds of his application to enable the Court to believe the truth of what he was saying.
19. On the ground of consultations between the offices of the Attorney General, the Clerk to the National Assembly and the Treasury learned Counsel challenged the nature of the said consultations. He invited the Court to take notice that the Respondents were not party to these consultations and therefore could not be affected thereby.

He also argued that since the Attorney General already knew the options and merely waited for the Clerk's instructions he could not see why it took up to April to file the application after the Clerk had allegedly responded in February 2009. He urged Court to find that there is no explanation at all on this ground as well.

20. On the ground of public interest around the application Mr. Kajwang contended that evidence of public interest should be brought before the Court and should not be an opinion of counsel. He told court that public interest cannot be on an amount of money awarded to a litigant but on a policy issue. He argued further that the Ruling on Taxation is a very private matter unless the Applicant can show the court any law which has shown that public policy in the community court is such that Partner States should not be made to pay certain amounts of money upon which the applicants would base to argue that a decision to award such money is against public policy.
21. On the ground of prejudice Counsel argued that there is a judgment by which the claimants acquired vested rights and it will be prejudicial if it is disturbed or re opened. He contended that these rights can only be disturbed by applying the rule of law and the rule of law in the present case is sufficient reason which, in his opinion, the Applicant had failed to show.
22. On the ground that the Reference is merited as the award is excessive and not founded on any legal basis, Counsel argued that the Taxing Officer gave a decision on the matter well aware of the position taken by the Court that one claimant could have brought the Reference and that, therefore, the Applicant's argument lacked basis. Secondly he questioned the basis of the Applicant's assertion that the sums awarded were excessive and wondered what they were excessive against or what the yardstick of what is not excessive was since excessive was a relative term.

Consideration of the Grounds

23. Rule 4 of the Rules of this Court empowers this Court, for sufficient reason, to extend the time prescribed by these rules. In *Boney M. Katutumba – vs Waheed Karim, Civil Application No.27 of 2007* Justice Mulenga, JSC, (as he then was) held: "… under rule 5 of the Supreme Court Rules (the equivalent of rule 4 of the rules of this Court), the Court may, for sufficient reason, extend the time prescribed by the rules. What constitutes "sufficient reason" is left to the Court's unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant from taking the essential step in time, or other reasons why the intended appeal should be allowed to proceed though out of time. For example an application that is brought promptly will be considered more sympathetically than one that is brought after an unexplained inordinate delay. But even where the application is unduly delayed, the Court may grant the extension if shutting out the appeal may appear to cause injustice."
24. I respectfully agree with that holding and will apply it in handling the present application. I, however, also agree with the respondent that it must be discernible that the application is made in good faith and the reasons plausible and candid to pass the test of sufficiency. See *Mohamed & Muigai Advocates vs Kang'ethe & Company Advocates H.C.C.C. No.234 of 1999 (O.S)*. Counsel for the Applicant stated the two main grounds of his application and added a few others, as afore shown, which I will proceed to examine.

1st Ground

25. In the first ground he said that inability to file in time was due to Christmas vacation. He stated, and I quote, "… it was within my knowledge that between the 15th December and 5th January 2009, the entire staff of the East African Community go on Christmas vacation… so part of the 14 days expired when Court was on vacation."
26. Mr. T.J. Kajwang, for the Respondents, attacked this reason for insufficiency. He contended that the Applicant was confusing Christmas day, official holidays, Court vacation and computation of time. He invited the Court to find that this particular ground of delay was not sufficiently explained by the Applicant.
27. Having listened to arguments to Counsel, I concur with learned Counsel T.J. Kajwang. Christmas day is an official holiday within the provisions of Article 2 of the Rules of this Court. Court vacation is a vacation of the Court determined by the President of the Court and published in the Gazette vide Rule 19, and, under Rule 3, periods in (b) shall include official holidays, Sundays and Saturdays and in (c) shall not be suspended during Court vacations. No such thing as "Christmas vacation" exists under the Rules of this Court.
28. In my view the applicant had a duty to sufficiently explain what he meant. A blanket statement that it was within his knowledge that the entire EAC Staff go on Christmas vacation between 15th December and 5th January, aware that it means different things to different institutions, without any reference to the above said rules or to how he could have acquired, and decided to rely on, this knowledge or, at least, to which officer of the court could have "misled" him, amounts, in my view, to a fairy tale.
29. If the Hon. Attorney General, or Mr. Ombwayo in particular had, indeed, desired to file this reference in time surely they had, at their disposal, all professional and material resources to find out what the rules provide. Instead they chose to rely on generalized knowledge. On deeper inquiry the Court finds that the first and only communication in this respect, availed to Court, to the Clerk of the National Assembly was written by Mr. Ombwayo and was written on the 6th January 2009, a day late. In its "options available" the letter suggests that the Registrar's ruling should be referred to a single Judge in accordance with Rule 78 (current Rule 114). The Court does not seem to see any urgency in the words used or in the tone of the letter if indeed the Attorney General thought that time was of the essence.
30. The Court itself asked Mr. Ombwayo to clarify these vacation issues for the record. First he said he did not know what the Rules provide. Immediately thereafter he said he was not aware if the President had declared a vacation. Then he said he believed the Court went on vacation just like the other staff of the EAC. When the Court pressed him about this belief he said it was a practice even in the past. In contradiction he said that he had been able to file documents during the 2007/2008 Christmas vacation. When it was suggested to him that it was possible, therefore, to receive documents at that time he said that, then, an officer was called from Kisii but that since this time it was a vacation he could not come back to file the reference.

    I found his answers so incoherent that to believe them would be to assume the very high risk of piecing them together and guessing which fits where. I preferred not to. I formed the opinion that this ground was being cooked up.

2nd Ground

31. Counsel for the Applicant's second ground was hardship. He told Court that his brothers at home were attacked one after another whereupon he intervened thereby losing valuable time.
32. Mr. T.J. Kajwang for the Respondents challenged the sufficiency of the explanation for this ground because of the many unanswered questions surrounding it as shown above.
33. I am of the view that the applicant failed to sufficiently explain this ground. Mr. Ombwayo was challenged to clarify the "vacation", referred to in his submissions, after which his family tragedies happened. He did not. He was challenged to mention the respective dates on which his brothers were attacked. He managed one, the 10th January 2009, which he could not prove. He was challenged to indicate when he travelled to his rural home and when he returned. He did not. He was challenged to produce medical, police or any evidence of these attacks. He only said that all available documents had been sent to the Teachers Service Commission as his brothers were teachers and the Commission needed the documents to process compensation. He did not tell the Court whether he attempted to obtain these documents and failed or whether he thought they were not required in evidence. He was asked why he thought the Court could believe his story without evidence and replied that as an officer of the Court he could not be lying. He was told that this is a Court of Law and the issue was one of proof and not one of who was lying and who was not. He answered that he had no opportunity to obtain proof. When he was asked whether the Attorney General's Chambers got incapacitated because he was away he said he had gone up country and mistakenly did not hand over the file otherwise the office was operational.
34. The Attorney General was served with Ms Sijengy's replying affidavit, in which the sufficiency of Mr. Ombwayo's explanation of his family tragedies was questioned, on or around 20th May 2009. He filed nothing in evidence. He personally sought and was granted leave to file a further affidavit. He did file one on 11th June 2009. He did not explain any of these issues.
35. Upon careful examination of the of arguments on this ground I could not tell, with certainty, whether the unfortunate tragedies actually happened, whether, if they happened, Mr. Ombwayo went home to assist or whether nothing at all happened to Stanley and Wyclif Ombwayo and the ground was a mere gamble. With due respect, I found Mr. Ombwayo's honesty, candour and effort in explaining his family tragedy far less than I would require to admit his story in Court. Clearly this was not the conduct of counsel who wanted to move the court to appreciate the personal tragedy that befell him, the resultant honest mistake he committed and the delay occasioned. (see *Mohamed & Muigai Advocates (supra)*.
36. Even the mistake he claimed to admit of going up country without handing over the file, needed to be proved, in the first place, before it could be admitted as mistake of Counsel. I am alive to established case law that mistake of Counsel should not be visited on his client. (see *Zam Nakumansi vs Suleman Lule Civil Application No. 02 of 1999 (SCU)*. Mr. Ombwayo did not prove to the Court that he went to Mumias or to Kakamega on any date between 19th December 2008 and 3rd April 2009. The veracity of his story was challenged way back in May 2009 in Ms Sijeny's affidavit.

He had all the time until 21st August 2009 to prove it. He knew it was his burden as Mr Ombwayo as well as Counsel for the applicant. There is clear authority that discretion is exercisable on the basis of evidence and sound legal principle; and that the duty of placing the necessary evidence before the Court to enable it exercise its discretion is squarely on the applicant; See *Bogetutu Farmers vs Mohamed Hassan Yonis H.C.C.C No. 154 of 1992.*)

In my view the applicant did not discharge his duty.

3rd Ground:

37. The Applicant's third ground was that there were consultations between the Attorney General's Office, that of the Clerk to the National Assembly and the Treasury which delayed the filing of the application. Counsel for the Respondents challenged this ground as shown above.

    The Court examined the arguments.

38. Counsel for the Applicant was asked to clarity the nature of these consultations, if they ever took place, and why they should have occasioned a delay. His response was that;

    "… some of the consultations were, in terms of meetings and, of course, there was also a possibility of settling the matter. Such consultations are the ones that delayed the filing of the reference. If there is that possibility of settling the matter and also analyzing the opinion that I had presented to them, we could not file the reference, until maybe a decision is made by the Office of the Attorney General and the Clerk to the National Assembly on the way forward. There is no correspondence annexed but some of the consultations were in terms of meetings…" When he was pressed further about the nature of consultations he responded that there was also some confusion between the Attorney General and the Clerk to the National Assembly, over who should pay. When he was asked whether the Clerk to the National Assembly responded to the Attorney General's letter of 6th January 2009, and whether that response was in writing, he told the Court that the Clerk replied in writing, sometime in February 2009, that he, in fact, instructed the Attorney General to proceed and file a reference pursuant to Rule 114 and that, although he had not found that letter to annex it to his affidavit, it was within his knowledge that it existed and it preferred the option of filing a reference.

39. Upon consideration of the arguments of Counsel I found the evidence of consultations placed before the Court by Counsel, very insufficient. Counsel merely stated that there were consultations and that he was willing to be cross-examined on his statement. With due respect this was not the burden placed on him. The burden was to place evidence before the Court and not to assure the Court that the evidence existed somewhere else. In the unlikely event that the consultations took place, the Court was not told why they impaired the capacity of the Attorney General's Office to file the Reference. Even a possible settlement, to which the Respondents were not party, would not have impaired the Attorney General from filing the Reference, just in case.

40. The only correspondence on record is of 6th January 2009. This was after the 14 days. It was late already. The alleged consultations took place, if at all, after that date. In my view no matter how fast agreement would be reached on the way forward, it seems

not to have been the intention of both of these offices that this application is filed in time.

41. The Court was told by Mr. Ombwayo that the Attorney General waited for the Clerk's reply before filing the application. But apart from stating, from the bar, that the Clerk replied, no evidence was placed before Court. In other words it was not proved whether the Clerk, up to know, ever responded. Whether it is true, as Counsel told Court, that the Clerk replied and instructed the Attorney General to proceed and file a reference under Rule 114, no evidence was placed before Court. Whether it is true that the letter could not be located in the Attorney General's Chambers, no evidence was brought. Assuming it is true the Attorney General received the missing letter, "sometime in February 2009", as Mr. Ombwayo told Court, still the Court was not told what happened all the way to 3rd April 2009. Counsel for the respondents sought an answer as to why they were not part of these consultations or why they should be affected thereby in the end. Mr. Ombwayo had no answer for this as well.
42. In *Paul Njoroge vs The Attorney General and others, HC Misc case no.90 of 2004* Justice W.S. Deverell, faced with inability due to negotiations, such as the inability due to consultations in the present case had this to say; "… I consider that it was a risky strategy for the applicants to delay filing the record of appeal on the strength of verbal negotiations, which do not appear to have been reduced to writing at any material stage. It would have been prudent to have complied with the requirements laid down in the rules while the alleged negotiations were ongoing and to have confirmed their existence in writing at some stage. As it is I am not in position in which I can make any meaningful decision as to who is telling the truth as to the existence of the alleged negotiations. The burden of proving their existence is upon the applicants who now wish to rely upon them and I am of the view that this burden has not been discharged."
43. This authority summarizes my opinion on this ground. I am not in position in which I can ascertain whether, in truth, these consultations took place and, if they took place, why the Respondents were not involved, and whether the objective was to find a way forward over this matter or to frustrate it. The burden of proving that they took place, what the objective was, and with what the result was upon the Applicant who now wish to rely on them. In my opinion this burden was not discharged. The Respondents cannot be affected adversely by unevidenced consultations which they knew nothing about.

Opinion of the Court on explanation for the delay

44. I am aware of, and respectfully agree with, the holdings of Githinji JA in *Wasike vs Khisa & Another (Civil Application NAI 241 of 2003)* that "… it would be a fetter on the wide discretion of the Court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained…" and that "… it is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable and whether or not delay is unreasonable will depend on the circumstances of the case…" Let me cast a comparative glance at the *Wasike* explanation for delay and the instant one. In *Wasike* the applicant said he was sick for sometime and annexed documents, complete with individual dates, of consultation and names of the Doctor

he consulted. This persuaded the Court that he was actually sick and unable. He also told Court that he was engaged in a High Court Election Petition at Nyeri and annexed the Court proceedings showing which petition it was and the various days it was heard. Understandably the Court was satisfied with the truth of the applicant's story. Requiring a minute examination of each act beyond this would be to ask too much.

45. In the instant case Counsel for the Applicant claimed inability due to Christmas vacation, due to family tragedy and due to consultations in the concerned institutions of Government. The Court did not require him to prove every minute detail of these stories. All that the Court required of him was to place before it the bare minimum to enable it form an opinion that what he was saying was probably true. He failed on each.

    I find the delay, therefore, inordinate, unreasonable and wanton. And I find, further, the explanations insufficient, less than candid and, in places, highly improbable.

46. My considered view is that the Attorney General's Chambers adopted a casual and "not urgent" approach in the way they handled the Ruling on Taxation and should blame nobody but themselves for the delay that resulted.

    Upon the above findings alone, this application should fail. But in keeping with the last holding in *Boney M. Katutumba V. waheed Karim (Supra)*, I will consider the other grounds to assure myself that shutting out the Reference will not appear to cause injustice.

4th Ground:

47. Counsel for the Applicant's argued that there is sufficient public interest in this application to warrant enlargement of time. He told court that the Kenyan public stands to lose if such a high award is paid out of the Government Consolidated Fund without Government having an opportunity to have it reviewed. It was challenged.

48. Upon consideration of the arguments I think this is a case of misplacement of public interest. I think that the Kenyan public, including the respondents, should be interested in scrutinizing issues leading to the award and not on the quantum of award itself. Counsel's argument suggests that if the award is reduced then the Kenyan public interest is diminished. Would the respondents, also members of the Kenyan public, support this view? I think not. Counsel could have done well perhaps to define the public interest he was talking about. He did not. The Kenyan public would for example be interested, in my view, on issues like why and how they ended up in this litigation, whether it was justifiable and unavoidable, why, then, was the Reference on Taxation not filed in time and the like. And it is obvious that the Court has nothing to do with such issues. The award, whatever the amount, is a mere consequence and the Court's hands in deciding awards cannot be tied to or pegged on an unknown quantity of public interest unless some law says so and defines the Court's minimum and maximum limits. I was not shown any. In the *Nairobi City Council case (supra*) Court held that the public had a right to scrutinize the processing and awarding of tenders by the City Council. That was a public interest issue, not the money that was paid to the winners of tenders, which would be a mere consequence. I find, therefore, the issue of public interest, in the sense it was argued before me, quite misplaced.

5th Ground:

49. On the resources of the parties Counsel singled out the 1st claimant in the Reference Prof. Peter Anyang Nyong'o to correspond with the "single claimant" who "could have brought the reference" (see *Ref. No.1 of 2006*), and told Court that he is a member of Cabinet who would suffer no prejudice if extension is granted because, "…a Cabinet Minister is not a man of mean resources." Nothing in the way of evidence was placed before me in support of this assertion. It was made from the bar. In my view this is a personal view Mr. Ombwayo holds. I was not told how and why he singled out the 1st Claimant from the other respondents and made him the "single claimant" in *Reference No.1 of 2006*. Secondly, unless Mr. Ombwayo's argument was that to be a Cabinet Minister in the Republic of Kenya is synonymous with being a person of no mean resources, he did not show me, and I doubt, whether he is so privy to Honorable Anyang Nyong'o's resource situation and that he can even make an informed opinion on how short or long the he can wait without any prejudice. I am not in a position to form any opinion either way.
50. Counsel further told Court that the respondents would suffer no prejudice if extension is granted because they have not commenced the process of execution against the Government as envisaged under Rule 74 of the Rules of this Court, Rule 3 of order 28 of the Civil Procedure Act (Chapter 21 Laws of Kenya) and Section 21 of the Government Proceedings Act (Chapter 40 Laws of Kenya), that as there is still a lengthy procedure for the Government to pay and, therefore, that the Reference would be heard and determined quickly without occasioning prejudice from such delay. First of all my reading of Section 21 of the Government Proceedings Act does not suggest a lengthy delay in executing against Government. I was not told why it should be lengthy. Secondly, while it is true that the respondents have not commenced execution proceedings to date, I would not hold that they would suffer no prejudice if extension is granted. The time the Court should seek accountability for is between the 22nd January and 3rd April 2009. The respondents cannot, in my view, be held accountable for all the time between those dates. The 22nd of January 2009 is the date of the Respondents' last formal correspondence to the Hon. Speaker of the National Assembly, copied to the Hon. Attorney General, offering amicable settlement "devoid of any acrimony". They must have waited for some response for some time. Ms Judith Sijeny's affidavit, at paragraph 19, avers that there was no response to explain any handicap or predicament or any action taken. The 3rd of April 2009 is the date this application was filed in this Court and copied to the Respondents. Commencement of execution proceedings then would be legally pointless.
51. I disallow this ground on three accounts; first that the respondents did not sit on their rights and waste valuable time. Second, that since, as Counsel for the Applicant told Court, execution against the government "is a very lengthy process", the respondents should be afforded an opportunity to embark on it sooner rather than later and third, I associate myself with P N Waki (JA) in *Samuel Ondieki V Samwel Mageto (2006) KLR* "… The right to enjoy the fruits of judgment is as hallowed as the right of appeal and a breach of either for no good reason would be prejudicial".

6th Ground:

52. Counsel for the Applicant told court that the application is merited for three reasons. First that the Taxing Officer did not take into consideration the order of court that in taxing the bill he had to consider that the one claimant could have brought the Reference, second, that it was not founded on any legal basis and, third, that the award of 1.3m$, as instruction fees, was inordinately high and excessive and not commensurate with the amount of work done and the complexity of the dispute. It was challenged.
53. I am aware, as I examine this ground, of the very thin line I tread in order avoid examining the Reference on Taxation itself. Therefore my opinion must be based on outwardly visible signs of merit and not the deep and invisible signs for which a microscope might be required.
54. Several authorities (for example *Mwangi v. Kenya Airways [2003] KL P.56, Leo Sila Mutiso v. Rose Hellen Wangari Mwangi Civil Application No. NAI 225 of 1997*)concur that in these applications merit, or chance of success if the application is granted, is merely stated as something for a "possible" consideration, not that it must be considered. The *Wa'njuguna case (Misc Civil Application 621 of 2000)* the applicant relied on is very instructive in dealing with a Ruling on Taxation itself not application to extend time to have a ruling on Taxation challenged as in the present case. I would therefore resist the temptation to rely on it for to do so would be to cross the thin line.
55. On the first reason, a quick glance at the Ruling on Taxation shows that the taxing officer referred himself to the particular order which Counsel for the applicant says he did not consider. On the second, Counsel did not show me that the Taxing Officer relied on a wrong or non-existent law or fact, or that he was plainly wrong, in arriving at the award of 1.3m$. On the third, Counsel did not show me, for example, that the taxing officer taxed a non-taxable item or that he included an item that had not been included in the bill or that he relied on a wrong calculation formula to arrive at the award.
56. He himself agreed that the matter was complex but his argument was that it was not complex enough to warrant an award of 1.3m$. He did not show me any fixed rule as to minimum or maximum levels of awards contrary to which the Taxing Officer made the instant award. With due respect, I do not think that the Reference can be merited on such unevidenced opinions of the Applicant.
57. I associate myself with the observation of the Privy Council in *Ratman vs Cumara Samy (1965) I WLR 10* at Page 12, also cited with approval in *Ambunda vs Tanzania Harbours Authority (Civ. App. No. 164 of 2005), TZCA 48 (4 April 2006)*, that "The rules of Court must be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation"
58. I would only add that if that "party in breach" is a Partner State within the East African Community, it would not only obey the rules but it would have to be seen, by all, to spare no effort to obey the rules if the Rule of Law in the Community is to achieve full

and uniform respect.

In the instant case, I find no material upon which I can exercise my discretion in favour of the Applicant. He has failed to satisfactorily and candidly explain the delay and other grounds to warrant extension of time. The application is lacking in merit and the scales of justice tilt towards dismissing it. I accordingly dismiss the same with costs to the Respondent.

* * * *

East African Court of Justice - Appellate Division
Appeal No. 1 of 2009

Attorney General of Kenya And Prof. Anyang' Nyong'o & 10 others

H. R.Nsekela P.; P.K. Tunoi VP; E. R.Kayitesi JA; L. Nzosaba JA; and J M Ogoola JA
August 18, 2010

In consistency between the Court's Rules and the EAC Treaty – Appeal from the decision of a Single Judge - Discretion exercisable on the basis of evidence and sound legal principle - Finality to litigation- whether the Appellate Division could entertain an appeal from a decision of a single Judge.

Articles: 2, 35A, 42(1) of the EAC Treaty - Rules: 1 (2) 4, 59(2),(3), 77, 89(1) ,of EACJ Rules of Procedure 2010.

In 2009, the Appellant sought to appeal against the refusal of the First Instant Division to extend time to file an appeal against a taxed bill and the decision of a single Judge to refuse the extension. That application was itself filed out of time thus, the memorandum and record of appeal could not be served on the Respondents.

On 2nd June 2010, the appeal to the Appellate Division for extension of time to serve the memorandum and record of appeal was heard and granted. This appeal sought the review of the exercise of discretion by a single Judge of the First Instant Division.

Held:
1. A single Judge of the First Instance Division has authority to entertain certain specified interlocutory matters under rule 59 such as applications for extension of time.
2. In the event of a conflict or inconsistency between the Rulesand a provision of the Treaty, the Rule must yield place of priority to the Treaty. In the instant case, Article 35A of the Treaty, overrides
3. Rule 59(3) of the Court's Rules. Therefore, the Appellate Division of this Court may entertain an appeal, that is lodged with it directly from a single Judge.
4. The learned trial Judge considered all the salient issues raised by the Appellant and exercised his discretion judiciously, not whimsically, nor capriciously, and cannot be faulted in any material particular. The Appeal was therefore disallowed.

Cases cited:
Egerton v Brownlow; Bowman v Secular Society Ltd [1917] AC at 427
Egerton v Brownlow (Earl) (1853) 4 HL Cas at 14 p.196
Janson v Dreifontein Consolidated Mines Ltd [1902] AC at 491, 492HL
Lim Laboratories Ltd v Evans [1984]2 All ER 417, at 435, CA
Mwangi v Kenya Airways Ltd [2003] KLR 486 at p.487
Phoebe Ndunda & Others v. Mwakini Ranch Co. Ltd & Kitui Town Council, Court of Appeal Kenya, Civil Application No. NAI.448 of 2001

Richardson v Mellish (1824) 2Bing 229
WasikeVs Khisa &Another, Civil Application No.248 of 2003 (KCA), [2004], 1KLR 197

Judgment

Hon. Justice James Ogoola, JA, read the Judgment of the Court:

1. This was a slow and convoluted case. It wound its tortuous way through the maze of the corridors of this Court at less than the proverbial snail's pace. The original Reference, lodged in November 2006, sought an interpretation and application of the East African Community Treaty ("the Treaty"), regarding the validity of the nomination and election of Kenya's representatives to the East African Legislative Assembly ("EALA"). The Court heard the Reference, and concluded that Kenya's National Assembly did not undertake an election within the meaning of Article 50 of the Treaty; and that the Election Rules in issue infringed the provisions of that Article 50. The Court ordered the Government of Kenya, through its Attorney General, to pay the costs of the Reference. Thereupon, Mutula Kilonzo & Co., Advocates for the claimant then lodged a bill of costs for the sum of US $ 5,622,528.69. On 19/12/08, the Registrar of this Court acting as Tax Master, taxed the bill to US$ 2,033,164.99. The Attorney General was aggrieved by the decision of the Registrar.
2. Under the Rules of Procedure of the EACJ ("Court Rules"), any party aggrieved by the decision of the Registrar as Tax Master may appeal by way of a reference to a single Judge of the Court whose decision is final. However, the Attorney General did not appeal until the prescribed period within which to appeal lapsed.
3. It was against this background that the Attorney General, on 3/04/09, applied to the First Instance Division of this Court, to extend the time within which to file a taxation reference. A single Judge of that Division (Busingye, PJ), acting pursuant to Rule 114 of this Court's Rules of Procedure, dismissed the application. The Attorney General then sought to appeal to this Appellate Division, against the Ruling of the single Judge. His Application, No. 4 of 2009 for that Appeal, was filed out of time; whereupon he filed yet another application for extension of time. On 16/10/2009, the First Instance Division dismissed the application for extension of time. Undaunted, the Applicant sought to appeal against the refusal to extend time. However, that Application too was itself filed out of time. The memorandum and record of appeal could not be duly served on the Respondents, on account of expiry of time. Accordingly, (in Civil Application No. 2 of 2010 filed on 19/03/10), the Applicant once again moved the Court, under Rule 4 of the Court's Rules, for an extension of time to enable service out of time, beyond the 7 days prescribed by Rule 89(1) of the Court's Rules.
4. For their part, the Respondents had in the meantime filed Application No. 1 of 2010 of 5/03/10, praying the Court to strike out the Applicant's purported appeal. In the midst of all this confused state of affairs, the Applicant once more applied to the First Instance Division (before ARACH, DPJ) for yet another kind of redress. Very sensibly the learned Judge, noting that the same matters were at that time already before the Appellate Division, declined jurisdiction and dismissed that particular application.
5. Eventually, this appeal to the Appellate Division (for extension of time to serve the memorandum and record of appeal), was duly heard and granted on 2/06/2010, with

an order to backdate the date of service to 13/01/2010. With that the first phase of the long, slow saga of the case ended yielding place to the next phase: namely, the hearing of the Applicant's appeal against the Ruling of Busingye, PJ. Inhat appeal, the Appellant (the AttorneyGeneral of Kenya) sought a review of the exercise of discretion by Busingye , PJ. In this regard, the Applicant's Skeleton/
Written Arguments state that:
"The Gravamen of the appellant argument is that the honourable judge failed to exercise his discretion in accordance with the law. It is trite law that the Court of Appeal can interfere with the discretion are(sic) decision of a judge where to (sic) the following matters can be discerned.

1) That the Judge misdirected himself in law.
2) That he misapprehended the facts.
3) That he took in account of (sic) considerations of which he should not have taken account.
4) That he did not take account of consideration of which he should not (sic) have taken account.
5) That his decision albeit it (sic) discretionary is plainly wrong."

6. From the outset, this Court wishes to dispose of one critical concern in this appeal, and one that both parties seemed to have swept under the rag – namely: Whether the Appellate Division should be seized of this appeal at all, given the existence of Rule 59 of this Court's Rules of Procedure. It is crystal clear that a single Judge of the First Instance Division has authority to entertain certain specified interlocutory matters. Among such matters are application(s) for "extension of time prescribed under the Rules" – pursuant to paragraph (2) of Rule 59. Accordingly, Busingye, PJ was totally within the scope and ambit of this Court's Rules when, as a single Judge, he entertained the Attorney General's application for extension of time.
7. However, as to whether the Attorney General, being dissatisfied with the decision of the single Judge, could or could not then appeal to this Division, is quite another matter – requiring careful analysis of the law. On the face of it, this Court's Rules of Procedure appear to bar any such direct appeal from a single Judge of the First Instance Division to this Appellate Division. In this regard, Rule 59 (3) states quite categorically that:
"A party dissatisfied with a decision of a single judge may apply orally to the judge at the time when the decision is given, or by writing to the Registrar within seven (7) days after a decision of the judge to have the order, direction or decision of a single judge varied, discharged or reversed by full Court."
8. Learned Counsel for the Respondents (Mr. T.J.Kajwang), sought to bolster the meaning of that Rule with yet another – namely, Rule 83, which provides as follows:
"Whenever application may be made either to the First Instance Division or to the Appellate Division, it shall in the first instance be made to the First Instance Division, unless specific rules provide otherwise."
9. It is true that a reading of Rule 59 together with Rule 83, appears to be unequivocal in suggesting that an appeal from the judgment of a single Judge of the First Instance Division of this Court should lie, not directly to this Appellate Division, but rather to a full bench of the First Instance Division. That, on its surface, is an eminently

attractive and logical interpretation. On the other hand, the Court is persuaded by a counter argument – namely, that a more apposite position is to read Rule 59, not with Rule 83, but with Rule 77 – and then to interpose the provisions of Article 35A of the Treaty, into the resultant equation (of reading together Rules 59 and 77). Rule 77 reads as follows: "An appeal from the judgment or any order of the First Instance Division shall lie to the Appellate Division on:

(a) points of law;
(b) grounds of lack of jurisdiction; or
(c) procedural irregularity."

10. As is evident from the above quotation, Rule 77 is the more specific rule governing "appeals", than is Rule 83 (which speaks to applications, in general, that may be made to the two Divisions of the Court). Rule 77 is couched in terms of appeals from "the judgment or any order of the First Instance Division". That language encompasses, directly, "orders" of the Court – such as the order that was handed down by Busingye, PJ. Similarly, the Rule encompasses not only the judgments or orders of the full bench of the First Instance Division, but also those of a single Judge (such as Busingye PJ). This is so because of the express definition, in Article 2 of the Treaty, of the term "judgment"– namely: "judgment' shall where appropriate include a ruling, an opinion, an order;"
11. Secondly, the matter at hand, in this instant appeal, falls squarely within the four walls of Rule 77 – namely, that the appeal is an appeal against "*points of law*", as well as against "procedural irregularities". As will be seen at once, the provisions of Rule 77 are but a mirror reflection: paragraph for paragraph, phrase for phrase, word for word, and comma for comma, of Article 35A of the Treaty.
12. That Article is a "new" Article, introduced at the time and in the course of the Second Amendment of the Treaty (in August 2007) when the Court was, among other features, drastically restructured into a First Instance Division and an Appellate Division. The Article eloquently bespeaks the effect and consequence of that historic restructuring, and the devolution of jurisdiction between the two Divisions: the one, the Trial Chamber; the other, the Appellate Chamber – with litigants of the Court afforded an unfettered right of liberty to appeal the judgments of the First Instance Division, to the Appellate Division.
13. That Article puts the matter beyond any possible debate whatsoever. It is trite law, and a fundamental doctrine and tenet of statutory interpretation, that where subsidiary legislation (such as the Court Rules, in this instant case) conflict with or are in any way inconsistent with the provisions of a parent legislation (such as the EAC Treaty, in this case), the provisions of the subsidiary legislation must yield to those of the parent one – to the extent of the conflict or inconsistency. In the instant case, there is a clear inconsistency – if not outright conflict – between Rule 59(3) of this Court's Rules, and Article 35A of the Treaty. The Court Rules are made pursuant to Article 42(1) of the Treaty. Accordingly, the Court Rules, which derive their life and existence from the Treaty, are of a legal hierarchy that is inferior to that of the Treaty. Indeed Article 42(1) itself specifically provides that: "The Court shall make rules of the Court which shall subject to the provisions of this Treaty, regulate the detailed conduct of the business of the Court."Indeed, Rule 77 was made after the

Second Treaty Amendment, precisely to comply with the amended Treaty.

14. Accordingly, in the event of a conflict or inconsistency between the Rules, or a particular Rule, and a provision of the Treaty, the Rule must yield place of priority to the Treaty. This means that, in the instant case, Article 35A of the Treaty, overrides Rule 59(3) of the Court's Rules. Therefore, the Appellate Division of this Court may entertain an appeal (such as the instant one), that is lodged with it directly from a single Judge of the First Instance Division – notwithstanding the apparent constraints of Rule 59(3) of this Court's Rules. Needless to say, the legal situation here ought to be regularized at the earliest appropriate opportunity – including re-writing the Court Rules, and re-visiting the Treaty provisions.
15. That is the state of the law. But in any event, in this particular appeal, the facts and history of the litigation, as set forth at the outset of this judgment, are quite disturbing. Their chronicle, adds up to a long litany of one application after another *ad infinitum*; and a catalogue of one misstep after another *ad nauseum* – all to the sad and costly detriment of the litigants. Justice demands that the successful litigants should enjoy the fruits of their litigation; and that both litigants should rest from the trauma of un-ending litigation. There must be an end to litigation. This Court cannot and must not at this outstretched stage, in subservience to Rule 59(3) of the Court Rules (which Rule has, in any event, now been impugned), remit the resultant decision of this appeal back to the full bench of the First Instance Division. To do so would, in all probability, be tantamount to launching yet another ponderous odyssey of a succession of applications and appeals – which would, once more, end at the gates of this Appellate Division. This Court must, in the interests of justice, pre-empt any such drawn-out scenario: which would be but a recipe for patent injustice to the Parties, coupled with judicial irresponsibility, if not judicial tyranny, by the Court in perpetuating the injustice of this never-ending litigation.
16. That is the state of the law. But in any event, in this particular appeal, the facts and history of the litigation, as set forth at the outset of this judgment, are quite disturbing. Their chronicle, adds up to a long litany of one application after another *ad infinitum*; and a catalogue of one misstep after another *ad nauseum* – all to the sad and costly detriment of the litigants. Justice demands that the successful litigants should enjoy the fruits of their litigation; and that both litigants should rest from the trauma of un-ending litigation. There must be an end to litigation. This Court cannot and must not at this outstretched stage, in subservience to Rule 59(3) of the Court Rules (which Rule has, in any event, now been impugned), remit the resultant decision of this appeal back to the full bench of the First Instance Division. To do so would, in all probability, be tantamount to launching yet another ponderous odyssey of a succession of applications and appeals – which would, once more, end at the gates of this Appellate Division. This Court must, in the interests of justice, pre-empt any such drawn-out scenario: which would be but a recipe for patent injustice to the Parties, coupled with judicial irresponsibility, if not judicial tyranny, by the Court in perpetuating the injustice of this never-ending litigation. In this regard, it behoves stating that to remit this matter back to the full bench of the First Instance Division of this Court would, to all intents and purposes, be to subject the matter to an "appeal" – in as much as (i) the single Judge sitting pursuant to Rule 114 of the Court's Rules,

is in truth exercising the powers vested in him/her alone, on behalf of the whole First Instance Division. Accordingly, in the event that the full bench is called upon to entertain the judgment of the single Judge, it would do so as an "appellate" forum. To that extent, the full bench of the First Instance Division (just like this Appellate Division of the Court) would interfere with the exercise of the discretionary powers of the single Judge only for very specific reasons – identical to the ones now canvassed in this Appellate Division. Why then duplicate and elongate the review process? This position was very ably considered and settled by the Court of Appeal of Kenya in the case of *Mwangi Vs Kenya Airways Ltd [2003] KLR 486 at p.487* to the effect that: "1. A single appellate judge sitting alone and acting under rule 4 of the Court of Appeal Rules (Cap 9 sub leg) is exercising the powers vested in him alone on behalf of the whole Court. A full court can only interfere with the exercise of those entirely discretionary powers for very specific reasons. 2. The circumstances under which the full court would be entitled to interfere with the exercise of the discretionary power by a single judge are similar to those under which an appellate court would be entitled to interfere with the exercise of a discretion by a trial judge".

17. We are of the view that it would be patently meaningless to remit this matter to the First Instance Division to do exactly that which this Appellate Court is now called upon to do. We must eschew playing a game of roulette with the fate of litigants who come to this Court for expeditious, effective, efficient, effectual, and cost effective remedies.
18. We now turn to the substantive issues raised by the Attorney General (and the Respondents) in this appeal. Learned Counsel, Mr. Ombwayo, for the Attorney General, raised, in all, a hefty total of twelve grounds of appeal. However, at page 24, of his own " Skeleton/ Written Arguments", the Learned Counsel was content to collapse the twelve grounds into four issues only, which he then proceeded to argue before us. In effect, Counsel Kajwang for the Respondents also agreed with the proposition that the four issues effectively embrace all the substantive factual issues arising from this appeal.
19. Specifically, Mr. Kajwang stated that: "Facts leading to this appeal have been accurately described by Learned Senior Principal State Counsel appearing on behalf of the Attorney General of the Republic of Kenya, we see no reason to reproduce them in our submissions".
20. Accordingly, the Court hereby adopts those broad issues as the real grounds of this appeal, namely: that the learned single Judge erred in exercising his discretion, in as much as he failed to consider, or considered only inadequately or inappropriately, that the Attorney General's delay to effect service was caused by:
    (i) the fact that at the material time, all the Court's staff were on Christmas Vacation;
    (ii) the Applicant's Counsel was attending to a family tragedy - well beyond his own control;
    (iii) the internal consultations between the Attorney General, the National Assembly and other Government Ministries.
21. We will now proceed to consider the veracity of each one of these grounds *seriatim*. Nonetheless, we need to emphasize that it is not the role of an appellate bench in a case of this kind, to review the substantive merits underlying the grounds of appeal.

Rather, the role of this Court is to review the propriety of the exercise of discretion by the trial Judge on each of these grounds. The question to ask, in respect of each ground, is: Whether the trial Judge in reaching the decision(s) he reached, did so on the basis of a proper, judicious exercise of his discretion? Did he arrive at the decision after a judicious process rooted in dispassionate and empirical analysis of the facts and the law; or merely on a flight of fancy, unanchored in any sound basis? If the Judge applied the empirical process, it matters not that he arrived at the "wrong" decision, unless such decision is plainly wrong. If, on the other hand, he engaged only in the fanciful or the whimsical, then it matters little that he arrived at the "right" conclusion, to the extent that the process and procedure is plainly and patently misconceived, irregular, unjust, and wrong. At the heart of the Appellate Court's review is the question: Did the Judge exercise his discretion properly (i.e. judicially)? On this point, both Counsel (for the Attorney General and the Respondents) were in total agreement as to the applicable Principles of law – namely, that an appellate court may interfere with the exercise of the trial Judge's discretion only where the Judge:

(i) misdirected himself/herself in law;
(ii) misapprehended the facts;
(iii) took into account matters/issues he/she should not have taken into account;
(iv) did not take into account matters/issues he/she should have taken into Account;
(v) reached a decision which is plainly wrong.

22. In this connection, this Court is in consonance with the principles laid down by *Mwangi's case (supra)*. In our view, that case recasts into brighter light the fundamental principles specifically enunciated by, most probably, the oldest case on this point in the East African jurisdiction – namely: *Mbogo Vs Shah [1968] EA at 93*. The Principles of this line of case law are that before an appellate court (or, as the case may be, a full bench of the same court) can interfere with the exercise of discretion by a trial Judge/single Judge, it must be satisfied that in coming to his/her decision, the Judge in question:

(i) took into account some irrelevant factor(s);
(ii) failed to take into account some relevant factor(s);
(iii) did not apply a correct principle to the issue (such as, for instance, misdirection on a point of law, or misapprehension of the facts);
(iv) taking into account all the circumstances of the case, the Judge's decision is plainly wrong.

23. Taking into account all the clear Principles and considerations embedded in our law, we will now embark upon a careful, clinical, and forensic examination of the processes by which the learned Busingye PJ dealt with each one of the four broad issues raised in complaint by the aggrieved Appellant/Attorney General. In doing so, we would wish to emphasize that the trial Judge in this particular case, was dealing with Rule 4 of the EACJ Rules, which requires a qualitatively higher standard to extend time (namely, "sufficient reason"), than is the case with the standard of "any reason", which is prescribed under the corresponding Rules in some of the EAC Member States (notably Kenya). Accordingly, the trial Judge in exercising his discretion to extend time in this case, had to and did indeed, raise the bar appropriately to meet the more rigorous standard of the Community Rule.

Christmas Vacation

24. The Attorney General's submission on this issue was to the effect that: "the learned Judge erred in law and, therefore, misapplied the law in holding that the ground of hardship due to Christmas Vacation was being cooked up, when it was very clear from the record that the entire staff of the East African Community including the Court, went on vacation during Christmas Vacation".
25. The question for this Court to ask is not whether the trial Judge erred in reaching the conclusions he reached on this issue. Rather, the question is whether and to what extent, and in which manner the Judge considered the issue that was before him regarding the "Christmas Vacation". We find that, indeed, the Judge dealt with this issue in depth and at quite some length. At page 3 of his Ruling, the Judge listed, by way of summary, Mr. Ombwayo's grounds of application as including: "That the application could not be filed in time due to Christmas Vacation that was being observed by the staff of the East African Court of Justice and the Registry was not manned."
26. Having so flagged the issue, the Judge then proceeded to diagnose and analyse the issue – starting thus: "canvassing the first of the grounds, learned Counsel submitted that it was within his knowledge that between the 15th December and 5th January, the entire staff of the East African Community go on Christmas vacation."
27. Next, the learned Judge (at page 5 of his Ruling) considered the counter arguments of opposing Counsel, Mr. Kajwang, to the effect that care should be taken not to confine Christmas day, official holidays, Court Vacation, and the computation of time under Rules 2, 3, and 19 of this Court's Rules of Procedure. Then (at page 7 of the Ruling), the Judge proceeded to cast his mind to the applicable jurisprudence: Case law, such as *Boney Katatumba Vs Waheed Karim, Civil Application No. 27 of 2007(unreported), Supreme Court of Uganda; and Mohamed & Muigai Advocates Vs Kang'ethe & Co. Advocates, Kenya HCCS No. 234 of 1999 (OS)*. The Judge concurred with the Respondent's Counsel that, indeed, there was here confusion between Christmas day as an official holiday (within the provisions of Rule 2 of the Court's Rules; Court Vacation (determined by the President of the Court and gazetted under Rule 19); official holidays, including Saturdays and Sundays; and Court Vacations. The Judge took the Senior State Counsel to task to show specifically which rules provide for "Christmas Vacation" (Counsel conceded he knew of none); whether there was any "Christmas Vacation" declared by the Court's President; whether it was fact or only Counsel's belief that indeed the Court staff were on leave during their "Christmas Vacation"; and whether, in fact, Counsel had not filed documents during the 2007/2008 "Christmas Vacation" – (he had).
28. It is evident, then, that the trial Judge not only dealt with the issue of Christmas Vacation; but, indeed, he did so: carefully, meticulously adequately, firmly, extensively, and fairly (i.e. took into account both sides of the argument). He quoted the applicable rules and the case law, and reflected deeply on the facts of the case (including the fact that Counsel had indeed filed documents during the period in contention). In all this, the Judge did not decide anything on the spur of the moment, nor did he treat the issue superficially, conjecturally or capriciously. He did so advisedly and judicially. There is, thus, no reason for this Appellate Court to fault the trial Judge on this ground. Accordingly, that ground fails.

Family Tragedy

29. Learned Senior State Counsel, averred that the delay in filing the documents was aggravated, in part, by a family tragedy that befell him personally – namely, to attend to his two brothers in the rural family home; and that the brothers were attacked, one after the other, by bandits who left them gravely injured and helpless. In this regard, the Appellant's complaints were that the Judge failed to consider certain unchallenged averments; considered instead irrelevant matters (such as that the Attorney General's Office, being operational, was not incapacitate due to Mr. Ombwayo's family misfortune); and that the Judge misapprehended the fact that re-allocation of the file on this case to another Counsel in the Attorney General's Chambers, would have required prior preparation of a brief to enable the new Counsel understand the dispute.
30. Here again, the task of the Appellate Court is not to try the matter on its merits.
    Rather, it is to ask: Whether the trial Judge exercised his discretion judicially in reaching his decision? In his Ruling (at page 10), the learned trial Judge dealt extensively with this issue. In summary, the Judge challenged Counsel to prove the fact of the multiple bandit attacks on his brothers. Counsel could not mention the dates of the attacks (except one). He could not indicate when he travelled to and returned from his rural home. He could not produce any medical, police or similar documentary evidence relating to the attacks. The Judge noted Ms Sijeny's affidavit which challenged Mr Ombwayo's own affidavit concerning these attacks. He even granted Mr Ombwayo the opportunity to depone a further affidavit. To all this, the Judge recorded the following: "He filed nothing in evidence. He personally sought and was granted leave to file a further affidavit. He did file one on 11th June 2009. He did not explain any of these issues". Then, on p.11, the learned Judge concluded, thus: "Upon careful examination of this ground, I could not tell with certainty, whether the unfortunate tragedies actually happened, whether if they happened [Counsel] went home to assist or whether nothing at all happened.
31. With due respect, I find [Counsel's] honesty, candour and effort in explaining his family tragedy far less than I would require to admit his story in court {see Mohamed & Muigai Advocates (supra). I am alive to established case law that mistakes of counsel should not be visited on his client (see *Zam Nakumansi v Suleman Lule, civil Application No.02 of 1999 (SCU*).
32. The veracity of his story was challenged way back in May 2009 in Ms Sijeny's affidavit. He had all the time until 21st August 2008 to prove it. He knew it was his [own personal] burden as well as Counsel for the applicant. There is clear authority that discretion is exercisable on the basis of evidence and sound legal principle; and that the duty of placing the necessary evidence before the court to enable it exercise its discretion is squarely on the applicant; see *Bogetutu Farmers vs Mohamed Hassan Yonis HCCC No. 154 of 1992.*
    In my view the applicant did not discharge this duty."
33. From the above, it is clear that the trial Judge was seized of the issue, explained it, asked all the questions relevant and necessary to establish the existence of the double tragedy, granted counsel every opportunity to prove the matter (including by further affidavit to counter Ms Sijeny's challenges promptly and effectively). He did not. Instead, he

took all the months of January, February and March – a total of approximately 90 days in all – to file this appeal. We cannot find anything at all untoward in all this, with which to fault the trial Judge concerning this particular ground of appeal. On the contrary, we are alive, rather, to the all - too - revealing dialogue (recorded at page 145 of the Record of Appeal) between the Court and Counsel on this aspect of the matter – namely: "Justice Busingye: Okay, when Mr. Ombwayo's family gets problems, does the Attorney General's Office get incapacitated? Mr. Ombwayo: I (sic) cannot get incapacitated but …of course with those personal problems, I did not even have time to brief the Attorney General on the issue of time limits. But as I said in my affidavit, those were my personal problems. It could have been an oversight on me not to have briefed the Attorney General and may be handed over the file for reallocation to the Attorney General to allocate it to another Counsel … I did not hand over the file for reallocation to the Attorney General . That is a mistake I admit to have made."

34. In addition to the above, this Court takes judicial notice of the fact that the Attorney General's Chambers is a fully – fledged State Office with many counsel (of whom Mr Ombwayo is only one; and indeed, a Senior Principal Officer). Any one of his juniors, let alone colleagues, could have stepped into his shoes to rescue the situation.

35. Learned Counsel argued very ingeniously both before the trial Judge and before this Court, that his mistakes as counsel (of which this Court finds quite a bundle), should not be visited on his client. This is all too true. Just like the trial court, we too are of course alive to and sympathetic with the position canvassed by Counsel. But then it has to be remembered that it is Counsel himself who initiated this ground; who injected , so to speak, the personal dimensions of his family into the official affairs of his client; and who having brought it to the fore, strenuously argued it before this Court and the single Judge in the court below. In these circumstances, he has himself to blame. In a sense, his argument is that if he succeeds on this second ground, then his client stands to gain. But if he fails, then his client should not suffer. The principal answer to all this, is that he cannot have his cake and eat it at the same time. He must bear his cross. In this regard, we would recall, with approval, the stand once taken by Waki, JA when faced with a similar predicament in the case of *Phoebe Ndunda & Others v. Mwakini Ranch Co. Ltd & Kitui Town Council, Civil Application No. NAI.448 of 2001 (CA Kenya*).His Lordship stated that: "The opportunity given to applicants was squandered and if it is their case that the advocate was to blame, they are at liberty to seek recompense from the advocate. As it is, the applicants appeal to sympathy rather than sound factual and legal basis in seeking the orders above. I would be surrendering my discretion to whim and caprice if I acceded to the application on that basis. I decline to do so." In the circumstances of this appeal, therefore, the second ground fails – irrespective of where the chips fall.

Internal Consultations

36. The Attorney General's third ground of appeal was that the delay to file in time was a consequence, in part, of the necessity for the Attorney General to consult with both the National Assembly, and the Treasury of Kenya on whether or not to pay the suit costs. Learned Counsel's complaint on this issue was that: "The Honourable Judge misapplied the law on discretion in discussing the [sic] the explanation on

consultation. The magnitude of the amount of money taxed required consultation between the three Ministries of the Attorney –General, National Assembly, and the Ministry of EA Cooperation. The Hon Judge misapplied the law and therefore fettered his discretion by requiring the appellant the [sic] explain every minute delay. The court should have considered all reasons of the delay…."

37. A cursory reading of the above ground leaves one with some amount of confusion. First, the first sentence appears to merely make the assertion (without more) that the trial Judge misapplied the law of discretion. Secondly, the sentence on fettered discretion does not seem to connect with the first at all. And even if it did, it seems to be a complaint about the Judge seeking an explanation in too minute a detail. Yet at the same time, the same Counsel in the final sentence faults the Judge for not having considered "*all reasons of the delay*". Unfortunately, all this leaves one wondering what exactly the complaint of this ground is? At best, the complaint is unclear. At worst, it is simply incoherent. Be that as it may, it was plainly evident that the trial Judge did adequately deal with the issue of "consultation."
38. Once more, the question is not whether the Judge's decision on this issue was "right" or "wrong". Rather, it is whether the Judge's decision was arrived at appropriately, after due consideration (i.e. judicially). Pages 12 and 13 of the Judge's Ruling, deal with this issue of internal consultations. Briefly, the Judge queried the existence and nature of these consultations; whether they were oral or verbal or written; and whether there was sufficient evidence to bear out these consultations. The Judge stated that: "The burden was to place evidence before the court and not to assure the Court that the evidence existed somewhere else. In the unlikely event that the consultations took place, the Court was not told why they impaired the capacity of the Attorney General's Office to file the Reference. Even a possible settlement, to which the Respondents were not party, would not have impaired the Attorney General from filing the Reference, just in case."
39. And then the learned trial Judge added, with approval, a quotation from Deverell, J, thus: "In *Paul Njoroge vs The Attorney General and others, HC Misc case no. 90 of 2004* Justice W.S. Deverell, faced with inability due to negotiations, such as the inability due to consultations in the present case had this to say; "… I consider that it was a risky strategy for the applicants to delay filing the record of appeal on the strength of verbal negotiations, which do not appear to have been reduced to writing at any material stage. It would have been prudent to have complied with the requirements laid down in the rules while the alleged negotiations were ongoing and to have confirmed their existence in writing at some stage. As it is I am not in position in which I can make any meaningful decision as to who is telling the truth as to the existence of the alleged negotiations. The burden of proving their existence is upon the applicants who now wish to rely upon them and I am of the view that this burden has not been discharged". And then, in virtually identical summation as Deverell's, the trial Judge concluded as follows: "This authority summarizes my opinion on this ground. I am not in position in which I can ascertain whether, in truth, these consultations took place and, if they took place, why the Respondents were not involved, and whether the objective was to find a way forward over this matter or to frustrate it. The burden of proving that they took place, what the objective was, and with what the result was upon the Applicant

who now wish to rely on them. In my opinion this burden was not discharged. The Respondents cannot be affected adversely by unevidenced consultations which they knew nothing about."

40. It is quite evident from all the above, that the learned trial Judge brought his mind to the issue of consultations; discussed and dissected it at length and in depth; asked of Counsel all the relevant questions; considered the counter-arguments of the opposing counsel; brought to light the applicable jurisprudence; and then (and only then), reached his own conclusions on the matter. Was he wrong on those conclusions? If wrong, was he "plainly wrong"? The first one of these two questions (to which our answer is No), is not really for this Appellate Court to ask, let alone to answer, in an appeal , (such as the instant one) concerning the exercise of a trial Judge's discretion. The second one of those two questions, is appropriate and necessary. The answer, in this case, is plainly No. In the result, the Appellant's third ground of appeal also fails.
41. This is because the learned trial Judge considered all the salient issues raised by the Appellant. He did so by, among others, casting his mind to the case of *Wasike Vs Khisa & Another, Civil Application No.248 of 2003 (KCA), [2004], 1KLR 197* – in which Githinji, JA, stated that: It would be a fetter on the wide discretion of the Court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained."
42. In light of the above, the trial Judge did cast a comparative assessment between the explanation for the delay in *Wasike's Case* and the comparable explanation for the delay in the instant case. The Applicant, in *Wasike's case*, produced a full dossier of evidence to support his claim of having been sick. The dossier was full – complete with dates of consultation, names of doctors, the relevant court proceedings, the date thereof, etc. In contrast, the Applicant, in the instant case, did not produce any documentary evidence. To this, the Judge stated, quite rightly in our view, that: "The court did not require him to prove every minute detail of these stories. All that the court required of him was to place before it the minimum to enable it form an opinion that what he was saying was probably true."

Prejudice – Failure to hear subsidiary grounds

43. In his oral submission before this Court, learned Counsel for the Attorney General took issue with the fact that the trial Judge, as single Judge, seemed to judge the application before him only on the above grounds 1,2 and 3; thus failing to consider all the other grounds before him – and, therefore, rendering himself to be prejudiced in the rest of the matter. We will make short shrift of this challenge. Counsel's point, in belaboring this line of argument, was premised on the trial Judge's statement (on page 37 of his Ruling) to the effect that: "upon the above [three] findings alone, this application should fail."
44. Now, even if that were all that the trial Judge stated and did on that matter, we would find no particular fault with it. First, this is common judicial practice for our courts of law to determine a matter before them on the basis of only some (not all) of the issues and grounds canvassed by Counsel – if the particular issues are critical and dispositive of the dispute. In the instant case, the three grounds were sufficiently determinative of the application before the Judge. Interestingly, the same Counsel said

as much. Indeed, the fact of three principal issues, coupled with other lesser issues, was common knowledge among all the participants in the court proceedings before the single Judge. Counsel Ombwayo himself said so; and even opposing Counsel, Mr Kajwang, acknowledged as much when, at p.150 of the Record of Appeal, he said: "My learned friend has put emphasis on the merits and I accept that it is one of the things that the Court will look at, but I will also be showing you in the authorities cited by myself and my learned friend, they have been coded as possibly, those issues which are on a secondary level and not the primary issues which the Court wants to look at.

45. I have seen the affidavit of my learned friend, Mr Ombwayo. It is about 17 paragraphs. I want to say that a lot of paper has been used because I think that only three paragraphs are important in my view, namely, Paragraph 14, 15 and 16….. .i.e. paragraph 14 Christmas vacation…paragraph 15 the tragedy that befell the family …. and paragraph 16 that there were some consultations. Those are the only three reasons. We just want to consider these reasons alone and see if they can fit within the principles of law that the case law has developed."

46. It is patently evident that the Court had before it three critical grounds on which the fate of the application depended. But be that as it may, it is not at all true, as contended by the Appellant, that the learned Judge discussed only the above three grounds. The record shows plainly that, indeed, after the three primary grounds, the Judge proceeded to consider and to make findings even on the secondary grounds as well – all of them. We now deal with those secondary grounds here below.

Public Interest

47. The Appellant pressed the point that the "exhorbitant" award of costs by the Taxing Officer should be impugned on the grounds of public interest – in as much as payment by the Attorney General of such a hefty sum of money, would impinge drastically on the welfare of the Public Treasury, eat into the Public Finances and adversely affect the tax payers of Kenya. Accordingly, the Appellant argued, the trial Judge should have been alive to this issue as a matter of "public interest" or "public policy". The argument is immensely ingenious and attractive. Indeed for the Attorney General to pay the suit costs, would involve a significant loss from the Public Purse of Kenya and would, to that extent, affect the interest of the Public who are the source of the tax revenues that feed into that public purse. However, we must be extremely careful with what constitutes "public interest", and what does not. A blanket view, to the effect that use of the taxpayers' money to pay legal costs constitutes public interest, needs weighty reflection and deep introspection – for if such argument were stretched to its logical extreme, then the Attorney General would never, ever, be condemned by the Courts of law into paying lawful damages, costs and similar expenses of litigation. In this regard, it bears repeating what Lord Griffiths so ably proclaimed – namely: "There is a world of difference between what is in the public interest and what is of interest to the public" – (see *Lim Laboratories Ltd v Evans [1984] 2 All ER 417, at 435, CA*.)

48. It is eminently true that paying legal costs (and especially in hefty sums) out of the Consolidated Fund of the National Treasury is, of course, a matter of great interest to the public. Nonetheless, that in itself, need not be a matter of public interest or public policy. *Blacks Law Dictionary (Seventh Edition, 1999, p.1245)* defines "public policy" in the following two senses:
    1) "Broadly, principles and standards regarded by the Legislature or by the courts as being of fundamental concern to the state and the whole society."
    2) More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large."
49. Generally speaking, courts have held public policy to be: "that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or the public good."-see *Egerton v Brownlow (Earl) (1853) 4 HL Cas at 14 p.196, per Lord Truro*.
50. Always at the back of the common law concept of what offends the public interest or policy, are issues of unlawfulness, morality, and similar reprehensible behaviour. In *Janson v Dreifontein Consolidated Mines Ltd [1902] AC at 491, 492 HL*, Lord Halsbury LC first enumerated the more usual acts, contracts and transactions normally held to be against public policy (including; contracts for marriage brokerage, restraint of trade, gaming and waging, and assisting the King's enemies). His Lordship then stated that all these: "are undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have either been enacted or assumed to be by the common law unlawful."
51. In the case before us, the essential element for consideration of the public interest is missing – namely, there would be absolutely nothing "unlawful",or "immoral", or reprehensible about the Attorney General of Kenya paying litigation costs from the Public Treasury of the Republic. If anything, such payment would indeed redound to the rule of law, in general, and to the enforcement of Court judgements, in particular – both of which are the very essence on which any law-abiding ship of State is anchored. We should, as a court be circumspect of what LORD HALSBURY (in the *Janson case* above (and others e.g. *Egerton v Brownlow; Bowman v Secular Society Ltd [1917] AC at 427*), termed as "*inventing a new head of public policy*". This is so because judges are interpreters of the law, not expounders of public policy; and it is important that the doctrine should only be invoked in clear cases, in which the harm to the public is substantially incontestable – see *Halsbury's Laws of England(Fourth Edition Reissue, 1998 Vol. 9 (1), Para 842*. Similarly, the Court should give heed to the following graphic advice opined by Burrough, J in *Richardson v Mellish (1824) 2 Bing 229 at 252*: "I, for one, protest … against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail".
52. Having regard to all the above, it will suffice to say that in the instant case, the trial Judge did, indeed, raise and consider the issue of "public interest" as canvassed by learned Counsel for the Attorney General. The Judge engaged Counsel on this at some considerable length. In particular, his Lordship discussed, especially, the irrelevance of the quantum of the costs. He opined that the Kenyan public, including

the Respondents, would be interested more in scrutinizing issues leading to the award of the costs, than merely the quantum of those costs. They would be interested in issues such as why and how they ended up in this litigation, whether it was justifiable and unavoidable, why the Reference on Taxation was not filed on time, and the like. Then, he reached his decision (dismissing the argument). The decision reached was, therefore, a function of a well-reasoned and fair process. Whether the decision emanating from that process was "right" or "wrong", is quite a different matter – not for this Appellate Court to second-guess. We are satisfied that the trial Judge exercised his discretion on this issue judiciously (not whimsically, nor capriciously). He cannot be faulted in any material particular.

Prejudice to the Respondents/Ministers

53. The Appellant's contention here was to the effect that if the trial Court had granted the application to file out of time, there would have been no prejudice occasioned to the Respondents – who were, in any case, high-ranking Government Ministers, etc, receiving regular monthly government salaries. The Court finds grievous fault with this line of argument, and on very many levels. First, not all the Respondents (eleven in number) were Ministers receiving Government salaries. On the contrary, at the onset of this litigation, virtually all eleven were other than Ministers; with many being in the opposition Political Parties. Second, and even if they were all or substantially all Government Ministers (as they now are), that would not avail much in the way of relieving the Respondents' legal rights or mitigating their loss. While receiving a regular salary might relieve or, at any rate, ameliorate the Respondents' "economic prejudice"(i.e. financial hardships, etc), it would do absolutely nothing to address, let alone redress, their "judicial prejudice".

Conclusion

54. Undoubtedly, the Appellant had a right to access ultimate justice by way of appeal. But then, that right was not open-ended. It was circumscribed by the Rules of this Court in terms of the requirement of Rule 4 to file the notice within 7 days. The Appellant did not comply. The delay dragged on from one month, to two, and ultimately to almost three months: in all, a delay of some 90 days. Such a delay was, by any measure, inordinate. It was inimical to the rights of the Respondents, to enjoy the fruits of the judgment of their long-standing litigation. It was inimical to the exercise of the trial Judge's judicial discretion – which was grounded in equity and which, like the Appellant's own application to extend time, was itself anchored in equity. In short, the Appellant came to equity tardy and untidy – with soiled hands and inept footwork. Equity eschews indolence. Finally, it was inimical to the principle of finality to litigation – the principle in respect of which we catalogued, at the outset of this judgment, all the convoluted twists and turns that have characterized this hapless litigation right from the start, all the way to the present. This ubiquitous twisting and turning must stop, at some point. That point is now. To this end, we derive comfort in Rule 1 (2) of this Court's Rules of Procedure, which mandates this Court to use its "inherent power to make such orders as may be necessary for the ends of justice…"
55. In the result, this Appeal is dismissed. The costs of the Appeal and of the related

proceedings, whether in this Appellate Division, or in the First Instance Division of this Court, are awarded to the Respondents.

It is ordered accordingly.

* * * *

East African Court of Justice – First Instance Division
Reference No. 1 of 2010

Hon. Sitenda Sebalu And The Secretary General of the East African Community, The Attorney General of the Republic of Uganda Hon. Sam. K. Nuba & Electoral Commission of Uganda

Johnston Busingye, PJ, Stella Arach-Amoko, DPJ, John Mkwawa, J, Jean-Bosco Butasi, J, Benjamin P. Kubo, J
June 30, 2011

Accountable governance -Appellate jurisdiction – Delay in operationalizing the extended jurisdiction of the EACJ - Partner State non-compliance - Sectoral Council on Legal and Judicial Affairs- Whether the Treaty conferred appellate jurisdiction on the Court over the decisions of the Supreme Court of Uganda - Whether the delay in vesting the EACJ with appellate jurisdiction contravened the Treaty.

Articles 6(d), 7(2), 8(1)(c), 23, 27(1),29, 30, 35A, 67(3) of the EAC Treaty- Rules 1(2) and 21 of the EACJ Rules of Procedure, 2010.

The Applicant filed Election Petition No. 25 of 2006 in the High Court of Uganda against Hon. Sam K. Njuba and Electoral Commission of Uganda and lost. The Applicants appeal to the Court of Appeal was dismissed with costs and thereafter, his second appeal to the Supreme Court of Uganda was also dismissed with costs to the respondents in 2009. Being dissatisfied with the decision of the Supreme Court of Uganda, the Applicant approached the EACJ to register his desire to file a further appeal to the EACJ as an Appellate Court claiming he still had a right of appeal to the EACJ under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty. The Applicant sought and interpretation of Articles 5, 6(d), 7(2) and 8(1)(c) of the Treaty so as to determine whether the delay in vesting the EACJ with appellate jurisdiction contravened the doctrines and principles of good governance, adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally acceptable standards of human rights" enshrined in the Treaty.

The Respondents opposed the Reference claiming inter alia that Applicant's insistence on breaches of Article 6 did not disclose any cause of action and that a right of appeal was presumptuous as the Council had not yet determined the extent of extended jurisdiction of the EACJ.

Held:

1. The delay of the Council of Ministers to operationalise, had a negative effect on good governance, democracy, rule of law and human rights in East Africa and this supports the existence of a cause of action.
2. Article 27(2) provides for appellate jurisdiction in the future via the mechanism of a protocol, which protocol is yet to be concluded. The appellate jurisdiction under

Article 35A had nothing to do with appeals from national courts thus the Treaty does not confer appellate jurisdiction on the EACJ over the decision of the Supreme Court of Uganda.

3. The holding of endless consultative meetings on the draft protocol over a period of six years without tangible results was counterproductive as it the process did not result in any outcome notwithstanding the acknowledgement by the Sectoral Council that jurisdiction of the EACJ ought to be extended.
4. The issue of extended jurisdiction of the EACJ did not come as an afterthought, the Court held that both the 1st and 2nd Respondents failed to discharge their respective obligations. Their failure or delay in submitting comments on the draft Protocol to operationalise the extended jurisdiction of the EACJ to the Council of Ministers was an infringement of the Treaty.
5. Quick action should be taken by the East African Community in order to conclude the protocol to operationalise the extended jurisdiction of the East African Court of Justice under Article 27 of the Treaty.

Cases cited:

Prof. Peter Anyang' Nyong'o & Others v Attorney General of Kenya and Others, EACJ Reference No. 1 of 2006

Semler v Murphy (1967) 1Ch.183

White & Another vButt (1909) 1KB 50

Judgment

Background

1. This Reference was brought before the East African Court of Justice (EACJ) by way of Notice of Motion under Articles 6, 7(2), 8(1)(c), 23, 27(1) (sic) and 30 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 1(2) and 21 of the EACJ Rules of Procedure ("the Rules"). The Notice of Motion filed on 14th June, 2010 and amended on 27th October, 2010 prayed for the following Orders:-
2. That the act of the 1st Respondent to delay to convene the Council of Ministers as stipulated under Article 27 of the Treaty to create The East African Court (sic) as an appellate court is an infringement of Articles 7(2), 8(1)(c) and 6 of the Treaty for Establishment of The East African Community.
3. That the inaction of the 1st Respondent is in itself an infringement of the Fundamental principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally acceptable standards of human rights which are enshrined in those Articles of the Treaty of the Community in particular regard to peaceful settlement of disputes.
4. That the inaction and the loud silence by the 1st and 2nd Respondents is an infringement of Articles 6, 27, 29 and 30 of the Treaty for the Establishment of the East African Community.
5. That quick action should be taken by the East African Community in order to conclude a protocol to operationalise the extended appellate jurisdiction of the

East African Court of Justice under Article 27 of The Treaty to enable the Applicant and other interested litigants "preserve" their right of appeal to the East Court of Justice (sic) under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 21 of the East African Court of Justice Rules of Procedure and subsequently file their appeals. That cost of the Reference be provided for.

The Notice of Motion is supported by the Affidavit of the Applicant also filed on 14th June, 2010.

Grounds of the Reference

6. The grounds upon which the Notice of Motion is based are essentially as follows:- The Respondents herein are sued jointly and/or severally for declarations that the Applicant has a right of appeal to the EACJ under the Articles alluded to in prayer (d) above.
7. The Applicant filed Election Petition No. 25 of 2006 in the High Court of Uganda against Hon. Sam K. Njuba and Electoral Commission of Uganda (3rd and 4th Respondents herein, respectively) and lost.
8. The Applicant then filed Election Petition Appeal No. 1 of 2008 in the Court of Appeal of Uganda against the High Court decision. The Appeal was dismissed with costs to the respondents in the petition appeal.
9. Still dissatisfied with the decisions of the first two Ugandan superior courts, the Applicant filed a second appeal, being Election Petition Appeal No. 6 of 2009 in the Supreme Court of Uganda (highest court in the land) against the Court of Appeal decision. The second appeal too was dismissed with costs to the respondents in the petition appeal.
10. The Applicant being also dissatisfied with the decision of the highest court in Uganda then came to the EACJ to register his desire to further appeal to the EACJ as an Appellate Court since, in his view, despite the Ugandan Supreme Court Judgment, he still has a right of appeal to the EACJ under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 21 of the EACJ Rules of Procedure.
11. The Applicant complained that although Article 27(2) of the Treaty provides for conferment on the EACJ of such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date, none of those additional limbs of jurisdiction has been conferred on the EACJ by the Council as yet.
12. The Applicant invited the Court through the current Reference to interpret Articles 5, 6(d), 7(2) and 8(1)(c) of the Treaty so as to determine the contention that the delay to vest the EACJ with appellate jurisdiction is a contravention of the doctrines and principles of good governance, including adherence to the principles of democracy, " the rule of law"social justice "and the maintenance of universally acceptable standards of human rights" which are enshrined in the Treaty which the East African Community Partner States undertook to abide by.
13. The Applicant contended that the rule of law requires that public affairs are conducted in accordance with the law; that the decisions of the courts can be appealed against;

and that "the continuous delay to establish the East African Court of Appeal as stipulated by Article 27 of the Treaty is a blatant violation of the rule of law and contrary to the Treaty and East African integration."

14. The Applicant's complaint against the 1st Respondent vide ground 21 was that the 1st Respondent being the Chief Executive Officer of the Community is mandated to convene the Council of Ministers of East African Community to conclude a protocol to operationalise the extended jurisdiction of the East African Court of Justice in order to handle appeals from the final Appellate Courts of the Partner States and that Protocol has been pending action since 4th May 2005 as A Draft Protocol to Operationalise The Extended Jurisdiction of The East African Court of Justice.
15. The Applicant finally averred in ground 22 that this Court is seized with jurisdiction to handle this matter by virtue of Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty and Rules 1(2) and 21 of the East African Court of Justice Rules of Procedure as there are serious questions for determination by this Court of "the legality of any Act, regulation directive, decision or action of a Partner State or institution of the Community on grounds that such Act, regulation, directive, decision or action is unlawful or an infringement of the provisions of the Treaty."

Representation of the Parties

16. The Applicant was represented by learned Counsel, Messrs Chris J. Bakiza and Justine Semuyaba. The 1st Respondent was represented by learned Counsel, Mr. Wilbert Kaahwa; the 2nd and 4th Respondents were represented by learned Counsel, Ms. Christine Kaahwa and Mr. Eric Sabiiti; while the 3rd Respondent was represented by learned Counsel, Mr. Daniel Wandera Ogalo.

1st Respondent's Response to the Reference

17. In his response filed on 2nd August, 2010 and amended on 10th November, 2010 the 1st Respondent contended that the Applicant's reference to breaches of Articles 6, 27, 29 and 30 of the Treaty was misconceived, frivolous and vexatious, essentially on the grounds:-

i) That pursuant to Articles 4 and 67 of the Treaty, the 1st Respondent is the Principal Executive Officer of the Community and his responsibilities include-
Facilitating the functioning of the Community, the Council of Ministers ('the Council') and the Community's Secretariat;
Convening the Council's meetings in accordance with Article 15 of the Treaty and the Rules of Procedure of the Council.

ii) That pursuant to Article 14(3) the Council at its first meeting held on 13th January, 2001 established a Sectoral Council on Legal and Judicial Affairs ('the Sectoral Council') which is the Council of Ministers' technical arm on the implementation of the Community's programmes on co-operation in legal and judicial affairs.

iii) That at its meeting held on 24th November, 2004 the Sectoral Council decided that in view of the growing scope of the East African Community integration process, the jurisdiction of the EACJ be extended.

iv) That the Secretariat under the 1st Respondent's guidance prepared a draft protocol (zero draft).

v) That in the discharge of his obligations and with reference to the draft protocol, the 1st Respondent convened the following meetings –

Meeting of the Sectoral Council held on 8th July, 2005 at which the zero draft protocol was adopted and a decision made to subject the draft protocol to a wide consultative process;

10th Meeting of the Council held on 9th August, 2005 at which progress on the draft protocol was noted;

Meeting of the Sectoral Council held on 5th – 10th June, 2006 at which progress on the consultative process was noted;

Meeting of the Sectoral Council held on 4th August, 2006 at which progress on the consultative process was further noted;

12th Meeting of the Council held on 25th August, 2006 at which progress reports of the Sectoral Council were noted;

6th Meeting of the Sectoral Council held on 24th January, 2009 at which the Partner States sought more time for consultations on the draft protocol;

7th Meeting of the Sectoral Council held on 27th April, 2009 at which the Secretariat's report on the Partner States' consultative process was noted;

9th Meeting of the Sectoral Council on Legal and Judicial Affairs [held on 8th October, 2010] at which recommendations for further consultative were made (sic).

vi) That the 1st Respondent has discharged and continues to discharge the role expected of him as the Community's Principal Executive Officer on the matter of the draft protocol and in particular to convene the relevant policy-making meetings; that from the initial zero draft the 'protocol' has consistently undergone improvement; that, therefore, the 1st Respondent cannot be accused of inaction, delayed conclusion of the draft protocol or infringement of Articles 6, 7(2), 8(1)(c), 27 or any other provision of the Treaty; and that the 1st Respondent cannot be accused of loud or any silence on the development and finalisation of the draft protocol.

vii) That the EACJ has no appellate jurisdiction and that the Applicant's insistence on breaches of Article 6 does not disclose any cause of action on how the 1st Respondent infringed the provisions of that Article.

viii) That the Applicant's insistence on a right of appeal is presumptuous as the Council has not yet determined the extent of extended jurisdiction of the EACJ.

ix) That Article 29 on which the Applicant relies does not apply because no Partner State has failed to fulfil an obligation or infringed a provision of the Treaty to necessitate a Reference by the 1st Respondent to the EACJ.

x) That Article 30 on which the Applicant relies does not apply because the pleading does not allege the illegality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community that is unlawful or infringes the Treaty.

xi) That the granting of declaratory orders does not arise and that the Reference be dismissed with costs.

2nd and 4th Respondents' Response to the Reference

18. The response of the 2nd and 4th Respondents filed on 18th November, 2010 to the Reference was basically along the lines and in support of the 1st Respondent's response; it chronicled various consultative workshops convened by the 1st Respondent between October, 2005 and January, 2009 plus the outcomes of those Workshops. The 2nd and 4th Respondents' response was supported by the affidavits of Sam Rwakoojo and Caroline Bonabana from Uganda's Electoral Commission and Attorney General's Chambers, respectively.
19. The thrust of the 2nd and 4th Respondents' response was that the workshops recorded certain concerns which were said to point to a need for further consultations by Partner States on the draft protocol and that the consultations were on-going. We address the reported concerns later in this Judgment.
20. The 2nd Respondent averred that he had not infringed Articles 6, 27, 29 and 30 of the Treaty. He reported that at the 9th Meeting of the Sectoral Council on Legal and Judicial Affairs (held on 8th October, 2010) the Republic of Uganda, which he represents, expressed the need for further consultations and requested for a three-month extension; and that the Sectoral Council extended the time for submission of comments in writing on the draft protocol to operationalise the extended jurisdiction of the EACJ to 31st December, 2010.

Like the 1st Respondent, the 2nd and 4th Respondents prayed for dismissal of the Reference with costs.

3rd Respondent's Response to the Reference

21. In his response filed on 3rd August, 2010 to the Reference, the 3rd Respondent essentially contended as follows:-

i) That the acts complained of and the interpretation of the Treaty sought are all in respect of actions and/or omissions of the 1st Respondent and not of the 3rd Respondent, thus the Reference does not disclose a cause of action against the 3rd Respondent and he should be struck off with costs.
ii) That in respect of the 1st and 5th grounds of the Reference, the Applicant has a right of appeal to the EACJ and that he desires to further appeal to the EACJ. The 3rd Respondent averred further that no appeal by the Applicant lies against him to the EACJ under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty.
iii) That the Reference does not contain a concise statement of facts and law relied upon, but a rather lengthy narrative of irrelevancies, reproduction of contents of provisions of the Treaty and arguments and as such is scandalous, frivolous, an abuse of court process and should be struck off with costs.
iv) That, in the alternative and without prejudice to the foregoing, the 3rd Respondent admitted that the Council of Ministers over the past 10 years neglected and/or failed to set a date for the extended jurisdiction of the EACJ as required by the Treaty and therefore held back the integration process to the detriment of the people of East Africa; but that, that notwithstanding, until the Council does so, the EACJ has no appellate jurisdiction.
v) That the deliberate delay to implement Article 27(2) by the Council of Ministers has

a negative effect on good governance, democracy, rule of law and human rights in East Africa as stated by the Applicant, but that the delay and/or refusal to extend jurisdiction cannot be cured by a decision of the EACJ.

vi) That in view of the foregoing, the Reference be dismissed as against the 3rd Respondent, with costs.

Applicant's Reply to the Respondents' Responses to the Reference

22. In his affidavit in reply filed on 27th September, 2010, the Applicant essentially made the following rejoinder to the Respondents' responses to the Reference:-

i) That much as the Sectoral Council and Partner States of the East African Community have engaged in wide consultations on the development of the draft protocol to operationalise the extended jurisdiction of the EACJ, the inaction and delayed conclusion of the draft protocol constitutes an infringement of the provisions of the Treaty.

ii) That the failure of the 1st and 2nd Respondents to fast-track the process of achieving the full extent of the extended appellate jurisdiction of the EACJ, much as it may be a shared responsibility, has left the Applicant and the rest of the Ugandan people aggrieved for failure to enjoy the full rights of good governance, democracy, rule of law and human rights in Uganda and that the failure constitutes a cause of action against the 1st and 2nd Respondents.

iii) That the cause of action equally affects the 3rd and 4th Respondents, being nominal Respondents.

iv) That whereas, according to records supplied by the 1st Respondent, issues pertaining to the establishment of the EACJ were discussed in the Meeting of Attorneys General of the Member States on 31st May, 2000, no serious action or follow-up on the matter was made by the 1st Respondent until 24th November, 2004 when the 1st Respondent convened a Sectoral Council Meeting to consider the zero draft protocol to operationalise the extended jurisdiction of the EACJ.

v) That during that period of inaction, the 1st Respondent convened other Sectoral Council Meetings to consider other matters of integration but not the matter of the extended jurisdiction of the EACJ.

vi) That according to the Rules of Procedure for the Council of Ministers, especially Rule 7(5) adopted on 13th January, 2001, the 1st Respondent may, under special circumstances, at any time, add items to the provisional agenda of the Meeting of the Council provided that Partner States shall be notified forthwith.

vii) That whereas the issue of the extended jurisdiction of the EACJ has at all material times been a critical matter for achieving meaningful integration of the East African Community, the 1st Respondent ignored and/or neglected his statutory obligation without any reasonable explanation.

viii) That the 1st Respondent is clearly responsible for the delays in operationalisation of the extended jurisdiction of the EACJ.

ix) That the 2nd Respondent, who represents the Republic of Uganda, is also responsible for grave inaction in this area.

x) That according to the records of the Consultative Session of Deputy Attorneys General of the Member States held on 19th March, 2010, it was clear that Uganda

had never submitted its written comments on the operationalisation of the protocol and Uganda was urged to submit the same by 30th September, 2010.

xi) That no reasonable explanation has been given by the 2nd Respondent for that inaction for such a long time.

23. That given the historical position of Uganda in the affairs of the East African Community integration process, it cannot be said that the 2nd Respondent has acted expeditiously as was required of Member States; and thus the delay has been an impediment to the expedition of the operationalisation of the protocol.
24. That the Treaty for the Establishment of the East African Community authorises the Council of Ministers to set a definite date for implementation of the draft protocol and, to that extent, the 2nd Respondent shares in the breach of that responsibility to the prejudice of the people of Uganda.
25. That the 3rd Respondent, rightly, admits that there is a delay to implement Article 27(2) by the Council of Ministers and that the delay has a negative effect on good governance, democracy, rule of law and human rights in East Africa as stated by the Applicant.

Issues for Determination

26. A Scheduling Conference was held on 26th October, 2010 where the issues for determination by the Court were framed as follows:-

i. Whether or not the Reference discloses a cause of action.
ii. Whether Article 27 of the Treaty confers appellate jurisdiction on the East African Court of Justice (EACJ) over the decision of the Supreme Court of Uganda in *Election Petition Appeal No. 6 of 2009, Hon. Sitenda Sebalu –vs- Hon. Sam K. Njuba and Electoral Commission of Uganda*.
iii. Whether the 1st Respondent and the 2nd Respondent have discharged their respective obligations regarding the conclusion of a protocol to operationalise extended jurisdiction of the EACJ.
iv. Whether the delay to extend appellate jurisdiction of the EACJ contravenes the fundamental principles of good governance, democracy, rule of law, social justice and human rights stipulated in the Treaty.
v. Whether the 3rd and 4th Respondents are nominal respondents.
vi. Whether or not the parties are entitled to remedies.

Consideration of Rival Pleadings and Submissions

27. The parties filed written submissions which they adopted at the hearing of the Reference on 30th March, 2011. The submissions are, not unnaturally, in support of the parties' respective pleadings.
28. We have given due consideration to the rival pleadings and submissions of the parties and to the authorities cited in support thereof. We proceed to consider below the issues in the order in which they were framed.

Issue No. 1: Whether or not the Reference discloses a cause of action

29. As already noted, the Reference under consideration was brought under Articles 6, 7(2), 8(1) (c), 23, 27(1) and 30 of the Treaty and Rules 1(2) and 21 of the EACJ Rules of Procedure. The Reference seeks the prayers recorded and on the grounds stated

hereinabove.

30. In *Reference No. 1 of 2006, Prof. Peter Anyang' Nyong'o & Others –vs- Attorney General of Kenya and Others*, the EACJ had occasion to consider what constitutes a cause of action under common law and also what constitutes a cause of action under statute or other legislation.
31. As for a common law cause of action, the EACJ cited with approval the conceptualisation of such cause of action in *Auto Garage –vs- Motokov (No. 3) [1971] E.A. 514* where Spry, Vice-President of the then Court of Appeal for Eastern Africa had, *inter alia*, this to say:
"... if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed .... If, on the other hand, any of those essentials is missing, no cause of action has been shown ...."
32. The EACJ, however, proceeded in the *Anyang' Nyong'o case (supra)* to observe that a cause of action created by statute or other legislation does not necessarily fall within the same parameters. The Court noted that the action in the *Anyang' Nyong'o case* was not seeking a remedy for violation of the claimant's common law rights but an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Court observed that the Treaty provides for a number of actions that may be brought to the EACJ for adjudication and that Articles 28, 29 and 30 virtually create special causes of action.
33. Among the articles relied on in the said *Anyang' Nyong'o case* was Article 30, which, *inter alia*, provides:
"30(1). Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."
34. We note that the matters complained of by the Applicant herein include actions or omissions of a Partner State, namely, the Republic of Uganda, represented in this Reference by the 2nd Respondent. Of the three Articles cited in the *Anyang' Nyong'o case (supra)*, including Article 30(1), the EACJ had this to say:
"It is important to note that none of the provisions in the three Articles requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference. We are not persuaded that there is any legal basis on which this Court can import or imply such requirement into Article 30."
Article 27 to which Article 30 is subject, *inter alia*, confers upon the EACJ initial jurisdiction over the interpretation and application of the Treaty; while
Article 23, also cited by the Applicant in the present Reference, makes the EACJ a judicial body to ensure the adherence to law in the interpretation and application of and compliance with the Treaty.
We note from the current Reference, essentially:-

i) That the Applicant lays blame on the 1st Respondent, on behalf of the Community, for delaying to convene the Council of Ministers to operationalise the extended

jurisdiction of the EACJ;

ii) That the Applicant also lays blame on the 2nd Respondent, on behalf of the Republic of Uganda, a Partner State, for contributing to the delay in operationalisation of the extended jurisdiction of the EACJ by delaying to submit to comments on the draft protocol.

iii) That the Applicant contends that "the inaction and the loud silence" by the 1st and 2nd Respondents is an infringement of the Treaty; and

iv) That the Applicant urges this Court to so interpret the Treaty and make appropriate orders.

35. On the other hand, the 1st Respondent contends that the present Reference does not disclose a cause of action under Article 30 of the Treaty; that the 2nd and 4th Respondents contend that the Applicant does not have a cause of action; while the 3rd Respondent says it was difficult to discern what cause of action the Applicant has against him since he has no role in the process of developing the protocol to extend the jurisdiction of the EACJ.

36. We observe that in the instant Reference, like in the *Anyang' Nyong'o case (supra),* the Applicant is not seeking a remedy for violation of his common law rights but has brought an action for interpretation and enforcement of provisions of the Treaty through the requisite procedure prescribed by the Treaty. In the premise, we have no hesitation in reiterating what this Court said in *Anyang' Nyong'o (supra)* about the import of Article 30(1) of the Treaty, namely, that a claimant is not required to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the Reference in question. It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner. In the present case, it is instructive that in addition to the Applicant's complaint of infringement of the Treaty by the main players, namely, the 1st and 2nd Respondents, there is averment in the pleadings of the 3rd Respondent, an Advocate of the High Court of Uganda who, according to his Counsel, has about 40 years experience at the Bar that the delay of the Council of Ministers has a negative effect on good governance, democracy, rule of law and human rights in East Africa. This averment supports the existence of a cause of action.

Accordingly, we answer Issue no. 1 in the affirmative.

Issue No. 2: Whether Article 27 of the Treaty confers appellate jurisdiction on the EACJ over the decision of the Supreme Court of Uganda in *Election Petition Appeal No. 6 of 2009, Hon. Sitenda Sebalu –vs- Hon. Sam K. Njuba and Electoral Commission of Uganda*

37. Article 27 is framed in the following terms:

"27(1). The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

(2). The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, Partner States shall conclude a protocol to operationalise the extended

jurisdiction."

38. The term 'jurisdiction' is defined in Words and Phrases Legally Defined (2nd Edition, Volume 3), *inter alia*, to mean:
"... the authority which a court has to define matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means ...."
We adopt this definition of 'jurisdiction'.
39. The Applicant seems to have adopted an ambivalent position as to whether there is a right of appeal from a decision of the highest courts of Partner States to this Court. In his prayer (d) he urges that quick action should be taken by the Community in order to conclude a protocol to operationalise the extended appellate jurisdiction of the EACJ, which implies acknowledgement by him that the subject appellate jurisdiction does not as yet reside in the EACJ. However, the very first of the grounds on which his Reference is based seeks from this Court a declaration that he has a right of appeal to this Court under Articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty. Among the latter Articles, only Article 23 has anything to do with appellate jurisdiction; but such appellate jurisdiction is internal within the EACJ itself, namely, from the First Instance Division to the Appellate Division, not any other type of appellate jurisdiction as Article 27(2) envisages.
A plain reading of Article 27(2) clearly reveals, *inter alia*, that the provision for appellate jurisdiction relates to the future via the mechanism of a protocol, which is yet to be concluded.
40. In the circumstances, it is this Court's finding that Article 27 of the Treaty does not confer appellate jurisdiction on the EACJ over the decision of the Supreme Court of Uganda in *Election Petition Appeal No. 6 of 2009, Hon. Sitenda Sebalu –vs- Hon. Sam K. Njuba and Electoral Commission of Uganda*.
Accordingly, we answer Issue No. 2 in the negative.
Issue No. 3: Whether the 1st and 2nd Respondents have discharged their respective obligations regarding the conclusion of a protocol to operationalise the extended jurisdiction of the EACJ
41. Article 67(3) of the Treaty designates the 1st Respondent as the principal executive officer of the Community. By virtue of Article 4(3), he/she is the person who represents the Community. Article 29 mandatorily requires the 1st Respondent: if he/she considers that a Partner State has failed to fulfil an obligation under the Treaty or if he/she considers that a Partner State has infringed a provision of the Treaty, to submit his/her findings to the Partner State concerned for the Partner State to submit its observations on the findings. If the Partner State does not submit its observations within four months, or if it submits unsatisfactory observations, the 1st Respondent must refer the matter to the Council which shall decide whether to resolve the matter itself or to refer the matter to the EACJ.
42. The position of the 1st Respondent with regard to Issue No. 3 is that Article 29 of the Treaty on which the Applicant relies does not apply because no Partner State has failed to fulfil an obligation of the Treaty or infringed a provision of the Treaty to necessitate Reference by the Secretary General to this Honourable Court.

43. The 1st Respondent added that the Applicant's insistence on a right of appeal is presumptuous as the Council has not yet determined the extent of the extended jurisdiction of the EACJ.
    The 1st Respondent also contended that because:
a) under his guidance a draft protocol was prepared;
b) the draft protocol was adopted by the Sectoral Council Meeting held on 8th July, 2005 and a decision made to subject the draft to a wide consultative process;
c) he caused various workshops to be held to consider the draft;
d) he convened the relevant policy-making meetings on the matter and
e) discussions on the draft protocol are still on-going among some stakeholders, he cannot be accused of inaction, delayed conclusion of the draft protocol or infringement of Articles 6, 7(2), 8(1) (c), 27 or any other provision of the Treaty
44. The 2nd Respondent's response to the accusation that he has not discharged his obligations regarding the conclusion of a protocol to operationalise the extended jurisdiction of the EACJ is basically as follows:-
    He denied inaction and loud silence on his part and associated himself with the submissions of the 1st Respondent.
45. He contended that the Republic of Uganda and other Partner States have in pursuance of Article 27 made a draft protocol on extended jurisdiction of the EACJ and several steps have been taken by them to have the protocol concluded as can be seen from Minutes of the Sectoral Council.
46. He argued that appellate jurisdiction of the EACJ is provided for in Article 35A; that what is before the EACJ is a draft protocol which to-date has not been concluded and is work in progress; that the result of that work in progress may or may not confer extended jurisdiction on the EACJ; and that one cannot derive any rights under an intended contract.
47. He submitted that it is fallacious for the Applicant to sue for breach of a right not yet conferred; and submitted that Article 30(3) does not confer appellate jurisdiction on the EACJ as in his view that jurisdiction has been reserved by the Constitution of Uganda to the Supreme Court of Uganda, being the last appellate court in that country.
48. He pointed out that Uganda is not the only Partner State that has not yet made written comments or given a position on the draft protocol for extended jurisdiction of the EACJ; and that even if the EACJ were to make declaratory orders, that would not cure the 'inaction' of the other defaulting Partner State.
49. He proceeded to submit that he has made progress towards enactment of the protocol and that even though no conclusions have been achieved since the work is still in progress, he has diligently discharged his obligations.
50. His contention was that there has been no delay to extend appellate jurisdiction of the EACJ; that Article 27(2) gives no timeframe for extension of EACJ's jurisdiction; and that if there has been any delay, it does not contravene the principles of good governance.
51. The essence of the Applicant's submissions on the above contention by the 1st Respondent is as follows:-
    That despite acknowledgement by Counsel for the 1st Respondent that the Sectoral

Council at the meeting held on 24th November, 2004 decided that in view of the growing scope of the Community integration process, the jurisdiction of the EACJ be extended, six years have elapsed without the said jurisdiction being extended.

52. That although the 9th Meeting of the Sectoral Council (held on 8th October, 2010) had given the Partner States which had by then not completed their consultations (the Republic of Uganda and the United Republic of Tanzania) up to 31st December, 2010 to complete consultations and submit written comments on the draft protocol, the said States had not done so; yet the 1st Respondent had not taken any action despite the filing by the Applicant of this Reference in June, 2010.
53. That vide Article 8(1)(c) the Partner States undertook to abstain from any measures likely to jeopardize the achievement of the objectives of the Community stipulated in Article 6, or the implementation of the provisions of the Treaty; that the fact that the EACJ's jurisdiction has not yet been extended is an infringement of Article 6 and contrary to the principles of the Community set out therein and a contravention of the doctrines and principles of good governance, etc. and in particular regard to peaceful settlement of disputes.
54. That by 10th November, 2010 when Counsel for the 1st Respondent filed response to the Reference, no mention was made by him of the discharge of the responsibilities of the defaulting 2nd Respondent and the other defaulting Partner State (the United Republic of Tanzania). Similarly, no comments were forthcoming from the 2nd Respondent on the matter.
55. That the acts of delay are continuous and that the 1st Respondent was under a duty to take action against the defaulting 2nd Respondent, plus the other defaulting Partner State, in line with Article 29 but the 1st Respondent has not shown that he discharged that responsibility.
56. That consultative meetings are not ending as they have taken over a decade without concrete results and the EACJ should intervene as it is an integral part of the Community's integration process.
57. That the EACJ is an international court, which heightens the expectations of East Africans on its performance. That the delay to extend the appellate jurisdiction in the circumstances of the present case has contravened the fundamental principles of good governance, freedoms and rights, thereby infringing the Treaty.
58. The Court observes from the submissions and evidence on record that:-

a) At its meeting held on 24th November, 2004, the Sectoral Council decided that in view of the growing scope of the East African Community integration process, the jurisdiction of the EACJ be extended.
b) The EAC Secretariat, under the guidance of the 1st Respondent prepared a draft protocol (zero draft); that at the Sectoral Council Meeting of 8th July, 2005 the draft protocol to operationalise the extended jurisdiction of the EACJ was adopted; and that the 1st Respondent has since organized, or caused to be organized, various consultative meetings to consider the draft.
c) The 1st and 2nd Respondents contended that the Applicant's insistence on a right of appeal is presumptuous as the Council has yet to determine the extent of the extended jurisdiction of the EACJ.
d) Vide ground 6(d) of the 1st Respondent's Response to the Amended Reference, he

averred that Article 29 of the Treaty on which the Applicant relies does not apply because no Partner State has failed to fulfil an obligation of the Treaty or infringed a provision of the Treaty to necessitate Reference by the Secretary General to this Honourable Court.

e) e)Annex XII to the 1st Respondent's Response to the Reference, being a Report of a Consultative Session of Deputy Attorneys General, Solicitors General and Permanent Secretaries of the Partner States held on 19th March 2010 records, inter alia, that the session was informed that the Republic of Uganda, represented by the 2nd Respondent herein, was one among the three Partner States (including the United Republic of Tanzania and the Republic of Burundi) which had not yet submitted their comments on the draft protocol; that the session considered the urgency to conclude the preparation of the protocol but noted the need to have in place comments by all Partner States which would enable the Secretariat to prepare and circulate a matrix of comments to assist in preparation of a revised protocol; and that the 2nd Respondent and the other defaulting Partner States were given up to 30th September, 2010 to submit written comments on the draft protocol.

f) A Report of the Sectoral Council Meeting held on 8th October, 2010 noted that the 2nd Respondent and the United Republic of Tanzania had still not submitted comments on the draft protocol; that the compliant Partner States expressed the view that since the consultations had been going on from April, 2009, a three-month extension would be sufficient for any further consultations; and that the Sectoral Council: urged the 2nd Respondent and the other defaulting Partner State to submit the requisite written comments by 31st December, 2010; directed the 1st Respondent to prepare a matrix of the comments and revise the draft protocol for circulation to all Partner States; directed the Secretariat to convene an Extra-ordinary Meeting of the Sectoral Council to consider the revised draft protocol after receiving comments from the 2nd Respondent and the other defaulting Partner State.

g) As at the hearing of this Reference on 30th March 2011, neither the 1st Respondent nor the 2nd Respondent gave any update that either the 2nd Respondent or the other defaulting Partner State had met the 31st December, 2010 deadline. The 1st Respondent had also not furnished any evidence of the matrix of comments by all Partner States on the draft protocol as directed.

h) Article 8(1) (c) obligates Partner States to abstain from measures likely to jeopardise the achievement of the objectives or the implementation of the provisions of the Treaty.

The Court finds that:-

59. It has taken over six years since the consultative process on the draft protocol began after adoption of the draft but the outcome of that process is yet to be made manifest notwithstanding acknowledgement by the Sectoral Council way back in 2004 that in view of the growing scope of the Community's integration process, the jurisdiction of the EACJ ought to be extended.

60. The delay by the 2nd Respondent to submit written comments on the draft protocol to operationalise extended jurisdiction of the EACJ constitutes measures likely to jeopardise the achievement of the objectives of the Community stipulated in Article

5 or the implementation of the Treaty within the meaning of Article 8(1)(c); and that the said delay is an act of non-compliance by the 2nd Respondent with obligations regarding the conclusion of the protocol in question. This state of affairs frustrates the Applicant's legitimate expectation of expedition in the matter and constitutes an infringement of the Treaty.

61. Submitting that the appellate jurisdiction of the EACJ is already provided for under Article 35A is erroneous since that Article, read with Article 23, relates to internal appeals within the EACJ from the First Instance Division to the Appellate Division but not from national courts to the EACJ.
62. By contending that there has been no or undue delay in concluding the protocol since Article 27(2) gives no timeframe for extension of EACJ's jurisdiction, the 2nd Respondent has laid his country open to accusations by the Applicant that it intends to indefinitely hold back the process of granting any appellate jurisdiction to the EACJ over decisions of national courts.
63. The 2nd Respondent's argument that what is before the EACJ is a draft protocol which may or may not confer extended jurisdiction on the EACJ further betrays a possible hidden agenda by his country to indefinitely hold back the process of extending any appellate jurisdiction of the EACJ as Article 27(2) envisages.
64. The 2nd Respondent's argument that the Republic of Uganda is not the only Partner State which has not yet made written comments or given a position on the draft protocol for the extended jurisdiction of the EACJ, and that even if the EACJ were to make the declaratory orders sought it would not cure the inaction of the other defaulting Partner State, does not hold water since the 2nd Respondent cannot plead the inaction of a non-party to the Reference against his own country's inaction.
65. The 2nd Respondent's submission that the Republic of Uganda has diligently discharged its obligations towards enactment of the subject protocol merely because it has held consultative meetings is untenable since in the absence of any written comments by that country on the draft protocol, there is nothing to enable anyone to gauge the outcome of those "consultations" to the subject at hand.
66. There is no plausible explanation for the 1st Respondent's failure to ensure that the 2nd Respondent met the 31st December, 2010 deadline or to report the issue to the Council of Ministers as mandated by Article 29 of the Treaty and by Rule 7(5) of the Rules of Procedure of the Council of Ministers.

    On the contrary, the 1st Respondent averred that no Partner State has failed to fulfil an obligation of the Treaty or infringed a provision of the Treaty. This is a clear failure by the 1st Respondent to discharge his obligation.
67. There was failure by the 2nd Respondent to meet the 31st December, 2010 deadline for submitting written comments on the draft protocol to operationalise the extended jurisdiction of the EACJ.

    The Republic of Uganda which the 2nd Respondent represents is a Partner State against which action may be taken under Article 30 and that it has rightly been sued before this Court.
68. No reasonable explanation was offered by the 2nd Respondent for the aforesaid failure or inaction and that in so failing, the 2nd Respondent must be deemed, on behalf of the Republic of Uganda, not to have fully discharged his obligation

regarding the conclusion of the protocol to operationalise the extended jurisdiction of the EACJ.

By failing to take action against the 2nd Respondent under Article 29, the 1st Respondent, too, has not fully discharged his obligations regarding the conclusion of the protocol.

69. Whereas the records presented before this Court by the 1st Respondent show that there have been consultative meetings from 2005 – 2010 on the draft protocol and whereas the meetings were a necessary part of the process, it is clear that all those meetings have not culminated in achieving the objective for which they were convened, namely, to conclude a Protocol to Operationalise Extended Jurisdiction of the East African Court of Justice.
70. There is no evidence that the 1st Respondent invoked any of the powers vested in him by the Treaty to cause the issue of EACJ's extended jurisdiction to be brought to a conclusion.

    It is the view of the Court that the mere holding of endless consultative meetings without tangible results is counterproductive.
71. Accordingly, we find that the 1st and 2nd Respondents have not fully discharged their respective obligations regarding the conclusion of a protocol to operationalise extended jurisdiction of the EACJ and we answer Issue No. 3 broadly in the negative.

Issue No. 4 Whether the delay to extend appellate jurisdiction of the EACJ contravenes the fundamental principles of good governance, democracy, rule of law, social justice and human rights stipulated in the Treaty

72. The Applicant's case is basically that there has been unjustified delay in extending the jurisdiction of the EACJ, *inter alia*, to include appeals from the decisions of the highest courts in the Community's Partner States. Arising from his dissatisfaction with that delay, and, in particular, his specific dissatisfaction with the decision of the Supreme Court of Uganda in *Election Petition Appeal No. 6 of 2009, Hon. Sitenda Sebalu –vs- Hon. Sam K. Njuba and Electoral Commission of Uganda*, the Applicant sought to invite this Court to determine his further contention that once there is further delay to vest the EACJ with appellate jurisdication, then there is contravention of the doctrines and principles of good governance including the various ingredients specified under that expression in the Treaty.
73. The bottom line of the pleadings and submissions of the Respondents is that the question of delay in concluding a protocol is not contested. Even the manner in which Issue No. 4 was framed by the parties demonstrates that delay is admitted. What is contested is whether the delay contravenes the Treaty.
74. The expressions "good governance" and "principles of good governance" are recurrent themes in this Reference. They are not legal terms. Although the said expressions also recur in the Treaty, they are not defined there. They seem to be used interchangeably in the Treaty. The only hint one gets from the Treaty, in particular Article 6 (d), as to what the usage of the expression "principles of good governance" in the Treaty entails is that the said principles include adherence to the principles of democracy, rule of law, social justice and maintenance of universally accepted standards of human rights. To widen understanding of the concept of "governance", it may be helpful to look at a couple of definitions from non-legal sources.

75. Habitat for Humanity, in a write-up entitled "The Global Campaign for Good Urban Governance" (Draft 3 of 1st December, 1999), instructively, described the term governance as both "complex and controversial". The same write-up gave a definition of good governance in an urban context as under:
"Good [urban] governance… can be defined as an efficient and effective response to [urban] problems by accountable [local] governments…"
76. According to a United Nations Development Programme (UNDP) Report entitled '*Governance for Sustainable Growth and Equity: Report of the Growth and Equity of the International Conference' (New York: United Nations, 1997*), governance refers to:
"the exercise of political, economic and administrative authority in the management of a country's affairs at all levels… it incorporates the complex mechanisms, processes and institutions through which the citizens and groups articulate their interests, mediate their rights and obligations"
77. Simply put, governance refers to the organization of society and management of its affairs. Governance can be good or bad. The expression "good governance" appears to be a fundamentally political, philosophical and elastic subject, it connotes sound management of societal affairs and what that entails.
78. This Court notes that the issue of extended jurisdiction of the EACJ did not come as an afterthought. It was acknowledged as an important complement of the Court right at the inception of the Community, the Court being recognized as a vital component of good governance which the Community Partner States undertook to abide by as Article 7(2) of the Treaty clearly demonstrates.
79. The Applicant has pointed out that the Treaty obliges Partner States vide Article 8(1)(c) to abstain from any measures likely to jeopardize the achievement of the objectives or the implementation of the provisions of the Treaty. The Court further notes that the objectives of the Community are given in Article 5 as including the development of policies and programmes aimed at widening and deepening co-operation among Partner States in legal and judicial affairs.
80. The Court hears the Applicant to be saying that the fundamental principles that govern the achievement of the objectives of the Community are stipulated in Article 6 and that, by virtue of Article 6(d), include good governance. We understand the Applicant to say in his Ground 1 of this Reference that notionally he has a right of appeal to the EACJ under Articles 6, 7(2), 8(1)(c) , 23, 27(2) and 30; and that he is calling upon the Community to take quick action to conclude the protocol in order , *inter alia* to enable him and other interested litigants "preserve" their right of appeal to the EACJ under the aforementioned Articles.
81. To the extent that the Applicant purports to speak for other prospective appellants from decisions of national courts to the EACJ, we find his claim to be exaggerated since the present Reference was not brought as a representative suit. The Applicant can legitimately only speak for himself.
82. It is clear from the Applicant's pleadings and submissions that he had hoped that the anticipated extended jurisdiction of the EACJ would include appellate jurisdiction over the decisions of the Partner States' highest courts even in electoral matters, so that he could, for instance, appeal against the decision of the Supreme Court of

Uganda in *Election Petition Appeal No. 6 of 2009, Hon. Sitenda Sebalu – vs – Hon. Sam K. Njuba and Electoral Commission of Uganda*.

83. The Applicant says his above legitimate expectation has been frustrated, *inter alia* , by the delay of the 2nd Respondent, representing the Republic of Uganda, in submitting written comments on the draft protocol. As we understand it, the Applicant believe that the 2nd Respondent has contributed significantly to the delay in conclusion of the protocol on extended jurisdiction of the EACJ by holding back requisite written comments on the zero draft thereby contravening the principles of good governance under Article 6(d) of the Treaty.
84. In their joint response filed on 8th November, 2010 to the Reference, the 2nd and 4th Respondents, both Ugandan entities, gave eight reasons as justification for further consultations which revolved around the following: –
85. The impact of the extension of the country membership of the East African Community to include the Republic of Burundi and the Republic of Rwanda, both of whose legal systems differ from other Partner States' common law systems;

(b) The reconstitution of the EACJ following amendments in 2006 of Chapter Eight of the Treaty (creating a First Instance Division and an Appellate Division);

(c) The need to make the EACJ a permanent institution of the Community in view of the Court's growing role as a regional judicial forum and the extended jurisdiction;

(d) A proposal that pending the attainment of a political federation, original and appellate jurisdiction in matters of human rights should be a primary obligation of national courts and the same be left at national level;

(e) Granting appellate jurisdiction to the EACJ may necessitate amendment of some of the Partner States' constitutions and other relevant national laws;

(f) The fact that some Judges currently serving on the EACJ would be considering on appeal, matters they had already considered in their national courts;

(g) The EACJ's lack of capacity given the fact that by virtue of Article 140(4) of the Treaty, the Judges are serving on *ad hoc* basis;

(h) The need to clarify the role of the Commissions for Human Rights *vis-a-vis* the East African Community's programmes on good governance, promotion and protection of human and people's rights; in this regard, these Commissions' access to the EACJ, whether as *amicus curiae* or otherwise, needs to be determined.

86. The Court notes from the Report of the Consultative Session of the Deputy Attorneys General, Solicitors General and Permanent Secretaries held on 19th March 2010 (Annex XII to the 1st Respondent's Response to the Reference) paragraph 2.4.1 that the majority of those concerns alluded to above had been raised way back in January, 2009.

Our comments on the above reasons are as hereunder:-

87. As to the reasons in (a) and (e), the Court observes that the founding member countries of the Community with common law legal systems voluntarily formed the Community. The member countries with civil law legal systems which came on board later voluntarily joined a going concern. It is reasonable to assume that the member countries, as Sovereign States, considered it beneficial to join the Community, which is governed by the Treaty establishing it. As this Court observed

in *Anyang" Nyong'o(supra)*:

"While the Treaty upholds the principles of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role."

88. In this regard, attention is drawn to Article 8(2) which obligates each Partner State, within twelve months from the date of signing the Treaty, to secure the enactment and effective implementation of such legislation as is necessary to give effect to the Treaty. It is, therefore, a natural consequence that national activities of Partner States touching or impacting on the Community have of necessity to accord due reverence to the Treaty, which constitutes East African Community law.
89. Reason (b) seems to be tied up with the 2nd and 4th Respondents' submissions suggesting that appellate jurisdiction is already provided for under Articles 35A; that in the case of Uganda, the Supreme Court is the last appellate court in that country; that an appeal is a creature of statute and that no statute has been cited to show where the Applicant derives his purported appellate right from.
90. The short answer to the above submissions, as indicated earlier, is that the appellate jurisdiction provided for by Article 35A relates to internal appeals within the EACJ itself, from the First Instance Division to the Appellate Division; and that such appeals are limited to points of law, grounds of lack jurisdiction, or procedural irregularities. The said appellate jurisdiction has nothing to do with appeals from national courts, which are not catered for in the Treaty at the moment.
91. Reasons in (c) and (g) revolve on the Court's capacity to deliver on its mandate. In this regard, the Court wishes to place on record that the situation on the ground is that litigation before the EACJ has been building up but cases cannot be heard as they come, precisely because the Judges serve on *ad hoc* basis while otherwise being engaged on full-time assignments in their respective Partner States.
92. The Judges' *ad hoc* status at the EACJ is neither of the Court's making nor is it cast in stone. It is also our reading Article 140 (4) of the Treaty that the Court's *ad hoc* status was a temporary measure which would be reviewed to ensure that it does not become an impediment to the Court's proper discharge of its mandate. It does not, therefore, make sense to use the Judges' *ad hoc* status as a ground to delay the issue of the extended jurisdiction of the Court.
93. With regard to reason (d), this Court wishes to draw attention to Article 6(d) of the East African Community Treaty which urges the Partner States, *inter alia*, to recognize, promote and protect human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights. National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community Partner State concerned to access their own regional court, to wit, the EACJ, for redress? We think they would.
94. As regards reason (f), this Court does not see this as a significant or unsurmountable

problem since there is an established judicial tradition for such Judges to disqualify themselves in appropriate circumstances.

95. Finally, reason (h) registered the need to determine the mode and extent of access by national commissions on human rights to the EACJ on matters pertaining to good governance, promotion and protection of human and people's rights. It is important for such determination to be made. That must be one reason why opportunity was afforded for the series of consultative workshops alluded to by the 1st Respondent. The workshops have so far been inconclusive.

96. The Applicant is questioning the indecisiveness of and procrastination by the 2nd Respondent and the other defaulting party, thereby delaying or frustrating the declared objective of extended jurisdiction of the EACJ. This Court finds the Applicant's concerns justified as the delay not only holds back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and the implementation of the provisions of the Treaty and amounts to an infringement of Article 8(1)(c) of the Treaty.

97. When delay like the one the Applicant complains about persists at the instance of some Partner States and the 1st Respondent, representing the Community, takes no effective corrective measures, such as invoking Article 29 of the Treaty, justification arises for a complainant to seek alternative legal means of obtaining redress. The EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission. It would be well to remember that the court is a primary avenue through which the people can secure not only proper interpretation and application of the Treaty but also effective and expeditious compliance therewith.

98. In the written submissions by the 1st Respondent it was contended that:
"The extension of appellate jurisdiction for the East African Court of Justice is an on-going executive function which ought to be left within the work and programmes of the Council as required by Article 27 of the Treaty."

99. The argument implies that a function vested in the executive is the exclusive concern of the executive and nobody should question the manner of its implementation or lack of it. Fortunately, that era is gone. Article 6(d) of the Treaty requires Partner States, inter alia, to adhere to the principle of accountability as part of good governance. The import of accountable governance is that the people can hold those holding public office to account for the manner in which they exercise the function of their office or for lack of exercise or for improper exercise of those functions.

100. In the present case, the Applicant is questioning the inaction or delay by the concerned organs of the Community in concluding or causing to be concluded a protocol on the extended jurisdiction of the EACJ. He has a right to do so; and doing it peacefully through the EAC's judicial forum is in the Court's view preferable to taking recourse to emotive methods, such as civil disobedience, which have the potential for disrupting peace.

101. In view of the foregoing, we have no hesitation in finding that the delay to extend the jurisdiction of the EACJ contravenes the principles of good governance as stipulated in Article 6 of the Treaty.

Accordingly, we answer Issue No. 4 in the affirmative.

Issue No. 5: Whether the 3rd and 4th Respondents are Nominal Respondents

102. The Applicant contended that it was impossible to raise the present Reference before the EACJ without bringing the 3rd and 4th Respondents on board because they were always respondents in the previous proceedings before the superior courts of Uganda. In his view, the 3rd and 4th Respondents are nominal respondents because the outcome of the decision of this Court will have a bearing on their rights or liabilities arising under the cases decided by the superior courts of Uganda between the Applicant and Hon. Sam K. Njuba and Electoral Commission of Uganda, hence the need for the latter two to participate in this Reference as nominal respondents.

103. The 1st Respondent's response to the Applicant's contention was that in law, a nominal defendant is included in a law suit because of a technical connection with the matter in dispute and who is necessary for the court to decide all issues and make a proper finding and judgment.

104. The 3rd Respondent submitted that it is difficult to discern what cause of action the Applicant has against him since he (3 rd Respondent) has no dealings with the process of extension of the protocol to extend the jurisdiction of the EACJ. The 3rd

105. Respondent's view was that if the Applicant's intention is that should his contention to the effect that he has a right of appeal to the EACJ succeed he will file an appeal, such appeal would of necessity have to be against the 3rd and 4th Respondents in the present Reference; and that it would be at that stage when the 3rd Respondent may legitimately be brought on board as a respondent, but not now. The 3rd Respondent added that since the Applicant is not seeking enforcement of any provision of the Treaty as against him (3rd Respondent), no cause of action exists against the 3rd Respondent. He drew our attention to Article 40 which permits a resident of a Partner State who is not a party to a case before the EACJ to seek the Court's leave to intervene in such a case and make submissions limited to evidence supporting or opposing the arguments of a party to the case. The 3rd Respondent further submitted that whereas he and the 4th Respondent would themselves have been able, with the leave of the Court, to come on board as interveners through Article 40, it was improper for them to be brought in purportedly as nominal respondents.

106. The 3rd Respondent referred the Court to the English cases of *Semler-vs-Murphy (1967) 1Ch.183 and White & Another-vs-Butt (1909) 1KB 50* in support of his contention that a nominal plaintiff is a mere shadow, a party with no beneficial interest. It was the 3rd Respondent's contention that he would have a beneficial interest in the Applicant's intended appeal in that if it was dismissed he (3rd Respondent) would retain his Membership of the Uganda Parliament for a full term, while if the appeal was allowed, he would have to vacate his seat. As far as the present Reference is concerned, however, the 3rd Respondent contended he is not a nominal respondent; that he was wrongly brought before the EACJ; and that the Reference should be dismissed with costs as against him.

107. Counsel for the 4th Respondent submitted that it appeared that the 3rd and 4th Respondents were joined as parties to the Reference because they were parties to the suits filed in the courts of judicature in the Republic of Uganda. Counsel observed that if the EACJ were to decide the Reference in favour of the Applicant, he would be given leave to file his appeal in the relevant Division of the EACJ wherein he

would state his reasons for dissatisfaction with the decision of the Supreme Court of Uganda. He further submitted that it was not necessary for the Applicant to join the 4th Respondent to the present Reference as a respondent, nominal or otherwise; that 4th Respondent has incurred costs in defending this matter, which should be reimbursed to him whether the EACJ dismisses or allows the Reference.

108. This Court notes that the Reference contains no prayers against the 3rd and 4th Respondents. No wrong-doing is alleged against them in the Reference. The Applicant averred in his first ground that he sued the 3rd and 4th Respondents alongside the 1st and 2nd Respondents for a declaration that he (Applicant) has a right of appeal to the EACJ. While there are substantive prayers against the 1st and 2nd Respondents, there are none against the 3rd and 4th Respondents as already noted. These latter two Respondents have no role regarding extension of EACJ's jurisdiction.

109. In *Semler's case (supra)* which discussed what a nominal plaintiff is, Lord Denning opined that a nominal plaintiff is a man who is plaintiff in name but who in truth sues for the benefit of another. And in *Butt's case (supra)*, Lord Justice Buckley also described a nominal plaintiff as one put forward by another for purposes of suing but who has no beneficial interest in the subject matter of the litigation. We adopt the above broad description of a nominal plaintiff, which, by analogy, conversely also describes a nominal defendant. In the present Reference, the question is whether the 3rd and 4th Respondents are nominal defendants.

110. While both the 3rd and 4 th Respondents would be directly and immediately interested in any appeal proceedings that might be brought before the EACJ against the decision of the Supreme Court of Uganda in Election Petition Appeal No. 6 of 2009 if the EACJ found the Applicant herein to have such right of appeal, that stage has not yet been reached and may actually not come as long as this Court's negative finding on Issue No. 2 stands. Being substantively interested in the outcome of the aforesaid appeal, the 3rd and 4 th Respondents would not be nominal respondents in such appeal if it materialised. In the present Reference, however, whatever interest that might be ascribed to them would only be peripheral and distant. Whereas they themselves might conceivably have been entitled to seek to come on board as interveners in this Reference, we consider their joinder as Respondents to the Reference at the instance of the Applicant premature.

Accordingly, we answer Issue No 5 in the negative.

Issue No. 6 Whether or not the parties are entitled to remedies

111. The Court has found that the Applicant has a cause of action against the 1st and 2nd Respondents based on their failure by them to fully discharge their respective obligations under the Treaty.

112. It follows, therefore, that the Applicant is entitled to the remedy of quick action by the East African Community to conclude a protocol to operationalise the extended jurisdiction of the EACJ.

113. In arriving at this conclusion, we are fortified by the following pertinent sentiments expressed at the East African Legislative Assembly's 14th Sitting – First Assembly: First Meeting – Second Session held on Tuesday 11th February, 2003:

Question to Chairperson of the Council of Ministers by Harrison Mwakyembe

(Tanzania):
"Is he (Chairperson of the Council) aware that the people of East Africa, during public discussions preceding the establishment of the East African Community very clearly and loudly wanted an apex Regional Court with a broader jurisdiction?"
Chairperson, Council of Ministers (Mr. Wapakhabulo):
"....I am one of those East Africans who was pushing for the East African Court of Appeal.... The East African Court of Appeal was a definite Court in the earlier Community. It made good contributions to our jurisprudence. Up to today, most of the prominent decisions that we refer to in Courts are from that Court. And that is what the Treaty envisages. As we integrate more and more, that will be easier. But this is an area where members of the legal fraternity should push through so that we can move in that direction."
Accordingly, we answer Issue No. 6 broadly in the affirmative.

Final Orders

114. Consequent upon the foregoing, we make declaratory orders as follows:-

We grant prayers (a) and (b) in an amended form and declare that the failure or delay by the 1st Respondent to refer the matter of the delay or failure by the 2nd Respondent to submit comments on the draft Protocol to operationalise the extended jurisdiction of the EACJ to the Council of Ministers is an infringement of Articles 29, 7(2), 8(1) (c) and, particularly, 6 (d).

We grant prayer (c) in an amended form and declare that the inaction by the 2nd Respondent is an infringement of Articles 6 (d), 7 (2) and 8(1)(c) of the Treaty.

We grant prayer (d) in an amended form and declare that quick action should be taken by the East African Community in order to conclude the protocol to operationalise the extended jurisdiction of the East African Court of Justice under Article 27 of the Treaty.

We award the Applicant costs as against the 1st and 2nd Respondents.

We strike off the 3rd and 4th Respondents from the Reference and direct that the applicant shall pay their costs.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Reference No. 2 of 2010

Emmanuel Mwakisha Mjawasi & 748 others And The Attorney General of the Republic of Kenya

Johnston Busingye, P.J; Mary Stella Arach-Amoko, DPJ and John Mkwawa, J
September 29, 2011

Jurisdiction- No exhaustion of local remedies required - Non Retrospective Treaty application - The doctrine of res judicata- whether the court had jurisdiction to entertain the reference - Whether the failure by the Kenya Government to pay the claimants' terminal benefits contravened Treaty provisions.

Articles 6(d), 7(2), 27, 30, 33 and 34 of the Treaty for the Establishment of the East African Community

The Applicants were seven hundred and forty nine former employees of the defunct East African Community who alleged that the respondent had neglected, failed or refused to pay to them pension and other benefits due to them for services they had rendered to the defunct EAC. They averred that this was contrary to Articles 6(d) and 7(2) of the Treaty and a violation of their rights. They sought an order compelling the Respondent to pay their terminal benefits.

Held:

1. The issues before the Court were not similar or substantially the same ones which were litigated before the Kenya High Court. Therefore, the doctrine of *res judicata* does not apply to this Reference.
2. The Applicants became aware of the acts/omissions of the Respondent by 1998, when they filed the suit in the Kenya High Court. This was well before the Treaty entered into force in 2000. So, although the Court has jurisdiction to hear the Reference and it is not barred the rule of exhaustion of local remedies, it cannot entertain the Reference on account of the non-retrospective application of the Treaty.

Cases cited:

James Katabazi and 21 Others v. The Attorney General of the Republic of Uganda, EACJ Reference No.1 of 2007

Professor Peter Anyang Nyong'o & Others v. The Attorney General of Kenya and Others, EACJ Reference No. 1 of 2006

Ruling

Introduction

1. The Claimants filed a Reference in this Court on the 24th June 2010 against the Respondent in his representative capacity as the Principal Legal Advisor of the Government of Kenya under Articles 6(d), 7(2), 27 and 30 of the Treaty for the Establishment of the East African Community and the Rules of Procedure of the East African Court of Justice (hereinafter referred to as the "Treaty" and the "Rules", respectively).
2. The Claimants totalling 749 alleged in the Reference that they are former employees of the defunct East African Community (EAC). That the Kenya Government has neglected/failed and or refused to pay to them pension and other benefits due to them for services they had rendered to the defunct EAC. They aver that the continued refusal, neglect and/or failure by the Respondent to pay their terminal benefits is contrary to Articles 6(d) and 7(2) of the Treaty and a violation of their rights under the various human rights conventions listed therein.
3. The Claimants seek from the Court declarations that the Respondent's continued refusal, neglect and/or failure to pay their terminal benefits for the services they rendered to the defunct EAC constitute:
    1. a breach of article 6(d) of the Treaty and in particular a travesty upon the recognition, promotion and protection of their rights as enshrined in the African Charter on Human and Peoples Rights of 1981.
    2. a breach of Article 6(d) of the Treaty in particular the principles of accountability, transparency and social justice.
    3. a breach of Article7(2) of the Treaty in particular by failing, refusing and/or neglecting to maintain universally accepted standards of human rights. The Claimants also pray for:
    4. an Order compelling the Respondent to pay the claimants in accordance with their individual records, their terminal benefits for the services they rendered to the defunct EAC including but not limited to ; pension, additional pension, gratuity, redundancy payment in lieu of notice, one month's salary in lieu of notice, loss of office benefits, pension emoluments, outstanding/accumulated leave, repatriation expenses,real value and 7 % compound interest until payment in full

Costs of the Reference.

4. In his response, the Respondent contended that the Claimants were not entitled to the alleged payment and also raised the points of law the subject of this Ruling. The objections were that:

i) The Court lacks the jurisdiction to hear and determine the Reference.
ii) The matter is *Res judicata*.
iii) The Reference is inadmissible in this Court since local remedies have not been exhausted.
iv) The East African Community Treaty of 2000 cannot be applied retrospectively.
v) The Claimants' statements are mere allegations without any proof of how the Treaty

or the various conventions listed therein have been infringed by the Respondents or that the respondent is a signatory to them.

vi) The Objectives of the Treaty under Article 5 do not provide for the redress of previous injustices, if any, to entitle the Claimants to rely on Articles 6 and 7 of the Treaty.

5. It is necessary to point out from the outset that Counsel for the Respondent raised the last three objections in his written submissions. They were not among the objections he had raised at the scheduling conference. Nevertheless, we have considered them in our ruling since it is trite law that a point of law can be raised at any stage of the proceedings. The rationale is that it would save courts time and resources if the objection can dispose of the case at the earliest. The record also indicates that Counsel for the Respondents abandoned the point raised against the capacity of the Claimants to institute these proceedings at the scheduling conference and did not canvass it in his written submissions.

Submissions by Respondent's Counsel

6. Counsel for the Respondent submitted, firstly, that since the Reference contains allegations of violations of the Claimants' human rights and is an appeal against the decision of the Kenya High Court dismissing a similar complaint by the Claimants in HCCS No. 1879 of 1997, in the absence of the protocol for the extended jurisdiction of the Court, this Court lacks the jurisdiction to hear and determine the same. Secondly, Counsel submitted that the matter is barred by the doctrine of *res judicata*, having been determined by the Kenya High Court in HCCS No. 1879 of 1997 between the same parties. Thirdly, Counsel submitted that the matter is inadmissible in this Court since the Claimants have not exhausted the local remedies available in the Republic of Kenya. Fourthly, it was Counsel's contention that the Treaty has no provision for retrospective application. The matters complained of occurred well before the Treaty entered into force in 2000. The Reference is therefore wrongly brought before this Court which cannot entertain it since the Court itself is a creature of the Treaty. Fifthly, Counsel attacked the Reference for being vague without any proof. Lastly, Counsel contended that Article 5 of the Treaty is about the Objectives of the Treaty, it cannot be used by the Claimants to bring a reference under Article 6(d) and 7(2) for previous injustices, if any. Consequently, he prayed that the Reference be struck out with costs.

Response by Claimants' Counsel

7. Counsel for the Claimants opposed the objections strongly asserting that this Court has the jurisdiction to hear and determine the Reference. He contended, firstly, that the Reference is not about human rights violations or an appeal against the decision of the Kenya High Court as alleged. He argued that the Reference concerns the breach of Articles 6(d) and 7 (2) of the Treaty by the Kenya Government and the fact that it contains allegations of violation of human rights under the conventions cited therein cannot prevent this Court from handling the Reference. In support of this stance he cited the decision of this Court in *Reference No.1 of 2007, James Katabazi and 21 others vs The Attorney General of the Republic Of Uganda*.

8. Secondly, he disagreed that the matter was barred by the doctrine of *res judicata*

since the issues before this Court are not similar or directly and substantially in issue before the Kenya High Court and Counsel for the claimants had not even shown that they were the same litigants in both suits.

9. Thirdly, Counsel contended the there is no requirement for exhaustion of local remedies under the Treaty and consequently, this Court should not entertain that objection.
10. Counsel made no response to the last three objections on the ground that they did not form part of the objections Counsel for the Respondent had raised and was agreed upon during the scheduling conference. He instead went ahead to submit on the capacity of the Claimants, a point which as we stated earlier in this ruling and is borne out by the record of proceedings, the Respondent's counsel had abandoned at the scheduling conference. For that reason we have not considered it in this Ruling as well.

Determination of the points of objection by the Court

11. After carefully considering the written submissions of both sides and the law, our findings and conclusions are as follows:

Jurisdiction

12. The jurisdiction of this Court is stated in Article 27 read together with Article 23 of the Treaty in the following words:

(i) The Court shall initially have jurisdiction over the interpretation and application of this Treaty.

(ii) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.
Article 23 provides that: 1. The Court shall be a judicial body which shall ensure adherence to law in the interpretation and application of and compliance with this Treaty.

13. It is not in dispute that the steps in Article 27(2) have not yet been taken. It follows therefore, that this Court may not adjudicate on disputes concerning violation of human rights per se. The Court has no appellate jurisdiction as well. However, in this Reference, this Court is neither being asked to adjudicate on a dispute concerning violation of human rights per se nor to exercise an appellate jurisdiction over the decision by the Kenya High Court. The Court is being asked to determine whether the alleged failure by the Kenya Government to pay the Claimants their terminal benefits constitutes a violation of Articles 6(d) and 7(2) of the Treaty. The fact that the Reference also contains allegations of violations of human rights under the conventions listed therein cannot prevent this Court from exercising its mandate under Article 27(1) of the Treaty. We have considered this objection and come to the same conclusion in a number of references including *James Katabazi & 21 Others-vs. - The Secretary General of the EAC and the AG of the Republic of Uganda(supra).* We still hold the same view. This point of objection is accordingly overruled.

Res Judicata

14. The doctrine is defined in the Civil Procedure Acts of Kenya, Uganda and Tanzania as follows: No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised, and has been heard and finally determined by such Court.
15. The doctrine has been applied in this Court in a number of references including *James Katabazi & 21 others (supra)* where the Court stated that for the doctrine to apply:
    (i) the matter must be 'directly and substantially' in issue in the two suits,
    (ii) the parties must be the same or parties under whom any of them claim, litigating under the same title; and
    (iii) the matter must have been finally decided in the previous suit.
16. In the present Reference, the issue which this Court is being called upon by the Claimants to determine is basically, whether the alleged failure, neglect and/or refusal to pay the claimants their terminal benefits for the services they rendered to the defunct EAC violate the principles of accountability, transparency, social justice, and also fall below the universally accepted standards of human rights and are therefore an infringement of Articles 6(d) and 7(2) of the Treaty. In deciding this issue, the Court will be required to interpret the provisions of the Articles cited.
17. On the other hand, the issues framed by the Court in the *HCCS No.1879 of 1997* were:
    "Firstly, when was pension payable?
    Secondly, had the Government complied with the Mediation Agreement?
    Thirdly, should the declarations and orders sought be granted?
    Fourthly, in any event is the suit time barred?
    Fifthly, who should pay the costs?"
    In that case, as can be discerned from the judgment, the Kenya High Court interpreted and applied the provisions of the Mediation Agreement as well as the relevant Kenyan laws.
18. From the foregoing, it is clear that the issues before this Court are not similar or substantially the same ones which were litigated before the Kenya High Court. We therefore agree with the Claimants' Counsel that the doctrine of *res judicata* does not apply to this Reference.

Exhaustion of local remedies

19. The rule is to the effect that a state should be given an opportunity to address an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question. The exemption is where the domestic remedy is unavailable or may result into undue delay. It has been incorporated into several human rights conventions including the African Charter on Human and People's Rights (See Article 50). It is a question of admissibility and not of substance. There is, however, no express provision in the Treaty requiring the exhaustion of local remedies before filing a Reference in this Court. Under Article

27(1) of the Treaty, matters requiring interpretation and application of the Treaty such as the instant Reference are admissible in this Court.

20. This Court dealt with this issue in *Reference No. 1 of 2006, Professor Peter Anyang Nyongo & Ors vs The Attorney General Of Kenya and Others* and the Court stated as follows at pages 20 to 21 of the judgment: Under Article 33(2), the Treaty obliquely envisages the interpretation of the Treaty provisions by national courts. However, reading the pertinent provisions with Article 34 leaves no doubt about the supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty.
21. For clarity, the provisions of the two Articles were reproduced. Article 33 provides that: ''1. Except where jurisdiction is conferred on the Court by the Treaty, disputes in which the Community is a party shall not on that ground alone be excluded from the jurisdiction of the national courts of the Partner States. 2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of the national courts on a similar matter.'' Article 34 provides that: "Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question".The Court said that the purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.
22. The Court further pointed out in Reference that: "Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor is there a provision directly conferring on the national court's jurisdiction to interpret the Treaty. Article 30 on the other hand, confers on a litigant resident in a partner state the right of direct access to the Court for determination of the issues set out therein. We, therefore, do not agree with the notion that before bringing a Reference under Article 30, a litigant has to "exhaust the local remedy". In our view there is no local remedy to exhaust.''

    We share the same view and accordingly, overrule this objection as well.

The Retrospective Application of the Treaty

23. The Vienna Convention on the Law of Treaties provides in Article 28 that: "Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry in force of the treaty with respect to that party".
24. According to the above provisions, a treaty cannot be applied retrospectively unless a different intention appears from the treaty, or is otherwise established. In the absence of a contrary intention therefore, a treaty cannot apply to acts or facts which took place or situations which ceased to exist before the date of its entry into force.

25. Form the pleadings on record; it is clear that the Claimants became aware of the acts/omissions of the Respondent complained of by 1998, when they filed the suit in the Kenya High Court. That was well before the Treaty entered into force in 2000.
26. There is no contrary intention from the reading of the Treaty that it was to apply retrospectively and none has been established by the Claimants.
This point of objection is accordingly upheld.

The Claim is a Mere Allegation.

27. This criticism has no basis in our view. The pleadings are clear. The Claimants allege that the respondent has breached specific Articles of the Treaty. The Claimants set out details in the supporting affidavits and annextures. That is all that is required of a Claimant under Rule 37 which provides that: ‘’…..every pleading shall contain a concise statement of material facts upon which the party’s claim or defence is based not the evidence by which those facts are to be proved’’.This point of objection is accordingly overruled.

The Objectives of the Treaty

28. The import of this point of objection is similar to objection No. 4 and the answer is the same. This objection is upheld.

Conclusion

29. In conclusion, we rule that although the Court has jurisdiction to hear the Reference and that it is not barred by the doctrine of res judicata or the rule of exhaustion of local remedies, nonetheless, it cannot entertain the Reference on account of the non-retrospective application of the Treaty.

The Reference is accordingly struck out with costs to the Respondent.
It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Reference No. 3 of 2010

Independent Medical Unit And The Attorney General of the Republic of Kenya, The Minister for Internal Security of Republic of Kenya, The Chief of General Staff of Republic of Kenya, The Commissioner of Police of the Republic of Kenya & The Secretary General of the East African Community

Johnston Busingye, PJ, Stella Arach-Amoko DPJ, John Mkwawa J, Jean-Bosco Butasi J, Benjamin Kubo J
June 29, 2011

Jurisdiction on human rights issues - Limitation of time- Preliminary objection- Officers employed by a Partner State wrongly joined as parties - Whether there was a cause of action against some of the respondents.

Article 6, 7(2), 30 of the EAC Treaty - Rule 24 of the EACJ Rules of Procedure, 2010

The Applicants contends that the failure by the 1st, 2nd, 3rd, and 4th Respondents to take measures to prevent, investigate or punish those responsible for executions, acts of torture, cruelty, inhuman and degrading treatment of over 3,000 Kenyans resident in Mount Elgon District which were carried out by the Respondents jointly between 2006 and 2008, violated the Treaty, several International Human Rights Conventions and the Kenya Constitution.

The Respondents raised several preliminary objections including lack of jurisdiction on human rights issues, limitation and lack of a cause of action.

Held:
1. The Court shall not abdicate its duty to interpret the Treaty merely because Human Rights violations are mentioned in this Reference.
2. The 2nd, 3rd, and 4th Respondents were merely officers employed in the Republic of Kenya and the maintenance of law and order was the sole responsibility of the Republic of Kenya. They were wrongly joined to the Reference and the correct party was the Attorney General of the Republic of Kenya.
3. The pleadings did not disclose any cause of action against the 5th Respondent
4. That the matters complained of were failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations. And that such action or omission of a Partner State cannot be limited by mathematical computation of time.

Cases cited:
James Katabazi and 21 others v TheSecretary General of the EAC and Another, EACJ Reference No.1 of 2007

Modern Holdings East Africa Ltd v Kenya Ports Authority, EACJ Reference No.1 of 2008
Prof. Anyang Nyongo and Others v the Attorney General of the Republic of Kenya, EACJ Reference No. 1 of2006

Editorial Note: On Appeal, it was held that the Reference was time-barred as the Treaty did not recognize any continuing breach or violation.

Ruling

1. The claimant brought a reference to this Court under Article 30 of the Treaty for the Establishment of the East African Community "the Treaty". In the reference, the Claimant contends that the failure by the 1st, 2nd, 3rd, and 4th Respondents to take measures to prevent, investigate or punish those responsible for executions, acts of torture, cruelty, inhuman and degrading treatment of over 3,000 Kenyans resident in Mount Elgon District which were carried out by the Respondents jointly and severally between 2006 and 2008, violated several International Human Rights Conventions, the Kenya Constitution as well as the Treaty. The Respondents opposed the Reference and prayed that it be dismissed with costs.
2. This ruling is in respect of preliminary objections raised by Counsel for the Respondents to the Reference when it came for scheduling conference on the 2nd December 2010 on the following points of law:-
   1) The jurisdiction of the Court.
   2) Non-compliance with Rule 24 of the EACJ Rules.
   3) Joinder of the 2nd, 3rd, and 4th Respondents.
   4) Cause of action against the 5th Respondent.
   5) Limitation.

After carefully considering the submissions made by both sides and perusing the pleadings on record, the following are our findings and conclusions:

Jurisdiction:

3. It was contended by Counsel for the Respondents that the Court is being asked to exercise jurisdiction and address issues of human rights raised in the Reference, but that the Court has no jurisdiction to do so since the Court's jurisdiction is at the moment restricted to the interpretation and application of the Treaty under Article 27(1). He argued further that Article 27(2) expressly excludes the jurisdiction to deal with human rights issues until the Court is granted extended jurisdiction through a subsequent protocol which has not yet been concluded.
4. Learned Counsel for the Claimant disagreed. Her contention was that the Court has jurisdiction to entertain this Reference. Counsel relied on the provisions of the Vienna Convention on the Law of Treaties that require a Treaty to be read, interpreted and performed in good faith.

   Counsel further relied on Article 27 of the Treaty and submitted that the reference before Court invokes the Court's jurisdiction to interpret and apply the provisions of the Treaty. That in particular, the reference seeks to invoke the Court's jurisdiction to hear and determine whether the 1st to 4th Respondents have breached the

fundamental principles of the Treaty including:
(a) The rule of law under Articles 6 and 7(2).
(b) Promotion and protection of human rights in accordance with the African Charter on Human and People's Rights under Article 7(2).
(c) Good governance under Article 6 and 7(2) and
(d) Maintenance of universally accepted standards of Human Rights under Article 7(2).

5. Counsel also cited Ref. No.1 of 2007 James Katabazi and 21 Others vs The Secretary General of the EAC and Another, where this Court held that although it does not have jurisdiction to deal with human rights issues yet, it has jurisdiction to interpret the Treaty even if the matters complained of include Human Rights violations.
6. We agree with Counsel for the Claimant. The allegations set out in the reference are that the 1st to 4th Respondents jointly and severally carried out executions, torture, cruel, inhuman and degrading treatment of over 3,000 Kenyans resident in Mt. Elgon District, between 2006 and 2008 and that the Republic of Kenya took no measures to prevent,investigate or punish the perpetrators of those actions.
It is alleged that this contravened several International Human Rights Conventions such as the Universal Declaration of Human Rights, International Law as well as the Kenyan constitution and laws and the Treaty particularly in paragraphs 64, 65, 66, 67, 70, 71, and 72 where the Claimant makes reference to Articles 4, 5(1) (3), and 6(d) of the Treaty.
7. Article 6 (d) reads: "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 and protection of human and people's rights."
8. In the *Katabazi case*, this Court was confronted with a similar objection. After considering the objectives of the Community as set out in Article 5(1), the fundamental principles of the Community particularly in Article 6(d), the operational principles in Article 7, as well as Article 8(1) where
Partner States undertake, among other things to:
"Abstain from any measures that are likely to jeopardize the achievement of those objectives or implementing of the provisions of this Treaty",

Court held that:

9. "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations."
10. Similarly, in this Reference, Court shall not abdicate its duty to interpret the Treaty merely because Human Rights violations are mentioned in the Reference. In the result, we hold that this Court has jurisdiction to entertain the Reference. 2

Noncompliance with Rule 24 of the EACJ Rules: This Rule provides that: "24….
(4)Where the reference is made by a body corporate the application shall be accompanied by documentary evidence of its existence in law."

11. The Claimant is described in the Reference as a Non-Governmental Organisation established in Kenya and registered under the Non-Governmental Organisations and Coordination Act of 1999. Initially the Certificate of Registration was not attached to the Reference. This anomaly was later on rectified after an application by the Claimant's Counsel and the Registration Certificate was filed in Court. Consequently it is no longer an issue.

Joinder of the 2nd, 3rd, and 4th Respondents

12. It was contended by Counsel for the 2nd, 3rd and 4th Respondents that they were wrongly joined to the Reference since they are neither Partner States nor Institutions of the Community and therefore do not fall under the ambit of Article 30 of the Treaty.
13. That they are officers employed by the Republic of Kenya. That the maintenance of law and order is the sole responsibility of the Republic of Kenya, hence the correct party should be the Attorney General of the Republic of Kenya.
14. Counsel for the Respondents relied on the ruling of this Court in *Ref. No. 1 of 2006, Prof. Anyang Nyongo and Others vs the Attorney General of the Republic of Kenya* and *Ref. No.1 of 2008, Modern Holdings East Africa Ltd vs Kenya Ports Authority* in support of their contention.
15. The Claimant's Counsel made a brief response in which she contended essentially that this objection was misconceived and should be dismissed.
16. We have carefully perused the pleadings and the authorities cited. We entirely agree with Counsel for the 2nd, 3rd, and 4th Respondents that they are merely officers employed in the Republic of Kenya. The correct party is the Attorney General.
17. In the *Anyang Nyongo case (supra)*, the 2nd,5th and 6th respondents were sued as Clerk to the National Assembly of the Republic of Kenya, the Vice- President of the Republic of Kenya and the Leader of Government Business and Chairman of NARC Kenya, a Political party,respectively. It was argued very strenuously by Counsel for the applicants that since a natural person has the capacity to sue in this Court, a natural person must have the capacity to be sued in the same Court as well.
That Article 30 should be interpreted to bring persons who commit misfeasance and who infringe the provisions of the Treaty,within the ambit of Article 30, to account for their actions.
18. This is what the Court said:-
"With due respect to Counsel for the Applicants, it appears to us that enjoining the 2nd, 5th and 6th Respondents to the reference were under a misconception. A reference under Article 30 of the Treaty Should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner States or of institutions of the Community. The alleged collusion and connivance, if any, is not actionable under Article 30."
The preliminary objection was upheld and the said Respondents were struck off the

reference with costs.

19. In the case of *Modern Holdings (supra)*, Court once again upheld an objection where the Respondent was not an institution or a Partner State of the Community. Similarly in this case, we are satisfied that the 2nd, 3rd and 4th Respondents were wrongly joined to the Reference and we order that they be struck off with costs.

Cause of Action Against the 5th Respondent

20. It was contended by Counsel for the 5th Respondent that the pleadings do not disclose any cause of action in the Reference against his client. On the other hand, Learned Counsel for the Claimant insisted that there is a cause of action against the 5th Respondent.
21. With due respect to learned Counsel for the Claimant, we have perused the pleadings and we find that they do not disclose any cause of action against the 5th Respondent in that there are no allegations or complaints against the 5th Respondent. There are also no remedies sought against him. We accordingly find merit in this objection and order that the 5th Respondent be struck off the reference with costs.

Limitation:

22. It was contended on behalf of the Respondents that the pleadings show that the complainant was aware of the complaint way back in 2008 and that, therefore, the Reference is barred by limitation in that it was filed outside the 2 months limitation period stipulated under Article 30(2) of the Treaty.
23. Counsel for the Claimant submitted that the Reference is not time barred in that, the matters complained of are criminal in nature and concern the Rule of Law, good governance and justice which do not have any statutory limits. The case of *Stanley Githunguri - vs - Republic (1986) KLR 1* and *Republic - vs - Gray Exparte Graham (1982) 3 All ER 653* were cited in support of this submission. Article 30 (2) provides that proceedings: "shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be;"
24. Upon careful consideration of this point of objection, it is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations. We find that such action or omission of a Partner State cannot be limited by mathematical computation of time.

We accordingly overrule this objection.

25. In conclusion, we rule that:
    1) This Court has jurisdiction to handle this matter.
    2) Rule 24 was complied with.
    3) The 2nd, 3rd and 4th Respondents were wrongly joined.
    4) There is no cause of action against the 5th Respondent.
    5)The 2nd, 3rd, 4th and 5th Respondents be struck off the reference with costs.
    6) The Reference is not time barred.

* * * *

East African Court of Justice – First Instance Division
Reference No. 6 of 2010

Alcon International Ltd And Standard Chartered Bank of Uganda, Attorney General on behalf of the Republic of Uganda & Registrar of the High Court of Uganda

Johnston Busingye, PJ, Jean Bosco Butasi J, Isaac Lenaola J
September 2, 2013

Cause of action - Enhanced jurisdiction - Cross-border investments- Non- retroactivity - Principles of treaty interpretation - Whether the 1st and 3rd Respondents were properly joined in the reference- Whether Court had jurisdiction over actions taking place before Common Market Protocol entered into force.

Article 27 (2), 30(1), 54 (2) (b), 151 of the EAC Treaty- Articles 29 (2) and 54 (2) (b) Protocol on the Establishment of the East African Community, Common Market.

The Applicant, a construction company incorporated and registered in the Republic of Kenya, entered into an agreement National Social Security Fund (NSSF) of Uganda for completion of a partially constructed structure in Kampala on 21st July, 1994. NSSF terminated the contract on 15th May, 1998 due to various defaults allegedly committed by the Applicant.

Upon filing a claim in the High Court of Uganda against NSSF for wrongful termination of the contract, an award was granted to the Applicant. NSSF challenged the same before the High Court and upon dismissal, appealed to the Court of Appeal of Uganda. The 1st Respondent issued a Bank Guarantee payable to Alcon International Limited as the judgment-creditor upon determination of the appeal. On 25th August, 2009, the Appeal above was determined in favour of the Applicant who then demanded that the 1st Respondent should honour the Bank Guarantee and pay the decretal sum but the 1st Respondent later declined to do so.

In the meantime, an appeal had been lodged in Supreme Court of Uganda and its judgment was delivered on 8th February, 2013. The Supreme Court set aside the arbitral award and the judgments of the High Court and Court of Appeal returned the case back to the High Court for fresh trial.

Prior to the Supreme Court's decision, the Claimant had filed the present Reference on 20th August, 2010 seeking an interpretation and application of Articles 27(2) and 151 of the Treaty and Articles 29(2) and 54(2)(b) of the Protocol on the Establishment of the East African Community Common Market with regard to the enforcement of, and enhancement of trade and resolution and settlement of disputes for the protection of cross-border investments. The 1st and 2nd respondent claimed that they had been improperly brought before the court.

Held:

1. Neither the 1st nor the 3rd Respondent were Partner State or Institutions established by the Summit and they could not, therefore, be properly sued in that capacity before this Court because they were not bound by the Treaty or any of its Protocols. They were improperly sued and all the complaints against them were therefore dismissed.
2. All the issues raised by the Claimant could not be properly adjudicated by the Court because there was no live dispute before it and no cause of action against the 2nd Respondent. No merit was found in the Reference and it was dismissed. Each party was to bear its own costs.

Cases cited:

Anyang' Nyong'o and others v. the Attorney General of the Republic of Kenya and others, EACJ Reference No.1 of 2006

Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare, EACJ Appeal No.3 of 2011

Emmanuel Mwakisha Mjawasi and 748 Others v. the Attorney General of the Republic of Kenya, EACJ Appeal No.4 of 2011

Modern Holdings (EA) Ltd v. Kenya Ports Authority, EACJ Reference No.1 of 2008

Editorial Note: In Appeal No 3 of 2013, the Appellate Division awarded costs to the Respondents' holding that the Trial Court had exercised its discretion improperly. However, the Applicant's appeal was dismissed.

Judgment

Introduction

1. This Reference dated 20th August, 2010 was brought, inter alia, under the provision of Articles 27(2) and 151 of the Treaty for the Establishment of the East African Community and Articles 29 and 54 of the Protocol on the Establishment of the East African Community Common Market, respectively.
2. The Claimant is a construction company incorporated and registered in the Republic of Kenya, a member State of the East African Community (herein after referred to as "the Community"). It has perpetual succession, a common seal and power to sue and to be sued in its corporate name and its address is Postal Box Number 47160, Nairobi, Kenya. For purposes of this Reference, its address was care of M/S Ibrahim Isaack and Company Advocates, Hughes Building 8th Floor Kenyatta Avenue, and P.O. Box 6697 500200, Nairobi, Kenya. The said Advocates were later replaced by M/S Muthomi & Karanja, Advocates Brandon Court, Marionette A2, Ndemi Lane, off Ngong Road, Nairobi, Kenya.
3. The First Respondent is a Limited liability company registered in Uganda and carrying out Banking Business, in Kampala, and its address is 5 Speke Road Postal Address as Post Office Box Number 7111, Kampala, Uganda. It is also incorporated in England with Limited liability by Royal Charter 1853.
4. The Second Respondent is the Attorney General sued on behalf of the Government of the Republic of Uganda and is the Principal Legal Advisor to the said Government.

Background

5. The Claimant was first registered in Kenya as Company Number C9646 by the Registrar of Companies at Nairobi and its history is very enigmatic and the reasons thereof will shortly become apparent. 42 years ago, in January, 1971, it was a Company Limited by shares, registered and incorporated in Kenya and the owners were three brothers of Indian origin, who are Kenyan nationals. For clarity, these brothers are:
   i. Inderjit Singh Hanspal;
   ii. Kultar Singh Hanspal;
   iii. Davinder Singh Hanspal.
6. At the time of incorporation, the Company was called Allied Concrete Works Limited but, it has changed its name over the years as follows:
7. On 6th November, 1971, it became known as Allied Contractors Limited.
   On 26th July 1984, it was re-renamed Alcon International Limited but as a company incorporated in the United Kingdom.
8. On 21st July, 1994 in any event, Alcon International Limited, a Company incorporated in the Republic of Kenya entered into an agreement with the National Social Security Fund (NSSF) of Uganda for completion of a partially constructed structure in reinforced concrete within Kampala City.
9. According to the Contract, Alcon International Ltd was to be paid USD16,160,00 after completion of the structure later to be known as "Workers House" in Kampala. Alcon International Ltd Uganda is the one that carried out the execution of the contract which covered civil works, mechanical and electrical engineering, general and architectural work etc. On various dates between 11th December, 1997 and 30th April, 1998, NSSF wrote to Alcon International Ltd giving notice of termination of the contract due to defaults allegedly committed by the later.
   After lengthy correspondences between the Parties, the contract was formally terminated on 15th May, 1998.
10. On 30th November, 1998, an application in *HCCS No.1255 of 1998*, (Uganda) was filed by Alcon International Ltd seeking certain orders for wrongful termination of the contract, but the Parties were advised to explore arbitration given the nature of the dispute. All the Parties agreed with the advice of the Court and after arbitration proceedings, the arbitrator awarded the Plaintiff, (Alcon International Ltd) an amount of USD 8,858,469.97.
11. Sometimes in the proceedings, Alcon International Ltd Uganda appeared before the High Court and the Arbitrator to stake its claim to the Award but upon the Award being delivered, the NSSF challenged the same before the High Court but its Appeal was dismissed and it then filed Civil Appeal No.4 of 2009 before the Court of Appeal of Uganda challenging the judgment of the High Court in Appeal No.2 of 2004. Upon the Appeal being dismissed, the 1st Respondent, the Standard Chartered Bank of Uganda issued a Bank Guarantee number UGBG-030482 for USD8,858,469.97 payable to Alcon International Limited as the judgment-creditor upon determination of Appeal No.4 of 2009 in the Court of Appeal of Uganda.
12. On 25th August, 2009, the Appeal above was determined in favour of the Claimant who then demanded that the 1st Respondent should honour the Bank Guarantee

and pay to it the decretal sum but later declined to do so.

13. In the meantime, the dispute had gone to the Supreme Court of Uganda in Appeal No. 15 of 2009 and the Supreme Court issued orders of stay of execution of the decree pending its judgment which was eventually delivered on 8th February, 2013. In that judgment, the Supreme Court ordered inter-alia as follows:
    i) that arbitral Award and the decision of the High Court should be set aside.
    ii) that the judgment of the Court of Appeal be similarly set aside.
    iii) *HCCS No.1255 of 1998* was returned to the High Court for trial afresh.
14. The reasons for that decision were that the Award was made in the absence of a cause of action against the Appellants; that it was obtained illegally and contrary to Public Policy and that *HCCS No.1255 of 1998* was wrongly referred to arbitration.
15. Prior to the above decision, the Claimant had filed the present Reference on 20th August, 2010 and it moved this Court to interpret and apply Articles 27(2) and 151 of the Treaty and Articles 29(2) and 54(2)(b) of the Protocol on the Establishment of the East African Community Common Market with regard to the enforcement of, and enhancement of trade and resolution and settlement of disputes for the protection of cross-border investments.

Case for the Claimant

16. The Claimant tendered both oral and Affidavit evidence and its Advocate Mr. Muthomi Thiankolu filed extensive written submissions and authorities in furtherance of the Claimant's arguments.
17. Its case can be summarized as follows:
    i. That the Republic of Uganda has failed to protect its cross-border investment contrary to the letter and spirit of the Treaty and the Protocol;
    ii. That the Respondents have violated the express provisions of inter-alia Articles 5, 27, 127(2)(d) and 151 of the Treaty as read with Articles 29 and 54(2)(b) of the Protocol by failing to honour the obligation to pay the decretal sum of USD8,858,469.97 and/or in accordance with a Bank Guarantee dated 29th October, 2003 and amended on 23rd October, 2008.
18. Further, that the Court's interpretation and application of the provisions of Articles 27(2) and 151 of the Treaty as read together with Article 54(2)(b) of the Protocol should lead to the following orders in favour of the Claimant:-
    a) the Respondents be ordered to jointly and/or severally pay the Claimant the sum of USD8,858,469.97 together with interest and costs in full under the Bank Guarantee dated 29th October, 2003.
    b) this Honourable Court be pleased to interpret and apply Articles 27(2) and 151 of the Treaty for Establishment of the East African Community together with Articles 29(2) and 54(2)(b) of the Protocol on the Establishment of the East African Common Market on the enhanced jurisdiction of this Honourable Court as a competent judicial authority with regard to the enforcement of and enhancement of trade and resolution of settlement of and enhancement of trade and resolution and settlement of disputes for the protection of cross-border investments.
    c) this Honourable Court be pleased to declare that the signing of the Protocol on

the Establishment of the East African Common Market and the coming into force of the said Protocol on 1st July, 2010 enhanced the jurisdiction of this Honourable Court as envisaged under Article 27(2) of the Treaty as a competent judicial authority for the determination of cross-border trade disputes between persons emanating from Partner States.

d) this Honourable Court be pleased to declare that where a Public official of a Partner State fails to honour his obligation/duty, statutory or legal to a person from a different Partner State, then under the spirit and letter of the Treaty and the Protocol, this Court has the jurisdiction to enforce that duty expeditiously.

e) direct the Respondents to pay the Claimant general damages as shall be determined by Court.

19. The said Prayers are also sought because the Claimant alleges that it has faced undue hardship and frustration in enforcing its rights through the Justice System in Uganda and that the Republic of Uganda is "guilty of unlawful expropriation, denial of Justice and failure to protect the Claimant's cross-border investment."

Case for the 1st respondent

20. The 1st Respondent, the Standard Chartered Bank of Uganda Limited has argued:
    a. that it has been improperly sued in the Reference as it is neither a Partner State nor an Institution of the Community to whom Article 30(1) of the Treaty can be applied;
    b. In any event that, no cause of action can lie against it because the Bank Guarantee was in effect a contract between the Bank and the 3rd Respondent and the Claimant was a stranger to that contract and;
    c. that no demand has been made by the 3rd Respondent for the Bank to honour the Guarantee.

f) More fundamentally, the 1st Respondent has made the point that there is no Guarantee left to be enforced because the Supreme Court of Uganda has since set aside all the orders that related to the Guarantee and, therefore, the substratum of the Reference no longer exists.

21. Two other issues were raised by the 1st Respondent:
    i. That the Reference is time-barred and also that the Claimant has no rights under the Protocol for acts which arose prior to the coming in force of the said Protocol.
    ii. It, therefore, prays that the Reference should be dismissed with costs.

Case for 2nd and 3rd Respondents

22. The 2nd and 3rd Respondents were represented by Attorneys from the office of the 2nd Respondent and their case is as follows:
    i. Like the 1st Respondent, the 3rd Respondent, not being a Partner State nor an Institution of the Community was improperly joined to the Reference. In any event, that the Claimant had no legal interest in the subject investment and was not a Party to the arbitral and litigation proceedings leading to the Bank Guarantee and, therefore, has nothing to enforce. Accordingly, the 2nd and 3rd Respondents had not breached any duty of care and neither did they fail to protect any cross-border investments as alleged.

ii. Like the 2nd Respondent, they seek orders that the Claimant has no cause of action; that the Reference is time-barred and that the Claimant has no rights under the Protocol and that the Reference should, therefore, be dismissed with costs.

The Scheduling Conference

23. On 3rd May, 2012, a Scheduling Conference was held and the Parties agreed that the following issues need to be determined by the Court:
    a. Whether this Reference is properly before this Court as against the 1st and 3rd Respondents within the meaning of Article 30(1) of the Treaty, they being neither Partner States nor Institutions of the Community;
    b. Whether the Claimant has a cause of action;
    c. Whether this Court has jurisdiction over acts that took place before the coming into force of the Protocol;
    d. Whether the Reference is time barred in accordance with Article 30(2) of the Treaty;
    e. Whether the provisions of Article 54(2) of the Common Market Protocol extended the jurisdiction of this honourable Court for settlement of cross-border disputes;
    f. Whether the Respondents are in breach of the provisions of Articles 27 and 151 of the Treaty for the Establishment of the East African Community as read together with the provisions of Article 54 of the Protocol on the Establishment of the East African Common Market by failing to honour or act in accordance with the Bank Guarantee dated 29th October, 2003 as amended on 23rd October, 2008;
    g. Whether the Claimant is entitled to the Prayers in the Reference dated on 20th August, 2010.

Determination

24. In the determination of the issues above, we have read and have taken note of the following documents:
    a. Reference No. 06 of 2010 itself;
    b. The Responses to the Reference together with the affidavits in support of, and opposition to the Reference;
    c. The Rejoinder to the Reply to the Responses;
    d. Applicant's written submissions filed on 30th January, 2013;
    e. First Respondent's written submissions filed on 1st March, 2013;
    f. 2nd and 3rd Respondents' written submissions filed and lodged on 27th March, 2013;
    g. Applicants' rejoinders to the Respondents' written submissions.
25. We have also taken into account relevant annexures namely, the contract between Parties for erection of the "Workers House" in Kampala, Uganda, the different Rulings and Judgments of the National Courts in Uganda, the Arbitral Award and the Bank Guarantee.

Principles of Interpretation of the Treaty

26. This Court in Modern Holdings (EA) Ltd versus Kenya Ports Authority, EACJ Reference No.1 of 2008 stated inter alia that:
"The Treaty being an International Treaty among five Sovereign States, namely, Burundi, Kenya, Rwanda, Tanzania and Uganda is subject to the International Law on interpretation of Treaties, the main one being 'The Vienna Convention on the Law of Treaties."
27. The Court in stating so relied on the principle set forth in Article 31(1) of the Vienna Convention on the Law of Treaties as a general principle to interpret the EAC Treaty. Article 31(1) of the said Convention provides that:
"A Treaty shall 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 its object and purpose".
28. This principle shall guide us in the determination of the issues arising out of the Scheduling Conference and which are set out above.
Issue No.1: Whether this Reference is properly before this Court as against the 1st and 3rd Respondents within
The meaning of Article 30(1) of the Treaty, they being neither Partner States nor Institutions of the Community.
29. Article 30(1) of the Treaty reads as follows:
    i. "Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an Institution of the Community on grounds that such an Act, regulation, directive, decision or action is unlawful or an infringement of the provisions of this Treaty."
    ii. "Partner State" is defined by Article 1 of the Treaty as "The Republic of Uganda, the Republic of Kenya, the Republic of Tanzania and any other country granted membership to the Community under Article 3 of this Treaty." Burundi and Rwanda later became full members of the EAC on the 1st July, 2007.
    iii. The word "Institution" is defined in Article 9(2) as follows: "The Institutions of the Community shall be such bodies, departments and services as may be established by the Summit." Article 9(3) then designates existing Institutions as such. They include the East African Development Bank and the Lake Victoria Fisheries Organisation.
    iv. Neither the 1st nor the 3rd Respondent are a Partner State or an Institution established by the Summit and they cannot, therefore, be properly sued in that capacity before this Court because they are not bound by the Treaty or any of its Protocols.

In *Anyang' Nyong'o and others versus the Attorney General of the Republic of Kenya and others, Ref. No.1 of 2006*, this Court stated inter-alia as follows:
"A reference under Article 30 of the treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an Institution of the Community. The alleged collusion and cognizance, if any is not actionable under Article 30 of the treaty."

30. We agree wholly and we further note that in *Modern Holdings (E.A.) Limited versus Kenya Ports Authority (Supra)* the Court stated that the Kenya Ports Authority was created by the Republic of Kenya and not by the Summit and the mere fact that it rendered services to East African Partner States and its Citizens did not *ipso facto* make it an Institution of the Community.
31. Again we adopt those findings and, therefore, it is our holding that the 1st and 3rd Respondents were improperly sued in the Reference and all the complaints against them are dismissed. We shall address the issue of costs later.

Issue No.2: Whether the Claimant has a Cause of Action

32. Having struck out the 1st and 3rd Respondents from the Reference, the question that remains to be answered is the substance of issue No.2 i.e. Whether there is a cause of action against the 2nd Respondent, the only remaining Respondent in the Reference.
33. It is agreed that the 2nd Respondent can in proper circumstances be sued in the name of the Republic of Uganda which is a Partner State. It is alleged by the Claimant that the Republic of Uganda has failed to protect its cross-border investment contrary to Articles 5, 127 and 151 of the Treaty as read with Articles 29 and 54(2) of the Common Market Protocol. In his submissions, Mr. Muthomi stated that the failure is embodied, *inter-alia* in:-
    a) the wrongful termination of the building contract by the NSSF;
    b) the refusal by the NSSF to pay for work done;
    c) the continued confiscation of the Claimant's plant, machinery and tools of trade;
    d) the failure and/or refusal by the 1st and 3rd Respondents to honour the Guarantee inspite of Rulings and Judgments of the High Court and the Court of Appeal made in favour of the Claimant; and
    e) failure and/or denial of justice, as evidenced by:-
        i) the failure of the justice system of Uganda to finally resolve the dispute between the Claimant and the NSSF expeditiously (at any rate within 90 days as required under the Arbitration Law then in force). That to this end, it is agreed that the Claimant's grievance has lagged before the Ugandan justice system for more than fourteen years;
        ii) unjustifiable attempts to deprive the Claimant of the benefit of the arbitral award and decree of the High Court and;
        iii) the recording of a fraudulent consent (purportedly agreed to by the Claimant) in the Supreme Court.
34. It is obvious to us that all the above alleged failures on the part of the Republic of Uganda must be looked at in the context of the whole Reference. The substratum of the Reference is the Bank Guarantee dated 29th October 2003 as amended on 23rd October, 2008.
35. But, does the Guarantee now exist? It does not. When the Reference was filed, the Claimant was relying wholly on the decision of the Arbitrator (Justice (Rtd) Torgbor) and the Appeals in the High Court and Court of Appeal of Uganda in favour of the Claimant. By the conclusion of the hearing of the Reference, however, the Supreme Court of Uganda had rendered its final decision regarding both the Arbitral and

Court proceedings. In a nutshell, all the decisions were set aside and the initial suit filed by the Claimant *HCCS No. 1255 of 1998* was ordered to proceed to trial on the merits. We do not know whether the trial has began but what is clear to us is this; once the proceedings aforesaid were set aside, the Bank Guarantee ceased to exist and the Claimant, by relying on it is clutching onto thin air only. With respect, once there is no lawful Bank Guarantee before the Court, then the whole Reference must collapse and the Claimant's remedy lies in pursuing *HCCS No.1255 of 1998* to conclusion.

36. Of course, we are alive to the long period the matter has taken and the obvious physical and mental strain the Claimant's Directors have had to endure, but sometimes the road to justice can be long and arduous.
37. In the event and without belabouring the point, all the issues raised by the Claimant cannot be properly adjudicated by this Court because there is no live dispute before it. There is in any event no cause of action against the 2nd Respondent.

Issue No.3: Whether this Court has Jurisdiction over acts that took place before the coming into force of the Protocol

a. The fact complained of is the failure to honor the Bank Guarantee by the 1st and 3rd Respondents.
b. It is not in dispute that the alleged breach of contract by those Respondents, the Arbitral proceedings and Award, the orders of the High Court and Court of Appeal and the issuance of the Bank Guarantee occurred before 1st July, 2010; the date of the coming into force of the Common Market Protocol. It is the contention of the Claimant that the issue as to whether this Court has jurisdiction over acts that occurred before the coming into force of the said Protocol has been overtaken by events since the Appellate Division had directed, in its Ruling dated 16th March, 2012 that the First Instance Division should proceed and "determine the merits of the Reference before the Court." The other submissions of the Claimant can be summarized as follows:
    i. that the Respondents are guilty of continuing breach of their obligations under the Guarantee and, therefore, the issue of retroactivity does not arise because it is expressed that the liability of the First Respondent should be extinguished by payment to the Registrar of the High Court of the decretal amount.
    ii. The rule as to non-retroactivity of Treaties does not apply where "a different intention appears from the Treaty or is otherwise established."
    iii. Although the Common Market Protocol came into force on 1st July, 2010, Article 151(4) of the Treaty indicates that once a protocol is signed and ratified it becomes an "integral part" of the Treaty and it follows that the Common Market Protocol should be read as "an Integral part" of the Treaty

38. The response by the Respondents on this issue is that:-
    i. A Treaty cannot apply to acts that took place before it comes into force unless it is expressly stated so or an intention can be inferred from its provisions.
    ii. No provision can bind a Party in relation to any act or fact which occurred or any situation which ceased to exist before the entry into force of the Treaty according to Article 28 of the Vienna Convention on the Law of Treaties.

iii. The Principle of non-retroactivity of a treaty has been discussed by this Court in *Emmanuel Mwakisha Majawasi and 748 Others Vs. the Attorney General of the Republic of Kenya (Appeal No.4 of 2011)* and it was held that the Treaty cannot apply retroactively unless it derives explicitly from the provision of the Treaty itself or it may be implicitly deduced from the interpretation thereof.

39. Further, that a plain reading of Article 55 of the Protocol would show that the Treaty cannot apply events prior to its ratification. Indeed, Article 55 provides that the Protocol shall enter into force after the deposit of instruments of ratification with the Secretary General by all the Partner States.
40. That if it was the intention of the Partner States to make the Protocol retroactive, they should have explained it clearly and unambiguously, but nothing in it points to such an intention and, therefore, the Protocol cannot apply to the Claimant's situation regarding the enforcement of the Bank Guarantee which was issued on 29th October, 2003 and amended on 23rd October, 2008 while the Protocol came into effect on 1st July, 2010.
41. For our part, we deem it necessary for avoidance of doubt, to reproduce the contents of Article 151(4) of the Treaty and Article 55 of the Protocol.
    Article 151(4) reads as follows: "The Annexes and Protocol to this Treaty shall form an integral part of this Treaty."
42. It cannot be gainsaid, therefore, that the Common Market Protocol constitutes an integral part of the Treaty.
43. Article 55 of the Protocol states that: "The Protocol shall enter into force upon ratification and deposit of instruments of ratification with the Secretary General by all the Partner States."
44. None of the Parties to this Reference has challenged the date of the entry into force of the Common Market Protocol i.e. 1st July, 2010.
45. The bone of contention between Parties is simply whether the Protocol has retroactive application and we have said elsewhere above that we shall in interpreting the Treaty and especially Articles 151(4) and 55, rely on the principles set out in the Vienna Convention on the Law of Treaties.
46. The relevant Article of the Vienna Convention is Article 28 which addresses non-retroactivity of Treaties.
47. It reads as follows: "Unless a different intention appears from the Treaty or is otherwise established its provisions do not bind a Party in relation to any act or a fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that Party."
48. The reference to the Treaty in this case must be a reference to the Common Market Protocol and the date that it came into force.
49. Furthermore, Article 31 of the Vienna Convention creates the threshold rule of interpretation. It states that:
    "1. A Treaty shall 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 its object and purpose.
    2. The context for the purpose of the interpretation of a Treaty shall comprise in addition to the text, including its preamble and annexes:

(a) any agreement relating to the Treaty which was made between all Parties in convention with the contention of the Treaty; (b) any instrument which was made by one or more Parties in connection with the conclusion of the Treaty and accepted by the other Parties as an instrument related to the Treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the Parties regarding the interpretation of the Treaty or the application of its provisions; (b) any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation; (c) any relevant rules of international Law applicable in relation between Parties.
4. A special meaning shall be given to a term if it is established that the Parties so intended."

50. We are duly guided and after careful reading and understanding of the above provisions nothing can show that the framers of the Protocol had any intention of its retroactive application. In a similar case, the Appellate Division of this Court held that:
"……. The Court considers the situation of the ex-employees of the defunct Community to have ceased to exist at the Community level from 14 May, 1984. That date was obviously before the entry into force of the EAC Treaty --- We, therefore, agree with the Court below that the Principle of non retroactivity is relevant to the instant case." (See *Appeal No.4 of 2011 in the Reference Emmanuel Mwakisha Mjawasi and 748 Others versus the Attorney General of the Republic of Kenya.*)
51. The same holding applies to a protocol and indeed without such retroactivity, the Protocol on the Establishment of the East African Community Common Market cannot apply to the acts that took place before 1st July, 2010 and this Court cannot have jurisdiction to determine the issue as framed.
52. In Appeal No.4 of 2011 cited elsewhere above in this case, the Appellate Division resolved the issue of the nexus between non-retroactivity and the question of jurisdiction as follows:
"……. Where then, one may ask, did the Court derive its jurisdiction, since the Treaty which normally confers the jurisdiction on the Court did not apply? Non retroactivity is a strong objection. When it is upheld, it disposes off the case there and then. As non retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the Court? non-retroactivity of jurisdiction."
53. That Court even went further in *Appeal No.3 of 2011 Attorney General of the United Republic of Tanzania vs. African Network for Animal Welfare* when on the question of jurisdiction, it stated that:
"Jurisdiction is a most, if not the most fundamental issue that a Court faces in any trial (sic). It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a Court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case."
54. We are wholly guided by the above finding. Moreover, we share the view that:
"A Court cannot give itself jurisdiction in a case otherwise outside its jurisdiction on the ground that it would be for the convenience of Parties and witnesses. The

Plaintiff must state the facts on which the Court is asked to assume jurisdiction". *See Civil Procedure & Practice in Uganda by M. Ssekaana & S.N. Ssekaana at P.7.*

55. In any functioning legal system, Judges are crucially bound by the Law and Rules that they are called upon to apply. Consequently, the more they distance themselves from the Law as set down by those charged with legislative authority and the more they come up with circumstantial solutions that attract their own tastes and preferences, the more they jeopardize the authority of their judgments which is akin to judicial tragedy.
56. With the greatest respect to the Claimant, once we have addressed issues Nos. 1, 2 and 3 in favour of the Respondents, the Reference must collapse and any determination of issues Nos. 4, 5, 6 and 7 becomes wholly academic. We decline to take that path.
57. In conclusion, we find no merit in the Reference before us and the same is hereby dismissed.
58. As to costs, the Claimant has been seeking justice for long and is yet to finalise *HCCS 1255 of 1998* in Uganda which was the original case in this dispute. We deem it inappropriate to penalize it with costs and so, each Party shall bear its own costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 6 of 2010

Alcon International Ltd And Standard Chartered Bank of Uganda, Attorney General on behalf of the Republic of Uganda , Registrar of the High Court of Uganda

Hon. Mr. Justice Johnston Busingye, PJ, Hon. Mr. Justice John Mkwawa, J, Hon. Mr. Justice Benjamin Patrick Kubo, J
August 24, 2011

Forum shopping- Parallel proceedings in two different courts- Whether the Claimant had rights under the Common Market Protocol prior to its entry into force – Whether the Reference was time-barred.

Article 27 (2), 30, 54 (2) (b) of the EAC Treaty- Articles 29 (2) and 54 (2) (b) Protocol on the Establishment of the East African Community, Common Market.

By a contract dated 21st July 1994 and a co-finance agreement, the Claimant agreed to construct the building now known as the Workers House in Kampala, Uganda on behalf of National Social Security Fund (NSSF) Uganda. NSSF terminated the aforementioned contract and the dispute was referred to arbitration. An arbitral award was granted to the Claimant but NSSF challenged the award in the Court of Appeal of Uganda and ultimately to the Supreme Court of Uganda which case was still ongoing at the time of filing the Reference.

The Claimant claimed inter alia that the EACJ is a Competent Judicial Authority with regard to the enforcement of and enhancement of trade and resolution and settlement of disputes for the protection of cross – border investments. They sought an interpretation and application of Articles 27(2) and 151 of the Treaty together with Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market on the enhanced jurisdiction of.

Held:

1. The Reference against the 1st, 2nd and 3rd Respondents was improperly before the Court.
2. That it would be absurd to have parallel proceedings in two different courts, namely, one before this Court and another in the courts in Uganda as a clash of decisions would cause confusion between this Court and the courts in Uganda and result in an execution stalemate. It was improper for the Claimant to have abandoned litigating before the courts in Uganda and instead sought sanctuary in this Court. The Reference was therefore struck out.

Editorial Note – In Appeal No. 2 of 2011, the Appellate Division observed that the Trial Court contravened the rules by not considering all the issues for determination. The ruling was therefore set aside and the Reference re-instated.

Ruling

1. The Claimant named above has brought a Reference to this Court against the Respondents, also named above, under Articles 27 (2) and 151 of the Treaty for the Establishment of the East African Community (the Treaty) and also under Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market (the Protocol), praying for orders:
2. That this Honourable Court be pleased to interpret and apply Articles 27(2) and 151 of the Treaty for the Establishment of the East African Community together with Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market on the enhanced Jurisdiction of this Honourable Court as a Competent Judicial Authority with regard to the enforcement of and enhancement of trade and resolution and settlement of disputes for the protection of cross – border investments. (sic)
3. That this Honourable Court be pleased to declare that the signing of the Protocol on the Establishment of the East African Community Common Market and the coming into force of the said Protocol on 1st July 2010 enhanced the Jurisdiction of this Honourable Court as envisaged under Article 27 (2) of the Treaty as a competent judicial authority for the determination of cross – border trade disputes between persons emanating from partner states.
4. That this Honourable Court be pleased to declare that where a Public Official of a partner state fails to honour his obligation/duty, statutory or legal, to a person from a different partner state, then under the Spirit and letter of the Treaty and the Protocol, this Court has the jurisdiction to enforce that obligation or duty expeditiously.
5. That this Honourable Court be pleased to direct the Respondents jointly and/or severally to pay to the Claimant the Decretal sum of USD 8,858,469.97 together with interest and costs in full under the Bank Guarantee dated 29th October 2003.
6. That this Honourable Court direct the Respondents jointly and or severally to pay to the Claimant General Damages assessed by this Court.
7. That this Honourable Court direct the Respondents jointly and or severally to pay interest on the sums of money due on such rates and from such dates as this Honourable Court should direct.
8. That this Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.
9. That the costs of this Reference be borne by the Respondents in any event.
10. The background to the instant Reference may, in the interest of brevity, be stated as follows:-
11. In 1994 and by a contract dated 21st July 1994 together with a co-finance agreement, Alcon International Limited agreed to construct the building now known as the Workers House in Kampala, Uganda on behalf of National Social Security Fund (NSSF) Uganda. It is common ground that NSSF did terminate the aforementioned contract and that the dispute was referred to arbitration. It is further common ground that Alcon International Limited obtained an arbitral award for the sum of USD 8,858,469.97 together with interest and costs. NSSF challenged the award in the Commercial Division of the High Court of Uganda. The latter affirmed the award. Things did not stop there, as subsequently the matter landed in the Court of

Appeal of Uganda and at present the matter is before the Supreme Court of Uganda Vide Civil Appeal No. 15 of 2009 where NSSF is seeking that the arbitral award be set aside. One issue which sprang up midway and seemed to overwhelm the rest of the issues in the case is: which Alcon International Limited is the proper beneficiary of the USD 8,858,469.97 award. It continues to bedevil the case to this day.

12. It behoves us to mention right at the outset that the pleadings and submissions that have been filed by the parties now before us amply establish that the Claimants Reference in this Court is a product of a protracted litigation both outside and inside the courts in Uganda
13. At the Scheduling Conference held on 25th February 2011 the first Respondent raised a couple of preliminary points of law and prayed that the Court disposes of them before proceeding to hear the main Reference.
14. The points raised were:
    i. Whether the Reference is properly before the Court as against the 1st and 3rd Respondents.
    ii. Whether the Reference is time-barred.
    iii. Whether the Claimant has rights under the Protocol on the Establishment of the East African Community Common Market in respect of acts which arose prior to the coming in force of the Protocol.
15. The law on preliminary objection is well settled and we need not belabour the same. Suffice it to say that the Court decided to dispose of the Preliminary Objections first.
16. Canvassing the grounds of the preliminary objections, Mr. Tumusingize, learned counsel for the First Respondent, raised a number of points in *limine*. In a nutshell, he submitted as follows:-
17. Firstly, that under Article 30 of the Treaty References must be brought only as against a Partner State or an Institution of the East African Community. In support of his stance he referred us to the decisions of this Court in *Reference No. 1 of 2006 Prof. Peter Anyang' Nyongo and 10 Others versus The Attorney General of the Republic of Kenya and 5 Others* and *Reference No. 1 of 2008 Modern Holdings (E.A) Limited versus Kenya Ports Authority*.
18. It was his argument that as the First Respondent is neither a Partner State nor an Institution of the Community, but is merely a private limited liability company incorporated and registered in Uganda, it can not be joined/impleaded to a Reference under the aforesaid Article 30 of the Treaty. He thus urged this Court to find and hold that the Reference against the First Respondent is misconceived and bad in law.
19. Secondly, the learned counsel argued that the settlement of disputes under the Protocol is by competent institutions in the Partner States. It was his submission that the East African Court of Justice does not fall under the purview of the bodies envisaged in Article 54 (2) (b) of the Protocol.
20. Thirdly, the learned counsel contended that to-date there has been no protocol to operationalise the extended jurisdiction of the East African Court of Justice to go to provide for original, appellate, human rights and other jurisdictions pursuant to Article 27 (2) of the Treaty. He further argued that even if this jurisdiction had been extended, the Reference would still be bad as against a party that is neither a Partner State nor an institution of the Community.

21. Fourthly, he submitted to the effect that, to-date, there are on-going proceedings relating to the complaint in the Reference in the Supreme Court of the Republic of Uganda between Alcon International Limited and the National Social Security Fund of Uganda (Supreme Court Civil Appeal No. 15 of 2009).
22. It was also his argument that the absurdity of having proceedings in two different courts at the same time should be clear to anyone. The learned counsel wondered what would happen to these proceedings and what would be the fate of this Reference in the event that this Court and the Supreme Court of Uganda make conflicting decisions.
23. In conclusion he argued that as the local remedies for settlement of this dispute have not been exhausted, this Reference is wrongly before this Court. He thus urged us to find and hold that the Reference is wrongly before this Court as against the First Respondent and consequently uphold the objection raised and condemn the Claimant to costs.
24. Ms. Patricia Mutesi, Principal State Attorney representing the Second and Third Respondents fully associates herself with the arguments advanced by the learned counsel for the First Respondent.
25. She urged the Court, not unlike Mr. Tumusingize for the First Respondent, to find and hold that the claim is improperly before this Court as against 2nd and 3rd Respondents and should be answered in the negative.
26. Mr. Fred Athuak, Learned Counsel for the Claimant, submitted in response to the three (3) Respondents' Submissions. In essence, he submitted as follows:-
27. Firstly, that it is important to note at the outset that from the manner in which the preliminary issues are framed by the parties, that this Reference is properly before this Court as against the Second Respondent, namely the Attorney General of the Republic of Uganda.
28. 28. Secondly, the learned counsel, if we may put it in a narrow compass, categorically contended that the Claimant is neither a Party to the proceedings before the Supreme Court in Uganda in Civil Appeal No. 15 of 2009 nor did he agree to the purported consent in that Appeal.
29. Thirdly, it was also submitted on behalf of the Claimant that by promulgation of the Protocol the jurisdiction of this Court was greatly enhanced as envisaged by Article 27 (2) of the Treaty and that Article 54 of the Protocol read together with Article 27 (2) of the Treaty gave new meaning to original jurisdiction of this Court. The learned counsel did conclude by saying that consequent to the foregoing the most celebrated case of *Anyang' Nyongo (supra)* was overtaken by events especially with regard to Article 30 of the Treaty.
30. We have carefully considered the rival submissions of the learned counsel in support of their respective stances.
31. First and foremost, we find it necessary to associate ourselves with the submission of the learned counsel for the First Respondent that there is overwhelming evidence from the material now before us that there have been and still are several cases in the Courts of Uganda in which the instant Claimant is directly interested.
32. It is also evident from the material submitted to us for consideration and determination for example that the Claimant was the respondent in the Court of

Appeal in Uganda Civil Appeal No. 2 of 2004, namely, National Social Security Fund and W. H. Sentoogo t/a Sentoogo and Partners versus Alcon International Limited. It is also on record that National Social Security Fund being aggrieved by that decision appealed to the Supreme Court of Uganda in Civil Appeal No. 15 of 2009.

33. It is on the basis of the foregoing that we are unable to agree that the Claimant, namely, Alcon International Limited is not a party to the proceedings in Uganda's courts, while at the same time seeking to enforce a decision from the same courts in the Reference before us. This is amply evident in prayer No. 4 at page 10 of the Reference filed by Alcon International Limited which reads:

"That this Honourable Court be pleased to direct the Respondents jointly and/or severally to pay Decretal sum of USD 8,858,469.97 together with interest and costs in full under the Bank Guarantee dated 29th October 2003."

34. In spite of the passion with which the Claimant laboured to convince us otherwise, we find ourselves in a position of absolute inability to resist the Respondents' submission that currently there are judicial proceedings going on in courts in Uganda of which the Claimant is aware and that at the moment they are at an advanced stage of litigation; and that it would be absurd to have parallel proceedings in two different courts, namely, one before us and another in the courts in Uganda. Indeed, a clash of decisions would not only cause confusion between this Court and the courts in Uganda, it would also result in an execution stalemate. We find it improper for the Claimant to have abandoned litigating before the courts in Uganda and instead sought sanctuary in this Court.
35. In our considered view, this amounts to forum shopping and we take this early opportunity to say loudly and clearly that this Court finds it unprofessional and strongly disapproves of it.
36. In the result and for the foregoing reasons, we find and hold that the Reference is improperly before this Court as against the 1st, 2nd and 3rd Respondents. Consequently, Issue No. 1 is answered in the negative.
37. In view of the position we have taken in disposing of this ground, we do not find it necessary to go into the other grounds raised by the parties or tackle the remaining objections, as this finding alone sufficiently and conclusively dispose of this Reference.
38. Consequently, the Reference is struck out with costs.

It is so ordered.

Before we pen off, we wish to express our appreciation to the learned counsel for the parties for their industry, good research and insightful presentations which were of immense assistance to us.

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East African Court of Justice – First Instance Division
Reference No.7 of 2010

Mary Ariviza and Okotch Mondoh And The Attorney General of the Republic of Kenya and the Secretary General of the East African Community

Johnston Busingye, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, Jean-Bosco Butasi & Benjamin Patrick Kubo, JJ
November 30, 2011

Due process – No competence in constitutional referendum dispute resolution- Whether the Gazette Notice on promulgation of the new Constitution of Kenya breached the rule of law- Interim Independent Constitutional Dispute Resolution Court which violated the provisions of peaceful resolutions of disputes.

Articles: 5(1), 6(c), (d), 7(2), 27(1), 29 and 30 of the Treaty for the Establishment of the East African Community,
Section 60A of the Constitution of Kenya (Amendment) Act, No. 10 of 2008

In 2010, Kenya was in the process of reviewing its Constitution in a process that would culminate in a Referendum. Under Section 60A of The Constitution of Kenya (Amendment) Act, No. 10 of 2008, any disputes arising out of the review process would be handled by an Interim Independent Constitutional Dispute Resolution Court (IICDRC). While the IICDRC enjoyed the status of the High Court of Kenya, it was not a division of the High Court of Kenya but had exclusive original jurisdiction to hear and determine matters arising fromthe constitutional review process. Act no 10 of 2008 was silent on appeals. On 4th August, 2010 a Referendum was conducted by the Interim Independent Electoral Commission and on 6th August, 2010 the results were published in a gazette notice.

Subsequently, the 1st Respondent set into motion an automatic promulgation of the New Constitution announcing that the promulgation would take place on 27th August, 2010.

On 19th August, 2010, the Claimants lodged Petition No.7 of 2010 with the IICDRC. They also sought an interim relief vide Application No.3 of 2010 and suspension of the gazette notice asserting that it had been published contrary to the law. The IICDRC disposed of petition No 7 of 2010 at *inter-locutory* stage during the hearing of Application No.3 of 2010 on 24th August, 2010.

Meanwhile on 23rd August, 2010 a Certificate giving final results of the Referendum was gazetted by the Interim Independent Electoral Commission. This happened before the Claimants' Petition No. 7 of 2010 had been heard and determined.

The Applicants then brought this reference as registered voters in the Republic of Kenya

alleging that the 1st Respondent had contravened the Referendum law in Kenya thus violating the rule of law and the EAC Treaty and that the 2nd Respondent took no action given with regard to the Treaty violations. They sought orders *inter alia* that: the promulgation of Kenya's New Constitution on 27th August, 2010 contravened the Treaty, and in particular Articles 6(c) & (d) and 7(2), and was therefore illegal, null and void; and that the Parliament of the Republic of Kenya should be restrained from passing legislation to implement the replacing Constitution until the hearing and determination of the Reference.

Held:

1. The Claimants case did not meet the required standard to establish that due process was not followed.
2. The fact that there was a decision on Petition No. 7 of 2010 was sufficient evidence that the Petition was heard and determined by the Interim Independent Constitutional Dispute Resolution Court. The decision of the Interim Independent Constitutional Dispute Resolution Court (IICDRC) complained of did not fall within the ambit of Article 30(1).
3. The conduct and result of the Referendum was subjected to the judicial process in Kenya, notably vide IICDRC Constitutional Petition No.7 of 2010. In its Ruling of 26th August 2010, the IICDRC categorically stated that it was well within the Attorney General's and IIEC's mandate to publish the final results. The Reference was asking the Court to inquire into and review the decision of the IICDRC not to hear the Petition 7 of 2010 on its merits. This was not part of the Court's competence as by doing so, the Court would in effect be sitting on appeal over the Interim Independent Constitutional Dispute Resolution Court's decision. Thus, the Reference was dismissed.

Case cited: Kiska Ltd vs De Angelis (1969) EA.6.

Judgment

Background

1. The Claimants averred that they were adult Kenyans duly registered as voters in Westlands Constituency in Nairobi and Nangoma Location of Busia District in Kenya, respectively. Ariviza added that she was an accredited polling agent for the Church Red Card National Referendum Committee while Mondoh added that he was an accredited observer, through the facilitation of the National Council of Churches of Kenya (NCCK), in the Referendum carried out in Kenya on 4th August, 2010.
2. There was a review of the old Constitution of Kenya initiated by Section 47A of the same Constitution with the aim of replacing the said Constitution. Detailed arrangements for the review were set out in the Constitution of Kenya Review Act, No. 9 of 2008 ("the Review Act") and rules made thereunder. The review process was to culminate in a Referendum whereat the people of Kenya were to vote for or against the proposed new Constitution (replacing Constitution). In apparent

anticipation that disputes would arise out of the review process, specific provision was introduced into the old Constitution vide Section 60A of The Constitution of Kenya (Amendment) Act, No. 10 of 2008 which established an Interim Independent Constitutional Dispute Resolution Court (IICDRC).

3. The IICDRC, while it enjoyed the status of the High Court of Kenya, was not a division of the High Court of Kenya and had exclusive original jurisdiction "to hear and determine all and only matters arising from the constitutional review process."
4. Act No. 10 of 2008 which came into force on 29th December, 2008 and established the IICDRC was silent on any appeal.
5. The Claimants took issue with various aspects of the conduct of the entire constitutional review process, including the Referendum and the manner in which the replacing Constitution was promulgated. In the premise they, either singly or jointly, instituted three sets of proceedings as under:-
   a) On 18th August, 2010 Ariviza filed High Court (Nairobi) *Miscellaneous Civil Application No.273 of 2010* against the Interim Independent Electoral Commission of Kenya & Attorney-General of Kenya, being judicial review proceedings for orders of certiorari and prohibition against Gazette Notice No.9360 which had on 6th August, 2010 published the result of the Referendum held on 4th August, 2010. The applicant prayed for leave to get an order of certiorari to move to the High Court for purposes of quashing the aforesaid gazette notice of the certificate of results of the Referendum and/or publication of the text of the new Constitution in the Kenya Gazette. Ariviza also prayed that she be granted an order of prohibition to prohibit the promulgation of the Proposed Constitution of Kenya by operation of law and/or publication of the text of the new Constitution in the Kenya Gazette. She likewise prayed for an order that the leave granted do operate as a stay of the promulgation of the Constitution of Kenya.

      The High Court found that Ariviza's complaint related to the management of the Referendum process after voting, that the complaint fell within the conduct of the Referendum and that it could be brought by way of petition before the IICDRC in accordance with the Review Act.

      In this regard, the High Court noted on 24th August, 2010 that Ariviza had already filed an application before the IICDRC which was pending there. The High Court concluded that in view of Sections 60 and 60A of the old Constitution, it had no jurisdiction to deal with the Application and, accordingly, struck it out.
   b) On 19th August, 2010 Ariviza and Mondoh filed in the IICDRC Constitutional Petition No.7 of 2010 ("the Petition") against the Interim Independent Electoral Commission, George Chege, Hellen Mutua & the Hon. Attorney General of Kenya seeking the following reliefs:-
      i. A scrutiny and recount of all the ballot papers and counter foils, registers and tally sheets for all votes cast on the polling day of 4th August, 2010.
      ii. An independent audit of software used in transmitting results of and tallying the votes from the Referendum of 4th August, 2010.
      iii. The Referendum Result declared by the 1st Respondent be declared null and void.

iv. The Respondent (sic) bears the costs of the Petition and matters incidental thereto.
v. Such further orders as the Court may deem fit and just to grant.

6. The Petition was based on the following grounds:
   i. Flouting of the law on campaigning.
   ii. Irregularities on the polling day.
   iii. Tallying of votes in a manner that gave an inaccurate result.
   iv. Failure to follow the law in regard to the publication of the gazette notice on the Referendum result.
7. Numerous incidents were cited to demonstrate alleged irregularities in the Referendum process. They included:
   i. Refusing the "NO" agents to accompany the ballot boxes to the Constituency Tallying Centres and up to the National Tallying Centre at Bomas of Kenya; and refusing the "NO" Chief Agent access to the Tallying Centre at Bomas of Kenya.
   ii. The television monitor showing streaming of the Referendum results being switched off at about 8.25 p.m. on 4th August, 2010 at the National Tallying Centre when the "NO" result was way ahead (about 14,000 votes) of the "YES" (about 9,000 votes).
   iii. On 4th August, 2010 at about 8.35 p.m. the streaming of the results resuming but now the "YES" leading by about 19,000 votes and the "NO" having gone down to about 8,000 votes.
8. On 24th August, 2010 Ariviza and Mondoh filed Application No. 3 of 2010 in the IICDRC (arising from Petition No.7 of 2010) seeking, *inter alia*, the following reliefs:
   i. That the Honourable Court do dispense with written request for interim relief.
   ii. That the Honourable Court do suspend the whole of the Gazette Notice purportedly giving the final result of the Referendum as it was the subject before that Court.
   iii. That the Honourable Court do suspend the Promulgation of the Constitution until the hearing and determination of Petition No.7 of 2010.
9. The Application was heard by the IICDRC which decided by a majority of three Judges that even if they granted the interim orders sought, such orders would be in vain for being based on a Petition they considered as inchoate (not fully developed), because the requisite Ksh.2 million security for costs had not been deposited and in the Judge's opinion it was too late to deposit it within the prescribed time. The court dismissed the Application. The other two Judges' dissenting opinion was that there was a valid Petition.
10. However, all the five Judges seemed to be on common ground that their Court had been presented with a fait accompli by the act of the Interim Independent Electoral Commission (IIEC) publishing on 23rd August, 2010 a notice in the Gazette confirming the Referendum result as final.
11. From the pleadings on record, the reason given by the IIEC for publishing the notice of final Referendum result was that the Attorney General and the IIEC had not been served with the Petition by that date and that there was no impediment for the IIEC to publish a certificate of the Referendum result as final.

On 13th September, 2010 Ariviza and Mondoh filed the present Reference No.7 of 2010 before this Court (EACJ).

Representation of the Parties

12. The Claimants were represented by Mrs J.W. Madahana and Mr Luka Sawe. The 1st Respondent was represented by Ms Wanjiku A. Mbiyu and Mr Kepha Onyiso.
13. The lead Counsel for the 2nd Respondent was Mr Wilbert Kaahwa but sometimes Mr Anthony Kafumbe or Mr Mathews Nderi Nduma stood in for him.

Revisiting the issue of jurisdiction

14. The complaints in this Reference revolve around alleged contravention by the 1st Respondent of the Referendum law in Kenya amounting to violation of the rule of law, thereby violating The Treaty for the Establishment of the East African Community ("the Treaty") to which Kenya is a party. The 2nd Respondent is accused of inaction in the face of the aforesaid Treaty violation.
15. Concurrently with the filing of the Reference, the Claimants also filed EACJ Application No. 3 of 2010 for a temporary injunction praying for the following substantive Orders:
    a) That the 1st Respondent be restrained and prohibited from receiving, tabling and/or passing any legislation to implement the new Constitution of Kenya until the hearing and determination of the Reference.
    b) That any new legislation passed by the Parliament of Kenya to implement the new Constitution be stayed until the hearing and determination of the Reference.
    c) That the 2nd Respondent does commence an investigation, as provided by Article 29 of the Treaty, into the violation of the law and the Treaty by the 1st Respondent.
16. At the commencement of the hearing of the Application, Counsel for the 1st Respondent raised a six-point preliminary objection revolving on the issue of jurisdiction as in the 1st Respondent's view the Court had no jurisdiction to entertain even the Reference from which the Application arose. In our Ruling of 1st December, 2010 we held that the points raised in the preliminary objection could not be disposed of without ascertaining facts which were in dispute. We deferred our Ruling on the preliminary objection until after hearing all arguments from both sides. Subsequently we heard full arguments from both parties on the preliminary objection. Counsel for the 2nd Respondent supported the preliminary objection.
17. In our Ruling of 28th December, 2010 we agreed with the Applicants that this Court had jurisdiction to hear their Application No. 3 of 2010. We overruled the preliminary objection and proceeded to hear the Application.
18. After hearing the Application, we delivered our Ruling on 23rd February, 2011 in which we found from the totality of the facts disclosed by the affidavits and submissions of the parties that there were bona fide serious issues warranting to be investigated by this Court. We, however, restrained ourselves from making any determination on the merits of the Application and defence to it, pending substantive consideration of the facts and applicable law after full hearing of the Reference itself. We declined to issue the injunctive or conservatory orders sought and dismissed the Application.

Grounds for and Prayers in the present Reference

19. As already recorded, on 13th September, 2010, the Claimants filed the present Reference which they amended on 13th December, 2010 pursuant to Rule 48(a) of the East African Court of Justice Rules of Procedure; the East African Community Treaty (1999) Articles 5(1), 6(c) &(d), 7(2)(c) [sic], 27(1), 29 & 30; the African Charter on Human and People's Rights Articles 1, 3, 7(1) & 9(2). The Reference was based on the following summarized grounds:

That the 1st Respondent, under Section 47A (of the replaced Constitution), received a draft Constitution and his mandate was only to make editorial changes. Instead he made changes (some substantial) to the draft and on 6th August, 2010 he purported to publish, under Section 34 of the Review Act, a draft Constitution with a confusingly different and misleading title.

That the Applicants (Ariviza & Mondoh) contend that the publication of a document with a materially different title with which the electorate was faced was stage-managed by the 1st Respondent to cause confusion amongst the voters most of whom could not ordinarily be expected to know the difference, import and legal implications of the title.

a) That on 4th August, 2010 a highly flawed Referendum was conducted by the Interim Electoral Commission (sic) and the result was published on 6th August, 2010 in a gazette notice and which certificate of result was in the view of the Claimants contrary to law, null and void *ab initio*.
b) That on the basis of the said gazette notice the 1st Respondent set in motion an automatic promulgation of the New Constitution, a document which was not in the public domain, within fourteen days of the said publication under the Review Act. This was borne out by the announcing to the public that the promulgation of the Constitution would be on 27th August, 2010.
c) That on18th August, 2010 the Claimants unsuccessfully moved the High Court of Kenya (vide Miscellaneous Civil Application No.273 of 2010) for Judicial Review Orders as the issue was of great fundamental importance, for promulgation of the Constitution would under Article 264 (of the replacing Constitution) repeal the (old) Constitution resulting in the loss of the Claimants' ascertained rights and freedoms.
d) However, on 24th August, 2010 the High Court declined to deal with the matter citing ousting of its jurisdiction by Sections 60 – 60A of the replaced Constitution.
e) That being dissatisfied by the conduct and result of the Referendum, Ariviza and Mondoh on 19th August, 2010 lodged in the IICDRC Constitutional Petition No.7 of 2010 within the period stipulated by the Review Act, No.9 of 2008 as amended by the Statute Law (Miscellaneous Amendment) Act, No.6 of 2009.
f) That on 23rd August, 2010 the IIEC gazetted a notice of certificate final Referendum result in spite of the pending IICDRC Constitutional Petition No.7 of 2010 before that Court.
g) That on 24th August, 2010 Ariviza and Mondoh lodged IICDRC Application No.3 of 2010 seeking suspension of the above gazette notice they asserted to have been published contrary to the law.
h) That the Review Act provided for the Petitioner to serve upon the Attorney

General (1st Respondent) a notice of the filing of a Petition challenging the Referendum within seven days after such filing, whereupon the Attorney General should within seven days of service of the said notice publish a notice of the filing of the Petition in the Kenya Gazette; but in express contravention of the law, the Attorney General failed to gazette the said Petition.

i) That under Section 47(1) of the Review Act no hearing of the aforesaid Petition could commence until seven days after publication of the requisite notice. The Claimants contend that non-publication of the notice effectively denied them their fundamental right to be heard in their cause, thus contravening their basic human rights.

j) That meantime the 1st Respondent in violation of the rule of law is moving Bills in the National Assembly that would give effect to the replacing Constitution whose legitimacy is in grave doubt and which is being operationalised in defiance of the rule of law and democratic principles.

k) That the Claimants contend that the 1st Respondent set up a Court (IICDRC) whose independence was not guaranteed and which though admitting jurisdiction reiterated its lack of powers to stop illegalities being

l) committed to ensure promulgation of the Constitution takes place despite the flouting of the law.

m) That the Claimants are aghast at the inaction by the 2nd Respondent who is mandated by the Treaty to investigate violations of the Treaty and which the Claimants contend has been done by the 1st Respondent who has flouted the rule of law, democratic principles and fundamental rights to be heard by an independent and fair court.

n) That this Honourable Court has jurisdiction to interpret and determine this very important issue that touches on the future of the Kenyan nation.

The Claimants prayed for the following orders:

a) A declaration that the publication of Gazette Notice No.10019 on 23rd August, 2010 by the 1st Respondent through the Interim Electoral Commission (sic) was illegal, null and void ab initio for being a violation of the fundamental operational principles of the Community and in particular Articles 6 (c) & (d), 7(2) and 8(1) (c) of the Treaty.

b) A declaration that the Interim Independent Constitutional Dispute Resolution Court is not an Independent or Impartial Court within the meaning of law capable of discharging the obligation by the Republic of Kenya under Articles 6(c) & (d) and 7(2) of the Treaty.

c) A declaration that the Applicants are entitled to be heard on their cause and to be heard by an Independent and Impartial Court of Justice and the refusal of the 1st Respondent to provide for this is in itself an infringement of fundamental principles of social justice and peaceful settlement of disputes.

d) A declaration that Section 47A, amendment to Section 60 and Section 60A of the replaced Constitution are an aberration and fundamental departure from the doctrine of separation of powers which is the cornerstone of democracy and the

rule of law constituting a violation of Article 7(2) of the Treaty.

e) An order that the 1st Respondent acting through the Parliament of the Republic of Kenya be restrained and or prohibited from tabling and or making and or passing legislation to implement the replacing Constitution until the hearing and determination of this case.

f) Any implementation and or operationalisation of any legislation made and or passed by the Parliament of Kenya to implement the New Constitution be stayed until the hearing and determination of this case.

g) A declaration that the promulgation of the New Constitution on 27th August, 2010 was in contravention of and a violation of the Treaty, and in particular Articles 6(c) & (d) and 7(2), and was therefore illegal, null and void.

h) A declaration that there is no document in the public domain purportedly published by the 1st Respondent that fulfils the requirements of a replacement of the Constitution of Kenya and is in itself a violation of Article 7(2) of the Treaty.

i) A declaration that the Proposed New Constitution is not the same as the Proposed Constitution of Kenya and is in itself a violation of Article 7(2) of the Treaty.

j) A declaration that the law as currently formulated on the Review of the Constitution is fatally flawed and is not a valid and or legal basis for replacement of the current Constitution being an infringement of Articles 6(c), (d) & (2) and 8(c)[sic] of the Treaty.

k) A declaration that the inaction by the 5th Respondent [sic] has aided and abetted the violation of the Treaty in particular Articles 8(c) [sic] and 29.

l) A declaration that the Respondents have abused office and power by subverting the rule of law and administration of justice violating the obligations under Articles 8(c) [sic] and 29 of the Treaty.

m) Costs of this Reference.

Respondents' Response

20. The Respondents denied the claims made by the Claimants and opposed the issuance of any of the orders prayed for. The position of the 1st Respondent herein was that due process was followed at all stages of the Constitutional Review Process; that gazettement of the certificate of the final Referendum result and subsequent promulgation of the Constitution were validly done; and that the dismissal of IICDR Application No.3 of 2010 was in accordance with the law. For his part, the 2nd Respondent denied failing to discharge his duties under Article 29 of the Treaty and contended that, to the best of his knowledge, the Constitution-making process in Kenya was smoothly conducted, supported by millions of Kenyans and that he had no notice of any occurrence that would have necessitated his investigation.
21. Both Respondents contended that there was no wrongdoing on their part and that the Reference should be dismissed with costs.

Agreed Issues

22. The issues for determination by this Court were agreed and framed by the Parties during the Scheduling Conference held on 30th January, 2011 as follows:-

    Issue No.1: Whether due process was followed in the presentation of the draft

Constitution to the Referendum and if not, did this amount to a violation of the Rule of Law in Kenya and, by extension, a violation of the East African Community Treaty?

Issue No.2: Whether there was failure of resolution of Petition No.7 of 2010 by the Interim Independent Constitutional Dispute Resolution Court which violated the provisions of peaceful resolutions of disputes.

Issue No.3: Whether or not the publication of Gazette Notice No.10019 on 23rd August, 2010 and the subsequent promulgation of the new Constitution of Kenya on 27th August, 2010 was a breach of the Rule of Law and, therefore, a violation of the Treaty.

Issue No.4: Whether or not the Parties are entitled to the remedies sought.

Consideration of the Issues:

23. We now proceed to consider the Reference under the four Issues. In so doing, we take due account of the authorities and legal literature cited by Counsel in support of their rival claims.
24. At the outset it is pertinent to mention that the issues as agreed revolve around one major theme, namely, the appropriateness of IICDRC's decision in Petition No.7 of 2010. But at the risk of repeating ourselves we have decided to consider them separately in order to be as comprehensive as this case demands.

    Issue No.1: Whether due process was followed in the presentation of the draft Constitution to the Referendum and if not, did this amount to a violation of the rule of law in Kenya and, by extension, a violation of the East African Community Treaty?
25. This issue has two limbs:
    i. Whether due process was followed in the presentation of the draft Constitution to the Referendum.
    ii. If not, did that amount to a violation of the Rule of Law in Kenya and, by extension, a violation of the East African Community Treaty?
26. As to the first limb, the Claimants contended that due process was not followed. Counsel for the Claimants described due process as a legal principle that the Government must respect legal rights that are owed to a person according to the law; that in this case due process demanded that at least the petition before the IICDRC should have been heard and disposed of on merit before promulgation of the New Constitution could proceed and that because this was not done, the rule of law, which implies due process, was violated.
27. The thrust of the Claimants' case on the first limb is:-
    a) That whereas the 1st Respondents' mandate was only to make editorial changes to the draft Constitution received from the National Assembly, he in fact purported to publish on 6th May, 2010 a document entitled "The Proposed Constitution of Kenya" to which he had made changes some of which were substantive.
    b) That whereas the Referendum question was "Do you approve the proposed New Constitution?" not enough copies of "The Proposed New Constitution" were circulated to the voters numbering 12,656,451, it being admitted by the 1st Respondent that only 5 million copies were printed, thereby leaving out 7

million persons.

c) That the publication of a document with a materially different title with which the electorate was faced was stage-managed by the Respondent (sic) to cause confusion amongst the voters most of whom could not ordinarily be expected to know the difference, import and legal implications of the title.

d) That there were serious flaws in the proposed Constitution of Kenya which other persons had attempted to bring to the attention of the IICDRC but which the IICDRC declined to deal with, citing lack of jurisdiction despite the wide jurisdiction conferred upon it by Section 60A of the replaced Constitution.

e) That on 4th August, 2010 a highly flawed Referendum was conducted by the Interim Independent Electoral Commission and the results were published on 6th August, 2010, in a Gazette Notice and which Certificate of Results was in the Claimants' view contrary to law, null and void.

The gist of the 1st Respondent's case is:

a) That due process was followed in the presentation of the Draft Constitution to the Referendum as per the procedure prescribed by the Review Act.

b) That whereas the Claimants complained that the 1st Respondent, who was not authorized to effect any alteration to the draft Constitution from the National Assembly except for editorial purposes, made substantial changes to the draft Constitution, the Claimants did not specify the alleged changes.

c) That while conceding that only five million copies of "The Proposed New Constitution" were printed and distributed, the 1st Respondent averred that further generic copies of the said Constitution were reproduced and distributed to voters; and that local dailies with nationwide circulation also reproduced the Constitution word-for-word in their editions.

d)

i. That whereas in the replaced Constitution reference was made to "draft Constitution", voters were clear in their minds that the draft Constitution they were voting for was the one which had been approved by Parliament and published by the 1st Respondent.

ii. That whereas the Claimants alleged there were flaws in "The Proposed Constitution of Kenya" and in the Referendum, they did not specify any of them.

28. On his part, the 2nd Respondent's case is:

a) That there was no iota of evidence that due process was not followed in the presentation of the Proposed Constitution of Kenya and the conduct of the Referendum.

b) That the Claimants had the opportunity to vote for or against the Proposed Constitution of Kenya; that Kenyans overwhelmingly endorsed the said Constitution; and that the Claimants cannot be heard to fault the process.

c) That this Court should take judicial notice of the unanimous acclamation and affirmation by the international observers including the 2nd Respondent and the East African Legislative Assembly and the world at large that the process was free and fair and a major step towards restoration of the rule of law in Kenya after the tragic events following the 2007 general elections.

We have carefully considered the rival stances of the parties, the law on the subject and we opine as hereunder:

29. In our understanding, the expression "due process" means the same thing as "due process of law". Simply put, "due process" and "due process of law" mean following laid down laws and procedures. Further, "due process of law" is a component of the principle of "the rule of law" as generally understood in Anglo-American jurisprudence. The following literary works may serve as elaboration of the concept of due process:
    The UN Secretary-General in his report of 23rd August, 2004to the Security Council (http://dacess-dds-ny.un.org/doc/UNDOC/GEN/04/395/29/pdf Open Element) described the rule of law, *inter alia*, as follows:
    "The 'rule of law'… refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated…. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law… legal certainty, avoidance of arbitrariness and procedural and legal transparency."
30. We adopt this amplified conceptualization of the rule of law and endorse the view that due process of law is one of its core components.
31. In his book "*The Due Process of Law*", first printed in 1980, Lord Denning, inter alia, stated (at the Preface):
    "By 'due process'… I mean much the same as Parliament meant when it first used the phrase… in 1354…. So by 'due process of law' I mean the measures authorized by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted …; that lawful remedies are readily available; and that unnecessary delays are eliminated."
32. As recorded earlier, the Claimants alleged that due process was not followed in the presentation of the draft Constitution to the Referendum. It is trite law that he/she who alleges must prove the allegation. In the instant case the burden of proof of the subject allegation lies on the Claimants, to be discharged on a balance of probability.
33. The Claimants alleged that several changes were made to the Draft Constitution but did not specify the changes. They alleged, too, that the change of title from "Draft Constitution" to "Proposed Constitution of Kenya" or "Proposed New Constitution" was stage-managed by the 1st Respondent to cause confusion amongst voters. We were not furnished with any evidence by way of affidavit from any voter, including the Claimants themselves, that any Kenyan voter was confused by the change of title. The Claimants alleged serious flaws in the Draft Constitution as well as in the Referendum process. We were not furnished with specific examples. The claimants alleged that the document entitled "The Proposed New Constitution" was not circulated to the voters numbering 12,656,451 because the 1st Respondent printed only 5 million copies. In our view, although the 1st Respondent conceded to printing only 5 million copies, we are, respectfully, not in agreement that 7 million voters were left out because it was shown in evidence that generic copies were printed and a number of Kenyan dailies, like Daily Nation and The Standard, with wide circulation

also reproduced the Draft Constitution word for word and even carried extensive discussions on it.

34. Having regard to the evidence, the rival submissions and jurisprudence above cited, we are of the view that the Claimants have not made out a case that meets the required standard to establish that due process was not followed.
35. The question of their Petition No.7 of 2010 not having been heard and determined on merit before the promulgation of the New Constitution has clearly kept nagging the Claimants at all material times. Notwithstanding the Claimants' complaint on the matter, we take cognizance of the fact that the IICDRC by majority decision found, while dealing with interlocutory Application No.3 of 2010 for interim reliefs, that there was no valid Petition. Whether that decision was right or wrong, the fact of the matter is that it is a judicial decision.
36. The Claimants came to this Court, *inter alia*, under Article 30 of the Treaty. Sub-Article (1) thereof provides:
"30(1) Subject to the provisions of Article 27 of this Treaty (relating to EACJ's jurisdiction) any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."
37. Was the decision of the IICDRC complained of a regulation, directive or action of a Partner State or an institution of the Community within the meaning of the Article 30(1) such as to empower this Court to inquire into or review the same?
38. In our respectful view, the matters which this Court can, in exercise of its original jurisdiction, inquire into under Article 30(1) do not include judicial decisions. The latter can only be subjected to requisite inquiry or review in exercise of appellate or review jurisdiction. We are not clothed with that jurisdiction.
We, accordingly, answer the first limb of Issue No.1 in the affirmative and this answer also disposes of the second limb.
Issue No2: Whether there was failure of resolution of Petition No.7 of 2010 by the Interim Independent Constitutional Dispute Resolution Court which violated the provisions of peaceful resolution of disputes.
39. As already recorded, on 24th August, 2010 Ariviza and Mondoh filed Application No.3 of 2010, arising from Petition No.7 of 2010, seeking interim reliefs. On 26th August, 2010 while dealing with Application No.3 of 2010, the IICDRC by majority decision found that Petition No.7 of 2010 was not a valid Petition, thereby affectively disposing of the Petition itself. In our settled view, the fact that there was a decision on Petition No.7 of 2010 is sufficient evidence that the Petition was heard and determined by the IICDRC. Whether the decision was right or wrong is immaterial. We accordingly, answer Issue No.2 in the negative.
Issue No.3: Whether or not the publication of Gazette Notice No.10019 on 23rd August, 2010 and the subsequent promulgation of the New Constitution of Kenya on 27th August, 2010 was a breach of the Rule of Law and, therefore, a violation of the Treaty.
40. This issue is against the publication/gazettment by the Interim Independent Electoral

Commission (IIEC) on 23rd August, 2010 of a Certificate giving final results of the Referendum before the Claimants' Petition No. 7 of 2010 challenging the conduct and result of the Referendum had been heard and determined. The reason given for the IIEC to publish the notice as aforesaid was that the Attorney General and IIEC had not been served with the Petition by that date. It is common ground that the Petition filed on 19th August, 2010 was served on the Attorney General and IIEC on 24th August, 2010.

41. The basic legal requirements relating to the questioned publication are found in Sections 43 and 44 of the Review Act as amended by the Statute Law (Miscellaneous Amendment) Act, No.6 of 2009 which provide as follows:

"43. (1) The Interim Independent Electoral Commission shall publish the result of the Referendum in the Gazette within two days of the holding the referendum.

(2) If no petition is made under Section 44 challenging the conduct or result of the referendum within the time limit for making such petitions, the result of the referendum shall be final upon the expiry of that time.

(3) If a petition is made under section 44 challenging the conduct of the referendum within the time limit for making petitions, the results of the referendum shall not be final until all such petitions are finally disposed of.

(4) The Interim Independent Electoral Commission shall, consequent upon the results of the referendum becoming final, by notice in the Gazette, confirm the results as the final result of the referendum.

43A. The President shall by notice in the Gazette, promulgate the New Constitution not later than fourteen days after the publication of the final result of the referendum.

(1) The conduct or result of the referendum may be challenged only by petition to the Interim Independent Constitutional Dispute Resolution Court established by Section 60A of the Constitution.

(2) A petitioner shall give notice of the petition to the Attorney General and the Interim Independent Electoral

Commission within seven days after the petition is made and the Attorney General shall publish a notice of each petition of which notice has been received, in the Gazette within seven days of the expiry of the period prescribed in subsection(1).

(3) The petitioner shall within seven days after the petition is made deposit two million shillings with the Court as security against costs.

(4) If the security is not given in accordance with subsection (3), the petition shall be dismissed."

42. The material placed before us in this Reference reveals that the challenge posed before this Court relating to the conduct and result of the Referendum was subjected to the judicial process in Kenya, notably vide IICDRC Constitutional Petition No.7 of 2010. The Claimants herein have taken issue with IICDRC's action of disposing of the petition at inter-locutory stage while dealing with Application No.3 of 2010 which was seeking interim reliefs pending the hearing of the Petition on merit. We note from its Ruling of 26th August, 2010 that the IICDRC categorically stated that it was well within the Attorney General's and IIEC's mandate to publish the final results.

43. In essence what the instant Reference is asking this Court to do, in the exercise of its

original jurisdiction, is to inquire into and review the decision of the IICDRC not to hear the Petition on merit. With respect, we do not consider it to be within this Court's competence to do that. If we did so, we would in effect be sitting on appeal over the subject IICDRC's decision. We do, respectfully, decline the invitation to inquire into and review the correctness or otherwise of IICDRC's decision on Petition No.7 of 2010.

Accordingly, we answer Issue No.3 in the negative.

Issue No.4: Whether or not the parties are entitled to the remedies sought.

44. This issue, though not so clearly framed, is in effect asking whether the Claimants are entitled to the remedies sought. It should be clear from our answers to Issue No.1, Issue No.2 and Issue No.3 that we find the Claimants not entitled to the remedies sought.

Accordingly, we answer Issue No.4 in the negative.

Having regard to the foregoing, we hereby dismiss the Reference.

Costs

45. This Court is aware that the successful party normally gets costs of the litigation unless the Court in its discretion, which should be exercised judicially, directs otherwise [see: Rule 111(1) of the Rules of this Court and *Kiska Ltd – vs – De Angelis (1969) EA.6]*.

46. We note that the Claimants are ordinary individuals who tussled over different aspects of the same matter before the High Court of Kenya, before Kenya's IICDRC and before this Court. They clearly must have felt strongly that they had genuine grievances requiring judicial adjudication even at regional level. The litigation before this Court was not frivolous and it was of interest not just to the Claimants but to other East Africans as well. In such litigation, one inevitably incurs expenses. We feel that the Claimants have already paid adequately by pursuing this matter before different courts including EACJ. We believe the Claimants undertook this litigation in good faith and we are not inclined to penalize them with costs.

Consequently, we direct that the Parties shall bear their respective costs.

* * * *

East African Court of Justice – First Instance Division
Reference No. 8 of 2010

Plaxeda Rugumba And The Secretary General of the East African Community, The Attorney General of the Republic of Rwanda

Mary Stella Arach-Amoko, DPJ, John Mkwawa, J, Isaac Lenaola,J

Computation of time -Jurisdiction - No exhaustion of local remedies required-Rule of law- whether arbitrary arrest and detention contravened the EAC Treaty

Articles: 6(d),7(2), 29, 30(1), East African Community Treaty - Rule 24(1), East African Court of Justice Rules of Procedure - Articles 90 to 100, Rwandan Code of Criminal Procedure-African Charter on Human and Peoples' Rights

The Applicant alleged that her brother Lieutenant Colonel Seveline Rugingana Ngabo was unlawfully arrested and detained by the 2nd Respondent's agents without any formal charges and without informing his next of kin about his whereabouts. The Applicant averred that: this was a breach of the fundamental principles of rule of law and universally accepted standards of human rights stipulated in the EAC Treaty; and that the 1st Respondent had failed to to fulfill his obligations under the Treaty by not investigating the 1st Respondent's non-compliance with Treaty provisions.

In response the 1st Respondent claimed inter alia that the Applicant did not exhaust the local remedy of habeas corpus, the 2nd Respondent contended that the Reference was time-barrred and that the court had no jurisdiction to hear human rights cases.

Held:

1. The detention complained of was continuous and it would be against the principles known to the rule of law to dismiss the complaint on the basis of strict mathematical computation of time.
2. Whereas the Applicant may have had a remedy in the Rwandan Justice System, the Court would not abdicate its mandate under the Treaty to apply, interpret and ensure compliance.
3. Prior to the filing of the Reference, the 1st Respondent had no notice of the alleged complaint and thus cannot be condemned for inaction.
4. The jurisdiction of the Court to interpret any breach of the Treaty was not in vain, neither was it cosmetic and the invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States.
5. The conduct of the 2nd Respondent with regard to the detention of the Subject without trial and without the production of the Subject before a competent Court or Tribunal for five months was in breach of Articles 6(d) and 7(2) of the Treaty.

Cases cited:
Connelly v. DPP [1964] 2 All ER 401 at 442
E. Mwakisha and 74 Others v. Attorney General Kenya, EACJ Reference No. 2 of 2010
Independent Medical Unit v. Attorney General Kenya and 4 Others, EACJ Reference No 3 of 2010
Katabazi and 21 others v. Secretary General of the East African Community, A. G. Uganda, EACJ Reference No. 1 of 2007

Judgment

Introduction

1. The Reference dated 8th November 2010 is premised on the provisions of Articles 6(d), 7(2) and 30(1) of the East African Community Treaty as well as Rule 24(1) of the East African Court of Justice Rules of Procedure (hereinafter referred to as "the Treaty" and "the Rules" respectively).
2. The Applicant, Plaxeda Rugumba (hereinafter referred to as "the Applicant"), claims that she is the natural elder sister of one, Seveline Rugigana Ngabo, a Lieutenant Colonel in the Rwanda Patriotic Front (RPF), the Defence Force of the Republic of Rwanda (which is a member of the East African Community, hereinafter referred to as the "EAC"). The Applicant alleges in paragraph 5 of the

Reference that:

"(a) One Seveline Rugigana Ngabo, a Lieutenant Colonel in the Rwanda Patriotic Front (RPF), was arrested by the agents of [the] Rwanda Government on 20th August, 2010;

(b)Lieutenant Colonel Ngabo's next of kin including his wife and children were not told why he had been arrested;

(c) Lieutenant Colonel Ngabo is believed to still be in detention in any place within Rwanda (sic);

(d) The grounds of belief are that the family has not been informed that he is dead nor has his body been seen anywhere;

(e) The next of kin of Lieutenant Colonel Ngabo have not been informed where Lieutenant Colonel Ngabo is detained;

(f) Lieutenant Colonel Ngabo has not been visited by his family, doctor, nor a member of the Red Cross and is held incommunicado;

(g) Lieutenant Colonel Ngabo has not been formally charged before any Court of Law in Rwanda nor is it disclosed anywhere what offence he is alleged to have committed;

(h) Lieutenant Colonel Ngabo's wife is not in a position to file an Application for habeas corpus to cause the release of her husband within Rwanda as the Government is hostile to such [a] process and her attempts to follow up the detention of her husband has led to her being harassed into hiding;

(i) The Applicant is the elder sister of the said Lieutenant Colonel Ngabo and has capacity and locus to bring this Application to protect the fundamental Human Rights of her brother."

3. The Applicant now seeks the following declarations from this Court, that:

(a) The arrest and detention by the 2nd Respondent's agents without trial of Lieutenant Colonel Seveline Rugigana Ngabo is a breach of the fundamental principles of the Community, to wit; Articles 6(d) and 7(2) which demand that partner states shall be bound to govern their populace on principles the of good governance and universally accepted standards of Human Rights.

(b) The failure by the 1st Respondent to investigate the failure of the partner state, Rwanda, to fulfill obligations of the Treaty enunciated in Articles 6(d) and 7(2) and submit its findings as required in Article 29(1) is wrongful.

(c) Any other relief as the Court may deem fit to grant.

(d) Costs of the Application.

Applicant's Case

4. It is the case for the Applicant as appears in her Affidavit sworn on 5th October 2010 and in Submissions by her Counsel, Mr. Rwakafuuzi, that:
   Firstly, the 1st Respondent acted in breach of Article 29 of the Treaty when he failed to take the "necessary action" concerning the alleged breach by the Government of the Republic of Rwanda with respect to the arrest and detention of Seveline Rugiga Ngabo (hereinafter referred to as "the Subject"). Secondly, that the 2nd Respondent, representing the Republic of Rwanda, was in breach of Articles 6(d) and 7(2) when the Government of Rwanda detained the Subject, unlawfully.
5. In furtherance of this issue, it was the argument of Counsel for the Applicant that the 2nd Respondent in fact admitted the breach when in his Amended Reply to the Reference, he conceded that agents of the Government of Rwanda had unlawfully detained the Subject from 20th August 2010 to 28th January 2011.
6. That since the African Charter on Human and Peoples Rights was specifically accepted as one of the sources of the fundamental principles governing the achievement of the objectives of the EAC, (in Article 6(d) of the Treaty), then it follows that the unlawful detention of the Subject must be held to be in breach of the Treaty.
7. Thirdly, an issue arose as to whether this Court is clothed with the Jurisdiction to determine the two issues raised above. The Applicant's position in that regard is that by dint of Article 30(1) of the (2) Treaty, legal and natural persons resident in the Partner States are granted the right to refer an action or decision of any Partner State, for the Court's interpretation under Article 27 (1) of the Treaty and for it to determine whether or not that act or decision infringes on any provision of the Treaty.
8. It is further contended that the Applicant has invoked Article 6(d) of the Treaty which enjoins a Partner State to govern its people in accordance with the principles of good governance including strict adherence to the Principles of Democracy, Rule of Law, including, the protection of human and peoples' rights as enshrined in the African Charter on Human and Peoples Rights. It is the Applicant's argument that she has placed sufficient evidence by way of Affidavits, that the Subject was arrested and detained without being charged before a competent Court and he was therefore not afforded the opportunity to appear and defend himself and those actions were against the Rule of Law and clearly a breach of Articles 6(d) and 7(2) of the Treaty and also of the Laws of Rwanda.

9. It is also contended that the court has the Jurisdiction to make a declaration under Article 27(1) of the Treaty that the act of arresting and detaining the Subject was in breach of the Treaty and the Government of Rwanda should bear culpability in that regard.
10. 10. Fourthly, it was the Applicant's further argument that it had no legal obligation to exhaust all local remedies in Rwanda before filing the present Reference. That in fact, the special Jurisdiction conferred on this Court to interpret the Treaty cannot be assumed by any Local Court in a Partner State and in the instant case, the remedy sought can only be granted by this Court and not any Local Court in Rwanda.
11. Fifthly, the Applicant also stated that the Reference was filed within time because whereas Article 30(2) of the Treaty limits the time for filing proceedings to two (2) months after the cause of action has risen, in the instant case, the Subject was arrested on or about 20th August 2010 and while the reference was filed on 8th November 2010 the "detention whose legality is the subject of this reference continued up to 28th January 2011 when the Subject was put in preventive detention by an Order of Court as provided by the Laws of Rwanda." That therefore, by the time the Reference was filed, the cause of action was still subsisting and Article 30(2) cannot apply to bar the present proceedings.
12. For all the above reasons, the Applicant states that she is entitled to the reliefs sought and the Court should exercise its discretionary Jurisdiction under Article 27(1) of the Treaty and grant the declarations as set out elsewhere above.

1st Respondent's Case

13. The 1st Respondent filed a Response to the Reference on 14th December 2010 and in it, raised the following issues:
    (i) That although he was not aware of the Subject's arrest and detention as claimed, upon the Reference being filed and served on him, "all necessary measures [would] be undertaken to address the situation."
    (ii) That the Reference is misconceived, frivolous and vexatious because the Applicant has failed to exhaust the local remedy of habeas corpus to seek the production of the Subject and neither has she shown that the Republic of Rwanda has failed to fulfill its obligations under the Treaty and therefore necessitating an investigation by the 1st Respondent or even the filing of a Reference in that regard.

In Submissions, the Counsel for the 1st Respondent added that:

    (iii) Upon learning of the Applicant's complaint, the 1st Respondent initiated correspondence with the 2nd Respondent and he was informed that the Applicant's allegations were being appropriately addressed. That therefore, the 1st Respondent had no further role to play in the matter and this Court should not find that he has failed in his obligations under the Treaty, in any way.
    (iv) The Court had no Jurisdiction to handle the complaint as the same was being adjudicated by competent organs of the Republic of Rwanda and in any event, the Applicant ought to exhaust all local remedies before approaching this Court.

14. Lastly, the 1st Respondent also contends that since the Reference was filed out of time, it should be struck off and that being the case , then the Applicant is not entitled to any remedy as against the 1st Respondent.

2nd Respondent's Case

15. The response by the 2nd Respondent is the one titled, "Amended Response to Reference", dated 16th June 2011 and filed on 21st June 2011. Together with that Response is an Affidavit sworn on 16th June 2011 by one Lieutenant Jean de Dieu Rutayisire, Chief Registrar, Military Court of Rwanda, as well as copies of proceedings of the said Court conducted on 28th January 2011 and on subsequent dates, all relating to the Subject herein.

Of relevance to the Reference are the following matters:

i. That the Subject was arrested for being "suspected [to have] committed crimes against National Security (sic)." And that on 21st January 2011, the Military Prosecution lodged its case for Preventive Detention and it was only on 28th January 2011 that the Military High Court ruled that "the detention of Lieutenant Colonel Ngabo from the date he arrested until the date his case was brought was before the Court was irregular and contravened the provisions of Articles 90 to 100 of the Rwandan Code of Criminal Procedure."

ii. That since that date, the Military High Court for reasons of gravity of the alleged crimes committed by the Subject,has continued to extend the Preventive Detention Order for regular periods and the Subject is detained in a known Military Prison and exercises all his rights, including visitation by his family, lawyers and friends.

Further, it is the 2nd Respondent's case that:

(iii) The Reference was filed in breach of Article 30(2) of the Treaty and it was time- barred.

(iv) The Court has no Jurisdiction to deal with Human Rights issues and has no Jurisdiction to deal with issues that are pending before a lawful Court in Rwanda and which Court is yet to issue a verdict on the said matter.
That in any event, the EACJ should only be considered as a Court of last resort when National Courts are unwilling or unable to render justice to the people in their jurisdictions,otherwise,it will attract millions of cases that would ,in normal circumstance, be competently handled by Local Courts in Partner States.

(v) The Government of Rwanda has at all times acted by the principles of good governance, including adherence to the principles of democracy,the rule of Law, Social Justice and maintenance of accepted Standards of Human Rights and so the Reference is without merit and should either be struck off or dismissed.

Issues for Determination

16. From the contested matters set out above and from the agreed issues as framed during the Scheduling Conference, the following questions ought to be determined:
    (a) Whether the East African Court of Justice's (EACJ) First Instance Division has Jurisdiction to entertain the Reference herein.
    (b) Whether it was permissible to file the Application out of time.
    (c) Whether the Applicant should have exhausted local remedies before filing the Reference.
    (d) Whether the 1st Respondent is in breach of the Treaty by his failure to investigate the alleged breaches by the 2nd Respondent.

(e) Whether the 2nd Respondent's arrest and detention of Lieutenant Colonel Rugigana Ngabo was a violation of the Laws of the Republic of Rwanda.
(f) Whether the 2nd Respondent breached the East African Treaty in Articles 6(d) and 7(2) when it detained Lieutenant Colonel Rugigana Ngabo unlawfully.
(g) Whether the Applicant is entitled to the reliefs sought.
(h) Who should bear the costs of the Reference?

17. Our opinion on the above issues is as follows:
(A) Whether the East African Court of Justice (EACJ) has jurisdiction to entertain the Reference herein

18. It cannot be denied that the Applicant is a person who is resident in a Partner State as defined by the Treaty. In her Reference, she stated that she is a Ugandan of Rwandan extraction and a natural elder sister of the Subject.
She has added that her address is in Kampala, Uganda and no party has raised issues with those facts. Article 30(1) of the Treaty provides as follows:
"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

19. In terms of locus standi therefore, and from the facts pleaded, the Applicant is a fit and proper person to file the Reference. The second limb of this question is whether the act complained of, is one that clothes the EACJ's First Instance Division with Jurisdiction to determine the Applicant's allegations against the Respondents. In that regard Article 27 of the Treaty provides as follows:
"1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty: Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.
2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."

20. We have heard the 2nd Respondent to argue that the issues raised by the Applicant are matters of a Human Rights nature which are not part of the "initial"Jurisdiction of the Court and therefore without am Protocol to operationalise any extended Jurisdiction, the Court cannot purport to exercise jurisdiction which has specifically been denied to it by the Treaty.

21. There is no debate that the extended jurisdiction as envisaged by Article 27(2) has not been conferred on this Court and in *Katabazi and 21 others vs. Secretary General of the East African Community and A. G. Uganda, Reference No 1 of 2007*, the predecessor to this Court stated partly as follows;"It is very clear that Jurisdiction with respect to Human Rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of Human Rights per se."

22. Having so said however, the Court went further to state as follows:
"… Article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course as provided in Article 5(1). Of particular interest here is paragraph (d) which talks of the rule of Law and the promotion and the protection of Human and Peoples Rights in accordance with the provisions of the African Charter of Human and Peoples' Rights." Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in Sub- Article (1) and seals that with the undertaking by the Partner States in no uncertain terms of Sub- Article (2): The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights. Finally, under Article 8(1) (c) the Partner States undertake, among other things to:
Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty.
While the Court will not assume Jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation."
23. We respectfully adopt the above reasoning as was also adopted in *Mwakisha and 74 Others vs. A.G. Kenya, Reference No.2 of 2010* and would wish to clarify that the Applicant in the Reference is asking only one fundamental question, with more than one facet to it; has the Republic of Rwanda breached the principles set out in Articles 6(d) and 7(2) of the Treaty? She therefore seeks the interpretation of that question by this Court under Article 27(1) and we see no bar to our doing so. It would be absurd and a complete dereliction of this Court's Oath of Office to refuse to do so as long as the two Articles are in the Treaty. There is no doubt that the use of the words, "Other original, Appellate, Human Rights and other Jurisdiction …" is merely in addition to, and not in derogation to, existing Jurisdiction to interpret matters set out in Articles 6(d) and 7(2). That would necessarily include determining whether any Partner State has "promoted" and "protected" human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights and the Applicant is quite within the Treaty in seeking such interpretation and the Court quite within its initial Jurisdiction in doing so and it will not be shy in embracing that initial jurisdiction.
We should conclude this question by adding that "Human Rights" is defined in *Black's Law Dictionary – Eighth Edition* as: "the freedoms, immunities and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live"
24. When the Applicant seeks to know whether the Subject's arrest and detention was a breach of the Treaty, she is not asking the Court to interpret the enforcement of any human right available to the subject,and that is why she withdrew her prayer for "an order that the said Lieutenant colonel Seveline Rugigana Ngabo be released from illegal detention", because this court would obviously have no such jurisdiction. All she is seeking are certain declarations within the mandate of the Court and we have said why such Jurisdiction to make such declarations exists.

25. The objection to Jurisdiction as framed and argued by the Respondents is misguided and is hereby dismissed.
(B) Whether it was permissible to file the application out of time
Article 30(2) of the Treaty provides as follows:
"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."
26. The Applicant has made the point that because the detention of the Subject was continuous, time could not have stopped running two (2) months after his arrest. We have taken into account the objections by the 2nd Respondent and we note that in the Amended Response and in the Affidavit of Lieutenant Rutayisire, not once has any of them stated the exact date when the Subject was arrested and detained by the agents of the Republic of Rwanda. The 2nd Respondent's objection as to time is premised on the candid statement of the Applicant that her brother was arrested on 20th August 2010. Should we then take it that time stopped running on 20th October 2010 and the Reference filed on 8th November 2011 was out of time?
This Court considered a similar matter in the case of *Independent Medical Unit vs. A.G. Kenya and 4 Others, Reference No.3 of 2010* and it rendered itself partly as follows:"It was contended on behalf of the Respondents that the pleadings show that the Complainant was aware of the complaint way back in 2008 and that, therefore, the Reference is barred by limitation in that it was filed outside the 2 months limitation period stipulated under Article 30(2) of the Treaty. Counsel for the Claimant submitted that the Reference is not time barred in that, the matters complained of are criminal in nature and concern the Rule of Law, good governance and justice which do no thave any statutory limits. The case of *Stanley Githunguri vs. Republic (1986) KLR 1 and Republic vs. Gray Ex-parte Graham (1982) 3 All ER 653* were cited in support of this Submission. Article 30(2) provides that:
"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."
Upon careful consideration of this point of objection, it is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy of the alleged violations.
We find that such action or omission of a Partner State cannot be limited by mathematical computation of time."
27. We adopt the same reasoning and agree with the Applicant that where issues in contest are criminal in nature and the action complained of is continuous (such as detention), it would be against the principles known to the rule of Law to dismiss the complaint on the basis of strict mathematical computation of time. We must also add that it is patently clear to us that the applicant only filed this Reference when she realized that the Republic of Rwanda had failed or refused to provide any remedy for the alleged violation and she cannot now be penalized on the basis of the inaction of

a Partner State.

28. The Reference, in our humble view, was within time and we shall say something about the period starting 20th August 2010 and ending on 28th January 2011, later in this Judgment.

(C) Whether the applicant should have exhausted local remedies before filing the Reference

29. We shall spend little time with this question because it is not in doubt that there is no express provision barring this Court from determining any matter that is otherwise properly before it, merely because the Applicant has not exhausted Local remedies. It has been agreed by the parties that upon the Reference being filed, the Republic of Rwanda produced the Subject before the Military High Court of that Country. Can that action be said to be sufficient for this Court to tell the Applicant to go to Rwanda and exhaust whatever remedies are available there? We must answer the question in the negative.

30. We say because it has been admitted by the 2nd Respondent that from 20th August 2010 until 28th January 2011, the Subject was held in detention without lawful authority. The Military High Court in Rwanda found that action to be a contravention of Articles 90 – 100 of the Rwandan Code of Criminal

31. Procedure. Thereafter, the Subject was placed in Preventive Detention as is the Law in Rwanda. This Court was already seized of the Reference now under consideration when the Rwandan Military High Court made its order for Preventive Detention and whereas the Applicant may well have a remedy in the Rwandan Justice System, this Court cannot abdicate its mandate under the Treaty to apply, interpret and ensure compliance therewith. The Rwandan Justice System has no jurisdiction to do so neither does any other Judicial body in a Partner State have that jurisdiction. The EACJ is the only Court mandated to determine whether the EAC Treaty has been breached or violated and we have said elsewhere above that in the present case, there is Jurisdiction to do so. Whether the Applicant's complaints can be addressed elsewhere is immaterial to the exercise of Jurisdiction under the Treaty and so the 2nd Respondent's contention to the contrary is dismissed.

(D) Whether the 1st Respondent is in breach of the Treaty by his failure to investigate the alleged breaches by the 2nd respondent.

32. In answer to the above issue, it has not been denied by the Applicant that prior to the filing of the Reference, the 1st Respondent had no notice of the alleged complaint. It would not therefore be reasonable to expect him to have taken any necessary action before 8th November 2010 when the Reference was filed. We have seen correspondence initiated by the 1st Respondent subsequent to that date and since the matter relates to actions taken prior to that date, we are convinced that to condemn the 1st Respondent for inaction in a matter he had no knowledge of, would be unfair and we shall dismiss the Applicant's complaint in that regard.

(E) Whether the 2nd Respondent's arrest and detention of Lieutenant Colonel Ngabo was in violation of the law of Rwanda.

33. It is admitted by the 2nd Respondent that for reasons said to be of "national" security, the agents of the Republic of Rwanda arrested and detained the Subject at a known facility within Rwanda.

Were those actions a violation of the Laws of Rwanda?
In his Affidavit, Lieutenant Rutayisire deponed partly as follows:

34. "That on 28th January 2011, the Military High Court ruled that the detention of Lieutenant Colonel Ngabo from the date he was arrested until the date his case was brought before the Court was irregular and contravened the provisions of Articles 90 to 100 of the Rwandan Code of Criminal Procedure.
However,basing on strong reasons to suspect him and the gravity of the crime against him, taking into consideration the fact of preventing him from interfering with the investigation and as insurance against potential evasion of justice, the Military High Court ruled on his preventive detention, applying Article 89 of the Rwandan Code of Criminal Procedure (as modified and complemented by Article 19 of the Law no 20/2006 of modified and complemented by Article 19 of 22/4/2006), which provides that "when a person is detained unlawfully, . A judge or magistrate then makes an order arresting or releasing the person on bail … That for the purposes of investigations and the gravity of the charges against Lieutenant Colonel Rugigana Ngabo, which require enough time and security precautions, the military prosecution complied with Article 100 of the Rwandan Criminal procedures, which provides that "An order authorizing for preventive detention remains in force for 30 days including the day on which it was delivered. After the expiry of that time, it can be renewed for one month and shall continue in that manner." The same Article provides that the time cannot be extended after one year for felonies. The crime against Lieutenant Colonel Rugigana Ngabo is qualified as a felony under Article 20 of Rwandan Criminal Code."
35. Further to this clear admission that the detention of the Subject was unlawful for a period of five (5)months, we have the unchallenged Submission by Counsel for the Applicant the at:
"The Laws of Rwanda provide that a person arrested shall not be detained beyond forty eight (48) hours before being taken to court, or released (sic). The Laws of Rwanda further provide that detention beyond forty eight (48) hours can only be by an Order of a competent Court."
36. There is little more to say in answer to the question posed above except to state that the continued detention of the Subject without trial in a competent Court was a breach of the Laws of the Republic of Rwanda and we so declare.
37. As a corollary to the above, we must now turn to the single issue that concerns the interpretation of Articles 6(d) and 7(2) of the Treaty. Although we have touched on the issue in passing, elsewhere above, it is clear to us that the arrest of the Subject on suspicion of having committed a crime known to the Laws of the Republic of Rwanda may per se not attract the intervention of this Court. However,his detention from 20th August 2010 to 28th January 2011 must do so. In making the intervention in this case, as we shall shortly do, we are not questioning the Partner State's right to apprehend and prosecute criminal suspects. In fact, we recognize this as every Partner State's duty and obligation to its populace. What we respectfully reiterate however, is that Partner States should apprehend and prosecute criminal suspects in accordance with established laws and if they do not, then they violate the Treaty.
38. We say so because we are of the firm view that the principles set out in Article 6(d)

and 7(2) were not inscribed in vain. The Jurisdiction of this Court to interpret any breach of those Articles was also not in vain,neither was it cosmetic. The invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States hence the words that Partner States must bind themselves to the "adherence to the principles of democracy,the rule of Law …as well as the recognition, promotion and protection of Human and Peoples Rights in accordance with the provisions of the African Charter on Human and Peoples Rights" (ACHPR).It is common knowledge that Article 6 of the Charter provides that a person shall not be deprived of his liberty except in circumstances permissible by Law.

39. Where a person is deliberately deprived of his liberty for a period of five (5) months by a Partner State and the Military High Court of the Partner State finds the deprivation to be "irregular" and therefore unlawful, how can this Court in its interpretive mandate find otherwise?
40. It has been suggested by the 2nd Respondent that once the Subject's situation was "regularized" military High Court's order of preventive detention, then the matter was settled. The fundamental question is; how can such an action validate what was previously and patently arbitrary, unlawful and in breach of the principles set out in Article 6(d) of the Treaty? How can it be said that a Partner State is adhering to the principles of good governance and the rule of law when a citizen is arrested and held incommunicado without any competent Court being seized of his matter? It matters not, as claimed by the 2nd Respondent, that the subject was held in a known facility and it matters not that his family, lawyers and friends may have had access to him. Where is his liberty when his incarceration has not been ordered by any Court of Law that is competent to order such incarceration?
41. These questions are not addressing any human rights issue per se but are addressing adherence to adopted in *Bennet vs. Horsefery Road Magistrate's Court* and another where Lord Griffith stated as follows:

    "If the Court is to have power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law." His Lordship went on to add that:

    "It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by."

    He then went further to refer to the words of Lord Devlin in *Connelly vs. DPP [1964] 2 All ER 401 at 442*: where His Lordship said that: "The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused."
42. We wholly subscribe to the above position and even without the extended jurisdiction in human rights issues, this Court cannot stand idly by and declare itself to be impotent of the capacity to render itself forcefully where the rule of law is threatened in its eyes and in the eyes of the Treaty.

In submissions, the 2nd Respondent contended partly as follows:

"As stated previously, the 2nd Respondent is of the humble opinion that if the

EACJ declares itself competent to deal with a case pending before national courts, it would create very serious problems for itself in the execution of its mandate. The 2nd Respondent is still concerned that this would create a very dangerous precedence where any individual in the region of millions and millions would bring any human right issue before this Honourable Court, including those pending before national courts of Partner States especially those who are politically motivated (sic) ……."

Our view, with respect, differs considerably with that stated above by the 2nd Respondent. We say so because the EACJ is one of the organs of the EAC established by Article 9(1)(e) of the Treaty. Article 27 of the Treaty grants locus standi to "any person who is resident in a Partner State" to bring for determination to the court, but within the mandate and jurisdictional parameters created by the Treaty, any matter regarding alleged breach of the Treaty. Whether the residents come in small numbers or in millions,is not a matter for the court to be overly concerned with. What should concern it is whether any Partner State has breached any provision of the Treaty and whether a remedy is available to the resident/Applicant. It would be expected that when the Court rules in favour of a particular resident/Applicant, the effect would be to deter the Partner State/Respondent from repeating the breach and thereby reduce the anticipated millions of Applicants with similar complaints of breaches of the Treaty. In the event, the 2nd Respondent's fear of an avalanche of litigation in the EACJ is misplaced and is accordingly overruled.

43. We need say no more; the conduct of the 2nd Respondent with regard to the detention of the Subject without trial and without at the very least, production of the Subject before a competent Court or Tribunal for a period of five (5) months was in breach of Articles 6(d) and 7(2) of the Treaty and we so declare. As he is now before a competent authority in the Partner State, we decline to say anything of the proceedings subsequent to 28th January 2011, save that by Rwandan law, to wit Article 100 of the Rwandan code of Criminal Procedure, the Preventive Detention Order cannot exceed one year and the 2nd Respondent must appreciate that fact, noting that the initial order was made on 28th January, 2011 and must necessarily come to an end on 28th January, 2012.

(F) Costs

44. We have shown above, that the actions of the 2nd Respondent in relation to the Subject were arbitrary and unlawful and the Applicant is properly before this Court. Rule 111 of the Rules of this court provides that "costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order." We have found no good reason to order otherwise in this case, and so the 2nd Respondent shall bear the costs of the Reference but payable to the Applicant only.

Conclusion

45. While thanking all Counsel appearing for their industry and courtesy extended to the Court, the final orders to be made in this Reference are as follows:
    (a) A declaration is hereby issued that the detention of the Subject, Lieutenant Colonel Seveline Rugigana Ngabo by the agents of the Government of the Republic of Rwanda from 20th August 2010 to 28th January 2011 was in breach of the fundamental and operational principles of the East African Community as

enunciated in Articles 6(d) and 7(2) of the Treaty which demands that Partner States shall be bound by principles of inter alia, good governance and the rule of Law.

(b) The case against the 1st Respondent is dismissed with no order as to costs.

(c)The 2nd Respondent shall pay to the Applicant the costs of this Reference.

Orders accordingly.

* * **

East African Court of Justice – First Instance Division
Reference 9 No. of 2010

African Network for Animal Welfare (ANAW) And The Attorney General of the United Republic of Tanzania

Johnston Busingye, Mary Stella Arach-Amoko, DPJ, John Mkwawa, J, Jean-Bosco Butasi
Isaac Lenaola, J
April 25, 2013

Discretion - Extension of time- Filing documents after close of pleadings- Service - Witness statements- Whether the Respondent was obligated to file and serve witness statements before the hearing.

Rules 4, 10,46(1), (3) and 53 of the East African Court of Justice Rules of Procedures, 2010

In its Reference, the Applicant claimed that the Respondent was about to upgrade and tarmac, the Natta-Mugumu – Kleins Gate Loliondo Road across the northern wilderness of the Serengeti National Park. It averred that this would have harmful environmental and ecological effects, cause irreparable and irreversible damage to the ecosystem of the Serengeti and the adjoining Masai Mara national park in Kenya and that this violated the EAC Treaty and other international conventions on the conservation of the environment and natural resources.

On 23rd January 2013, during the Scheduling Conference, the Applicant was granted leave to file an expert's Report, on or before 22nd March 2013. The report was lodged two days after the due date and the Applicant's Counsel sought leave to have the Report admitted out of time.

Respondent's Counsel opposed the admission of the Report out of time, stating that the reasons given for delay coupled with a clear reading of Rule 46 of the Court's Rules of Procedure precluded any discretion in favour of the Applicant.

Held:

1. The expert's Report was filed on a Monday after time had lapsed on the previous Friday. It is normal in the conduct of the affairs of human beings that strict deadlines may not be met, depending on prevailing circumstances that is why Rule 4 was crafted. However, the reasons given for an extension of time must be sufficient and the production of the documents in question must be necessary in the eyes of the Court. A weekend's delay is not inordinate and the Report is necessary and would assist the Court in reaching a fair and just decision.
2. While there is no express obligation to file and serve witness statements before the hearing of the Reference, in the current case, Counsel for the Respondent specifically sought an order, during the Scheduling Conference, to prepare and serve those statements. Thus upon service of the Report, the Respondent shall, file and serve written statements for its three proposed witnesses within 14 days of today's date.

Ruling

1. On 23.1.2013, during the Scheduling Conference in this matter, the Applicant prayed for, and was granted an order to file an expert's Report ,on or before 22.3.2013.
2. The Report was only lodged in the Nairobi sub-registry of the Court on 25.3.2013 and today, the date set for hearing of the Reference, the Applicant's Counsel has indicated that the Report was lodged two day's outside time because the expert had to visit the area where the Mugumu-Tabora B- Klein's Gate-Loliondo Road(the subject of the Reference) is situated, prepared and submitted the report on 25.3.2013 and it was thereafter lodged on the same day. That in fact since 22.3.2013 was a Friday and 25.3.2013 was a Monday ,then it was promptly lodged in the circumstances. He now seeks leave to have the Report admitted out of time although he did not mention any Rule pursuant to which he was making the application for leave aforesaid.
3. The Respondent's Counsel strongly opposes any attempt at admitting the Report out of time ,arguing that the reasons given for delay coupled with a clear reading of Rule 46 of the Court's Rules of Procedure would preclude any discretion in favour of the Applicant.
4. During submissions, three other issues were raised viz:
   i) Whether the Applicant was obligated to serve the expert's Report upon filing it.
   ii) Whether the Respondent was obligated to file and serve witness statements before the hearing of the Reference.
   iii) Whether the hearing of the Reference should be adjourned.
5. We have considered the submissions on all the issues above and our opinion is as follows:
   A concise and clear reading of Rules 4, 10 and 46(1) and (3) of the Court's Rules of Procedure would show that the discretion to extend time and/or grant leave to file a document is discretionary. In the present instance, the expert's Report was filed on a Monday after time had lapsed on the previous Friday. The reasons given that the expert had to visit the disputed road, and thereafter compile the report, are neither outlandish nor unreasonable, contrary to the strong position taken by Counsel for the Respondent. It is normal in the conduct of the affairs of human beings that strict deadlines may not be met, depending on prevailing circumstances, and that is why Rule 4 of the Rules of Procedure was crafted. However, the rider in both rules 4 and 46(1) and (3) is that the reasons given must be sufficient and in the case of documents, such as the expert's report in question, its production in the eyes of the Court is necessary.
6. We are satisfied that both criteria outlined above have been met in the matter before us as a weekend's delay is not inordinate and certainly the Report is necessary and would greatly assist the Court to reach a fair and just decision in the Reference.
7. Regarding service of the Report, the matter is premature because without it being admitted, service is a non-issue and we shall at the end of this Ruling make the necessary orders in that regard.
8. As to the Respondent's obligation, or lack thereof, to file and serve witness statements before the hearing of the Reference, while there is no express obligation imposed on a party to do so, the record would bear us out that Counsel for the Respondent

specifically sought an order, during the Scheduling Conference, to prepare and serve those statements. Today, he has decided to waive his right to do so and whilst that right still exists, the Court is not precluded from giving directions as to how each case should be heard. This is a discretion granted to it under its inherent jurisdiction to do justice without undue regard to technicalities under Rule 55(3)(d) of the Rules of Procedure. The facts and circumstances of this case would necessitate that this Court should invoke that jurisdiction.

9. In the event, and for the above reasons, invoking Rules 4, 10, 46(1) and (3) of the Court's Rules of Procedure, we shall order and direct as follows:
   i) The expert's Report lodged in the Nairobi sub-registry on 25.3.2013 by the Applicant is admitted into the record and shall be deemed as filed within time.
   ii) The Report shall be served forthwith upon the Respondent, by the Applicant and in any event, within the next 7 days.
   iii) The Respondent shall, within 14 days of today's date, file and serve written statements for its three (3) proposed witnesses .
   iv) The hearing of the Reference shall be adjourned to a date to be given by notice to the parties and as to costs, we deem it fit in the circumstances, to order that each party should bear its own costs.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Reference No. 9 of 2010

African Network for Animal Welfare (ANAW) And The Attorney General of the United Republic of Tanzania

Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, John Mkwawa, J.
June 20, 2014

Co-operation in environmental and natural resources management- Jurisdiction -Limitation of time - Permanent injunction - Protection of the environment and natural resources- Whether the Respondent intended to upgrade a trunk road in the Serengeti National Park- whether the adjoining Parks would suffer irreversible environmental and ecological effects - Whether the proposed upgrade infringed the EAC Treaty.

Articles: 5 (3) (c), 8 (1) (c), 111 (2), 114 (1) (a), 151 (4) of the Treaty for the Establishment of the East African Community.

The Applicant, a Charitable Pan-African animal welfare and community-centred organization registered as a Non-Governmental Organisation in Kenya, alleged that the Respondent was about to upgrade, tarmac, pave, realign, construct, create and/or commission a trunk road called "Natta-Mugumu – Kleins Gate Loliondo Road" ("the North Road") across the northern wilderness of the Serengeti National Park. It averred that this would have harmful environmental and ecological effects, cause irreparable and irreversible damage to the delicate ecosystem of the Serengeti and the adjoining Masai Mara national park in Kenya. The applicant alleges that this was in violation of the EAC Treaty obligations and those made in other international conventions on the conservation of the environment and natural resources.

The Respondent contented that the road was being upgraded and this was within the mandate of the Government of the United Republic of Tanzania and was compliant with environmental preservation and conservation rules and obligations under international and regional treaties. The upgrade would stimulate the socio-economic growth of over two million citizens and reduce transport costs between Mugumu and Loliondo. Any negative environmental impacts would be mitigated with the guidance of environmental experts. The Respondents also alleged that the Reference was untenable in law as it sought to enforce provisions of the Treaty in chapter Nineteen on co-operation on environment and natural resources which were yet to be ratified by all Partner States.

Held:

1. While Article 151 (1) of the Treaty spelled out the objectives and scope of, and institutional mechanisms for co-operation and integration, the failure to enact a protocol did not oust the obligations placed on Partner States. Therefore, Chapter

Nineteen of the Treaty was binding on Tanzania and the other Partner States with or without a protocol in that regard.

2. It was evident that the Respondent intended to upgrade the Natta-Mugumu-Tabora B – Kleins Gate-Loliondo Road from its current earth status to bitumen or gravel standards. Whereas the Government of the Republic of Tanzania is lawfully entitled to construct roads within its territory, where it fails in its obligations to conserve and protect the environment within the meaning of Articles 5(3) (c), 8(1) (c), 111(1) and 114(1), then the Court could make declarations in that regard. If the road project as initially conceptualized is implemented, it would be in violation of the Treaty as this had the potential to cause irreversible negative impact on the Serengeti environment and ecosystem and that of the neighboring Parks.
3. The court issued a permanent injunction restraining the Respondent from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park.

Cases cited:

Democratic Party v. Secretary General, East African Community and 4 Others, EACJ Reference No. 2 of 2012

Mukisa Biscuit Co Ltd v.West End Distributors Ltd [1969] EALR 696

Pimentel v. Executive Secretary, Supreme Court of Phillipine G. R. No. 158088 (2005)

Society for the Protection of Silent Valley v. Union of India 1980 Kerala HC.

Editorial Note: In Appeal No 3 of 2014, the Appellate Body held that an action must constitute more than a mere abstract idea or hypothetical plan. Thus the trial court erred in law by entertaining the Reference based on a proposal.

Judgment

Introduction

1. The Reference herein is dated 8th December 2010 and was filed in Court on 10th December 2010.
2. The Applicant, African Network for Animal Welfare (hereinafter "ANAW") has described itself as a Charitable Pan-African animal welfare and community-centred organization registered as a Non-Governmental Organisation in Kenya and was registered as such on 21st June 2006. It is represented in these proceedings by Mr. Saitabao Kanchory Mbalelo, an Advocate of the High Court of Kenya and whose address for service was previously Odyssey Plaza, Ist Floor, Mukoma Road, South B, P. O. Box 23746 – 00100, Nairobi, Kenya but now said to be c/o Kanchory & Co Advocates, Upper Hill Gardens, Block C – 18, 3rd Ngong Avenue, PO. Box 23746 – 00100, Nairobi, Kenya.
3. The Respondent is the Attorney General of the United Republic of Tanzania sued as such on behalf of the latter, a Partner State within the meaning of Articles 1 and 3 of the Treaty for the Establishment of the East African Community (hereinafter, "the

Treaty" and "the EAC", respectively).

4. In the proceedings before us, he was represented by Mr. Gabriel Pascal Malata, Principal State Attorney, Ms. Stella Machoke, Senior State Attorney and Mr. Theophilo Alexander, Advocate. The address of service for the Respondent has been given as Attorney General's Chambers, Kivukoni Front, P.O. Box 9050, Dar es Salaam, Tanzania.
5. The Reference was filed to challenge the proposed action by the Government of the United Republic of Tanzania to construct and maintain a road known as the "Natta-Mugumu – Tabora B-Kleins Gate – Loliondo Road", across the Serengeti National Park. The road is said to have been intended for the use of the general public with all the attendant consequences to the environment, generally.
6. On 26th August 2011, the Respondent's Preliminary Objection to the Reference on the grounds of jurisdiction, limitation of time and form was overruled and his appeal to the Appellate Division in EACJ Appeal No. 3 of 2011 was dismissed on 15th March 2012 and the matter remitted to this Division for substantive trial and adjudication on the merits.

Applicant's Case

7. The Applicant tendered both oral and Affidavit evidence and its counsel filed written submissions on 4th October 2013 which he highlighted at the hearing on 10th February 2014.
8. Its case is that before the Reference was filed, a 53 km earth road existed between Tabora B Gate and Kleins Gate within Serengeti National Park and only 5 km of that road was paved with gravel or murram.
9. The road was mostly used by tourists and Tanzania National Parks Authority (TANAPA) officials and any other person who wanted to do so had to obtain special authorization from Serengeti National Park's Management to use it.
10. In his Affidavit in support of the Reference, sworn on 8th December 2010, Mr. Josephat Ngonyo Kisui, the Executive Director of ANAW stated at paragraph 4 thereof, that before filing the Reference, ANAW had received information that the Government of the United Republic of Tanzania was about to upgrade, tarmac, pave, realign, construct, create and/or commission a trunk road called "Natta-Mugumu – Kleins Gate Loliondo Road" (hereinafter, "the road" otherwise referred to as "the North Road" or "the Superhighway") across the northern wilderness of the Serengeti National Park (hereinafter "the Serengeti").
11. It is now the Applicant's submission that the said action would have deleterious environmental and ecological effects and is likely to cause irreparable and irreversible damage to the delicate ecosystem of the Serengeti and adjoining national parks such as the Masai Mara in Kenya. These would include, it is urged:
    i) disruption in animal migration;
    ii) driving and scaring away wildlife from the game controlled areas;
    iii) fragmentation of animal habitats and weakening or disappearance ; of an entire generation of a given animal population disruption of the wildlife corridor;
    iv) loss of scenic and visual quality;
    v) increased and disruptive vehicular traffic;

vi) enhanced and disruptive human activity;
vii) increased wildlife mortality due to road kill from speeding vehicles ;
viii) deterioration of air quality;
ix) surface water and soil pollution;
x) increased poaching activities.

12. In support of its stated position, the Applicant filed an environmental and impact assessment, feasibility and preliminary design for the road, which is said to be 239 kms in length, prepared by the Tanzania Roads Agency (TANROADS). In that report, all the above adverse effects are mentioned as negative impacts but they are said to be capable of mitigation, a position not shared by the Applicant.
13. It is the Applicant's further case that :
The actions of the Respondent are a violation of Article 114 (1) (a) of the Treaty which enjoins all Partner States to conserve, protect and manage the environment and natural resources and Articles 5 (3) (c), 8 (1) (c) and 111 (2) of the Treaty which obligate Partner States to co-operate in the management and utilization of natural resources within the Community and to abstain from any measures that would jeopardize the attainment of the objectives of the Treaty in that regard.
14. It is also the Applicant's position that the United Republic of Tanzania's actions are a violation of its obligations in respect of Serengeti which has been declared a "World Heritage Property" of "outstanding Universal value" according to the United Nations Educational, Scientific and Cultural Organization (hereinafter "UNESCO") and therefore its protection and conservation is a matter of international concern. That UNESCO for that reason, in its 34th Session held in Brasilia, Brazil, between 25th July 2010 and 3rd August 2010, expressed its concern about the proposed threat to the environmental conservation of the Serengeti by the upgrading of the road as was the intention of the Government of the United Republic of Tanzania.
15. In addition, that all the above actions are unlawful and in conflict with the United Republic of Tanzania's obligations under the African Convention on the Conservation of Nature and Natural Resources, 2003; the Rio Declaration, the Stockholm Declaration and the United Nations Convention on Biodiversity, all of which create obligations on States with regard to environmental management and conservation.
16. In support of its case, the Applicant called an expert witness, Mr. John Mabala Kuloba, a registered Environmental Impact Assessment Expert working with M/S EarthCare Services Limited of Nairobi, Kenya. His report is dated 25th March 2013 and his conclusion upon visiting the Serengeti and having used the road, was that the proposed upgrading of the road and its opening up to use by the general public would create more negative impacts than the positive and that an alternative route should be created. He reached that conclusion from his findings that the following negative impacts would be occasioned should the road be built as proposed:
i) impact on migratory species such as zebras and wildbeeste;
ii) impacts on the Serengeti ecosystem;
iii) impact on animal behavior;
iv) impact on the country's image;
v) increased wildlife poaching;

vi) air quality and noise will increase in an environment where ambient noise levels have been low;
vii) Construction of camps will have an impact because of generation of waste, sewage disposal etc;
viii) impact on soils;
ix) generation of solid waste;
x) impact because of burrow pits and quarry sites;
xi) impact because of blasting and rock excavation;
xii) road safety and increased accidents;
xiii) impact on flora and fauna (ecosystem);
xiv) declines in scenic quality;
xv) Conflict in management of the Serengeti between TANAPA and TANROADS, acronyms for the Tanzania National Parks and Tanzania Roads, both Government agencies.

17. It is for all the above reasons that the Applicant now seeks the following orders;
(i) A declaration that the action to construct a road across the Serengeti National Park is unlawful and infringes the provisions of the East African Community Treaty specified ;
(ii) A permanent injunction restraining the Respondent from undertaking the action complained of;
(iii) A permanent injunction restraining the Respondent from maintaining any road or highway across any part of the Serengeti National Park ;
(iv) The Respondent be permanently restrained from gazetting any part of the Serengeti National Park for the purpose of upgrading, tarmacking, paving, realigning, constructing, creating or commissioning the Nata-Mugumu-Tabora B-Kleins Gate-Loliondo Road;
(v) The Respondent be permanently restrained from removing or relieving herself from the UNESCO obligations in respect of the Serengeti National Park on the object of upgrading, tarmacking, paving, realigning, constructing, creating or commissioning the said road otherwise for that purpose upgrading, tarmacking, paving, re-aligning, constructing, creating or commissioning or maintaining a trunk road or highway across the Serengeti National Park.
(vi) Costs.

18. We must at this point state that when highlighting his written submissions, Mr. Kanchorry abandoned prayers (ii) and (iv) and so only prayers (i), (iii), (v) and (vi) will be the subject of determination in this Judgment.

Respondent's Case

19. The Respondent filed a Reply to Reference on 24th May 2012 and in it, the point made is that the road has been in existence and in use and has had no negative impact on the Serengeti ecosystem and is not the first of its kind in national parks. That a reputable consultancy firm was hired by the Government of the Republic of Tanzania to give a guiding report on how to overcome any negative impacts that its existence may cause and that the said consultant's recommendations when implemented, would reduce those negative impacts and enhance the safety of animals.

20. The Consultant's report is attached to the Reply to the Reference and its name and address are given as M/S Inter-consult Ltd, Inter House, New Bagamoyo Road, P. O. Box 423, Dar es Salaam, Tanzania.
21. 21. It is the Respondent's further case that the road is merely being upgraded and that action is being taken within the mandate of the Government of the United Republic of Tanzania. That in doing so, the said Government intends to abide by its laws and rules on environmental preservation and conservation as well as its obligations to all international and regional treaties on the subject, including the Treaty for the Establishment of the EAC.
22. In addition, that as a sovereign State, the Government has decided to upgrade the road in order to stimulate the socio-economic growth of over two million of its citizens and reduce the prevailing costs of transport between Mugumu and Loliondo Centres and in doing so has mitigated all negative environmental impacts.
23. 23. In the report by M/S Inter-Consult Ltd signed by its Acting Chief Executive, Mr. P.A.L. Mfugale, the conclusion reached is that "considering the measures that are being put in place to ensure that possible adverse impacts on the Serengeti National Park will be adequately addressed, it is proposed that the Government should proceed with the implementation of the Natta-Mugumu-Loliondo road project."
24. In that report, the Consultant also states that "the project will entail upgrading of approximately 179 kms of the existing earth/gravel road from Natta-Mugumu-Loliondo to bitumen standard."
25. The Respondent further tendered oral evidence in support of its position and called three witnesses, Ms. Zafarani Madayi, the Head of Safety and Environment Unit in the Directorate of Planning within TANROADS and Dr. James Wakibara, Principal Economist with TANAPA as well as Mr. William Simon Mwakilema, Chief Warden, TANAPA.
26. In her evidence, Ms. Madayi stated that whereas the report by M/S Inter-consult Ltd gave the intended road project a clean bill of health, environmentally, another consultant, M/S International Consultants and Technocrats PVT Ltd (India) in association with M/S Appex Ltd (Tanzania) Ltd were hired in 2009 by TANROADS to undertake, inter alia, a detailed engineering design and a comprehensive environmental impact assessment study for the said road project to be submitted to stakeholders including NGOs. That the said designs and study are yet to be completed and have therefore not been subjected to stakeholder discussions nor have they been submitted to the relevant Ministry for review and/or implementation.
27. Dr. Wakibara on his part stated that he is greatly involved in UNESCO's work and has submitted reports to it on the road project and since the Serengeti is a World Heritage site and that in "Decision 35 COM 7A.18, UNESCO commended Tanzania for its intention to maintain the 53 km stretch of the project traversing Serengeti National Park to gravel standard and to reserve it mainly for the Park's tourism and administrative purposes".
28. In his evidence, Mr. Mwakilema stated that the part of the road passing the Serengeti is 53 kms and is used mainly for tourism and administrative purposes and the intention of the Government is to upgrade it to gravel status only.
29. For the above reasons, the Respondent has urged the Court to dismiss the Reference

and in addition, Mr. Malata filed a Notice of Preliminary Objection on 2nd May 2013 and it reads as follows:

"TAKE NOTICE THAT, on the first hearing date the humble Respondent shall raise a preliminary objection based on points of law to the effect that:

i. The Reference before this Honourable Court is bad and untenable in law as the same seeks to enforce a part of the East African Treaty which is yet to be ratified by all Partner States thus unenforceable in law;
ii. The Applicant has no locus stand to institute this Reference against the Respondent for the purported violation of International Conventions and Declarations on Environment and Natural Resources ;
iii. The Reference before this Honourable Court in particular on the violation of Articles of International Conventions and Declarations on Environmental and Natural Resources is untenable for being placed and enforced before the wrong forum."

Scheduling Conference

30. At the Scheduling Conference held on 21st January,2013 the following points of disagreement were recorded as were the agreed issues for determination:

Points of disagreement

(i) The road as proposed does not exist. It is being constructed, realigned, and upgraded (Applicant);
(ii) The road exists. It is just being upgraded and realigned where necessary (Respondent).

Agreed Issues for determination

(i) Whether the Respondent intends to upgrade, tarmac, pave, realign, construct, create and/or commission a trunk road officially known as the Natta-Mugumu-Tabora B-Kleins Gate-Loliondo Road also known as the North Road or Serengeti Super Highway across the northern wilderness of the world famous Serengeti National Park;
(ii) Whether the disputed road exists and is in use;
(iii) If so, whether the proposed action infringes the provisions of the EAC Treaty specified therein as well as the international instruments referred to;
(iv) Whether the Applicant is entitled to the prayers sought.

Determination

Preliminary objection

31. In determining the issues in contest within the Reference herein, we deem it appropriate and prudent to first dispose of the Preliminary Objections raised by the Respondent. We have elsewhere above indicated that the Respondent had initially raised preliminary objections on grounds inter alia of jurisdiction and limitation of time which objections were overruled both by this Division and the Appellate Division of the Court. It would have been expected that a diligent litigant would have filed all preliminary objections to the Reference at the time of filing its pleadings as is the expectation of Rule 41 of the Court's Rules instead of doing so piecemeal, as the Respondent has done. Nevertheless and in order to do substantive justice,

we shall proceed to address the same with a reminder of the words of Sir Charles Newbold in *Mukisa Biscuit Co Ltd vs West End Distributors Ltd [1969] EALR 696* where he stated thus:

"The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice must stop."

32. With that background, the first issue raised by the Respondent is that the Reference is bad and untenable in law as it seeks to enforce a part of the Treaty which is yet to be ratified by all Partner States thus unenforceable in law.
33. At the hearing, Mr. Malata , with respect, was unclear on this point but in his written submissions, we deduced his argument to be the following:
'That because some of the Partner States, specifically Tanzania, are yet to ratify a Protocol dated 2nd April 2006 to operationalise Chapter Nineteen of the Treaty, then all the provisions of Articles 111 – 114 of the Treaty are also yet to be ratified and are thus unenforceable in law. Further, that because there are no modalities and/or mechanisms to deal with issues relating to the environment and natural resources, then the Applicant's case is misguided and cannot stand'.
34. In response, Mr. Kanchory argued that there is no requirement that until a protocol is enacted, certain parts of the Treaty remain either unratified or become operational only when a protocol is enacted.
35. On this point, and with tremendous respect to Mr. Malata, while he cited no authority to support his contentions, we are clear in our minds that he has completely misunderstood the Treaty on this issue. We say so, because Article 152 thereof provides as follows:
"This Treaty shall enter into force upon ratification and deposit of instruments of ratification with the Secretary-General by all Partner States."
Article 153 (1) then provides as follows:
"This Treaty and all instruments of ratification and deposit of instruments shall be deposited with the Secretary General who shall transmit certified true copies thereof to all the Partner States."
36. The Treaty was signed on 30th November 1996 and there is absolutely no evidence before us that the United Republic of Tanzania or any other Partner State never ratified it or ratified it with exceptions. In fact, from records held by the Secretary General of the Community and which are available for perusal, the United Republic of Tanzania ratified the Treaty on 28th June 2000 and deposited her Instruments of Ratification on 30th June 2000.
37. While therefore, we agree that signature and ratification are two different and distinct steps in the treaty – making process and that ratification is the final consent by a Partner State to be bound by the provisions of a treaty, there is no evidence before us that Tanzania has not ratified any part of the Treaty neither has it raised any reservations to it – See *Pimentel Vs Executive Secretary G. R. No. 158088 (2005)* per the Supreme Court of Phillipines on that issue.
38. Our finding above is also in line with Article 11 of the Vienna Convention which provides that "the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance,

approval or accession or by other means if so agreed".

39. The United Republic of Tanzania having signed and ratified the Treaty is clearly bound by each provision therein and it is very surprising to hear its Chief Legal Advisor submit to the contrary.
40. More fundamentally, and in answer to what was really the gist Mr. Malata's objection, whereas it is true that a protocol is expected to be concluded for each area of co-operation including on the environment and natural resources, non-conclusion of a protocol does not oust obligations placed on a Partner State by the Treaty itself. Article 151 with regard to protocols states as follows:

"(1) The Partner States shall conclude such protocols as may be necessary in each area of co-operation which shall spell out the objectives and scope of the institutional mechanism for co-operation and integration."

(2) ….

(3) Each protocol shall be subject to signature and ratification by the parties thereto."

41. In the context of the present Reference ,Chapter Nineteen of the Treaty is titled "Co-operation in Environment and Natural Resources Management", and in that regard, there is general agreement that a protocol has been concluded to operationalise these areas of co-operation between Partner States in the EAC and at the 26th Council of Ministers meeting held between 19th – 26th November 2012, the United Republic of Tanzania was directed to ratify that Protocol and deposit the instruments of ratification with the Secretary General by 15th December 2012. It is unclear whether it did so but, does that fact alone render all the provisions of Chapter Nineteen inoperable until the Protocol is ratified by all Partner States?
42. Mr. Malata gave us no authority to support his arguments in that regard, neither have we found any such authority. We understand Article 151 (4) of the Treaty to be saying that "the Annexes and Protocols to [the] Treaty shall form an integral part of the Treaty" and by its very nature, a protocol under Article 151 (1) of the Treaty spells out the objectives and scope of, and institutional mechanisms for co-operation and integration but failure to enact a protocol does not oust the obligations placed on a Partner State by clear and unambiguous provisions in the body of the Treaty. We make this categorical point because Chapter Nineteen is as binding on Tanzania as to other Partner States with or without a protocol in that regard.

It is our finding therefore that for the above reasons the first objection must fail and is accordingly overruled.

43. The second and third limbs of the preliminary objection are inter-related and shall be determined as one for reasons that both are premised on the argument that the Applicant has no locus standi to institute a reference premised on alleged violations of International Conventions and Declarations on the environment and natural resources and consequently the Applicant is in the wrong forum.
44. The objection speaks for itself but as can be seen above, the Applicant has alleged violations of the provisions of the African Convention on Conservation of Nature and Natural Resources, 2003, the Rio Declaration, the Stockholm Declaration and the United Nations Convention on Biodiversity. In that regard, Mr. Malata submitted that the Applicant has no *locus standi* to enforce those Declarations and Conventions and more specifically, enforcement of their provisions cannot be done

before this Court.

45. Mr. Kanchory's answer to the above arguments, was that Articles 27 and 30 of the Treaty when read together, would show that whereas the principal mandate of this Court is to determine whether any Act, regulation, directive, decision or action of a Partner State is unlawful and an infringement of the Treaty, the choice of the word "unlawful" would extend to contravention of any law binding on a Partner State including International Conventions and Declarations.
46. This Court was recently confronted with a similar question in the case of *Democratic Party vs Secretary General, East African Community and 4 Others, EACJ Reference Non. 2 of 2012*. In that case, the Applicant had sought orders inter alia that a declaration ought to be made that failure by some of the Partner States to accept the competence of the African Court in line with Articles 5 (3) and 34 (6) of the Protocol to the African Charter on Human and People's Rights and all other International Human Rights Conventions, is an infringement of Articles 5, 6, 7 (c), 126 and 130 of the Treaty as well as Articles 1, 2, 7, 13, 26, 62 and 66 of the African Charter on Human and People's Rights and the Vienna Convention on the Law of Treaties, 1969.
47. In dismissing that Reference, this Court stated partly as follows:
"But that is not the end of the matter because we heard the Applicant to be saying that failure to deposit the declarations aforesaid is a violation of Articles 6(d), 7 (2), 126 and 130 of the Treaty. Article 126 provides for the scope of co-operation in legal and judicial affairs while Article 130 provides for relations with other regional, international organizations and development partners. Article 130 (2) specifically states that:
"2. The Partner States reiterate their desire for a wider unity of Africa and regard the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community."
Article 130 (1) also provides that:
"1. The Partner States shall honour their commitments in respect of other multinational and international organizations of which they are members."
48. Reading the above Articles together, it is obvious to us that where a Partner State "fails to honour commitments" made to other international organizations, with appropriate facts placed before the Court, a decision to ensure compliance thereof may be made in favour of a party that fits the description in Article 130 (4)and which has a genuine complaint in that regard. In fact, the Organisation of African Unity (now the African Union) , the United Nations and its agencies and other international organizations, bilateral and multi-lateral development partners interested in the objectives of the Community are specifically named in that regard and Partner States are implored to "accord special importance to co-operation with those agencies" and we have no doubt that in appropriate circumstances, a case may be made if a Partner States acted to the contrary.
49. In stating the above, the only rider is that this Court cannot purport to operate outside the framework of the Treaty and usurp the powers of other organs created for the enforcement of obligations created by other instruments including the African Charter and Protocol."

50. We reiterate the above holding and in applying it to the instant Reference, the gravamen of the Applicant's case is not alleged violations of the cited International Declarations and Conventions per se, but infringement of Chapter Nineteen of the Treaty, a matter well within the mandate of this Court and the Applicant has locus standi under Article 30(1) of the Treaty to bring proceedings in that regard. By our Ruling of 29th August 2011, we determined the issue of jurisdiction of this Court and the Appellate Division upheld our reasoning and we see no reason to revisit those issues.

    Without saying more, the second and third limbs of the objection must both fail.

51. Having disposed of the preliminary objections by the Respondent, we shall here below determine each of the issues that were framed as points of disagreement between the Parties.

    Issue No. 1 - Whether the Respondent intends to upgrade, tarmac, pave, realign, create and/or commission a trunk road officially known as the Natta-Mugumu-Tabora B-Kleins Gate -Loliondo Road also known as the North Road or Serengeti Super Highway across the northern wilderness of the world famous Serengeti.

52. Looking at the above issue and based on the evidence submitted by both Parties, we consider it necessary to address the same together with issue No. 2 which is worded thus;

    Issue No. 2 – Whether the disputed road exists and is in use

    52. In that regard, two positions were placed before us; the first is by the Applicant which has alleged, through the evidence of Mr. Kuloba, that there is indeed a road traversing the Serengeti and in his own words (page 3 of his report):

    "The road cuts across the park without particularly serving any population until the exit; there is only one tourist lodge located off the road. Currently, Klein's gate is an entry gate while Tabora B is not used as an exit gate, but rather for administration purposes. In its current form for the 53 kms, the road starts off at Klein's gate through a distance of about 3 km as gravel with a single culvert on that stretch, then for the rest of the distance of about 48 kms [it] is purely an access trail made and used by four wheel drive vehicles; the distance of about 2 km as you approach Tabora B is minimally gravel. The road is currently used for tourism and administration purposes only but the user will change to public and commercial once the construction is undertaken. In addition, the road is currently managed by TANAPA but when its constructed it will be managed by TANROADS."

53. The second position was that of the Respondent who relied on the evidence contained in the report prepared by M/S Inter-consult Ltd where at page 1 thereof, the following statement is found:

    "The project will entail upgrading of approximately 179 km of the existing gravel/ earth road from Natta-Mugumu-Loliondo to bitumenstandard."

54. Further, under a sub-heading titled, "Issue of the Road Passing in the Serengeti National Park", it is stated thus:

    "A section of the Natta-Mugumu-Loliondo road from Tabora B – Klein's Gate for 54 kms is proposed to pass through the Serengeti National Park. The proposal to pass this road section in the Serengeti National Park has caused a number of protests from a number of environment based groups on the grounds that it will have harmful

effects to the wild animals in the Serengeti…"

55. Further, in his evidence, Mr. Makwilema stated as follows:
"The section of 53 kms that is intended to be upgraded by the Government to gravel status will mainly cater for administrative and tourism activities for the Park. For tourism, the road will be used by tourists going to more than five permanent tented camps situated along the road including Sayari, Kurya Hills, Bush Top, Lamai, Mara River Tented Camps. The road is also intended to service tourists going to more than twenty special camp sites, especially during the wildebeest migration period. There is also one permanent tented camp near Kleins Gate (known as Kleins Tented Camp). There is no lodge at the moment, either at the entry gate or at the Tabora B gate or within the Park along the 53 kms section."
56. Without belabouring the point and looking at Issues Nos. 1 and 2 again, there is little difference in the evidence presented by both the Applicant and Respondent because, save for the contradictions in the Respondent's case whether the whole stretch of 179 kms was to be upgraded to bitumen or gravel standards, one fact is obvious; namely that, the Respondent intends to upgrade the Natt-Mugumu-Tabora B – Kleins Gate-Loliondo Road from its current earth status. There is no evidence that it intends to re-align it but certainly upgrading involves construction and commissioning thereof.
57. The answer to both issues in the totality of all evidence placed before us can only therefore be in the affirmative.

Issue No. 3 – Whether the proposed action infringes the provisions of the EAC Treaty and International Instruments

58. We have elsewhere above set out the respective arguments by the parties on this issue and we also note that while prayer (i) in the Reference uses the word 'action', both parties at the Scheduling Conference used the words 'proposed action' as regards the road project. We see no reason to worry about the semantics because the issue before us is the decision to build a road across the Serengeti and we have previously ruled that we have jurisdiction to determine that issue under Article 30 of the Treaty. But for the sake of clarity, it was argued by the Applicant that the Respondent's decision and action aforesaid were in violation of Articles 5(3)(c), 8(1) (c) and 111 (2) of the Treaty. These Articles provide as follows:

Article 5(3) (c);

"3. For purposes set out in paragraph 1 of this Article, and as subsequently provided in particular provisions of this Treaty, the Community shall ensure:

a) …….
b) …….
c) the promotion of sustainable utilization of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States."

Article 8 (1) (c);

"1. The Partner States shall:

(a) …
(b) …
(c) co-ordinate through the institution of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community."

Article 111(2);

"2. Action by the Community relating to the environment shall have the following objectives:

a) To preserve, protect and enhance the quality of the environment;
b) …
c) …
d) …"

59. To put matters into proper perspective, both parties agree that construction of the road would have negative impacts on the Serengeti environment and ecosystem. In addition, both produced documents sharing the concerns expressed by UNESCO as to the project. For example, in its Report of the Decisions Adopted by the World Heritage Committee of UNESCO at its 34th Session in Brasilia, 2010 the Committee stated in Decision 35 COM 7B.5 that, it: "expresses its utmost concern about the proposed North Road which will dissect the northern wilderness area of the Serengeti over 53 kms, [and] considers that this proposed alignment could result in Irreversible Damage to the property's outstanding Universal value and therefore urges the State Party to submit an Environmental Impact Assessment to the World Heritage Centre before a decision to implement the project is taken."
60. The same Committee in Decision 36 COM 7B.6 stated as follows, under the heading "Serengeti National Park (United Republic of Tanzania) (N156);"

"The World Heritage Committee,

i. Having examined Document WHC – 12/36.COM/7B;
ii. Recalling Decision 35 COM 7B.7, adopted at its 35th Session (UNESCO, 2011);
iii. Welcomes the substantial efforts made by the State Party to implement the recommendations of the 2010 mission as requested by the World Heritage Committee at its 35th Session, and encourages the State Party to continue its efforts to fully implement them;
iv. Notes the commitment of the State Party to solicit funding for a Strategic Environment and Social Assessment (SEA) for the northern Tanzanian road and calls on donors to provide funding for this study as well as the southern alignment, which will avoid Serengeti National Park;
v. Also welcomes the announcement by the State Party that the planned railway linking the coast via Musoma to Kampala will not traverse the property but will go south of it.
vi. ….
vii. ….
viii.…."

61. From the foregoing and from the evidence on record, there is no doubt that the United Republic of Tanzania had initially intended to construct a bitumen road from Natta through Mugumu to Tabora B Gate at Serengeti and 53 kms of it would have had to go through the Park to Kleins Gate and onwards to Loliondo. The intention, according to the report by Inter-Consult Ltd, was to "provide an all-weather road linking the district town of Mugumu and Loliondo to the regional capitals of Musoma and Arusha and thereby stimulating socio-economic growth of 2.3 million people living in the districts of Serengeti and Ngorongoro whose respective capitals

of Mugumu and Loliondo will be served by bituminized road".

62. The report is dated 17th January 2011 and took into account the protestations by environmental based groups, including the Applicant which is specifically mentioned in the following words:
"The intention by the African Network for Animal Welfare (ANAW) to refer the matter to the East African Court of Justice seeking the Government of Tanzania to be restrained from upgrading the Natta-Mugumu-Loliondo road is yet another such protest."
63. Further, that "while protesters are entitled to pursue their interests, their opposition to the proposed route ignores the socio-economic needs of 2.3 million people living in Serengeti and Ngorogoro districts to whom the project is intended."
64. The same report, however, acknowledges that the road would have grave negative impacts and to mitigate the said negative impacts of the project relative to Serengeti, the 53 kms stretch of the proposed road that passes through Serengeti should be constructed to "gravel standard only".
65. In addition, three gates between Tabora B and Kleins Camp should be operated by TANAPA "to curb speed and avoid animal kill along this sensitive section".
66. The above facts would lead to the obvious conclusion that the initial proposal by the Government of the Republic of Tanzania was that the road was intended to serve the general public and tourists in large numbers. Further, the said road would be bituminized including the 53kms that would be within the Serengeti. Consequently, upon the foregoing, we pause here to ask the following: Was that action proper, lawful and within the obligations imposed on Tanzania by Articles 5(1) (c), 8(1) (c) and 111 (2) of the Treaty?
67. The experts called by the Parties have differed on the consequences of negative impacts but agree on all the negatives. Happily for us, UNESCO, a renowned world body and objective on the subject has given us the answer to the question. Elsewhere above, it stated that:
    (i) The proposed alignment of the road could result in irreversible damage to the property's (Serengeti's) Universal value;
    (ii) It supports a Strategic Environmental and Social Assessment which would include a southern alignment which would avoid the Serengeti.
68. In the Inter-Consult Ltd report and in the evidence of Ms. Zafarani Madaya, and clearly acting on both pressure from environmentalists, including the Applicant as well as UNESCO, the Government of the Republic of Tanzania has not moved to the second stage of the project i.e the preparation of a detailed engineering design and a comprehensive Strategic Environmental and Social Assessment. It has also not moved to seek the input of TANROADS and the National Environmental Management Commission neither has the approval of the Minister in-Charge of the Environment been obtained. The road project in fact, although conceptualized in 2005 and the second stage commenced in 2009, has not moved at all and partly also because of the pendency of this Reference.
69. With that background, the Government of the Republic of Tanzania as can be seen from the UNESCO reports, seems to have taken into account the concerns raised on the negative impacts on the environment and from evidence before us, has not

started construction of the proposed road.

70. But, that is not the end of the matter because the Applicant is seeking declaratory and injunctive orders that the project as initially conceptualized and if implemented would have grave and irreparable negative consequences to the Serengeti and that fact alone is sufficient to warrant a finding that the Respondent is in violation of the Treaty.
71. On that aspect of the case it is difficult to fault the Applicant because that is precisely what UNESCO specifically told the Respondent and also specifically suggested that the road should be constructed so as to avoid the Serengeti and certainly that is what caused M/s Interconsult Ltd to propose that the 53kms road should be upgraded to gravel standards only as opposed to the initial proposal to upgrade it to bitumen standard.
72. The point here is that all parties now agree that if the initial proposal is implemented, then the adverse effects would not be mitigated by all the good that the road was intended to bring to the 2.3 million people residing in the affected areas of Mugumu-Loliondo.
73. Turning back, therefore, to the obligations imposed on Tanzania by Articles 5(3),8(1)(c),111(2) as well as 114(1) of the Treaty, there is no doubt that if implemented, the road project as initially conceptualized, would be in violation of the Treaty to that extent only.
74. Regarding alleged breaches of the cited International Conventions and Declarations, once we have found as we have done above, our mandate would have been exercised and we see no reason to visit obligations in respect of other international instruments save reiterating our decision in Democratic Party (supra). But having said so, we must also note that while the Applicant mentioned those instruments in its pleadings and submissions, it failed to show what parts of them were violated and in fact it was the Respondent who spent considerable time in his submissions in a bid to show that there were no violations of any of those International Instruments.
75. In the circumstances, we can only answer the issue framed above partly in the affirmative and will make appropriate and necessary orders at the end of this Judgment.

Issue No. 4 – Whether the Applicant is entitled to the prayers sought

76. We have already indicated that prayers (ii) and (iv) of the Reference were abandoned.
77. In regard to prayer (i), we find that whereas the Government of the Republic of Tanzania is lawfully entitled to construct roads within its territory, where it fails in its obligations to the conservation and protection of the environment within the meaning of Articles 5(3) (c), 8(1) (c) and Article 111(1) as well as Article 114(1), then this Court can properly make declarations in that regard. In the instant Reference, it is obvious that while its actions had the potential to cause irreversible damage to the Serengeti environment and ecosystem, once UNESCO and other bodies, including the Applicant intervened, it did not proceed with the road project and instead retreated to the drawing board and is conducting further studies on it. Whatever orders we must make therefore must be preventative and geared towards restraining it from pursuing the bituminized road project and secure the Serengeti ecosystem and any roads in the Serengeti should generally be used by wildlife, tourists and Park

administrators and not the general public because of the attendant risks associated with such use.

78. However and flowing from the above, there is no doubt that if is allowed to proceed with the road project as earlier conceptualized ,it would be in breach of the above Articles of the Treaty.
79. The necessary orders to make in that regard will shortly become apparent.
80. On prayer no. (iii), the Applicant seeks to restrain the Respondent from maintaining any road or highway across the Serengeti National Park. That prayer must necessarily be determined together with prayer no. (v) where the Applicant seeks orders to restrain the Respondent from removing or relieving itself from obligations imposed by UNESCO with regard to the intended road. Having anxiously considered the matter and as can be seen above, we have found that all evidence points to the fact that if the road project is implemented as originally intended, then following UNESCO's findings it could have an irreversible negative impact on the Serengeti environment and ecosystem. While this view is not expressly shared by the Respondent, we are persuaded by those findings. In fact, the Respondent seemed to have taken note of that fact and has effectively suspended the project and that is an admission that it has realized the error in the initial decision. His own consultant also gave a long list of possible negative impacts and which tally with those given by the Applicant.
81. We are therefore convinced that if the road project is implemented as originally planned, the effects would be devastating both for the Serengeti and neighbouring Parks like the Masai Mara in Kenya and it behoves us to do the right thing and stop future degradation without taking away the Respondent's mandate towards economic development of its people.
82. In the event, we find that prayer (iii) is practical and proper in the totality of our findings above and to ensure that the United Republic of Tanzania as a Partner State stays within its obligations under the Treaty. However the final orders to be made will be tailored so as not to tie its hands in programmes that it has designed for its people. This is within our mandate under Rule 68(5) of the Court's Rules of Procedure.
83. As to costs, we find that the litigation was in the wider public interest and for the sake of a sustainable future for the environment. The Applicant has no direct benefit in our final orders and so each party shall bear its own costs.

Conclusion

84. This Reference raises issues that are today the subject of wide debate across the world, including; environmental protection, sustainable development, environmental rule of law and the role of the State in policy formulation in matters relating to the environment and natural resources. In addition, the role of the Court in balancing its interpretative jurisdiction against the needs of ensuring that Partner States are not unduly hindered in their developmental programs has come to the fore. All these issues must however be looked at from the one common thread running through the Reference viz. the need to protect the Serengeti ecosystem for the sake of future generations and whether the road project has potential for inflicting irreparable damage to the environment. The damage will be irreversible and we have already

ruled on that subject based on the evidence before us and no more. And we have also restrained ourselves from merely approving the decision of the United Republic of Tanzania because it may be a popular decision with its policy makers-See Society for the Protection of Silent Valley vs Union of India 1980 Kerala HC. Whatever orders we must make therefore should be preventative and for obvious reasons; the environment, once damaged is rarely ever repaired.

85. Having so stated, the final orders that are appropriate in the unique circumstances of the matter before us are the following:
    i) A declaration is hereby issued that the initial proposal or the proposed action by the Respondent to construct a road of bitumen standard across the Serengeti National Park is unlawful and infringes Articles 5(3)(c),8(1)(c),111(2) and 114(1) of the Treaty.
    ii) A permanent injunction is hereby issued restraining the Respondent from operationalising its initial proposal or proposed action of constructing or maintaining a road of bitumen standard across the Serengeti National Park subject to its right to undertake such other programmes or initiate policies in the future which would not have a negative impact on the environment and ecosystem in the Serengeti National Park.
    iii) Each party shall bear its own costs.

It is ordered accordingly.

* * * *

East African Court of Justice – First Instance Division
Application No 1 of 2010

In the matter of a Civil Appeal No 1 of 2009

The Attorney General of Kenya And Professor Peter Ayang Nyong', Abraham Kibet Chepkonga, Fidelis Mueke Nguli, Hon. Joseph Kamotho, Mumbi Ngaru, George Nyamweya, Hon. John Mumyes, Dr. Paul Saoke, Hon. Gilbert Ochieng Mbeo, Yvonne Khamati, Hon. Rose Waruhiu

Mary Stella Arach-Amoko, DPJ
March 5, 2010

Extension of time for service of a Memorandum and Record of Appeal -Whether a Single Judge or the First Instance Division had jurisdiction and application concerning an appeal.

Rules: 4, 78(2) 80,82,83, 90 (1), 114, Sixth Schedule of the East Court of Justice Rules of Procedure, 2010

Upon the completion of Reference No 1 of 2006 costs were awarded to the Respondent and their bill of costs was taxed in favour on 18th December 2008. Being dissatisfied the Applicant belatedly sought to challenge the taxation however the application was heard and dismissed by the Principal Judge on 16th October 2009. Subsequently, the Applicant filed a Memorandum of Appeal and a Record of Appeal within the requisite time in the Appellate Division Registry however service was not done within seven days as prescribed in the court rules. Through this application, the Applicant sought orders of an extension of time, in the First Instance Division, for serving the Memorandum of Appeal and the Record of Appeal claiming that the delay was occasioned by the Christmas vacation and late receipt of information.

The Respondents contended that the application should have been filed in the Appellate Division.

Held:
The primary and purpose of the Court Rules is to regulate and to ensure the orderly conduct of proceedings before the Court. Once an appeal has been lodged in the Appellate Division under Rule 86, the matter ceases to be within the jurisdiction of the First Instance Division. Any applications thereafter become matters for the jurisdiction of the Appellate Division and the First Instance Division ceases to have jurisdiction over them. Only the Appellate Division could extend time thus the application was struck out.

Cases Cited:
The East African Law Society And Others v. The Attorney General of Kenya And Others, EACJ Reference No. 3 of 2007

Ruling

1. This is an application by the Attorney General of Kenya (hereinafter referred to as the Applicant) brought by Notice of Motion under Rule 4 of the Rules of this Court for orders that:
   i. This matter be certified urgent and be heard on priority basis.
   ii. The time for serving the Memorandum of Appeal and the Record of Appeal is extended to enable the applicants serve the Memorandum of Appeal and Record of Appeal out of time.
   iii. In the alternative, the Memorandum of Appeal and the Record of Appeal filed and served on the Respondents on the 13th of January 2010 be deemed as dully served.
2. The grounds of the application are that: a) The delay in serving the Memorandum of Appeal and Record of Appeal was occasioned by hardship due to Christmas Vacation. b)The delay in serving the Memorandum of Appeal and the Record of Appeal was due to the fact that the counsel conducting the matter for the Applicant did not receive information that the documents had been executed by the Registrar until the 6th of January 2010, two days after the expiry of the period for service.
3. The application is supported by two affidavits sworn by Mr. Anthony Oteng'o Ombwayo, Senior Principal Litigation Counsel, on the 12th January and the 19th February 2010 respectively.
4. Ms Judith Sijeny, one of the Respondents' counsels swore an affidavit in reply on behalf of the Respondents on the 4th February 2010 opposing the application. On the same date, Counsel for the Respondents also filed and served a notice of objection notifying the Applicant of his intention to raise the following objections during the hearing of the application:
5. "1. That the appellant ought to have filed his application before the Court of Appellate Division and not before the Court of First Instance Division. 2. The appellant's motion lacks merit and must fail with costs to the Respondent." On record is another affidavit sworn by one Boniface Namulu Ogoti, a Clerk of this court, on the 2nd February, 2010, on the instruction of the Registrar.
6. The background to the application is rather long and checkered. It began with *Reference No. 1 of 2006, Professor Peter Anyang Nyongo And Others vs The Attorney General of Kenya And Others.* This Court decided that Reference in favour of Professor Anyang Nyongo And Others and ordered the Attorney General to pay them inter alia, the taxed costs of the Reference. Consequently, Professor Anyang Nyongo And Others filed their bill of costs before the Registrar vide Taxation Cause No. 6 of 2008. The Registrar taxed it and allowed $ 2, 033,164.99 in his Ruling delivered on the 19th December 2008.
7. The Attorney General was dissatisfied with the learned Registrar's decision and wished to challenge it under Rule 114 which provides that: "Any person who is dissatisfied with a decision of the taxing officer may within 14 days apply for any matter to be referred to a single judge of the Court whose decision shall be final".
   By the time the Attorney General took the decision to refer the matter before a single judge of the Court under the provisions of Rule 114 above, however, the 14 days

period had long elapsed.

8. Consequently, on the 3rd April 2009, the Attorney General filed Application No. 4 of 2009, between the same parties, under Rule 4 of the Rules of Court for extension of time to file the said reference.
9. That application was heard by Hon. Justice Busingye the Principal Judge of the Court and a judge of the First Instance Division who delivered his Ruling on the 16th October 2009, dismissing the application, again with costs to Professor Anyang' Nyongo And Others.
10. The Attorney General was once again dissatisfied with that Ruling and on the 29th October 2009, a Notice of Appeal was lodged on his behalf under Rule 78(2) in the Court's Registry indicating his intention to appeal against the said decision. The Notice of Appeal was lodged within the 14 days prescribed by Rule 78(2) for lodging a Notice of Appeal.
11. On the 28th December 2009, Counsel for the Attorney General lodged in this Court's Registry in the Appellate Division a Memorandum of Appeal and a Record of Appeal. These documents were also lodged within the 60 days prescribed by Rule 86. The appeal was registered in the Appellate Division as Civil Appeal No. 1 of 2009.
12. The problem arose in service of the said documents on the Respondents. Rule 90 (1) provides that:

    "(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies of them on each respondent who has complied with the requirements of Rule 80."
13. Rule 80 requires every person on whom a notice of appeal has been served, to lodge in the appropriate registry and serve on the intended appellant, a full address for purposes of service within fourteen days after service of the notice of appeal. This is not in issue.
14. It is also not disputed that the Applicant's Counsel did not serve the memorandum and record of appeal on the Respondents within the seven days prescribed under Rule 90(1). According to learned counsel for the Applicant, Mr. Ombwayo, the documents were not served on the Respondents until 13th January 2010. By then, the seven days prescribed by Rule 90(1) had long elapsed.
15. Mr Ombwayo apparently realized this irregularity, and has filed the instant application in a bid to rectify it by the orders sought herein. At the hearing of the application before me on the 17th February 2010, Mr. T. J. Kajwang, learned Counsel for the Respondents raised two issues for determination by court, namely:

    1)Whether the First Instance Division has the jurisdiction to determine this application. 2) Whether the applicant has met the conditions for extension of time. Submissions followed the same order.

    Issue No. 1: Whether the First Instance Division has the jurisdiction to determine this application.

    Mr. Kajwang contended that: The Applicant should have filed the instant application in the Appellate Division and not in the First Instance Division. The confusion seems to have arisen from Rule 83 which is entitled "Application to First Division first", but Rule 83 borrows from Rule 82 because Rule 82 talks about "Applications for leave to appeal", and Rule 84 gives the form of application to the Court.

16. Rule 83 does not apply to applications for extension of time under Rule 4. The Rules are compartmentalized into different sections dealing with each of the two Divisions of the Court. Rule 83 is in Part C which deals with Proceedings before the Appellate Division. It exists because there are instances in which there are applications which can be made to the First Instance Division because an appeal has not been instituted or filed. Once that is done, then there is a proper appeal before the Appellate Division which is the Court which has the jurisdiction and direct control over the appeal in both procedural and substantive law.
17. Rule 83 is titled "Applications to First Instance Division First. Whenever application may be made either to the Appellate Division or to the First Instance Division, it shall in the first instance be made to the First Instance Division".Rule 82, the rule immediately before this Rule is titled "Application for leave to appeal". Rule 82(2) says "Where an appeal lies with the leave of the Appellate Division, application for leave shall be made in the manner prescribed in rules 83 and 84 within fourteen days of the decision against which it is desired to appeal or, where an application for leave has been made to the First Instance Division and refused, within fourteen days of that refusal."
18. Rule 84 gives the form of application to the Court, which is by Notice of Motion.
    It is appears to be clear that Rule 83 borrows from Rule 82 because Rule 82 talks of "Applications for leave to appeal", and it says that where there is that application, then Rules 83 an 84 come into play, and it makes sense because where an applicant wishes to appeal with the leave of court, that application may be made to both the divisions. Rule 83 explains clearly that because it can be made to both divisions, it should be made first to the court of First Instance Division. That is the only sense in which Rule 83 exists in this procedure. It does not apply to applications under Rule 4 or to any other applications other than applications under Rule 82.
19. If an applicant served or filed a Notice of appeal out of time, and were to come to court for extension of time, it is probable that he could approach the Court of First Instance Division as a result of Rule 83 because an appeal has not yet been filed or instituted. But when you consider Rule 86 which is "Institution of appeals", sub-section 1 says: (1) Subject to the provisions of Rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged— "(a) a memorandum of appeal, in quintuplicate; (b)the record of appeal, in quintuplicate; (c) the prescribed fee; and (d) security for the cost of appeal."
20. Once this is done, then there is a proper appeal before the Appellate Court which is under the direct jurisdiction and control both in matters of substantive law and procedural law before the Appellate Court. An Applicant would not therefore confuse both courts there. Where an appeal has been properly filed, then he cannot come to the court of First Instance to determine procedural issues regarding an appeal which is substantively and properly filed. Once the Attorney General did what he did under Rule 86, there was an appeal properly filed within time, and having done that, he evoked the jurisdiction of the Appellate Court Division and the Appellate Division therefore exercises a competent jurisdiction both on substantive law and on procedural law.

21. Rule 83 is not one of those Rules which deal with the First Instance Court, unless the applicant is coming to court for leave to appeal, or leave for extension of Notice of appeal before filing or instituting an appeal. Once an appeal has been instituted, the Court of First Instance is *functus officio* in respect of those issues and the Appellate Court takes over the jurisdiction to determine both the procedural issues and substantive issues. If Rule 83 were to be construed otherwise, it would conflict with Article 23 of the Treaty because after the amendments, Article 23 has created the two Divisions and in paragraph 3 it says that the First Instance Division shall have jurisdiction to hear and determine at the first instance, subject to a right of appeal to the Appellate Division under Article 35 (A), any matter before the Court in accordance with the Treaty. So there is a right of appeal and that right of appeal is exercised when an applicant has evoked Rule 86, and once there is an appeal properly instituted, it would conflict with the jurisdiction allocated by Article 23 of the Appellate Division. It says "An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the appellate division on points of law, grounds of jurisdiction, or procedural irregularity".
22. The decision that the applicant seeks to appeal from is from the Principal Judge and is on grounds of procedural irregularity. This application also touches on procedural irregularity. If one construed Rule 83 in a way that would allow the First Instant Division to exercise jurisdiction, it would conflict with Articles 23 and 35 (A) of the Treaty.
23. The only jurisdiction left for the Court of First Instance is found in Rule 59 (3), since the applicant is dissatisfied with the decision of a single judge of the First Instance Division in an application for extension of time. The matter would now have to be placed before a full bench of three judges of the First Instance Division, and not by an appeal to the Appellate Division.
24. The application is misconceived in that Mr. Ombwayo filed it in the First Instance Division. He should have filed it in the Appellate Division under Rule 4 and the Appellate Division would exercise a competent jurisdiction to extend time. The rules of court need to be properly adhered to and need to be properly exhausted for the applicant to get the remedy he seeks from the Court. The application ought to fail even for this reason alone.
25. Mr. Ombwayo's response is that:
    He filed the application in the proper Division of the Court. What is before court is an application within the appeal that was filed on 28th December 2009. The appeal was filed in the Appellate Division. Rule 4 provides that the court may for sufficient reason extend the time limited by the rules or by any decision of the court for doing any act authorized or required by these rules, so any Division of the Court has the jurisdiction to extend time. One might file an appeal in the Appellate Division, but request the First Instance Division to extend time within which to file the appeal.
26. Rule 4 provides that you can file the application either in the First Instance Division or the Appellate Division, but under Rule 83, if you can file the application in both Divisions, then you should file the application in the First Instance Division first. This Court still has jurisdiction to entertain the application. Rules 4 and 83 ought to be read with the interpretation section Rule 2, where "Court" is defined as "the

East African Court of Justice established under the Treaty and includes any division of that Court and a single judge exercising any power vested in that Judge sitting alone".

27. There is only one Court with two divisions under the Treaty, not two. So, whatever decision comes from the First Instance Division or the Appellate Division, those are decisions of the Court. Rule 83 provide that you first make your application to the First Instance Division. Therefore, Rule 83 should be read with Rule 4. Since Rule 4 provides that you can file the application in either Division of the Court, it means that you can file the application in either Division of the Court, but you commence your application in the First Instance Division.
28. Rule 59 is discretionary, one can choose to go by Rule 59 by filing a reference to full bench, but that does not take away the right of appeal under Rule 77. Under Rule 77, the applicant has two options, to refer the matter to a full bench or to appeal. The applicant has opted to appeal because under Rule 77, one can appeal on points of law against the decision of a single Judge. Both rights are concurrent. You can refer the matter to a single Judge, a full bench or institute an appeal.
29. The fact that Part C deals with appeals does not pre-empt the application of Rule 4 because if you look at Part C section 18 which deals with the proceedings in the Appellate Division, there is no distinct provision for extension of time in the Appellate Division. The provisions for extension of time is in section 1 Part A which is under the General section and that part is applicable to all parts. Rule 4 is within this general section. Therefore, under Rule 4, each division can extend time.
30. Mr. Ombwayo compared the Rule to the provisions in the rules of Kenya, where the Court of Appeal can grant leave to appeal and also the High Court can grant you the same leave. He argued that he is not asking for any action to be done in the Appellate Division, he is only asking to serve a record of appeal, which is a step provided for by law. The objection should be therefore be overruled.
31. After careful consideration of the submissions by both learned counsel, and perusal of the Rules, this is my finding and decision: This issue basically revolves around the interpretation of Rules 4 and 83 of the rules of this Court. The Vienna Convention on the Law of Treaties sets out international rules of interpretation of treaties. Article 31(1) reads- "1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their full context and in light of its object and purpose."
32. Article 32 provides that where, in interpreting a treaty, the application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse would be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion.
33. This rule of interpretation has been adopted by this Court over the years in a number of references including for instance, *Ref. No. 3 of 2007, The East African Law Society And Others versus The Attorney General of Kenya And Others at pages 23 to 24*. These rules are applicable to the East African Court Of Justice Rules of Procedure, 2008, by virtue of the fact that the said Rules are made by the Court in exercise of the powers conferred on the Court by Article 4 of the Treaty for the Establishment of the

East African Community. It is therefore part and parcel of the Treaty.

34. It is common knowledge that initially, the Court was one, but the Treaty was amended and two Divisions were created under Article 23, namely, the First Instance Division and the Appellate Division. Consequently, the Rules were revised by the Court in 2008 to conform to the Treaty amendments restructuring the Court. The rules are indeed divided or compartmentalized into four Parts namely, A, B, C and D, entitled "General Provisions",
"Institution of Proceedings In First Instance Division," "Proceedings In The Appellate Division," and "Miscellaneous Provisions," respectively.
35. Part A has sections I to V entitled "General," "Registrar and Registry", "Documents", "Appearance", "Court Vacation and Holidays", respectively. Rule 4 is found section I of Part A entitled "General". Rule 4 provides that: "A Division of the Court may for sufficient reason extend the time limited by these Rules or by a decision of the Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to such time so extended".
36. From the definition of "Court" under Rule 2 that is "…..the East African Court of Justice established under the Treaty and includes any division of that Court and a single Judge exercising any power vested in that Judge sitting alone", it would appear on the face of it that under Rule 4, extension can be granted by either division of the Court and applications can therefore be made in either division as submitted by Mr. Ombwayo.
37. Taking into account the general principles of interpretation enunciated in Article 31 of the Vienna Convention, however, it is my view that Rule 4 must be interpreted not only in accordance with its ordinary meaning, but also in its context and in light of its objective and purpose. Primarily, one has to take into account the objective of the Treaty and of the Rules as a whole.
38. It is gainsaid that the primary objective and purpose of the Rules like any other Rules of procedure, is to regulate and to ensure the orderly conduct of proceedings before the Court as established by the Treaty. The object and purpose of the Amended Rules is to "revise the rules of procedure to conform to the Treaty amendments restructuring the Court".
39. Article 23 (2) and (3) of the Treaty reads: "2.The Court shall consist of a First Instance Division and an Appellate Division. 3. The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty."
40. Article 35 A provides that: "An appeal from the judgment or order of the First Instance Division of the Court shall lie to the Appellate Division on- (a)points of law (b)grounds of lack of jurisdiction; or (c)procedural irregularity".
41. The interpretation by Mr. Ombwayo is that since Rule 4 provides that you can file the application for extension of time either in the First Instance Division or the Appellate Division, then Rule 83 comes into play because it provides that you begin with the First Instance First.

42. With much due respect to Mr. Ombwayo, if this interpretation were to be accepted, it would lead to a result that is manifestly absurd and unreasonable and which is likely to lead to total confusion and uncertainty in the conduct of proceedings before the Court in that even after an appeal has been lodged and is lying before the Appellate Division as in the instant case, a single judge of the First Instance Division can extend time in the Appellate Division. This could not have been the object and purpose of Rule 4 let alone 83.
43. Further, and of equal importance is the fact that the decision the Applicant seeks to appeal from is of a single judge of the First Instance Division. As stated before, the appeal is lying before the Appellate Division. If Rules 4 and 83 were construed according to Mr. Ombwayo's interpretation, it will also conflict with the clear provisions of Articles 23 and 35A of the Treaty which created the two distinct and separate divisions of the Court and spelled out their jurisdictions. According to the two Articles the First Instance Division shall have the jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division, any matter before the Court in accordance with the Treaty. Therefore, there is a right of appeal, and that right of appeal is exercised when an applicant evokes the provisions of Rule 86 by lodging a memorandum and record of appeal in the Appellate Division and the appeal is registered and given a number, as in the instant case. The First Instance Division does not have the jurisdiction after this stage in the proceedings to entertain any application for extension of time because the matter is then squarely within the jurisdiction of the Appellate Division.
44. In any case, applications for extension of time in the First Instance Division are specifically catered for in Rule 59(2) (a) which provides that a single judge of the division can extend time as stated therein at the trial stage. The confusion by Counsel Ombwayo should not have therefore arisen in the first place in light of this provision.
45. Regarding Rule 83, that Rule is entitled "Applications to First Instance Division First". It is found in Part C of the Rules entitled "Proceedings In The Appellate Division".This part contains Rules dealing with the Appellate Division.
46. Rule 83 provides that: "Whenever an application can be made either to the Appeallate Division or to the First Instance Division it shall first be made to the First Instance Division".

    Rule 83 is allied to Rule 82, especially Rule 82(2). They concern applications for leave to appeal to the Appellate Division. This is obvious from the provisions of Rule 84 (2) which prescribes the form of application which reads: "(2) A Notice of Motion shall be substantially in the Form A in the Sixth Schedule to these Rules and shall be signed by or on behalf of the applicant."

    Form A in the Sixth schedule shows that the application is to be made in the Appellate Division.
47. It therefore very clear that this Rule applies to proceedings in the Appellate Division only. It must, however, be read together with the preceding Rules in Part C including Rule 82 which makes provision for applications for leave to appeal.
48. It is also clear that all the applications provided for under Rule 83 are in part C and are supposed to be made before the institution of the appeal. Applications that can be entertained by the First Instance Divisions there under are mainly applications

for leave to file an appeal, extension of time to file or to serve a notice of appeal, not applications for extension of time to serve a memorandum and record of appeal. Once the appeal has been lodged in the Appellate Division under Rule 86, the matter ceases to be within the jurisdiction of the First Instance Division. Any applications thereafter emanating from the instituted appeal becomes a matter for the jurisdiction of the Appellate Division. The First Instance Division ceases to have jurisdiction over them.

49. According to the Notice of motion, the Applicant lodged his appeal in the Appellate Division on the 28th
December 2009. Mr. Ombwayo has also alluded to the said appeal in his submissions. All the Applicant now seeks is an extension of time to serve the appeal on the Respondents.
50. Although Rule 4 makes provision for such applications, it is my opinion that the time can only be extended by the Appellate Division where the appeal is lying, and not the First Instance Division.
51. For these reasons, I find merit in Mr. Kajwang's objection and I hold that neither a single judge of the First Instance Division nor the First Instance Division has the jurisdiction to entertain an application of this nature. The answer to this issue also determines the outcome of the entire application since a decision made without jurisdiction is in law a nullity. I therefore need not go into the second issue, which I believe is the preserve of the Appellate Division to which the Applicant should direct his application.
52. The application is accordingly struck out with costs to the Respondents.

* * *

East African Court of Justice – First Instance Division
Application No 3 of 2010

Arising out of Reference No. 7 of 2010

Mary Ariviza and Okotch Mondoh And Attorney General of the Republic of Kenya and the Secretary General of the East African Community

Busingye Johnston PJ, Stella Arach Amoko DPJ, Mkwawa John J, Butasi Jean Bosco J, Kubo Benjamin
1, December 2010

Jurisdiction- Invoking internal laws- Preliminary objection- The principle of pacta suntservanda – The Vienna convention on the Law of Treaties

Articles: 23(1), 27(1) and 30 (1) of the EAC Treaty –Article 2(3) of the Constitution of Kenya - The Vienna Convention on the Law of Treaties.

The Applicants filed Reference No 7 of 2010 claiming that the conduct and process of a Referendum in the Republic of Kenya as well as the promulgation of the new Constitution were contrary to law, infringed the Treaty for the East African Community and should be declared null and void. They sought a temporary injunction restraining and prohibiting the 1st Respondent from receiving, tabling and or passing any legislation to implement the new constitution until the hearing and determination of the Reference.

The Respondent raised a preliminary objection claiming *inter alia* that the court had no jurisdiction.

The issue for determination was whether the Court had jurisdiction to hear and determine the application and the reference since the Constitution making process was within the sovereign power of Kenyans and dispute settlement was vested in the Interim Independent Constitutional Dispute Resolution Court.

Held:

1. The Court had jurisdiction to hear the Reference and the merit of the Applicants' claim would be determined by the Court after the hearing.
2. The Treaty, being an international treaty among three sovereign states, is subject to international law on interpretation of treaties, the main one being the Vienna Convention on the Law of Treaties. The Convention embodies the principle of *pacta sunt servanda* that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty. Thus the preliminary objection is overruled.

Cases cited:
Modern Holdings v Kenya Ports Authority EACJ Reference No.1 of 2008
Owners of Motor Vessel "Lillian" v Caltex oil (Kenya) Ltd[1989] KLR 1
Professor Anyang' Nyong'o and Others v The Attorney General of Kenya and Others, EACJ Reference No 1 of 2006

Ruling

1. This is a ruling in respect of a preliminary objection raised in the above application when it came before us for hearing on the 28th, October, 2010.
2. The brief background is as follows:
   Mary Ariviza and Okotch Mondoh the 1st and 2nd Claimants in this Application have filed a reference in this Court under Articles 5(1), 6 (c) and (d), 7(2), 8(1) (c), 27 (1), and 29 of the Treaty for the Establishment of the East African Community ("the Treaty"), Articles 1, 3, 7(1) and 9(2) of the African Charter on Human and Peoples Rights.
3. Their claim, briefly, is that the conduct and process of the Referendum as well as the promulgation of the new Constitution in the Republic of Kenya were contrary to law, infringed the Treaty for the East African Community and should be declared null and void.
   The reference is pending before this Court.
4. At the time of filing the Reference, the claimants also filed the instant application for a temporary injunction praying for the following substantive Orders:
   1) That the 1st Respondent be restrained and prohibited from receiving, tabling and or passing any legislation to implement the new constitution until the hearing and determination of this case.
   2) That any new legislation passed by Parliament to implement the new Constitution be stayed until the hearing and determination of this case.
   3) That the 2nd Respondent does commence an investigation, as provided by Article 29 of the Treaty for the Establishment of the East African Community, into the violation of the law and the Treaty by the 1st Respondent.
5. The main ground for the Application is that the 1st Respondent has begun the process of implementing the illegal Constitution by fast -tracking bills through the National Parliament to the detriment of the Claimants and, that, the Reference shall be rendered nugatory if the injunction is not granted.
6. In response to the application, Ms Wanjiku A. Mbiyu and Kepha Onyiso, learned Counsel for the 1st Respondent filed a notice of preliminary objection containing six grounds. At the commencement of the hearing they abandoned one and maintained the following five:
7. That this Court has no jurisdiction to hear and determine the reference because neither the Treaty nor any Protocol grants it jurisdiction. That under Article 2(3) of the Kenyan Constitution, jurisdiction to hear and determine issues arising from the constitution making process was vested in the Interim Independent Constitutional Dispute Resolution Court (the "IICDRC") and hence this Court's jurisdiction is ousted.

8. That under Article 60 A of the replaced Constitution, the jurisdiction to hear and determine issues arising from the Constitution - making process was vested in the IICDRC and hence this Court lacks the requisite Jurisdiction.
9. That since the Constitution making process is within the sovereign power of Kenyans and this Court is not one of the organs through which such sovereignty can be exercised, it lacks jurisdiction to hear and determine this matter.
   That the Court lacks jurisdiction to stop Parliament undertaking its legislative function.
10. Ms Wanjiku canvassed the preliminary objections. On the first one, she contended that the Court does not have jurisdiction to hear and determine the Reference as well as the Application as neither the Treaty nor any Protocol grants it such jurisdiction. She argued that Article 27 (1) gives this court jurisdiction to interpret and apply the Treaty but that the Reference as well as the present Application seeking for interim orders do not, in her view, come under the purview of Article 27(1). Equally, she contended that Article 27 (2) is not applicable in view of the fact that the jurisdiction of the Court envisaged therein is yet to be determined by a decision of the Council of Ministers of the East African Community.
11. On the second objection she submitted that Article 2 of the Constitution of Kenya provides that the validity of the constitution cannot be challenged in any forum including this Court.
12. On the third objection Ms Wanjiku contended that Section 60 (A) of the replaced Constitution of Kenya vested jurisdiction to hear and adjudicate issues pertaining to the referendum in the Interim Independent Constitutional Dispute Resolution Court (IICDRC) which was in existence and therefore this matter could not be a subject of determination by this Court.
    She did not canvass the fourth ground.
13. On the fifth objection she contended that this Court does not have jurisdiction to stop the legislative process of implementing the Constitution in Kenya because the Constitution, as the Supreme Law, is very clear on the process of its implementation. Therefore, she argued, this Court lacks jurisdiction to issue any injunctive or conservatory orders staying that process.
14. She prayed the Court to uphold the preliminary objection and dismiss the application with costs to the Respondents.
15. The 2nd Respondent was represented by Mr. Wilbert Kaahwa, Counsel to the Community. He associated himself with the submissions made on behalf of the 1st Respondent on the preliminary objection. He however made some additions.
16. First, he told the Court that under the Vienna Convention on the Law of Treaties, 1969, the Treaty for the East African Community is the "grund- norm" for the integration process and does not oust the sovereignty of the Partner States. He contended that this Court has no jurisdiction to entertain the Application and the intertwined Reference before it.
17. He referred the Court to the word "initially" used in Article 27 of the Treaty and contended that the extent of jurisdiction of the Court goes only as far as applying and interpreting the Treaty and not further.
18. Mr. Kaahwa argued that the present application is based on the claimant's dissatisfaction with the constitution making process and with the constitutional

implementation in Kenya. He told Court that the replaced Constitution established the IICDRC and vested in it exclusive jurisdiction to deal with such disputes, that it had in fact done so, a fact the applicant is aware of. He therefore contended that the proper forum to pursue dissatisfaction with the Constitution making process in Kenya was the IICDRC not this Court.

19. Regarding disputes on the implementation of the Constitution, Mr. Kaahwa argued that the new Constitution provides, in its chapter 10, judicial organs with authority to address complaints that may arise during the legislative process in Kenya.
He finally told the Court that Constitutional matters also fall in the Executive and Legislative domain of States and that there are issues of public interest and political necessity that the court ought to take into account when addressing such matters.
20. The claimants were represented by Mrs. J.W.Madahana and Mr.Luka Sawe. Mrs. Madahana made the reply. We observe at this point that she did not respond to the matters raised in the preliminary objections in the order they were raised or in any ascertainable order. Be that as it may, the foregoing is what we were able to discern from her lengthy submissions.
21. First, she contended that the preliminary objection is misconceived because issues raised in preliminary objections should be, purely, legal yet, for example, the issue of whether there is a pending petition in Kenya's Constitutional Court similar in content to the present application is not an agreed fact.
22. Secondly she argued that it was also not agreed that there was a court established and still able to determine this case in Kenya as, from the legal point, it is no longer a Court.
She argued further that although the Respondents had relied on Article 27 of the Treaty to challenge the jurisdiction of this court, she was referring the Court to Article 6 (c) on peaceful settlement of disputes and (d) which sets out the fundamental principles of the Community including adherence to principles of democracy, rule of Law, accountability, transparency, social justice, and other values of Community.
23. She contended that here was a situation where there has been no adherence to the law and, citing a decision of the Constitutional Court of Uganda, in the case of Paul K. Semogerere and 2 others Vs The Attorney General of Uganda, Constitutional Appeal N°1 of 2002, urged the Court to find that it can do something, in other words, to find that it has jurisdiction and dismiss the preliminary objections.
24. Asked to identify for the Court specific acts that she was complaining of as violations of the Treaty, Mrs. Madahana told Court that non- gazzettement of the notice of petition created a situation where the claimants felt that they were not satisfied with the way the referendum was conducted and the way the dispute arising there from was resolved. In her view this constituted a violation of Article 6 (c) and (d) of the Treaty which relate to peaceful settlement of disputes, adherence to democratic principles, rule of law and other values.
Additionally she argued that the gazzettement of the results of the referendum before their petition was heard and determined constitutes a specific act that, in her view, violates the Treaty.
25. On the issue of sovereignty she argued that accession to the Treaty means ceding part of sovereignty and accepting obligations to be met so that citizens can enjoy rights conferred by the Treaty. In support of this argument she relied on a decision

of this court in *Reference No 1 of 2006, Prof Peter Anyang Nyong'o and 10 others Vs The Attorney General of Kenya and 2 others.*

26. Mrs. Madahana referred the Court to its own judgment in *Reference N°1 of 2007, James Katabazi and 21 others Vs the Attorney General of Uganda and the Secretary General of the East African Community*, and said that Article 27 does not restrict the Court's jurisdiction and the Court cannot stand idly by when a fundamental principle that underpins civilization is trampled upon.
27. In reply Ms. Wanjiku repeated her conviction that the preliminary objections were valid and that this Court had no jurisdiction.
28. Likewise, Mr. Kaahwa reiterated his prayer adding that the requirement under Article 30 is a specific Act, regulation, directive, decision or action which is unlawful or an infringement of the Treaty, and not a generalized one as the claimants' application shows.
29. The preliminary issues raised and canvassed are all objections to the jurisdiction of this Court. What is sought, in effect, is a dismissal, *in limine*, of the application, and, by implication, the Reference out of which the application arose, for want of jurisdiction.
30. It is trite law that issues of jurisdiction, whenever raised, must be examined and determined forthwith because jurisdiction is the bedrock on which our litigation system is based.

    In *Modern Holdings Vs Kenya Ports Authority (Reference N°1 of 2008)* this court took cognizance of "……the fact that jurisdiction is basic *toits* adjudicatory function, such that if it is challenged and made an issue, it ought to be addressed and determined forthwith…."
31. The rationale for this, with which we concur, was aptly put by Nyarangi J.A in *Owners of Motor Vessel "Lillian" Vs Caltex oil (Kenya) Ltd [1989] KLR 1*, at p.14 where he stated that a question of jurisdiction ought to be raised at the earliest possible opportunity and the Court is obliged to decide on it right away. He went on to state that "…..jurisdiction is everything. Without it a Court has no power to make one more step……..."
32. In order to determine whether or not we have jurisdiction to hear this application or the reference, our task must be to examine the law, issues raised in the preliminary objections, the arguments of counsel, as well as authorities on the subject.
33. This Court is created by the Treaty and its jurisdiction is established by the same. Article 23(1) of Treaty provides that the role of The Court shall be to ensure the adherence to law in the interpretation, application of and compliance with the Treaty.
34. Article 27 (1) provides that the Court shall initially have jurisdiction over the interpretation and application of the Treaty provided that the power to interpret shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.
35. Under Article 30 (1) the Court can determine the legality of an Act, regulation, directive, decision or action of a Partner State or an institution of the Community, referred to it by any person who is resident in a Partner State, on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty.

36. The Claimants' case is that the conduct and process of the Referendum as well as the promulgation of the new Constitution in the Republic of Kenya was contrary to law, an infringement of the Treaty and should be declared null and void.
37. They claim that the 1st Respondent is responsible for the said conduct and process, and the 2nd Respondent is responsible for inaction in the face of Treaty violations.
38. The Respondents' response is a denial in toto of the alleged violations and a contention that this court has no jurisdiction to entertain the reference.
39. Two Residents of the East African Community, alleging that a Partner State has committed acts that violate provisions of the Treaty for the Establishment of the East African Community, have come to the East African Court of Justice, a judicial body established by the Treaty and entrusted with the role of ensuring adherence to law in the interpretation, application of and compliance with the Treaty. Have those East African residents come to the wrong court? Have they brought the wrong action? Ought they to be heard?
40. The Respondents urged us to shut the door in the face of the Claimants and tell them we cannot hear them because we do not have jurisdiction. The Claimants, on the other hand, urged us to find that we have jurisdiction and hear both sides.
41. We agree with the Claimants. Whether or not there is merit in their claim is a matter to be considered and determined by this Court after hearing the Application and the Reference. Whether or not they have a right to bring this claim to this court and whether this court has jurisdiction to hear it are, in our view, settled matters.
42. We are fortified in this view by the decision of this Court in the case of *Professor Anyang' Nyong'o and Others Vs The Attorney General of Kenya and Others, Reference No 1 of 2006, at p.10*, where this Court stated as follows:
    "The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions. In Article 23, the Treaty provides-
    "The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty".
43. It then provides thus in Article 27(1)-
    "The Court shall initially have jurisdiction over the interpretation and application of this Treaty".
44. The Treaty, being an international treaty among three sovereign states, is subject to international law on interpretation of treaties, the main one being the "Vienna Convention on the Law of Treaties." The three Partner States acceded to the Convention on different dates; (Uganda on 24th June 1988, Kenya on 9th November 1988 and Tanzania on 7th April 1993). The articles of the Convention that are of particular relevance to this Reference are Articles 26 that embodies the principle of *pacta sunt servanda*, Article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and Article 31, which sets out the general rule of interpretation of treaties".
45. In light of the foregoing we have no difficulty in finding and holding that the preliminary objection lacks merit. We accordingly overrule it and direct that the Application be heard on merit.

Costs shall be in the cause.

* * *

East African Court of Justice – First Instance Division
Reference No. 5 of 2011

Samuel Mukira Mohochi And The Attorney General of the Republic of Uganda

Johnston Busingye, PJ, John Mkwawa, J, Isaac Lenaola, J
May 17, 2013

Community law precedes sovereignty -Denial of entry into Uganda - Deprivation of liberty – Citizens of Partner States and free movement of persons- Good governance - 6

Articles: 6(d), 7(2), 27, 30, 38 and 104 of the Treaty - Article 7, 54 of the East African Common Market Protocol – the East African Community Common Market (Free Movement of Persons) Regulations, Annex 1- Rules1(2) and 24 of the EACJ Rules of Procedure, 2013- Sections: 52 (a), (b), (c), (d) and (g) of the Uganda Citizenship and Immigration Control, Chapter 66 of the Laws of Uganda - African Charter on Human and Peoples' Rights

The Applicant, Mr. Samwel Mukira Mohochi, is a citizen of the Republic of Kenya and an Advocate of the High Court of Kenya and a human rights defender. On 13th April 2011, the Applicant travelled to Uganda as part of a 14-member-delegation of the International Commission of Jurists- Kenya Chapter (ICJ Kenya) scheduled to meet The Chief Justice of Uganda.

Upon arrival at Entebbe International Airport the Applicant was restrained, confined and detained in the offices of the Ugandan Immigration at Entebbe International Airport between 9.00 am and 3.00pm when he was deported back to Kenya. He was served with a copy of a "Notice to Return or Convey Prohibited Immigrant" addressed to Kenya Airways. The immigration authorities did not inform him why he had been denied entry as well as why he had been declared a prohibited immigrant and subsequently returned to Kenya and the Respondent maintains that immigration authorities owed the applicant such duty, under the law. And that the action they took was lawful, bonafide, justifiable and in the security interest s of the people of the East African Community.

The Applicant filed this Reference contending that Respondents actions were violations of his rights and Uganda's obligations under the Treaty, the Common Market Protocol and The African Charter on Human and Peoples' Rights and he sought redress.

Held:

1. The Treaty is neither a Human Rights Convention nor a Human Rights Treaty as understood in international law. Rather it is a Treaty to govern the widening and deepening of, inter alia, the political, economic, social, cultural, research, technology, defence,and security, legal and judicial cooperation between the Partner States. If

the intention of the framers of Article 27(2) of the Treaty had been to deny the Court any type of jurisdiction, as claimed by the Respondent, they would have categorically and expressly provided so, in a prohibitive phrase. The import of this Article is that the framers intended to extend, progressively add to or widen the jurisdiction of the Court. Therefore this Reference was properly before the court.

2. Uganda's sovereignty to deny entry to persons who are citizens of Partner States was not taken away by the Treaty and the Protocol, but the exercise thereof can only be valid if it is done in strict compliance with the requirements of Articles 104 and of the Treaty and Articles 7 and 54(2) of the Common Market Protocol. Where Uganda fails, refuses, ignores or otherwise does not comply with the above provisions of the Treaty and the Protocol, it acts in violation of her Treaty obligations.
3. The denial of entry into Uganda of the Applicant, a citizen of a Partner State, without according him the due process of law was illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7 (2) of the Treaty.
4. The actions of denial of entry, detention, removal and return of the Applicant, a citizen of a Partner State, to the Republic of Kenya, a Partner State, were illegal, unlawful and in violation of his rights under Articles 104 of the Treaty and 7 of the Common Market Protocol.
5. On matters pertaining to citizens of the Partner States, any provisions of Section 52 of Uganda's Citizenship and Immigration Control Act formerly inconsistent with provisions of the Treaty and the Protocol were rendered inoperative and have no force of law, as of the respective dates of entry into force of the Treaty and the Protocol as law applicable in the Republic of Uganda.

Cases cited:

Attorney General of Uganda v Omar Awadh and 6 Others, EACJ Appeal No 2 of 2012.
Centre for Health Human Rights and Development and 3 others v the Attorney General, Constitutional Petition No 16 of 2011(Uganda)
Commission of the European Communities v Kingdom of Spain, European Court of Justice Case – 503/03
Costa vs Enel, European Court of Justice, ECJ Case 6/64
Katabazi case, Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, EACJ Appeal No. 1 of 2012
Plaxeda Rugumba v The Attorney General of Rwanda, EACJ Reference No 10 of 2010
Raducan & Anor -v- MJELR & Ors [2011] IEHC 224
State v Royer European Court of Justice, Case 48/75

Judgment

Introduction

1. The Reference dated 13th June, 2011, was brought under Articles 6(d), 7(2), 27, 30, 38 and 104 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty"), Article 7 of the East African Common Market Protocol (hereinafter referred to as "the Protocol") and Rule 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as "the

Rules") and all enabling provisions of the law. (sic).

2. The Applicant, Mr Samwel Mukira Mohochi, is a citizen of the Republic of Kenya and an Advocate of the High Court of Kenya. In this Reference he is also introduced as "an accomplished human rights defender". He is represented by two Counsel; Mr Mbugua Mureithi wa Nyambura and Mr Donald Deya.
3. The Respondent is the Attorney General of the Republic of Uganda, who is the Chief Legal Advisor to the Government of Uganda, and is being sued on behalf of the Government of Uganda. Representing the Respondent is Ms Peruth Nshemereirwe, State Counsel and Ms Maureen Ijang, State Attorney.
4. When this Reference was filed, the Secretary General of the East African Community had been impleaded as the 2nd Respondent but after the filing, by a Notice of Withdrawal filed in the Registry on the 4th October 2011, the Applicant withdrew the Second Respondent from the Reference.

Background

5. The Applicant travelled to Uganda from Kenya on 13th April 2011 on a Kenya Airways flight. He was part of a 14-member-delegation of the International Commission of Jurists- Kenya Chapter (ICJ Kenya) scheduled to meet The Chief Justice of Uganda, the Honourable Mr Justice Benjamin Odoki, on the 14th April 2011. The whole delegation was on the same flight. On arrival at Entebbe International Airport, at 9.00am the Applicant was not allowed beyond the Immigration checkpoint in the Airport.

   What happened immediately thereafter is contested. The Applicant says he was arrested, detained and confined by airport immigration authorities. Immigration authorities maintain that that they handed him to Kenya Airways who took him into their custody. What is uncontested is that he was subsequently served with a copy of a "Notice to Return or Convey Prohibited Immigrant" addressed to the Manager, Kenya Airways by the Principal Immigration Officer, Entebbe International Airport, bearing his (the Applicant) names as the prohibited immigrant. It is also uncontested that that same day, at 3.00 pm, he was put on a Nairobi bound Kenya Airways flight and returned to Kenya. The immigration authorities did not inform him, verbally or in writing, why he had been denied entry as well as why he had been declared a prohibited immigrant and subsequently returned to Kenya. The immigration authorities maintain that they owed him no such duty, under the law.

6. The Applicant contends that these actions were violations of his legal rights and Uganda's obligations under the Treaty, the Protocol and The African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), and has filed this Reference seeking redress.

The Applicant's Case

7. In the Reference the Applicant alleges that on arrival at Entebbe International Airport, he was denied entry into the country, restrained, confined and detained at the immigration offices at the airport and subsequently deported to Kenya.
8. The Applicant maintains that it was unlawful on the part of the Respondent not to

subject him to any legal or administrative process before the decisions of declaration of status of prohibited immigrant, denial of entry and deportation back to Kenya were taken. He contends that he had committed no immigration or criminal offence against the laws of Uganda or the East African Community to warrant the denial of entry into Uganda and deportation back to Kenya.

9. In the premises he asserts that the subject matter of this Reference is that the above actions of the Republic of Uganda under the advice of the Respondent are:
   i) in violation of Uganda's obligations under Article 104 of the Treaty.
   ii) in violation of the guarantees of free movement and non-discrimination of East African citizens under Article 7 of the Protocol.
   iii) illegal, unlawful and in violation of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty with regard, particularly, to the denial of the due process of law or fair administrative process.
   iv) in violation of the fundamental rights and freedoms of the Applicant against discrimination, freedom from arbitrary arrest and detention, the right to a fair and just administrative action, the right to information and freedoms of assembly, association and movement guaranteed by Articles 2,6,7,9,10,11 and 12 of the Charter
   v) and that the provisions of Section 52 (a), (b), (c), (d) and (g) of the [Uganda] National Citizenship and Immigration Control Act (Chapter 66 of the Laws of Uganda) bestowing unchecked and overarching discretionary powers to the Minister and the Director of Immigration to unilaterally declare any person, including a citizen of a Partner State of the East African Community, (EAC) as a "Prohibited Immigrant", without affording him or her a hearing, due process of law or any formal administrative process, are inconsistent with and in violation of Uganda's obligations to respect, uphold and observe the rule of law, transparency, accountability and human rights as well as fundamental freedoms under Articles 6 (d), 7 (2) of the Treaty and the guarantee of free movement within the East African Community under Article 104 of the Treaty and Article 7 of the Protocol.

10. The Applicant says that the Reference is premised on Articles 6(d), 7(2), 27,30,38 and 104 of the Treaty, Article 7 of the Protocol and Articles 2, 6, 7,9,11 and 12 of the Charter. The Applicant prays for the following orders:-
    i). A Declaration that the denial of the Applicant, a citizen of one of the Member States of the East African Community, of entry into Uganda without according him a hearing, due process of law or any legal or administrative process is illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty.
    ii). A Declaration that the denial of the Applicant, a citizen of one of the Member States of the East African Community, of entry into Uganda, without Treaty based reasons, is illegal, unlawful and a breach of Uganda's obligations under Articles 104 of the Treaty and 7 of the Protocol.
    iii). A Declaration that the stoppage, restraining, and detention of the Applicant at Entebbe International Airport, denial of entry into Uganda and subsequent deportation back to Kenya without disclosure of the reasons for the declaration

of status of prohibited immigrant, without due process of law or any form of administrative process before the declaration of status of prohibited immigrant and subsequent deportation are violations of the Applicant's fundamental rights and freedoms as to freedom from discrimination, freedom from arbitrary arrest and detention, right to fair administrative action, right to information and freedoms of association, assembly and movement contrary to the provisions of Articles 2,6,7,9,10,11 and 12 of the Charter as recognised by Articles 6(d), and 7(2) of the Treaty.

iv). A Declaration that the provisions of Section 52 (a), (b), (c), (d) and (g) of the Citizenship and Immigration Control, Chapter 66 of the Laws of Uganda, bestowing unchecked and overarching discretionary powers on the Minister and the Director of Immigration to unilaterally declare persons who are citizens of Member States of the East African Community, such as the Applicant, the status of prohibited immigrants, are inconsistent with and in violation of Uganda's obligations of observance of the imperatives of the rule of law, transparency, accountability and human rights under Articles 6(d), 7(2), and the guarantee of free movement and residence within the East African Community under Article 104 of the Treaty and Article 7 of the Protocol.

v). An Order that costs of and incidental to this Reference be met by the Respondent.

vi). That this Court be pleased to make such further or other orders as may be fit and just in the circumstances of the Reference.

Respondent's case

11. In a response supported by the Affidavit of one Okello Charles Cowards, a Principal Immigration Officer, Entebbe International Airport, the Respondent admits that the Applicant arrived at Entebbe International Airport as alleged and was indeed denied entry into Uganda.
12. Save for the above admission, the Respondent denies that the Applicant was arrested, restrained or detained by immigration authorities and states, instead, that the Applicant was validly denied entry in accordance with Article 7 (5) of the Protocol, that the Respondent was under no legal obligation to give the Applicant reasons for the denial of entry and that the Applicant was handed over to Kenya Airways, with instructions to take him into its custody and ensure that he is removed from the non-permissible area and returned to Kenya on its first available flight.
13. The Respondent also denies that the actions of the immigration officers at the airport on the material date and time contravened Articles 6(d), 7(2), and 104 of the Treaty, Article 7 of the Protocol or violated Articles 2,6,7,9,10,11 and 12 of the Charter, and contends that this Court does not have jurisdiction to enforce Articles 2, 6, 7,9,10, 11 and 12 of the Charter.
14. The Respondent further avers that Section 52 of the Uganda's Citizenship and Immigration Control Act is not in contravention of the Treaty or the Protocol, that neither the Treaty nor the Protocol takes away the sovereignty of the member states to make decisions in the best interest of their national security and, in response to allegations that Section 52 of Uganda's Immigration Act bestows unchecked and overarching discretionary power to declare people, including East African Citizens,

prohibited immigrants, further avers that under Article 76(2) of the Protocol, implementation of the Common Market shall be progressive.

15. The Respondent finally avers that, in the alternative and without prejudice to prior averments, the action undertaken by the Government of Uganda to deny the Applicant entry into Uganda was lawful, bonafide, justifiable and in the security interest of the people of the East African Community.
16. The Respondent prays that the Reference be dismissed with costs.

Scheduling Conference

17. At a Scheduling Conference held on 24 February 2012 it was agreed that the following were the issues to be determined by the Court:
    i) Whether the Reference is properly before the Court;
    ii) Whether the Treaty and the Common Market Protocol take away the sovereignty of Uganda to deny entry to unwanted persons who are citizens of Partner States of the EAC;
    iii) Whether the Applicant was detained at Entebbe International Airport and whether the actions complained of, of the Republic of Uganda, were in conformity with Articles 6 (d) and 7(2) of the Treaty;
    iv) Whether the actions of the Republic of Uganda were in conformity with Article 104 of the EAC Treaty and Article 7 (6) of the Common Market Protocol;
    v) Whether the Provisions of section 52 of the Uganda Citizenship and Immigration Act are inconsistent and in violation of Articles 6 (d), 7 (2) and 104 of the Treat and Article 7 of the Protocol;
    vi) Whether the Applicant is entitled to the prayers sought.

Consideration and Determination of the Issues Whether the Reference is properly before the Court

Submissions

18. The question as to whether this Reference is properly before the Court was a point of law challenging the Court's jurisdiction and was raised by the Respondent. It was argued by Ms Maureen Ijang, the Respondent's Counsel, who submitted that this Court lacks jurisdiction to hear the Reference basically for two reasons:
    i) that the Reference is mainly based on allegations of human rights violations and that this Court lacks jurisdiction to try such violations by virtue of the "clear provisions of Article 27 of the Treaty which expressly put allegations of human rights violations in the Court's extended jurisdiction which is not yet in place..." (sic) It was her contention that "the intention of the framers of the Treaty was that this Court would not interpret human rights matters until a protocol allowing it to do so is concluded." (sic) In support of this argument, Counsel referred us to the case of *James Katabazi & 21 Others v Attorney General of Uganda, EAC Reference No. 1 of 2011 (The Katabazi case), as well as to that of the Attorney General of Kenya v Independent Medical Legal Unit EACJ Appeal No. 1 of 2011 (the IMLU Case)* in which the Appellate Division stated that for the Court to claim and exercise jurisdiction in any matter, it has to find and supply, through interpretation of the Treaty, the source and basis for such jurisdiction, in the

circumstances of the matter before it. Similarly Counsel submitted that to the extent that the Applicant is alleging human rights violations by the Respondent and seeking declarations that the actions of the Respondent violated "the human rights provisions in the Treaty",(sic) the Court should find and supply the basis of its jurisdiction through interpretation of the Treaty and not simply by relying on the Katabazi case.(supra)

ii) that Article 6 (d) of the Treaty, which the Applicant alleges was infringed by the Respondent, consists of aspirations and broad policy provisions for the Community which are futuristic and progressive in application and that it raises political questions which cannot be answered by this Court. That the provision is not capable of being breached and, therefore, it is not justiciable. In support of her stance, Counsel cited the authority of a Ugandan case, *Centre for Health Human Rights and Development & 3 others versus The Attorney General of Uganda, [Constitutional Petition No 16 of 2011]*, where the Constitutional Court of Uganda declined to entertain a Petition premised on allegations that the Government was not investing sufficiently in maternal health services with dire consequences for women and children, because it was political in character and concerned policy issues.

19. Mr Mbugua Mureithi argued the case for the Applicant. In answer to the issue of want of jurisdiction, he asserted that the Reference was properly before the Court in accordance with Article 30 (1) of the Treaty which provides that:
"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty".
20. He further submitted that in determining a matter in question under the above Article, the Court is required to review the lawfulness of that matter and whether it amounts to an infringement of the Treaty.
21. In response to the Respondent's assertion that the cause of action in this Reference is human rights violations, Counsel argued that while agreeing that the jurisdiction of the Court is subject to the provisions of Article 27 of the Treaty, the crux of the Applicant's plea, as exhibited in the Reference, is that the actions complained of are breaches of Uganda's obligations under Articles 6(d), 7(2) and 104 of the Treaty and Article 7 of the Protocol. It is on the basis of the foregoing, that the Applicant is asking the Court to pronounce itself on the alleged breaches of the said Treaty obligations by Uganda in light of his grievances.
22. Furthermore, relying on the authority of the Katabazi case (supra), Counsel submitted that this Court's jurisdiction is not ousted merely on the basis that the acts complained of are based on allegations of human rights violations.
23. Finally, Counsel submitted that Article 7 of the Protocol creates subjective rights to which citizens of the East African Community are entitled in their individual capacities and those rights are enforceable vide the Court's jurisdiction under Articles 27 and 30(1) of the Treaty and it matters not whether those rights are said to be "human rights" or rights by whatever lexicon.

24. In answer to the Respondent's assertion that Articles 6 (d) and 7(2) of the Treaty contained aspiration and broad policy provisions not capable of being breached and therefore not justiciable, Counsel cited the IMLU Case (supra) as his authority to show that the Articles create obligations that Partner States have voluntarily entered into and that to breach them is a Treaty violation. To drive his point home, Counsel pointed out that in the Applicant's view, provisions of Article 6 (d) are, in fact, foundational to the Community in that they are conditions precedent to a foreign country being granted membership of the East African Community under Article 3 clause 3 (b) of the Treaty. Counsel distinguished the authority cited by the Respondent's Counsel from the present Reference and submitted that whereas the issues before Uganda's Constitutional Court in that Petition were about provision of sufficient maternal health services in the country, and that is why the Court held that it was a matter of resource allocation which should be determined by the Executive and other political organs of the State, the issues in the present case are about crystallised provisions of Articles 6 and 7 of the Treaty which are foundational and core to the continued existence of the Treaty.
    We have considered the rival positions of the parties in support of their respective positions on this matter and we opine as here under:
25. It is common ground that under Article 27 (1) of the Treaty, this Court has jurisdiction over the interpretation and application of the Treaty, where such jurisdiction is not conferred by the Treaty on organs of Partner States. We think this is plain enough. This Court does have jurisdiction to interpret and apply any and all provisions of the Treaty save those excepted by the proviso to Article 27. While we agree, with the Respondent that the Court's jurisdiction will be extended via a Protocol as envisaged by Article 27 (2), we do not consider that the envisaged extension, in any way, acts to prohibit the Court from interpreting and applying any provision of the Treaty. In particular, this Court has consistently held, and the Appellate Division has consistently upheld, that mere inclusion of allegations of human rights violations in a Reference will not deter the Court from exercising its interpretation jurisdiction under Article 27(1) of the Treaty- (see especially the *Katabazi case, Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, Appeal No. 1 of 2012 and Attorney General of Uganda v Omar Awadh and 6 Others, Appeal No 2 of 2012.*)
26. We also need to reflect on the Respondent's assertion that, in the present Reference, the Applicant is alleging human rights violations as well as seeking declarations that the actions of the Respondent violated the human rights provisions in the Treaty. We hasten to make two points here:
27. First, that the Treaty is neither a Human Rights Convention nor a Human Rights Treaty as understood in international law. It is rather a Treaty to govern the widening and deepening of, inter alia, the political, economic, social, cultural, research, technology, defence, security, legal and judicial cooperation between the Partner States, see- Article 5 of the Treaty and *Attorney General of Uganda v. Omar Awadh(supra)*.
28. Secondly, we are not aware of a chapter, article or provision in the Treaty, Protocols and Annexes which designates any provisions therein as "the human rights provisions". The Respondent merely referred to them but did not show us which

ones they are, where they are located and the evidence she relies on. Under Article 1: "Treaty" means the Treaty establishing the East African Community and any annexes and protocols thereto, and it is our view that provisions therein are provisions of the Treaty, plain and simple. The object and scope of each provision is reflected in the titles and sub-titles of the chapters and articles therein. For a litigant to unilaterally sub-designate some Treaty provisions into human rights provisions, just to bring them within the purview of the yet to be given jurisdiction under Article 27 (2) is mischievous, to say the least.

29. In the instant matter, the Applicant's allegations against the Respondent are that he was denied entry, restrained, arrested, detained, declared a prohibited immigrant, returned to Kenya, denied any legal or administrative process and was not furnished with reasons for these actions. He alleges that these actions violate specific provisions of the Treaty including Articles 104, 6(d), 7(2) and Article 7 of the Protocol. Where he alleges violations of various provisions of the African Charter on Human and Peoples' Rights, he qualifies it with "as recognised by Article 6(d) and 7(2) of the Treaty". In effect, we understand the cause of action in his case to be the alleged infringement of a Partner State's Treaty obligations which we find to be a matter which lies outside the province of human rights. -see Attorney General of Uganda v Omar Awadh (supra).
30. What matters, in our view, is that the Application seeks that this Court determines whether the actions and decisions of the Respondent were an infringement of specific Treaty provisions. It is the interpretation and application of these provisions in order to determine whether the impugned actions and decisions are infringements that provides the jurisdiction of this Court under Article 27(1).
31. Consequently, we think the Applicant has passed the test established by the Appellate Division of this Court in the IMLU Case (supra). It is not violations of human rights under the Constitution and other laws of Uganda or of the international community that is the cause of action in the Reference, rather the cause of action is constituted by allegations of infringements of specific Treaty provisions by the Ugandan Government. Applying the IMLU test to the present case, as the Respondent urged us to do, we do find, indeed, that the Treaty provisions alleged to have been violated have, through Uganda's voluntary entry into the EAC Treaty, been scripted, transformed and fossilised into several principles, obligations and treaty guarantees now stipulated in, among others, Articles 6(d), 7(2), 104 of the Treaty and 7 of the Protocol, breach of any of which by Uganda would give rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Article 27(1) constitutes the cause of action in the instant Reference, and consequently, establishes the legal foundation of the jurisdiction of this Court in this Reference.
32. The import of Article 27(2) became a point of contention in submissions and at the hearing. Article 27 (2) is framed as follows:
"The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."

33. Again a plain reading of the incremental language of the aforesaid provision would be enough. The provision says that the Court shall have other jurisdiction at some future time. We think that if the intention of the framers of the Treaty had been to deny the Court any type of jurisdiction, as claimed by the Respondent, they would have categorically and expressly provided so, in a prohibitive phrase, like "The Court shall not have original, appellate, human rights jurisdiction and other jurisdiction...." or words to precisely convey such intent. Indeed the framers used such a phrase in Article 30(3). It is quite obvious to us that the import of the Article, as we have said before, and do repeat here, is that the framers merely intended to extend, progressively add to or widen the jurisdiction of the Court. In *Plaxeda Rugumba v.The Attorney General of Rwanda, Reference No 10 of 2010*, we said, inter alia, that; "there is no doubt that the use of the words, "...other original, appellate, human rights and other jurisdiction...." is merely in addition to, and not in derogation to, existing jurisdiction....".
34. Clearly, the sub-article is intended to provide for the giving to this Court of other jurisdiction, which Council will determine, at a suitable subsequent future date. It does not in any way impinge on the Court's jurisdiction, under Article 27 (1), to interpret and apply any and all provisions of the Treaty.
35. The Respondent submitted that the provisions of Articles 6 (d) of the Treaty are aspirations and broad policy provisions which are futuristic and progressive in application and that they raise political questions which cannot be answered by this Court. Further, that they are not capable of being breached and, therefore, are not justiciable. We find this stance erroneous for the following reasons:
    i) Article 6 provides the six Fundamental Principles of the Community. Black's Law Dictionary defines "Principle" as "a basic rule, law or doctrine".(9th Edition at p 1313) Our understanding of "Fundamental Principles" as used in this Article, aided by the above definition, is that these are rules that must be followed or adhered to by the Partner States in order that the objectives of the Community are achieved.

    Paragraph 11 of the Preamble to the Treaty provides that the Partner States are;
    "Resolved to adhere themselves to the fundamental and operational principles that will govern the achievement of the objectives..."
    Article 146(1) of the Treaty provides, inter alia, that a Partner State may be suspended from taking part in activities of the Community if that State fails to observe and fulfil the fundamental principles and objectives of the Treaty.
    Article 147(1) provides, inter alia, that a Partner State may be expelled from the Community for gross and persistent violation of the principles and objectives of the Treaty.
36. These provisions show that the framers of the Treaty, attached the greatest importance to the fundamental principles, among very few other provisions. Why then, would they attach to them such importance, including severe sanctions for non-observance thereof, if they were, as the Respondent claims, no more than mere aspirations?
37. Fortified by the above provisions of the Treaty, we agree with the Applicant that these principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely

aspire to achieve their observance, they are to observe them as a matter of Treaty obligation. In our view, all the six principles in the Article were each carefully thought out, negotiated, appropriately weighted, individualized and crafted the way they are for a particular effect. Integration depends on each of them singly and collectively.

38. The principle in Article 6(d), which was the main target of the Respondent's attack, is good governance. "Good governance" means many things in many contexts. Wikipedia, the online Encyclopedia defines it in descriptive terms. We paraphrase it thus:

    "Good governance is an indeterminate term used in international development literature to describe how public institutions conduct public affairs and manage public resources. The concept "good governance" centres around the responsibility of governments and governing bodies to meet the needs of the masses. Because the term "good governance" can be focused on any one form of governance, organisations and authorities will often focus the meaning of good governance to a set of requirements that conform to the organisation's agenda, making good governance imply many different things in many different contexts."

39. We fully associate ourselves with the above description and we are of the firm belief that herein lies the explanation why the framers of the Treaty went beyond stating the principle and instead negotiated and agreed upon a specific minimum set of requirements that constituted the good governance package that, in their wisdom, suited the EAC integration agenda. That package, for purposes of the EAC integration, as set out in Article 6 (d), includes;
    a) adherence to the principles of democracy,
    b) the rule of law, accountability,
    c) transparency,
    d) social justice,
    e) equal opportunities,
    f) gender equality, as well as
    g) the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

40. Apart from asserting that the provisions are aspirations and broad policy provisions for the Community, political in character and with a futuristic and progressive application, Counsel did not substantiate. They did not explain how and why these fundamental principles are mere aspirations. They failed to show us why we should depart from the position of this Court succinctly stated in the IMLU Case(supra) that these provisions constitute responsibilities of Partner States to citizens which, through those States' voluntary entry into the EAC, have crystallised into actionable obligations, breach of which gives rise to infringement of the Treaty.

41. We examined the authority which Counsel told us she was fortified with. We found that the Petitioners' contention in that authority, *Centre for Health Human Rights and Development and 3 others Versus the Attorney General, Petition No 16 of 2011*, was that the State failed to provide basic indispensable health items in Government facilities for expectant mothers and that as a result of this failure, together with the imprudent and unethical behaviour of health workers, the maternal mortality rate in Uganda was high.

42. It is basically this contention that the Court considered and held, inter alia, that the Executive has the political and legal responsibility to determine, formulate and implement Government policy and that the Court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and later on, their implementation and that, if it did that, it would be substituting its discretion for that of the executive granted to it by law.
43. We failed to find the connection between the facts of the authority cited and the present Reference, where the contention is whether a Partner State violated specific provisions of the Treaty.

    It is clear to us that the provisions of Article 6 (d) of the Treaty are solemn and serious governance obligations of immediate, constant and consistent conduct by the Partner States. In our humble view, we know of no other provisions that embody the sanctity of the integration process the way the above do.

    In view of the foregoing, we find and hold that the Reference is properly before the Court.

    Whether the Treaty and the Common Market Protocol take away the sovereignty of Uganda to deny entry to unwanted persons who are citizens of Partner States of the EAC.

Submissions

44. Mr Mbugua Mureithi, for the Applicant, submitted on this issue as follows:
    i) That neither the Treaty nor the Protocol takes away the sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of Partner States of the EAC. It is his contention however, that the exercise of sovereign power by any EAC Partner State to deny entry to citizens of Partner States is heavily qualified and, strictly governed by the Treaty and the Protocol.
    ii) That under Article 104 of the Treaty, the Partner States undertook to guarantee to all citizens of the EAC free movement of persons, labour and services and to ensure their right of establishment and residence.
    iii) That by Article 7 of the Protocol, the EAC Partner States guaranteed the free, non-discriminatory movement of citizens of the Partner States within the EAC countries without visas, and that the only limitation to the guarantee of free movement of persons that a Partner State can lawfully impose are contained in Article 7(5) of the Protocol and confined to matters of public policy, public security and public health.
    iv) That the right of EAC citizens to free movement within the Community is a treaty-right guaranteed by Article 7 of the Protocol, and that Article 7 is in the character of a directly applicable provision which confers upon the individual, rights, and that national governments or their institutions cannot jeopardise, delay or curtail their full, complete and uniform application in the Partner States
    v) That under the Protocol, Uganda or any other Partner State of the EAC can limit the guaranteed right of free movement of a citizen of any Partner State, such as the Applicant, only pursuant to duly invoking the provisions of Article 7 (5) of the Protocol and declaring or notifying the same to other Partner States and the

EAC Secretary General in accordance with Article 8 (3) (c) of the Treaty and Article 7 (6) of the Protocol. It is his contention that this is the only residual sovereignty left to Partner States of the EAC within the EAC.

vi) That the unsubstantiated insinuation that the Applicant is a threat to the security of the people of the EAC or a threat to the national interest of Uganda, not having been notified to the EAC Secretary General and the Partner States in accordance with Articles 8(3)(c) of the Treaty and 7(6) of the Protocol, remains a unilateral action that cannot prevail over the Applicant's guaranteed right of free movement within the EAC.

45. Ms Peruth Nshemereirwe, for the Respondent, argued issues ii and iv together. In a nutshell, she submitted as follows:

i) That neither the Treaty nor the Protocol takes away the Sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of the EAC.

ii) That sovereignty is the supreme political authority of an independent state and, as such, Uganda is an independent state whose sovereignty was not submerged in the creation of the EAC

iii) That Article 104 of the Treaty is subject to the provisions of the Protocol and Article 7(5) thereof gives Uganda a right to restrict movement of persons into Uganda on grounds of public policy, public security or public health and that according to affidavit evidence tendered, the Applicant was denied entry into Uganda under Article 7 (5) of the Protocol.

iv) That the Applicant's argument that Uganda has not complied with the provisions of Article 7(6) to notify the Secretary General of the EAC and The Republic of Kenya about the Applicant's denial of entry is a mere allegation for which the Applicant showed no evidence of non-compliance.

v) That Article 7 (3) of the Protocol provides for compliance with national laws in guaranteeing the protection of citizens, Article 7 (9) provides that implementation of the Protocol shall be in accordance to the EACM (Free Movement of Persons) Regulations specified in ANNEX 1 to the Protocol. That Article 5 (1) of those Regulations provides that a citizen who wishes to enter or exit the territory of another Partner State shall do so at entry or exit points designated in accordance with national laws of the Partner State and shall comply with the established immigration procedures. It was her contention that the key point in the above provisions is "in accordance with national laws" and is in consonance with the concept of sovereignty.

vi) That affidavit evidence on record showed that the national law which was relied on in handling the Applicant was the Uganda Citizenship and Immigration Control Act, Cap 66, and that vide paragraphs 4 and 5 of the affidavit of Charles Okello Cowards, the Applicant was handled in accordance with the law and he was neither confined nor detained as alleged.

vii) That under the above said Ugandan law, immigration officers are empowered under its Section 52, to deny the Applicant or any other person entry into Uganda and are not under any obligation to give reasons. She contended, therefore, that the Applicant was clearly dealt with and denied entry in accordance with national law.

viii) That the cited regulations on free movement of persons under the Protocol are part of the EAC Treaty under Article 151 thereof, that the actions of the Respondent were in conformity with Articles 104 and 7(5) of the Treaty and Protocol respectively, and that, flowing from that, she contended, there was no contravention and or breach of the Treaty.

46. We have carefully considered the rival submissions. We entirely agree, as we think both parties do, that Uganda is an independent sovereign state whose power to deny entry to unwanted persons who are citizens of EAC Partner States was not submerged with the coming into force of the Treaty and the Protocol, but still exists, so long it is exercised in accordance with the requirements of the law. Indeed it was the stance of Counsel for the Respondent that, in the exercise of her sovereignty Uganda denied the entry to the Applicant in accordance with Article 7(5) of the Protocol.
47. What we find to be in contention in the instant Reference, however, are two things namely; the extent of Uganda's sovereignty, given the provisions of Sections 52 and 66(4) of Uganda's Citizenship and Immigration Control Act, Articles 104 and 7 of the Treaty and Protocol respectively, and the application of those provisions in the matter of the Applicant.
48. Article 104 (1) of the Treaty provides that;
"The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the community."
It provides, in 104 (2) that;
"For purposes of this Article, the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services, and Right of Establishment and Residence at a time to be determined by the Council." That was November 30th 1999.
49. On 20th November 2009, the Protocol envisaged in 104 (2) came into force. The object of its Article 7 is "Free Movement of Persons". The Article then provides as under;
"7 (1) The Partner States hereby guarantee the free movement of persons who are citizens of other Partner States within their territories.
7(2) In accordance with paragraph 1, each Partner State shall ensure non-discrimination of the citizens of the other Partner State based on their nationalities by ensuring:
a) the entry of citizens of other Partner States into the territory of the Partner State without a visa
b) the free movement of persons who are citizens of the other Partner State within the territory of the Partner State
c) that the citizens of the other Partner States are allowed to stay in the territory of the Partner State, and
d) that the citizens of the other Partner States are allowed to exit the territory of the Partner State without restrictions.
7 (5) The free movement of persons shall be subject to limitations imposed by the host Partner State on grounds of public policy, public security or public health.
7(6) A Partner State imposing limitation under paragraph 5, shall notify the other

Partner States accordingly

7(9) The implementation of this Article shall be in accordance with the East African Community Common Market (Free Movement of Persons) Regulations, specified in Annex 1 to this Protocol."

50. We find it pertinent to refer to the two following Regulations:
Regulation 2: The purpose of these Regulations is to implement the provisions of Article 7 of the Protocol and to ensure that there is uniformity among the Partner States in the implementation of the Article and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.
Regulation 5 (1): A citizen of a Partner State who seeks to enter or exit the territory of another Partner State, shall do so at entry or exit points designated in accordance with the national laws of the Partner State and shall comply with the established immigration procedures.
51. Counsel for the Respondent submitted that Uganda is an independent state and its sovereignty was not submerged with the creation of the East African Community. We believe that Counsel was referring to Uganda's internal sovereignty ie the power enjoyed by the governmental entity of a sovereign state, including affairs within its own territory and powers related to the exercise of external authority- see Black's Law Dictionary, 9th Ed. at p.1524. And by "power" in this context we take the definition again, in Black's Law Dictionary (supra) at p.1288, as "the legal right or authorisation to act or not to act.".
52. Our view is that, like every other country, Uganda's sovereignty is defined by law. Prior to the entry into force of the Treaty and, subsequently, the Protocol, Uganda's sovereignty to deny entry to unwanted persons was defined by The Citizenship and Immigration Control Act, Chapter 66, Laws of Uganda. The Treaty then came into force.
53. The Republic of Uganda, gave the Treaty the force of law pursuant to Section 3(1) of the East African Community Act, 2002. The Section provides that:
"The Treaty as set out in the Schedule to this Act shall have force of Law in Uganda."
The above Act defines the Treaty as:
"The Treaty for the Establishment of the East African Community dated 30th November 1999, and entered into by the United Republic of Tanzania, The Republic of Uganda, and the Republic of Kenya which is set out in the Schedule to this Act, and as from time to time amended under any provision of the Treaty or otherwise modified"-see Section 2 of the Act. The Common Market Protocol came into force on the 20th November 2009- see Article 55, Common Market Protocol.
Article 151 (4) of the Treaty then specifically provides that:
"The Annexes and Protocols to this Treaty shall form an integral part of this Treaty."
54. The above chronology shows that the Treaty is law applicable in, binding to and in Uganda. It shows, as well, that the Protocol, as of its entry into force, constitutes a modification to and is an integral part of the Treaty. The Treaty created the East African Community, a legal entity comprising of the Partner States. Of particular interest, is the fact that the meaning of foreign country under the Treaty is "...any country other than a Partner State".(see: Article 1 of the Treaty) The Treaty also

defines persons, formerly foreign nationals as between the individual EAC states prior to entry into force of the Treaty, as nationals or citizens of Partner States,(see: Article 1 of the Protocol) The Treaty accorded these persons wide ranging, preferential and superior treatment and rights in terms of movement, establishment, residence and working within the Partner States. With specific regard to the Republic of Uganda, her sovereignty regarding the movement of the citizens of partner states in and out of the Partner States started to be defined and governed by the Treaty, the Protocol and the Citizenship and Immigration Control Act, provisions of the former taking precedence in case of conflict.

55. We would hope that the foregoing brief chronicle of the growth of community law and its direct applicability in the Partner States is helpful to the parties. We certainly recognize that in exercise of her sovereignty, the Republic of Uganda has power to admit persons on, or deny them entry into, her territory, in accordance with the country's law. The law in Uganda, however, includes the Treaty and the Protocol which, also in the exercise of her sovereign power, the Republic of Uganda accepted not only to be bound by, as Community law, but equally as national law.
56. Like in any other Partner State, once the Treaty and, subsequently, the Protocol, were given force of law within Uganda, they became directly enforceable within the country and took precedence over national law that was in conflict with them. Existing legal provisions became qualified and started to be applicable only to the extent that they were consistent with the Treaty and the Protocol. These included provisions in Uganda's Citizenship and Immigration Control Act.
57. The provisions, relevant to the present Reference, that affected the existing law are:
    i) Article 104 of the Treaty by which Uganda agreed to adopt measures to achieve the free movement of persons.
    ii) Article 7 (2) of the Treaty by which Partner States undertake to abide by principles of good governance including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.
    iii) Article 7 of the Protocol by which Uganda guaranteed free movement of persons who are citizens of the other Partner States within her territory
    iv) Article 7(2) of the Protocol by which Uganda bound itself to ensure non-discrimination of the citizens of the other Partner States by ensuring their entry without a visa, their free movement within its territory, their stay and their exit without restrictions.
    v) Article 7(5) by which, in respect of citizens of Partner States, Uganda can impose limitations on the free movement of persons only on grounds of public policy, public security and public health.
    vi) Article 7(6) by which Uganda must notify the other Partner States if it should impose limitations under Article 7(5).
    vii) Article 54(2) of the Protocol, by which Partner States guarantee that persons whose rights and liberties as recognised by the Protocol shall have been infringed upon, shall have a right to redress, even when the infringement has been committed by persons acting in their official capacities; and that the competent judicial, administrative or legislative authority or any other competent authority

shall rule on the rights of the person who is seeking redress.

58. The import of these provisions is that by accepting to be bound by them, with no reservations, Uganda also accepted that her sovereignty to deny entry to persons, who are citizens of the Partner States, becomes qualified and governed by the same and, therefore, could no longer apply domestic legislation in ways that make its effects prevail over those of Community law.
59. Sovereignty, therefore, cannot not take away the precedence of Community law, cannot stand as a defence or justification for non compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty or the Protocol.
60. We are of the view, therefore, that while Uganda can declare a citizen of a Partner State a prohibited immigrant and deny him/her entry, it is clear from the foregoing that such declaration or denial of entry can only be valid if it complies with the requirements of Articles 104 and 7(2) of the Treaty and 7 and 54(2) of the Protocol.
61. Our interpretation is further fortified by the holding of the ECJ in the case of *Costa vs Enel, Case 6/64*, where the Court, while interpreting a provision similar to Article 8(4), held, inter alia, that:
"The transfer by the States, from their domestic legal system to the Community legal system, of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail...."
62. In answer, therefore, to the issue under consideration, it is our finding that Uganda's sovereignty to deny entry to persons who are citizens of Partner States was not taken away by the Treaty and the Protocol, but the exercise thereof can only be valid if it is done in strict compliance with the requirements of Articles 104 and of the Treaty and Articles 7 and 54(2) of the Protocol. Where Uganda fails, refuses, ignores or otherwise does not comply with the above provisions of the Treaty and the Protocol, it acts in violation of her Treaty obligations.
Whether the Applicant was detained at Entebbe International Airport and whether actions of the Republic of Uganda were in conformity with Articles 6 (d) and 7(2) of the Treaty;

Submissions:

Mr. Mbugua Mureithi, for the Applicant, submitted on this issue in two parts:-

63. On whether the Applicant was detained at Entebbe International Airport he submitted that on 13.04.2011 the Applicant arrived at the Airport, was denied entry into Uganda, was restrained, confined and detained in the offices of the Uganda Immigration Department at the airport from 9.00 am to 3.00 pm when he boarded a Kenya Airways flight back to Kenya.
64. He further submitted that the Notice signed by the Principal Immigration Officer, Entebbe International Airport, directed Kenya Airways to "return or convey" the Applicant, as a prohibited immigrant and, pending such conveyance, remove him from the non permissible area.
Additionally, Counsel contended that the Respondent admitted that the Applicant was put on the next available flight to Nairobi which was at 3.00pm. Counsel argued

that these circumstances showed that on 13.04.2011 between 9.00am to 3.00pm the Applicant was not a freeman, he was restricted and confined in custody, away from the non permissible area at the Entebbe Airport, pending conveyance to Kenya, on the orders of the Principal Immigration Officer at the Airport.

65. Counsel referred the Court to the definition of the verb "detain" in the Advanced Learners Dictionary as "1 to keep somebody in an official place eg a police station....2. to prevent somebody from leaving or doing something...."
66. Counsel further submitted that since the Applicant's detention was pursuant to the orders of the Principal Immigration Officer, it is the Respondent who is liable for the detention.
67. Counsel urged the Court to take judicial notice that airlines within EAC do not have security officers or places of holding persons in custody, adding that it would be improbable that the Ugandan authorities would have left the Applicant to the physical custody of an airline after labelling him a threat to the security of the peoples of the East African Community.
68. Concluding his submissions on the first part, the Counsel contended that on the balance of probabilities he had proved that the Applicant was restrained, confined and detained at Entebbe International Airport on the orders of the Principal Immigration Officer.
69. On whether the actions complained of were in conformity with Articles 6(d) and 7(2) of the Treaty, Counsel submitted that the Respondent's confirmation that the Applicant was denied entry and orders issued to return him to Kenya as a prohibited immigrant, exhibited that he had been declared a prohibited immigrant. He submitted further that he had shown that the Applicant was not given any reasons for any of the adverse actions taken against him and that the Respondent's confirmation, in replying affidavits, that immigration officials were under no obligation to give reasons to the Applicant, confirm that he was not informed why adverse actions were taken against him.
70. It was Counsel's further submission that in light of the Applicant's guaranteed right of free movement within the EAC under the Treaty and the Protocol, and his right of redress under Article 54(2) of the Protocol, the Respondent was obliged to accord him natural justice through a legal process that adhered to the rule of law, accountability, transparency and protection of human rights in accordance with Articles 6(d) and 7(2) of the Treaty.
71. Counsel disputed the Respondent's assertion that the process that the Applicant went through by filling in a card, lining up and waiting to present his travel documents to the immigration control officials at Entebbe Airport, amounts to a legal and administrative process. He contended that this process does not qualify as a hearing as known to the law and natural justice. Counsel further contended, that the reason the Respondent gave for denying the Applicant entry, i.e. that it was in the security interests of the people of East Africa, is a matter that cannot rest with an immigration official at the airport counter as the competent authority to determine after filing in a card, lining up and waiting to present travel documents.
72. Finally, Counsel submitted that since the Applicant had been to Uganda on other occasions immediately preceding the denial of entry on 13.04,2011, then the burden

on Uganda to show compliance with the provisions of Articles 6(d), 7(2) and 8(3) of the Treaty and Articles 7(5), 7(6) and 54(2) of the Protocol, is that much higher.

73. In a spirited rebuttal, Ms Nshemereirwe, for the Respondent, denied that the Applicant was detained by the immigration authorities. She submitted that the Applicant was simply handed over to the carrier which had delivered him at the airport to return him wherever he had come from.
74. She submitted further, that since the next Kenya Airways flight was to depart at 3.00pm, it was only logical that Kenya Airways had to place the Applicant somewhere awaiting the next flight. It was Counsel's submission that at that point the Applicant was no longer in the hands of the Respondent and the Respondent was neither responsible nor privy to how the Applicant was kept or taken out of the country. She asserted that the Respondent's only interest was to see the Applicant out of the non-permissible area of the Airport.
75. On whether the actions complained of were in conformity with Articles 6(d) and 7(2) of the Treaty, Counsel submitted that the Applicant was accorded due process in accordance with the Uganda Citizenship and Immigration Control Act. She contended that the discussion the Applicant had with immigration officials before he was informed that he could not be admitted into Uganda, the process of filling in an entry card, taking of finger prints and picture amounted to an administrative process which the Applicant underwent before he was found unworthy of entry into Uganda.
76. We have carefully considered the arguments of both Counsel, examined the law on the subject and we will examine the issues starting with whether the actions of the Republic of Uganda complained of were in conformity with Articles 6(d) and 7(2) of the Treaty. We will examine each action.

Denial of Entry

77. As shown above, Counsel for the Respondent maintained that the Applicant was handled according to the law and was accorded the full benefit of due process. However, on analysing the whole chain of actions complained of and how they happened, with profound respect, we do not agree with the reasoning of Counsel for the Respondent.
78. "Due process", according to *Black's Law Dictionary (supra)* at p.575 is defined as "The conduct of legal proceedings according to established rules and principles for the protection of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case". We adopt this definition.
79. The process that Counsel claimed amounted to due process i.e. filling an immigration card, taking finger prints and pictures and "a discussion" with the desk officer before being found unworthy to enter Uganda, is at variance with the above definition. The Respondent did not show us that the immigration officials had anything against the Applicant. We were not shown that he was informed of any wrong they were holding against him. His treatment seems to have been a result of caprice rather than coherently thought out decisions. We agonised over the Respondent's failure to disclose, even in Court, what it was the immigration officials had against him that warranted the harsh treatment.

80. The Applicant's right to redress was guaranteed by Article 54 of the Protocol. The Article provides that:

i) in accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and

b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.

81. Discussing the import of a similar provision the European Court of Justice in *State v Royer Case 48/75*, held that:

"a decision ordering the deportation of a Community alien may not be carried out, save in cases of urgency which have been properly justified, against a person protected by Community law until the latter has been able to exhaust the remedies guaranteed by Articles 8 and 9 of Directive 64/221".

82. The combined effect of this very persuasive authority and the import of Article 54 of the Protocol, reproduced above, regarding the instant Reference is that the immigration officials had, foremost, an obligation to strictly apply the limitations of the freedom of movement, given its importance to the East African Community Common Market in particular, and integration in general. Failing this, once they decided to infringe upon the Applicant's rights and liberties as recognised by the Protocol, they ought to have guaranteed his right to redress. This entailed, in our view, a duty to give the Applicant sufficient reasons for denying him entry, declaring him a prohibited immigrant and removing him from Uganda.

83. Equally importantly, they had a duty to afford him a fair opportunity to be heard, and, as they made their decisions about him, to take into consideration whatever he had to say. These, in our view, are basic indicators of due process, are the hall marks of the rule of law and they distinguish a potentially just and fair process from a potentially unjust and unfair one. Worthy of underscoring also is the fact that the Applicant was owed these things not as favours from anyone but as hallowed rights guaranteed by the Treaty. The provisions of its own national law, even if they existed, could not exempt the Republic of Uganda from this Community law obligation.

84. What the Applicant proved, and the Respondent failed to disprove, is that he was not aware, and he was not informed, of any offence he had committed or was suspected of having committed, against any law of Uganda or against the Treaty. To us this also is basic. Whatever else Counsel claimed to be due process was but a mockery of the same if it could enable the Immigration to bundle up a citizen of a Partner State, and dispatch him out of the country unheard.

85. In Court we expected Counsel to show us what exactly it was that the Applicant was suspected of and/or charged with and needed due process for in the first place. To our dismay, nothing was shown, despite our prodding.

86. The Applicant is a citizen of a Partner State and, as shown elsewhere above, is a special creature of and protected under the Treaty. The Republic of Uganda is voluntarily and irrevocably bound by the Treaty.

The Applicant's freedom of movement within Uganda was a right guaranteed by the

Treaty, specifically Articles 104 and 7 of the Treaty and the Protocol respectively. Article 7(1) of the Protocol provides that;

"The Partner States hereby guarantee the free movement of persons who are citizens of other Partner States within their territories".

87. Those rights could not be interfered with, save as provided by the Treaty. In other words, the provisions of Uganda's Immigration and Citizenship Control Act (supra), that Counsel told us were applied, could only apply to the Applicant only to the extent that they complied with the Treaty.

Alleged Discrimination

88. The Applicant claimed to have been discriminated against. The guarantee of non-discrimination is a clear provision of Article 7(2) of the Protocol. It provides that:

7(2) In accordance with paragraph 1, each Partner State shall ensure non-discrimination of the citizens of the other Partner State based on their nationalities by ensuring:

a. the entry of citizens of other Partner States into the territory of the Partner State without a visa.
b. the free movement of persons who are citizens of the other Partner State within the territory of the Partner State.
c. that the citizens of the other Partner States are allowed to stay in the territory of the Partner State, and
d. that the citizens of the other Partner States are allowed to exit the territory of the Partner State without restrictions.

89. The Applicant was part of a 14 member delegation, on schedule to meet the Honourable Chief Justice of Uganda. It is evident from the visas in his passport that he had visited Uganda on at least three occasions between 01.02.2011 and 13.4.2011. It is amply clear, therefore, that he was not a stranger in Uganda. He was the only member of the delegation who received adverse treatment. Short of a reasonable explanation of this treatment by the Respondent, this failure to treat him equally with the other members of the same delegation, would amount to discrimination. The Respondent, in our view, failed to explain it.
90. We have discussed the import of Articles 6(d) and 7(2) of the Treaty at length elsewhere in this judgment, and we reiterate that position here. The Applicant travelled to a Partner State that is bound by the principles of good governance enshrined in Article 6(d), and had a legitimate expectation of being treated in accordance therewith. We find, however, that the treatment he was subjected to was adverse and discriminatory.
91. That he was singled out of a delegation, declared a prohibited immigrant, denied entry, returned to Kenya, without being furnished with reasons why and without being heard in his defence was clearly at variance with and in violation of Uganda's obligation to adhere to the rule of law, accountability, transparency as well as the recognition and protection of human rights in accordance with the Charter, as provided under Articles 6(d) and 7(2) of the Treaty and 7(2) of the Protocol.

Declaration of Prohibited Immigrant

92. In the Reference the Applicant alleges that save for a copy of the "Notice to Return or Convey Prohibited Immigrant", he was not furnished with any reasons, written or verbal why he was declared a prohibited immigrant. At paragraph 4 of his affidavit evidence, Mr Charles Okello Cowards, the Principal Immigration Officer, avers, inter alia, that he knows that under S.52 of the Uganda Citizenship and Immigration Control Act, Cap 66, Immigration officers are not under the obligation to give reasons for such actions. At the hearing Counsel for the Respondent told Court that the Applicant was handled under S.52 of Cap 66.
93. Section 52 describes who prohibited immigrants are and provides twelve categories of them. We will reproduce the Section verbatim:
"The following persons are prohibited immigrants and their entry into or presence within Uganda is unlawful except in accordance with the provisions of this Act:-
    a. a destitute person
    b. any person who:-
        i) refuses to submit to medical examination after having been required to do so under section 50;
        ii. is certified, by a Government medical practitioner, to be suffering from a contagious or infectious disease which makes his or her presence dangerous to the community
    c. any person against whom there is in force an order of deportation from Uganda made under this Act or any other law for the time being in force;
    d. any person whose presence or entry into Uganda is, or at the time of his or her entry was, unlawful under this Act or any other law for the time being in force;
    e. any person who has not in his possession a valid passport issued to that person by or on behalf of the Government of the State of which he or she is a subject or citizen or a valid passport or document of identity issued to him or her by an authority recognised by the Government, such document being complete and having endorsed on it all particulars, endorsements and visas required from time to time by the Government or authority issuing that document and by the Government;
    f. any person who is a drug trafficker and who is living, or who prior to entering Uganda was living, on the earnings of drugs or drug trafficking or trade;
    g. a person who as a consequence of information received from the Government of any State, or any other source considered reliable by the Minister or the Commissioner, is declared by the Minister or by the commissioner to be an undesirable immigrant; but every declaration of the commissioner under this paragraph shall be subject to confirmation or otherwise by the Minister;
    h. any person who, not having received a free pardon, has been convicted in any country, for murder, or any offence for which a sentence of imprisonment has been passed for any term, and who by reason of the circumstances connected with the offence is declared by the Minister to be an undesirable immigrant; except that this paragraph shall not apply to offences of a political character not involving moral turpitude;
    i. any person who is a subject or citizen of any country with which Uganda is at

war;

j. the children, if under eighteen years of age and dependants of a prohibited immigrant, and any other dependent of a prohibited immigrant; and

k. any person convicted of any offence under this Act.

94. A good faith and plain reading of the aforesaid Section shows that, from (a) through (k), for any person to be declared a prohibited immigrant under any of the twelve categories, there is a formal technical process by which it is ascertained that certain conditions exist and, once ascertained, then the decision to declare him such prohibited immigrant or not is made.

95. Secondly, while a person can be declared a prohibited immigrant under one or more clearly ascertained categories, our reading of the Section indicates that it would be impossible for a person to be declared a prohibited immigrant pursuant to the whole blanket Section 52. From the foregoing, it would seem to us that the Applicant could not have possibly been declared a prohibited immigrant under the whole of Section 52, without reference to any of the twelve categories.

96. At the hearing Counsel were asked what part of Section 52 the Applicant offended for him to be declared a prohibited immigrant. Ms Ijang replied that it was Section 52(d). When she was told that the Notice to Convey Prohibited Immigrant contained no reference to Section 52, she shifted to Section 66(4). At that point, Ms Nshemereirwe came to her colleague's aid and told the Court that they were relying on, and we should, as well, on the affidavit evidence of the Principal Immigration Officer, specifically the averment that under Section 52, Immigration Officers were under no obligation to give reasons.

97. Our consideration of this evidence and submissions posed a number of problems. In the first place this was now a court of law, not an immigration desk. While it may be that the immigration officials believed, albeit mistakenly, that they were under no obligation to give the Applicant reasons for denying him entry, we are convinced that, as an administrative authority, at an international airport, in this day and age, they had an obligation, to have a record of, or, at the very least, to know those reasons and, consequently, we would have expected them to disclose them in the Court. The law, this time, put them under obligation to disclose. The Rules of this Court permit the conduct of proceedings in camera, for sufficient cause. In spite of demands and prodding, Counsel did not disclose any reasons. We formed the opinion that there were none.

98. Secondly, much as we perused and combed through Section 52, (and this is why we reproduced it verbatim) we did not find any provision that empowers Immigration Officers in Uganda not to give reasons to persons whom they deem to be prohibited immigrants and/or deny entry into the country. We found no provision that prohibits them from doing so or penalises them for doing so. On the contrary, we found that the Section shows that none of the processes leading up to a decision that one is or is not a prohibited immigrant under any of the categories, can be concluded without informing the immigrant of the reasons and hearing him in his defence or in explanation.

99. Thirdly, even if that power existed under Section 52, the Immigration authorities knew or ought to have known that by Uganda's accession to and domestication of the

Treaty and Protocol, that power would be strictly qualified and limited by Articles 104 and 7(2) of the Treaty and 7 and 54(2) of the Protocol. In other words, they were duty bound to treat the Applicant in accordance with those provisions, and not to do so amounted to violation of his rights and Uganda's obligations there under.

100. Finally, in spite of paying close attention to the Respondent's evidence and submissions, we were unable to ascertain whether the Applicant was ever declared a prohibited immigrant, by what procedure and at what point. The only document that was issued was the Notice to Return or Convey Prohibited Immigrant. It was issued under Section 66(4) of the Citizenship and Immigration Control Act.

The Section provides as under:

"Where a prohibited immigrant enters Uganda from a ship or vehicle, whether or not with knowledge of the owner, agent or person in charge of it, the agent or person in charge commits an offence and is liable on conviction, to a fine not exceeding one hundred currency points; and provision shall be made by the owner, agent or person in charge, as the case may be, to the satisfaction of an immigration officer for the conveyance out of Uganda of the prohibited immigrant".

The Notice was issued to Kenya Airways, not to the Applicant.

101. The Section penalises the owner or agent of a ship or vessel that brings a prohibited immigrant into Uganda. We were not told whether the Applicant could have been a prohibited immigrant before starting his journey to Uganda or he was declared a prohibited immigrant on arrival. All we could see was Kenya Airways being condemned to removal, from Uganda, of a prohibited immigrant they had brought into the country but nowhere were we shown how, why, when, and by whom he was so declared. We were not shown whether the declaration was oral or it was documented. The Notice, in our view, was not just irregular, it was unknown to Ugandan law.

102. The foregoing leaves us with four conclusions: Firstly, that the Applicant was not a prohibited immigrant, under the law, because there is no evidence that he was declared so. Secondly, that Immigration Authorities merely labelled him a prohibited immigrant so as to deny him entry. Thirdly, that the Notice was issued in order to corner Kenya Airways into returning him to Kenya and, finally, that the Immigration Authorities resorted to kangaroo methods for want of a lawful procedure by which to swiftly return the Applicant to Kenya.

103. Paragraph 13 of the affidavit evidence of Charles Okello Cowards stated that Uganda's action to deny the Applicant entry was lawful, bonafide, justifiable and in the security interests of the people of East Africa. We found this to be an important area to consider. Counsel for the Respondent, however, made it anything but easy for us. Beyond the averment we were told/shown nothing else. It would have been immensely helpful for the Court to hear and evaluate what security interests of the people of East Africa the immigration officials considered and how the Applicant's entry into Uganda would put those interests at risk or how his denial of entry did preserve or protect them. We were not told anything. We dismissed the averment as lacking in value.

104. Counsel for the Respondent, in submissions, asserted that the Court should consider the circumstances during the wind of terrorism (sic) and affirm the Ugandan

position to deny the Applicant entry into Uganda. Counsel, however, trod carefully and avoided any direct allegation, from the bar, against the Applicant in relation to that wind of terrorism.

105. We find it pertinent to point out here that, at no point, throughout the Applicant's ordeal was such or any allegation of wrongdoing levelled against him. Again, without substantiation, we were of opinion that the assertion was of no ascertainable value. We think that if the Respondent had evidence of wrong doing against the Applicant he would have been prosecuted in Uganda. This Reference was another crucial opportunity to come clean. The documentary evidence he produced to show that he is an Advocate of the High Court of Kenya and also a human rights activist and, therefore, a law abiding citizen of a Partner State, were not challenged.

106. Curiously while the Principal Immigration Officer averred in his affidavit that the Applicant was denied entry in the security interest of East African citizens, the way they handled him pointed in the direction of an individual known to be harmless to the Region. Indeed, we wonder why a person known or suspected to be a risk to Regional security would, once found in one Partner State, not be arrested and charged but just be left to await the next flight to return him to another Partner State, and, once there, remain at large.

107. We entirely understand the terror attacks referred to and we condemn them in the strongest of terms. But even then, for Uganda to take out the consequences of that tense situation on the Applicant the minimum we would expect was evidence that he was a suspect or was in some way connected. Surprisingly the Respondent did not even attempt to allege anything against him in that regard.

108. From evaluation of the evidence, it does not seem to us that the Applicant was a threat or would have failed to explain his presence in or wish to enter Uganda, given the chance, but his fate was sealed the moment the Immigration authorities chose to interpret Section 52 as not obliging them to inform him of any reasons or to hear his side of the story.

Alleged Detention

109. The Applicant alleged that pursuant to his denial of entry, he was restrained, confined and detained in the offices of the Ugandan Immigration at Entebbe International Airport between 9.00 am and 3.00pm when he was deported back to Kenya via Jomo Kenyatta International Airport.

110. According to the Respondent's affidavit evidence, the Principal Immigration Officer avers that he knows that upon denial of entry into Uganda, the Applicant was handed over to Kenya Airways Limited with instructions to take him into their custody and ensure that he is removed from the non permissible area and put him on their next flight proceeding to Nairobi. The "Notice to Return or Convey Prohibited Immigrant" addressed to the Manager Kenya Airways stated, inter alia, that the Applicant had been denied entry in accordance with the law and the Manager was requested to take him into his custody and ensure that he is removed from the non-permissible area.

Black's Law Dictionary defines "detention" as, "the act or fact of holding a person in custody; confinement or compulsory delay."

Custody is defined as the "the care and control of a thing or person for inspection, preservation or security".

111. We have shown above that the "Notice to Convey or Remove Prohibited Immigrant", issued by the Principal Immigration Officer, which contained instructions that the Applicant be taken into custody, was illegal and unjustified. It is undeniable, that he was taken into custody, deprived of his liberty and was not a free man between 9am and 3pm.

112. We think that whether it was Kenya Airways which took him into custody as the Notice requested, or it was the Immigration officials who held him for some time and Kenya Airways the rest of the time, is not material. What we find material is that it was all done in execution of the illegal Notice of the Principal Immigration Officer. Without it, he would have been attending the meeting with Uganda's Chief Justice or remain a free man in Kampala. Consequently, our view is that once the illegal decision to declare the Applicant a prohibited immigrant was made and the Notice to remove him from Uganda was issued the rest of the actions were merely foregone conclusions.

113. What matters is that he was not a free man, and that his Treaty guaranteed freedom of movement within a Partner State was cut short as a result of the actions and decisions of the Partner State's immigration officials, which actions were illegal under the Treaty, the Protocol and national law. The act of pinning Kenya Airways with responsibility for bringing a prohibited immigrant into Uganda narrowed the Applicant's possibilities to one, namely, that he would remain under some custody until he boarded the next available Kenya Airways flight to Nairobi. The detention instruction was complete when the illegal Notice was issued, not when he was put into whichever custody that he was put.

114. Detention is indeed deprivation of liberty. When it is illegal it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity. Furthermore, when a citizen of a Partner State is illegally detained in another Partner State, with no right to be informed why or to be heard in his defence, and the reasons cannot be disclosed, even in a court of law, it is not just a violation of the Treaty, it is indeed a threat to integration.

115. The High Court of Ireland, in a case where a woman had been denied entry into Ireland and detained for three days, had this to say:
'It is a matter of profound regret that a perfectly innocent person who had every right to enter the State was instead refused entry and found herself obliged to spend the equivalent of almost three full days in custody. This must have been a humiliating and degrading experience for her- (see *Raducan & Anor -v- MJELR & Ors [2011] IEHC 224 at para 26*)',

Return to Kenya

The foregoing analysis clearly shows that the Applicants' return to Kenya was unjustified, high-handed and was procured through unlawful means.

116. Our answer to the issue, therefore, is that the actions and decisions to declare the Applicant a prohibited immigrant, deny him entry into Uganda, detain him and return him to Kenya were illegal, unjustified, unlawful and inconsistent with

transparency, accountability, rule of law; and universally accepted standards of human rights and, therefore, in violation of his rights and Uganda's obligations under Articles 6(d) and 7 (2) of the Treaty and Articles 7(2) and 54(2) of the Protocol.

Whether the actions of the Respondent were in conformity with Article 104 of the EAC Treaty and Article 7 (6) of the Common Market Protocol

117. For ease of reference, we shall reproduce the content of the relevant provisions of the Treaty and the Common Market Protocol in this Reference and analyse them systematically.

Article 104 of the Treaty provides that:

1. The Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community.
2. For purposes of paragraph 1 of this Article, the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence at a time to be determined by the Council.

Article 7 of the Common Market Protocol provides that:

i) The Partner States hereby guarantee the free movement of persons who are citizens of the other Partner States, within their territories.

ii) In accordance with paragraph 1, each Partner State shall ensure non-discrimination of the citizens of the other Partner States based on their nationalities by ensuring:

a) the entry of citizens of the other Partner States into the territory of the Partner State without a visa;

b) free movement of persons who are citizens of the other Partner States within the territory of the Partner State;

c) that the citizens of the other Partner States are allowed to stay in the territory of the Partner State; and

d) that the citizens of the other Partner States are allowed to exit the territory of the Partner State without restrictions.

3. The Partner States shall, in accordance with their national laws, guarantee the protection of the citizens of the other Partner States while in their territories.
4. The free movement of persons shall not exempt from prosecution or extradition, a national of a Partner State who commits a crime in another Partner State.
5. The free movement of persons shall be subject to limitations imposed by the host Partner State on grounds of public policy, public security or public health.
6. A Partner State imposing a limitation under paragraph 5, shall notify the other Partner States accordingly.
7. The Partner States shall effect reciprocal opening of border posts and keep the posts opened and manned for twenty four hours.
8. The movement of refugees within the Community shall be governed by the relevant international conventions.
9. The implementation of this Article shall be in accordance with the East African Community Common Market (Free Movement of Persons) Regulations, specified in Annex I to this Protocol.

118. We should recall for clarity of issues that the actions complained of are the

denial of entry to the Applicant, being declared a prohibited immigrant, detention and return to Kenya. We have shown above that these actions were in violation of the freedom of movement of the Applicant which is among the foundational principles of the Common Market. We therefore do not hesitate to hold that the same actions are in violation of Article 104 of the Treaty.

119. As regards the question whether the actions of the Respondent were in violation of Article 7 (6), we also indicated earlier in this analysis that the provision created an obligation on aPartner State imposing a limitation of the freedom of movement of persons under Article 7(5) of the Protocol to notify the other Partner States accordingly.

120. The Respondent argued that the Applicant had a duty to prove that Uganda did not comply with that provision, since he is the party who made the allegation. With respect, we think otherwise. Article 7(6) is a Protocol obligation upon a Partner State imposing a limitation to inform the other Partner States. It is also a Treaty obligation under Article 8(3) (c). It is not dependent on whether there is litigation or not. A notification is, in our view, a notice meant for the public in the Partner States to be known and be complied with by all. With respect, therefore, we think that the burden was on the Respondent to prove that Uganda had or had not made the notification. It would otherwise be an unbearable burden on the Applicant to do so. The Respondent did not discharge this burden.

121. With or without notification, however, we are still of the view that the Applicant's case had to be evaluated on its own merit. A Partner State, before imposing a limitation on an individual would have to satisfy itself that the measure is merited in each particular case. If, for example the Applicant, was slapped with a limitation because he was a threat to the security interest of the East African people, it was incumbent on the Respondent to satisfy themselves that it was merited, and where he challenged the legality of the limitation in Court, the Respondent had a duty to prove in Court that the Applicant indeed constituted a real threat to regional security.

122. In stating so, we are fortified by the European Court of Justice, which, while interpreting a similar provision, in *Commission of the European Communities v Kingdom of Spain, Case – 503/03*, held, inter alia, that; the Spanish authorities were not justified in refusing entry to the persons concerned without having first verified whether their presence constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

123. We find, from the foregoing, that the actions of the Respondent were not in conformity with Article 104 of the Treaty and Article 7(6) of the Protocol.

Whether the Provisions of section 52 of the Uganda Citizenship and Immigration Act are inconsistent and in violation of Articles 6 (d), 7 (2) and 104 of the Treaty and Article 7 of the Protocol

124. As Section 52 of the Citizenship and Immigration Control Act 1999 (the Act) is reproduced verbatim and discussed at length elsewhere in this judgment, we do not find it necessary to reproduce it here.

The Applicant argued that the Section is in violation because, one, it does not provide for the right of due process before a person is declared a prohibited immigrant. Secondly, that it does not provide for a distinction in treatment between EAC citizens

and other immigrants. Thirdly that it does not recognize that limitations can only be imposed pursuant to the Protocol; and finally, that it does not provide for the duty to inform other Partner States when a Partner State imposes limitations.

125. The Respondent, on the other hand, argued that there is no uniform EAC law on the movement of persons and that it is an area regulated in accordance with national law.

We have shown above that we disagree with the assertion that Section 52 does not provide for the right to due process. We reiterate our position. We have shown, as well, that Community Law in this area is very much part of the national law in Uganda. The argument of the Respondent that there is no East African Community uniform law on the free movement of persons is, therefore, erroneous. Indeed, Article 7 (9) of the Common Market Protocol provides that the implementation of the freedom of movement of persons shall be in accordance with the Freedom of Movement of Persons Regulations. We have observed earlier that Regulation 2 provides that the implementation process of Article 7 of the Protocol shall be transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.

126. While we, respectfully, agree with the Applicant's critique of Section 52, we are of the opinion that the provisions cited no longer have force of law regarding citizens of partner states and are, therefore, not inconsistent with Treaty provisions.

127. We have found and held, in Issues ii and iv, that upon enactment of the Treaty and, subsequently, the Protocol, they became part of national law and law applicable in Uganda as of their dates of entry into force. We reiterated, as well, our position that The Republic of Uganda is bound by the precedence of community laws over national ones in matters pertaining to the implementation of the Treaty.

128. We think, therefore, that the obligations voluntarily entered into by the Republic of Uganda, and the rights acquired by the citizens of the Partner States, under the Treaty and Protocol, in respect of the movement of citizens of the Partner States, within Uganda, carried with them a permanent limitation against which a provision of existing or subsequent national law incompatible with the Treaty and Protocol, by the Republic of Uganda, cannot stand.

129. The upshot of this, in our view, is that from the dates of entry into force of the Treaty and the Protocol, in Uganda, Section 52 would have to be read together with, and give precedence to, the relevant Treaty and Protocol provisions, on matters pertaining to the determination of whether a citizen of a Partner State is a prohibited immigrant or not. Section 52 is still applicable as it is where citizens of other nations, except the Partner States, are concerned. In matters pertaining to citizens of the Partner States, however, it would result in an infringement of the Treaty. In this Reference it is clear that if the Section had been read together with the relevant Treaty and Protocol provisions, as shown above, the Applicant would have been treated like a citizen of a Partner State but we got the impression that a procedure, unknown to any law, could have been applied to the Applicant and the immigration officials were conveniently stretching the law to fit.

130. In view of the foregoing, we find and hold that the provisions of Section 52 are neither inconsistent with, nor in violation of Articles 6(d), 7(2) and 104 of the Treaty and Article 7 of the Protocol because, on matters pertaining to citizens of Partner

States, any offending provisions of the Section were rendered inoperative as of the respective dates of entry into force of the Treaty and Protocol as applicable law in Uganda.

Costs

131. We are alive to the provisions of Rule 111 of the Rules of this Court which provides that "costs in any proceedings shall follow the event unless the Court shall, for good reasons, otherwise order".

We believe that in the filing and prosecution of this Reference the Applicant's objective was to highlight, contest and cause resolution to an issue of regional concern rather than to seek material restitution, for his six hour ordeal, from the Republic of Uganda. We think he has achieved that.

132. It is our belief also that the physical and emotional distress he was subjected to, while tucked away and chilling unnecessarily at Entebbe International Airport, stung the human rights activist in him into seeking to prevent it from happening to another citizen of a Partner State. We would hope he has achieved this or, at any rate, made his contribution to its achievement.

133. Finally, we have no doubt that the issues raised and determined in this Reference will enrich and benefit Community jurisprudence, courtesy of the Applicant.

134. In view of the foregoing, we find that this Reference qualifies as a public interest and a fitting one where each party should bear their costs.

Whether the Applicant is entitled to the prayers sought.

129. In light of the above considerations and findings, prayers i, ii, iii, and iv are granted. Prayer v is not granted.

Conclusion

130. We thank all Counsel for their research which enriched the debate and helped us in the determination of this Reference. We make the following final orders:

i) The Reference is properly in the Court.

ii) The Sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of the Partner States is not taken away by the Treaty and the Protocol but, in denying entry to such persons, the Republic of Uganda is legally bound to ensure compliance with the requirements of the relevant provisions of the Treaty and the Protocol. Sovereignty cannot act as a defence or justification for non compliance, and neither can it be a restraint or impediment to compliance.

iii) The denial of entry into Uganda of the Applicant, a citizen of a Partner State, without according him the due process of law was illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7 (2) of the Treaty.

iv) The actions of denial of entry, detention, removal and return of the Applicant, a citizen of a Partner State, to the Republic of Kenya, a Partner State, were illegal, unlawful and in violation of his rights under Articles 104 of the Treaty and 7 of the Common Market Protocol.

v) On matters pertaining to citizens of the Partner States, any provisions of Section 52 of Uganda's Citizenship and Immigration Control Act formerly inconsistent with provisions of the Treaty and the Protocol were rendered inoperative and

have no force of law, as of the respective dates of entry into force of the Treaty and the Protocol as law applicable in the Republic of Uganda.

vi) Each party shall bear its costs. It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 6 of 2011

Democratic Party and Mukasa Mbidde And The Secretary General of the East African Community and the Attorney General of the Republic of Uganda

Busingye Johnston, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa J, Butasi Jean Bosco J, and J, Isaac Lenaola, J
May 10, 2012

EALA elections in Uganda's Parliament - Restraining orders pending amendment of election rules- Whether amendments had been tabled before the Parliament of the Republic of Uganda and if the process of amendment was ongoing - Whether the 1st Respondent failed to supervise the Government of the Republic of Uganda to ensure that its National Assembly amended its Rules of Procedure for election of members of EALA- Whether the election of Members to EALA is the preserve of the Parliament of the Republic of Uganda.

Articles: 6 (d), 7, 8, 23, 27, 30, 33, 39 and 50 of the Treaty - Rules 1 (2), 17 and 24 of the East African Court of Justice Rules of Procedure, 2010 - Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006

Pursuant to Article 50 of the Treaty, the Parliament of Uganda passed the Rules of Procedure of Uganda's Parliament, 2006, providing for election of members of the East African Legislative Assembly. In 2008, the Rules were found to be in contravention of the Treaty and various Articles of the Constitution of Uganda and declared null and void. The Attorney General of Uganda obtained a stay of execution of that judgment and appealed against to the Supreme Court of Uganda. That appeal was still pending at the time this Reference was filed.

The Applicants averred that those Rules contravened the Treaty as they discriminated and limited the freedom and right of the Democratic Party (DP) and its members, including the second Applicant, in vying for election as representatives of the EALA.

The Applicant claimed that the 2nd Respondent and its Parliament were unwilling to amend the Rules while the 1st Respondent had failed to supervise the Government of Uganda to ensure that its Parliament amends the rules in question to make them consistent with Article 50. They stated that the state of affairs would continue and become irreversible unless the Court intervened. The Applicants sought several declarations.

Held:

1. The issue of whether the said Rules contravened any Articles of the Constitution of the Republic of Uganda was an issue to be determined by the appropriate national courts in Uganda.

2. There was inordinate delay in amending the Rules on the part of the 2nd Respondent. And, if the issue of amendments was not addressed with expedition and in conformity with the Treaty, it was likely to stall the commencement of the next EALA term and result in further endless litigation.
3. The Parliament of the Republic of Uganda, the Attorney General of the Republic of Uganda, the EALA were restrained and prohibited from conducting and carrying out any elections of members to the EALA, assembling, convening, recognising, administering Oath of Office or otherwise howsoever presiding over or participating in the election of the Representatives of Uganda and recognising of any names of nominees as duly nominated and elected to the EALA until the Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006 were amended by the Parliament of the Republic of Uganda to conform to the provisions of Article 50 of the Treaty for the Establishment of the East African Community.
4. While inaction by the 1st Respondent would not be considered a Treaty violation, it could constitute a violation under a different set of facts. The Respondent was therefore encouraged to establish, as a matter of administrative principle, a standard practice of following up on allegations of treaty infringements once it received formal communication about the same and to act as appropriate and provide feedback to the complainant.

Cases cited:
Bennet v. Chappel [1966] Ch.391,CA
Christopher Mtikila v The Attorney General of Tanzania and the Secretary General of the East African Community, EACJ Reference No 2 of 2007
CoxV. Green [1996] Ch. 216
Jacob Oulanyah Vs The Attorney General, Constitutional Court of Uganda, Constitutional Petition No. 28 of 2006
Loelv. Sanger [1949] Ch. 258
Mellstram v Garner [1970] IW.L.R.603
Prof Peter Anyang Nyong'o and others vs The Attorney General of Kenya and 2 others, EACJ Reference No 1 of 2006
Williams's v Home Office (No.2) 1981IALL ER1211

Judgment

Introduction
1. This is a Reference by the Democratic Party, one of the Registered Political Parties in the Republic of Uganda and represented in the Parliament of Uganda, (hereinafter referred to as "the DP") and one Mukasa Fred Mbidde, a DP Member and legal Advisor of the DP and an Advocate of the Courts of Judicature of Uganda.
2. The Reference is brought under Articles 6 (d), 7, 8, 23, 27, 30, 33, 39 and 50 of the Treaty for the Establishment of the East African Community (the Treaty) and Rules 1 (2), 17 and 24 of the East African Court of Justice Rules of Procedure (the Rules). The Reference is supported by the Affidavit of Mukasa Fred Mbidde.

3. The 1st and 2nd Respondents are the Secretary General of East African Community and the Attorney General of the Republic of Uganda, respectively. In opposition to the Reference, there are the replying affidavits, for the 1st Respondent, of Dr. Julius Tangus Rotich, a Deputy Secretary General and for the second Respondent that of The Attorney General, Hon. Peter Nyombi, MP and that of Daniel Gantungo, of the Attorney General's Chambers, Uganda.
4. Mr. Justin Semuyaba appeared for the Applicants, Mr. Wilbert Kaahwa appeared for the 1st Respondent and the 2nd Respondents was represented by Mr. Philip Mwaka and Ms. Christine Kaahwa.

Background

5. This Reference is predicated on conformity to Article 50 (1) of the Treaty which provides that, "1. The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as is feasible, the various political parties in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine."
6. Pursuant to the above Article, the Parliament of Uganda passed the Rules of Procedure of Uganda's Parliament, 2006, providing for election of members of the East African Legislative Assembly (hereinafter referred to as "EALA"). The Rules were, in 2008, found to be in contravention of Article 50 of the Treaty and various Articles of the Constitution of Uganda by Uganda's Constitutional Court in a now famous Constitutional Petition No28 of 2006, *Jacob Oulanyah Vs TheAttorney General* (hereinafter referred to "the Oulanyah Case") and were declared null and void. The Attorney General of Uganda applied for, and obtained a stay of execution of that judgment, appealed against it to the Supreme Court of Uganda and that appeal is still pending to date.

The Applicants' case.

7. The crux of the Applicants' case is that the Government of the Republic of Uganda and its Parliament are unwilling to amend the Rules of Procedure of Parliament, 2006 for the election of the EALA Members to have them conform to the provisions of Article 50 of the Treaty and that the Government and Parliament of Uganda intend to conduct the upcoming EALA elections by those unamended Rules.

8. The Applicants contend that those Rules, specifically Rule 11 (1) and Appendix B r3, 10 and 11 of the rules in issue, contravene not only Article 21 (1) and (2), 29 (1) (e) 89 (1) and 94 (1) of the Uganda Constitution but also Article 50 of the Treaty to the extent that they discriminate and limit the freedom and right of the DP and its members, including the second Applicant, to associate in vying for election as representatives of the EALA.
9. The Applicants also claim that the Secretary General has failed to supervise the Government of Uganda to ensure that its Parliament amends the rules in question to make them consistent with Article 50 of the Treaty.
10. The Applicants maintain that the above state of affairs means that the DP, other

Political Parties and shades of opinion in Uganda, though represented in the Uganda Parliament are, and will not be, represented in EALA, which violates Article 50 of the Treaty. Fearing that this state of affairs will continue and become irreversible unless the Court intervenes, the Applicants filed this Reference and prayed for orders that;

a) Rule 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used by the Parliament of Uganda in the election of the members of the East African Legislative Assembly in the upcoming elections are inconsistent with and contravene Articles 29(1) (e) of the Constitution of the Republic of Uganda, to the extent that they limit the freedom and right of the Democratic Party and its members including the second applicant to associate in vying for election for members as representatives in the East African Legislative Assembly (EALA).
b) Rule 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used in upcoming elections of the members of the East African Legislative Assembly are inconsistent with and contravene Articles 21(1) and (2) of the Constitution of the Republic of Uganda, to the extent that they discriminate against the opposition political parties including the second applicant in vying for elections to the East African Legislative Assembly.
c) The procedure to be carried out under the authority of Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used by the Parliament of Uganda in election of members of the East African Legislative Assembly are inconsistent with and contravene Article 89(1) and 94(1) of the Constitution of the Republic of Uganda to the extent that the said Rules of Parliament do not allow the Members of the Parliament of Uganda to elect the members of EALA.
d) The procedure to be used under the authority of Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used by the Parliament of Uganda in the upcoming elections of the members of the East African Legislative Assembly under Rule 2 (2) the interpretation section thereof do not define election in its true sense of the word as they provide for approval and not election.
e) The inaction of the Parliament of Uganda to amend the said Rules to conform to Article 50 of the Treaty for Establishment of the East African Community is in itself an infringement of the fundamental principles and the doctrines and the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights which are enshrined in those articles of the Treaty of the Community in particular with regard to peaceful settlement of disputes.
f) The inaction and the loud silence by the Government of Uganda and the Parliament of Uganda in not amending and realigning Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 in accordance with Article 50 of the Treaty for Establishment of the East African Community which are going to be used by the Parliament of Uganda in the upcoming elections of members of the East African Legislative Assembly is an infringement of Article 50 of the Treaty for Establishment of the East African Community.

g) The Secretary General of the East African Community has failed to supervise the Government of Uganda to ensure that the Parliament of Uganda amends its laws in order to make them conform to Article 50 of the Treaty for the Establishment of the East African Community.
h) Pending the hearing and determination of the instant motion, this Honourable Court be pleased to restrain and prohibit the East African Legislative Assembly, The Attorney General of Uganda and The Parliament of Uganda from conducting and carrying out any elections, assembling, convening, recognising, Administering Oath of office or otherwise howsoever presiding over or participating in the Election of the Representatives of Uganda and recognizing of any names of nominees as duly nominated and elected to the East African Legislative Assembly until Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda, 2006 which are going to be used by the Parliament of Uganda in the upcoming elections of the members of The East African Legislative Assembly are amended by the Parliament of Uganda to conform to Article 50 of Treaty for Establishment of the East African Community.
    i) The Attorney General is vicariously liable for the actions of The Government of Uganda and The Parliament of Uganda.
    j) The costs of this Reference be provided for.

The 1st Respondent's case

11. The 1st Respondent counters by denying the legality of the Applicants' claims and in particular argues that election of members of EALA is a function of Partner States' National Assemblies; that the Republic of Uganda pursuant to Article 50 (1) of the Treaty and the Rules of Procedure of Parliament of 2006, has determined the procedure for the election of EALA Members; that any amendment howsoever caused is a process vested in the Parliament of Uganda over which the Secretary General has no supervisory powers. The 1st Respondent asserts further that not only do matters complained of in this Reference not fall within the purview of Article 29 of the Treaty, but that he has also not considered that the Republic of Uganda to has failed to fulfil a Treaty obligation. The Secretary General finally asserts that further, and in the alternative, the Parliament of the Republic of Uganda has "within its Constitutional sovereignty and discretionary powers" embarked on addressing the Rules of Procedure that were impugned.

The 2nd Respondent's case.

12. For its part the 2nd Respondent states that the Republic of Uganda and its agents, at all times and in all instances, acted within their constitutional mandate and within the confines of the Treaty, the African Charter and related instruments. In particular, the 2nd Respondent states that it acknowledges that the rules in question were impugned and, accordingly, an amendment process commenced; that proposals have been made and will "beimminently presented to the Plenary for consideration"; that the information is in the public domain and finally that the Applicants' failure to acknowledge the above casts doubt on their good faith in bringing this Reference to this Court.

13. We need to point out at this juncture, for chronological reference, that when this Reference was filed the Applicants applied, under certificate of urgency, for a restraining order and the Court allowed the application and granted a temporary injunction restraining the Attorney General of Uganda and the Parliament of the Republic of Uganda from conducting elections of the Representatives of the Republic of Uganda to the EALA until determination of this Reference.

Scheduling Conference

14. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on the 29th February, 2012 at which the following were framed as the points of agreement and disagreement respectively:
    (i)points of agreement:
    a) The election of members of the East African Legislative Assembly is governed by Article 50 of the Treaty;
    b) Pursuant to the provisions of the Treaty, the election of the Members of the EALA from the Republic of Uganda is the preserve of the Parliament of the Republic of Uganda;
    c) The current Rules of Procedure (Appendix B to the Reference) were declared null and void in the Jacob Oulanyah case;
    d) Amendments have been proposed/tabled before Parliament by the Attorney General of the Republic of Uganda and the process of amendment is ongoing.
    (ii) points of disagreement:
    a) Whether or not the 1st Respondent has failed to supervise the Government of the Republic of Uganda to ensure that its National Assembly amends its Rules of Procedure for election of members of the East African Legislative Assembly.
    b) Whether or not the Applicants are entitled to declarations sought against the Respondents.
15. It was further agreed at the said Conference that evidence would be by way of affidavits. The Parties also agreed to file written submissions in respect of which they would make oral highlights at the hearing.
    Both parties noted that the case presented a good potential for settlement and it was agreed that the case preparation and attempts to settle should proceed concurrently and, in the event that a settlement is reached, the Court would be informed and appropriate orders would be issued. Ultimately no settlement was reached, hence this judgment.

Preliminary Point

16. In their written submissions and at the hearing, Counsel for the 2nd Respondent raised an issue *in-limine*, which they called "a preliminary objection on a point of law" to the effect that the Reference is moot and an abuse of Court process, in view of the proceedings in the Parliament of the Republic of Uganda to amend the 2006 Parliamentary Rules of Procedure. Consequently,counsel invited the Court to find that it has no jurisdiction to proceed with it. In addition Counsel asked the Court to take into consideration the fact that time was fast running out for the next EALA

elections and prayed, in the alternative, that the Injunction Order be varied to enable the elections to take place.

In support of this stance, Counsel for the 2nd Respondent submitted that;

a) the Parliament of Uganda has not taken any steps to conduct elections of its EALA Representatives under the 2006, Rules of Procedure;

b) although there is in place a stay of execution of judgment in the Oulanyah, Case there is ample evidence that the Parliament of Uganda is in the process of amending its Rules of Procedure, which are due to be enacted imminently and are in any case the Rules of Procedure to be used in the 2012 EALA elections;

c) the matter could have been resolved administratively without recourse to Court and the Applicants being in Parliament knew that it could be so resolved;

d) this Reference is premised on assumption or speculation, with no iota of evidence offered, that the 2006 Rules of Procedure will be used in the EALA elections of 2012;

e) the instant Reference is anticipatory in nature, could have been addressed administratively without recourse to court and is, therefore, not properly before or justiciable in this Court.

17. Mr. Semuyaba, Counsel for the Applicants, also in submissions and at the hearing, opposed the 2nd Respondent's objection and put up the following reasons:

(a) that EALA members who had been elected to represent Uganda using the 2006 rules went ahead to sit in the Assembly for five years during which period the appeal of the Oulanyah Case before the Supreme Court was never heard;

(b) that for all intents and purposes, the impugned Rules 11 (1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda, 2006 have not been amended todate, are still law and are still on the statute books in Uganda;

(c) that it is clear that the Attorney General of Uganda is not ready and willing to amend the Rules impugned by Uganda's Constitutional Court because he (the Attorney General) filed a Memorandum of Appeal in which he stated that he was dissatisfied with the whole of the judgment and decision of the Constitutional Court;

(d) that the Minister of State for Justice and Constitutional Affairs of Uganda, Hon. Fredrick Ruhindi stated in Parliament that the Government did not abandon the Appeal in the Supreme Court;

(e) that the Court should take judicial notice of the fact that the Petitioner in Constitutional Petition No 28 of 2006, Hon Jacob Oulanyah has changed political alliance and joined the NRM Party and is, therefore, unlikely to pursue the petition as he is no longer an independent member of the Parliament of Uganda;

(f) that the foregoing demonstrates that the Reference is not moot, anticipatory or premature as alleged by the 2nd Respondent but a Reference that raises issues that can stall the operations of the Community if not resolved.

18. It is trite law that a party may raise any point of law at any stage of the proceedings and that points of law should be determined at the outset because of their potential, if successful, to dispose of cases without the need for their determination on the merits –See: *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd [1969] EA 696.*

19. On examination of the written and oral submissions, however, we find that the issue raised was not a pure point of law but rather an issue requiring evidential proof before it could be determined. Counsel for the 2nd Respondent and for the Applicants both referred us to the evidence already on record, including the affidavits of The Attorney General, Hon Peter Nyombi, Hansards of Uganda's Parliament and other evidence to prove their respective and opposing arguments.
    Although the issue raised by Counsel for the 2nd Respondent was not a pure point of law we find, nonetheless, that it has to be determined at the outset because, it would dispose of the Reference if it is determined in favour of the 2nd Respondent.
    We have carefully considered the evidence and the rival submissions on this matter and have the following to say:
20. It is not in dispute that on 30th May 2008, the Constitutional Court of Uganda in the *Oulanyah Case* made declaratory orders impugning the Rules which are the major subject of this Reference. The Constitutional Court after considering the issues in the Petition declared, inter alia, that;
    1) "Rule 11(1) Appendix B rule 3, 10 and 11 of the Parliamentary Rules of Procedure of Parliament are inconsistent with Article 21 (1), 2 of the Constitution.
    2) 3 Rule 11(1) Appendix B rule 11 (1) of the Parliamentary Rules of Procedure is inconsistent with Article 74(4) (5) of the Constitution and is null and void.
    3) Rule 11(1) Appendix B rule 3, 10 and 11 of the Rules of Procedure of Parliament of Uganda is inconsistent with Article 89 (1) and 94(1) of the Constitution and is therefore null and void
    4) The Parliament of Uganda as the Electoral College did not carry out any election for members of the East African Legislative Assembly as required by Article 50 of the Treaty and Article 89 of the Constitution ..."

For clarity's sake, the impugned Rules provide as follows:

i. Rule11(1) provides that elections of Members of EALA, "shall reflect the proportional party membership based on numerical strength of the Parties in the House and take into consideration gender and other shades of opinion", and;
ii. Rule 3 of Appendix B provides that "elected members of the Assembly representing Uganda shall be nominated by the Parties or Organisations represented in the House on the basis of proportional party membership taking into consideration the numerical strength of the parties or organisations and gender" and;
iii. "rule 10 provides that "the Speaker shall announce to the House the nominations of members to the EALA"
iv. "rule 11 provides that "As soon as the Speaker announces the names of the elected members the Clerk shall publish the names in the Gazzette".

21. It is common ground that the Attorney General applied for stay of execution of that Order which was granted on the 23rd June 2008 and is still in place todate. The Attorney General also appealed the case on the 12th May 2009 and it is further common ground that this Appeal has not been heard todate. What is clear from the foregoing is that the impugned Rules are still law in Uganda.
22. Counsel for the Applicants also invited the Court, in written and oral submissions, to take judicial notice of the fact that Hon Jacob Oulanyah, the Petitioner in *Constitutional Petition No 28 of 2006* (referred to above), is no longer an Independent,

as he has since joined a political party, and it is likely that he is no longer interested in the Petition. Counsel for the 2nd Respondent did not contradict this submission. We therefore, take judicial notice thereof.

23. In regard to the assertion that amendments of the Rules are ongoing, we acknowledge the affidavit of the Attorney General and its contents but with due respect we do not find it sufficient to resolve the inaction complained of. Indeed the Hon Attorney General in the said affidavit deponed, inter alia, that while he was Chairperson of the Rules, Privileges and Discipline Committee of the 8th Parliament, the Committee;
"…….in recognition of and pursuant to the decision of the Constitutional Court of Uganda in Constitutional *Petition No. 28 of 2006 Jacob Oulanyah Vs The Attorney General*, the Government of Uganda commenced the process of amending the Rules of Procedure of the Parliament of Uganda to conform to the East African Treaty and the Constitution of Uganda." This was on September 20th 2011.
24. Exactly five months later, on the 21st February 2012, The Deputy Attorney General, Hon Ruhindi Fredrick, when querried in Parliament about the Oulanyah Case appeal in the Supreme Court, told the House that they (the Attorney General's Chambers);
"... did not abandon the Appeal in the Supreme Court. We have had challenges in the Supreme Court and sometimes due to problems of quorum ... for Judges to sit in the Supreme Court. It has always been an issue of resources ... but it was actually not the Attorney General abandoning an Appeal." (Official Report of Parliament, 1st Session, Third Meeting, at p 2524)
25. In our considered view, these contradictory statements coming not only from the same office, that of the Chief Legal Advisor to the Government , are glaringly short on clarity and leave even a trusting beneficiary of the amendments in serious doubt.
26. Furthermore, during the hearing of the Reference, Counsel for the 2nd Respondent told the Court that the process of amending the 2006 Rules started prior to May 2011 and that:
"... the Rules of 2012 are in the process of being completed"and urged the Court to consider the matter settled. In respect of the stay of execution, in place since the *Oulanyah case*, Counsel submitted that;
"the stay may serve only the purpose of staying but the direction and the orders given in the *Jacob Oulanyah Case* are being put into place by the 2nd Respondent"
27. The above submissions of Counsel, with respect, reinforce, rather than dispel, doubt. Why a straightforward amendment which started prior to 2011 should still be; "in the process of being completed" or "being put into place"or"in the course of debate" or "in the process of amendment.....", is difficult to fathom.
In the premises, we too find them devoid of any promise for an intending beneficiary such as the Applicants.
28. On whether the matter could have been addressed administratively, we think, indeed it could because it appears to be simple. We however do not agree with Counsel for the 2nd Respondent that the Applicants are at fault for resorting to this Court. The reasons they advanced are convincing. On the contrary, this dispute looks, to us, like one which the Attorney General had not only the power but also the duty, *suomotu* to resolve, or help resolve, administratively, given his duties under Article 119 of the Constitution of Uganda. That he did not do so since the *Oulanyah Case* to date,

we think, he should shoulder the blame and not seek to conveniently shift it to the Applicants.

29. We find and hold, therefore, that the instant Reference is neither moot, anticipatory nor an abuse of court process. It is rather a proper Reference grounded on the facts that the said 2006 Rules of Procedure are still law, efforts to amend them are not promising, an appeal against their nullification is still in place, a next round of EALA elections is fast approaching and it is the Applicants' legitimate fear that the kind of election that happened in 2006 can happen again, to their disadvantage.
    The objection is accordingly overruled.
30. While canvassing this point, Counsel for the Applicants, invited us to consider and determine what the substance of the amendment of the Rules, to make them conform to Article 50 of the Treaty should be. One of the Hansards of the Parliament of Uganda filed in evidence also indicated that the Parliament of Uganda at one time expressed similar sentiments. (See *Official Report of the Proceedings of Parliament,1st Session, 16th Sitting, Third Meeting at p.2614.*)
31. We note as well that in a letter dated 27th March 2012 to the Registrar of this Court, to which Counsel for the 2nd Respondent alluded during oral submissions, the Deputy Attorney General, Hon. Fredrick Ruhindi, stated in one of its concluding paragraphs, inter alia, that;
    "Parliament resolved that the Attorney General should seek guidance on the interpretation of Article 51(1) in respect of the application by Legal Brains Trust.....".
32. With due respect, the letter was not of much use to us because it reached the court record by a procedure unknown to the Court's Rules of Procedure and, as such, it lacked any ring of appropriateness. We did not attach evidential value to it. In any event, the Treaty in Article 50 provides, inter alia, that elections of EALA members shall be conducted; "....in accordance with such procedure as the National Assembly of each Partner State may determine".
33. This Court has reiterated this position before- See *Prof Peter Anyang Nyong'o and others vs The Attorney General of Kenya and 2 others, Reference No 1 of 2006, Christopher Mtikila v The Attorney General of Tanzania and the Secretary General of the East African Community, Reference No 2 of 2007*. We do so even now.
34. Further it is an agreed point in this Reference that"the election of members of the East African Legislative Assembly from the Republic of Uganda is the preserve of the National Assembly of the Republic of Uganda."
35. We, therefore, do not consider that it is the Court's duty, at this juncture, to give guidance to or interpret for the Legislature of Uganda on what does or does not constitute compliance with Article 50 or Article 50 (1) of the Treaty because it is not the issue in contention. The issue about the Rules in this Reference is that they have not been amended to conform to Article 50 of the Treaty since the *Oulanyah Case* and there is no tangible promise that they will be. We shall say something about the matter later in this judgment.

Consideration of the agreed Issues:

Issue No.1. - Whether, or not, the 1st Respondent has failed to supervise the Government of the Republic of Uganda to ensure that its Parliament amends its Rules

of Procedure for the election of Members of the East African Legislative Assembly.

36. The Applicants' complaints above, about which the Secretary General is alleged to have taken no action, are contained in a letter from the Democratic Party, dated 27th July 2011, copy of which is at page 125 of the Reference, addressed to the Secretary General by the 2nd Applicant. The letter draws attention of the Secretary General to the Rules of Procedure of election of members of EALA and asserts that the "... provisions under the rules are an outright infringement of the East African Treaty 1999 ..." (sic) and goes on to explain why they are an infringement. The purpose of the letter, to quote from its last paragraph, is as follows;

    "The purpose of this letter is to require your good office to conduct your supervisory role of the Community buttressed in Article 29 (1) of the Treaty and accordingly prevail upon Uganda as a Partner State to amend its rule 11 (1) for the election of members of the East African Community (sic) attached as appendix B to the rules of Procedure of the Parliament of the Republic of Uganda for purposes of strict adherence to Article 50 (1) of the Treaty in particular with regard to our quest for representation to the Assembly and the attendant manner and conduct of the elections as preparations by intending candidates are underway." (sic)

37. The complaints contained therein are, in our view, that;
    a) the Secretary General was requested to prevail upon Uganda to amend its rules providing for elections to EALA, to adhere to Article 50 of the Treaty;
    b) the Democratic Party intends to be represented in the EALA; and
    c) that preparations by intending candidates are underway.

38. We find that points (c) and (d) that were agreed at the Scheduling Conference (supra) seem to show that the Secretary General cannot be blamed for inaction or loud silence in this Reference.

    We find the alleged want of supervision on the part of the Secretary General to ensure that the Rules in question are amended unsustainable in the face of the Parties' agreement, above, that the Rules were declared null and void in the *Oulanyah Case* and that the process of amending them is ongoing. It would be unjust, in our view, to fault the Secretary General for not supervising or following up on some process inside a Partner State which, the parties, including the one complaining, agree is being undertaken by the Partner State.

39. The alleged want of action or inaction on the part of the Secretary General as Ugandan Members of EALA are "about" to be elected using the impugned Rules in contravention Article 50 of the Treaty also, in our view, fails to stand because those elections have not taken place, and, apart from assertions from both the Applicants and the 2nd Respondent's Counsel, we were not shown evidence that they are about to take place.

40. In the result, we find no merit in the allegations that the Secretary General has failed to supervise the Republic of Uganda and its Parliament to ensure that they amend the said Rules of Procedure or that he has taken no action as EALA members of the Republic of Uganda are about to be elected using the impugned Rules. We do not find it useful to examine the rest of the arguments.

    The issue is resolved in the negative

41. We observe, however, that we did not get any evidence in the written or oral

submissions about what the Secretary General did after receiving the Democratic Party's letter. Mr Kaahwa, Counsel for the 1st Respondent did not inform us of a particular action that the Secretary General took, that is, whether he responded to the letter and how; whether he did not respond to it and why; or whether he took any step to verify the claims contained therein and what findings he made.

42. While we would not consider such inaction as a Treaty violation in this particular Reference due to its particular factual situation as explained above we are aware that it can constitute a violation under a different set of facts.
43. We would, therefore, encourage the Community Secretariat to establish, as a matter of administrative principle, a standard practice of following up on allegations of treaty infringements and/or violations once it receives formal communication about the same and to act as appropriate including providing feedback to the complainant. That would be, in our view, a good administrative act that would not overly tax either the Community Secretariat or the Secretary General.

Issue No. 2. - Whether or not the Applicants are entitled to the declarations sought.

44. In this Reference the Applicants sought a number of Declarations. At the outset we briefly examine the law on Declarations which we intend to be guided by in determining the issue.

Black's Law Dictionary defines "declaration" as:

"A formal statement, proclamation or announcement ..." *Black' s Law Dictionary Ninth Edition at p.467*)

Hood Phillips and Jackson describe the objective of declarations thus;"An action for a declaration asks for a "declaration of right". It may be brought ... in the Court even though no damages or other relief is claimed ..." – See *Constitutional and Administrative Law, Hood Phillips and Jackson, Eighth Edition, at p.735*.

In *Cox V. Green [1996] Ch. 216*, Court observed that for a declaration to issue "... there must be a justifiable issue", and in a number of other precedents See (*Loel v. Sanger [1949] Ch. 258, Mellstram v Garner [1970] IW.L.R.603* it has been held that the remedy of declaration cannot be brought in order to ".... ask hypothetical questions". In *Bennet v. Chappel [1966] Ch.391,CA*. Court held that, "The Court, in its discretion, will not grant a declaration unless the remedy would be of real value to the plaintiff". In *Williams v Home Office (No.2) 1981IALL ER1211, TudorEvansJ,* held that,"The Court will not grant declarations which are academic and of no practical value".

45. In light of the above authorities we will examine the declarations sought in the order in which the Applicant listed them and which we have reproduced elsewhere above. In prayers a, b and c the Applicants seek declarations that the impugned Rules contravene various Articles of the Constitution of the Republic of Uganda.
46. We find that the issue of whether the said Rules contravene any Articles of the Constitution of the Republic of Uganda is, in our view, an issue to be determined by the appropriate national courts in Uganda and we decline the invitation to assume that role.

In the result the declarations sought in (a), (b) and (c) cannot be granted.

47. In prayer (d) the Applicants seek a declaration that the said Rules of 2006 do not define "election in its true sense ..."

Since it is a point of agreement that the Rules are in the process of being amended it would be merely academic and of no practical value to the Applicants to grant such a declaration- (See: *Bennet Vs Chappel (supra)*)

48. In (e) the Applicants seek a declaration that the inaction of the Uganda Parliament to amend the said Rules to conform to Article 50 of the Treaty constitutes an infringement of the fundamental principles enshrined in the Treaty.
It was agreed at the Scheduling Conference that the Parliament of the Republic of Uganda is in the process of amending the Rules. We find that it would be hypothetical to grant a declaration such as is being sought-(See: *Mellstram vs Garner (supra)*.)
49. In prayer (f), briefly, the Applicants are seeking a declaration that the inaction and loud silence by the Government of Uganda and the Parliament of Uganda in not amending the rules in accordance to Article 50 (1)of the Treaty is an infringement of the Article. The essential requirements for EALA elections provided in Article 50 of the Treaty are that:
    - the National Assembly shall conduct an election;
    - sitting members of the Assembly are not eligible;
    - elected members shall be nine;
    - the elected members shall represent, as much as is feasible:-

    a) the political parties in the National Assembly;
    b) shades of opinion;
    c) gender; and
    d) other special interest groups;

    - the procedure for elections shall be determined by the National Assembly.

    Any election, or rule of procedure for election, of EALA members that departs from the above clear requirements risks contravening the Treaty.
50. We also note that the Constitutional Court in the *Oulanyah Case* decided, inter alia, that; (per Okello JA, as he then was): "on issues 1-4, I concur with the reasoning and conclusions of Mpagi Bahigeine, JA. I agree that for the reasons she has given that Rule 11(1) of the rules of Procedure of the Parliament of Uganda, 2006 which provided that election of the members of the East African Legislative Assembly representing Uganda, be conducted under Appendix B r3, is inconsistent, with all the stated Articles of the Constitution. As seen above r3 of Appendix B omitted to provide for "consideration of other shades of opinion in the House when electing Members of the East African Legislative Assembly representing Uganda. This is a serious omission because it is the basis of the Petitioner's complaint. It contradicted the very clear provision of Rule 11 (1) of the Rules of Procedure of Parliament of Uganda, 2006 and Article 50 (1) of the Treaty".
The Learned Judge went on to state that Rule 10 of Appendix B also failed to provide the mode of election by Parliament and stated that; ".....this omission is contrary to Article 50(1) of the Treaty which provides that the elected members of the EALA representing a Partner State shall be elected by the National Assembly of the Partner State..."
51. This was on May 30th, 2008. Four years down the road, nothing has been done by the 2nd Respondent apart from "recognising" the Oulanyah Case and making commitments to amend the Rules. Clearly there has been an inordinate delay to

amend the Rules on the part of the 2nd Respondent. Without doubt the delay has locked the Applicants out of the EALA and has, understandably, frustrated them. It is also a delay which, if not addressed, could adversely impact the commencement of the next EALA term. Bluntly put, the conduct of the Republic of Uganda has imposed this costly and avoidable Reference on the Applicants and, if the issue of amendments is not addressed with expedition and in conformity with the Treaty, it is likely not only to stall the commencement of the next EALA term but also result in further endless litigation.

52. The 2nd Respondent also seems to have exploited this delay for as long as there was a legal possibility. One result of this delay, for instance, is that the legal basis of the current EALA members from Uganda has comprised of the disputed election, the judgment nullifying that election, the stay of execution of that judgment and the unheard appeal against that judgment. Given that the current EALA term is almost at an end, we think that if the appeal eventually goes for hearing and determination it will, in almost all likelihood, be determined after the expiry of the current term.
53. Whether this was achieved by design, sheer luck or coincidence, the 2nd Respondent's Counsel were not able to explain to us. What appears natural to us, though, is that we cannot fault the Applicants for doubting, legitimately so, in our view, the 2nd Respondent's intentions given the way the whole process played out. The Applicants' dilemma is that if this could happen on the 2nd Respondent's watch, and for four years it has not been resolved, it can happen again unless the Applicants are vigilant enough to outsource intervention which is what they did in the instant Reference.
54. In light of the facts that it was agreed at the Scheduling Conference that election of EALA members is a preserve of the Republic of Uganda; that the impugned Rules of Procedure were declared null and void by the *Oulanyah Case;* that the amendment process thereof is ongoing; and that the 2nd Respondent assured this Court that the upcoming EALA elections will be conducted using amended Rules that conform to Article 50 of the Treaty, we find that it is only fair to give the 2nd Respondent the benefit of doubt by, inter alia, not granting the declaration sought. We say so despite our finding that the 2nd Respondent's conduct regarding amendment of the 2006 Rules leaves a lot to be desired and is the cause of the filing of this Reference.
55. The Community Court should, in our humble view, support positive and forward looking programs for the future rather than dwell on negative and inward looking agendas that are past.
    In any event, we think that the grant of such a declaration would not be of real value to the Applicants- see *Williams Vs Home Office (supra)*.
    Accordingly we decline to grant the declaration sought.
56. In (g) the Applicants seek a declaration that the Secretary General has failed to supervise the Government of Uganda to ensure that Parliament amends its laws to make them conform to Article 50 of the Treaty.
    In view of our findings on Issue No. 1 this declaration, too, is not granted.
57. In (h) The Applicants seek orders restraining and prohibiting the EALA, the Attorney General of Uganda and the Parliament of Uganda from conducting and carrying out any elections under the Rules of Procedure of the Parliament of Uganda, 2006 until those Rules are amended to conform to Article 50 of the Treaty.

58. We think that this is one remedy that would be of real practical value to the Applicants, yet occasion no prejudice to the either Respondent, since the 2nd Respondent is in the process of amending the 2006 impugned Rules of Procedure of Parliament and EALA elections have not taken place. We have said enough elsewhere above why this is the case.
    The declaration sought is accordingly granted.
59. In (i) the Applicants seek orders that the Attorney General of the Republic of Uganda be held vicariously liable for the actions of the Government and Parliament of the Republic of Uganda.
    We note that apart from mere assertions the Applicants did not show any particulars of omission or commission for which we can hold the Attorney General vicariously liable.
    Accordingly we considered the prayer abandoned.
60. In prayer (j) the Applicants prayed for costs. Having found as above we think it is fair and equitable that they should get the costs from the 2nd Respondent.

Decision of the Court

61. In view of our findings above, we find and hold that the Applicants have made out a case that the 2006 Rules do not conform to the Treaty. Accordingly, they are entitled to orders that will restrain the Parliament of the Republic of Uganda from conducting the EALA elections unless and until they amend the impugned Rules to conform to Article 50 of the Treaty.

In conclusion, It is Hereby Ordered That:

1. The Parliament of the Republic of Uganda, the Attorney General of the Republic of Uganda, the EALA are restrained and prohibited from conducting and carrying out any elections of members to the EALA, assembling, convening, recognising, administering Oath of Office or otherwise howsoever presiding over or participating in the election of the Representatives of Uganda and recognising of any names of nominees as duly nominated and elected to the EALA until the Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006 are amended by the Parliament of the Republic of Uganda to conform to the provisions of Article 50 of the Treaty for the Establishment of the East African Community.
2. The case against the 1st Respondent is dismissed with no orders as to costs.
3. The 2nd Respondents shall pay the costs of this Reference to the Applicants.

* * * *

East African Court of Justice – First Instance Division
Reference No 8 of 2011

Professor Nyamoya François And Attorney General of the Republic of Burundi & The Secretary General of the East African Community

Mary Stella Arach-Amoko, DPJ(Rtd), Isaac Lenaola, DPJ, John Mkwawa, J
February 28,2014

Amendment of Pleadings - Declaratory Orders - Limitation of Time - Adherence to Court's Rules of Procedure - Whether the Court had jurisdiction -Whether the actions and omissions of the 1st Respondent infringed the Treaty- Whether the 2nd Respondent failed to fulfill his obligations under EAC Treaty.

Articles 3 (3) (b), 6 (d), 7 (2), 8 (4), 27 (1) and 30 (1) and (2) of the Treaty for the Establishment of the East African Community and Rules 1(2) and 24 of East African Community Rules of Procedure- Rules 45, 48(a), 49 of the EACJ's Rules of Procedure, 2010

On 28th July 2011, the Applicant, who was an advocate and a spokesperson of one of the Opposition Political Parties in Burundi, was arrested on the orders of the Public Prosecutor of Burundi for alleged subornation of witnesses in a criminal matter which involved the murder of one, Dr. Kassim Allan. The case had been instituted sometime in 2003. The Tribunal of First Instance of Bujumbura, where the Applicant was charged, released him immediately and provisionally pursuant to the Penal Procedure Laws of Burundi. Despite the order for release, the Public Prosecutor allegedly refused to process his release and as a result, the Applicant remained in jail until 17th February, 2012.

The applicant averred that Burundi contravened internationally recognized tenets and principles of good governance and specifically Article 6(d) of the Treaty by unlawfully detaining him and he sought his immediate and unconditional release.

The 1st Respondent averred that the detention was lawful under Burundi's Criminal Procedure Code and that there was an appeal against the Applicant's release order. On 5th September 2013, the Court of Appeal quashed the judgment of the First Instance Tribunal in effect confirming the Applicant's preventive detention order. Furthermore, the matter complained related to human rights and was vested in the National Courts of Burundi pursuant to Article 27(2) and 30 (3) of the Treaty and thus the Court had no jurisdiction to hear the reference.

Held:

1. The mere inclusion of allegations of human rights violations in a Reference would not deter the Court from exercising its interpretative jurisdiction under Article 27 (1) of the Treaty.

2. The Court had no jurisdiction to make declaratory orders relating to the Applicant's right to enjoy his freedom according to the judgment of Tribunal of First Instance of Bujumbura or to order his release as this was properly conferred on the National Courts of Burundi.
3. The Applicant's Reference was lodged more than 16 days after the expiry of the two-month time-limit prescribed by Article 30 (2) of the Treaty. It was therefore time-barred.

Cases cited:
Independent Medico Legal Unit v. Attorney General of the Republic of Kenya, EACJ Reference No. 3 of 2010
Modern Holdings Limited v Attorney General of Kenya, EACJ Reference 1 of 2008
Omar Awadh & 6 Others v Attorney General of Kenya, EACJ Appeal No. 2 of 2012
Re Owners of Motor Vessel 'Lilian S' v. Caltex Oil(K) Ltd [1989]KLR 1
Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda, EACJ Ref. No. 5 of 2011

Judgment

Introduction
1. This Reference was lodged in this Court on 14th October 2011. Before the Reference could be heard, the Applicant filed an amended Reference which was lodged on 31st October 2012. The said Reference is premised on Articles 3 (3) (b), 6 (d), 7 (2), 8 (4), 27 (1) and 30 (1) and (2) of the Treaty for the Establishment of the East African Community and Rules 1(2) and 24 of East African Community Rules of Procedure (hereinafter referred to as the "Treaty" and the "Rules", respectively).
2. Professor Nyamoya Francois (hereinafter referred to as the "Applicant") is a resident of Bujumbura in the Republic of Burundi. He is an advocate and a spokesperson of one of the Opposition Political Parties in Burundi and his address for the purposes of this Reference is indicated as care of Mr. Isidoire Rufyikiri, Batonnier of Burundi Bar Association, Rue du Muscee, No. 3, B.P. 1745, Bujumbura, Burundi.
3. The 1st Respondent is the Attorney General of the Republic of Burundi and he is sued in his capacity as the Principal Legal Adviser of the Government of the Republic of Burundi . His address is given as care of the Minister of Justice and Keeper of the Seal, Republic of Burundi, P. O. Box 1870, Bujumbura, Burundi.
4. The 2nd Respondent is the Secretary General of the East African Community (hereinafter referred to as the "Community"). He is sued in his capacity as the Principal Executive Officer of the Community pursuant to his mandate under Articles 4(3), 29 and 71 of the Treaty. His address is EAC Headquarters, Barabara ya Afrika Mashariki, P. O. Box 1096, Arusha, Tanzania.

Representation
5. The Applicant was represented by Mr. Richard Onsongo. Mr. Nester Kayobera appeared for the First Respondent whereas Mr. Wilbert Kaahwa appeared for the Second Respondent.

The Applicant's Case

6. The Applicant's case can be deduced from his pleadings, the accompanying affidavit of one Onesime Kabayabayo sworn on 30th August 2012, the affidavit of one James Aggrey Mwamu sworn on 22nd February 2013 as well as his submissions filed on 10th Mary 2013.
7. In a nutshell, his case is as follows: On 28th July 2011, he was arrested on the orders of the Public Prosecutor of Burundi for alleged subornation of witnesses in a criminal matter which involved the murder of one, Dr. Kassim Allan, in a case that was instituted sometime in 2003. On 19th August 2011, the Public Prosecutor took the Applicant to the court -in - charge of confirmation of detention in the Tribunal of First Instance of Bujumbura.
8. The said Tribunal, after deliberation, provisionally released him and further ordered that its decision was to be executed immediately pursuant to the provision of Article 84 of the Penal Procedure, Laws of Burundi. The aforegoing notwithstanding, the Public Prosecutor allegedly arbitrarily refused to deliver the necessary documents for his release and as a result, the Applicant remained in jail in the absence of any supporting documents for his further incarceration.
9. It is his contention therefore, that the harassment, arbitral and unlawful detention that he was subjected to by agents of the Government of Burundi contravened internationally recognized tenets and principles of good governance and specifically Article 6(d) of the Treaty.
10. It is also the Applicant's case that the matter in question was widely reported in the print and electronic media both locally in Burundi and internationally but the 2nd Respondent failed to fulfill his obligations under Articles 29 and 71(1)(d) of the Treaty and failed to intervene in the matter.
11. For the reasons above, the Applicant prays for the following declarations and orders from this Court:
    a) That keeping him in detention is an infringement of Article 6(d) and 71 (1) (d) of the Treaty and that the said action is null and void.
    b) That the Secretary General failed to fulfill his obligations under Article 29 and 71 (1)(d) of the Treaty; and
    c) He has a full right to enjoy his freedom; and
    d) An order should be issued that he, be immediately released unconditionally.
    e) Costs of the Reference.

1st Respondent's case

12. In his Response to the Amended Reference, filed on 22nd February 2013 and in his written submissions filed on 6th November 2013, the 1st Respondent admits that the Applicant was arrested and detained as alleged but avers that the said acts were done in accordance with the laws of the Republic of Burundi, specifically Article 265 of the 1981 Burundi Penal Code (repealed in April 2013). He further avers that although the First Instance Tribunal at Bujumbura ordered provisional release of the Applicant, the Public Prosecutor, in accordance with Article 84 (2) of the Burundi Criminal Procedure Code ,re-arrested him and retained him in lawful preventive detention. He also states that subsequently ,the said Public Prosecutor,

immediately the Applicant's release order was issued, appealed to the Court of Appeal of Bujumbura against the said order and on 5th September 2013, the Court of Appeal quashed the judgment of the First Instance Tribunal and in effect confirmed the Applicant's preventive detention order.

13. It is on the basis of the foregoing that the 1st Respondent finally avers that the arrest and detention of the Applicant was lawful and that the Applicant cannot now be heard to say that the provisions of Article 6 (d) of the Treaty were violated by agents of the Government of Burundi.
14. Further, it is also the 1st Respondent's contention that the matter complained of is one that relates to human rights and is vested in the National Courts of Burundi pursuant to Article 27(2) and 30 (3) of the Treaty and therefore no jurisdiction is thereby conferred on this Court. In any event, that the Applicant was granted provisional release on 17th February 2012 and since then he is no longer in detention and his complaints are therefore baseless.
15. The 1st Respondent finally contends that the Applicant is not entitled to the remedies sought and the Amended Reference should be dismissed with costs.

The case for the 2nd Respondent

16. The 2nd Respondent's case rests on his response filed on 9th November 2012 which is supported by the affidavit of Dr. Julius Tangus Rotich, the then Deputy Secretary General of the Community, filed on 9th November 2012 and another by Ms.Jesca Eriyo, Deputy Secretary General, filed on 27th February 2013 as well as his written submissions filed on 14th June 2013. Mr. Kaahwa, learned Counsel for the Community, later highlighted those submissions when the matter came up for hearing on 6th November 2013.
17. It is the 2nd Respondent's case that firstly ,the instant Reference is time-barred because while the Applicant was arrested on 28th July 2011,the Reference was filed on 14th October 201 in breach of Article 30 (2) of the Treaty which obligates any party claiming a violation of the Treaty to institute any proceedings in this Court within two months of the Act, regulation, directive, decision or action complained of.
18. Secondly, that he was irregularly impleaded without leave of Court and contrary to the requirement of pleadings that amendments must be highlighted in distinct colour appended to the original pleading.
19. Thirdly, the 2nd Respondent also firmly maintains that his conduct has been consistent with the requirements of his office and that he has discharged his obligations in accordance with the Treaty and, therefore, there are no grounds for the grant of the reliefs sought by the Applicant against him and consequently prays that the Reference be dismissed with costs.

Scheduling Conference

20. At a Scheduling Conference held on 23rd January 2013, all the Parties were in agreement that there are triable issues based on the provisions of Articles 6, 27, 29 and 30 of the Treaty.
21. The issues that were framed and agreed for adjudication are therefore as follows:-

i) Whether the East African Court of Justice has jurisdiction to entertain the Reference.
ii) Whether the actions, omissions and commissions of the 1st Respondent infringe on the Treaty for the Establishment of the East African Community.
iii) Whether the 2nd Respondent has failed to fulfill his obligations under Articles 29 and 71 (1) (d) of the Treaty and ;
iv) Whether the Applicant is entitled to the declaratory Orders he seeks.

22. We also deem it important to note at this stage that the issues raised by the 2nd Respondent by way of Preliminary Objection and which were argued at the hearing, will require our determination for reasons to be seen shortly.
23. We also propose to determine the issue of Jurisdiction first because without it there is nothing ; and if we find that we have no jurisdiction then we must down our judicial tools and take no further step(see *Re Owners of Motor Vessel 'Lilian S' vs Caltex Oil(K) Ltd [1989]KLR 1*)

Consideration and determination of Issue No(1) - Whether the East African Court of Justice has jurisdiction to entertain the Reference

Submissions

24. The question as to whether this Court has jurisdiction to entertain the Reference was raised by the 1st Respondent in his response to the Amended Reference filed on 22nd February 2013.

The Applicant's Submissions

25. Mr. Onsongo ,who argued the case for the Applicant ,was emphatic that this Court has jurisdiction to entertain the Reference and that Article 30 of the Treaty confers jurisdiction on any litigant resident in a Partner State of the East African Community to institute proceedings alleging that there is a violation of the Treaty. It is also his submission that any such litigant has direct access to the Court for the determination of any issue relating to infringement of the Treaty without the requirement for the exhaustion of local remedies.
26. He further contends that by dint of the provisions of Article 30 (1) of the Treaty, the instant Reference is properly before the Court and that pursuant to the aforesaid provisions of the Treaty, not unlike each of the Partner States, the Republic of Burundi has undertaken to honour its commitments in respect of other multinational and international organizations of which it is a member.
27. He further submits that in determining a matter in question under the above Article, the Court is required to review the lawfulness of that matter and whether it amounts to an infringement of the Treaty.
28. In response to the 1st Respondent's assertion that the cause of action in this Reference relates to alleged violations of human rights and therefore outside the jurisdiction of the Court, Counsel argued that the 1st Respondent' s contention is erroneous and that on the contrary, while agreeing that the jurisdiction of this Court is subject to the proviso contained in Article 27 of the Treaty, the crux of the Applicant's plea, as exhibited in the Reference, is that the actions complained of are breaches of Burundi's obligations not only under international law generally e.g.

under the Bangalore Principles of Judicial conduct, 2002 but also under Article 6 (d) of the Treaty.

29. It is on this basis of the foregoing, that the Applicant is asking the Court to pronounce itself on the alleged breaches of the said Treaty obligations by Burundi in light of his grievances, namely that the three arms of government have come together and have acted to deny him his freedom.
30. Finally, relying on the authority of *James Katabazi & 21 Others Vs. Secretary General of the East African Community – Reference No. 1 of 2007*, Counsel submitted that this Court's jurisdiction is not ousted merely because the acts complained of are based on allegations of human rights violation and that following the *Katabazi case (supra)*, this Court should not abdicate from its duty to interpret the Treaty even if the issues raised in the Reference may touch on human rights.

1st Respondent's Submissions

31. Mr. Nestor Kayobera, for the 1st Respondent, in a nutshell submitted that while this Court has jurisdiction to hear and determine the Reference in respect of prayers (a), (b) and (c) of the said Reference, it lacks jurisdiction in respect of other prayers basically for the following reasons:
    a) That the Court's jurisdiction ought to be in accordance with Articles 27(1), (2) and 30 (3) of the Treaty and that under Article 27(1) "the Court shall initially have jurisdiction over the interpretation and application of this Treaty; provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States'.

       That because the instant Reference is premised on allegations of human rights violations, this Court lacks jurisdiction to try such violations unless the jurisdiction of this Court is extended or a protocol to do so, is concluded. Counsel stressed that the jurisdiction of the Court to entertain human rights disputes still awaits the operationalisation of a Protocol under Article 27 (2) of the Treaty and without it there cannot be jurisdiction to address such issues .
    b) Counsel concluded his submission in respect of this issue by contending that the instant case is different from and can be distinguished from the case of *Attorney General of the Republic of Rwanda Vs. Plaxeda Rugumba – EACJ Appeal No. 1 of 2012* because the Applicant in the instant matter ,unlike the subject of the Rugumba case, had not at any material time been detained in violation of Burundi national laws, a fact that was admitted by the Attorney General of Rwanda in Rugumba, nor has the Applicant been held incommunicado and in ignorance of his charges.

       Counsel went on to say that it has in fact been shown that the legality of the Applicant's detention was affirmed by the Court of Appeal of Burundi after determining the Appeal by the Public Prosecutor in that regard.
32. In view of the aforegoing, Counsel for the 1st Respondent urges this Court to declare itself incompetent to hear and determine the instant Reference.

2nd Respondent's submission

33. Mr. Wilbert Kaahwa, Counsel to the Community, advocating the case for the 2nd Respondent had the following to say in answer to the issue of want of jurisdiction:
    (a) That this Court derives its mandate from Articles 23 (1), 27 (1) and 30 (1) of the Treaty. In Article 23 (1) the Treaty provides that:
    "The Court shall be a judicial body which shall ensure the adherence of law in the interpretation and application of and compliance with the Treaty."
    The Treaty then provides in Article 27 (1) that:
    "The Court shall initially have jurisdiction over the interpretation and application of this Treaty."
34. It is Counsel's argument that the Treaty makes provision, for reference by natural or legal persons on any matter that infringes the Treaty or whose legality is disputable, to the Court under Article 30 of the said Treaty for determination and contended that the issue of jurisdiction of this Court was settled in;
    i) *EACJ Reference No. 1 of 2006: Prof. Peter Anyang' Nyong'o and 10 Others Vs. Attorney General of Kenya & 3 Others*
    ii) *EACJ Reference No. 3 of 2010; Independent Medico Legal Unit Vs. Attorney General of the Republic of Kenya (commonly known as the IMLU case)* and;
    iii) *EACJ Reference No. 9 of 2012 – The East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community*.
35. His further argument was that in all the above cases, this Court found and held that it has jurisdiction to determine matters under the Treaty notwithstanding the fact that some of the claims had the inclusion of allegations of violations of human rights.
36. Counsel observed and noted in that regard that in the instant matter, the Applicant seeks five remedies, some of which fall outside the jurisdiction of this Court and further argued that only the remedies sought under paragraphs (a), (b) and (e) of the Reference may be granted by the Court in exercise of its interpretive jurisdiction under Article 27(1) of the Treaty if proved by the Applicant and referred us to the decisions in the *Rugumba case (supra)* and the *Katabazi case (supra)* in support of that submission.
37. Counsel concluded by submitting that this Court has jurisdiction to entertain only some parts of the Reference and not the whole of it contrary to submissions on behalf of the Applicant.

Decision of the Court on Issue No. 1

38. We have examined at substantial length the submissions of all the learned Counsel in respect of the issue now in question. It is plainly clear from their submissions that they are generally in agreement that the remedies sought under paragraphs (a), (b) and (e) of the instant Reference may be granted by this Court in exercise of its interpretative jurisdiction subject to the usual standard of proof by the Applicant.
39. In view of the foregoing, we have found it necessary, for ease of reference, to reproduce the prayers in question. They are as follows:
    "(a) A declaration that the decision of keeping Professor Francois Nyamoya in detention as mentioned above is an infringement of Article 6 of the Treaty for

the Establishment of the East African Community and that it is null and void;
(b) A declaration that the 2nd Respondent failed to fulfill his obligations under Articles 29 and 71 of the Treaty establishing the East African Community;
(c) Declare that the Applicant has a full right to enjoy his freedom according to the judgment of Tribunal of First Instance of Bujumbura
(d) Order that Professor Nyamoya Francois be immediately released without any conditions.
(e) Costs of this Reference"

40. We are persuaded by the reasoning of learned Counsel for the 2nd Respondent and we fully associate ourselves with his submission that this Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference now before us.
41. Further to the foregoing, we wish to reiterate what this Court has consistently maintained/ held that the mere inclusion of allegations of human rights violations in a Reference will not deter this Court from exercising its interpretative jurisdiction under Article 27 (1) of the Treaty. (See for example the *Katabazi case (supra)*, the *Rugumba case (supra)*, the case of *Omar Awadh & 6 Others vs Attorney General of Kenya, EACJ Appeal No. 2 of 2012* and *EACJ Ref. No. 5 of 2011 – Samuel Mukira Mohochi Vs. The Attorney General of the Republic of Uganda*)
42. Without belabouring the point, we find and hold that this Court has jurisdiction to entertain the Reference in so far as prayers (a), (b) and (e) of the Reference are concerned.
43. As regards prayers (c) and (d),we have no jurisdiction to make such orders and we decline the invitation to perform the duties properly conferred on the National Courts of Burundi.

Preliminary Objection

44. Although a preliminary objection should ordinarily be raised at the earliest stage of any legal proceeding, we deem the one raised by the 2nd Respondent sufficiently important to address in this Judgment.

On amendment of the Reference

45. In *Modern Holdings Limited vs Attorney General of Kenya,EACJ Ref.1 of 2008*, this Court upheld an objection on the basis that a proper preliminary objection must be a pure point of law whose determination would bring the dispute to a quick resolution. In that regard and noting the twin objections by Mr.Kaahwa, the one that the Reference was unprocedurally amended and that the 2nd Respondent was improperly impleaded ,portends no difficulty at all.
46. We say so, with respect ,because a clear reading of the record in this matter would show that when Counsel for the Applicant appeared before us on 13th July 2012,an adjournment was granted for him to do certain things including amending the Reference. By that time, pleadings had not closed under Rule 45 of this Court's Rules of Procedure and therefore under Rule 48(a) of the said Rules, he did not require any leave to amend the Reference and introduce the 2nd Respondent as a party to the proceedings. He therefore properly amended the Reference and our finding is that this limb of the objection is not supported by the law and the record and is

consequently overruled.

47. Regarding the physical and visual manner of effecting an amendment, Rule 49 of the Rules merely requires a party after amending a pleading to deposit the amended version in the Registry and that is what the Applicant did on 31st August 2012 and after service thereof, the 2nd Respondent became a party to the proceedings and duly responded to the Amended Reference. There is no express provision in the Rules similar to that found for example in the Civil Procedure Rules of Kenya, Uganda and Tanzania that red, blue and green colours be used in showing the effected amendments against the original pleading. The Amended Reference in any event indicates the amended portions of the original Reference and we are satisfied that it meets all the requirements of an amended pleading. That limb of the objection is therefore similarly misguided and is overruled.

On whether the Reference is time-barred

48. Turning to the question whether the Reference as amended is time-barred, from the submissions made ,the following facts clearly emerge;
From the Applicant's own pleadings and from the supporting Affidavit of one Onesime Kabayabaya ,the Applicant was arrested on 28th July 2011 while the Reference was lodged on 14th October 2011 and amended on 31st August 2012 .
49. It is Mr. Kaahwa's argument that in view of the limitation period set out by Article 30(2) of the Treaty the Reference was filed out of time and is therefore time – barred. The said Article states that:
"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."
50. It has been further argued by Mr. Kaahwa that the starting date of an act complained of under the provision of Article 30 (2) of the Treaty is not the day the act ends, but the day when it is first effected and contends that both justice and equity abhor a claimant's indolence or sloth which is the case in the present Reference.
51. In support of his stance, he referred us to the decisions of this Court in *Omar Awadh and IMLU (supra)* and submitted that on the basis of those decisions , the Applicant in the present Reference cannot argue that computation of time can only commence after the cessation of his detention as any argument premised on continued breach militates against the very spirit and grain of the principle of legal certainty.
52. It is therefore his case that since the Reference was filed outside the time limit prescribed by Article 30(2) aforesaid, the same should be struck off with costs.
53. As can be gleaned from the record, specifically the proceedings of 6th November 2013, Mr. Onsongo, learned Counsel for the Applicant, was very brief in his rebuttal on this point. It was his main argument that the complaint does not relate to the exact date and point of arrest and detention. That the Applicant is basically arguing against an unlawful set of activities and that the process which led to his incarceration and denial of freedom of movement was unprocedural; and so the issue of limitation of time cannot arise in the circumstances; and the objection should therefore be overruled.

54. The 1st Respondent made no submissions on the preliminary objections raised by Mr. Kaahwa.

Decision of the Court

55. We have carefully considered the rival submissions of the Parties in support of their respective positions regarding the above issues. It is common ground, as is evident from the affidavits in support of their respective pleadings, that the acts complained of (the arrest, detention and alleged denial of freedom of movement of the Applicant) happened between 28th July 2011 and 17th February, 2012 when he was released (see paragraph 2 of Onesime Kabayabaya's affidavit sworn on 30th August 2012 in support of the Reference). It is further common ground that the instant Reference was lodged in this court on 14th October 2011 and amended on 31st August 2012.
56. It is glaringly clear from the foregoing that the Applicant lodged his Reference more than 16 days after the expiry of the two-months time-limit prescribed by Article 30 (2) of the Treaty.
57. It is now settled law as amply demonstrated in the decisions of this Court that Mr. Kaahwa has made reference to, that the computation of time starts on the date of the unlawful act act complained of, and not the day that the act ends –See Omar Awadh's case [supra] and the Independent Medico Legal Unit case (supra).Time therefore started running on 28th July 2011 and stopped running on 28th September 2011.
58. Mr Onsongo, in rebuttal to Mr. Kaahwa's arguments on this point, contends that his client's main grievance is "the process that led to the incarceration and the denial of freedom of movement ". He submits that the whole process was conducted unprocedurally. With due respect to him, we do not find merit in this argument. He cannot, in our candid view, afford himself the argument to the effect that Article 30(2) of the Treaty as regards the computation of time to institute proceeding does not apply to the matter now before us. This is precisely what he is saying and is now inviting us to buy his novel argument. With unfeigned respect to him, we decline his invitation to do so.
59. On the contrary, we are in full agreement with Counsel for the 2nd Respondent on his objection and further add that the principle of legal certainty that was enunciated in the Omar Awadh case (supra) and the Independent Medical Legal Unit case (supra) requires strict application.
60. In view of all the foregoing, we hasten to conclude that the Applicant filed his Reference out of the prescribed time and that action consequently spells out the obvious ;that the instant Reference has not complied with the strict provisions of Article 30 (2) of the Treaty and having said so, we hereby emphatically hold that it is time-barred and we shall make the necessary orders at the end of this Judgment.

Issues Nos. 2, 3 and 4

61. In light of the above, we refrain from entertaining the remaining issues for the one obvious and simple reason that the Reference is no longer alive and any attempt at determining those issues will be a mere academic exercise.

Conclusion

62. Before taking leave of the Reference we are constrained to reiterate the remarks of Lady Justice Arach Amoko (DPJ, as she then was) made on 6th November 2013 when the matter was before us for highlighting of the written submissions lodged by all the Parties in this Reference. The remarks were in respect of compliance with the Rules of Procedure of this Court. It behoves us at this juncture to remind all who are coming to this Court to observe the Rules of Procedure of this Court. In the Reference now before us, all Parties have on several occasions fallen prey to the non-observance of the Rules of Procedure of this Court and specifically the Rule that requires filing of authorities. As a result, on more than two occasions, this Court was compelled to invoke its inherent powers under Rule 1 (2) of the Rules of Procedure, 2013 to admit documents that were filed outside the time stipulated by the Rules.
63. We think that it is high time that we reminded all persons (advocates in particular) who appear before this Court to comply with the said Court Rules and to strictly adhere to them. Rules were made for a purpose and that purpose was for orderly conduct of our business in this Court. We are alive to the fact that the Rules of Procedure are only hand maidens of justice and they should not be used to defeat substantive justice , but it is our pious hope and prayer that our remarks will bear fruit and that we shall see no more of what transpired in the instant Reference.

Final Orders;

(a) For the reasons we have given, the Reference is dismissed
(b) As for costs, we endeavour to say that given the peculiar circumstances of this case, we deem it just that each Party shall bear its own costs.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Reference No. 10 of 2011

Legal Brains Trust (LBT) Limited And Attorney General of Uganda

Johnston Busingye, PJ; Mary Stella Arach-Amoko, DPJ; John Mkwawa, J; Jean Bosco Butasi, J; Isaac Lenaola, J
March 30, 2012

Consistency in Treaty Interpretation -EALA re-election - Partner State discretion- Maximum terms of EALA members- Newspaper articles not legal authorities- No locus standi to request for an Advisory Opinion-Whether a Member of the EALA could only hold office for a maximum of two terms- Whether the Attorney General of Uganda infringed the Treaty.

Articles 23, 27,30, 36 and 51 (1) of the Treaty for the Establishment of the East African Community - Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2010 -Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

In a letter dated 25th August 2011, the Speaker of the Parliament of Uganda wrote to the Respondent seeking an advisory opinion from the East African Court of Justice (the EACJ) on the interpretation of Article 51 (1) of the Treaty. This was due to the divergent views on the interpretation of the Article specifically as regards the phrase "for afurther term of five years". Clarity was required due to the East African Legislative Assembly elections that were due to be held that year.

The Respondent did not seek the advisory opinion as requested, but instead interpreted the Article and advised the Speaker vide his letter dated 24th November 2011.

The applicant, a limited liability company, whose main objective is, *inter alia*, to defend the rule of law, democracy and good governance, came across the interpretation and formed the view that the interpretation was erroneous, unlawful and that if that matter was not resolved, it would lead to litigation which would adversely affect the smooth functioning of the EALA. Thus the Applicant filed this Reference seeking the Court's interpretation.

Held:

1. Article 51(1) provides that an elected member shall hold office for five years and be eligible for re-election for a further term of five years. This means that upon election to office, a member serves five years and he or she is then eligible for re-election for a further term of five years. The member can also serve only one term of five years if not re-elected. The total period is ten years.
2. On tenure of EALA members, Article 51(1) states that the tenure is not renewable perpetually.

3. A State Party should be left to exercise its discretion as to which matters are referred to this Court for advisory opinion. The Respondent in resorting to interpret the Treaty instead of making a request for an advisory opinion, did not infringe the Treaty but failed to exercise his discretion judiciously.
4. The need for consistency in interpretation of Treaty provisions, should make it imperative for Partner States to refer questions of interpretation of the Treaty to the East African Court of Justice which is the organ established, inter alia, for that purpose

Cases cited:
Pinner v Everrett (1969) ALL ER 258
Prof. Peter Anyang Nyongo and Others v Attorney General of Kenya, EACJ Ref.No. 1 of 2006
Queen v Brocklehurst (1892) QB 566
The East African Law Society & 4 others vThe Attorney General of the Republic of Kenya & 3 others, EACJ
Reference No. 3 of 2007

Editorial Note: In Appeal No 4 of 2014, the Appellate Division vacated the judgment of the trial court as being moot holding that: the Reference raised hypothetical and academic questions; and that the Applicant had no locus standi to seek an Advisory Opinion.

Judgment

Introduction:
1. This is a Reference by Legal Brains Trust Ltd, (the Applicant) under Articles 23, 27 and 30 of the Treaty for the Establishment of the East African Community (the Treaty) and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (2010). The Reference seeks the interpretation of Article 51 (1) of the Treaty which provides that:
" Subject to this Article, an elected member of the Assembly shall hold office for five years and be eligible for re-election for a further term of five years."

Background:
2. The Speaker of the Parliament of Uganda wrote to the Respondent a letter dated 25th August 2011, requesting him to seek an advisory opinion from the East African Court of Justice (the EACJ) on the interpretation of Article 51 (1) of the Treaty, because she had received two divergent views on the interpretation of the Article specifically as regards the phrase "for a further term of five years". One school of thought suggests that the phrase means that a member is free to seek re-election every time a term of the East African Legislative Assembly (the EALA) comes to an end. The second interpretation is that EALA members shall serve for two terms only.
3. The Speaker stated in her letter that Article 51(1) was incorporated in the Uganda Rules of Procedure of Parliament and she did not want to be faced with the same issue of conflicting interpretation during the forthcoming EALA elections due this year.

4. Upon receipt and perusal of the said letter, the Attorney General, the Respondent herein, was of the view that this was not a question of law but it was a matter that he could handle using his constitutional mandate as the principal legal advisor of the government. Consequently, he did not seek the advisory opinion of the EACJ as requested, but instead went ahead to interpret the Article and advised the Speaker vide his letter dated 24th November 2011 that:
   "Following the literal rule of interpretation, the phrase "a further term of five years" which uses the article "a" implies that the words following the article "a" being "further term of five years" are meant to refer to one more term of five years.
   Accordingly, the phrase "a further term of five years" means that the elected members are eligible to hold office for another term or a second term which will run for five years thereby making their total tenure as two terms only".
5. The Applicant, a limited liability company, whose main objective is stated to be, inter alia, to defend the rule of law, democracy and good governance in the region, stated that, when it came across the interpretation of Article 51(1) by Respondent, it formed the view that the interpretation was erroneous, unlawful and if the issue is not resolved by this Court, it is likely to once again lead to litigation which will adversely affect the smooth functioning of the EALA. It therefore filed this Reference and prayed for orders:
   (a) That the decision of the Respondent to the effect that a Member of the East African Legislative Assembly can only hold office for two terms is unlawful.
   (b) That the said decision infringes the provisions of the Treaty.
   The Applicant also prayed that the costs of the reference be provided for.
6. The Respondent filed a response in which he denied the allegations set out in the reference and contended that his action was lawful and constitutional in his capacity as the Principal Legal Advisor to the Government of Uganda.
   In the premises, the Respondent averred that the reference has no merit and prayed for its dismissal with costs.

Issues:

7. At the scheduling conference held on the 24th February 2012, three issues were agreed upon for determination by the Court , namely:
   (1) Whether under Article 51(1) of the Treaty, a Member of the EALA can only hold office for a maximum of two terms.
   (2) Whether it was an infringement of the Treaty for the Attorney General of Uganda to interpret Article 50 (1) of the Treaty.
   (3) Whether the Applicant is entitled to the remedies sought.
8. It was further agreed by both parties that the evidence was to be by way of affidavits. The said affidavits were namely, that of Mr. Isaac Kimaza Ssemekede, the Executive Director of the Applicant filed in support of the Reference and that of Hon. Peter Nyombi, the Attorney General of Uganda, filed in support of the response.
   Counsel requested the Court dispense with oral arguments due to the urgency of the matter and we allowed them.

Resolution of the issues:

Issue No. 1: Whether under Article 51(1) of the Treaty, a member of EALA can only hold office for a maximum of two terms:

Submissions by Counsel for the Applicant:

9. Learned Counsel for the Applicant Mr. Wandera Ogalo submitted that: The reference seeks the interpretation of Article 51(1) of the Treaty which reads:
"Subject to this Article, an elected member for the assembly shall hold office for five years and be eligible for re-election for a further term of five years.
10. The law applicable to the interpretation of the Treaty was laid down by this Court in *Ref. No. 1 of 2006 – Peter Anyang Nyongo and Others –v – Attorney General of Kenya and others*, citing Article 31 of the Vienna Convention on the law of Treaties. It is that:
"1. A treaty shall 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 light of its object and purpose.
2. The context for the purpose of interpretation of a treaty shall comprise, in addition to the text ..."
In applying the above principles to the issue before us, Mr. Ogalo divided his submissions into sub-headings A and B.
A – The Ordinary meaning of the words:
11. Under this sub-heading, Mr. Ogalo submitted that the specific words requiring interpretation in his view, are "a further term". The Respondent at page 2 of his letter which is Annexture "C" to the Reference, gives his understanding of the meaning of those words where he stated that "accordingly the phrase "a furtherterm of five years" means that the elected members are eligible to hold office for another term or a second term which will run for five years thereby making their total tenure as two terms only".
12. The Annexture was signed personally by the Hon. Peter Nyombi, the Attorney General and in Mr. Ogalo's view, the Respondent was in fact giving an alternative meaning to the phrase. The first is that it means "another term" and secondly that it can mean "a second term."
13. According to Mr. Ogalo, the ordinary and natural meaning of the words "a further term" cannot by any stretch of imagination equal "a second term". To say so is a curious argument that would appeal any English speaking person.
A "second" is specific and limiting. It means number two. While "a further" has no aspect of limitation attached to it.
14. Firstly, he entirely agreed with the first meaning given by the Respondent that a "a further term of five years simply means another term of five years", but contended that the last part where the Respondent says "thereby making their tenure two terms only" is incorrect. His argument is that, by adding these words, the Respondent imported into the phrase being interpreted, something entirely new. This was therefore, the Respondent's conclusion, not the interpretation of the phrase for interpretation.
15. Secondly, Mr. Ogalo contended that in the context of the whole sentence, the

question to ask is: what is "and be eligible for re- election?". In his view, to claim that the words limit the number of terms is to read and "eligible for re-election" in isolation from the words " for a further term of five years." When the two are put together, it is clear that eligibility for re-election is for a further terms (sic) of five years. It is eligibility for re-election which creates a right for another term. Therefore, a further term of five years can only make sense when there is eligibility for re-election. Without eligibility for re-election, there can be no " further term of five years". In Mr. Ogalo's view, reading the words in the context of the whole sentence leads to one conclusion: the words in issue are tied to " eligibility" and not to term limits.

16. In an effort to prove his point that the ordinary and natural meaning of the phrase "a further term" creates no limitation to two terms as the Respondent appears to think, Mr. Ogalo reproduced the following examples which he had downloaded from the internet:
17. Jomo Kenyatta (from Wikipedia p.6):
    "On 29th January 1970, he was sworn as President for a further term. For the remainder of the presidency ... Kenyatta was again re-elected as President in 1974, in elections which he, again, ran alone. On 5th November 1974, he was sworn in as President for a third term".
18. He submitted that if the Respondent's interpretation is right, it means that when Jomo Kenyatta was sworn in on the 29th January 1970, that was the last term and he would not be eligible to stand again for President. Yet we see him standing for another term. We see the words sworn in for "a third term". Clearly, the words "a further term" meant and mean "another term". The writer used them well aware that he would a few minutes later write that Jomo Kenyatta stood for a third term.
    2. An English news article published on the 23rd November, 2011 read: "Engineer Philip Okundi's term as CCK chair extended by "a further 3 years".
19. According to a press release from the CCK circulated today, President Mwai Kibaki has made the appointment through a Kenya Gazette notice in accordance with Section 6 (1) (a) of the State Corporation Act, Cap. 446.
20. The re-appointment is effective October 25, 2011 and follows Engineer Okundi's first appointment as CCK Board Chairman."
21. Mr. Ogalo argued that in order to determine the meaning of the phrase "a further three years" , we need to look at the origin. President Kibaki made the appointment under section 6(1) (a) of the State Corporations Act, Cap. 446. That section imposes no limitation of terms of service. It does not contain the words "a further".
22. It simply empowers the President to appoint the chairman of the Board and indeed the writer of the article quotes the section. When using the term "afurther term of three years" he or she was aware that there was no limitation. By using the words, therefore, he or she clearly meant "another term" and not "one last term".
23. Mahammed El Baradei: (Wikipedia p.12) : "Comments on no fourth term;
    In 2008, El Baradei said that he would not be seeking a fourth term as Director General. Moreover, he said, in an IAEA document, that he was not available for "a further term" in office."
24. Mr. Ogalo submitted that the writer of the article used the phrase "a further term" to

mean another term. This is because Mr. Bardei had made a conscious decision not to run for a third term. It was not the law barring him. He could not have used the phrase to mean a second or last term because Mr. Baradei had already served three terms. If the Respondent's interpretation is right, he could only have used the phrase after his first term.

25. Jail term:"... Former Argentine dictator Bignone was Thursday handed a further 15 year jail term..."
... The latest sentence against Bignone who had already been sentenced twice, to 25 years in jail and to life imprisonment..."
26. Mr. Ogalo argued that the said newspapers refer to the 15 years as the latest sentence and not the last sentence. That it would indeed be illogical to reason that even if other crimes were uncovered, no conviction or sentence would be imposed because a further 15 years jail term means the second and last sentence.
27. Moreover the article shows that the man had already been convicted twice i.e. already two terms in jail. The words are obviously used to mean another jail term.
28. The Guardian Newspaper: The heading of the Newspaper is:
"You Tube Saudi woman driver face further 10-day jail term.
A Saudi Arabian woman who posted a video online of herself driving her car is facing another 10 days in prison, according ..... from the Kingdom".
29. According to Mr. Ogalo, this leading British Newspaper was using the word"further" and"another"interchangeably. They mean the same thing. Constitutional Court of Slovenia: The writer says:
"Nine judges are elected for a period of nine years with no possibilities of a further term ..."
30. Mr. Ogalo submitted that it would be illogical to say the term means oneother term when clearly, "no possibility" exists.
HSBC: "HSBC has agreed a further three year term as global sponsor of FEI ...."
According to Mr. Ogalo,
"a further three year term" was equated to "renewal".
31. High Commissioner Guterres: " High Commissioner Guterres seeks mandate renewal for further five year term.
The UN General Assembly voted on Thursday to renew the mandate of High Commissioner Antonio Guterres extending his term by a further five years."
32. Mr. Ogalo contended that in this article, a " further five years term" heading of the article is described in the main body of the article as a "renewal" . That this is exactly what a member of the EALA does. He or she goes for re-election to renew his or her mandate.
33. Bashir: The author writes: "Bashir sworn in for a further term. Sudan's President Omar Hassan Bashir is sworn into office for another five years after disputed elections."
34. Mr. Ogalo contended that in this article, the author used "a further term" and "another five years" interchangeably.
Mr. Ogalo submitted further that, even in statutes, the words are used to mean "another" as shown below:
35. The Commercial Banking Company of Sydney Incorporation Act:

The legislature of New South Wales extended the powers of the bank for a "further term of ten years"; and whereas the ten years were about to expire, Parliament was now extending to the bank, power to issue, circulate and re-issue bank notes for "a further term of twenty one years".

36. He submitted that if the argument of the Respondent is to be allowed, it would mean that when the New South Wales Parliament used "a further term of ten years" that would be the second and last term. Yet we see that after that second term "a further term of twenty one years is used."
37. He submitted that in all three occasions, Parliament used the words to mean "another term". To hold otherwise, would therefore be illogical as it would mean that the country would cease to have a legal tender because the words mean"only" and "last term". That is absurdity in itself.
38. The Privacy Act of Canada: Section 53 (3) of the 1985 Privacy Act of Canada reads: "The Privacy Commissioner, on expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years".
39. According to Mr. Ogalo, the proper construction to put on that section is that there is a first term after which the section allows subsequent terms. In other words, subsequent terms can be one or many. Even after that one (which would be a second) the holder can still be re-appointed for a further term. There is therefore the first term, followed by another term or subsequent terms and still the holder is eligible for a further term. "Further term" is therefore used to mean "another term". If "a further term" meant one and that term, the wording of this statute would be at variance with logic. No one would draft inthat way.

B - Words in their context and in light of the treaty's objective and purpose:

40. The main thrust of Mr. Ogalo's submission under this sub-heading is that the overriding objective and purpose of Article 51 (1) is to prescribe the period of time when a member holds office. It is simply to tell us that a member shall be in office for five years. That is the primary objective. The matter of eligibility to be re-elected is secondary. Therefore the primary objective to prescribe the period of the term cannot be mixed with disqualification. If it were true that a member is limited to two terms, then it becomes a disqualification to run for a third term. Such a person would not be disqualified to be elected. That aspect of non qualification cannot fall under an article with a heading "Tenure of office of elected members". In other words, disqualification cannot be the object and purpose of an article providing tenure.
41. He added that the object and purpose of such article is to provide for the act of holding office; the terms and conditions while in that office as provided in Article 51 (2) ; and vacation of office as provided in Article 51 (3).
42. He further submitted that the purpose and object of Article 51(1) can be seen in light of Article 51 (2) and (3) as providing tenure of office rather than disqualification to hold office. The Article whose purpose is to provide for qualifications and by implication disqualification, is Article 50(2). One would qualify to be elected provided he or she has not served two terms.
43. He contended that matters relating to electing members of EALA are provided for in Article 50(1). These include the Electoral College, number of Members to be elected, representation and how they shall be elected. After being elected under Article 50

(1), a member then holds office under Article 51, and the holding of that office can be questioned under
Article 52. Each of the three Articles (50, 51 and 52) have a different object and purpose.

44. Mr Ogalo asserted that, the Respondent, by interpreting the Article in issue as he did, seeks to mix up the different objects and purposes of the Articles of the Treaty. He seeks to mix up election with tenure. Election or re-election as well as qualifications is the subject matter of Article 50. That interpretation is thus erroneous.
45. He averred that the object and purpose of Article 50(1) is not to limit the number of terms but rather to provide for what happens when the five years come to an end that is the ability to seek a fresh mandate.
46. To prove his point and to eliminate the Respondent's interpretation of the said Article, Mr Ogalo then analysed and compared the words in Article 51(1) to the following Articles of the Treaty:
    (a) Article 67 (4) which provides that "The Secretary General shall serve a fixed five year term".
    (b) Article 68 (4) which provides that "The Deputy Secretaries General shall each serve a three year term renewable once".
    (c) Article 53 (1) and (2) which provides that "1. The Speaker of the Assembly shall be elected ..... to serve for a period of five years."
    (a) The Speaker of the Assembly " shall vacate his or her office upon expiry of the period for which he or she was elected."
    (b) Article 25 (1) provides that "1..... a Judge appointed under paragraph 1 of Article 24 of this Treaty, shall hold office for a maximum period of seven years".
47. He contended that the Treaty provisions in respect of all the above offices are explicit where they intend to limit the number of years for holding office in the Community. There is no vagueness. The language is clear and unambiguous. There is no room left as to whether or not a holder of an office can remain in office after a particular time. Words such as "a fixed five year term, renewable once" and "a maximum period of seven years",show clearly that where the framers of the Treaty intended to limit the period of service, they said so very clearly.
48. In keeping with that, he further argued, there would have been no reason for them not to frame Article 51 (1) in the following terms, if the Respondent's interpretation is correct:
    "... shall hold office for five years and be eligible for re-election for only one other term of five years"; or
    "... shall hold office for five years and be eligible for re-election only once"; or
    "... shall not hold office for more than two terms of five years each".
49. It was Mr. Ogalo's strong contention that, the fact that the framers of the Treaty did not use explicit wording in Article 51(1) as they did elsewhere in the Treaty can only mean that the Respondent's interpretation is erroneous.
50. Mr. Ogalo submitted further that the Respondent's argument that the letter "a" used before the word "further" creates a single term is incorrect. The *New Webster Dictionary* defines the letter "a" as "used primarily before nouns in the singular,before

collectives which imply a number of persons or things."

51. The *Oxford Advanced Learner's Dictionary* defines the letter 'a' inter alia as "used instead of one before numbers: "a thousand people were there". Further, the Dictionary defines the word 'a' as "any, every". The Dictionary then gives an example of "a lion is a very dangerous animal". This would therefore equate 'a' to "any or every". The said Dictionary also defines a noun as "a word that refers to a person, a place or thing, a quality or an activity."
52. The word "further" is not a noun. Accordingly, it cannot turn letter "a" into a singular. Indeed in *R vs. Durham Justices (1895) 1 QB 801*, it was held that "a" can mean "any". In Re Fickus (1900) ICL 331, "a share" was defined to mean "some share",
53. In that context therefore, "a further term" can mean "any term" or "every term". This is best explained by a member who serves from 2001 to 2006, is not re-elected for the 2007 – 2012 term but is again elected for the 2012 – 2017 term. The two terms he or she has served can be equated to "any term". The 2012 – 2017 term cannot be called "a further term" for such a member because of the five year gaps between them. This shows the absurdity of the Respondent's argument.
54. Mr. Ogalo submitted that further absurdity can be shown by the fact that such member is not eligible to be elected for the 2017 – 2022 term because the 2001 – 2006 and 2011 – 2017 terms are two terms. The 2001 – 2006, 2011 – 2016 and 2022- 2027 are three non-consecutive terms. The use of "a" in this context is therefore not "one", but "any". A member could as well be elected for those three non-consecutive terms. It would be illogical to argue that a member who has served two consecutive terms (2001 – 2011), is not eligible for election for the 2016 – 2022 terms.
55. He argued that the letter "a" before the word "further" is equivalent to "any" not "one". That the case of *Queen V Brocklehurst (1892) QB 566* throws more light on the word "further". In that case, the question was, what the meaning of "further proceedings" is. A .L. Smith J stated that the definition placed upon that expression by the guardians that "further proceedings" means "a fresh start" was right. Therefore, "a further term" means "a fresh start". A member is eligible to be elected anew. It is a fresh start.
56. He concluded his argument on this point by stating that, in his interpretation of Article 51(1) of the Treaty, the Respondent applied the law on interpretation of statutes. Had he applied the law on interpretation of treaties instead of the law of statutes, there is a possibility that he would have reached a different conclusion. He appears to regard the Treaty as an Act of Parliament, which is a grave misdirection.

Submission by the Respondent's Counsel:

57. In response to Mr. Ogalo's submissions, Learned State Attorneys M/s Margaret Nabakooza and Mr. Kasibayo Kosia (learned counsel for the Respondent) supported the interpretation by the Respondent in its totality and submitted that a member of the EALA is eligible for re-election only once, hence he or she can only hold office as a member of the EALA for only two terms,
58. They, however, agreed with Mr. Ogalo on the law on interpretation of treaties as stated in the *Anyang Nyong'o Reference(supra)* as the Vienna Convention on the Law

of Treaties.

59. Apart from that, Counsel for the Respondent were of the view that the rules that govern interpretation of treaties and statutes are not very different from each other. They pointed out that the literal rule of interpretation also applies in that words are given their natural and ordinary meaning.
60. They referred us to Sir Rupert Cross *On Statutory Interpretation , 3rd Edn. 1995, p. 1* where the author states that :
"... the essential rule is that words generally be given the meaning which the normal speaker of the English language would understand them to bear in the context in which they are used."
61. Counsel for the Respondent also relied on *Maxwell on Interpretation of Statutes, 12th Edition by J. Langon*, Chapter 2: General Principles of Interpretation; where it is stated that the first and most elementary rule of construction is that it is to be assumed that the words and phrases of a technical legislation are used in their technical meaning if they have acquired one and otherwise in their ordinary meaning; and secondly, that phrases and sentences are to be construed according to the rules of grammar. That, if there is nothing to modify, alter or qualify the language which the statue contains, it must be construed in the ordinary and natural meaning of the words and sentences. It is further stated in the said text book that the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.
62. In further support of this point, Counsel relied on the statement in *Pinner v Everrett (1969) ALL ER 258-9*, by Lord Reid that: In determining the meaning of any word or phrase in a statue, the first question to ask is always " what is the natural or ordinary meaning of that word or phrase in its context in the statute"? It is only when that meaning leads to some result which cannot be reasonably supposed to have been the intention of the legislature that it is proper for some other possible meaning of the word or phrase.
63. According to counsel for the Respondent, if the above rules are applied in the construction of the phrase " a further term of five years," which uses the article "a", it implies that the words following the article " a" being " a further term of five years" are meant to refer to only one further term of five years. Accordingly, the phrase "a further term of five years" means that the elected members are eligible to hold office for another term or a second term which will run for five years therefore making their total tenure as two terms only.
64. Regarding the second leg of the submission by Mr. Ogalo, Counsel for the Respondent's response was that the context in which the words are used is indeed paramount in the interpretation of such words. That the key object of Article 51(1) is to provide for the period or tenure of office of an elected member of the EALA; and secondly, it provides for whether such member can be eligible for re-election to that office; and how many times. That for one to be eligible for another term of five years, that person must have held office or been in office as a member of the EALA for five years. Therefore, where one has been in office for two terms, hence ten years, he or she falls outside the ambit of the Article 51(1) and is not eligible for re-election

upon the expiry of ten years.

65. Counsel further submitted that holding office for five years and eligibility for re-election for a further term of five years have to be read together and cannot be separated because: the first part of the sentence is joined to the second part of the sentence by the word "and", which is classified as conjunctive in character and connotes togetherness, according to *GC Thornton Legislative Drafting, 3rd Edition, P. 84*. Therefore, where one has been in office for 10 years, the first part of Article 51(1) is no longer applicable; and where that one is not applicable, then the next part automatically lapses , for the reason that the two are connected by the word "and" and hence one sentence that can only be read as one to get the meaning.
66. Counsel for the Respondent further argued that the Treaty is supposed 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 light of its object and purpose. Good faith would dictate that "a further term" means another one term and to subject it to any other kind of interpretation than its ordinary meaning would be a total deviation from the intention of the framers of the Treaty.
67. Regarding the Commercial Banking Company of Sydney Incorporation Act , New South Wales, Counsel for the Respondent contended that one is not eligible for re-election after ten years in office, under Article 51(1) of the Treaty, unless it is amended. Similarly, New South Wales amended the Act after realising the ten year limitation. Had it not done so, the bank's authority to issue, circulate and re-issue bank notes would have expired.

Reply by Applicant's Counsel:

Counsel for the Applicant made a brief reply in which he agreed that the words whose meaning is sought is "a further term" but strongly reiterated his earlier position.

Resolution of Issue No. 1 by the Court:

68. This is the crux of the Reference. The issue revolves around the interpretation of Article 51(1) of the Treaty. The Vienna Convention on the Law of treaties sets out the international rules of interpretation of treaties. Apart from the *Anyang' Nyongo reference(supra)*, this Court has applied the rules in other references such as, the *East African Law Society and four others vs The Attorney General of the Republic of Kenya and three others, Reference No. 3 of 2007*.

    Article 31 that comprises the general rule of interpretation reads:

    "1. A treaty shall 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 light of its object and purpose.
    2. The context for the purpose of interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
        (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
        (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the Treaty.

3. There shall be taken into account:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties.
   (c) Any relevant rules of international law applicable in the relations between the parties.
   (d) A special meaning shall be given to a term if it is established that the parties so intended".

69. Article 32 provides that where, in interpreting a treaty, the application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion.
70. This is what this Court stated in the latter reference:
    "Taking into account the said general principles of interpretation enunciated in Article 31 of the Vienna Convention, we think we have to interpret the terms of the Treaty not only in accordance with their ordinary meaning but also in their context and in light of their objective and purpose. Primarily we have to take the objective of the Treaty as a whole, but without losing sight of the objective and particular provision".
    In interpreting Article 50(1) of the Treaty, we have adopted the same approach.
71. In the first part of his submissions, Mr Ogalo contented that the specific words requiring interpretation are " a further term".
72. We do not agree with him. What requires interpretation is contextual, that is, the whole of Article 51(1) of the Treaty. It is in our view, a deliberate way of isolating that phrase from the context of Article 51(1) and is perhaps calculated to confuse the Court. It is therefore against the principle of interpretation of treaties that a treaty shall be interpreted in good faith.
73. We also disagree with his argument that when the phrase " and be eligible for re-election" is put together with " for a further term of five years", it means eligibility for a further term of five years.
74. That interpretation in our view, suggests that there was a previous term or terms. It simply means that someone has already been serving and he can be re-elected . The further term has a definite length or period, that is, five years. We are unable to see the further terms after the five years.
75. In the context of Article 51(1), we think that it becomes even clearer. The Article provides that an elected member shall hold office for five years and be eligible for re-election for a further term of five years. This means that upon election to office, a member serves five years and he or she is then eligible for re-election for a further term of five years. It means that he or she can even serve only one term of five years if he or she is not re-elected. The total period is ten years.
76. Regarding Mr Ogalo's submission on non-consecutive terms, our view is that Article 51(1) of the Treaty does not address itself on no-consecutive terms. The question of election of EALA members generally, is not before us in this Reference. The issue

before us is specific, it concerns the tenure of EALA members under Article 51(1) of the Treaty and it starts from to the first term of five years followed by eligibility for re-election to a further term of five years. Article 51(1) is clear, it says, the tenure is not renewable perpetually.

77. We have also perused the articles and newspaper reports referred to us by Mr Ogalo. We do not need to comment on them in detail. Suffice it to say that Counsel should have warned himself of the dangers of relying on newspaper articles as authorities because they are not. Further it is common knowledge that news reporters areprone to using phrases and words without necessarily considering their legal definitions. Most importantly, we find that they do not support the Applicant's case because they were used in the context of the respective circumstances of those reports.
78. The Jomo Kenyatta one is the best illustration on the point simply because at that time, it well known that at the material time, Kenya had no term limits, so the phrase could in the circumstances rightly mean an endless re-election. Moreover, according to the article, Mzee Jomo Kenyatta ran alone in the said elections until he was unable to do so due to age and poor health.
79. Regarding Mr Okundi's tenure, there is a definite understanding of how long Engineer Okundi could serve as Chairperson of the Kenya Communications Commission. He had a three year tenure to which he could be appointed without any limitation.
80. Regarding Mr. Baradei, we see that it was his choice not to run for a further term but there was no doubt what that fourth term meant.
81. For the Argentinean dictator, it was certain from his own submissions that the dictator was given 25 years in jail, then a life sentence, and the further 15 year jail term was for crimes against humanity, i.e. another jail term altogether. We did not have the benefit of listening to Mr Ogalo orally, so his submission on this point left us in confusion. We do not know where this submission supports his case, is it on the length of the jail term or the meaning of the word "further" ?.
82. In the case of the Saudi Arabian woman who was convicted of driving, our view is that the further ten days were in addition to the five days she had already spent in jail. So, it was clear.
83. The rest of Mr. Ogalo's examples are not any different from the above. We do not need to comment on them any further in the judgment.
84. To drive home his argument that Art 51 (1) does not limit the number of terms members of EALA can serve the Assembly, Mr Ogalo compared the construction of Art 51 (1) with that of the other articles providing for tenure of office in other organs of the community. He submitted that Articles 67 (4), 68(4), and 25(1) of the Treaty (above cited) which provide respectively for the tenure of service of the Secretary General, Deputy Secretaries General and Judges of this Court, are explicit in their intention to limit the number of years of holding office in the Community, that there is no vagueness, that they are in clear unambiguous language and that they leave no room for whether or not a holder of office can remain in office after a particular time. He substantiated his argument by pointing out phrases such as "a fixed five years term, renewable once" and" a maximum period of seven years" that the framers of the Treaty employed to convey a clear intention to limit periods of service in the Community.

85. We shall not reproduce the Articles here, since we have done so earlier on in this judgment. We have however carefully examined the said Articles including Article 51(1) and have come to a different conclusion, that is, that all the Articles are as explicit as can be on the number of years for holding an office in the Community. Article 25 (1) provides, with a "shall" that a judge of the Court shall hold office for a maximum of seven years; Article 51 (1) provides, with a "shall" that an elected member serves a term of five years and, after re-election, a further term of five years; Article 67 (4) provides, with a "shall" that the Secretary General serves a fixed five years term and 68 (4) provides, also with a "shall" that a Deputy Secretary General serves a three years term renewable once.
86. We also see nothing to fault the language in Art 51 (1) for. This is because we do not see anything even remotely vague or ambiguous in the Article. Apart from the wilfully blind, no one else would fail to read and understand the tenure of office of elected members as provided in the article. Nothing calls for interpretation, since in our view, a plain reading of the Article is enough.
87. We find, instead, that the framers of the Treaty in Art 51 (1) went the proverbial extra mile to prevent the kind of misinterpretation the applicants are deliberately indulged in by inserting the words "five years" both for the first term and "five years" to clarify the situation after re-election. We do believe that the framers risked repetition and wrote "five years" twice in one short sentence for avoidance of doubt as to what their intention was. Even if they had stopped at "a further term" a common sense contextual interpretation would have shown that that further term was consistent and equal to the previous one.
88. We do not find any particular linguistic hurdles that the Applicant needed to cross in order to understand what is clearly an ordinary and straightforward English sentence.
89. Mr Ogalo argued that the object and purpose of Article 51(1) cannot be the object and purpose of an Article providing for tenure and disqualification at the same time. With due respect, we find that he is the only one reading disqualification in Article 51(1).It is not the Respondent's interpretation. Similarly, for us, what we see in Article 51(1) is tenure of elected members. That is the heading of the Article and it goes on to say that the members will be in office for five years upon election and for a further term of five years upon re-election. Our ordinary and plain understanding of tenure is a period of time when someone has a job or is holding office.(See: *Longman's Dictionary of Contemporary English* page 1710.)
90. Mr. Ogalo also says that the Article whose purpose is to provide for qualifications and by implication, disqualification, is Article 50(2). We agree with him in the sense that Article 50(2) sets down, from (a) up to (e), the qualifications of an electable person. We also agree that someone who falls short of any of those qualifications is not electable and is therefore disqualified. But with due respect and for the reasons already stated in this judgment, we part company with him at the point where he attempts to stretch the provisions of Article 50(2) to cover tenure as well.
91. With due respect to learned counsel for the Applicant, we are also not persuaded by his argument that a "a further term" means "any" or "every term".

The phrase under interpretation is "a further term of five years". It would be absurd to say that the phrase means "any term of five years" or " every term of five years", as the applicant's counsel would like us to believe.

By reason of the foregoing, we are unable to accept Mr. Ogalo's novel argument.

We accordingly answer this issue in the affirmative.

Issue No. 2: Whether it was an infringement for the Honourable Attorney General to interpret Article 50(1) of the Treaty.

Submissions by Counsel for the Applicant:

Learned counsel for the applicant submitted that the this issue should be answered in the affirmative for the following reasons:

92. When the Speaker wrote to the Honourable Attorney General (referred to herein as the Respondent, for brevity), as head of one arm of government to another, she had formed the view that the matter required an advisory opinion, so she specifically stated that the Respondent should seek an advisory opinion on the interpretation of Article 51(1) from the Respondent from this Court. She demanded so because the Respondent has the mandate " to represent the government in courts..." under Article 119 (4) of the Constitution of Uganda.
93. Counsel stated that the Speaker did not seek legal advice from the Respondent or his opinion . Her letter was written in very simple English. He submitted that where an institution of government of a partner state wishes to have an advisory opinion from the EACJ on a matter touching the interpretation of the Treaty, it is not open to anyone or authority to decide whether the opinion of the Court should be sought or not. The Attorney General is a mere conduit to facilitate the concerned institution or body.
94. This is because, firstly, Article 36 generally gives a partner state authority to seek an advisory opinion. Article 1 defines Partner State. The honourable Attorney General is not a Partner State. The query has to emanate from a person, institution or body implementing the provisions of the Treaty and not the Attorney General. The Attorney General is not the one applying the Treaty and may not comprehend the magnitude of the difficulties the Speaker is grappling with. In the present case, the Speaker had to determine whether to exclude a candidate from the ballot paper. If the Speaker makes a wrong decision, it may lead to litigation and annulment of the whole election which would lead to suspension of EALA like in 2006. With respect, the Honourable Attorney General did not seem to comprehend the effect of blocking the Speaker. This Court ought, for that reason, to lay down a general rule as to how advisory opinions from partner states ought to be processed.
95. Mr Ogalo submitted that the second reason is consistency. The question posed by the Speaker arises from Article 50(1) of the Treaty which provides for tenure of office of EALA members. As directed by Article 8 (2) of the Treaty, Uganda as a partner state, enacted The EAC Act, 2002, to give effect to the Treaty. Section 3 thereof confers on the Treaty the force of law in Uganda. It is very clear therefore, that the Treaty is part of the laws of Uganda. It is a schedule to the EAC Act 2002. That makes it part of the law of Uganda. The question of tenure of members of Parliament of Uganda is a matter of law.

96. That the Schedule which is the Treaty itself provides who has the jurisdiction to interpret the Treaty and vests that power in the EACJ. In other words, an Act of Parliament confers upon the EACJ jurisdiction to interpret the Treaty. That is the law in Uganda. There is no law whatsoever which grants the Attorney General the authority to interpret the Treaty.
97. He contended that the Attorney General seems to be acting under the mistaken belief that the authority under Article 119 (4) of the Constitution to give legal advice to the government of Uganda includes usurping the jurisdiction of this Court. These are two different things.
98. Jurisdiction is conferred by law. It cannot be assumed. The assumption by the Honourable Attorney General to interpreted the Treaty therefore infringed Articles 27(2) and 23 (1) of the Treaty because he purported to do what is vested elsewhere in the Treaty.

Submission by the Respondent's Counsel:

99. The response of the Respondent's Counsel was, no, the Attorney General did not infringe the Treaty by giving an opinion on the matter. Their contention is that the Attorney General, being the principal legal advisor to government, after addressing his mind to the principles of interpretation and bearing in mind the busy schedule of this Court, thought it wise not to seek an advisory opinion on a matter that was and is still self explanatory as discussed in issue number one. By so doing, he did not usurp the power of the Court, but was fulfilling his constitutional mandate under Article 119 of the Constitution.
100. They submitted that Article 33(2) of the Treaty envisages interpretation of the Treaty provisions by national courts although this Court remains with the supremacy in interpretation of the Treaty.
101. They further submitted that Article 31 of the Treaty does not mean that it is a mandatory requirement for the courts or tribunals of a Partner State to seek interpretation form this Court. They can do so if they consider that a ruling on a certain question is necessary. That the same applies to advisory opinions. The seeking of an advisory opinion by a Partner State is purely discretionary. A State can only seek an advisory opinion from this Court if it deems it necessary. That in any case, an advisory opinion is not binding on all Partner States, it can be challenged through a reference, just like in the instant case, where one is not satisfied with the interpretation.
102. Counsel for the Respondent contended further that to argue otherwise would lead to a floodgate of applications seeking for advisory opinions from this Court, hence paralyse the normal operations of the Court. It would therefore be a risky precedent to hold that member states are under a mandatory duty to seek an advisory opinion when a member a party state requests the Attorney General of that party state to do so.
103. A party state should be left to exercise its discretion as to which matters are referred to this Court for advisory opinion.

    The contention by the applicant that the Attorney General is just a conduit is therefore untenable and should be rejected by the Court.

Resolution of Issue No. 2 by the Court:

104. It is not in dispute that Article 36 of the Treaty gives a Partner State authority to seek an advisory opinion and that the Attorney General has the mandate to make the request. We however disagree with Mr Ogalo that the Attorney General is a mere conduit. The language of Article 36 is discretionary. It says:

The Summit, Council or Partner States may request the Court to give an advisory opinion regarding a question of law arising from this Treaty which affects the Community..."

105. The Article gives the Attorney General the discretion to make the request for advisory opinion to this Court where he deems appropriate in his capacity as the principal legal advisor to government. The Attorney General, must of course, exercise that discretion judiciously, on the basis of the materials or information available to him or her, otherwise his or her decision can be challenged in a court of law.

106. In the instant case, we observe that the materials availed to the Honourable Attorney General of Uganda, namely, the Speaker's letter, the Treaty, specifically Article 36 thereof, clearly shows that the issue before him: is a question of law which required resolution by the Court; It arose from the Treaty; and Affects the Community.

107. Therefore, a judicious exercise of discretion by the Respondent should have compelled him to request for an advisory opinion from this Court and saved the Community the costs of this Reference.

108. Otherwise, we find that the Articles of the Treaty cited by Counsel for the Respondent are not useful as they do not apply to the Respondent. Article 31 deals with disputes between the Community and its employees, while Article 33 deals with the interpretation of the Treaty by national Courts. Article 33(2) actually states expressly that the interpretation by this Court takes precedence over that of national courts.

109. We do not, however, find anywhere in his opinion that the Attorney General was holding out as the Court. His document is, in our view, a legal opinion and cannot be mistaken by any stretch of imagination as an advisory opinion from this court. The criticism that he usurped the power of this court is thus unfair, in the circumstances.

110. For the reasons given, we find and hold that the Attorney General, in resorting to interpret the Treaty instead of making a request for an advisory opinion, did not infringe the Treaty as such, but failed to exercise his discretion judiciously.

111. We, however, strongly advise that before any Attorney General or official of any Partner State of the Community makes such a decision or does such an act, he or she should always warn himself or herself of the ramification of the real possibility of five different interpretations of an Article of the Treaty (from the five Partner States). We therefore find it imperative to remind the Partner States particularly Attorneys General that the need for consistency in interpretation of Treaty provisions, should make it imperative for them to refer questions of interpretation of the Treaty to the East African Court of Justice (EACJ), the organ established, inter alia, for that purpose.

In the result and for the reasons given, we answer issue No. 2 in negative.

Issue No. 3: Whether the Applicant is entitled to the reliefs sought.

Submission by Counsel for the Applicant:

Learned Counsel for the Applicant submitted that the applicant is entitled to the reliefs sought on the basis of his submissions in the preceding issues. The Court should order accordingly.

Submission by Counsel for the Respondent:

112. Learned Counsel for the Applicant is not entitled to the reliefs sought. That it could have requested the Court for an advisory opinion without involving the respondent. The reference was uncalled for, therefore, it should be dismissed with costs to the respondent.

Resolution of issue No. 3 by Court:

113. We respectfully disagree with the Respondent's Counsel's submission that the Applicant could have requested for an advisory opinion from the Court instead of filing this Reference. This is because the Treaty does not allow individuals or other legal entities like the Applicant to request for advisory opinion from this Court. It is restricted to the Summit, the Council and Partner States under Article 36. Instead it is the Respondent's duty to do so.

114. As a result of our findings on the previous two issues, we find and hold that the Applicant has not made out a case for the grant of the orders sought in the Reference. We answer this issue in the negative.

The Reference is accordingly dismissed.

115. We however order each party to bear its costs, this being in our view a public interest litigation. This is because it was not contested by the Respondent that the objectives of the Applicant are, inter alia, the defence of the Rule of law, democracy, good governance and human rights in the region. The Reference was thus for the benefit of the Community.

116. We thank both parties for the zeal and industry they exhibited in this Reference.

* * * *

East African Court of Justice – First Instance Division
Reference No.11 of 2011

Mbugua Mureithi wa Nyambura And The Attorney General of the Republic of Uganda &The Attorney General of the Republic of Kenya And *Avocats sans Frontières* - **Amicus Curiae**

Jean Bosco Butasi, PJ; John Mkwawa, J; Faustin Ntezilyayo J.
February 24, 2014

Limitation of time - Cause of action -Interpretative jurisdiction of the court on human rights issues-Whether the arrest, interrogation, detention and deportation of the Applicant infringed the EAC Treaty.

Articles: 6(d), 7(2), 27 ,(1) and 104(1) of the Treaty - Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the East African Common Market Protocol - Rules 1(2) and 24 of the EACJ Rules of Procedure, 2010.

In July, 2010, six Kenyan citizens were arrested and detained incommunicado in Kenya and then handed over to Ugandan Authorities for trial as terrorist bombings in Kampala on 11th July 2010. Thereafter, the Muslim Human Rights Forum a Kenyan Human Rights Non-Governmental Organization and their families instructed the Applicant, a resident of Kenya, a Human Rights lawyer and defender, to pursue the issue of a fair trial of the suspects in the Courts of Uganda.

On 15th September, 2010, the Applicant flew to Kampala, Uganda to attend to the case scheduled on 16th September, 2010 at the Nakawa Chief Magistrate's Court. Upon arrival at the Entebbe Airport, the Applicant alleges that he was hurled into a trap by members of the Uganda's Rapid Response Unit (RRU). He was arrested at gunpoint, manacled on the legs and driven around the outskirts of Kampala throughout the night and threatened with being charged with terrorism and murder. The Applicant was locked up incommunicado with his clients in the cells at RRU Kireka from 16th to 17th September, 2010, and his belongings were seized.

On 18th September, 2010, the Applicant was escorted by Ugandan security officers to an Aircraft of Uganda Airlines destined for Nairobi, Kenya. His passport and other belongings were handed back to him in the aircraft. The agents of the 1st Respondent did not give any reasons for his arrest and detention.

The Applicant filed this Reference contending that the Respondents actions of violated the Treaty and he sought declaratory orders that *inter alia*: the deportation and/or forcible removal of the Applicant from Uganda without due and legal process was unlawful, unjustifiable and in violation of Articles 6(d), 7(2) and 104(1) of the Treaty and Article 7 of the Protocol for the Establishment of the East African Common Market.

Held:

1. The inclusion of allegations of human rights violation in a reference would never distract the Court from exercising its interpretative jurisdiction. The Court had jurisdiction to entertain the Reference.
2. The Applicant could not rely on the Rugumba case since he was released on 18th September, 2010 and he took one year, three months and twelve days to file the Reference instead of two months prescribed by the Treaty. The Reference was therefore dismissed as time-barred.

Cases cited:

Attorney General of the Republic of Kenya v Independent Medical Legal Unit, EACJ Appeal No.1 of 2011

James Katabazi & 27 Others v. EAC Secretary General and the Attorney General of the Republic of Uganda, EACJ Reference No.1 of 2007;

Prof. Anyang Nyong'o v the Attorney General of the Republic of Kenya, EACJ Reference No.1 of 2006.

Samuel Mukira Mohochi v Attorney General of the Republic of Uganda, EACJ Reference No.5 of 2011

Judgment

Introduction

1. The Applicant is a citizen of the Republic of Kenya, an Advocate of the High Court of Kenya and a Human Rights lawyer and defender. His address of service for purposes of this Reference is care of Mureithi Olewe & Associates Advocates, 4Th floor, Josem Trust House (housing Barclays Bank), Masaba Road, off Bunyali Road, Lowerhill, P.O. BOX 52969,(00200), Nairobi, Kenya.
2. The 1st Respondent is the Attorney General of the Republic of Uganda, the Chief Legal Advisor to the Government of Uganda and is sued on behalf of the Government of Uganda. The 1st Respondent's address of service for the purposes of the Reference is care of the Ministry of Justice and Constitutional Affairs Headquarters, plot No.1, Parliament Avenue, Queen`s Chambers, P.O. Box 7183 Kampala, Uganda.
3. The 2nd Respondent is the Attorney General of the Republic of Kenya and is sued on behalf of the Government of Kenya. The 2nd Respondent's address of service for the purposes of this Reference is care of the Attorney General`s Chambers, State Law Office, Sheria House, Harambee Avenue, P.O. Box 40112 – 00100, Nairobi, Kenya.
4. It is also worth noting that on 3rd May, 2013, Avocats Sans Frontières by its Notice of motion sought orders for leave to intervene as Amicus Curiae in this Reference in compliance with Article 40 of the Treaty for the Establishment of the East African Community and Rule 36 of the Court's Rules of Procedure, 2013 (herein referred to as "the Treaty" and" the Rules" respectively). The Application was granted on 28th August, 2013.

Representation

The Applicant was represented by Mr. Selemani Kinyunyu.

Mr. Denis Bireije, Mr. Phillip Mwaka, Mr. Richard Adrole and Mr. E. Bafirawala appeared for the 1st Respondent.

Ms. Stella Munyi represented the 2nd Respondent while Mr. Nicholas Opiyo and Mr. Antony Mulekyo appeared for Avocats Sans Frontières.

Background

5. The Applicant is a Human Rights lawyer and defender. Sometime in July, 2010, six Kenyan citizens were arrested and detained incommunicado in Kenya before being rendered from Kenya and handed over to Ugandan Authorities for trial as terrorist bombings in Kampala on 11th July 2010.
6. Following their arrest, the Muslim Human Rights Forum (hereinafter referred to as "MHRF"), a Kenyan Human Rights Non-Governmental Organization and their families instructed the Applicant to pursue the issue of a fair trial and assist the suspects in the Courts of Uganda.
7. On 15th September, 2010, the Applicant flew to Kampala, Uganda in order to attend their case at the Nakawa Chief Magistrate's Court scheduled on 16th September, 2010 and to petition for temporary admission to the Roll of Ugandan Advocates to enable him to defend the suspects in Court.
8. Upon his arrival at the Entebbe Airport on the same date, the Applicant alleges that he was hurled into a trap by members of the Uganda's Rapid Response Unit (hereafter referred to as "the RRU") through an officer who kept calling one Al-Amin Kimathi. The latter had travelled with the Applicant from Nairobi. That officer pretended to be waiting for them at Niagara Hotel with a letter from one of the Applicant's clients.
9. When they reached the Niagara Hotel, they were arrested at gunpoint, manacled on the legs and subjected to endless high speed driving into the outskirts of Kampala throughout the night, while being taunted as terrorists and threatened with being charged with terrorism and murder offences. The Applicant was locked up incommunicado with his clients in the cells at RRU Kireka from 16th to 17th September, 2010, and his belongings were seized.
10. He was thereafter transferred to Entebbe International Airport Police Station where he continued to be detained incommunicado without any contact from his family until 18th September, 2010. On the morning of 18th September, 2010, the Applicant was escorted by Ugandan security officers to an Aircraft of Uganda Airlines destined for Nairobi, Kenya. His passport, mobile phone and other personal belongings were handed back to him in that aircraft. No reasons were given to him about that mistreatment.
11. This instant Reference challenges the aforesaid acts of ill-treatment to the Applicant by the 1st and 2nd Respondents.

The Applicant's Case

12. The Applicant's case is contained in his Reference filed on 30th December, 2011 under Articles 27, 30 and 38 of the Treaty and Rules 1(2) and 24, his affidavit sworn on 20th March, 2013 and filed on 21st March, 2013 as well as in his written submissions.

13. In summary, his case is as follows: The Applicant alleged that he was arrested upon his arrival at Kampala on 15th September, 2010, where he was detained incommunicado and interrogated by the agents of the 1st Respondent in complicity with the agents of the 2nd Respondent from 15th to 18th September, 2010.
14. On 18th September, 2010, the Applicant was deported to Kenya without having been given reasons for his arrest, detention, interrogation and deportation.
15. It is the Applicant's contention that, the above acts of the Respondents were in violation of Articles 6(d), 7(2) and 104(1) of the Treaty, Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the East African Common Market Protocol and Articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 of the African Charter on Human and Peoples' Rights and Principles 16, 17, 18 and 21 of the UN Basic Principles on the Role of Lawyers.
16. On the basis of the foregoing, the Applicant sought the following orders:
    i.) that the arrest of the Applicant by security agents of Uganda in complicity with the Kenyan security agents without warrants and the search and confiscation of his belongings without warrants were unlawful and unjustifiable and constituted a violation of Articles 6(d) and 7(2) of the Treaty by the Respondents;
    ii.) that the violent arrest of the Applicant without warrants at gunpoint, hooding him, manacling him in the legs, subjecting him to endless high speeding into outskirts of Kampala throughout the night while taunting him of being a terrorist and threatening him with execution and depriving him of sleep and rest by Ugandan security agents in complicity with Kenyan security agents were unlawful and unjustifiable and contravened Articles 6(d) and 7(2) of the Treaty;
    iii.) that the incommunicado and unlawful detention for four days and confiscation of his belongings without warrants by Ugandan Security agents in complicity with Kenyan security agents, infringed Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
    iv.) that the interrogation of the Applicant jointly by the security agents of Uganda and the security agents of Kenya relating to the Applicant's instructions as an Advocate of his clients was unlawful and unjustifiable and was in violation of Uganda's and Kenya's obligations under Articles 6(d) and 7(2) of the Treaty and Principles 16, 17, 18 and 21 of the UN Basic Principles on the Role of Lawyers;
    v.)that the deportation and/or forcible removal of the Applicant from Uganda without due and legal process was unlawful, unjustifiable and in violation of Articles 6(d), 7(2) and 104(1) of the Treaty and Article 7 of the Protocol for the Establishment of the East African Common Market;
    vi.) that the refusal to the Applicant by the Respondents to give any information or reasons related to his mistreatment was unlawful and contravened Articles 6(d) and 7(2) of the Treaty;
    vii.) that the violent arrest of the Applicant without warrants followed by mistreatment and his detention incommunicado by the Respondents were a violation of the fundamental rights enshrined in Article 5 of the African Charter on Human and Peoples' Rights;
    viii.) that the arrest, search, confiscation of the Applicant's belongings without warrants, his incommunicado detention without charge, interrogation related

to his professional engagement and deportation from Uganda without formal process were in contravention with Articles 2, 4, 5, 6, 7, 8, 10(1) and 12(1) and (4) of the African Charter on Human and Peoples' Rights;

ix.) that the denial of the Applicant jointly by Government of Uganda and Government of Kenya of any information or reasons concerning his aforesaid mistreatment constituted an infringement of the Applicant's fundamental rights of access to information guaranteed by Article 9(1) of the African Charter on Human and Peoples' Rights;

x.) that the Applicant is entitled to a remedy of reparation in general, exemplary and/or punitive damages from the Respondents jointly and/or severally consequent upon the violation of his fundamental rights and freedoms;

xi. that an order for such general, exemplary and/or punitive damages as this Honourable Court may assess or as may be assessed by the competent National Courts of the Respondents as may be directed by this Court;

xii.) costs of this Reference;

xiii.) that such other Orders, remedy or directions as the Court may deem fit to grant.

Case for the 1st Respondent

17. The 1st Respondent's case rests on a response to the Reference filed on 14th March, 2012 which was supported by an Affidavit sworn by Okello Charles on 13th March, 2012 and filed on 14th March, 2012 and an additional Affidavit sworn by Aguna Joel on 20th March, 2012 and filed on 22nd March, 2012 and he 1st Respondent's Case is contained in the written submissions dated 14th November, 2013.
18. In a nutshell, the 1st Respondent's case can be summarized as follows:

i.) That the Applicant arrived in Uganda, through Entebbe International Airport, on the night of 15th September, 2010;

ii.) that the Applicant was arrested on the same night of the 15th September, 2010 on suspicion of being involved in terrorism, being a facilitator of terrorism by way of being a conduit for funds directed towards terrorist operations and murder over 70 Ugandans on 11th July, 2010, based on intelligence information obtained by Uganda's security forces;

iii.) That the Applicant was, at the time of his arrest, informed of the preferred charges against him and was then driven to Kampala for interrogation;

iv.) That whilst in Kampala, the Applicant was detained on the 16th September, 2010, interrogated and recorded a statement with the Uganda Police;

v.) that on 17th September, 2010 the Applicant was transferred to Entebbe International Airport Police Station;

vi.) That the Applicant voluntarily returned to Kenya in the morning of 18th September, 2010 and his passport was only stamped with an exit stamp;

vii.) That the 1st Respondent denies that the Applicant was deported and further denies that its servants, agents marked or in any way mutilated the Applicant's passport;

viii.) that the 1st Respondent denies in toto the allegations of violation of the stipulated Treaties and instruments and contends that its servants, agents executed their duties professionally, in accordance with Uganda's Laws and in compliance

with the stipulated Treaties and instruments;

ix). that the 1st Respondent contends that the Applicant is not entitled to the remedies sought.

Case for the 2nd Respondent

19. The 2nd Respondent's case is contained in his response to the Reference filed on 27th February, 2012. In a nutshell, the 2nd Respondent denies vehemently the allegations of the Applicant. In summary, the 2nd Respondent's case is expressed as follows:
    i.) that he was not aware of the arrest, interrogation, detention and the alleged deportation of the Applicant;
    ii.) That he denies any implication and responsibility for the sub judice matter;
    iii.) that the 2nd Respondent contended that Uganda is a sovereign State and took action with the Government of the Republic of Uganda since he was informed of the Applicant's case.

***Avocats sans Frontières'* Position**

20. The amicus curiae's position is summarized in its written submissions. In brief, it is explained as follows:
    i.) that it is the obligation of each State to respect and protect the Principles of lawyer's independence in the East African Community;
    ii.) that the lawyers' independence is a fundamental standard of human rights;
    iii.) That the lawyers' independence is most essential in protecting and upholding the rule of law;
    iv.) That the lawyers' independence is universally accepted standard of human rights recognized in the Treaty.

Scheduling Conference

21. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 29th January, 2013 where the Parties pointed out the points of agreement: That the issues raised in this Reference are triable on the basis of Articles 6, 7, 27 and 30 of the Treaty for the Establishment of the East African Community.
22. The following were stressed as points of disagreement and therefore issues for determination by this Court:
    a) Whether the East African Court of Justice has jurisdiction to entertain this Reference;
    b) Whether the Reference is time-barred;
    c) whether the arrest, interrogation and detention of the Applicant was a violation of Articles 6(d), 7(2) and 104(1) of the Treaty for the Establishment of the East African Community, Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the Protocol for the Establishment of the Common Market and Articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 of the African (Banjul) Charter on Human and Peoples' Rights and the United Nations Basic Principles on the Role of Lawyers have been violated;
    d) whether or not the Applicant was deported and if so, whether the deportation was in violation of Articles 6(d), 7(2) and 104(1) of the Treaty for the Establishment

of the East African Community, Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the Protocol for the Establishment of the Common Market and Articles 2, 5, 6, 7, 8, 9, 10, 11 and 12 of the African (Banjul) Charter on Human and Peoples' Rights and the United Nations Basic Principles on the role of Lawyers have been violated;

e) Whether the Parties are entitled to the remedies sought.

Determination of the Issues

Applicable Rules and Principles of Interpretation

23. On many occasions, this Court has stated that the Treaty for the Establishment of the East African Community is an International Treaty subject to International Law of Treaties and in particular, Article 31(1) of the Vienna Convention on the Law of Treaties which has set up the general Rule of Interpretation of Treaties as follows:

"A Treaty shall 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 its object and purpose."

24. In the determination of the issues framed in this Reference, we shall be guided by the above Principles and by the relevant Articles of the Treaty related to the jurisdiction of the Court.

Issue No.1: Whether the East African Court of Justice has Jurisdiction to entertain this Reference

The Reference is premised on Articles 27 and 30(1) of the Treaty.

25. The Applicant is a citizen and resident of the Republic of Kenya, one of the Partner States of the East African Community and in that capacity, Counsel for the Applicant said that he has the right to bring a reference before this Court. It is the Applicant's submission that under Article 30(1) of the Treaty in determining "the legality" of any matter in question, the Court is empowered to pronounce itself on the "lawfulness" of the matter and on whether the actions complained of constitute an infringement for the provisions of the Treaty.

26. Through his prayers, the Applicant contended that the actions complained of breached Uganda's and Kenya's obligations under Articles 6(d), 7(2) and 104(1) of the Treaty as well as Article 7 of the Protocol for the Establishment of the East African Common Market.

27. The Applicant thus, sought the interpretation of the aforesaid Articles of the Treaty and therefore relied on the cases of the *Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No.1 of 2011*; the *Attorney General of the United Republic of Tanzania vs. the African Network of Animal Welfare (ANAW), EACJ Appeal no.3 of 2011*; *James Katabazi & 27 Others vs. EAC Secretary General and the Attorney General of the Republic of Uganda, EACJ Reference No.1 of 2007; Samuel Mukira Mohochi vs. Attorney General of the Republic of Uganda, EACJ Reference No.5 of 2011; the East African Law Society vs. the Secretary General of the East African Community, EACJ Reference No.1 of 2011 and the Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba, EACJ Appeal No.1 of 2012.*

On the basis of the above reasons, Counsel for the Applicant urged the Court to answer Issue No.1 in the affirmative.

28. Counsel for the 1st Respondent on their part stated that this Court does not have jurisdiction to entertain this Reference. Counsel for the 1st Respondent argued that the Court derives its jurisdiction from the Treaty and pointed out specifically Articles 23 and 27 of the Treaty. Article 23 of the Treaty provides that:
    (1) "The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty;
    (2) The Court shall consist of First Instance Division and an Appellate Division;
    (3) The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty."

    Article 27(1) and (2) of the Treaty gives more clarifications as regards the jurisdiction of the Court as follows:
    (1)"The Court shall initially have jurisdiction over the interpretation and application of this Treaty;
    (2) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Counsel at a suitable subsequent date. To this end, the Partner States shall conclude a Protocol to operationalize the extended jurisdiction."
29. Counsel for the 1st Respondent averred that the issues referred to this Court are related to Human Rights Matters. Therefore, it follows that, until the Protocol to operationalize the extended jurisdiction is concluded, this Court is not vested with jurisdiction to handle the Reference.
30. Counsel for the 1st Respondent further asserted that even if he agrees with the Applicant that the Court has jurisdiction to determine the matters set out in Article 30(1) of the Treaty, the Court is not empowered to entertain Human Rights matters as raised by the Applicant.

    Counsel for the 1st Respondent concluded his submissions by urging the Court to dismiss the Reference on basis of that issue itself.
31. Counsel for the 2nd Respondent did not file written submissions. However, at the hearing date of this Reference, she associated herself with the Counsel for the 1st Respondent on Issue No.1.
32. Counsel for *Avocats Sans Frontières* did not address the Court on the issue of jurisdiction. They considered that, being an issue argued between Parties, they did not have to interfere. Rather, they addressed the Court on the issue of the independence of the Advocates to practice in their respective Partner States.

    Counsel for *Avocats Sans Frontières* contended that the Court, being the guardian of the Treaty is bestowed with jurisdiction to interpret and apply it.

Findings of the Court on Issue No.1

33. We have read the Applicant's submissions and counter submissions filed by the Respondents. At this juncture, we have to recall that Article 27 of the Treaty reproduced elsewhere above shows the jurisdiction of the Court. It is not in dispute that this Court has jurisdiction over interpretation and application of the Treaty.
34. The contention by the Respondents that the Applicant is invoking the Human Rights jurisdiction is a speculation that cannot stand. We agree with the Respondents that

as long as the Protocol to operationalize the extended jurisdiction is not concluded, this Court is not vested with jurisdiction to entertain Human Rights matters. However, as to whether the functionality of Article 30(1) of the Treaty is subject to the provisions of Article 27(2), we are unable to back that misinterpretation. A reference under Article 30 of the Treaty is to be construed as an action to challenge the legality under the Treaty of an activity of a Partner State and/or an institution of the Community.

35. A clear reading of the points of disagreement arrived at during the Scheduling Conference shows that the Applicant sought this Court to determine whether or not his arrest, interrogation and detention was an infringement of Articles 6(d), 7(2) and 104(1) of the Treaty as well as Articles 2(4)(b), 4(5), 5(2)(b), 7(2), 10(3), 11(1) and 12(1) of the Protocol for the Establishment of the Common Market. The wording of the issues (c) and (d) agreed upon at the Scheduling Conference and the prayers sought relate to the interpretation which is the preserve domain of the Court's jurisdiction under Article 33(2) of the Treaty.
36. It is not in dispute that the Court has jurisdiction to interpret each Article of the Treaty. The inclusion of allegations of human rights violation in a reference will never distract this Court from exercising its interpretative jurisdiction. This has consistently been the finding of the Court in *Katabazi case (supra), Rugumba case (supra), Omar Awadh case (supra) and Prof. Anyang Nyong'o vs. the Attorney General of the Republic of Kenya, EACJ Reference No.1 of 2006*.
37. Furthermore, this instant Reference is similar to *Mohochi case (supra)*, in which the Applicant challenged the violation of Articles 6(d), 7(2) and 104(1) of the Treaty as well as the infringement of Article 7 of the Protocol for the Establishment of the Common Market. This Court in the aforesaid case found and held that the cause of action in the above case was based on the alleged infringement of a Partner State's Treaty obligations which lies outside the territory of Human Rights. The Court held that the Reference fell under its jurisdiction. Moreover, during the Scheduling Conference, both Parties agreed that there are triable issues based on the provisions of Articles 6, 7, 27, and 30 of the Treaty. In view of the foregoing, we find and hold that this Court has jurisdiction to entertain the Reference.

Issue No.2: Whether the Reference is Time-barred

38. On whether the Reference is time-barred, the Applicant submitted that: Firstly, both the Respondents have not pleaded the limitation of time in their respective responses to the Reference;

    Secondly, having contested all allegations of fact and any breach or violation of the Treaty, there is no longer a substratum on which the Respondents could base the plea of time limitation, especially as a threshold issue. The Respondents are unable to state the moment when the time started to run, hence, they cannot admit any alleged violation;

    Thirdly, the Respondents have the onus to show what among the reliefs sought by the Applicant is time-barred;

    Fourthly, before being furnished with full information related to the violations complained of, the Applicant cannot be held to time limitation due to lack of full

material to focus on his cause of action;

Finally, the Applicant relied on Rugumba case (supra) and contended that until he had been furnished with all the information to the questions posed by the Appellate Division of this Court as to "when, where, why and by whom he had been detained", he would not have filed any reference to this Court.

39. The 1st Respondent, on his part argued, that it is obvious that the Applicant was arrested at Entebbe International Airport upon his arrival on 15th September, 2010, by the Ugandan security officers and was, thereafter interrogated. He added that on 17th September, 2010, the Applicant was transferred to Entebbe International Airport from where he subsequently left Uganda on 18th September, 2010.
40. The 1st Respondent averred that it is not in dispute that the Applicant filed this Reference on 30th December, 2011. The 1st Respondent asserted that the Applicant came to know the alleged violation of his rights on 15th September, 2010, the date of his arrest or on 18th September, 2010 when he left Uganda for Kenya.
41. He further submitted that the time frame provided for under Article 30(2) of the Treaty to challenge any Act or action complained of is two months and that period must be strictly interpreted. He cited the *Omar Awadh case (supra) and East African Law Society vs. the Attorney General of the Republic of Uganda,the Attorney General of the Republic of Kenya and the Secretary General of the East African Community, EACJ Reference No.3 of 2011* in support of his submissions.
42. The 1st Respondent averred that on the contrary, the arguments of the Applicant that he had never raised the issue of time limitation in his pleadings are untenable. He stated that he pleaded that the Reference was barred in law under paragraph 5 of his response to the Reference and even at the Scheduling Conference, both Parties framed an issue relating to time limitation. He asserted in addition, that even if he would have forgotten to raise that issue before, the Court could not close its eyes to such illegality.
43. He contended that it is the Court's duty to interpret and apply the provisions of the Treaty and to inform itself of the relevance of provisions that may affect its decisions.
44. In conclusion, he submitted that, the Reference was filed out of time and prayed that this Court be pleased to dismiss it with costs.
45. As said previously, Ms. Munyi, Counsel for the 2nd Respondent did not file written submissions. Nevertheless, during the last hearing of the Reference on 18th November, 2013, she associated herself with the submissions of the 1st Respondent on the issue of time limitation. She further referred the Court to the list of Authorities, in particular the decision of the Appellate Division in Omar Awadh case (supra) where the Court held that the Treaty does not contain any provision which allows any disregard about the time limit of two months prescribed in Article 30(2).
46. Counsel for the 2nd Respondent, therefore, urged the Court to hold the same by dismissing the Reference with costs to the 2nd Respondent.

Findings of the Court on Issue No.2

50 For ease of Reference, we shall reproduce the content of Article 30(1) and (2) and analyze especially sub Article 1: "Subject to the Provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the

Court, the legality of any Act, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty;
2. The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."

51. The general Rule of interpretation set out by the Vienna Convention on the Law of Treaties reproduced elsewhere above is applicable to the interpretation of this Article. It is our understanding from the plain reading of Article 30(2) that a reference challenging any unlawfulness or infringement provided for under Article 30(1) must be instituted within a period of two months of their occurrence or in the absence thereof, when the complainant came to know the Act or action complained of. That is the clear and ordinary meaning to be given to the Article 30(2).
52. It is undeniable that the Applicant was arrested upon his arrival at Entebbe International Airport on 15th September, 2010 by the Ugandan Rapid Response Unit (RRU) and was escorted by Ugandan security officers into an Aircraft of Uganda Airlines destined for Nairobi, Kenya on 18th September, 2010. It is also common ground that this Reference was filed before this Court on 30th December, 2011.
53. The Applicant took exactly one year, three months and twelve days to file the Reference instead of two months prescribed by the Treaty. Is there any hardship that can explain such unusual non-compliance with the Article 30(2) of the Treaty? To that question, the Applicant contended that he wanted to be told before he initiated any reference when, where, why, and by whom he had been detained.
54. At this juncture, we hasten to say that this reasoning is not helpful at all. Why do we say so? It is well set out in the Reference brought by the Applicant that he was arrested and detained on 15th September, 2010,(when), upon his arrival at Kampala, (where). The Applicant further pointed out that he was threatened with being charged with the same terrorism and murder offences that his clients were facing if he did not give false statement about the incrimination against the suspects, (why). It is also evident from the complaint that he was arrested, interrogated and detained by the Uganda's Rapid Response Unit, (who).
55. It is our considered view that the Applicant can no longer rely on *Rugumba case(supra,)* since he was released on 18th September, 2010. The Court was not told what prevented the Applicant to file his Reference between 18th September, 2010 and 18th December, 2010 that to say, two months as prescribed by the Treaty.
56. We further find and hold that the Applicant cannot argue that he was not furnished with full material to crystallize his cause of action. Indeed, it has been established by this Court that an alleged infringement of the provisions of the Treaty would give rise through interpretation of the Treaty under Article 27(1) to a cause of action [See *Mohochi case (supra) and Independent Medical Legal Unit case(supra)*].
57. A cause of action is defined by the *Black's Law Dictionary* as "A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person."
58. The Applicant has complained of the violation or infringement of the aforesaid

Articles of the Treaty by the 1st and 2nd Respondents. It is that infringement which constitutes a cause of action. Therefore, since he was enjoying his rights which were allegedly violated by the Respondents, the requirements to support or sustain a cause of action were enough to enable him to file a reference.

59. Coming back to time limitation as enshrined in Article 30(2) of the Treaty, we need to say that the word "Limitation" is defined by the *Black's Law Dictionary* as "a statutory period after which a law suit or prosecution cannot be brought in Court."
60. The *Dictionary of Words and Phrases* Legally Defined further clarifies that "For most actions, periods of limitation are prescribed by statute with the consequence that an action begun after the period of limitation has expired is not maintained."
61. In addition, "A limitation period is a time limit, during which an action may be brought, thereafter a potential plaintiff is barred and may no longer bring his action. Statutes of limitation are in their nature strict and inflexible enactment" (See *Law Africa, Civil Procedure & Practice in Uganda, M. Ssekaana & S. N. Ssekaana*).
62. Recently, the Appellate Division of this Court found and held that:
"It is clear that the Treaty limits Reference over such matters like these to two months after the action or decision was first taken or made, or when the Claimant first became aware of it. In our view, the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the Article above. Equally so, the Court below could not rule otherwise on the face of the explicit limitation in Article 9(4) to the effect that the Court must act within the limits of its powers"- [See *Independent Medical Legal Unit case(supra)*].
63. Moreover, the Court above found and held that "The principle of legal certainty requires strict application of the time limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend, to condone, to waive or to modify the prescribed time limit for any reason"- [See *Omar Owadh case (supra)*].
64. Consequently, the Court is bound by the Law (Treaty) and for the above reasons we have to take cognizance of the fact of the limitation. Therefore, we hold that the Reference is time-barred. Moreover, as we have answered issue No.2 in the affirmative, we refrain from entertaining issues nos. 3 and 4 for the simple reason that the Reference is no longer alive.

Accordingly, this Reference is hereby dismissed.
As to costs, due to peculiar circumstances of this case, we deem it just for each Party to bear its own costs.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Application No. 4 of 2011

Omar Awadh Omar, Hussein Hassan Agade, Mohammed Adan Abdow, Idris Magondu,Mohammed Hamid Sulaiman, Yahya Suleiman Mbuthia, Habib & Suleiman Njoroge

And

The Attorney General, Republic of Kenya, The Attorney General, Republic of Uganda & The Secretary General, East African Community

Johnston Busingye, P.J, John Mkwawa, J, Jean Bosco Butasi, J
December 1, 2011

Continuous chain of actions - Continuing Treaty infringements – No mathematical computation of time - Unlawful detention continues until it is stopped- Whether the Reference was time-barred.

Article 30 (2) of the EAC Treaty - Rules 1(2), 4, 21 and 118 of the EACJ Rules of Prrocedure, 2010.

Through Reference No 4 of 2011, the Applicants claim that they were abducted from the Republic of Kenya, taken to the Republic of Uganda, detained and arraigned on charges of terrorism allegedly committed in Uganda. They maintain that their arrest, transfer to and detention in Uganda infringed the Treaty. The first and second Respondents violated the Treaty by continuing to detain the Applicants. The Applicants sought interim orders restraining the Second Respondent and all institutions and authorities from proceeding with prosecution and trial of the Applicants pending the hearing and the determination of the Reference.
Before the Application was heard, the 2nd Respondent raised a preliminary objection claiming the actions complained of started in July 2010 and the Reference was therefore time-barred and the Court had no jurisdiction to extend the time.

Held:

1) The object and purpose of Article 30(2) could not have been to deny the people in East Africa the right to challenge continuing Treaty infringements of which they are victims just because it was over two months since such infringements started.
2) The violations complained of constituted a continuous chain of acts the occurrence of which the Applicants could not and cannot, until now, append a specific hour, day and month.
3) While an unlawful arrest can be time specific an unlawful detention continues to be an unlawful act on each succeeding day until it is stopped. The facts of the instant Reference indicate unlawful acts, or treaty infringements which, if proved would be continuous and incapable of mathematical computation of time. The preliminary

objection was therefore disallowed.

Case cited:
Independent Medical Legal Unit vs The Attorney General of Kenya and 4 Others, EACJ Ref. No.3of 2010

Editorial Note: In Appeal No 2 of 2012 it was held that;the limitation period started to run from the date the arrest and detention were effected; and that continuing violations were not exempted from the two-month limitation period. The action was therefore time-barred.

Ruling

Introduction

1. The Applicants filed an Application before this Court by Notice of Motion under Rules 1(2), 4, 21 and 118 of the EACJ Rules and Article 30 (2) of the Treaty for the Establishment of the East African Community, ("the Treaty"). The Applicants are seeking for orders and interim orders that:
2. This motion and any other pleadings/Applications by the Applicants touching on and/or arising from Reference No.4 of 2011 before this Court or connected therewith be lodged without payment of fees and fee in connection with the said Reference be waived and/or refunded as the case may be.
3. Due to the nature and urgency of the Application, and to avoid irreparable injustice this Honourable Court be pleased to prohibit, restrain and injunct the Government of Uganda (the Second Respondent herein) and all institutions and/or persons and/or authorities hereunder, as the case may be, from proceeding with prosecution and/or trial of the Applicants pending the hearing and the determination of Reference No. 4 of 2011 before this Honourable Court.
4. The time lag for institution of this Reference as prescribed by Article 30 (2) of the Treaty be condoned by extension of time and the Reference be deemed to be within time.
5. The Costs incidental to this Application abide to result of Reference No.4 of 2011 lodged with this Honourable Court.
6. The Application is supported by the affidavits of Rabia Mohamed Omar, the wife of the 1st Applicant herein. In opposition to the Application is the response of Ms. Patricia Mutesi, Counsel for the 2nd Respondent.

Background

7. According to the affidavit evidence and written submissions on the record it is discernible that the Applicants were arrested from the Republic of Kenya, taken to and detained in the Republic of Uganda where they have been arraigned on charges of terrorism allegedly committed in Uganda.
8. They maintain that their arrest, transfer to and detention in Uganda infringes the Treaty. It is against this background that they are before this Court seeking urgent intervention.

9. At the hearing Counsel for the Applicants dropped prayers (c) and (d), and maintained prayers (a) and (b) related to fees and injunction respectively.
10. Before the hearing of the Application could proceed Ms Patricia Mutesi, Counsel for the 2nd Respondent raised a preliminary objection, on limitation of time. The Court then allowed all parties to file their respective submissions on the objection.

This Ruling is in respect of that preliminary objection.

Submissions:

2nd Respondent's Submissions

11. Ms Patricia Mutesi, Counsel for the 2nd Respondent relied on the affidavits of Ms Robina Rwakoojo, the Acting Director of Civil Litigation in the Attorney General's Chambers, Kampala, Ms Joan Kagezi, Senior Principal State Attorney in the Directorate of Public Prosecutions, Kampala and that of Wilson Magomu, Seniors Superintendent in the Uganda Prisons Service, and told the Court that the acts complained of in the Reference happened between 22ndJuly and 17th September 2010. She pointed out evidence on the record that shows that the Applicants were at all times from the 22nd July 2010 aware of the acts they are now complaining of. She then showed the Court evidence that the Reference was filed on the 9th June 2011. She contended that the Reference on which this Application is based is itself out of time, that the Court has no jurisdiction to extend the time and therefore the Court cannot proceed to grant interim or any orders on such an Application.
12. Citing Article 30 (1) and (2) of the Treaty Counsel for the 2nd Respondent submitted that the Reference should have been filed within two months from the date the acts complained of happened or from the date the Applicants became aware of them. The present Reference, she argued, meets neither of those Treaty requirements. She contended that the present Application which arises from the Reference is time barred.
13. She argued that Article 30 (2) of the Treaty reflects the principle that a cause of action arises when a state of facts occurs which gives a potential claimant a right to succeed against a potential defendant. She further argued that the Article also recognizes that where applicable, time to file a Reference does not begin to run until a claimant becomes aware of the alleged unlawful act or infringement complained of. However, after a person becomes aware of the said action, the stipulated time of two months begins to run and the time limit is thus imposed. She further contended that Article 30 (2) of the EAC Treaty does not legally recognize any "continuing" breach of violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant.
14. Counsel contended that although the Applicants had sought to rely on Rules 1(2) and 4 of the East African Court of Justice Rules of Procedure, ("the Rules"), those Rules do not grant the Court any jurisdiction outside the Treaty but are themselves subject to the provisions of the Treaty. In support of her stance she cited Article 9 of the Treaty which provides, inter alia, that Organs of the Community shall perform their functions within the limits of the powers conferred by/or under the Treaty.

1st Respondent's Submissions

15. Mr. Edwin Okello, Counsel for the 1st Respondent, associated himself with the 2nd Respondent's submissions and added that the proceedings provided for in the Article 30 (2) must be instituted within two months of enactment, publication, directive, decision or action complained of.
16. He further added that there is no provision within the Treaty that provides for extension of time. He further contended that the cause of action arose between 22nd July, 2010 and 17th September, 2010 and that; therefore, the Reference should have been filed by 17th November, 2010 at the latest.

3rd Respondent's Submissions

17. Mr. Agaba Stephen, Counsel for the 3rd Respondent, also associated himself with the 1st and 2nd Respondents' submissions. Citing Article 31 (1) of the Vienna Convention of the Law of Treaties he submitted that if the Court interprets Article 30 (2) of the Treaty strictly and gives it its ordinary meaning, the present Reference will be found to have been filed after the two month period provided under the above provision.
18. Counsel distinguished the case of *Independent Medical Legal Unit Vs the Attorney General of Kenya and 4 Others Ref. No.3. of 2010* where this Court held that "failures in a whole continuous chain of events cannot be limited by mathematical computation of time"from the present case. Firstly, he submitted that the Applicants did not show that they were abducted from Kenya and surrendered to Uganda illegally and that, therefore, the action complained of cannot be said to be still ongoing, when it did not even happen. Secondly, he argued, that the Applicants had not shown that the Republic of Uganda had failed to provide any remedy before coming to this Court.

Applicants' Response

19. Mr. Muturi Kigano, Counsel for the Applicants, in reply, submitted that it was not contested that the Applicants and Counsel were aware of the infringements complained of from July 2010. However, his contention is that the Republic of Kenya and the Republic of Uganda continue to violate the Treaty by continuing to detain or falsely imprison his clients to-date. Citing this Court's holding in *Independent Medical Legal Unit vs The Attorney General of Kenya and 4 Others, Ref No 3 of 2010*, he submitted that the Treaty violations complained of were a chain of continuous acts and that, in a situation such as the Applicants are in, time cannot begin to run until the violations end.

Determination of the Application

20. We have carefully considered the evidence, the submissions as well as the applicable law on the subject. The following are our findings and conclusions:
    Article 30 (2) of the Treaty provides that:
    "The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in absence thereof , of the day in which it came to the knowledge of the complainants, as the case may be".

21. This Court is alive to the strict limitations imposed by this provision. We also agree with the Respondents that proceedings can only be brought within two months of the unlawful act or infringement complained of, or of the day the complainant became aware of it.
22. The facts of the instant Reference, however, present us with the kind of unlawful acts, or treaty infringements which, if proved would, in our view, obviously be continuous and not capable of mathematical computation of time.
23. This can be discerned from Paragraphs 5 and 6 of the Reference which state that:
"5.On diverse dates between 22nd July 2010 and 17 September 2010 the Applicants were captured and abducted from various locations in the Republic of Kenya by officers from the Kenyan and Ugandan Police respectively in collaboration with officers/officials acting on behalf of the United States of America, Federal Bureau of Investigation (FBI) and were, after being illegally detained in various police stations in Kenya (without charge) for periods between 3 and 6 days, spirited across the border to Uganda in what is notoriously referred to as "rendition".
"6. Upon rendition as aforesaid todate the Applicants have been shuffled between various locations, forests, police stations, military barracks/camps and prisons under the directions of the 2nd Respondent. All the applicants are currently being detained at Luzira Prison, Kampala, Uganda."
24. It can be further discerned from paragraphs 6 and 7 of the supporting affidavit of Rabia Mohamed Omar which, at paragraph 6 says, in part, that several Kenyan Muslims, inclusive of her husband, have been captured by and/or abducted by the Kenya Police and/or officers acting thereunder in cahoots and/or collaboration with officials from the Republic of Uganda and the United States Government and transported/ transferred and surrendered to Uganda. None of the victims have been subjected, before rendition to Uganda, to due legal process and/or recourse to due extradition process; and at paragraph 7 it states that:
"My said husband is in custody of the notorious Rapid Response Unit (para military) at Kireka, Kampala following violent capture, abduction and surrender as aforesaid. He has not been tried or convicted. He was abducted on the 17th September 2010 on Kimathi Street……"
25. From the above cited parts of the Reference and affidavit evidence, it is clear that the acts complained of as unlawful include unlawful detention, detention incommunicado, denial of bail, vicious torture, continuous interrogation.
"*Black's Law Dictionary, 9th Edition*, at p.514,defines"Detention"as "The act or fact of holding a person in custody; confinement or compulsory delay."
The Online Encyclopedia, Wikipedia, defines "Detention" as"any form of imprisonment where a person's freedom of liberty is removed…..".
Loukės G. Loukaidės, in "*The European Convention on Human Rights: Collected Essays"*, at p.26, states, inter alia, that "…detention appears to be a typical case of a continuing violation initiated by an instantaneous act…"
26. The common thread running through the above literature, with which we are respectfully in agreement, shows that detention is not a single happening;rather it is a situation in which one's right of liberty stands removed. It is a constant state of affairs, that is to say, a continuing deprivation of a person's liberty.

27. We were invited by Counsel for the 3rd Respondent to interpret Article 30 (2) of the Treaty in accordance with the provisions of Article 31 (1) of the Vienna Convention on the Law of Treaties. The Article provides that:
"..a Treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the Treaty in their context and in the light of its object and purpose."
28. We have given careful thought and consideration to the import of Article 30 (2) of the Treaty. We are of the decided view that its object and purpose could not have been to deny the people in East Africa the right to challenge continuing Treaty infringements of which they are victims just because it is over two months since such infringements started.
29. In *Independent Medical Legal Unit vs The Attorney General of Kenya and 4 Others (supra)* this Court held, in sum, that where matters complained of are failures in a whole continuous chain of events from when the alleged violations started until a claimant decides that a Respondent has failed to provide any remedy for the alleged violations, then such action or omission of a Partner State cannot be limited by mathematical computation of time. Counsel for the3rd Respondent attempted to distinguish this case from the present Application. We are respectfully unable to find the distinction he laboured to establish. The issues whether or not the Applicants were abducted and surrendered to Uganda illegally and whether or not the Republic of Uganda failed to provide a remedy are matters for the merits of the case.
30. In our considered view, the violations complained of do not constitute an act, rather, it is our finding that they constitute a continuous chain of acts the occurrence of which the Applicants could not and cannot, until now, append a specific hour, day and month. For instance, while an unlawful arrest can be time specific an unlawful detention continues to be an unlawful act on each succeeding day until it is stopped.

Conclusion

31. In view of the foregoing, we have no hesitation in concluding that the alleged Treaty violations complained of in the present Reference are continuous to-date and cannot be subjected to mathematical computation of time.
32. Accordingly, we find and hold that Reference No 4 of 2011 is properly before this Court. Consequently, the present objection is hereby disallowed.

Costs shall be in the cause.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Application No. 4 of 2011

Arising from Reference No. 4 of 2011

Omar Awadh Omar, Hussein Hassan Agade, Mohammed Adan Abdow, Idris Magondu, Mohammed Hamid Sulaiman, Yahya Suleiman Mbuthia, Habib & Suleiman Njoroge

And

The Attorney General, Republic of Kenya, The Attorney General, Republic of Uganda & The Secretary General, East African Community

Johnston Busingye PJ, John Mkwawa J, Jean Bosco Butasi, J
February 28, 2012

Discretion to hear oral application - Stay of proceedings pending appeal-Whether the Court had discretion to hear an oral application and to grant the stay.

Rule 21(7) (a) of the East African Court of Justice Rules of Procedure, 2010

The Second Respondent made an oral application for stay of further proceedings pending an intended appeal against the ruling of the same court dated 1st December, 2011. A Notice of Appeal had been filed on 1st day of December, 2011 and the Appeal would be rendered nugatory if the stay was not granted.

The Applicants claimed that no notice had been given on intended application for a stay and that the stay would be prejudicial to the Applicant as it would result in criminal proceedings against his client's in the Ugandan Criminal Courts and defeat the very purpose of the Reference.

Held:
The Court had discretion to hear an oral application and to stay the proceedings for sufficient cause. The Court need not go into the merits of the pending appeal as that is the sole domain of the Appellate Division.

Ruling

1. When the matter came up for hearing this morning namely the 28th day of February, 2012, Counsel for the Second Respondent, Ms. Patricia Mutesi, made an oral application for stay of further proceedings pending an intended appeal against the ruling of this court dated 1st December, 2011.
2. The ground for the intended Appeal as contained in a Notice of Appeal filed in this Court on the 1st day of December, 2011, namely, on the very day that this Court gave

its decision, is against the whole decision of this Court as decided that Reference No. 4 of 2011 is not time-barred.

3. The learned Counsel informed the Court that the Notice in question was served upon all the parties a long period before today. She argued with great force and pertinacity that if today's hearing proceeds as scheduled the intended Appeal would in essence be rendered nugatory. She further argued that what is now before this Court is provided by the Rules of this Court, namely, Rule 21(7) (a) of the Rules.
4. Learned Counsel for the Applicant, namely, Mr. Amuga strenuously opposed the application. In support of his stance, he essentially contended that:
   (a) The intended Appeal has no chance of success.
   (b) The 1st Respondent's counsel was aware of today's hearing but took no steps to let the Claimant's/Applicant's Counsel know of the intended prayer for stay of proceedings in order to avoid the inconvenience so caused as a result thereof.
   (c) The stay would be prejudicial to the Applicant as it would result in criminal proceedings against his client's in the Ugandan Criminal Courts hence defeat the very purpose of the Reference now before the Court.
5. He further submitted that if the prayers are granted then this Court should issue the interim orders sought in the Reference, namely that, proceedings before the National Court in Uganda should be stayed pending the hearing of the instant application now before this Court.
6. In rejoinder it was counter-submitted by Counsel for the Respondent that whether the Appeal has a chance of success is a matter to be determined by the Appellate Division and not this Court whose decision is subject matter before the Appellate Division. In other words, she submitted that the submissions made by the learned Counsel for the Applicant were speculative.
7. As regards the other limbs pursued in the Reference she submitted that, that cannot be talked at this juncture as the intended Appeal is in respect of the very basis of the claim in the Reference in question. In sum, she urged the Court to allow her prayer for stay.
8. Mr. Agaba Steven Counsel for the 3rd Respondent associated himself entirely with the stance of the Counsel for the 1st Respondent; and associated himself with the arguments advanced thereof.
9. We have given due consideration to the rival submissions and we have the following to say: This Court has discretion to hear an oral application as provided under the Rules of the Court and proceed to stay the proceedings for sufficient cause.
10. We do, however, agree with the Counsel for the Applicant/Claimant that the Counsel for the Respondent should have in one way or another indicated that she was going to ask for stay of proceedings as filing an intended Appeal by itself is not sufficient.
11. We are of the candid view that in order for the Applicant to succeed in an application for stay of proceedings in a pending appeal it is not required by this Court to go into the merits of the pending appeal as that is the sole domain of the Appellate Division.
12. We are further of the view that the prayers made by the Counsel of the Applicant/ Claimant which appear as a "trade off" cannot be granted by this Court as the prayer sought by the Counsel is not within our domain at this stage.
13. Accordingly, we grant the application and do hereby stay any further proceedings

before us until the determination of the intended appeal.

14. We do however strongly feel that the Claimant/Applicant is entitled to to-day's costs in any event.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Application No. 6 of 2011

Arising from Reference No. 6 of 2011

The Democratic Party & Mukasa Fred Mbidde And The Secretary General of the East African Community & The Attorney General of Uganda

Johnston Busingye, P.J; Mary Stella Arach-Amoko, DPJ; John Mkwawa, J
November 30, 2011

Criterion for granting an interim injunction-East African Legislative Assembly elections-Judicial discretion - Whether interim orders should be granted

Articles: 39 and 50 of the EAC Treaty - Rules- 1(2), 17, 21, 24 and 73 of The East African Court of Justice, Rules of Procedure, 2010-Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006

The applicant averred that the Government of Uganda and its Parliament had failed to amended the Rules of Procedures of Parliament, 2006 (the "Rules"), in order to conform to the provisions of Article 50 of the Treaty which provides for election of members of the East African Legislative Assembly (EALA). The Applicants' feared that, unless the Parliament of Uganda was going to use the said Rules in the forthcoming election of Uganda's representatives the EALA to their detriment.

Pending determination of Reference No 6of 2011 filed in this Court, they sought an interim order, restraining EALA, the Attorney General and the Parliament of the Republic of Uganda, from inter alia conducting any elections, recognizing any names of nominees as duly nominated and elected to EALA, administering the Oath of office and ultimately sending the representatives of Uganda to the EALA until Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedures of the Parliament of Uganda, 2006 were amended to conform to the provisions of Article 50 of the Treaty.

Held:
The criterion for the granting of an interim injunction had been satisfied therefore, the Attorney General and the Parliament of the Republic of Uganda were restrained from conducting elections of Representatives of the Republic of Uganda to the EALA until the determination of the Reference No. 6 of 2011.

Cases cited:
American Cynamid v Ethicon[1975] All ER 504
E.A.Industries v Trufoods (1972) E.A. 420
Giella v Cassman Brown Co. Ltd (1973) E.A 358
Jacob Oulanya v the AttorneyGeneral of Uganda, Constitutional Court of Uganda,

Constitutional Petition No.28 of 2006
Mary Ariviza & Another vThe Attorney General of The Republic of Kenya & Another, EACJ Application No. 3 of 2010
Professor Anyang' Nyongo and Ten Others v The Attorney General of The Republic of Kenya and Five Others, EAC Reference No.1 of 2006
Sargeant v. Patel (1972) 16 EACA 63

Ruling

Introduction

1. We have before us an application made by the above applicants under Article 39 of the Treaty For The Establishment Of The East African Community Treaty (hereinafter referred to as the "Treaty" and Rules 1(2), 17, 21, 24 and 73 of the Rules of The East African Court Of Justice , 2008, whereby they are praying for orders that:
2. (a) Pending determination of their Reference filed in this Court, an interim order be issued against the Respondents restraining the East African Legislative Assembly, the Attorney General and the Parliament of the Republic of Uganda, from conducting and carrying out any elections, assembling, convening, recognizing any names of nominees as duly nominated and elected to the East African Legislative Assembly "EALA",administering the Oath of office and ultimately sending the representatives of Uganda to the EALA until Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedures of the Parliament of Uganda, 2006 are amended to conform to the provisions of Article 50 of the Treaty.
   (b) They be granted such other orders and directions as may be appropriate in the circumstances.
   (c) The costs of the application be provided for.
3. The application is supported by the affidavit of the Second Applicant. In opposition to the application, there are replying affidavits sworn by the Attorney General of the Republic of Uganda, Hon. Peter Nyombi and Dr. Julius Tangus Rotich, the Deputy Secretary General (Finance and Administration) of the East African Community, on behalf of the 1st and 2nd Respondents, respectively. Hon. Lubega Medad Ssegona and Hon. Susan Namaganda, Members of Parliament representing the Democratic Party in the 9th Parliament swore supplementary affidavits in rejoinder to the two affidavits in reply.

Background

4. It behoves us to mention right from the outset that the instant application arises from Reference No.6 of 2011 filed in this Court by the first Applicant, a Political Party Organisation duly registered in the Republic of Uganda and the second Applicant, its legal advisor.
5. The gravamen of the complaint of the Applicants, if we may put it in a nutshell, is that the Government of Uganda and its Parliament have not to-date amended the Rules of Procedures of Parliament, 2006 (hereinafter referred to for brevity as the "Rules"), in order to conform to the provisions of Article 50 of the Treaty which

provides for election of members of the EALA. The Applicants contend that Rules 11(1) and Appendix B r 3, 10and 11 of the Rules in question do not only contravene Articles 21 (1) and (2); 29(1) (e); 89 (1) and 94(1) of the Uganda Constitution but Article 50 of the Treaty as well to the extent that they discriminate against and limit the freedom and right of association of members of the opposition to vie for election to the EALA and do not allow members of the Uganda Parliament to elect the EALA members. The Applicants blame the second respondent for failure to supervise the Uganda Parliament to ensure that the Rules are amended in conformity to Article 50 of the Treaty. It is the Applicants' fear that, unless constrained by Court, the Parliament of Uganda is going to use the said Rules in the forthcoming election of Uganda's representatives the EALA to their detriment.

6. In the Reference, the Applicants are seeking the following declaratory orders:
   (a)That Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006 which are going to be used by the Parliament of Uganda in the election of the members of the East African Legislative Assembly in the upcoming elections are inconsistent with and contravene Articles 21(1) and (2), 29 (1)(e), 89(1) and 94 (1) of the Constitution of the Republic of Uganda in that the aforesaid infringement will have the effects of limiting the freedom and rights of the First Applicant to associate in vying for the upcoming elections for the representatives of EALA. Apart from the foregoing, the aforesaid Rules complained of do not allow the Members of Parliament of Uganda to elect the Members of EALA.
   (b) That the inaction and the loud silence by both the Government and the Parliament of Uganda in not amending and realigning the aforesaid Rules which are going to be used by the Parliament of Uganda in the upcoming elections for members of EALA in accordance with Article 50 of the Treaty, is an infringement of the said Article.
   (c) That the Secretary General of the East African Community has failed to supervise the Government of Uganda to ensure that the Parliament of Uganda amends its laws in order to make them conform to Article 50 of the Treaty.

Submissions:

7. It was strenuously argued by Mr. Justine Semuyaba, who appeared for the Applicants, that the EALA's current term expires in June 2012. That campaign for election of the new Representatives from Uganda are already under way and elections are to be held sooner than later. That there is every likelihood that the new Representatives for the EALA will be elected in accordance with the Rules of Procedure of the Parliament of Uganda, 2006 as was the case when the Representatives to the Pan-African Parliament were elected.
8. It was Mr. Semuyaba's main argument that the aforesaid Rules are not in conformity with Article 50 of the Treaty. He added that in the case of *Jacob Oulanya versus the Attorney General of Uganda, Constitutional Petition No.28 of 2006*, which was before the Constitutional Court of Uganda, the Court held, inter-alia, that the aforesaid Rules of Procedure infringe several Articles of the Constitution of the Republic of Uganda. It is his stance that no election should be held until the aforesaid Rules are

amended by the Parliament of Uganda which does not seem ready to do so.

9. It is his contention that if the order sought is not granted, the Uganda Parliament will go ahead and elect the EALA representatives using the impugned Rules. In that case, the Applicants will suffer irreparable damage in that they will be disenfranchised because the Uganda Parliament will conduct the elections on the basis of the numerical strength rule. Further, it is also his contention that it is not only the instant Applicants, but also the EALA and the East African Community in general, that stand to suffer irreparable damage, if it turns out that one third of the EALA's members were not legally elected.
10. In support of his stance, he has invited us to invoke the principles enunciated in the cases decided by this Court, namely *Professor Anyang' Nyongo And Ten Others vs The Attorney General Of The Republic Of Kenya And Five Others, Ref. No.1 of 2006* and the decision in *Application No.9 of 2007 arising from Ref. No.3 of 2007, which was between the East African Law Society And Three Others and The Attorney General of The Republic Of Kenya And Three Others*.
11. Learned Counsel further contented that the Reference which is before this Court awaiting a hearing raises more than a prima facie case with a probability of success. He maintained that the Reference pending in Court raises serious issues which have to be considered and decided by this Court.
12. Further to the foregoing, the learned Counsel stressed that the Applicants are trying to stop an election which has not taken place and that they are not going to wait until the elections are conducted under the impugned Rules because then, there will be more problems. Citing an observation by this Court in the case of *Professor Anyang' Nyongo, (supra)*, he contended that it is better to stop a mischief before it takes place than wait until it has happened.
13. Learned Counsel in support of his submission on this point, also relied on the case of the *European Parliament vs The Counsel of The European Communities, Case N.C-70 of 1988*, where the European Court of Justice intervened in a matter where Parliamentary Procedures were infringing the European Community Treaty.
14. He thus urged this Court, not unlike in the case he cited, to intervene where Rules of Procedure of Parliament of a Partner State are infringing the Treaty, pending the hearing of the main Reference, which may not take place soon.
15. In rebuttal, it was contended by Mr. Wilbert Kaahwa, learned Counsel for the First Respondent, that Article 50(1) of the Treaty places the responsibility for the process of the election of the members of the EALA on the respective National Assemblies and that the elections are conducted "in accordance with such proceedings asthe National Assembly of each Partner State may determine". He maintained that there is no evidence to show that at the material period, the process of election of members of the EALA is on-going in Uganda as alleged by the applicants. Learned Counsel relying on paragraph 7 of Dr. Rotich's affidavit, contended that the Secretary General has no supervisory role in matters vested in Partner States of the EAC, "save as is provided under Article 29 of the Treaty". He further submitted that the letter from the Speaker's Office which was in response to the First Applicant's letter dated 19th July, 2011, cannot be taken as evidence to support the assertion that the elections are underway. He thus urged this Court to dismiss the application with costs.

16. Ms. Christine Kaahwa, learned Counsel for the Second Respondent, was very brief in her response. The thrust of her argument was that the Applicants' contentions are premised on mere speculation. It is on the basis of the foregoing that she urged the Court to find and hold that the Applicants have failed to establish a prima facie case.
17. Basing himself on the affidavit of Hon. Peter Nyombi, Mr. Phillip Mwaka, learned State Attorney, also representing the Second Respondent submitted that subsequent to the decision in the case of *Jacob Oulanya versus the Attorney General of Uganda (supra)*, the Government of Uganda commenced the process of amending the Rules of Procedure of the Parliament of Uganda, 2006 to conform to Treaty and the Constitution of Uganda.
18. It is also Mr. Mwaka's submission that the 8th Parliament of the Republic of Uganda considered and reviewed the Rules of Procedure of the Parliament of Uganda including the Rules challenged in this Reference and made proposals to the Government of the Republic of Uganda for consideration. Consequently, the instant application is premature and it is not in the interest of justice that it be granted.

Determination of the Application by the Court

19. We have carefully gone over the materials placed before us in this application and after considering the oral submissions of both sides and the law on the subject, our findings and conclusions are as follows:
20. One, it is trite law that the granting of an interim injunction is an exercise of judicial discretion which must be exercised judiciously. (See: *Sargeant V. Patel (1972) 16 EACA 63; Giella V Cassman Brown Co. Ltd (1973) E.A 358 and Mary Ariviza & Another Vs. The Attorney General Of The Republic Of Kenya And Another, Application No. 3 of 2010 arising from Ref. No.7 of 2010.*)
21. Two, the principles for granting an application for an interim injunction by courts is well settled although they have been expressed in various terms over time. They are that: For an interim injunction to issue, the Court must be satisfied that the applicant has a prima facie case with a probability of success. An interim injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would adequately be compensated by an award of damages. .(See: *Professor Anyang'Nyongo (supra)*. If the court is in doubt, it will decide the application on the balance of convenience. (See: *E.A.Industries vs Trufoods (1972) E.A. 420 and Giella vs Casman Brown (supra)*, to mention just a few decisions.
22. In light of these general principles, we now turn to the facts of the present case.
23. Regarding the first principle, the court must be satisfied that the claim is not frivolous or vexatious and that there is a serious case to be determined by court. (See: *American Cynamid v Ethicon[1975]* All ER 504 at 510 per Lord Diplock).
24. It is evident from the Applicants' affidavits in support of the instant application and the affidavit deponed by Hon. Peter Nyombi, the Attorney General of Uganda, sworn on behalf of the Second Respondent, that the impugned Rules were subject of litigation in the Constitutional Court of Uganda in the *Jacob Oulanya's case (supra).* It is common ground that the said Court found *inter-alia* that the Rules in question to be infringing several Articles of the Constitution of the Republic of Uganda. It is further common ground that the Constitutional Court went ahead to declare the

aforesaid rules to be inconsistent with both the Constitution and Article 50 of the Treaty.

25. It is further amply clear from the evidence on record and the submissions of both sides that at the moment, the execution of the aforesaid decision of the Constitutional Court has been stayed, pending the determination of the appeal before the Supreme Court of Uganda. Here, we are respectfully in agreement with Mr. Semuyaba, learned Counsel for the Applicants, that in law, those Rules are operational.

27. Further, Hon. Nyombi deponed in paragraphs 4, 5, 6 and 8 of his affidavit in reply that the application is premature in: "4. That pursuant to the decision of the Constitutional Court of Uganda in *Constitutional Petition No 38 of 2006; Jacob Oulanyah versus the Attorney General*, the Government of Uganda commenced the process of amending the Rules of Procedure of the Parliament of Uganda to conform to the East African Treaty (sic) and the Constitution of Uganda.

5. That the Rules of Procedure are in the process of amendment in order to provide for the conduct of the election of members of Parliament representing Uganda at the East African Legislative Assembly when the current term expires.

6. That I was the Chairperson of the Rules, Privileges and Discipline Committee in the 8th Parliament of the Republic of Uganda which considered and reviewed the Rules of Procedure of the Parliament of Uganda including the Rules challenged in this Reference and made proposals to be presented to the 9th Parliament of the Republic of Uganda for consideration."

28. However, it is also instructive from the Second Respondent's affidavit in support of this application, that on the 19th July, 2011, the First Applicant wrote to the Speaker of the 9th Parliament of Uganda inquiring about the number of slots available to the First Applicant in the EALA for which its members may contest.

29. One Helen Nanteza Kawesa, who replied to the aforesaid letter on behalf of the Speaker on the 26th July 2011, stated *inter-alia*, as follows:
"Please note that the slots in EALA are determined by the numerical strength of the Party. It is, therefore, most probable that the Opposition will be entitled to at least two slots. The final decision will be determined on the floor of the House".

30. Based on the foregoing, therefore, we find that the complaint by the Applicants is neither frivolous nor vexatious considering the 1st Applicant' numerical strength in Parliament as indicated in the annextures to the affidavits filed on behalf Applicants *vis avis* the clear provisions of Article 50 of the Treaty.

31. We are thus of the considered view that the totality of the facts, without expressing a concluded view, discloses *bona fide* serious issues that need to be investigated by this Court. In other words, there is an arguable or *prima facie* within the meaning enunciated in the Giella's case, to mention just one decision in respect of this area of the law.

32. As stated before in applications of this nature, the finding that there is a prima facie case with a probability of success is to say no more than that if the Respondents do not put up any plausible defense or response the Applicants would succeed.

33. The reason is obvious, that at this stage, we must of course; refrain from making any determination on the merits of the application or any defense to it. A decision on the merits or demerits of the case must await the substantive consideration of the facts

and applicable law after full hearing of the Reference.

34. We have also carefully read the case of the *European Parliament versus the Council of the European Communities (supra)* where the European Court of Justice intervened in a matter where Parliament Procedures were infringing the European Community Treaty. We are fully aware, of course, that although it is not binding on us, it is of persuasive value to this Court.
35. We now come to the second hurdle that the Applicants have to cross, namely, whether an irreparable injury will be occasioned to the Applicants if the Court does not interfere.
36. We are of the considered view, based on the totality of the available affidavit evidence on record, that if the application is denied and the elections of Uganda's Representatives to the EALA take place under the impugned Rules and if the Reference is eventually determined in favour of the applicants, not only the Applicants but also the EALA and the East African Community itself, stand to suffer irreparable injury. This is not only because the Applicants will have been denied an opportunity to send Representatives to the EALA but, as this Court observed in a similar application in the *Anyang' Nyongo Reference (supra)*, there will be improperly elected Representatives in the EALA and the credibility of the EALA will be questionable. It is our view that no amount of damages would ever be able to adequately compensate the Applicants for that kind of injury.
37. We, therefore, find and hold that the second criterion for the grant of an interim injunction has also been satisfied.
38. On the question of balance of convenience, while we note from the affidavit of the Attorney General Hon. Peter Nyombi that the Government of Uganda has commenced the process of amending the said Rules, and we have no reason to doubt the Hon. Attorney General, the process seems to be too slow in the circumstances. It is accordingly our considered view that since the matter is already before this court, it would do no harm to the Respondents if the election process of Representatives of the Republic of Uganda to the EALA is halted for the time being to await the final outcome of the Reference which is pending in the Court. It is our finding, therefore, that the balance of convenience favours the Applicants.
39. In the premises and for the reasons given, we allow the application and issue the following orders:
    1) The Attorney General and the Parliament of the Republic of Uganda are hereby restrained from conducting elections of Representatives of the Republic of Uganda to the EALA until the determination of the Reference No. 6 of 2011.
    2) The costs of the application shall be in the cause.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Appeal No. 1 of 2011

Appeal from the Ruling in Reference No. 3. of 2010 in the First Instance Division by: J. Busingye, PJ; M. S. Arach Amoko, DPJ; J. J. Mkwawa, J. B. Butasi and B. P. Kubo, JJ, dated 29th June, 2011

Attorney General of the Republic of Kenya And Independent Medical Legal Unit

Before: H. R. Nsekela P; P. K. Tunoi VP; E. R. Kayitesi, L. Nzosaba and J. M. Ogoola, JJA
March 15, 2012

Earliest knowledge of the acts complained of applies in the computation of time - Improper raising of preliminary objections -No continuing Treaty violation- States' responsibilities to their citizens and residents - Whether the learned Judges erred in deciding that they had jurisdiction to hear the Reference and it was not time barred.

Articles 23(3), 27(2), 30(2) and 35A of the EAC Treaty - Rules: 68(5) and 77 of the EACJ Court Rules of Procedure, 2010.

The Appellant filed this Appeal challenging the Ruling of the First Instance Division concerning Reference No. 1 of 2011. The Appellant had raised preliminary objections inter alia averring that the Court had not jurisdiction to entertain the Reference as it did not comply with the provisions of limitation of time. After hearing the objection, on 29th June, 201, the First Instance Division found that the Court had jurisdiction to entertain the Reference and that the Reference was not barred by limitation of time. Subsequently, this Appeal was lodged contending that the court had erred in law.

Held:

1) Only points of pure law unstained by facts or evidence, should be raised as preliminary objections. The improper raising of points by way of preliminary objections unnecessarily increases costs and, on occasion, confuses the issues.
2) There was no enabling provision in the Treaty to disregard the time limit set by Article 30(2). This Article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit. The Respondent came to the knowledge of the acts complained of between 2006 and February, 2009 which was one-and-half years before the Reference was brought. Thus the Reference was time –barred and the appeal was allowed.

Cases cited:

Ferriera Valsabbia Spa v EC Commission OJ C2009, 9.8.84 p.6, para 14, ECJ Case 209/83
James Katabazi & 21 Others v EAC Secretary General & AttorneyGeneral of Uganda, EACJ Reference No. 1 of 2007
Mukisa Biscuits Manufacturing Co. Ltd v. West EndDistributors Ltd [1969] EA 696.
Nebec v EC Commission [1975] ECR 145 at 151, ECJ, Case 24/69

Judgment

Factual Background

1. The Appellant filed this appeal in the Appellate Division of this Court, challenging the Ruling of the First Instance Division dated 29th June, 2011 concerning Reference No. 1 of 2011 by Independent Medical Legal Unit (``IMLU``), a Non-Governmental organization operating in Kenya. That Reference had its origins in the alleged executions and actions of torture, cruelty, inhuman and degrading treatment of over 3,000 Kenyan residents that took place in the Mount Elgon District of Kenya, between 2006 and 2008. Consequent upon the tragic situation, the Government of the Republic of Kenya was accused of failure to investigate those atrocities and of not taking any administrative, judicial or other measure to prevent or punish the perpetrators.
2. The Respondent in the First Instance Division canvassed the following five Preliminary Objections:
   (1) The Jurisdiction of the Court;
   (2) Non-compliance with Rule 24 of the EACJ Rules;
   (3) Misjoinder of the 2nd, 3rd, and 4th Respondents;
   (4) Cause of action against the 5th Respondent; and
   (5) Limitation.
3. The First Instance Division held that the Court had jurisdiction to entertain the Reference; and decided that the Reference was not barred by limitation of time.
4. On 29th September 2011, the Appellant lodged an appeal against part of the above decision of the First Instance Division, citing nine grounds of appeal. The Appellate Division of the Court is seized of this appeal under Articles 23(3) and 35A of the Treaty establishing the East African Community (the ``Treaty``), and Rule 77of the EACJ Court Rules of Procedure.

Appeal on Points of Law: Jurisdiction and Limitation.

5. The Court agreed with the parties to consolidate the nine grounds of appeal cited in the submissions of the Appellant into two points of law, namely:
   (i) The learned Judges erred in law and in fact in arriving at the decision that the Court has jurisdiction to hear the Reference;
   (ii) The learned Judges erred in law and in fact in arriving at their decision that the Reference is not time barred.

Preliminary Objections

6. Before considering the above substantive two grounds of appeal, the Court wishes to address, at the outset, one issue of paramount judicial importance affecting the Court's practice and proceedings, namely, the treatment to be accorded to applications for preliminary objections. In the present Reference, the Attorney General of the Republic of Kenya as Respondent in the Reference before the Court below, raised two preliminary objections, challenging the jurisdiction of this Court to entertain this matter; as well as the time limitation on the Respondent/Applicant to institute this matter before the First Instance Division.

7. The Court below, in as far as can be ascertained, dealt with the two issues as a matter of course. In its scheduling conference of 2nd December 2010, as indeed in its Ruling of 29th June 2011, the Court below reiterated the fact that:
"This Ruling is in respect of preliminary objections raised by the Respondents to the Reference when it came for scheduling."
8. It is evident that the Court and all Counsel proceeded to treat these challenges as matters of preliminary objection. There was absolutely no challenge, let alone discussion, of the validity or otherwise of whether these matters properly constitute points of preliminary objection. None of the Counsel (nor indeed the Court itself), raised any such concern or objection and none was argued, canvassed or in any way adverted to. Instead, all concerned proceeded to address the twin issues of jurisdiction and limitation – as preliminary points of law. They all did this on the mutual assumption that, indeed, these were valid points of preliminary objection. All gave no heed at all to the proper procedure for entertaining such preliminary objections.
9. This Court wishes to set the record straight, concerning the appropriate practice and procedure to adopt when faced with an application for a Preliminary Objection. The procedure was firmly established by the East African Court of Appeal in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696*.
10. The purported preliminary objection in the Mukisa case was an application for summary dismissal of the suit for want of prosecution. The trial court overruled the application after hearing the Appellant`s counsel, but without calling upon the opposite counsel to reply; and without reading its reasons in open court. The Court then gave judgment in the substantive suit.
11. Upon appeal of that judgment, the issue of the original preliminary objections was raised afresh. The Appellant`s counsel contended that the matter (of summary dismissal of the suit for non-prosecution), had been raised under the guise of a preliminary objection – when it was not. It should have been raised in the form of an application by way of motion – accompanied by affidavits, and a reply by the plaintiff giving reasons for the delay in prosecuting the suit. The Court (Law, JA) emphasized that the proper form should have been a motion, and not a preliminary objection – which it was not. He underlined the essence of a preliminary objection as being:
"A point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point, may dispose of the suit".
12. The President of the Court (Sir Charles Newbold) – mindful of the paucity of "facts in that case, and the inevitable dispute as to what were the facts" – gave a succinct elaboration of this point, thus:
"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if and fact has to be ascertained or if what is sought is the exercise of judicial discretion . The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop".

13. It is abundantly clear from the above, therefore, that the adoption of a wrong procedure, disadvantages both the Applicant and the Respondent, as well as the judicial process itself. This is uniquely so where, as in this present Reference, the Parties disagreed virtually on every fact that gave rise to the background to the suit.
14. It is equally clear that the improper raising of points by way of preliminary objections "*does nothing but unnecessarily increase costs and, on occasion, confuse the issues*". The Court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will, instead, treat as preliminary objections, only those points that are pure law: which are unstained by facts or evidence, especially disputed points of fact or evidence or such like.

Jurisdiction

15. The Appellant`s learned Counsel, Mr Ombwayo, raised the issue of the jurisdiction of this Court, submitting that "*The learned Judges erred in law and in fact in arriving at the decision that the Court has jurisdiction to hear the Reference*". He explained that the Reference in the Court below dealt with human rights violations carried out by the Respondent in contravention of the fundamental principles of the Treaty and similar provisions of other international conventions: notably Articles 4, 5(1), (5)(3) (f), and 6(d) of the Treaty.
16. Further, Mr Ombwayo asserted Article 27(2) presupposes that the Court has no jurisdiction to entertain a Reference based on a breach by a Partner State of the rights of her people, unless and until the EAC Council of Ministers will have determine so; and a Protocol operationalizing such extended jurisdiction will have been signed.
17. Mr Ombwayo forcefully submitted that the Reference does not merely refer to violations of human rights, but is indeed based on violations of human rights; because even the order sought by the Claimants in the Reference called for the enforcement of the human rights of the above victims..
18. In response to Mr Ombwayo`s submissions, learned counsel for the Respondent, Ms Kilonzo, averred that the State failed to investigate the allegations of human rights violations in the Mount Elgon District.
    The Government`s failure to investigate those human rights violations, to prosecute and punish the perpetrators, and to afford relief to the victims, constituted a breach of the Treaty principles of the Rule of Law, Good Governance, promotion and protection of Human and People's rights, as expressly stipulated in Articles 5, 6 and 7 of the Treaty; and contravenes several International Conventions, International Law, as well as the Constitution and Laws of the Republic of Kenya.
19. As regards, the jurisdiction of the Court, Mr Deya (*Amicus Curiae*), stated that Article 27 of the Treaty implies that there is already jurisdiction for the Court. The Court has a wide mandate in that its duties include delivery of justice in the matter, to ensure that there is interpretation of the Treaty, and also to ensure that there is compliance with the Treaty. Taking into account the fact that the alleged acts of omission and commission constituted mass atrocities and violations of criminal and civil laws, the Court should address all these from the point of view of the responsibility of the State

towards its citizens. From that standpoint, this Court has jurisdiction to entertain the Reference.

20. Having regard to the above submissions of all three Counsel, we take the lower Court`s Ruling as our starting point for consideration of this ground of appeal on jurisdiction. That Court appears to have adopted, as its own decision, the sentiments expressed in the case of *James Katabazi & 21 Others v EAC Secretary General & Attorney General of Uganda (Reference No. 1 of 2007)*: Judgment of 1st November 2001 – namely, that:
"While the court will not assume jurisdiction to adjudicate Human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article27(1) merely because the reference includes allegations of human rights violations".
21. On that basis, the Court then pronounced its own substantive decision in virtually identical terms thus:
"Similarly, in this reference, the Court will not abdicate duty to interpret the Treaty merely because Human Rights violations are mentioned in the Reference".
22. It is from the above decision that the aggrieved Party came to us on appeal. The issue of jurisdiction, brought before this Appellate Division, is indeed a point of law stipulated by Article 35A of the Treaty. However, it appears that the Ruling of the First Instance Division relied only on *Katabazi case*. It is, therefore, quite clear that the First Instance Division abstained from categorically and effectually analyzing the allegations pleaded and discussed by both parties, to demonstrate how those facts were related to the Court`s decision on jurisdiction.
23. The significance and genius of the *Katabazi case* is not so much in the Court`s famous refusal "not to abdicate" its jurisdiction. Rather, it was the Court`s ability to find and supply, through interpretation of the Treaty, the source and basis for the Court`s jurisdiction in the circumstances of the case then before the Court. To this end, the Court in the *Katabazi case* proceeded to probe, to examine and to asses at great length and in great depth the source that allowed the Court to claim and exercise jurisdiction in the matter. They found and supplied the cause of action flowing from the Treaty (that was different and distinct from violation of the human rights) on which to peg the Court`s jurisdiction. Similarly, in the instant Reference, the Court below ought to have gone beyond `` non abdication of power``. It should have delved into the cause of action and other considerations that provide the legal linkage and basis for this Court`s jurisdiction in the instant Reference, which is separate and distinct from human rights violations. Sadly, they did not do so. Against such a linkage or nexus, *Katabazi case* has no mystic properties of a magic wand that cures all.
24. In these circumstances, we are of the view that the decision taken by the First Instance Division that it would not abdicate its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of Human rights violations``, was sound, because the EACJ is the Institution mandated to determine whether a Partner State has or has not breached, infringed, violated or, otherwise offended the provisions of the Treaty. However, we consider that the issue of jurisdiction as canvassed before the Court below, was a mixed question of both fact and law. Therefore, to come up with a decision on jurisdiction, the First Instance

Division ought to have analyzed the allegations of lack of jurisdiction in the light of both the law and the facts as presented before that Court. Yet, it did not categorically and emphatically do so.

25. The Court`s reasoning and analysis of these issues was submerged and drowned in the lone reference to the *Katabazi case*, without the Court giving its own reasoning for its own decision. In doing so, the Court failed to observe the express requirement of Rule 68(5) of this Court`s Rules of Procedure, namely to provide the reasons for its judgment. That Rules provides in relevant parts, as follows:
"(5) The judgment of the Court shall contain"`:
(f) the points for determination,
(g) the decision arrived at,
(h) the reasons for such decision``.
26. Moreover, it also deprived both Parties to the Reference as well as us, the Appellate Division, of knowing the reasons for its judgment on this particular issue.
27. As adverted to above, Counsel Deya contended before us that the Court should have addressed the question of jurisdiction from the point of view of the responsibility of the State towards its citizens. We agree. The respective Partner States' responsibilities to their citizens and residents have, through those States voluntary entry into the EAC Treaty, been scripted, transformed and fossilised into the several objectives, principles and obligations now stipulated in, among others, Articles 5, 6 and 7 of the Treaty, the breach of which by any Partner State, gives rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Article 27(1), constitutes the cause of action in a Reference, such as the instant Reference. It is not the violations of human rights under the Constitution and other Laws of Kenya or of the international community that is the cause of action in the Reference at hand. The Court below could have explored all these and more to establish the legal foundation for this Court's jurisdiction in this Reference. It did not do so; and neither did it supply other substantive reasons for its peremptory holding.
28. In the premises,this Appellate Division could have optedto remitthe matter back to the First Instance Division for a proper determination of the question of jurisdiction, especially in as much as that Division did proceed to adjudicate the second issue before it, namely: the time limitation imposed on the Applicant to bring its complaint to the Court within two months of the Government`s action. Upon reflection, however, we decline to do so. This is because the issue of limitation of time is equally before us in this appeal, as a ground of appeal. That ground, like the ground of jurisdiction of this Court, is properly before us, pursuant to Articles 23(3) and 35A of the Treaty.

Limitation

29. The main issue for determination before the Court below was whether or not the Reference was time barred. The Appellant averred that the acts complained of took place within a specified period of time which could be determined. However, the Respondent contended that the matters aforesaid are matters of a criminal nature which in effect concerned the Rule of Law and Good Governance, and do not actually have any statutory time limits, but had remained in limbo and unresolved. The Court below after considering both oral and written submissions canvassed before it by

Learned Counsel for the parties, held as follows:

"Upon careful consideration of this point of objection, it is our considered view, that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations. We find that such action or mission of a Partner State cannot be limited by mathematical computation of time."

30. Mr Ombwayo, contended before us that Article 30(2) of the Treaty was unambiguous and categorical that the Reference ought to have been instituted within the time specified therein. Moreover, he argued, it was easy to ascertain and subject the time within which the Reference could be lodged to mathematical computation of time on the basis of the reports of the tragic events in the Mount Elgon District since those reports were recorded and widely publicized.
31. Ms Kilonzo adopted her submissions in the Court below and added that there is no limitation of time in failing to file a reference on lack of investigation by the State because the obligation to investigate is of a continuing nature. She gave an example of persons accused of rape or murder who cannot challenge the statute of limitation against the crimes charged. Similarly, she contended, that the State cannot avail itself of such argument.
32. Ms Kilonzo also referred us to the case of *Moiwana Community v Surnam (Inter-American Court of Human Rights: Judgment of June 15, 2005)*. This was a case on human rights with facts similar to the matter now before us. In that case the State of Surinam in 1986 attacked a village called Moiwana and massacred 40 men, women and children. Those violations occurred in 1986, when Surinam had not yet become a signatory to the American Convention on Human Rights. In fact, it became a signatory on the Convention in 1987, one year after the State agents had attacked the village. The case was brought before the Court of Human Rights in 2005, 20 years after the fact; and the State submitted that the Court lacked jurisdiction to hear the application because the events in question took place before Surinam became a signatory to the Convention.
33. It is worthy of note that in the Moiwana case, the Court distinguished between two violations; (i) those of a continuing nature; and (ii) those which had clearly occurred in the past.

    Article 30 of the Treaty provides as follows:

    "(1) Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

    (2) The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision, or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be…"
34. It is clear that the Treaty limits References over such matters like these to two months after the action or decision was first taken or made, or when the Claimant

first became aware of it. In our view, the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the Article above. Equally so, the Court below could not rule otherwise on the face of the explicit limitation in Article 9(4)to the effect that the Court must act within the limits of its powers under the Treaty.

35. To borrow from European Community jurisprudence, it is also a well established principle of law that the European Court of Justice can only act within the limits of the powers conferred upon it by the existing Treaties or any later conventions. Its jurisdiction must therefore be from specific provisions and does not extend beyond the defined area – See *Halsbury`s Laws of England, 4th Edn., Volume 51*.
36. It follows, therefore, in our view, that this Court is limited by Article 30(2) to hear References only filed within two months from the date of action or decision complained of, or the date the Claimant became aware of it.
37. In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit – see *Case 24/69 Nebec v EC Commission [1975] ECR 145 at 151, ECJ*. Again, no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty.
38. The reason for this short time limit is critical – it is to ensure legal certainty among the diverse membership of the Community: see *Case 209/83 Ferriera Valsabbia Spa v EC Commission OJ C2009, 9.8.84 p.6, para 14, ECJ quoted in Halsbury's Laws (supra) Para 2.43*.
39. It must be made clear at the outset that the main complaint against the Appellant and the Government of Kenya is that it failed to investigate the alleged atrocities. It is obvious that the Government could not investigate unless it had knowledge of those violations. Various publications, reports and documents show beyond doubt that the Government had knowledge of those atrocities and the Respondent knew that the Government had the said knowledge through the following reports exhibited in the Court below:
    i) The People Daily of 27 November, 2009 where IMLU had urged the Government of Kenya to make public the report of May 2008.
    ii) Kenya National Commission on Human Rights subsequently released a report entitled "*The Mountain of Terror*" - 2008.
    iii) The Report by Human Rights Watch released In July 2008 entitled "*All the Men Have Gone*".
    iv) The United Nations on May 26th, 2009 published a "*Report of the Special Rapporteur Phillip Alston on extrajudicial, summary or arbitrary executions*".
    v) The wide media and electronic coverage (July – August 2008) publicised the executions, torture and other atrocities committed against Kenyans resident in Mount Elgon by the four Respondents.
40. After consideration of the various reports, narrated herein above and whose copies were made public and availed to the Respondent, the Court finds that, firstly IMLU came to the knowledge of the acts complained of, at the earliest, in 2006; and, at the

latest, in February, 2009; which was at least one-and-half years before the Reference was brought. Secondly, the reason advanced that there was no way to compute time is irrelevant, since all those reports were dated and widely circulated to the Public.

41. For the above reasons, we conclude that IMLU filed the Reference out of the prescribed time and consequently, the Reference is time - barred for not complying with the amended provision of Article 30(2).

Conclusion

42. In the result: This appeal is hereby allowed.
    The Reference lodged in the First Instance Division on 12th July 2010, is hereby ordered struck out for having been filed outside the time limit prescribed under Article 30(2) of the EAC Treaty.

Each party shall bear its own costs of the appeal.

* * * *

East African Court of Justice- Appellate Division
Appeal No. 2 of 2011

Appeal from the Ruling in Reference No. 6 of 2010 in the First Instance Division by: J. Busingye PJ, JJ Mkwawa, B. P. Kubo, JJ dated 24th August, 2011

Alcon International Limited And The Standard Chartered Bank of Uganda, The Attorney General of Uganda and Registrar of the High Court of Uganda

Before: Harold R. Nsekela P, Emily R. Kayitesi, JA, James Ogoola, JA
March 16, 2012

Content of judgments- No concurrent jurisdiction –Reinstatement of Reference - Preliminary objections-Whether the Court erred in holding that the Reference against the 1st, 2nd and 3rd Respondents was improper - Whether they erred by failing to make a finding all the preliminary issues raised by the Respondents-Whether the Court failed to appreciate the pleadings and by failing to hold that the Appellant and the Respondents were not parties to the proceedings pending in the Supreme Court of Uganda- Whether the Court erred in holding that parallel proceedings in two different Courts would cause confusion between the EACJ and the Courts in Uganda resulting in an execution stalemate.

Articles: 23, 35A of the EAC Treaty- Rules: 68 (5), 77, 92 of the EACJ Rules of Procedures, 2010

The Appellant was contracted by the National Social Security Fund, Uganda (NSSF) to construct 'Workers House', in Kampala. NSSF terminated the agreement and this set in motion arbitration proceedings under the contract. The Appellant was the successful party in the arbitration proceedings. This arbitral award was being contested in the courts in Uganda and the matter was before the Supreme Court in which NSSF sought to set aside the arbitral award.

While the matter was still being litigated in the courts in Uganda, the Appellant herein instituted Reference No. 6 of 2010 in the First Instance Division against the above-mentioned Respondents seeking *inter alia*: an interpretation and application of Articles 27 (2) and 151 of the Treaty together with Articles 29 (2) and 54 of the Protocol on the Establishment of the East African Community Common Market on the enhanced Jurisdiction of this Honourable Court as a Competent Judicial Authority with regard to the enforcement of trade and resolution and settlement of disputes for the protection of cross-border investments.

During the Scheduling Conference, the 1st Respondent raised a number of preliminary objections on points of law. After dealing with the preliminary objections, the First Instance Division struck out the Reference with costs.

The Appellant then appealed from the Ruling dated 24th August, 2011.

Held:

1) The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. While considering the preliminary objection, the court below descended into considering facts and not law. The court below was expected to deal with "pure points of law" which would dispose of the Reference. The issue of jurisdiction had to be answered first before proceeding with any other issue.
2) In view of the decision it had reached, the court below did not deem it necessary to consider and determine the remaining issues. This was in contravention of Rule 68 (5) as all the issues raised in the Scheduling Conference had to be decided upon.
3) The cause of action before this Court was an alleged breach or infringement of the Treaty and not an arbitral award for breach of contract as in the Uganda courts. There was, therefore, no likelihood of a conflict or a clash between this Court and the courts of Uganda.
4) The Treaty and this Court's Rules of Procedure do not give the Appellate Division concurrent jurisdiction with the First Instance Division.
5) The First Instance Division did not discuss or make a finding of whether it had jurisdiction to entertain the Reference. This was a fundamental issue which had to be decided as a threshold issue. Therefore the Ruling and Order of the First Instance Division was set aside, and Reference No. 6 of 2010 re-instated.

Cases cited:

Ashmore v Corp of Lloyds[1992] 2 A11ER 486

Fanuel Mantiri N'gunda v Herman MantiriNg'unda and 20 Others, Court of Appeal Tanzania, Civil Appeal No. 8 of 1995(unreported)

Owners of the Motor Vessel "LillianS" v Caltex Oil (Kenya) Limited, [1989] KLRI

Judgment

1. The present case is an appeal by Alcon International Limited, a limited liability company incorporated in the Republic of Kenya, against the decision of the First Instance Division of the Court in Reference No. 6 of 2010. The Standard Chartered Bank of Uganda; the Attorney-General of the Republic of Uganda; and the Registrar of the High Court of Uganda are the 1st, 2nd and 3rd Respondents, respectively.
2. The substance of the dispute between the Parties as placed before the court below is as follows: The Appellant company was contracted by the National Social Security Fund, Uganda (NSSF) to construct 'Workers House', in Kampala. NSSF terminated the agreement and this set in motion arbitration proceedings under the contract. The Appellant was the successful party in the arbitration proceedings and was awarded US $8,858,469.97. This arbitral award is being contested in the courts in Uganda and the matter is now before the Supreme Court as Civil Appeal No. 15 of 2009, in which NSSF wants to set aside the arbitral award.
3. While the matter is being litigated in the courts in Uganda, the Appellant herein instituted Reference No. 6 of 2010 in the First Instance Division against the above-mentioned Respondents seeking the following reliefs –
   1) That this Honourable Court be pleased to interpret and apply Articles 27 (2)

and 151 of the Treaty for the Establishment of the East African Community together with Articles 29 (2) and 54 (2) (b) of the Protocol on the Establishment of the East African Community Common Market on the enhanced Jurisdiction of this Honourable Court as a Competent Judicial Authority with regard to the enforcement of trade and resolution and settlement of disputes for the protection of cross-border investments.

2) That this Honourable Court be pleased to declare that the signing of the Protocol on the Establishment of the East African Community Common Market and the coming into force of the said Protocol on 1st July 2010 enhanced the jurisdiction of this Honourable Court as envisaged under Article 27 (2) of the Treaty as a competent judicial authority for the determination of cross-border trade disputes between persons emanating from Partner States.
3) That this Honourable Court be pleased to declare that where a public official of a Partner State fails to honour his obligation/duty, statutory or legal, to a person from a different Partner State, then under the spirit and letter of the Treaty and the Protocol, this Court has jurisdiction to enforce that obligation or duty expeditiously.
4) That this Honourable Court be pleased to direct the Respondents jointly and/or severally to pay to the Claimant the decretal sum of US$8,858,469.97 together with interest and costs in full under the Bank and costs in full under the Bank Guarantee dated 29th October, 2003.
5) That this Honourable Court direct the Respondents jointly and or severally to pay to the Claimant general damages assessed by this Court.
6) That this Honourable Court direct the Respondents jointly and or severally to pay interest on the sums of money due on such rates and from such dates as this Honourable Court should direct.
7) That this Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.
8) That the costs of this Reference be borne by the Respondents in any event.

4. The 1st Respondent during the Scheduling Conference conducted by the First Instance Division under Rule 53 of the Court's Rules of Procedure raised a number of preliminary objections on points of law. At the end of the scheduling conference, the agreed preliminary objections were as follows –
   1) Whether the Reference is properly before the Court as against the 1st and 3rd Respondents;
   2) Whether the Reference is time barred;
   3) Whether the Claimant has rights under the Protocol on the Establishment of the East African Community Common Market in respect of acts which arose prior to the coming in force of the Protocol.
5. Before hearing the merits of the substantive Reference, the court below had to deal first with the above mentioned preliminary objections. Learned Counsel for the Parties filed their respective written submissions on the issues agreed upon and made oral submissions as well. In the final analysis, the court below struck out the Reference with costs. It is against this background that the Appellant has now appealed to the Appellate Division of the Court.

6. The Appellant lodged a total of fifteen (15) grounds of appeal in its memorandum of appeal. In terms of Rule 99 of the Rules of Procedure, a Scheduling Conference was held and the parties agreed upon the following five (5) grounds of appeal, namely that –
   1) The learned Honourable Judges erred in law and fact in holding in the first place that the Reference was improperly before the Court as against the 1st, 2nd and 3rd Respondents and striking out the Reference before making a finding as to whether the Court itself had jurisdiction to entertain the Reference.
   2) The learned Honourable Judges erred in law and fact by failing to address and/or make a finding on each of the only preliminary issues raised by the Respondents and which were the subject of the Ruling.
   3) The learned Honourable Judges misdirected themselves and erred in law and fact by failing to appreciate the pleadings of all the Parties before the Court and failing to hold that the Appellant and the Respondents were not parties to the pending proceedings in the Supreme Court of Uganda.
   4) The learned Honourable Judges erred in law and fact with regard to the intepretation and application of the provisions of the Treaty and the Protocol by failing to pinpoint which provisions of the Treaty and the Protocol ousts the jurisdiction of the Honourable Court on the basis of pendency of proceedings in the National Courts.
   5) In view of the provisions of Article 33 (2) of the Treaty, the learned Honourable Judges erred in law by holding, inter alia, that:
      (a) it would be absurd to have parallel proceedings in two different Courts;
      (b) that a clash of decisions would cause confusion between the Court and the Courts in Uganda;
      (c) it would result in an execution stalemate.
7. Mr. Athuok learned Counsel for the Appellant adopted the written submissions that were filed in the Court of First Instance. The Appellant categorically denied that it was a party to Supreme Court Civil Appeal No. 15 of 2009, National Social Security Fund and N.H. Sentongo t/a Sentongo and Parties vs Alcon International Limited. This was a contested issue and could not form the basis of a preliminary objection. Learned Counsel added that the First Instance Division failed to address the issues based on the interpretation of the Treaty for the Establishment of the East African Community ("the Treaty") and the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol) and so this Division should interpret the Treaty where the court below failed to do so.
8. Mr. Athuok was of the view that this Division had jurisdiction to dispose of the preliminary objections on appeal. He contended that the court below erred in law in finding that the Reference was improperly before it and in striking it out even before making a finding as to whether the Court had jurisdiction. He added that they had submitted that the Court had jurisdiction under the Treaty and the Common Market Protocol. The court below had a duty to intepret Articles 27 and 30 of the Treaty as well as Articles 29 and 54 of the Common Market Protocol in order to show that the Court had jurisdiction to entertain the Reference.
9. Mr. Tumusingize,learned Counsel for the 1st Respondent submitted that Article

54 of the Common Market Protocol did not extend the jurisdiction of the Court to handle disputes under the Common Market Protocol. Article 27 of the Treaty was not amended to cater for the purported extended jurisdiction. In addition, he submitted that there was no rule or law requiring that the court below should have addressed all the preliminary points of law raised and on the available material before the court below, the court below was entitled to hold that there were pending proceedings in the Supreme Court of Uganda.

10. Ms. Patricia Mutesi, learned Counsel for the 2nd and 3rd Respondents, adopted the submissions made before the court below. She contended that the court below had discretion in any matter before it to determine whether it should hear everything that had been placed before it. She added that the court below was prudent and wise to consider the on-going proceedings in the courts of Uganda.
11. With all due respect to the learned Counsel for the 1st Respondent, we are beginning to witness in this Court a growing tendency to commence the trial of References not on their merits but with preliminary objections on points of law. Perhaps it is an expedient way of disposing of References, but this may not end up that way. More often than not, it is an unnecessary costly detour of the proceedings. We wish to associate ourselves with these pertinent observations made by Lord Templeman in *Ashmore V Corp of Lloyds [1992]2 A11ER 486* at page 493 where he stated thus –
"The Parties and particulary their legal advisers in any litigation are under a duty to cooperate with the courts by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner."
12. Before we move on to discuss and determine the substantive grounds of appeal, it is instructive to briefly mention the nature of the jurisdiction of the Appellate Division of the Court. It is not every decision of the First Instance Division which is appealable. Article 23 (3) of the Treaty provides as follows –
"23(3) The First Instance Division shall have jurisdiction to hear and determine at first instance subject to a right of appeal to the Appellate Division under Article 35A any matter before the Court in accordance with this Treaty." Appeals to this Division are governed by Article 35A of the Treaty as amended. It provides as follows – "35 A. An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on –
(a) points of law;
(b) grounds of lack of jurisdiction;
(c) procedural irregularity."
13. The Appellate jurisdiction of this Division is derived from the Treaty. It is evident from Article 35A above that matters of fact are in principle the exclusive province of the First Instance Division. Consequently prospective appellants to this Division of the Court should bear in mind Article 35A and Rule 77 of the Rules of Procedure when lodging their respective appeals.
14. With this background, we now proceed to consider the first ground of appeal. This was to the effect that the court below struck out the Reference before making a

finding on the jurisdiction of the Court to entertain the Reference in the first place. The first preliminary objection was divided into four sub-issues as follows –

(i) That the 1st Respondent is neither a Partner State nor an Institution of the Community in terms of Article 30 of the Treaty;

(ii) That the Court had no jurisdiction to entertain and determine the Reference under Article 54 (2) of the Protocol;

(iii) That the Court had no jurisdiction under Article 27 (2) of the Treaty;

(iv) That it would be a duplication of proceedings to entertain the Reference, since there are pending proceedings in the courts in Uganda.

15. Learned Counsel for all the parties, both in their written submissions and orally before us covered all these issues. However, the court below discussed the fourth sub-issue alone. The court below stated as follows –

"First and foremost, we find it necessary to associate ourselves with the submission of the learned Counsel for the 1st Respondent that there is overwhelming evidence from the material now before us that there have been and still are several cases in the courts of Uganda in which the instant Claimant is directly involved."

16. With this finding, the court below was of the view that it was inappropriate for the appellant to pursue its claims in two different fora. On this ground alone, the court below struck out the Reference. The sub-issue discussed above by the court below, was not, with respect, a preliminary objection. In the oft-cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*, Law, J.A. stated at page 700 –

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration,"

And Sir Charles Newbold, P. had this to say at page 701 –

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

17. The matters discussed by the court below are disputed facts. This is evident from the 1st Respondents' response to the Reference in paragraphs 3, 4, 7, 8, 9 and 10. The 2nd and 3rd Respondents' joint response also do not agree with the facts pleaded by the Appellant. From the parties' pleadings themselves, these issues are contested. The court below descended into considering facts and not law. We are in respectful agreement with the Respondent that this sub-issue was not a valid preliminary objection. The court below was expected to be dealing with "pure points of law" which would dispose of the Reference. The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts are in dispute. In the event, we overrule the fourth sub-issue as a preliminary objection.

18. The remaining three sub-issues of the first issue; the second; the fourth and fifth grounds of appeal are essentially grounds of complaint against the Court's assumption

of jurisdiction in the Reference. The issue of jurisdiction of the Court to entertain the Reference was squarely put before the court below. It was one of the three issues agreed upon to be resolved as preliminary objections. The requirement that jurisdiction be established as a threshold matter is very basic. Without jurisdiction, the court cannot proceed at all. The determination of doubts about jurisdiction must precede the determination of the merits of the Reference. In the case of the Owners of the *Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited, [1989] KLRI* at page 14 Nyarangi, J. A. stated thus –

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

19. And in the case of *Fanuel Mantiri N'gunda v Herman Mantiri Ng'unda and 20 Others (CAT) Civil Appeal No. 8 of 1995* (unreported) the Court stated as follows –
"The basic question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... (T)he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial ... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."
20. Learned Counsels for both parties with one voice, as it were, correctly submitted that the court below did not attempt to answer the fundamental issue before it: whether the Court had jurisdiction to entertain the Reference. The issue of jurisdiction had to be answered first before proceeding any other issue. Inexplicably, an issue that was not in law a preliminary objection was taken up to strike out the Reference.
21. The second ground of appeal was to the effect that the court below did not make a finding on the preliminary objections agreed upon during the scheduling conference. There is considerable merit in this complaint. The record clearly shows that the court below dealt only with one sub-issue. Two issues were not touched upon. Even the fundamental issue of jurisdiction was not discussed at all. Rule 68 (5) of the Rules of Procedure provide in part as follows –
"68 (5) The judgment of the Court shall contain:
(f) the points for determination;
(g) the decision arrived at;
(h) the reasons for such decision".
22. The court below, in view of the decision it had reached, did not deem it necessary to consider and determine the remaining issues. This was in contravention of Rule 68 (5) above. All the issues raised in the Scheduling Conference had to be decided upon by the court below.
23. The third ground of appeal relates to the joinder of parties in the municipal courts in Uganda and in this Court. With respect, we have a problem with this ground of appeal. Does it fall under "ground of law" in Article 35 A of the Treaty? The parties have disagreed as to who are the parties in the Supreme Court of Uganda. This is a question of mixed law and fact which cannot be resolved by the Appellate Division of this Court. The complaint seems to be that the parties in the Supreme Court are

not the same parties in the Reference before the Court. This is a disputed matter of fact and the court below did not make a finding. With respect, we the Appellate Division cannot make findings of fact on appeal.

24. The complaint in the fourth ground of appeal is to the effect that the court below did not refer to any of the provisions of the Treaty or the Common Market Protocol which oust the jurisdiction of the Court on the ground that there are similar undecided cases in the municipal courts. We agree with this complaint. The issue was raised and argued but, the court below did not consider and determine it.
25. The last ground of appeal challenged three findings of the court below to the effect that: (1) it will be absurd to have parallel proceedings in two different courts (2) that a clash of decisions would cause confusion between this Court and the courts in Uganda and (3) it would result in an execution stalemate. Essentially, this is a complaint against the only finding of the court below made allegedly, as a preliminary objection. The court below made a determination on the facts on this point, considered irrelevant issues, and struck out the Reference. By any stretch of imagination, this was not a preliminary objection. The issue could not be resolved without adducing evidence to establish the facts. The cause of action before this Court is an alleged breach or infringement of the Treaty and not an arbitral award for breach of contract as in the Uganda courts. There is, therefore, no likelihood of a conflict or a clash between this Court and the courts of Uganda.
26. Counsel for the 1st Respondent, Mr. Tumusingize, lodged in terms of Rule 92 of the Rules of Procedure, a Notice of Grounds for Affirming the Decision upon other grounds than those relied upon in the First Instance Division. These grounds were –
    (i) That the Reference was improperly before the Court as against the First Respondent as it is not a Partner State or Organ of the Community within the meaning of Article 30 of the Treaty for the Establishment of the East African Community;
    (ii) That the Reference was time barred;
    (iii) That the Claimant has no rights under the Protocol on the Establishment of the East African Community for acts that arose prior to the coming into force of the Protocol.
27. These issues are essentially the same ones that were raised by the 1st Respondent as preliminary points of law. Learned Counsels for the parties made very erudite arguments when presenting their arguments in this appeal. As we stated earlier on in this judgment, the First Instance Division did not discuss these issues nor did it make a decision thereon. The Treaty and this Court's Rules of Procedure do not give the Appellate Division concurrent jurisdiction with the First Instance Division below to assume jurisdiction so that this Division takes up the issues and resolve them on appeal. Hence, we decline the invitation to do so, however attractive. It is contrary to the spirit of Articles 23 (3) read together with Article 35A of the Treaty.
28. The Appellant sought the following Orders, namely –
    1) That the Ruling and Order of the 1st Instance Division of the Court dated the 24.9.2011 be set aside;
    2) That this Honourable Court be pleased to dispose of the preliminary points of law raised by the Respondents in the First Instance Division of the Court;

3) That the First Instance Division had jurisdiction to entertain Reference No. 6 of 2010;
4) That Reference No. 6 of 2010 in the First Instance Division of the Court be reinstated.

29. With respect, our answer to the first prayer is, yes. For the reasons explained in this judgment, the Ruling of the First Instance Division dated the 24.9.2011 cannot be allowed to stand. However, we decline the invitation to assume original jurisdiction and thereby to dispose of the preliminary objections raised by the Respondents. This is an Appellate Division of the Court operating under the mandate of Article 23 (2) and (3) and Article 35A of the Treaty. That mandate of the Appellate Division is to hear and determine appeals from judgments and any Orders from the First Instance Division of the Court. We are not aware of any provision in the Treaty that confers concurrent jurisdiction with the First Instance Division. The First Instance Division did not discuss nor did it make a finding of whether it had jurisdiction to entertain the Reference. This was a fundamental issue on which the court below had to decide as a threshold issue.
30. In the result, we allow the appeal with costs. The Ruling and Order of the First Instance Division dated 24.9.2011 is accordingly set aside, and we do hereby re-instate Reference No. 6 of 2010. Furthermore we direct the First Instance Division to specifically determine the merits of the Reference before the Court.

* * *

East African Court of Justice - Appellate Division
Appeal No. 3 of 2011

Appeal from the Ruling of the First Instance Division by J. Busingye, PJ; M. S. Arach Amoko, DPJ; JJ. Mkwawa, J. B. Butasi and I. Lenaola, JJ, given on 29th August, 2011, in Reference No. 9 of 2010

The Attorney General of the United Republic of Tanzania And African Network for Animal Welfare (ANAW)

Before: H.R. Nsekela, P; E. R. Kayitesi and J. M. Ogoola, JJA
March 15, 2012

Application of Court rules- Fact and Law Jurisdiction- Preliminary Points of law - Permanent Injunction - The reasons for a judgment - Trans-boundary consultations - Notice of Motion - Procedural irregularities- Reference- Whether a permanent injunction could be granted against a Partner State- Whether the First Instance Division failed to properly weigh the Appellant's points of law and submissions- Whether a Notice of Motion or a Reference ought to be filed.

Articles: 5, 8, 23(3), 27, 30, 35A, 39, 111, 112 and 114 of the EAC Treaty – Rules: 21, 24(2), 68(5) of the EACJ Rules of Procedure, 2010

The Respondent filed Reference No. 9 of 2010 in this Court challenging the "action" of the Government of the United Republic of Tanzania, among others, upgrade, construct or commission the "Natta-Mugumu-Tabora B – Klein's gate – Loliondo road" (also known as the "North Road" or the "Superhighway") across the Serengeti National Park. In that Reference the Respondent contended that the Government's action was unlawful and infringed the provisions of the EAC Treaty. They sought a declaration that the Appellants actions were unlawful and infringed provisions of the Treaty and a permanent injunction restraining the Appellant from carrying out the construction.

The Appellant opposed the Reference and raised several preliminary objections to the reference. The First Instance Division overruled the objections and awarded cost to the Appellant. Thereafter the Appellant lodged this appeal.

Held:

1) The issue of appropriate relief is a function of the court's powers not of the court's jurisdiction. To mix up the two under the one rubric of jurisdiction, was to invite unnecessary and uncalled for difficulties. The substantive jurisdictional issue was shrouded and completely covered up under the impermeable veil of groping in the thick mist of whether or not to grant an interim, let alone a permanent, injunction. Relief can only be granted after the trial, when the Parties have adduced evidence, witnesses (if any) have been examined, cross-examined, and judgment has

been entered for the Party praying the particular relief. The issue concerning the appropriate relief as contested before the First Instance Division was premature. It should not have been treated as a preliminary objection at all. It was incapable of disposing of the Reference – since it should have been dealt with at the end, and not at the commencement, of the trial. An objection whose disposal requires proving or disproving of facts or evidence, ceases to be a preliminary point of law.

2) The Ruling dated 29 August 2011, did not specifically apportion any weightings to the various averments, contentions and submissions of the respective. However, while the Appellant may be genuinely aggrieved, the issue now before this Appellate Division could not be a proper appeal as only questions of law, jurisdiction or procedural irregularity may be appealed to the Appellate Division. Questions of fact are not appealable. The Appellate Division has no role to entertain grounds of appeal whose import is one of fact – namely, whether the Court below accorded weight to the Appellant's submissions. To do so would be to arrogate unto itself a role which is by the Treaty, expressly allotted to the First Instance Division. In omitting to provide the reasons for their Ruling on jurisdiction, the First Instance Division failed to fulfill the requirements of Rule 68 (5).
3) The Court Rules in question are an unfortunate source for confusion and pitfalls. On their face, the Rules require all matters filed before the Court, presumably including references, to be instituted through "application" by way of "notice of motion. Therein lies the germ of confusion. The Court is not prepared to visit the sins of the inelegant drafting of its own Rules on the hapless heads of the lawyers or on the Parties finding that the documentation presented to the First Instance Division contained all the substantive contents of a Reference as required under Rule 24 (2) of the EACJ Court Rules. The mix up in this case, arose from the interpretation and application or implementation of the provisions of the Court's Rules. The matter raised no point of law; nor did it manifest any procedural irregularity.

Cases cited:

Attorney General of Kenya v Independent Medical Legal Unit EACJ, Appeal No. 1 of 2011

Fanuel Mantiri Ng'unda v Herman Ng'unda, Court of Appeal Tanzania, Civil Appeal No. 8 of 1995 (unreported).

James Katabazi & 21 Others v EAC Secretary General and the Attorney General of Uganda, EACJ Reference No. 1 of 2007

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR1 at 14

Prof. Peter Anyang' Nyong'o & 10 Others v Attorney General of Kenya & 5 Others), EACJ Reference No.1 of 2006

Judgment

Factual Background

1. The facts giving rise to this appeal, can be put quite simply. In sum, the Respondent: Africa Network for Animal Welfare ("ANAW" who was the Applicant in Reference No. 9 of 2010), filed that Reference in this Court challenging the "action" of the

Government of the United Republic of Tanzania (the "Government") to, among others, upgrade, construct or commission the "Natta-Mugumu-Tabora B – Klein's gate – Loliondo road" (also known as the "North Road" or the "Superhighway") across the Serengeti National Park. The "Reference" was filed by way of a "Notice of Motion", supported by an affidavit. In that Reference (or Notice of Motion), ANAW contended that the Government's action was unlawful and infringed the provisions of the EAC Treaty (the "Treaty"). Accordingly, ANAW prayed the Court:

i. to declare that the impugned action is "unlawful and infringes" the provisions of the Treaty; and
ii. to issue a permanent injunction restraining the United Republic of Tanzania from carrying out that action.

2. The Government, through its Attorney General the ("Attorney-General"), opposed the Reference. It raised the following six "preliminary" objections which, it argued, were dispositive of the entire dispute – namely, that :
   i). the Application is time-barred;
   ii). the Notice of Motion is bad in law for want of proper and specific enabling law;
   iii). the Application is ambiguous, scandalous, frivolous and vexatious for being neither a Reference, nor a Notice of Motion;
   iv). the affidavit supporting the Notice of Motion, is totally defective;
   v). the Court has no jurisdiction to determine and grant the reliefs sought; and
   vi). the Application is bad in law for merging two different applications in one.
3. The First Instance Division of this Court considered all the above "preliminary" objections; and, in paragraphs 35 and 36 of their Ruling of 29 August, 2011, came to the following conclusions – namely:
   "35. In sum, we find and hold that:
   1. This Court has jurisdiction to handle this matter and to grant orders such as those sought by the Appellant.
   2. The Reference is not time-barred.
   3. The Reference, as drawn, is properly before the Court.
   4. The issue of affidavits does not arise at this stage.

   The Preliminary Objection is consequently overruled, in its entirety, with costs to the Applicant."
4. Aggrieved by the above Ruling of the First Instance Division, the Attorney General lodged an appeal to this Appellate Division against "the whole of the said decision". On 24th January, 2012, the Appellate Division of this Court, heard the Attorney-General's appeal. At the scheduling conference of the appeal, the following consolidated grounds of appeal were agreed:-
   i). Lack of jurisdiction;
   ii). Failure to consider and/or to properly weigh the Appellant's points of law and submissions;
   iii). Mixed grill, namely: Confusion over whether to file a "Notice of Motion" or a "Reference".

   This Court will now consider each one of these grounds substantially in the order in which they have been presented above:

Jurisdiction

5. In the course of the oral submissions by learned counsel for both parties, in the appeal before us, it was made abundantly clear from the outset that the Appellant's grievance in this particular ground of appeal was a limited one: namely lack of "jurisdiction" of this Court to grant the relief of a permanent injunction against a Partner State (the United Republic of Tanzania). In this regard, Counsel for the Appellant readily conceded that indeed this Court has jurisdiction to entertain a dispute that concerns environmental issues. To ascertain that concession, the question was put to Counsel at least three times; and three times Counsel explicitly and unambiguously admitted the Court's jurisdiction. Towards the end of his submission, however, Counsel seemed to recant his concession. However, realizing the grave consequences of any such recantation, learned Counsel quickly withdrew that line of argument, and confirmed that:
6. "I am, instead, withdrawing my present position; and reverting to my earlier concession: that this Court has jurisdiction to entertain a reference that involves environmental issues".
7. Be that as it may, the Court cannot and will not depend solely on a party's concession to derive jurisdiction for this Court. This is so because it is trite law, that it is not the Parties to a dispute who confer jurisdiction on a court of law. The Court must itself derive jurisdiction from its own underlying constitutive law – independently of what views the parties may or may not hold or espouse. To complicate matters somewhat, the First Instance Division of this Court, held in its Ruling of 29 August 2011 which is now challenged under the present appeal (the impugned Ruling) that:
"1. This Court has jurisdiction to handle this matter and to grant the orders such as those sought by the Applicant."
8. Notwithstanding, the clarity of the above holding by the Court, however, a close examination of the impugned Ruling does not disclose the reasons, let alone the analysis, for the Court's holding. This was an unfortunate omission, about which the Appellant complained – and, in our view, quite rightly so. What reasoning there was in the Court's Ruling is captured in paragraphs 6 – 21 (both inclusive) of the Ruling. Of these, paragraphs 6 – 9 recite the opposing contentions of the respective Counsel for the Appellant and for the Respondent on the issue of "jurisdiction". Paragraphs 10, 11 and 12 delve into the sub-issue of whether the United Republic of Tanzania has or has no right to develop its infrastructure within its own borders (it does); and whether natural and legal persons may sue a Partner State under the Treaty (they can). Paragraphs 13 – 15 examine whether the impugned act was of a kind reserved for institutions of a Partner State under the ambit of Article 30 (3) of the Treaty (it was not). Paragraphs 16 – 19 deal with the sub-issue of whether the EACJ has "power" to grant the relief of a permanent injunction (it does). And paragraphs 20 and 21 sum up the Court's overall conclusion and collective holding on all these issues – namely that the Government action complained of in this Reference is not the kind reserved to the Partner States under Article 30 (3); and that Article 39 of the Treaty (on the granting of interim orders), does not bar the Court from granting the permanent injunction that was sought by the Applicant, ANAW.
9. It is evident from the above analysis that the Court below did not directly and

effectually address the issue of substantive jurisdiction. Nowhere in the above cited paragraphs of its Ruling did the Court come out specifically and positively to state that the EACJ either has or has no jurisdiction to entertain a Reference grounded in an environment dispute. Instead, the Court confined itself to the ancillary issues of whether ANAW could as a "natural or legal" person bring this Reference; and whether or not ANAW's prayer for a permanent injunction could be granted by the Court. Only obliquely did the Court get anywhere remotely close to the issue of substantive jurisdiction – namely, that the Government action complained of was not of the kind reserved to the Partner States (i.e outside the jurisdiction of the EACJ). This oblique reference amounted at best, to only an implicit finding of the Court's jurisdiction. But even so, it contains not any real emphatic "reasoning" for the Court's finding of jurisdiction in this environmental dispute – the first ever such dispute to come before this Court.

10. That omission was unfortunate. This is so for, at least, two good reasons. First, Rule 68(5) of the EACJ Rules expressly requires the Judgment (including the Rulings) of this Court to contain "the reasons for the judgment". That Rule provides as follows:
"(5) The judgment of the Court shall contain:
(a) the date on which it is read,
(b) the names of the judges participating in it,
(c) the names of the parties,
(d) the names of the advocates and agents of the parties,
(e) a concise statement of the facts,
(f) the points for determination,
(g) the decision arrived at,
(h) the reasons for such decision,
(i) the operative part of the judgment, including the decision as to costs".
11. In omitting to provide the reasons for their Ruling on jurisdiction, the First Instance Division failed to fulfill the requirements of Rule 68 (5). Second, the importance to supply the reasons for a court's judgment is self-evident. In matters of jurisdiction, a court is under double compulsion to adduce the reasons for its holding: first, to comply with Rule 68 (5) of our Court Rules; and secondly, to inform the Parties and the Appellate Division of the basis for the Court's decision.
12. Jurisdiction is a most, if not the most, fundamental issue that a court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case – for, as NyarangI, JA so aptly opined:
"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction" – (see *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR1 at 14*).
On the other hand, the converse is equally damning – for: "Where a court takes it upon itself to exercise a jurisdiction which it does not posses, its decision amounts to nothing." – see *Words and Phrases Legally Defined – Vol. 3: I – N, page 113.*

13. More subtle, however, but no less devastating is, where a court simply assumes that it has jurisdiction. Here, too, the authorities are clear:
"It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case" – see the *Tanzanian case Fanuel Mantiri Ng'unda v Herman Ng'unda (CAT) Civil Appeal No. 8 of 1995 (unreported)*.
14. In this regard, the Court drew comfort from the Parties' own pleadings. In their Reference, the Applicants (ANAW) had adverted to this subject of jurisdiction; and had gone to great lengths to argue the case for the Court's jurisdiction. In particular, the Applicants referred the Court below to a plethora of provisions of the law (both within and beyond the EAC Treaty) from which the Court should derive its environmental jurisdiction. Those provisions, which were all expressly pleaded in the trial before the First Instance Division, are Articles 5 (2) and (3); 8 (1) (c); 111 (1) (d); 111 (2); 112 (1) and (2); and 114 (1). In their essence, those Articles provide as follows:
Article 5 (2): The Partner States undertake to strengthen and regulate their infrastructural, social and other relations, to the end that there shall be harmonious and balanced development and sustained expansion of economic activities the benefit of which shall be equitably shared.
Article 5 (3) (c): [the Community is under obligation to ensure] the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States.
Article 8 (1) (c) : [in their implementation of the Treaty provisions the Partner States are under a general undertaking] to abstain from any measures likely to jeopardize the achievement of the objectives or the implementation of the provisions of the Treaty.
Article 111 (1) (b): [the Partner States] agree to take concerted measures to foster co-operation in the joint and efficient management and sustainable utilization of natural resources within the Community.
Article 111 (1) (d): Partner States are obliged to provide prior and timely notification and relevant information to each other on natural and human activities that may or are likely to have significant trans-boundary impacts; and to consult with each other at an early stage.
Article 111 (2): prescribes as Community objectives the several requirements stipulated in paragraphs (a), (b) and (c) – namely:
(a) to contribute towards the sustainability of the environment;
(b) to ensure sustainable utilisation of natural resources like terrestrial ecosystems; and
(c) to jointly develop and adopt … management policies that ensure sustenance and preservation of ecosystems.
Article 112 (1): [For purposes of Article 111] the Partner States undertake to adopt, develop, encourage and promote all the co-operative measures listed in paragraphs (a) through (n) of Article 112 (2).
Article 114 (1): [For purposes of Article 111] the Partner States agree to take

concerted measures to foster co-operation in the joint and efficient management and the sustainable utilisation of natural resources within the Community for the mutual benefit of the Partner States. In particular, the Partner States shall;

(a) take necessary measures to conserve their natural resources;

(a) co-operate in the management of their natural resources for the conservation of the ecosystems and the arrest of environmental degradation.

15. From this long catalogue of Treaty provisions, it is more than abundantly clear that the Partner States have bound themselves to observe a variety of express undertakings and obligations, concerning the promotion, preservation, conservation and protection of the environment. The scope and import of the environmental obligations voluntarily and freely undertaken by the Partner States under the Treaty, is broad and all-encompassing. The purpose of these Treaty provisions cannot and must not be allowed to be undermined by a narrow or restrictive reading of those provisions. Rather the provisions must be given a purposive interpretation, construction, application and implementation. Such is the essence of the Vienna Convention on the Interpretation of Treaties.

16. In the instant case, the Treaty obligations of the Partner States are to be examined and ascertained even more emphatically by reason of the nature, size and location of the proposed Superhighway Project – whose implications would loom large on the environmental landscape; and whose impact would immediately, directly, and substantially affect the interests of a neighboring Partner State (the Republic of Kenya: Masai Maara National Park) and, indeed, also the interests of the entire international community (through UNESCO's designation of the Serengeti National Park as a World Heritage). In this connection, it is not known whether or not the obligation in Article 111 (1) (d) of the Treaty (on trans-boundary consultations), was strictly observed between the United Republic of Tanzania and the Republic of Kenya concerning the proposed construction of the Serengeti Superhighway. For purposes of the Reference, however, the significant point is that this Article of the Treaty clearly and emphatically brings these kinds of actions of Partner States into the purview of the EACJ jurisdiction.

17. It is quite evident that all the above provisions impose on the Partner States of the EA Community one obligation or another; one duty or another; and one undertaking or another with regard to their mutual co-operation in the environmental field. The Applicant's position was simply this: Let the Court, which is the guardian of the Treaty, interpret these various Articles; apply them, and establish whether the Partner State in question here (namely, the United Republic of Tanzania) has or has not complied with its Treaty obligations under each and everyone of those Treaty provisions.

18. It is beyond gainsaying that the Applicant's prayer here amounts to no more than asking this Court to exercise its undoubted jurisdiction under Article 27 (1) of the Treaty: to interpret and apply the Treaty; and equally, the Court's indispensable mandate under Article 23 (1): to ensure compliance with the provisions of the Treaty. Needless to say, the Court's power under Article 27(1) to interpret the Treaty traverses the entire territory of the Treaty – it covers interpretation not only of the substantive Articles of the Treaty, but also of the objectives, principles, Annexes,

Protocols, Rules, Regulations , Directives and Decisions attaching to or otherwise emanating from the Treaty.

19. Now, whether or not the United Republic of Tanzania has infringed those provisions – or any of them, is precisely what the present Reference seeks to establish. However, for purposes of ascertaining whether or not this Court has jurisdiction, it is not necessary to establish at this stage the alleged infringement, unlawfulness or illegality on the part of the United Republic of Tanzania. That was the cause of action before the First Instance Division. That is a matter for substantive trial – wherein the
20. Parties will adduce the requisite evidence and testimony, produce all witnesses (if and as needed), engage in examination and cross-examination, make submissions (whether written or oral or both), etc. On the other hand, at this preliminary stage, however, all that is required is for the Court to make the legal nexus between the Applicant's allegations and the existence of positive provisions in the Treaty, and elsewhere, that impose on the Partner States an obligation, a duty, or an undertaking that binds the Partner States to do or to withhold from doing or engaging in certain acts; or to observe certain standards or behavior in the area of environmental protection, conservation, and management.
21. Looked at from this stand-point, it is immensely evident that this Court has jurisdiction under Articles 5(2), 5(3), 8 (1) (c), 111 (1) (d), 111 (2), 112 (1), and 114 (1) (a) and (b) to entertain environmental disputes that are brought before it. This is so, notwithstanding the reservation in Article 30 (3) of the EAC Treaty; which provides for an exception to the Court's jurisdiction – namely:
"The Court shall have no jurisdiction under this Article where an Act regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State".
22. There is no provision at all under the Treaty which reserves environmental jurisdiction to the Partner States, or any of them or their institutions. In this regard, it is noteworthy that certain reservations to the Court's jurisdiction have been expressly stipulated in Articles 24 (1), 41 (2) and Annex IX of the EAC Customs Union Protocol, as well as in Article 50 (2) of the EA Common Market Protocol – through creation of parallel mechanisms for dispute resolution which aim to exclude this Court's jurisdiction. As far as we are able to ascertain, none of these reservations encompasses the environmental arena of the Treaty, to exempt from this Court's jurisdiction the obligations of the Partner States in that area. Accordingly, we have no hesitation at all to find and to hold that the many provisions of the EAC Treaty cited above do, singly and collectively, confer jurisdiction on the EACJ to entertain disputes involving the environmental obligations and undertakings of the EAC Partner States.
23. Indeed, these Treaty provisions do not only prescribe the Partner States' obligations, they themselves (read together with the provisions of Articles 28, 29 and 30 of the Treaty) do, in effect, constitute the cause of action – with the consequence that a claimant or an aggrieved party does not have to demonstrate a personal tort, right, infringement, injury or damage specific to himself in order to refer the matter to this Court for adjudication. The mere fact of the Treaty breach, is itself the cause of action – see this Court's holding in *Prof. Peter Anyang' Nyong'o & 10 Others v*

Attorney General of Kenya & 5 Others), Reference No.1 of 2006 Judgment of 30th March 2007) on special causes of action created by the EAC Treaty.

24. In J*ames Katabazi & 21 Others v EAC Secretary General and the Attorney General of Uganda (Reference No. 1 of 2007*: Judgment of 1st November, 2007), this Court had occasion to apply elements of the doctrine of a special cause of action under the EAC Treaty. In that case, the cause of action in the matter before the Ugandan courts was contravention of the provisions of the Constitution of Uganda (regarding prevention by the Army of decisions of the High Court and the Constitutional Court). Before the EACJ, however, the cause of action was totally different – namely, violation (by the Partner State) of the principles of the Rule of Law and of Good Governance enshrined in, inter alia Articles 5, 6, 7 and 8 of the EAC Treaty; and, therefore, an infringement of the Treaty.

    In the premises, the first ground of appeal fails – to the extent (if any) that it sought to challenge the jurisdiction of this Court to entertain this Reference.

Permanent Injunction

25. As regards the ancillary features of "jurisdiction", the Appellant went to extraordinary, if not extreme, lengths to argue that the Court below had no "jurisdiction" (as counsel put it) to grant the reliefs prayed – and, in particular, the relief of a permanent injunction. While the Appellant's lead counsel characterized this as "jurisdiction", it would be more correct to call it the "power" to grant the challenged relief. This would be for a number of reasons. The granting or withholding of a relief - any relief prayed by a Party to a dispute – is not a function of the court's jurisdiction. Rather, it is a consequence of a court's holding or finding in a dispute in favour of that Party.
26. Jurisdiction being central and crucial to the authority of a court to entertain the dispute at all, is ordinarily pleaded upfront, at the commencement of the hearing or proceedings. The granting of a relief, on the other hand, always follows the substantive holding of the court, after the Parties have canvassed their respective sides of the case, on its merits. The relief, redress, remedy, restitution or sanction, as the case may be, is a culmination of the court's holding or judgment: the consequence of the courts' assessment and evaluation of the merits of the case. There is no way the court can grant a relief unless and until it has first established or otherwise ascertained its jurisdiction in the matter.
27. Accordingly, the issue of appropriate reliefs is a function not of the court's "jurisdiction", but of the court's "powers". To mix up the two under the one rubric of jurisdiction, as was evident in this case, was to invite unnecessary and uncalled for difficulties. In the instant case, this mix up led to the Appellant's submissions on jurisdiction, when in truth the submission was limited to the power of the Court to grant or not to grant various reliefs. This in turn led the Court to treat the issue as a preliminary objection and to deal with it up front – when the issue was, in truth, best suited for dealing with at the end of the trial, in the context of the merits of the case; and, only if, the Applicants were found to have won their claim under the Reference. Worse still, as the matter was dealt with as a jurisdictional one, it led to a finding of jurisdiction for the Court, but without the necessary reasoning and analysis of how and why the Court had jurisdiction. The substantive jurisdictional issue was

shrouded and completely covered up under the impermeable veil of groping in the thick mist of whether or not to grant an interim, let alone a permanent, injunction.

28. In light of all these, this Court is of the considered view that this ground of appeal before us is premature. All that the Court below held in its Ruling of 29 th August, 2011, was that it had power to grant the reliefs – including grant of a permanent injunction – as prayed in the Applicant's Reference. Nowhere was it shown, or even contended that the First Instance Division went beyond the step of holding that it has the power. Certainly the Court did not grant any interim injunction – let alone a permanent injunction or, indeed, any other relief for that matter. There was no way, in any event, that the Court would have granted any such relief at that stage, when all it was doing was considering preliminary points of law. As we have explained above, relief can be granted only after the trial, when the Parties have adduced evidence, witnesses (if any) have been examined, cross-examined, and judgment has been entered for the Party praying the particular relief.
29. It is evident then that all that was before us was at best, the Party's own anticipation and, at worst, the Party's own speculation if not imagination, that the Court might grant the feared permanent injunction. To that extent, this ground of appeal was intrinsically speculative; and, therefore, premature before this Court. For this Court to canvass that ground, as now prayed, would be to deal in the purely academic, the abstract, the conjectural and the theoretical. It is quite clear that the issue concerning the appropriate relief as contested before the First Instance Division, was equally premature. Indeed, it should not have been treated as a preliminary objection at all. It was incapable of disposing of the Reference – since it should have been dealt with at the end, and not at the commencement, of the trial. And, in any event, calling for the weighing, appreciation and ascertainment of facts and evidence (as it did), this objection was not a proper preliminary point of pure law. An objection whose disposal requires proving or disproving of facts or evidence, ceases to be a preliminary point of law. Accordingly this Court, declines to go into the substantive merits of this particular ground of appeal.
30. Before taking leave of this particular aspect of this ground of appeal, we are constrained to make an important and critical observation concerning the trial Court's treatment of what the Parties framed as preliminary points of law. It is quite clear in this Reference that the First Instance Division had before it up to six issues to determine – namely (i) time-bar, (ii) want of enabling provisions, (iii) ambiguous, scandalous, frivolous and vexatious suit (iv) defective affidavit (v) "jurisdiction" to grant a permanent injunction, and (vi) the "mixed grill" issue. A careful look at all these issues and the manner and extent to which the Court's ruling dealt with each one of them, reveals that only one or two (out of the six) was truly a Preliminary Point – in the sense of being a pure point of law, whose determination could dispose of the entire Reference. Chief among such Preliminary Points was the jurisdictional issue, albeit limited to the "power" of the Court to grant the relief of a permanent injunction against a Partner State.
31. All the other so-called Preliminary Points were not at all Preliminary Points of law. Each and everyone of them involved the clash of facts, the production of evidence, and the assessment of testimony. Any such issue (depicting those features) cannot

and should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on its merits – with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined; and a finding of fact then made by the Court. On the proper treatment of preliminary objections in this Court, we have articulated our views at length in our judgment of today's date in the parallel case of *Attorney General of Kenya v Independent Medical Legal Unit EACJ, Appeal No. 1 of 2011 (from Reference No. 3 of 2010)*. "Mixed grill" Issue

32. The Appellant made a spirited argument concerning the formal propriety of the correct filing of the matter before the First Instance Division. Was it a "Reference", brought under Rule 24 of this Court's Rules of Procedure; or a "Notice of Motion" filed under Rule 21 of those Court Rules? The importance of that question lies in the legal consequences attaching to either Rule. A Reference under Rule 24 requires no supporting affidavit; but needs to show and to present the various detailed substantive contents specified in that Rule. A Notice of Motion, on the other hand, requires a supporting affidavit, but does not need to specify any substantive information concerning the particulars of the complaint. Secondly, and even more importantly (for the purposes of this present case), a Reference requires the Respondent to make a reasoned Response in defence; while a Notice of Motion could be answered by a counter-affidavit (as indeed the Appellant, in this case, was led to do).
33. In response to the Appellant's above submissions, the Respondent underscored four points: First, the documentation filed in this case, contained all the relevant underlying provisions of the law for a defence. Indeed, it expressly carried the word "Reference" in its title. Second, that indeed the body of the documentation did contain all the contents required for a Reference under Rule 24 (2) – namely: the particulars (name, identity, address, residence) of the Applicant and of the Respondent, the subject matter of the Reference, a summary of the law; the nature of the supporting evidence, and the orders sought.
34. Third, that the word "Notice of Motion" crept onto the face of the documentation accidentally and unintentionally; as, indeed, was the addition of a supporting affidavit (which in this case was mere surplassage). While all this made for some confusion, the Respondent contended that the Respondent (now Appellant) was not caused any substantive prejudice or injustice.
35. Fourth, the Respondent urged this Court to consider that the mix up in the nomenclature in this case arose from the mix-up inherent in the two sets of Rules themselves. Rule 24 (1) states that a Reference under that Rule is instituted by presenting to the Court "an application". The word "application" is not defined or referred to anywhere in the Rules, except in Rule 21, in which it is stipulated that: "all applications to the First Instance Division shall be by notice of motion; which shall state the grounds of the application".
36. This Court agrees with the Respondent. The Court Rules in question are, indeed, an unfortunate source for confusion and pitfalls. On their face, the Rules require all matters filed before the Court (presumably including references, such as the instant Reference) to be instituted through "application" by way of "notice of motion". Therein lies the germ of confusion – especially for the unwary or the uninitiated

litigant and/or their lawyer. The devil is in the drafting. To that extent, the Court is not prepared to visit the sins of the inelegant drafting of its own Rules on the hapless heads of the lawyers, let alone of the Parties themselves. We are alive to the fact that the Court's practice is still embryonic at this early stage of the Court's operations. There is still room for that practice to take root and to bloom among the practising lawyers; and for the Court itself to revisit its own Rules with a view to streamlining the potential pitfalls of practice.

37. Moreover, the documentation that was presented to the First Instance Division contained all the hallmarks of a Reference instituted under both Rule 24 of this Court's Rules of Procedure, and Articles 23, 27, 30 and 39 of the EAC Treaty; as well as under "all other enabling provisions of the law". It carried the word "Reference" in its title; and, even more significantly, it contained all the substantive contents of a Reference as required under Rule 24 (2) of the EACJ Court Rules. In matters of this kind, one of the critical dispositive points to consider is whether the "irregularity" (if that is what the mix-up was), caused the Party (the then Respondent) to suffer any significant prejudice, hardship or injustice. There was none. All that the Respondent (now the Appellant) contended, was that he was misled by this documentation in making a response by way of a counter- affidavit, instead of a fully fledged Response.
38. That may well be – but we are of the view that the "irregularity" in contention here was not a fatal one. It was one that could have been cured upon application and ample explanation to the Court below. Indeed, it is not too late for the Appellant to do just that. We are fortified in this view by the Respondents learned Counsel's own affirmation on this issue – namely, that the Respondent is ready, even now, to accommodate any such request for appropriate amendment of pleadings by the Appellant. This Court is, therefore, prepared to remit the matter to the First Instance Division for substantive trial of the merits of the Reference – and the opportunity to rectify, as appropriate, any irregularities lurking in the pleadings of the Parties.
39. One last word on this aspect of the appeal. The Appellant contended that this mix-up in the Applicant's pleadings constituted a "procedural irregularity" fit for an appeal under Article 35A of the Treaty (and Rule 77 of the Court Rules). While the mix-up could have been "irregular", it is debatable whether it did and could amount to a "procedural" irregularity. This is because, procedural irregularities are in character, irregularities that attach to the conduct of a proceeding or trial. It comprises such irregularities as the inadmissibility of documents or witnesses, denying a party the opportunity to be present or to be heard at all, hearing a matter in camera (where it should be heard in public and vice versa), failure to notify or serve in time or at all, etc. In this regard, "procedure" is defined in *Black's Law Dictionary (9th Edn. at p. 1324)* as:

    "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."

    Clearly, the emphasis in the above definition is on "regularity" and "orderlines" of the judicial progression of the process – "irregularity" being a departure or variation from the normal conduct of action (*Black's Law Dictionary supra, at p. 906*).
40. In short, procedural irregularities attach to a denial or failure of due process (i.e. fairness) of a proceeding or hearing. It seeks to ensure orderly, fair, equitable,

balanced, transparent, honest and just progress in the conduct of the steps encompassed in carrying out juridical proceedings – from commencement of the action, to delivery (and execution) of judgment. The mix up in this case, on the other hand, arises from the interpretation and application or implementation of the provisions of the Court's Rules. We were prepared to entertain this aspect of the appeal in the event that it raised substantive points of law under Article 35A (a) of the EAC Treaty, or in as far as it amounted to a procedural irregularity under the ambit of paragraph (c) of that same Article. As it turned out, however, we find that the matter raised no point of law; nor did it manifest any "procedural irregularity", properly so called.

Accordingly, that ground of appeal too must fail.

Weighting of the Law and Counsel's Submissions

41. The Appellant's last ground of appeal was to the effect that:
"2. That, the Court of the First Instance erred in law in according no legal weight to the submissions and precedents submitted by the Respondent/Appellant" .
42. In his oral submission before this Appellate Division, learned Counsel for the Appellant explained that notwithstanding his submission in the First Instance Division concerning the interpretation and application of Article 23 (1) – read with Article 39 – of the EAC Treaty, the First Instance Division did not apportion weight to his submissions. This may well have been the case. The Ruling of that Division dated 29 August 2011, does not specifically apportion any weightings to the various averments, contentions and submissions of the respective Counsel – and neither does the Court record of the proceedings of that Division dated 29 July 2011. That being the case, however, it is clear that while the Appellant may be genuinely aggrieved, the issue now before this Appellate Division cannot be a proper appeal. As a general rule, the Court has no mathematical formula for apportioning its weighting in these kinds of judicial considerations. More specifically, however, there are two other considerations of substantive import.
43. First, Article 23 (3) confers on the First Instance Division original jurisdiction to entertain matters brought before this Court. That Article states that:-
" 23 (3). The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty".
44. Second, it is important to recall the architecture of the Treaty – particularly so after the August 2007 Amendment of the Treaty. Both Article 23 (3) and Article 35A are creatures of that Amendment. Article 35A provides as follows:
"35A. An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on –
(a) points of law;
(b) grounds of lack of jurisdiction; or
(c) procedural irregularity."
45. The intention of the Amendment (which the above two provisions of the Treaty set out to implement) was to transform the EACJ from a one- chamber court (whose judgments and decisions were final), into a two-chamber court, with one chamber exercising original jurisdiction, and the other exercising appellate jurisdiction.

Article 23(3) confers on the First Instance Division all the original jurisdiction of the Court. Article 35A, on the other hand, delienates, in a limited and restricted fashion, the scope, nature and extent of the appeals that may be brought to the Appellate Division. The great divide here is essentially one of law versus facts.

46. Only questions of law, jurisdiction or procedural irregularity may be appealed to the Appellate Division. Questions of fact are exclusively and conclusively decided at the level of the First Instance Division. They are not appealable to the Appellate Division. Evaluation and assessment of questions of fact before the First Instance Division are to be determined by the First Instance Division exhaustively and with finality – without appeal to the Appellate Division. In their wisdom, the framers of the EAC Treaty saw it fit to allocate these respective roles to the two Divisions of the Court. In matters of fact, the two Divisions do not have concurrent jurisdiction. In view of this clear demarcation of juridical space, therefore, we find that in this instant Reference, the Appellate Division has no role to entertain the Appellant's last ground of appeal whose import is one of fact – namely, whether the Court below accorded weight to the Appellant's submissions. For the Appellate Division to do so, would be to purport to stand in the shoes of the First Instance Division to hear the matter at its level of original jurisdiction and, indeed, to arrogate unto itself a role which is, by the clear provisions of the Treaty, expressly allotted to the trial Division of this Court.
47. In the result, we dismiss all the grounds of the appeal. However, as all these grounds were appeals against preliminary objections raised in the Court below, we order that the matter be, and is hereby, remitted to the First Instance Division for substantive trial and adjudication of the Reference on its merits.

It is so ordered.

* * * *

East African Court of Justice – First Instance Division
Appeal No.4 of 2011

Arising from a Ruling of the First Instance Division in Reference No.2 of 2010, before: J Busingye, P.J; Mary Stella Arach-Amoko, DPJ and John Mkwawa, J, 29th September 2011

Emmanuel Mwakisha Mjawasi and 748 others And The Attorney General of the Republic of Kenya

Before: H. R. Nsekela P; P. K. Tunoi VP; E. R. Kayitesi, L. Nzosaba and J. M. Ogoola, JJA
April 27, 2012

Jurisdiction in national courts- Procedural irregularity- Res judicata-Non retrospective application of the EAC Treaty - The Preamble to the EAC Treaty- Former employees of the defunct East African Community –Whether there was procedural irregularity and the Appellants were not afforded an opportunity to present their submissions.

Article 6(d) and 7(2) of the EAC Treaty - The East African Community Mediation Agreement, 1984- Article 31 of the Vienna Convention –

The Appellants are Kenyan citizens and former employees of the defunct East African Community (EAC) that collapsed in 1977. Subsequent to the dissolution of the defunct EAC in 1977, the Partner States executed a Mediation Agreement on 14 May, 1984, for the division of the assets and liabilities of the defunct Community. Under that Mediation Agreement, each Partner State undertook the responsibility to pay out of its share of the defunct Community's assets, the pensions and other terminal benefits of its respective nationals who had been employed by the EAC and its institutions prior to the division date of the assets. The division dates were different for each of the existing institutions and the latest such division date was 30th June 1977.

The appellants claimed that though they were absorbed into the Kenyan Public Service and other State agencies and were eventually paid their terminal dues by those organizations, they were not paid their corresponding dues for the services they rendered to the East African Community; yet they lost their employment at the EAC pursuant to the abolition of their offices.

The Appellants, who had previously instituted two suits in the High Court of Kenya, averred that they are entitled to be paid by the Respondent their EAC terminal benefits in accordance with their individual records for the services they rendered to the defunct East African Community before the division date.

The Appellants filed Reference No.2 of 2010, before the First Instance Division claiming that the Respondent's refusal, neglect or failure to pay the Applicants their

EAC terminal benefits constituted a breach of Article 6(d) and Article 7(2) of the EAC Treaty.

The Respondent raised several preliminary objections and upon hearing, on 29th September, 201, the First Instance Division ruled that it had no jurisdiction to hear the Reference on account of none retrospective application of the Treaty. Aggrieved by the decision, the Appellants lodged this appeal. The Respondent posited that the instant Reference did not deal with the interpretation nor the application of the Treaty.

Held:

1). Kenya's former Community employees had a genuine and legitimate basis for their grievance of injustice against the Kenyan State concerning their Community pensions. Nonetheless, the jurisdiction for interrogating the merits (or demerits) of Appellants' grievance properly lay with the national Courts and allied fora on account of the non retrospective application of the new EAC Treaty of 2000.

2). The objection of non retroactivity of a Treaty is a fundamental issue that goes to the root of the case. Retroactivity is eminently a point of pure law which this Court is not only entitled to raise on its own motion, but also to entertain as a point of objection that is capable of disposing of the entire case. The instant case meets the necessary conditions for the principle of non retroactivity to be applied. The EAC Treaty is non retroactive. So the Treaty does not apply to the present Reference. Consequently, the East African Court of Justice is not clothed with the jurisdiction to entertain the Reference.

3). The Mediation Agreement of 1984 effectively and definitively moved the management of the assets and liabilities of the defunct Community from the remit of the East African Community, to the realm of the various National States.

Cases cited:

Attorney General of the United Republic of the Tanzania v. African Network for Animal Welfare, EACJ Appeal No.3 of 2011

Brazil – Measures Affecting Desiccated Coconut, AB 1996 – 4, WTO Report of the Appellate Body, 15

Mavrommatis Palestine Concessions (Greece v U. K.), 1924, P.C.I.J., (SER. B) No.3

The Ambatielos case (jurisdiction), judgment of July 1st 1952; I.C.J. reports 1952

Judgment

Introduction

1. This is an appeal by Emmanuel Mwakisha Mjawasi and 748 others ("the Appellants"), represented by Mr. Mutembei of Gichuru & Co., Advocates, against the Ruling of the First Instance Division of the Court in Reference No.2 of 2010.
2. The Respondent is the Republic of Kenya, represented by the Honourable Attorney General of the Republic of Kenya.

Background to the Case

3. The Appellants are Kenyan citizens and former employees of the defunct East African Community (EAC) that collapsed in 1977. Subsequent to the dissolution of the defunct EAC in 1977, the Partner States executed a Mediation Agreement on 14 May, 1984, for the division of the assets and liabilities of the defunct Community. Under that Mediation Agreement, each Partner State undertook the responsibility to pay out of its share of the defunct Community's assets, the pensions and other terminal benefits of its respective nationals who had been employed by the EAC and its institutions prior to the division date of the assets. The division dates were different for each of the existing institutions as indicated in article 1 (i) of the Mediation Agreement. However, the latest such division date was 30 June 1977.
4. Article 10.05 of the Mediation Agreement provided as follows: "Each State shall:
   (a) Pay its nationals employed by Corporations or GFS and retired from active services by the division date the pensions and other benefits due to them on account of such employment.
   (b) Make provision for the pension rights and entitlement to other benefit accrued as of the division date in favour of its nationals in active service with such Corporations or GFS at that date."
5. Interestingly, the Kenyan Government devised a somewhat novel way of dealing with the situation which arose as the consequence of the Mediation Agreement. In this regard, the ex-employees who were still in active service on the division date were given the option to take their EAC pension directly; or to join the Kenyan Public Service, including its Parastatals and State corporations. Through this latter option, many ex-employees of the defunct EAC were absorbed into the employ of the Kenyan Public Service. Conversely, those who took the option to retire were paid at once all their benefits, including additional pensions on the basis that their offices had been abolished in the EAC.
6. It was the Appellants' case before us and in the Court below that even though they were absorbed into the Kenyan Public Service and other State agencies and were eventually paid their terminal dues by those organizations, they have not, however, been paid their corresponding dues for the services they rendered to the East African Community; yet they lost their employment at the EAC pursuant to the abolition of their offices.
7. The Appellants, therefore, averred that they are entitled to be paid by the Kenyan Government their EAC terminal benefits in accordance with their individual records for the services they rendered to the defunct East African Community before the division date -- including their pensions, additional pensions, provident fund, severance allowances, gratuity, redundancy, payment in lieu of notice, repatriation expenses, loss of office, benefits outstanding, accumulated leave, salary in lieu of notice, real value and compound interest until full payment.
8. It is common knowledge that the Appellants instituted two suits in the High Court of Kenya, which were later consolidated. The Appellants later petitioned the Kenya National Assembly, but also, in vain. It is on the basis of this background that the Appellants filed the Reference No.2 of 2010, before the First Instance Division of the East African Court of Justice (EACJ).

The Reference

9. It is to be recalled that in their Reference in the Court below, the Applicants (now Appellants) had prayed for declarations that the Respondent's refusal, neglect and/or failure to pay the Applicants their EAC terminal benefits constitutes a breach of Article 6(d) and Article 7(2) of the EAC Treaty.
10. They also prayed for an order to compel the Respondent to pay their EAC terminal benefits including, but not limited to, one month's salary in lieu of notice, loss of office benefits, pension emoluments, outstanding/accumulated leave, repatriation expenses, real value and 7% compound interest until payment in full.

Respondent's Response

11. The Respondent opposed the Reference in the Court below. He raised the following objections which were agreed as issues by both parties during the Scheduling Conference, namely:
    i. The Court lacks the jurisdiction to hear and determine the Reference;
    ii. The matter is *res judicata*;
    iii. The Reference is inadmissible in this Court since local remedies have not been exhausted.
12. Subsequently, however, the Respondent unilaterally added the following issues in the Respondent's written submissions after the hearing:
    (1) The East African Community Treaty of 2000 cannot be applied retroactively;
    (2) The Claimants' statements are mere allegations without any proof of how the Treaty or the various Conventions listed therein have been infringed by the Respondent or that the Respondent is a signatory to them;
    (3) The objectives of the Treaty under its Article 5 do not provide for the redress of previous injustices, if any, to entitle the Claimants to rely on Articles 6 and 7 of the EAC Treaty.

Ruling of the First Instance Division

13. The First Instance Division considered all the above six preliminary objections, including those which had not been agreed upon by the Parties at the Scheduling Conference, and concluded with the decision that:
    (1) The Court has jurisdiction to hear the Reference;
    (2)The Reference is not barred by the doctrine of res judicatan or by the rule of exhaustion of local remedies;
    (3) The Court cannot entertain the Reference on account of no retrospective application of the Treaty;
    (4) The Reference is accordingly struck out with costs to the Respondent.

The Grounds of Appeal

14. Aggrieved by the above decision of the First Instance Division, the Appellants lodged an appeal to this Appellate Division based on 8 grounds; but at its Scheduling Conference held on 16 March, 2012, this Appellate Division agreed with the Parties to reduce the grounds of appeal from eight to only three, namely:

(1) Whether the learned Judges of the First Instance Division erred in law in finding that the East African Community did not have retroactive application in respect of the present case;
(2) Whether the learned Judges of the First Instance Division erred in law when they made findings of fact with finality at the preliminary stage without a full trial;
(3) Whether there was procedural irregularity in entertaining and determining the issue of retroactivity with finality without affording the Appellants notice for and an opportunity to present their submissions.

Ground 1: Whether the EAC Treaty has retroactive application for the instant case?

15. On this point, the Court below made the following finding:
"it is clear that the Claimants became aware of the acts/omissions of the Respondent complained of by 1998, when they filed the suit in the Kenya High Court. That was well before the Treaty entered into force in 2000. There is no contrary intention from the reading of the Treaty that it was to apply retrospectively and none has been established by the Claimants."
16. That finding was contested by the Appellants with the argument that their case was within the scope of the EAC Treaty, since the time of their cause of action was not in the year 1998 as the Court below found. Counsel for the Appellants contended that the issue of non retroactivity of the EAC Treaty was not relevant to the circumstances of this case. He added that the Court below did not give the reasons why it chose the year 1998 as its reference point, in lieu of the years 2004 or 2009. He affirmed that the issue of non- payment of terminal benefits by the Respondent to the ex-employees for services they rendered to the defunct Community, was raised in Kenya's National Assembly on 5 August, 2009, and that the Respondent admitted to holding monies for payment to the Appellants and that non-payment was due to the fact that the beneficiaries could not be found or traced. Learned Counsel concluded that the admission of debt by Kenya, constituted an acknowledgement of the Applicants' debt and reactivated their cause of action in this matter.
17. The Respondent contended the opposite position. He averred that the EAC Treaty 2000 was not applicable to the instant case by virtue of the principle of non retroactivity. He recalled the collapse of the former EAC (as it is briefly narrated in the background of this case). He stated that the employment of the Appellants ceased to exist on the division date of each institution and that no contrary intention by the founders of the new Community, has been shown by the Appellants. He concluded that, in the absence of any such contrary intention for its continuance, the current Treaty cannot operate retrospectively. Moreover, since this Court is a creation of the EAC Treaty of 2000, it cannot be seen to interpret and apply the EAC Treaty of 2000 to acts or facts that took place in 1977.
18. The principle of non retroactivity is a well known doctrine. It is generally applied in the jurisprudence of Public International Law. It constitutes a limit on the scope of a Treaty ratione temporis[see "*O. Dorr and K Schmalenhack (eds)*], Vienna Convention on the Law of Treaties, Springes – Verlag Berlin Heldelberg 2012; A. Buyse: "*A Lifeline in Time- Non-retroactivity and Continuing Violations under the ECHR*" In *Nordic Journal of International Law*, 75: 63-88, 2006, Pr Dr J. Wouters, Dr D. Coppens, D. Geraets: "*The Influence of General Principles of International Law*"

http://www.kuleuven.be .

19. When a treaty is not retroactive, the consequence is that it cannot apply to any act or fact which took place or any situation which ceased to exist before the date of its entry into force. Retroactivity of a treaty may derive either explicitly from the provisions of the treaty itself, or it may implicitly be deduced from its interpretation.
20. Upon closely and carefully reading the EAC Treaty, we did not find any provisions explicitly stating that the Treaty may be applied retroactively. We, then, turned to its interpretation in a bid to determine whether the framers of the Treaty had any intention to make the EAC Treaty retroactive.
21. The performance of this Court's duty in this regard, is guided by the Vienna Convention on the Law of Treaties. Article 2 (1) (a) of that Convention defines the instruments/treaties to which the Convention applies. The Article states as follows:
"For the purposes of the present Convention:
(a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;"
22. On the specific issue of non retroactivity, Article 28 of the Vienna Convention provides as follows:
"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or, any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."
That Article helps in establishing the intention of the parties where this intention is not explicitly expressed in a particular Treaty. Such is the case with the EAC Treaty in the instant case. This Court, therefore, needed to interpret the Treaty in order to establish whether the EAC founders manifested any intention to make their Treaty retroactive. Moreover, further guidance in this lies in Article 31 of the Vienna Convention which provides, inter alia, as follows:
"1. A treaty shall 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 its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(1) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(2) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty…"
23. Consistent with the above guidelines, this Court interpreted the provisions of the EAC Treaty: it placed them against the objectives and purposes of the Treaty. We find that the intention of the framers of the new EAC Treaty of 2000 was to turn the page of the past and to build a new project for the future.
24. The context of the creation of the new EAC Community confirms that finding. The Preamble to the EAC Treaty leaves no doubt about the objective of putting a definite end to the defunct Community. The fourth paragraph of the Preamble clearly states that:

"AND WHEREAS in 1977 the Treaty for East African Co-operation establishing the East African Community was officially dissolved,…"

The fifth paragraph of the same Preamble likewise underscores the fact of that "dissolution", thus:

"AND WHEREAS upon the dissolution of the East African Community the said countries signed … the Community Mediation Agreement 1984 for the division of the assets and liabilities of the former East African Community."

25. From the preambular paragraphs quoted above, it is patently clear that far from manifesting any intention to resurrect the old Community or its Treaty, the framers of the new Treaty made their intention abundantly obvious: namely, to officially dissolve the defunct Community and then, to divide and share out the assets and liabilities of the defunct Community among the three Partner States of the old Community. Accordingly, this Court agrees with the finding of the Court below that the EAC Treaty 2000 cannot be applied retrospectively. This particular point is put beyond any shadow of a doubt by Article 15.00 of the Mediation Agreement 1984, which stipulates that:

"The Treaty for East African Co-operation, dated 6th June, 1967,is hereby abrogated."

The above finding leads the Court to examine yet another question: Was the application of non retroactivity relevant to the instant case?

The conditions specified byO. Dorr and K. Schmalenhack (supra) for fulfilling the test of "relevant application" of the principle of non retroactivity, are as follows:

1) Existence of a Treaty to which the Respondent is a party. In the instant case, there exists the EAC Treaty.
2) The absence of any intention of the parties to apply their Treaty retroactively. In the instant case such absence has been amply demonstrated in the above Court analysis concerning the EAC Treaty.
3) 3. An act or fact which took place, or a situation which ceased to exist, before the entry into force of the Treaty concerned. In the instant case, we have the alleged refusal by the Republic of Kenya to pay the terminal benefits of the former employees of the defunct Community in execution of the Mediation Agreement signed in 1984 after the dissolution of the Community in 1977.
4) The entry into force of the Treaty is posterior to the act; fact or situation which constitutes the cause of action against the Respondent. In the present case, the EAC Treaty entered into force for Kenya on 7July 2000, after the Appellants 'claim which was already before the Kenyan High Court at Nairobi.
5) The Claimant asks the Court for the application of the Treaty to the Party in respect of the act/fact which took place or situation which ceased to exist before the coming into force of the Treaty. In the instant case, the Appellants prayed this Court to apply the EAC Treaty to their case.

26. From all the above, this Court finds that the instant case meets the necessary conditions for the principle of non retroactivity to be applied. In this regard, the Court considers the situation of the ex-employees of the defunct Community to have ceased to exist at the Community level from 14 May, 1984. That date was obviously way before the entry into force of the EAC Treaty in July 2000. We, therefore, agree with the Court below that the principle of non retroactivity is relevant to the instant

case.

Consequently, the first ground of this appeal fails.

Ground 2: Whether the First Instance Division made findings of fact with finality at the preliminary stage without a full trial?

27. Learned Counsel for the Appellants contended that the question of non retroactivity was an issue of fact. From this stand point, he contended that the Court below could not, therefore, determine this point at the preliminary stage, without full trial.
28. The Respondent postulated a totally opposite understanding of the issue of non retroactivity of a Treaty. He averred that non retroactivity is a pure point of law, intertwined with jurisdiction, which the Court can even consider on its own motion.
29. We are of the view that the Court below applied the correct law. The objection of non retroactivity of a Treaty is a fundamental issue, one that goes to the root of the case. The court cannot avoid that question. It must determine it at the outset, before dealing with any other issues. True, it is not possible to deal with the objection of non retroactivity without considering the cause of action of the particular case. However, such consideration helps only to situate the objection in a certain period, and it does not transform the principle of non retroactivity into a matter of facts. We agree with the Respondent that objection of non retroactivity is interconnected with the question of jurisdiction. The Court must consider the question even where the Parties themselves fail to raise it. Indeed, it is incomprehensible that the Respondent omitted to bring it up at the Scheduling Conference in the Court below. Nonetheless, it is recognized, in our jurisprudence that for the attainment of substantive justice, a point of law can and should be raised at any time during the course of the proceedings, preferably at the earliest available opportunity.

For these reasons, the second ground of appeal also fails.

Ground 3: Whether there was procedural irregularity for the Court below to entertain and determine the issue of retroactivity without the Appellants' submissions?

30. Under this ground the Appellants raised three distinct sub issues, which could be summarized as:
    i) smuggling into the case the issue of non retroactivity, when the Parties had not agreed any such issue during the Scheduling Conference;
    ii) denying the Appellants sufficient notice to respond to, and a fair opportunity to be heard on, the smuggled issue of non retroactivity (all in contravention of natural justice);
    iii) raising non retroactivity as a preliminary point of objection, when it was not a point of pure law.
31. Counsel for the Appellants contended that the issue of non retroactivity of the EAC Treaty was not among those which were agreed upon by the Parties during the Scheduling Conference. He averred that the point was introduced only subsequently in the Respondent's written submissions after the hearing; but that, nonetheless, the Court proceeded to consider and determine that point with finality, without affording the Appellants effective notice to respond, or an opportunity to present their submissions thereon. He prayed this Court to find that all this amounted to a procedural irregularity; and to reinstate the case in order to enable the Appellants to present their submissions.

32. He averred that in determining the point and making a finding on it without full trial, the Court below contravened the well established principle of natural justice.
33. On the third sub issue, Counsel contended that non retroactivity is an issue of fact, not of law, which should not have been entertained by the Court below by way of a preliminary objection.
34. This Court considers that, even if it was not agreed upon during the hearing, the issue of non retroactivity was totally unavoidable. It fundamentally determines the applicability of the new Treaty to the Reference. Without prior determination of this point, the Court could not proceed even one step further. Nonetheless, the Court below should have afforded the Appellants the opportunity for effective notice to make their submissions on that point. The failure to do so constituted an irregularity. Nevertheless, the injustice occasioned has now been duly cured, in as much as the Appellants have been given the opportunity to submit on the point in this appeal.
35. Given our finding that non retroactivity is a fundamental point of law, we need not delve into or tarry long on the Appellants' sub issue of whether non retroactivity is a point of fact, which the Court below should not have entertained by way of a preliminary point of objection. It is evident from our analysis of the issue elsewhere in this judgment, that retroactivity is eminently a point of pure law, which this Court is not only entitled to raise on its own motion, but also to entertain as a point of objection that is capable of disposing of the entire case.
    Therefore, the third and last ground of this appeal also fails.
    Effects of non Retroactivity to the Question of Jurisdiction
36. While recognizing the jurisdiction of this Court over the interpretation and application of the EAC Treaty, as provided for by Article 27(1), the Respondent argued that the instant Reference does not deal with the interpretation nor the application of the Treaty.
37. The Court below, considering the submissions of the parties, held that it had jurisdiction on the basis of Articles 27(1) and 23 of the Treaty, but that the EAC Treaty was not applicable to this Reference on account of the non retroactive application of the Treaty to that particular Reference.
38. Where then, one may ask, did the Court derive its jurisdiction, since the Treaty which normally confers the jurisdiction on the Court did not apply? Non retroactivity is a strong objection. When it is upheld, it disposes of the case there and then. As non retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the Court? Non retroactivity leads the Court to the lack of jurisdiction.
39. This is the first time that this Court has been confronted with the issue of non retroactivity. The jurisprudence of other International Courts would help to illustrate the effects of non retroactivity; particularly so, concerning the consequential, but all-critical question of jurisdiction. In this connection, three cases come to mind:
    (1) The *Ambatielos case* (jurisdiction), judgement of July 1st 1952; I.C.J. reports 1952, p.28;
    (2) *Mavrommatis Palestine Concessions* (Greece v U. K.), 1924, P.C.I.J., (SER. B) No.3 (Aug.30) Publications of the Permanent Court of International Justice Series A – No.2; collection of judgements A.W. Sfjthoff'n Publishing Company, Leyden, p. 194; and

(3) *W. T.O., Brazil – Measures Affecting Desiccated Coconut*, AB 1996 – 4, Report of the Appellate Body, page 15.

In all the three cases quoted above, the consequences of a finding of non retroactivity of a treaty, invariably led to a finding of lack of jurisdiction; and that was the end of the proceedings.

40. This Court has repeatedly underlined the effect of lack of jurisdiction. Without it, "a Court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case" – (see *Appeal No.3 of 2011: Attorney General of the United Republic of the Tanzania vs. African Network for Animal Welfare, EACJ, Appellate Division*, Judgment of 15 March, 2012, p.7).
41. Having in mind the effect of non retroactivity of a Treaty, the point should have been determined before any other issues in order to avoid the ambiguity contained in the final conclusion of the Ruling of the Court below, which held as follows:
"In conclusion, we rule that although the Court has the jurisdiction to hear the Reference and that it is not barred by the doctrine of res judicata or the rule of exhaustion of local remedies, nonetheless, it cannot entertain the Reference on account of the non retrospective application of the Treaty".
42. For the above reasons, this Court finds that the EAC Treaty is non retroactive. It is not applicable to the present Reference. Consequently, the East African Court of Justice is not clothed with the jurisdiction to entertain it.
43. Before departing from this matter altogether, this Court is constrained to make the following observations. The framers of the new EAC Treaty of 2000 saw it fit--indeed desirable -- to interpose in the new Treaty the fact of the Mediation Agreement of 1984, which the three former Partner States of Kenya, Uganda and Tanzania had agreed a formula for dividing and sharing the assets and liabilities of the defunct Community, including the settling of terminal benefits and pensions of the former employees of the defunct Community. The interposition of all these factors into the new Treaty was, thus, a deliberate and express action on the part of the Partner States. In our view, beyond mere recording of history, the interposition was done for a reason and a purpose - namely, to "revisit" or to "keep alive" the nexus between the Old and the New order of the East African integration (paragraph 2 of the Preamble); cooperation, former and future (paragraph 6 of the Preamble); and upgrading into a Treaty the Region's Tripartite efforts of 1997-2000 (paragraph 9 of the Preamble); as well as breathing a fresh breath of oxygen into the important issue of the sharing and the management of the assets and liabilities -- including the welfare of the former employees of the defunct Community (paragraph 5 and 6 of the Preamble). The interposition of these factors was, thus, a clear statement by the new Community expressing its profound interest in the continued management of the assets and liabilities of its predecessor Community, and the welfare of the former employees of that defunct Community.
44. By analogy to municipal law, the Mediation Agreement on the sharing of assets and liabilities was the equivalent of drawing a Will and appointing Administrators/ Executors to oversee and administer the Estate of the defunct Community. Conversely, the Mediation Agreement was the equivalent of the creation of a Trust and appointment of Trustees to oversee and manage the residue of the affairs of the

defunct Community (see in particular Article 10 and Annex "F" of the Mediation Agreement). In either case, the Administrators/Executors or Trustees owe a duty of care to manage the Estate or Trust for the benefit of the beneficiaries (in this case the former Community employees), in accordance with the well known and generally accepted norms and standards that govern Administrators, Executors and Trustees. In the event of any "audit" queries concerning the exercise of their duty, the Administrators, Executors or Trustees of the Estate or Trust must be held responsible and accountable.

45. From all this, Kenya's former Community employees (who are the Applicants/Appellants before this Court), appear to have a genuine and legitimate basis for their grievance of injustice against the Kenyan State concerning the issue of their Community pensions.
46. Nonetheless, notwithstanding our being a court of justice, the jurisdiction for interrogating the merits (or demerits) of Appellants' grievance lies not in this Court, on account of the non retrospective application of the new EAC Treaty of 2000. That jurisdiction properly lies with the national Courts and allied fora, in as much as the Mediation Agreement of 1984 effectively and definitively moved the management of the assets and liabilities of the defunct Community from the remit of the East African Community, to the realm of the various National States.

Conclusion

47. In the result, this Court dismisses all the grounds of the Appeal. Each Party shall bear their own costs of this appeal, and of the Reference in the Court below.

It is so ordered.

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